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Distinguishing Between the Law and the Legal: A Rhetorical Analysis of Judicial Argument and Media Coverage of the U.S. Supreme Court's Deliberations in the University of Michigan Affirmative Action Cases

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Distinguishing Between the Law and the Legal: A Rhetorical Analysis of Judicial Argument and Media Coverage of the U.S. Supreme Court's Deliberations in the University of Michigan Affirmative Action Cases

by

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In memory of Jonathan Birdnow and Dorothy Perrin.

Acknowledgments

Robert Sells writes in *The Soul of Law* about the "imposter syndrome," a widespread phenomenon in the legal profession.[*] The syndrome afflicts new attorneys who secretly harbor gnawing fears of complete incompetence and the more terrible fear of being found out. To that end, I confess to a similar feeling in making scholarly commentary on a subject-matter populated by so many eminent thinkers in rhetoric, communication theory, media studies, jurisprudence, and philosophy. If I am an imposter, I am an entirely grateful one for having had the opportunity to be one in their company.

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[*] Benjamin Sells, *The Soul of the Law*, Rockport, Mass.: Element Press, 1994, 131-34.

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This dissertation provides a theoretically grounded framework for investigating "legal rhetoric." By making a distinction between the discursive elements of a Legal system and the broader rhetorical notion of Law, rhetorical critics can better understand the interdependent relationship between citizens, their legal structures, and their cultures. The Legal system represents the forum in which legal disputes are addressed. In contrast, the Law signifies the principles of justice and fairness that give rise to legal disputes addressed by the Legal system. This dissertation emphasizes the important role that media play in disseminating information about specific legal disputes and providing citizens an opportunity to reflect on which principles of justice and fairness are to be valued. This study specifically examines the text, reasoning, and media coverage of *Gratz v. Bollinger* and *Grutter v. Bollinger*, two U.S. Supreme Court cases related to the University of Michigan's use of racial classifications in its admissions process. By comparing which arguments and rhetorical elements from the Supreme Court's 2003 decisions were reported in the press, this dissertation both demonstrates the rhetorical concepts of the "Law" and the "Legal System" and suggests how citizens and rhetorical scholars can more fully critique legal texts.

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Chapter I: Introduction

Citizens have long needed help dealing with legal conflicts. Both history and legend suggest that around 476 B.C., a Sicilian named Corax developed a systematic approach for arguing legal probability in order to aid citizens of Sicily in reclaiming land seized by a tyrant. He and his disciple Tisias became forbearers to the First Sophistic movement in Greece and, in the process, to modern rhetoric.[1] What Corax and Tisias offered the Greeks was more than an appreciation for the spoken word or an ability to discuss matters of justice and fairness.[2] Corax and Tisias created a reliable and efficient system to teach citizens how to make their own legal arguments using rhetorical principles. Their students also developed the capacity to effectively assess critically the quality of the judicial tribunal's ultimate decision. What would Corax and Tisias make of modern legal rhetorical practices? They might be puzzled by the permanent place courts now occupy in modern life. Could they have rationalized the professional advocates, the expert witnesses, the voluminous evidence, the jargon, and the bizarre procedural requirements within their own approach to training citizens to argue their own cases?

A. Overview

What Corax and Tisias would find disappointing is that modern citizens have no equivalent system of arguing or even understanding their legal claims or rights. Nearly 2,400 years after their initial efforts to train citizens in the art of legal discourse, the general citizenry of the United States is arguably less prepared than the clients of Corax and Tisias to understand what has become an increasingly

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[1] James J. Murphy, "The Origins and Early Development of Rhetoric," in *A Synoptic History of Classical Rhetoric.* ed. James J. Murphy, Davis, Ca.: Hermagoras, 1983, 6-7; George Kennedy, *The Art of Persuasion in Greece*. Princeton, N.J.: Princeton University Press, 1963, 58-61.

[2] Murphy persuasively argues that the citizens of Athens had probably already accepted most of the rhetorical system by the time that Tisias was reputed to have ventured to the Greek mainland. (p. 7). The establishment of a school of rhetoric by Gorgias (another Sicilian) in 431 B.C., suggests that Athenians already had a deep interest in discourse. *Id.*

more complicated legal system. The volume of new rules and regulations continues to expand and modern legal systems arguably regulate more aspects of a citizen's individual life than ever before.[3] Given the complexity of the modern legal system, can citizens be effective critics of their legal system or their society's notion of law? This question is a response to a call by rhetorical scholar Hans Hohmann for new approaches to scholarship in legal rhetoric that are grounded in civic awareness.[4] I believe that a grounded rhetorical theory of Law can spur that sort of scholarship and be beneficial to citizens trying to understand their Legal system and their Law.

Accordingly, this dissertation has two goals: first, to provide a disciplined and principled rhetorical method for applying diverse research methodologies in the study of legal rhetoric; and second, to challenge scholars to include media analyses in their respective projects. The first goal is merely a continuation of Corax and Tisias' project. The second goal expands on the framework by including media analysis, which is a critical aspect of the modern citizen's relationship with Law and the Legal system. Through an analysis of the U.S. Supreme Court's opinions in a pair of companion racial discrimination cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*,[5] this dissertation offers a modest example of how legal rhetorical analyses can be theoretically grounded and practical, all at once. The end product of this project will not be a standardized approach to legal rhetorical scholarship. There are too many methodologies being employed across various disciplines to establish such a standard. However, this project does present a theoretical framework grounded in a vital, if underappreciated, basic distinction

[3] It is an open question as to whether modern citizens are more tightly regulated than their ancient forbearers. Although many modern societies are free from the racial, ethnic, gendered, or religious restrictions of older societies, the emergence of technology and a larger police state suggests that modern citizens are more likely to be disciplined for their abuse of previously unenforceable rules.
[4] Hanns J. Hohmann, "Rhetoric in the Public Sphere and the Discourse of Law and Democracy." *Quarterly Journal of Speech* 84 (1998): 358-393.
[5] *Gratz v. Bollinger,* 539 U.S. 244 (U.S. Supreme Court 2003); *Grutter v. Bollinger*, 539 U.S. 306 (U.S. Supreme Court 2003).

between the Law as a commonly recognized body of principles of justice and fairness and the Legal system as the forum and linguistic system that provides a setting for the resolution of principles of justice and fairness. The various methodologies can be understood within the context of this framework. Given that the interaction between citizens and the Law or the Legal system is through media consumption, this framework will emphasize Media as a vital dimension in the citizen's relationship with legal systems and Law. Armed with a better understanding of the Law/Legal distinction, future projects will have the capacity to do a better job of investigating what kind of rhetoric is being produced and reproduced by the legal system, as well as how citizens come to learn about the Law through media consumption.

This project contains a three-part analysis that incorporates a rhetorical understanding the citizen's relationship with the Legal system, the broader notion of Law, and media coverage of legal disputes. In order to understand the relevance of these three entities, I first present a brief introduction to the concept of the Law/Legal distinction. Then, I offer a general explanation as to why scholarship in legal rhetoric is presently unable to account for the Law/Legal distinction. I also detail the underlying problem of judicial legitimacy. In short, the inability of citizens to distinguish the broader notions of Law from the specific mechanical aspects of the Legal system disempowers citizens from being effective critics of both concepts. Finally, I describe the three-part methodology, demonstrating how all three dimensions can be explored independently or comprehensivelywhen looking at a single legal text, in this case, the U.S. Supreme Court's decisions in the companion cases, *Gratz v. Bollinger*and *Grutter v. Bollinger*.

B. Understanding the Law/Legal Distinction

The starting point for this dissertation is making a distinction between "Law" and the "Legal system." Law professor James Boyd White applies a

variation of Aristotle's definition of rhetoric in describing "Law" as "the particular set of resources made available by a culture for speech and argument on those occasions, and by those speakers, we think of as legal."[6] Thus, laws, rules, statutes, and judicial opinions are no different than maxims, proverbs, and expressions of conventional wisdom as useful tools for the opportunistic lawyer. While lawyers may generally agree upon which tools are relevant, there is never a perfect consensus.[7] Although the components of legal argument are perhaps objectively discoverable through an empirical process, their "reformulation and use [is] an inventive or creative one."[8]

Citizens do not need a law degree to understand which arguments are appropriate for a legal setting. This study understands "Law" as the set of principles of justice judged by a rough consensus of society to be appropriate for legal arguments. Principles of justice or fairness such as equal treatment and due process, if only in their most abstract meanings, are accepted by a rough consensus of citizens. Some of these principles fall out of fashion, but these changes have all the velocity of a glacier as the history of race relations in the United States aptly demonstrates.

In contrast, the "Legal system" is the forum in which conflicts between principles of Law are usually addressed. Tribunals are established to allow facts to be determined and legal principles to be weighed. A court ultimately serves as a forum for resolving these conflicts between various principles of justice. The legal systems of the world have always been technically sophisticated and constantly evolving methods of societal control. The "Legal" offers citizens an alternative to vigilante individual action, in exchange for a general willingness to submit to the rule of law. Legal systems are commonly inherited from previous cultures.

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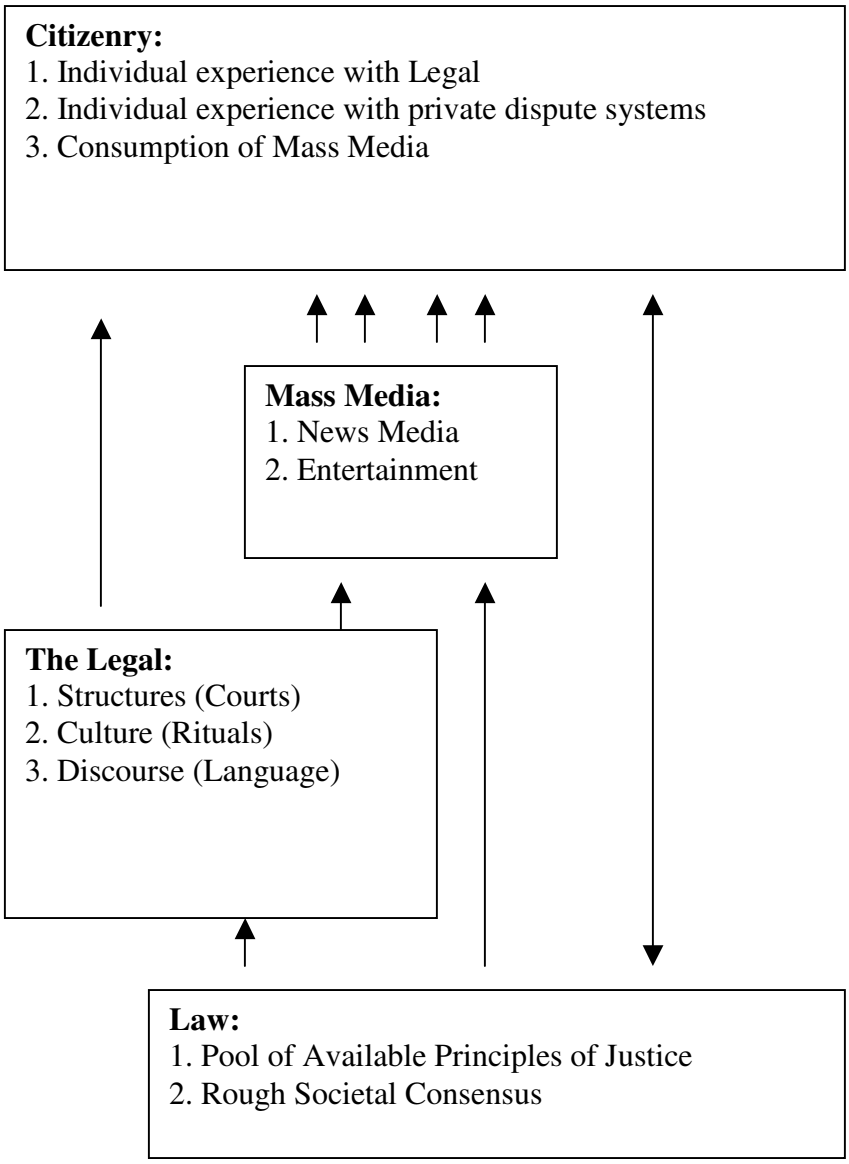
[6] James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*, Chicago: University of Chicago Press, 1984, 689.
[7] *Id.* 689-90.
[8] *Id.*

The citizenry learns about the Law and the Legal in different ways. The Legal, both as an institution of courts and a discourse, is an intimate part of everyday life for most citizens. The Legal manifests itself in the form of traffic signs, income tax regulations, legal jargon and thousands of other ways. Individuals are arrested for or are the victims of criminal acts. Individuals sometimes serve on juries. In addition, the Legal system is a popular dramatic setting for mass media, from the nightly news to fictional comedies and dramas. Citizens learn about legal procedures, language, and culture through these media and are perhaps disappointed when the "real" Legal system is hardly as compelling. The average citizen will have plenty of actual or simulated contacts with the Legal system in his or her daily life, thanks to government regulation and mass entertainment media. It is important to note that most of these contacts for most citizens are generally quite impersonal, given the enormous size of the justice system and the media.

In contrast, the typical citizen's interaction with the Law is restrained, but often deeply personal. The principles of justice that populate the Law are grounded in cultural acceptance and are therefore often part of one's social identity. Contemporary U.S. culture encourages a personal relationship between individual citizens and Law through notions of individual rights, civil disobedience, and self-regulation. In other cultural contexts, the relationships between the Law and the citizen were quite removed. On one hand, many cultures had such homogenous cultural outlooks (or at least professed so) that individuals felt no need to differentiate themselves from their peers. In other instances, the merging of religious and legal institutions in theocracies like the Vatican eliminates the obligation for individual introspection. The trend towards a more personal relationship between citizen and Law is a particularly vital aspect of a democratic society that values individuality.

Diagram 1.1 offers a simplistic, but descriptive view of the relationship between the Law, the Legal, Media, and citizens. The diagram demonstrates how citizens are exposed to the notion of Law through personal experiences with the Legal system as well as exposure to the Media. Likewise, Diagram 1.1 demonstrates how individual citizens develop a personal understanding of what Law should represent.

Diagram 1.1: Relationship between Law, the Legal, and Citizenry



In practice, the relationships demonstrated by the Diagram are not nearly so clear. Yet, these distinctions are fundamentally important. A careful balance must be in place in order for the citizen in a democratic culture to feel ownership of the Law and to be a willing subject to the Legal system. The Legal system may constantly strive for legitimacy, but must also demonstrate a latent subservience to the underlying will of the citizenry who ultimately dictate what counts as Law.

C. Disorganized Scholarship on Legal Rhetoric

Scholarship in legal rhetoric is itself rhetorical.[9] In this respect, a central tenet of modern rhetorical theory is that rhetoric, even scholarly rhetoric, is situational in the sense that the "situation controls the rhetorical response in the same sense that the question controls the answer and the problem controls the solution."[10] As Lloyd Bitzer explains, rhetorical situations invite a fitting response, not just any response, which is somewhat prescribed by the situation.[11] One way of criticizing speech is by looking at the "exigence and compiles of persons, objects, events, and relations which . . . are located in reality, [which] are objective and publicly observable historical facts in the world we experience."[12] Situational analysis may be intended to be holistic, and not focus on any one situational variable excessively; however, in practice all rhetorical situational analyses (regardless of their form) do focus on a set of variables related in one manner or another. Given the substantive and rhetorical complexity of Law and Legal systems, it is important to find a set of variables that captures the wide variety of scholarship in legal rhetoric.

There is a surplus of quality legal analysis on a diversity of legal subjects from financial transactions to equine law. Unfortunately, the scholarship on the

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[9] Gerald Wetlaufer, "Rhetoric and its Denial in Legal Discourse," *Virginia Law Review* 76 (1990): 1545-1597.
[10] Lloyd Bitzer, "The Rhetorical Situation," *Philosophy and Rhetoric* 1 (1968): 1-11.
[11] *Id.* 7.
[12] *Id.* 7-8.

rhetoric of Law is not as comprehensive. Modern scholarship on the topic of "legal rhetoric" can be categorized in two ways. First, most scholarship about the language of law, legal discourse and jargon, or "legal communication" is about the most effective or popular rhetorical methods used in legal arguments, or more broadly, legal settings. Taken at its most basic level, this scholarship examines how we communicate within different legal systems. Law school library shelves are full of volumes on effective legal writing. In addition, an industry of consultants stands ready to prepare attorneys and expert witnesses for trial presentations and testimony. On a more theoretical level, scholars have closely investigated the culture and rhetorical structure of various legal systems.[13] What

[13] Marouf Hasian is the leading communication studies rhetorical critic on legal culture. See "The Public Addresses of Meese and Brennan: Voices in the American Legal Wilderness." *Communication Studies* (1993) 44: 299-319; "Critical Legal Rhetorics: The Theory and Practice of Law in a Postmodern World." *Southern Communication Journal* (1994) 60: 44-56; "The Aesthetics of Legal Rhetoric: The Ambiguities of 'Race' in *Adarand v. Pena* and the Beginning of the End of 'Affirmative Action." *Howard Journal of Communications* (1997) 8: 113-27; "The Domestication of Legal Argumentation: A Case Study of the Formalism of the Legal Realists." *Communication Quarterly* (1998) 46: 430-45; "Jurisprudence as Performance: John Brown's Enactment of Natural Law at Harper's Ferry." *Quarterly Journal of Speech* (2000) 86: 190-214; *Legal Memories and Cultural Amnesias in Anglo-American Rhetorical Culture.* Boulder, Co., Westview, 2000; "Holocaust Denial Debates: The Symbolic Significance of *Irving v. Penguin & Lipstadt*." *Communication Studies* (2002) 53: 129-45. Hasian has also collaborated with other communication scholars similarly interested in a critical rhetorical analysis of the law. See Marouf Hasian and A. C. Carlson. "Revisionism and Collective Memory: The Struggle for Meaning in the 'Amistad' Affair." *Communication Monographs* (2000) 67: 42-62; Marouf Hasian and E. Croasmun. "Rhetoric's Revenge: The Prospect of a Critical Legal Rhetoric." *Philosophy and Rhetoric* (1996) 29: 384-99; Marouf Hasian and G. Klinger. "Sarah Roberts and the Early History of the 'Separate But Equal' Doctrine: A Study in Rhetoric, Law, and Social Change." *Communication Studies* (2002); Marouf Hasian and Trevor Parry-Giles. "A Stranger to Its Laws': Freedom, Civil Rights, and the Legal Ambiguity of *Romer v. Evans*." *Argumentation and Advocacy* (1997) 34: 24-42; Marouf Hasian, Celeste M. Condit, et al. "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate But Equal' Doctrine." *Quarterly Journal of Speech* (1996) 82: 323-42; Marouf Hasian, Celeste M. Condit, et al. "Judicial Rhetoric in a Fragmentary World: 'Character,' and Storytelling in the Leo Frank Case." *Communication Monographs* (1997) 64: 250-69.

Clarke Rountree has closely investigated the relationship between legal argumentative norms and rhetoric. See "On the Rhetorical Analysis of Judicial Discourse and More: A Response to Lewis." *Southern Communication Journal* (1995) 61: 166-73; "Instantiating 'The Law' and Its Dissents in *Korematsu v. United States*: A Dramatistic Analysis of Judicial Discourse." *Quarterly Journal of Speech* (2001) 87: 1-24. Rountree has also recently edited a collection of essays on the rhetorical

these projects have in common is a focus on how the Legal system functions, whether as a writing system, a performance art, or a cultural structure.

In contrast, the second broadly drawn category of legal rhetorical scholarship is a treatment of Law as a symbolic or rhetorical construct that can reveal important cultural or philosophical insights about human interaction. Scholars interested in understanding Law as a text invariably examine the underlying principles that warrant application or enforcement of a particular rule. Scholars in the Law and Literature movement even find applications of the Law in non-legal settings and non-legal texts, such as in literary works of fiction.[14] The common focus for these projects is appreciating Law outside the context of the Legal system.

This study attempts to transcend both the practical study of the Legal system and the broadly abstracted inquiry into the Law as a philosophical or rhetorical concept. This effort is motivated by the practical reality that there is no organized body of legal rhetorical scholarship. To be fair, there are some strongly aligned areas of interest such as the Law and Literature movement, which show great promise as a disciplinary movement. However, cross-citation between legal and communication scholars is relatively rare.[15] Moreover, when communication scholars do focus on legal rhetorical topics, their attention span is limited to a

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history of *Brown v. Board of Education.* See *Brown v. Board of Education at Fifty: A Rhetorical Perspective* (ed. Clarke Rountree) Lanham, MD.: Lexington Press, 2004.

[14] The Law and Literature movement represents various investigations into the relationship between literary theory and legal discourse. Representative scholarship includes Sanford V. Levinson and Stephen Mailloux. *Interpreting Law and Literature*. Evanston, Ill.: Northwestern University Press, 1988; Sanford V. Levinson, "Law as Literature." *Texas Law Review* (1982) 60: 373-402; Robert A. Ferguson, "The Judicial Opinion as Literary Genre." *Yale Journal of Law and the Humanities* (1990) 2: 201-219; Robert A. Ferguson, "Story and Transcription in the Trial of John Brown." *Yale Journal of Law and the Humanities* (1994) 6: 37.

[15] William Lewis and Clarke Rountree's debate on the proper role of a rhetorical critic in legal rhetoric in the *Southern Communication Journal*, for example, received no attention from any law review author. William Lewis, "Of Innocence, Exclusion, and the Burning of Flags: The Romantic Realism of the Law," *Southern Communication Journal* 60 (1994): 4-21; Rountree, "On the Rhetorical Analysis of Judicial Discourse and More: A Response to Lewis," (1995).

special issue of a scholarly journal.[16] With very few exceptions, the leading communication scholars in legal rhetoric are just as active in other areas of inquiry.[17] In short, true interdisciplinary scholarship on legal rhetoric is rare.

The problem is not just a lack of scholarly output. Rhetorical scholars often examine different aspects of the Legal system or the rhetorical notion of Law. Likewise, legal scholars have produced plenty of analyses that adopt rhetorical perspectives. The problem is a lack of a coherent theoretical structure in which to order the multiplicity of studies in Law's rhetorical nature. Without any framework within which to place these references, there is little hope of organizing those insights into a growing body of scholarship on legal rhetoric. This dissertation proposes such a framework.

D. A Question of Legitimacy

The benefit of a better organized scholarly framework for investigating legal rhetoric is a better informed public. Modern courts only wield suasory force concurrently with the public's perception of legitimacy. The historical evolution of legal systems explains why modern Legal systems that rely on the cooperation of democratically-minded citizens are in trouble when those citizens become disengaged from the legal process. Modern notions of Law and Legal have evolved in vastly different ways. Whereas citizens now have an exceedingly personal relationship with Law, their relationship with most Legal systems is surprisingly distant. Ironically, ancient cultures operated in a precisely opposite fashion. Individual citizens were quite comfortable within the Legal system, but much more removed from older religious based models of Law. The difference may be a consequence of the rise of the professional legal advocate.

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[16] Special issues of the communication journals have focused on the work of James Boyd White, Chaim Perelman, and critical legal discourse. *Southern Communication Journal* 60 (1994): 1-86; *Argumentation and Advocacy* 30 (1994): 191-247; *Legal Studies* 17 (1994): 341-436.

[17] Marouf Hasian and Trevor Parry-Giles both focus on presidential rhetoric. Clarke Rountree is a noted Burkean scholar.

The following brief review of the history of legal rhetoric as a scholarly and professional subject reveals three important points. First, legal systems are fairly "portable" and rarely culturally bound. What may appear to be a uniquely American approach to civil procedure looks very similar to classical legal codes used by the Romans. Second, the rhetorical notion of Law has evolved from a statement about a society's relation with Nature or God into a reflection of the individual relations between a citizen and her Law. Third, the media is an integral part of the modern citizen's interactive relationship with the Law.

1. Appropriation of Legal Systems.

Legal systems are a ripe source for cultural appropriation. Aristotle's *Rhetoric* displayed a "shrewd practical emphasis on technique" inherited from Gorgias and the Sophistic tradition.[18] Thanks to the cultural preservation efforts of the Alexandrian library and the cheerful willingness of the rising Roman Empire to appropriate cultural practices from conquered lands, an edited version of Aristotle's system was included with an illustrative canon of great Greek orators as part of a standardized form of legal and oratorical training throughout the Roman Empire.

Like the Greeks, the Romans saw little reason to differentiate the discourse of the legal system from the art of public oratory. From 100 B.C. to 500 A.D., the Roman Empire promoted a consistent method of education that trained future civic leaders in legal and political rhetoric. The Roman Empire's propagation of a system of laws based on this standard legal training in turn preserved Aristotle's fundamental rhetorical assumptions about proof, audience, and other rhetorical notions. Roman law reflected these rhetorical assumptions by adopting systems of proof and contract administration that could be used by any of the diverse peoples that made up the Empire. Under the codified Roman legal tradition, rules of procedure calcified organizational tropes, burdens of proof, and appropriate

[18] Thomas Duncan Shearer, "Gorgias' Theories of Art," *Classical Journal*, 33 (1938): 402-415; Murphy, 20.

discursive roles for advocates, witnesses, and tribunals. This systematic discourse was exported to cultures conquered by the Romans and, in the case of the Visigoths and the medieval Christian Church, by cultures that succeeded the Roman Empire.

The primary differences between the Roman legal system and the Athenian system from which it freely borrowed were in scope and economy. First, the legal discourse of Aristotle's world was essentially limited to Athens. There was no necessary agreement between city-states like Athens and Sparta on basic legal rules or norms. In contrast, the Roman legal system was much more uniform and covered an astonishing swath of geography. Even where local cultures deviated from the Roman legal tradition, the differences are cast into relief largely because of the general amount of agreement. Second, the Athenian legal system was based on culturally agreed upon notions of good rhetorical practice. Litigants plead their own case before panels of 200 to 500 citizen-judges each paid less than most day laborers for their troubles. There was no need for specialized discursive rules unique to a legal setting. Hearsay, for example, was disapproved of because Athenian society rejected hearsay as reliable evidence in general, not just in legal settings. In contrast, Romans regularly relied upon professionally trained advocates who were often rewarded for their mastery of the specific rules of legal argumentation. While the Roman system was clearly less specialized than modern legal discourse, it is clear that the rhetorical practices of litigants were much more focused than their Athenian forbearers.[19] The massive economy of the Roman marketplace for conflict resolution demanded specialization.

The creation of the professional legal advocate is another crucial historical development in legal rhetoric. In the Golden Age of Athens, citizens were expected to prosecute their own civil or criminal matters without the assistance of

[19] For an introductory comparison between the Athenian and Roman legal systems, see Christopher Carey, *Trials from Classical Athens,* Routledge: London, 1997.

the state or legal counsel.[20] In the Roman Republic, the legal representation of a fellow citizen was an honor for which payment was unnecessary.[21] By the seventeenth century, legal advocacy had evolved into a highly lucrative profession with enough status to become an object of Shakespearean satire.[22] As legal discourse has progressively become the domain of trained professional legal advocates, common citizens have fewer opportunities to contemplate and judge legal language for themselves. Interestingly, the pedantic relationship between legal and rhetorical training has been downplayed by legal historians, although lawyers have historically shown an interest in communication training.[23]

Legal professionalization combines with complicated political structures to make the Legal system too complicated for the average lay citizen.[24] Consider English law as an object of study. The historian of English law will encounter not only three superior courts of common law, but also the Chancery, Star Chamber, and High Commission, as well as ecclesiastical and admiralty courts, and a multiplicity of local and regional jurisdictions. Moreover, across common law courts, judges could develop significantly different understandings of the scope of the law they administered.[25] It is no wonder that rules of procedure in the expansive English system of law were so formal. Formality breeds consistency regardless of the makeup of a legal audience. In contrast, a rhetorical approach

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[20] Carey, 11, 13. Carey notes that many litigants did employ a logographer (speech writer). Id. 19.
[21] Alan Watson, *The Law of the Ancient Romans*. Dallas: Southern Methodist University Press, 1970, 4-5, 7. Of course, strength in legal advocacy might assist one in being elected to political office. *Id.* 7.
[22] William Shakespeare, *Henry IV, Part II*, Act 4, scene 2, (containing the observation now a requirement for any thoughtful consideration of the woes of the legal profession—"The first thing we do, let's kill all the lawyers!").
[23] Hanns J. Hohmann, "Logic and Rhetoric in Legal Argumentation: Some Medieval Perspectives," *Argumentation* 12 (1998): 39-55.
[24] The term "lay citizen" refers to typical citizens.
[25] Michael Lobban, "Introduction," 4 in *Law and History*, eds. Andrew Lewis and Michael Lobban, Oxford: Oxford University Press, 2003.

does consider the particular situation of the audience. Rhetoric became increasingly less important than procedure in formal British legal training.

Does such formality replace the personal and civic involvement of legal rhetoric's Sicilian roots? British legal scholar S.M. Phillips explains in his essay on circumstantial evidence that "the principles of evidence are founded on our observations on human conduct, on common life, and living manners: they are not just because they are rules of law; but they are rules of law because they are just and reasonable."[26] Phillips' conclusion that a rule of conduct, to be good, must be so on general grounds, acknowledges that any rule must be understood in reference to the state of society in which the citizenry is placed.[27] Ever the optimist, Phillips concluded that "[h]appily, the wholesome state of British morals does not require that men should be convicted on any evidence but that which is established by law, and warranted by sound reason."[28] However, not all societies enjoy such a presumption of morality or homogeneous cultural understanding of a central notion of morality. Accordingly, rhetorical scholars should be ready to distinguish between the Legal system that presumes cultural consensus and the underlying principles of Law that do enjoy a rough societal consensus.

2. Segregating the Law from the Legal.

Friedrich von Von Hayek comments that if ancient law was understood to have been "discovered" by legal rhetoricians and medieval law "delivered" by God, then law after the Scientific Revolution might be understood as "created" by man.[29] Von Hayek argues that it is no accident that we still use the same word "Law" for the invariable rules which govern nature and for the rules which govern men's

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[26] Samuel M. Phillips, "Introduction on the Theory of Presumptive Proof" in *Famous Cases of Circumstantial Evidence*, New York: James Cockcroft, 1874, vii.
[27] S. Phillips, xxviii.
[28] *Id.*
[29] Friedrich A. von Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, Chicago: University of Chicago Press, 1973, 71-83.

conduct: both were *initially* conceived independently of human will.[30] Von Hayek's overall point notwithstanding, legal rules and procedures are not necessarily man-made Law, but often mere attempts by societies to adhere to authority in a predictable manner whether the Law is inspired by divinity or democracy. There is a distinction between the Law and the Legal, as is aptly demonstrated by the cultural appropriation of legal codes without acceptance of the underlying Law.

A serious consequence of the Roman appropriation of Greek legal rhetoric was the segregation of the Legal from the Law. The Romans, like any appropriator of legal codes or other language, did not intend to adopt the Greek hierarchy of authority that constitutes the Law. Roman citizens might have turned to Greek literature for wisdom, but not binding authority. Thus, a distinction between the Legal and the Law becomes evident. Consider the development of the modern Catholic Church, which has employed a series of different legal codes, but continues to support a religious-based version of authority in its Law. In contrast, many Western secular democracies have replaced religious authority for the Law with a popular-rule based notion of Law. At the same time, the popular-based notions of Law may employ Legal systems (including texts, lexicons, or logical structures) that date back to Roman and early Church-based societies.

Scholarship that ignores the distinction between Law and the Legal risks following Von Hayek's mistaken assumption that human will created both the Law and the Legal. While, in fact, people may acquiesce to any given Legal system, such a system is a creation of an intersection of culture, politics, and historical

[30] *Id.* 73. It bears mentioning that some scholars still argue that U.S. constitutional law remains pre-modern and therefore no man-made. For example, see Samuel P. Huntingdon, *American Politics: The Promise of Disharmony*, Cambridge: Belknap Press, 1981. In practice, even Professor Huntingdon would be hard pressed to argue that the entire text of the U.S. Constitution is treated with religious reverence. Rather, some Americans (and perhaps most Americans) treat *certain* Constitutional concepts with reverence. Compare the First Amendment to the latest: the protection of political dissent is treated differently by citizens than the ability of Congress to give itself pay raises.

chance. Citizens of modern day Louisiana are no more responsible for creating the State of Louisiana's legal system, which is a combination of French civil law and American constitutionalism, than they would be responsible for creating the Creole language. Both the system and the language are inherited from previous generations. However, the ever-evolving notion of Law is the responsibility of citizens. Louisianan citizens may use ancient methods of resolving conflicts, but they still must address contemporary questions of justice and fairness in their deliberations.

3. Missing the Media.

Central to a complete understanding of the relationship between Law, the Legal, and citizens is the function of the media. Diagram 1.1 demonstrates the media's capacity to present real and dramatized conflicts of Law. Citizens learn about the Law in part by observing or participating in the Legal system. However, citizens will learn most of what they know about both the Legal and the Law through the media. Michael Schudson's argument that news must be understood as culture also applies to media coverage of legal disputes.[31] Media is an essential staple of contemporary civic life, presenting both real and simulated representations of conflicts of law. Under this model, citizens learn more about law from movies, television shows, and other forms of simulated mass media than from personal experience or formal education. Yet, there is ample evidence that news reporting on legal issues is problematic. Scholarship on media coverage of U.S. Supreme Court cases suggests that journalists fail to understand the significance or particular legal meaning of the language of an opinion.[32]

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[31] Michael Schudson, *The Power of News*. Cambridge: Harvard University Press, 1995.

[32] For examples of discontent with Supreme Court reporting, see Ethan Katsch, "The Supreme Court Beat: How Television Covers the U.S. Supreme Court." *Judicature* 67 (1983): 6-12. (noting that "some important legal issues are consistently neglected" by Supreme Court reporting); John MacKenzie, "The Warren Court and the Press." *Michigan Law Review* 67 (1968): 303-16 (arguing that the Court's "bad press" can be traced "to the often sloppy and inaccurate work of news gatherers"); Elliot E. Slotnick, "Media Coverage of Supreme Court Decision Making: Problems and

An underlying assumption of this dissertation is that some measure of media analysis is necessary in order to effectively understand how legal information is transmitted and evaluated by citizens. To make arguments about how Law operates rhetorically without taking into account any aspect of media's role in that process is to ignore the realities of modern social life.

4. The Emerging Crisis in Legal Communication

The combination of a democratically-centered notion of Law and a professionalized Legal system will invariably leave many, if not most, citizens ill equipped to understand what is happening in their legal institutions. A lack of understanding and input will lead to questions of the Legal system's legitimacy. For some segments of the U.S. population, the perception may have already set in that the courts only serve dominant classes. For many citizens, the courts represent a sort of judicial casino where wealthier or better connected citizens are generally given more power. Jürgen Habermas has spelled out the trouble with a faltering legitimacy by public institutions. That concern is reflected in Hans Hohmann's underappreciated call for a renewed focus on everyday legal language, which is an important influence on this dissertation.

a. Legitimacy and the Rhetoric of the Modern Legal System

Legitimacy is the key to a successful legal order. Law, as Jürgen Habermas explains, is "connected from the start with the authorization to coerce" which is justified only for the "prevention of a hindrance of freedom."[33] The less a legal

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Prospects." *Judicature* 75 (1991): 128-142 (quoting journalist Max Friedman as saying that "the Supreme Court is the worst reported ... institution in the American system of government"). Richard Davis reports that television media coverage of decision announcements is mostly guided by preprinted reaction statements distributed outside the Supreme Court by interest group advocates. Richard Davis, *Decisions and Images: The Supreme Court and the Press.* Englewood Cliffs, N.J.: Prentice Press, 1994.

[33] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, Mass.: MIT Press, 1999, 28 (citing Immanuel Kant, *The Metaphysical Elements of Justice, pt. 1 of The Metaphysics of Morals*. trans. John Ladd, New York: Hackett, 1965, 36).

order is legitimate, or "at least is considered such," the more other factors such as intimidation, circumstantial force, custom, or "sheer habit" are relied upon to reinforce the legal order.[34] Legitimacy must be obtained on both the individual and societal level because a legal order's claim to legitimacy "can be redeemed only through the socially integrative force of the 'concurring and united free will of all' free and equal citizens."[35] Habermas is certainly not the only scholar interested in legitimacy, but his description offers a fairly common understanding of legitimacy's function as a citizen's check against a political (or legal) order.

Courts require legitimacy in order to function effectively. Legal commentator Neil MacCormick explains that "courts are not self-sustaining institutions endowed with legitimacy by their own say so, clothed with might by their own bodily vigor."[36] Instead, courts are "institutions established (however informally or formally) by a wider community from which they derive their legitimacy and authority as determiners of controversies."[37] Agreeing with Habermas' concern for the legitimacy of institutional discourse of the courts, MacCormick observes that "the forcefulness of the orders they issue depends in the first instance on acceptance of their authority by those to whom the orders are addressed, and in the second instance (relatively later in historical development) on acceptance of their authority by enforcement officials who do wield some degree (often a considerable degree) of collective might."[38] Legal discourse, without a basis in Law, erodes the order needed for effective social discourse to occur in the public sphere. Alfred Phillips, in an effort to reconnect legal institutions to democratic government, argues for a bottom-up approach to the validation of law:

> Law produced by the political and adjudication processes in a democratic state should in some sense reflect public opinion insofar

[34] Habermas, 30.
[35] *Id.* 32.
[36] Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1994, 55.
[37] *Id.*
[38] *Id.*

> that a citizen might be able to recognize the principles, norms, and rules of law as the basis of right and disinterested choices and judgments which he might have made reasonably for himself.[39]

There are difficulties in finding a place for a lay citizen to criticize the Law and the Legal. First, legal discourse has become the language of trained professional attorneys, who develop their discursive expertise through advanced graduate study and years of specialized practice. Although the United States leads the world in the production of attorneys, most Americans simply are unable to read and accurately interpret many legal rules and regulations for themselves. Even if the average citizen could eavesdrop on legal discourse effectively, rule-making powers are distributed among thousands of legislatures, judges, agencies, executive officers, and committees on the federal, state, and local level.

Even as public legal institutions become increasingly distanced from the citizens who must support them, non-public institutions continue to model private rules and regulations on the public institutional models. Rosemary J. Coombe notes that legal systems produce more than just instruments and forums for societal problem solving, but they also generate the signs and symbols by which difference is given meaning.[40] John Rawls intuitively notes a difference between the role of justice on the "basic structure" of society and the types of rules and regulations relied upon by private institutions like families, churches, labor unions and universities.[41] These institutions are subject to Law, but not always regulated by the Legal system. As an example, Rawls notes that "while churches can

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[39] Alfred Phillips*, Lawyers' Language: How and Why Legal Language is Different*. London: Routledge, 2003, 14.
[40] Rosemary J. Coombe, "Sports Trademarks and Somatic Politics," 44 in *Between Law and Culture: Relocating Legal Studies.* Eds. David Theo Goldberg et al, Minneapolis: University of Minnesota Press, 2001.
[41] John Rawls, *Justice as Fairness—A Restatement*, ed. Erin Kelly, Cambridge: Belknap Press, 2001, 10.

excommunicate heretics, they cannot burn them."[42] The central concern is the production of "reason" for both public and private institutions. Rawls differentiates between "public reason" and "non-public reason," noting that whether we are acting as citizens or institutional members we all need some recognized way of reasoning that contains principles of inference, rules of evidence, and standards of truth and correctness.[43] Why should a private institution be held to a higher standard of accountability to its private, presumably voluntary, members than a public legal institution to its citizens?[44] Alternatively, if legal discourse overwhelms the ordinary citizen's ability to understand issues of constitutional justice, how can individuals know whether the rules of private institutions are within the broader notions of justice? How will churches come to know that burning sinners at the stake is not acceptable without resorting to legal institutions?

Legitimacy requires more than just civic obedience. As Barry Friedman observes, "*legal legitimacy* asks whether the decisions of judges find support in existing sources and understandings of law," while "*social legitimacy* asks if those same decisions are met with acceptance by a substantial part of the public in terms of the felt necessities of the time."[45] Friedman's observation suggests that a legal ruling can be legitimate in the first instance by not departing from previous legal decisions, but fail the legitimacy test in the second instance by not reflecting the public's current needs. I would argue that the Law/Legal distinction accounts for both the social and legal legitimacy described by Friedman because it differentiates popular support for an abstract principle of law, which supports social legitimacy,

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[42] *Id.* 11.
[43] Revealing himself as an undereducated student of rhetoric, Rawls says that without these common elements, we do not have ways of reasoning but mere rhetoric or artifices of persuasion. *Id.* 92.
[44] Citizenship, while theoretically voluntary, is for all practical purposes inescapable except for a departure from the country's borders. *Id.* 93. One might comment that the long arm of U.S. law has increasingly stretched well beyond its territorial waters.
[45] Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*," *New York Law Review* 76 (2001): 1383-1455, 1453 (italics added for emphasis).

from the precision with which a judicial tribunal resolved a conflict, a facet that reflects legal legitimacy.

b. Hohmann's Call for a Renewed Focus on Legal Rhetoric.

I believe that rhetorical inquiry can make a difference. In a review of the book *Between Facts and Norms*, in which Habermas calls for the "institutionalization of a legal public sphere that goes beyond the existing culture of experts and is sufficiently sensitive to make problematic leading cases the focus of public controversies,"[46] Hans Hohmann builds a case for focusing on legal rhetoric as an exercise in civic engagement, arguing that Habermas's structural analysis of the role of rhetoric in the democratic legal discourse ought to be combined with contemporary rhetorical studies that allow for a broader intercultural perspective on law.[47] This dissertation is motivated in part by Hohmann's call to action to return legal rhetoric back to common citizens. Specifically, Hohmann calls for a synthesis of Habermas's comprehensive approach with rhetorical studies. Hohmann notes that Habermas's proceduralist paradigm requires him to rely heavily on procedural and mechanistic safeguards, but worries that the people who engage the safeguards might lack the appropriate rhetorical competence: "How can judicial decisions fruitfully be made the focus of public controversy if the public is unable to understand either the judges' written opinions or the critiques of these opinions by experts?"[48]

Consensus in the public sphere is hardly agreement insofar as participants may continue to disagree about any particular argument in the abstract. They only find consensus on the argumentative contest at hand.[49] The law is meant to be a

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[46] Hohmann, "Rhetoric in the Public Sphere and the Discourse of Law and Democracy," (1998). Note that all further references to Hohmann are to this article.
[47] *Id.* 367.
[48] *Id.* 365-66.
[49] Eric A. Doxtader, "The Entwinement of Argument and Rhetoric: A Dialectical Reading of Habermas' 'Theory of Communicative Action.'" *Argumentation and Advocacy* 28 (1991): 51-64.

"way in which people can live together in spite of their differences."[50] James Boyd White describes the judicial opinion as a "continuing and collective process of conversation and judgment," rather than an isolated exercise in power."[51] He notes that one judicial opinion becomes the material for arguments in a future case, which results in a continuous cycle of "opening and closure, argument and judgment."[52] Likewise, the consensus does not require the abandonment of legal discourse. As Sanford Levinson notes, legal discourse can be formative: "Constitutional law provides a public vocabulary absolutely necessary to understanding the nature of political discourse within our society."[53]

The very elements that make the Law so slippery in meaning also allow it to provide an agreeable basis for decision-making among parties seeking closure. Doxtader notes that consensus-seeking strategies can often use rhetorically ambiguous agreements that have no practical effect other than to demonstrate cooperation between parties. In contrast, Walter Fisher described the failure of the efforts to avoid the American Civil War through the 1861 Compromise as a result of no room for deliberative rhetoric: "[i]n deliberative councils dialectical issues are resolved by a decisive vote of like-minded men, by avoiding or shifting the issues, or by disruption of the organization."[54] The procedural deliberations of Congress are one of the best practical examples of legal discourse occurring outside of a courtroom. Fisher's analysis is also a good example of the mechanical aspects of legal discourse overwhelming the capacity of citizens to avoid the Civil War.

The citizen's concern is not that the Law is accurate and satisfactory, but that it remains open to change. As Habermas explains, in order for a legal norm to be valid, the state must offer two basic guarantees simultaneously: "on the one

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[50] James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. Madison, Wis.: University of Wisconsin Press, 1985, 47.
[51] White, 1984, 264.
[52] *Id*.
[53] Sanford Levinson, *Constitutional Faith*, Princeton, N.J.: Princeton University Press, 1988, 168.
[54] Walter R. Fisher, "The Failure of Compromise in 1860-1861: A Rhetorical View," *Communication Monographs* 33 (1966): 364-71, 371.

hand, the state ensures average compliance, compelled by sanctions if necessary; on the other hand, it guarantees the institutional preconditions for the legitimate genesis of the norm itself, so that it is always at least possible to comply out of respect for the law.[55] The public can evaluate the "institutional preconditions" only if it commands some understanding of the rhetorical process by which legal opinions are created. Accordingly, Hohmann raises awareness of the need to educate the general public in the ways of legal rhetoric. He argues that what is required is a "well developed and ultimately teachable theoretical framework for the rhetorical criticism of judicial discourse."[56] Hohmann suggests that such a theory should contain elements of classical rhetoric, use Habermas's notion of procedural legitimacy, and not shy away from discussing substantive values.

Hohmann argues that legal jargon is not the greatest barrier to public deliberation of key legal issues, but rather the "dried-up and bleached-out nature of rationalistic academic discourse that is purged of explicit personal and affective elements and thus of any recognizable human context."[57] Nevertheless, jargon has the potential to exclude minority groups that lack the linguistic competence to participate in legal forums. Surely this phenomenon occurs in a variety of non-legal situations, but Habermas's concerns here are paramount because of the central role of law in a discursive community. The danger is that Americans will learn about their legal rights and obligations through a distorted social context, leaving them unprepared to make legal decisions on their own.

No better example of the common citizen's unerring belief in the evocative power of legal language exists than the standard "cease and desist" letter. Such a

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[55] Habermas, 448.

[56] Hohmann, 366. Other scholars have also called for a return to focus on classical rhetoric. Brian Vickers, *In Defence of Rhetoric*. Oxford: Clarendon Press, 1988; Eileen A. Scallen, "Classical Rhetoric, Practical Reasoning, and the Law of Evidence." *American University Law Review* (1995): 1717-1815; Patrick O. Gudridge, "The Persistence of Classical Style." *University of Pennsylvania Law Review* (1983) 131: 663-791.

[57] *Id.*

letter demonstrates the citizen's "belief that lawyers' language was the right medium, given the nature and gravity of his grievances."[58] What the reliance on the cease-and-desist letter does not teach the average citizen is how to resolve a conflict without the use of an overt threat whether litigation or criminal indictment. Law becomes a metaphor indistinguishable from power, losing the sense of communal consensus in that transformation. Phillips, in an effort to reconnect legal institutions to democratic government, argues for a bottom-up approach to the validation of law: Law produced by the political and adjudication processes in a democratic state should in some sense reflect public opinion; a citizen must be able to recognize the principles, norms, and rules of law as the basis of right and disinterested choices and judgments which he might have made reasonably for himself.[59] In a sense, the gap between democratic participation and judicial independence might be found at the intersection of law and rhetoric.

Although the crisis of legal communication affects a variety of academic and professional fields, the most promising source of a resolution of this crisis is in the application of rhetorical principles. First, the American model of speech communication has long been grounded in notions of civic duty.[60] Learning to be an effective communicator allows one to become a more effective citizen. The same notion applies to the subset of legal communication, given the practical importance of communication skills to the profession. Second, rhetoric has an ancient and compelling relationship with legal studies. The two disciplines share a common historical DNA. A combination of classical and contemporary rhetorical theories should easily fit within the framework of legal practice, given the close proximity of both fields. A rhetorically centered understanding of how citizens can actively and effectively participate in the legal rule-making process reinforces the

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[58] A. Phillips, 38.
[59] *Id.* 14.
[60] William Keith, "Identity, Rhetoric, and Myth: A Response to Mailloux and Leff," *Rhetoric Society Quarterly* 30 (2000): 95-106.

importance of civic engagement in all public affairs. If citizens cannot have a critical conversation about the legal system soon, the laws that are produced from those systems will be largely irrelevant to the needs of most citizens.

The solution to the increasing gap between legal discourse and civic understanding undoubtedly contains many elements. However, we might reduce the general features of an effective solution to the following elements: first, a public that is better educated in legal rhetoric; second, a media that is more effective in reporting legal developments; and third, a legal system that is more responsive the foregoing needs of the public and the media. In all of these elements, the ability of legal discourse to produce precise, appropriate, and flexible statements of law should be preserved. In other words, a distinction must be made between the discourse of the legal system and the rhetoric of the broader social conception of law.

In English, *law* means rules and standards as well as the enveloping system that applies those rules and standards. At first, this might seem unfortunate and leading to ambiguity. After all, the French have *le loi* (rules and regulations) and *le droit* (the system of control).[61] If one were to describe the law as a language, *le loi* would describe the text and *le droit* might be the system. A similar trouble occurs when defining the term *rhetoric*, which could mean the particular way of talking (*e.g.*, the use of rhetorical devices like metaphors and repetition) or an entire system of talk (*e.g.,* the Rhetoric of the New Deal). Although arguments some times erupt over the failure of modern rhetorical scholars to recall Classical rhetorical structures, rhetorical scholars have largely accepted that the notion of rhetoric has a plurality of meanings and definitions that all have something to do with symbol use.

On an entirely practical level, a definition of legal rhetoric that includes both *le loi* and *le droit* holds one accountable to the law regardless of how difficult

[61] Of course, the French also use *le juste* to describe the justness and the fairness of a proposition. A. Phillips, 164.

it may be to understand as a layperson. Not as obvious is the corollary that the system itself is symbolic of the better efforts of the society that approves of it. As an example, John W. Halderman described two significant factors of the United Nations Charter: first, "the Charter, as originally written and adopted, was never anything more than the framework of a potential system;" and second, the Charter "nevertheless did, and still does, constitute such a potential framework."[62] For the U.N. Charter, or any system of law to function, Halderman argued that the concept must be "grounded in a basic frame of mind in which the [people's] concerned desire to do justice as among themselves, have a common notion of what they mean by justice, and general agreement as to how to go about securing it."[63] The most effective "rule of law," argued Halderman, is not the substantive content or the consistency with which the rules are applied.[64] Instead, the decisive factor is the "nature of the effort made, and seen to be made, on the part of the competent authorities to achieve justice through the equal and dispassionate application of law and principle."[65] The goal of "rule of law" is the "development of the requisite degree of public confidence in the 'system' being sought after."[66] Thus, in critiquing the U.N. Charter, Halderman admits that the "particular form of a legal order envisioned at San Francisco proved unworkable … however, the principles themselves are more important than any question of form. They are flexible, capable of being adapted to use in varying situations and thus of playing their essential role, in terms of political realities, in the development of a dynamic system capable of maintaining peace and security in an evolving world."[67]

By acknowledging the capacity of legal rhetoric to reflect the democratic aspirations of a lay public as well as the systematic effort to interpret and enforce

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[62] John W. Halderman, *The United Nations & the Rule of Law*, Dobbs Ferry, NY: Oceana, 1966, 1-2.
[63] *Id.* 3.
[64] *Id.* 11.
[65] *Id.*
[66] *Id.*
[67] *Id.* 215.

those wishes, any study of legal rhetoric can be reduced to a dual faceted distinction. Following Cherwitz and Hikins' notion of rhetoric as the "use of language to describe reality" as a starting point, one might suggest that Law is the "use of language to describe *justice*."[68] This dissertation proposes a rhetorical understanding of Law as a pool of argumentative resources available to engage in descriptions of justice that are supported by a rough societal consensus. McGee might describe the Law as an ideograph, or a short hand for an ideologically centered worldview, but this project would broaden that definition to allow Law to serve as a reservoir of other justice-related ideographs. For example, the Law may enjoy a rough societal consensus supporting the principle that individuals facing societal punishment ought to be able to defend themselves. There are plenty of variations as to how this principle might be used, but it clearly has a place in the pool of argumentative resources available when discussing a matter of justice.

In contrast, the Legal rules and regulations that are put into place by authoritative figures to enact the Law do not generally enjoy societal consensus. In fact, the very nature of the discourse and the underlying system encourages Legal discourse to become specialized, elitist, and most importantly, efficient. At the same time, the Legal must be responsive to the fact that the American style of legal conflict resolution often asks lay citizens to do their own legal analysis and make their own legal arguments. Any citizen faced with the difficult decision to contest a traffic ticket is placed in this very dilemma. Moreover, legal discourses are also generated by private institutions that simulate the legal discourse of the public legal system. Credit card holders attempting to argue their way of out late payment penalties invariably find themselves at the mercy of one of these private legal discourses. The general rules of public Law still apply to private legal discourses but, without a system that ensures that the Legal discourse reflects the rough

[68] Richard Cherwitz and James W. Hikins. *Communication and Knowledge.* Columbia, S.C.: University of South Carolina Press, 1986.

consensus of the Law, there is little to prevent a private or public rule-making institution from running roughshod over citizens.

The Law/Legal Distinction is strictly a rhetorical argument, not a legal one. Few citizens, outside of Hollywood screenplays, will ever win a legal ruling by appealing to general notions of fairness. Those arguments might work with a jury, but a staggering array of legal arguments must be made long before citizens would ever get to that point. The rub is that the distinction, although based on rhetorical perspectives, is not rhetorical in the pejorative sense. Rather, the Law/Legal distinction can be substantive. An argument about whether something is legal is grounded in axiology and applied perspectives. In contrast, a lawful argument is about the world of possibilities. The difference in rhetorical grounding can be illustrated by a trial court's consideration of questions of fact and questions of law. A question of fact, in legal parlance, is usually left to a jury (or a judge acting as a jury in a bench trial) to determine. However, a judge is free to base a decision about a question of law on imagined realities. In many U.S. Supreme Court oral arguments, the justices question the attorneys about absurd hypotheticals in order to probe the limits of a question of law. Geoffrey Samuel also critiques the assumption that knowledge of law can be contained in the knowledge of the rules.[69] He argues effectively that such a rule-model epistemological assumption fails for lack of considering the construction of facts. He argues that cases are not based on real facts, but "virtual" facts. In fact, he argues, the object of legal science is the construction of legal model of facts.

As a consequence of this different rhetorical grounding, legal and lawful arguments are invoked by distinctive argumentative personas. Legal woes are suffered by cognizable individuals who have suffered an injury capable of remedy. The scope of the issues is limited, theoretically, to the facts available in the private instance. In the U.S. Supreme Court case of *University of California Board of*

[69] Geoffrey Samuel, *Epistemology and Method in Law*, Aldershot: Ashgate, 2003, 173-215.

Regents v. Bakke, the petitioner's identity as a rejected white medical school applicant is crucial to the legal application of equal protection rules developed by the Court.[70] In contrast, the lawful argument requires a broader argumentative personae because the issues are of public concern. In *Bakke*, that same white petitioner must also invoke the larger argumentative personae of any political minority for his argument against "reverse discrimination" to have merit. In the modern U.S. system, the large class action lawsuit offers an excellent laboratory for examining the differences between public and private disputes. At one level, each class action litigant must demonstrate eventually that she or he has the standing to be a plaintiff. However, the class of plaintiffs must also demonstrate why their individual claims should be taken up by the courts as one collective action.

However distinctive the lawful might be from the legal, the modern public is rarely provided with the opportunity to see the distinction. The typical American usually only encounters the legal side of the justice system. A citizen might receive a parking ticket, for example, as a consequence of parking too close to a fire hydrant. The citizen can either pay the ticket or appeal the citation. In order to appeal, the citizen must follow a set of court procedures that usually requires filing appropriate paperwork within the proper amount of time and appearing for a grievance hearing. Purportedly, the average citizen would wade through all of these legal rules and procedures and finally encounter "the law" in the form of a judge. Yet before the citizen-complainant can argue about the speciousness of the fire-hydrant law, she will have to rise when the judge enters the courtroom, wait to begin her argument, remember to address the judge with all of the proper formalities, and be prepared for the judge to interrupt her presentation with questions. Imagine her frustration when the judge hands down his decision that expresses sympathy for her argument, but notes his powerlessness in overturning

[70] 438 U.S. 265 (U.S. Supreme Court 1978).

traffic laws. In order for her to get an opportunity to see a judge talk about the Law, rather than the Legal, she will have to appeal to a higher court.

In sum, the Law/Legal Distinction is worth paying attention to because Law and the Legal perform different rhetorical functions. While some languages condense the two concepts into the word "Law," rhetorical scholars would do well to keep the distinction in mind. In the next section, the proposed methodology of this project will incorporate the Law/Legal Distinction into a media analysis, allowing scholars to ground the rhetorical perspective with a clear understanding of how citizens receive their law.

E. Introducing the Methodology and Artifact

This project searched for answers to the following three questions in *Gratz v. Bollinger* and *Grutter v. Bollinger*, a set of companion cases on affirmative action handed down by the U.S. Supreme Court in 2003:

(1) The Legal System: How is the legal system constituted in the text?
(2) The Law: What principles at Law are in conflict in the text?
(3) The Media: What can citizens learn from media coverage of a text?

While these questions are relevant for analyzing any item of legal text, these two particular Supreme Court decisions are appropriate artifacts of study for at least three reasons. First, the topic of affirmative action has received enough media coverage to be familiar to most consumers. In that sense, the general topic is more approachable than other recent court decisions. Second, the nature of the dispute, whether a state is constitutionally justified in using racial classifications in higher education admissions, relies on a line of constitutional argument that is much easier to decipher by the average lay citizen than most legal analyses. Finally, there is little need to make emerging scholars in legal rhetoric familiarize themselves with new areas of law for every article they review. Indeed, rhetorical critics are also citizens. A model of legal rhetorical criticism ought not require that critics become doctrinal experts in the area of law that a judicial decision inhabits.

U.S. Supreme Court discourse is representative of legal rhetoric in general. Indeed, the language employed by the Supreme Court is cited by thousands of lower courts and courts from other jurisdictions. From a critical standpoint, the main benefit of a Supreme Court opinion is the number of authors involved in its ultimate form. Any given decision is a product of input from dozens of attorneys, from the attorneys litigating the case, the various judges making rulings, and the judicial clerks assisting in the research and drafting of the opinion. While the appellate practitioners may not reflect the typical legal discourse of the average courthouse, there are enough similarities to justify using Supreme Court cases as illustrative examples.

This study tracks the Law/Legal distinction by examining what arguments and rhetorical elements of the decisions are reported by three U.S. newspapers covering the *Gratz* and *Grutter* cases. First, I assess the major legal discursive arguments in the case. In a fully realized analysis, this stage would require the review of all majority, concurring, and dissenting opinions of the Court, as well as the briefs of the litigants and any "friends of the Court"—not to mention the massive record of litigation in the underlying cases. For the sake of simplicity, this project limits its survey of the leading legal arguments to the majority, concurring, and dissenting opinions in these two cases. The first question can be answered by first comparing the results of my analysis in stage one (identifying the architectural and cultural variables) with the media reporting of those same variables. The relative emphasis of the news reporting of each variable will help establish which arguments the public was intended to view as more or less important. In addition, the correlation between media strategic framing in general and the coverage may be illuminating. Thus, the "legal" analysis includes three aspects: first, a general tabulation of different arguments advanced by different opinion writers; second, an examination of some rhetorical features that emphasize the architecture of the

Legal system; and third, an examination of some rhetorical features that emphasize the culture of the Legal system.

Second, I analyze the issues of Law, which involve addressing the underlying legal principles in conflict within the cases. By evaluating the language of the majority opinion in two companion cases addressing the constitutionality of affirmative action programs in higher education, this study will identify the general principles such as the importance of diversity in education, the appropriateness of state-sponsored racial classifications, or what constitutes diversity. Note that these terms reflect the Court's constitutional lexicon for cases involving equal protection questions. Therefore, the second question can be answered by comparing the results of my analysis in stage two (identifying the principles of Law in conflict) with the media reporting of those same conflicts. Like the legal analysis stage, the media's relative emphasis of the principles may be revealed through the placement of the references within the story. In addition, the correlation between media issue framing in general and the coverage may be illuminating.

Most scholarship in legal rhetoric essentially stops at this point, preferring to describe the relationship between the Law and the Legal in a variety of methodologically sound ways. While there are great lessons to be learned from essentially descriptive analyses of the interplay between legal rules and their underlying social or democratic justifications, this dissertation asks scholars to make a connection between the language of the law and legal systems with the citizens who tacitly or actively affirm the legitimacy of the legal order. Most people learn about law from exposure to television and other media of popular culture, not from direct experience.[71]

The third question is answered through a compilation of data from all three stages. Initially, the strategic framing analysis will suggest some lessons for

[71] Stephen Macauley, "Images of Law in Everyday Life: The Lessons of School, Entertainment and Spectator Sport," *Law and Society Review* 21 (1978): 185-218.

citizens. The final stage of this analysis tracks media coverage of the Court's decisions. Using a content analysis method derived from an unpublished pilot project, this study examines which arguments are being passed along to media consumers by newspapers at the national, regional, and local level and measure the general framing of the coverage. Specifically, I track references to strategic, narrative, and issue framing. In addition, I attempt to measure how many arguments and issues identified in the first two stages were actually reported by media. Most importantly, the media coverage can reveal what the citizen's role is in the conflict. If there is a heavy emphasis on covering the stage one (Legal) aspects of the case, to the detriment of coverage of stage two (Law) issues, citizens understand that they have a limited role in evaluating the conflict.

The results of this analysis will also provide support for suggesting alternative approaches to covering legal conflicts. If the data suggest that citizens are essentially removed from the conflict through media coverage, that data will provide some basis for an alternative mode of reporting that focuses on different variables more relevant to citizen's needs in evaluating legal conflicts.

F. Conclusions and Preview of Remaining Chapters

To summarize, the central question of this study is how can rhetorical scholarship help citizens become better critics of the law? The question is premised on Hans Hofmann's call for more research on what keeps citizens from becoming effectively engaged with the legal process. This study takes one modest step towards that goal by establishing a general framework for organizing scholarship in legal rhetoric and using the Law/Legal Distinction as the central facet of that organizational schema. In addition, my objective is to demonstrate how media analysis can be incorporated into a regular part of a legal rhetorical analysis.

The remaining chapters of this dissertation accomplish the following tasks:

Chapter Two introduces readers to *Gratz v. Bollinger*and *Grutter v. Bollinger* as the primary artifacts of this study and offers a general discussion of the legal, political, and cultural background of these cases.[72] In particular, I briefly review the Court's prior ruling in *Bakke v. Regents of California*, which was the Court's last major ruling on affirmative action. This chapter also contains a review of the major arguments forwarded by the opinion writers in *Gratz* and *Grutter*, which will subsequently be tracked in the media coverage analysis.

Chapters Three and Four deal respectively with the proposed analyses of the Legal system and the Law by first reviewing relevant research literature and then applying the analyses described in this chapter to the *Gratz* and *Grutter* opinions. Chapter Three reviews the variables relating to legal architecture and culture and Chapter Four examines the principles in conflict, all of which will be tracked in the media coverage analysis.

Chapter Five describes the attitudinal variables (strategic, narrative, and issue framing) that are tracked in the media coverage analysis.

Finally, *Chapter Six* reports findings of the media coverage analysis that will incorporate elements from Chapters Three through Five. This chapter also draws conclusions about whether the media coverage is distorted in favor of the Law or the Legal issues, what framing technique is predominant, and which arguments and rhetorical features of the cases are more likely to be transmitted to citizens. In addition, Chapter Six contains recommendations on what improvements or adjustments might make media coverage of legal disputes more helpful to citizens taking a critical posture towards the Legal system.

Despite this introductory chapter's critique of the exclusion of citizens from the legal system, the end goal of this process is not to simplify the legal process,

[72] Note that in lieu of a single literature review, the appropriate references will be reviewed within each Chapter.

however laudable that goal might be. Fuller's comparison of the law to the weather is appropriate:

> For the man in the street or in the field the most common response to law is a gesture of helplessness and indifference … It may be said that through reactions to the law—like those toward the weather—may be complex and subtle, but there is nothing about the notion of law itself that suggests such qualities. Individual laws, to be sure, may be complicated and forbiddingly so, with their endless paragraphs, their "aforesaid's" and "provided however's" But about the notion of law itself there is no mystery. Everybody knows what it is and why it exists."[73]

The system for reporting on weather is necessarily complex and would not benefit from the regular intervention of amateurs. However, the complexity of the Legal system should not prevent citizens from understanding the impact of its decisions. Just as a farmer does not need a degree in meteorology in order to speak intelligently about the weather, citizens do not need a professional education in legal discourse and procedure to be effective critics of the law. What is needed is some degree of transparency within the Legal system and some degree of accountability by the media for its news coverage and dramatic depictions of legal conflicts. The methodological structure described in this study is one way to gauge the transparency of the Legal system and its coverage by the media. More centrally, this notion of a Law/Legal Distinction can aid any critic, whether a rhetorical scholar or a lay citizen, in evaluating legal texts.

[73] Lon F. Fuller, *Anatomy of the Law*, Westport Conn.: Greenwood Press, 1968, 6.

Chapter II: Artifact

Legal anthropologist Stephane Palmié explains that a U.S. Supreme Court opinion is but one narrative that amounts to a "thinly spread icing on a thickly layered cake of stories. Cutting into this heteroglossic cake is a modest archeological task."[74] This dissertation relies on two simultaneously written and released U.S. Supreme Court decisions styled respectively, *Gratz v. Bollinger*[75] and *Grutter v. Bollinger*,[76] to draw broad conclusions about the rhetorical character of law and the relationship between law, legal systems, and citizenship.

A. Overview

As Palmié suggests, the decisions only represent a small part of the entire legal dispute. However, for the purposes of this dissertation, the two cases demonstrate the rhetorical distinctions to be found between Law, the Legal system, and the Media. The cases revolved, respectively, around the University of Michigan undergraduate and law school admissions programs. The two cases afforded the Court the opportunity to address whether and how state-funded educational institutions can use race-based classification programs like affirmative action to promote racial and ethnic diversity. The legal basis for the decisions rests with the interpretation of the Fourteenth Amendment of the U.S. Constitution, which guarantees equal protection of the law to all citizens.[77] Handing down both decisions on June 23, 2003, the Court ultimately upheld the law school's admissions program, but found the undergraduate system to be unconstitutional.

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[74] Stephane Palmié, "Which Centre, Whose Margin? Notes Toward an Archaeology of US Supreme Court Case 91-948, 1993 (*Church of the Lukumí vs. City of Hialeah, South Florida)*" 184-209, 185-86, in *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity*, ed. Olivia Harris, London: Routledge, 1996.

[75] *Gratz v. Bollinger*, 539 U.S. 244 (U.S. Supreme Court 2003).

[76] *Grutter v. Bollinger*, 539 U.S. 306 (U.S. Supreme Court 2003).

[77] The Fourteenth Amendment, passed in 1868 in the wake of the U.S. Civil War, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV.

As with any study, the use of a limited data sample to make broad claims must be carefully justified. This chapter will first discuss why U.S. Supreme Court opinions are generally appropriate artifacts for the study of legal rhetoric. In the process, the basic structure of the court and the "rhetoric of its decisions" are reviewed. Second, because any rhetorical analysis of a legal text requires some basic familiarity with the underlying legal issues, this Chapter will expose the reader to the legal issues at play in *Gratz* and *Grutter* That review includes the basic jurisprudential background of racial classifications in American constitutional law as well as the specific issues discussed and arguments made by the Justices in the two cases.

B. Using U.S. Supreme Court Decisions as Rhetorical Artifacts

If we understand "legal rhetoric" as "the use of language to describe reality," then at some level we must justify using U.S. Supreme Court opinions as rhetorical artifacts that are representative of that language use.[78] Generally, the Court's rhetoric is unique within the legal system. Most legal disputes do not go to trial, let alone reach an appellate court. Indeed, most legal rhetoric is generated in non-litigative disputes that are well beyond the domain of a judiciary. More to the point, scholars should be able to assess any legal text to gain insights into legal rhetoric. As Levinson notes, every case, and every opinion in every case, studied in a law school classroom is an example of the on-the-wall "thinking like a lawyer."[79]

However, Supreme Court opinions, along with sensationalistic or celebrity-driven trials, tend to receive more media coverage than the aggregate of so-called normal legal disputes.[80] Similarly, rhetorical scholars have shown much more

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[78] Cherwitz & Hikins, 60-61.
[79] Levinson, *Constitutional Faith,* 177.
[80] Dennis E. Everette, "Another Look at Press Coverage of the Supreme Court." *Villanova Law Review* 20 (1974): 765-799; Jerome O'Callaghan and James O. Dukes, "Media Coverage of the Supreme Court's Caseload." *Journalism Quarterly* 69 (1992): 195-203. Richard Davis, *Decisions*

interest in Supreme Court opinions than legal texts generated by other rule-making institutions. The answer to the question of why journalists and rhetorical scholars are interested in Supreme Court opinions is straightforward, Supreme Court opinions are viewed as more important and influential than the decisions of another rule-making institution, such as the state motor vehicle board, for example. The rest of this section examines why the Court is considered to be so influential.

1. Structure of the U.S. Supreme Court

First, a short description of the Supreme Court's place in the U.S. judicial system may be helpful. The Court is the highest court of the land for most federal issues, subject to the approval of Congress. Indeed, Congress maintains the power to limit the reach of the Supreme Court's decision-making authority through legislation. However, Congress has chosen to give the Supreme Court a vast amount of discretionary authority to issue *writs of certiorari* to cases it deems important enough to decide, managing its case load in the process. The Court generally hears appeals from two sets of courts: the federal courts of appeal and the various state supreme courts. The federal courts of appeals are divided topically and geographically into thirteen circuits.[81] One basis for filing for a Supreme Court appeal is a disagreement among the circuit courts regarding the proper interpretation or application of a point of law. Generally, most disagreements among the circuits are resolved once a majority of the circuits have adopted a particular interpretation of a law, although substantive difference between circuits can exist for decades. The effect is that a federal district (trial) court in one district may be forced to apply a different legal standard than a federal district court in a

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and Images (1994); Linda Greenhouse, "Telling the Court's Story: Justice and Journalism at the Supreme Court." *Yale Law Journal* 105 (1996): 1537-67.

[81] The First through Eleventh Federal Circuits cover the fifty United States as well as U.S. territories such as Guam or Puerto Rico. The D.C. Circuit covers the Washington, D.C. area and certain federal administrative matters. Finally, the U.S. Federal Circuit deals with specific federal topics, such as appeals from the U.S. Patent and Trademark Office. One might also mention the U.S. Court of Appeals for the Armed Forces, which takes appeals from courts martial rendered by the military justice system and may be appealed to the U.S. Supreme Court.

neighboring state.[82] The Court's various doctrines related to its review of state supreme court judgments are outside the scope of this project.

The diversity of state and federal trial and appellate courts raises the question of why the U.S. Supreme Court merits attention. Most cases barely reach trial, let alone the U.S. Supreme Court. By using only the text of two companion Supreme Court cases to illustrate the distinction between what constitutes the Law in a rhetorical sense and what constitutes the Legal system, this dissertation is using an absurdly discrete data sample. The modern U.S. Supreme Court only releases approximately seventy decisions a year, often with multiple opinions and dissents. Moreover, the scope of the federal judiciary produces thousands of written legal decisions every year. A minimally representative sample of legal texts might also include the reported opinions of state trial and appellate courts as well. Even with all of that text, we still have hardly touched the legislative and executive rules and regulations propagated by the federal and state governments. A comprehensive discussion about legal rhetoric would invariably have to examine the law making systems of other countries and perhaps the hundreds of thousands of private rule-making institutions. Finally, there are millions of written and oral legal agreements between private parties in effect every day. Two U.S. Supreme Court decisions, in the grand scope of law, are paltry and inadequate as a representative sample of legal texts in general.[83]

There is some question of whether the discourse of the Supreme Court even reflects ordinary legal talk. Even when legal disputes do reach trial, the types of

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[82] For example, the conflict between the Fifth Circuit and other federal circuits over whether states can justify racial classifications on the basis of increasing classroom diversity ultimately convinced the Court to address the two Michigan cases studied here. *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996) (finding no justification for race-based classifications in admissions program at the University of Texas School of Law); *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) (finding race-based classifications permissible in the admissions program for the University of Washington Law School).

[83] Cass Sunstein questions whether Supreme Court opinions are more important on a practical level or a symbolic level. Cass R. Sunstein, "Incommensurability and Valuation in Law," *Michigan Law Review* 92 (1994): 779-861.

legal communication present there only barely resemble the discourse of the Supreme Court. The argumentative protocols at the trial level are simply different than the matters before any appellate court. In most jurisdictions, appellate courts have a separate code of appellate procedure. Like any court, the Supreme Court has its own set of written and unwritten rules regarding the appearance of attorneys, filing and briefing procedures, and even appropriate behavior during the hearing of a matter. Few courtrooms are conducted with the sort of formality and attention to legal tradition that is commonplace in the Supreme Court. Even most appellate court decisions are different than the rhetorical nature of the Supreme Court. Perhaps one might justify the attention to the Supreme Court by the public's tendency to ascribe more importance to a Supreme Court decision than an equally final and binding state supreme court or federal appellate court decision. However, the Supreme Court's discourse is perhaps fundamentally different that other appellate courts, by virtue of its public nature.

Despite the relatively unique nature of the Court's posture and discourse, the decisions of the Court remain effective examples of legal rhetoric for a variety of reasons. First, the Court's formality and traditions make it a model for other courts. The influence of the Court's language is routinely seen in constitutional law, when the Court's phrasing of a rule is replicated by so-called lower courts, even when the rule is fundamentally altered in the process. Second, the Court's symbolic importance elevates the rhetorical value of its language beyond the sphere of legal discourse. Hunsaker notes the profound rhetorical influence the Court's decision in *Brown v. Board of Education* had on subsequent social movements advocating for "equal rights" for women and homosexuals.[84] While other courts have undoubtedly had a similar influence on public talk, the Supreme Court's rhetoric is an excellent starting point for exploring this rich connection.

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[84] David M. Hunsaker, "The Rhetoric of *Brown* v.*Boa rd of Education*: Paradigm for Contemporary Social Protest." *The Southern Communication Journal* 43 (Winter 1978): 91-109.

Another reason for focusing on the rhetoric of the Supreme Court is that most Supreme Court decisions are the product of dozens of legal authors. The Michigan cases produced: seven majority, concurring, and dissenting opinions; over sixty minutes of oral arguments; twelve briefs filed in the Supreme Court by the litigants in these cases; over 135 additional briefs filed by "friends of the court"; and approximately thirty three additional written decisions of lower courts in this litigation; thousands of pages documenting relevant evidence admitted at various stages of the litigation. A full accounting of the case would also require consideration of the hundreds of relevant federal and state court decisions generated since the passage of the Fourteenth Amendment in 1868 and relevant law review articles and scholarly publications discussing the Fourteenth Amendment and racial preferences. Even all of those sources would not include any consideration of how courts will apply the Michigan cases to related disputes in the future. Without these other sources of authorship, a Supreme Court decision can be viewed as a synthesis of a fairly broad scope of divergent and engaged legal thinking on the matter, whether or not all of the viewpoints are not fully and fairly represented in the final opinion. In contrast to a trial court, there is less of an opportunity for a single individual (whether it be a judge, attorney, or party) to change the nature of the language.[85]

[85] This point is made without discounting the possibility that significant voices can influence legal rhetoric. Like the traditional conflict within speech communication regarding the over-emphasis of so-called great speakers, law schools struggle with ensuring that law students are exposed to as representative sample of legal voices and texts that might constitute a canon of constitutional law. For a fuller discussion on the expansion and contraction of the legal canon, see David E. Marion, "The State of the Canon in Constitutional Law: Lessons from the Jurisprudence of John Marshall," *William & Mary Bill of Rights Journal* 9 (2001): 385-418; Sanford Levinson, "Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism," *Constitutional Commentary* 17 (2000): 241-66; Randall Kennedy, "Race Relations Law in the Canon of Legal Academia," *Fordham Law Review* 68 (2000): 1985-2010; Brad Snyder, "How Conservatives Canonized *Brown v. Board of Education*," *Rutgers Law Review* 52 (2000): 383-494; Jack M. Balkin and Sanford Levinson, "The Canons of Constitutional Law," *Harvard Law Review* 111 (1998): 963-1024.

One impact of the multiple authors of Law is a sense by many jurists and legal scholars that courts are in a constant dialogue with the legislative and executive branches of the government. In a close textual reading of *McCulloch v. Maryland*,[86] legal rhetorical scholar James Boyd White expresses the notion that all judicial opinions are part of a conversation:

> The most prominent feature of the judicial opinion is that it is not an isolated exercise of power but part of a continuing and collective process of conversation and judgment. The conversation of which it is part is not a political conversation of the usual sort, proceeding as such conversations ordinarily do—by kind of jostling and compromise, focusing mainly on the problem of the immediate present—but a highly formal one, in which authoritative conclusions are reached after explicit argument. These decisions in their turn become the material of future arguments leading to future decisions, and so on in a continuing process of opening and closure, argument and judgment, of which no one can claim to foresee the end.[87]

Courts may also be engaged in a dialogue with the citizenry. Some legal scholars suggest that American federal courts, particularly the Supreme Court, makes decisions that closely mirror national norms.[88] Public opinion researchers have detected a similar pattern with the modern Supreme Court.[89] These observations are somewhat in contrast to the notion of the judiciary as an anti-democratic or

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[86] 17 U.S. (4 Wheat.) 316 (U.S. Supreme Court1819).

[87] James Boyd White, *Acts of Hope. Creating Authority in Literature, Law, and Politics*, Chicago: University of Chicago Press, 1994, 640.

[88] Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker," *Journal of Public Law* 6 (1957): 279-95; Mark A. Graber, "The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35-72, 36; Michael J. Klarman, "*Bush v. Gore* Through the Lens of Constitutional History," *California Law Review* 92 (2001): 1721-1765, 1749-50.

[89] Thomas Marshall, *Public Opinion and the Supreme Court,* Winchester, Mass: Unwin Hyman, 1989 (noting that up to sixty six percent of Supreme Court opinions historically mirror public opinion polls); Thomas Marshall, "Policymaking and the Modern Court: When do Supreme Court Rulings Prevail?" *Western Political Quarterly* 42 (1989): 493-507.

counter-majoritarian branch of government.[90] Nevertheless, if the judiciary does mirror public sentiment (or perhaps lead it), then it may be worthwhile to use a leading Court decision as a sort of cultural barometer.

This study is limited to the consideration of the Court's two decisions in the Michigan cases. A "decision" by the U.S. Supreme Court typically encompasses two or three types of competing opinions. The *majority* opinion is the authoritative decision of the Court and consists of the majority of the voting justices. That opinion is authored by a justice in the majority,[91] but is subject to editorial commentary by the other justices on the Court. In truth, almost every majority opinion is something of a collaborative writing project. The second type of opinion typically found in the Court decision is the*concurring* opinion. When a justice in the majority wishes to concur in the judgment of the Court, but for different or more specific reasons than the majority, the result may be a concurring opinion. While concurring opinions carry no precedential weight, the reality is that in a close decision, the concurring opinion of a "swing vote" often becomes more important to legal practitioners than the majority opinion. Third, when justices disagree with the judgment and analysis of the majority, they often write *dissenting* opinions. Again, the dissenting opinion carries no precedential value. However, the dissent can serve a number of important rhetorical purposes in future cases. A fourth type of opinion emerges when a majority of the justices agree only on the proper result. In such a case, the opinion with the most number of justices is referred to as a plurality opinion. Plurality opinions have very limited precedential value, but can serve important rhetorical purposes. In the ensuing analysis of

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[90] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution*. Oxford: Oxford University Press, 1982, 542; Alexander Bickel, *The Least Dangerous Branch*. Binghamton, N.Y.: Vail-Ballou Press 1962, 26.

[91] Traditionally, the task of writing the majority opinion is assigned by the highest-ranking justice in the majority, which is either the Chief Justice or the longest serving justice. The highest-ranking justice may assign the task to himself. For example, Chief Justice Earl Warren took on the task of writing the Court's unanimous decision in *Brown v. Board of Education*.

Grutter and *Gratz*, the Supreme Court's plurality opinion in *Bakke v. Regents* is crucially important.

Finally, Supreme Court opinions are good artifacts for rhetorical inquiry because of their audiences, some of whom are intuitive and others whom might surprise casual observers of the Court.[92] At a basic level, the Court is explaining its decision to the litigants in the case. On a second level, the Court is explaining to the general public why the decision was just. On a third level, the Court offers guidance to other courts on how to treat similar types of situations or applications of a particular law. On a fourth level, the Court offers critical feedback to legislative and regulatory bodies creating law, and executive branches that are attempting to enforce laws. On a fifth level, the Court offers commentary to future litigants on other methods of dealing with the legal dispute at issue. On a sixth level, the Court speaks to legal scholars and historians interested in the subject matter of the dispute. Finally, on a surprisingly intimate level, the Justices of the Court often speak to each other by offering praise or criticism. Much like the synthetic authorship of a Supreme Court decision, the various audiences also lend considerable weight to the decision.

For a rhetorical scholar, a fully argued Supreme Court decision with a variety of opinions and audiences involved can be a lifetime's data sample for research. This study has two such decisions, both of which will be more thoroughly covered in the ensuing chapters. For the purposes of this chapter, a brief overview of the legal issues and postures of *Grutter* and *Gratz* should be sufficient. The next subsection describes the historical background for the Equal Protection Amendment arguments found in these cases. The basic arguments various opinions of the two cases are briefly described in subsection 3.

C. Supreme Court Jurisprudence on Racial Classifications

[92] Rhetorical scholars are often guilty of glossing over important audiences. For example, see R. Scott Medsker and Todd F. McDorman, "Maintaining Institutional Power and Constitutional Principles: A Rhetorical Analysis of *United States v. Nixon*," *Speaker & Gavel*, 41 (2004): 1-19 (listing the Court's audiences as President Nixon (the litigant), the general public, and future courts).

The Michigan decisions primarily focus on the question of whether a state educational institution may use race as a factor in its admissions program. The Fourteenth Amendment of the U.S. Constitution requires states to guarantee, among other matters, the "equal protection of the laws" to all persons.[93] One of the Civil War Amendments, the Fourteenth Amendment was intended in large part to prevent states from treating recently freed slaves as second-class citizens. Congress had earlier passed the Ku Klux Klan Civil Rights Act, which offered some measure of civil rights protections, but the constitutionality of whether the federal government could force states to provide such protections came into question. Accordingly, the Fourteenth Amendment only requires states, not the federal government, to provide such protections.

Not surprisingly, African-Americans found the Equal Protection Clause to be of little practical assistance in the struggle to overcome institutional racism. Equal protection was "the usual last resort of constitutional arguments."[94] The "old" Equal Protection jurisprudence emphasized legislative deference to the objectives of the state, leaving only the actual classifications open to analysis. In *Plessey v. Ferguson*,[95] the Court upheld the right of states to segregate railroad passengers by race, so long as the separate accommodations were essentially equal. The outcome made perfect sense because both races were ostensibly being treated equally.

However, the Court's Equal Protection jurisprudence has grown more individualistic in nature, focusing only on the effects of state classifications on individual rights.[96] The "separate but equal" policy was effectively retired by the

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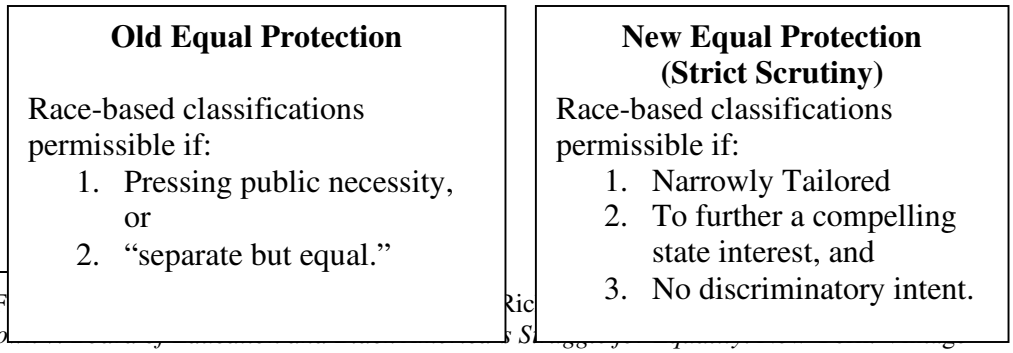
[93] U.S. Const., § 1, Fourteenth Amendment.
[94] *Buck v. Bell*, 274 U.S. 200 (U.S. Supreme Court 1927).
[95] 163 U.S. 537 (U.S. Supreme Court 1896).
[96] David Breshears. "One Step Forward, Two Steps Back: The Meaning of Equality and the Cultural Politics of Memory in *Regents of the University of California v. Bakke*." *Journal of Law & Society* 3 (2002): 67-90. Most of Breshears' analysis related to post-*Brown* equal protection cases, but the trend towards focusing on individual treatment can arguably be traced back to the first rulings related to African-Americans and jury service in the 1890s.

Court in *Brown v. Board of Education* and in subsequent decisions.[97] Decided in 1954, *Brown* was the first opinion issued by the Warren Court and signaled a "new" equal protection doctrine[98] that focuses on a state's objectives in racial classifications. The "new equal protection" standard mandated that any effort by a state to classify persons on the basis of race be held to "strict scrutiny." Under the strict scrutiny analysis, racial classifications could be constitutional if they were "narrowly tailored to further a compelling interest" of the government. Well before *Brown*, the Court approved the use of racial classifications when "pressing public necessity" is shown, such as in the internment of Japanese-Americans during World War II.[99] The Warren Court's influence in *Brown* and in subsequent case law was to elevate strict scrutiny to such an exacting level that the analysis was arguably strict in theory and fatal in fact.[100]

Diagram 2.1: Old Equal Protection and New Equal Protection



[97] F Ric
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Books, 1977; *Brown v. Board of Education at Fifty: A Rhetorical Perspective*, ed. J. Clarke Rountree, Lanham, Md.: Lexington Press, 2004.

[98] Gerald Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harvard Law Review* 86 (1972): 1-32.

[99] *Hirabayashi v. United States*, 320 U.S. 81 (U.S. Supreme Court 1943); *Korematsu v. United States*, 323 U.S. 214 (U.S. Supreme Court 1944) (regarding curfew orders and concentration camp regulations applicable only to Japanese-Americans during WWII).

[100] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (U.S. Supreme Court 1995) (refuting notion that strict scrutiny analysis can never be satisfied).

Since *Brown*, the Court has generally treated racial classifications and racial discrimination with the same strict scrutiny test, even though a classification generally does not inherently treat members of one race differently from members of another race. An example is the prohibition against interracial marriage, to which the Court has applied the strict scrutiny test.[101] In the same vein, the Court has declared deliberate segregation in public schools to be inherently unequal in *Brown v. Board of Education*.[102] In that sense, the Court's approval of the "separate but equal doctrine" of *Plessy v. Ferguson*, may be seen as effectively repudiated. Nevertheless, the Court has never suggested that the mere existence of racially segregated schools, when unintentional, is a constitutional violation. A finding of discriminatory intent is required.[103] In most cases involving racial classifications, the most important element of a strict scrutiny review is the determination of whether a state had a discriminatory purpose in instituting the racial classification.[104] Racial discrimination may be found in a variety of ways, including explicitly discriminatory regulations and "facially neutral" regulations that are unequally administered[105] or have an impermissible legislative motive.[106]

Much in line with President Kennedy's original use of the phrase "affirmative action,"[107] in the context of intentional segregation in public schools,

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[101] *Loving v. Virginia*, 388 U.S. 1 (U.S. Supreme Court 1967).
[102] *Brown v. Board of Education*, 347 U.S. 483 (U.S. Supreme Court 1954).
[103] *Columbus Board of Education v. Penick*, 443 U.S. 449 (U.S. Supreme Court 1979).
[104] *Washington v. Davis*, 426 U.S. 229 (U.S. Supreme Court 1976).
[105] *Louisiana v. United States*, 380 U.S. 145 (U.S. Supreme Court 1965) (literacy tests in voting)
[106] *Gomillion v. Lightfoot,* 364 U.S. 339 (U.S. Supreme Court 1960) (changing of city boundaries to eliminate almost every black voter).
[107] When Kennedy created the Equal Employment Opportunity Commission in 1961, he used the phrase to describe the requirement that projects receiving federal funds take "affirmative action" to ensure that employment decisions are free from racial discrimination. See Executive Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961)

the Court has placed an affirmative duty on school boards to eliminate intentional racial segregation.[108] School boards may not perpetuate new systems that result in racial segregation, nor may they continue older systems, unless the board can show that the action serves important and legitimate ends.[109] The same rules apply to public colleges and universities.[110] Courts are empowered to use their equitable powers (based on fairness rather than regulation) to balance individual and collective interests while remedying the constitutionally offensive condition.[111]

With the question of access to public institutions seemingly secured, civil rights advocates began focusing on the problem of rectifying decades of segregation by pressing for admissions programs that used race as a basis for admission. Educational institutions began working toward improving the racial makeup of various professional programs, such law and medical schools, which had traditionally lacked strong minority representation. In the 1978 case of *Bakke v. California Board of Regents*, the Court addressed the practice of the California Board of Regents, which set aside 16 of 100 seats in the state university's medical school for minority students. The affirmative action program was challenged by Alan Bakee, an unsuccessful white applicant to the medical school, who argued that the school had no "compelling interest" in discriminating against white applicants.

In *Bakke v. California Board of Regents*, the Court was fractured by an unusual plurality opinion. Four justices found a compelling state interest in remedying past racial discrimination and would have upheld the admissions

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[108] *Green v. New Kent County School Board*, 391 U.S. 430 (U.S. Supreme Court 1968).
[109] *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (U.S. Supreme Court 1979).
[110] *United States v. Fordice*, 505 U.S. 717 (1992).
[111] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (U.S. Supreme Court 1971); *Strauder v. West Virginia*, 100 U.S. 303 (U.S. Supreme Court 1880) (blacks serving on grand juries). *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (denial of laundry licenses to only Chinese); *Hernandez v. Texas*, 347 U.S. 475 (U.S. Supreme Court 1954) (discrimination against Mexican-Americans in jury service).

policy.[112] Four other justices refused to address the constitutional question, preferring to strike the program on statutory grounds.[113] The ninth vote was held by Justice Powell, who wished to strike the program, but uphold California's "substantive interest that legitimately [may] be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[114] The substance of Justice Powell's opinion for the Court, although joined by no other justice, became the basis by which educational institutions modeled their admissions policies through the 1980s and 1990s. In particular, because Justice Powell praised Harvard University's admission program that viewed race as a "plus" among a range of factors, many schools sought to adopt a plus-factor admission program.

By the mid-1990s, several schools were facing legal challenges to the use of race in the admissions process. In *Hopwood v. Texas*, the University of Texas School of Law was sued in a class action by four rejected applicants alleging that the school's system of considering minority candidates separately from other applicants was unconstitutional. Taken on appeal to the Fifth Circuit Court of Appeals twice, the Texas Law School unsuccessfully argued Justice Powell's view that diversity served a compelling interest. The Supreme Court denied the law school's petition for a *certorari of review* and Texas Law School was forced to abandon any consideration of race in its application process. The attorney general for the State of Texas interpreted the *Hopwood* decision as to prohibit any state consideration of race for admission purposes or scholarships in any state institution. The result was a complete overhaul of Texas state educational policies regarding race. Other similar cases evolved in Washington State, Georgia, and New York, but no consensus was to be found among the circuit courts of appeals.

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[112] *Bakke,* 325.
[113] *Id.* 408.
[114] *Id.* 320.

Finally, in 2003, the Court granted certorari to two companion cases involving the University of Michigan. The first case, *Gratz v. Bollinger*, involved a class action claiming that the undergraduate admissions program unconstitutionally considered race. The second case, *Grutter v. Bollinger*, involved a second class action that levied the same argument at the University's law school. The Court heard oral arguments on both cases and accepted amicus curie briefing from dozens of interested parties. Ultimately, the Court found the undergraduate admissions program in *Gratz* to fail strict scrutiny. However, in *Grutter*, the Court accepted the law school's admissions program as constitutional. The decisions rendered in those cases are the basis for the analysis in the subsequent chapters of this dissertation. The next section explains the specific legal issues in the Michigan cases and the various opinions that constitute the Court's decision in these cases.

D. *Gratz v. Bollinger* and *Grutter v. Bollinger*

In *Gratz v. Bollinger* and *Grutter v. Bollinger*, the Court reviewed the use of racial preferences in the undergraduate and law admissions programs at the University of Michigan. Noting important differences between the two admissions programs, the Court upheld the law school program, but declared the undergraduate program to be unconstitutional. The decision was not unanimous, evoking fierce concurring or dissenting opinions from every Justice on the Court. Even the majority opinion tempered its support for the law school's use of racial preferences by suggesting that they would be unnecessary within 25 years.[115] Between the two cases, there are two binding majority opinions, six suggestive concurring opinions, and five non-binding dissenting opinions. Technically, only the majority opinions are law as the rest are considered *dicta*, or surplus reasoning. However, given that both decisions were essentially five to four decisions, the reasoning of each Justice voting for a case is important.

[115] *Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

As an overview, the two majority positions essentially affirm what has been long suggested as the Court's position since its 1978 judgment in *Regents of California v. Bakke*:[116] racial preferences in educational institutions are permissible, but quotas are not.[117] First, *Grutter* establishes that a school may consider race as part of its admissions program, but only as one non-determinative factor in the admissions process. This was the basic argument of Justice Lewis Powell, who was the "swing vote" for upholding the University of California's affirmative action program in *Bakke*; however, Powell's "plurality" opinion was not joined by any of the other Justices voting in favor of the affirmative action program. Under a rule laid down by the Court in *Marks v. United States*,[118] Powell's opinion with respect to diversity was the controlling rationale for the judgment of the Court and therefore controlling precedent. Although the application of the *Marks* rule has been controversial, *Grutter* endorsed Powell's position that student body diversity is a compelling state interest that can justify the use of race in university admissions.[119]

Second, the *Gratz* majority affirmed Powell's view that racial preferences should not be determinative factors in admissions processes. The Michigan undergraduate admissions program gave points for certain applicant characteristics. Students with enough points were guaranteed offers of admission. Applicants of particular minority groups and recruited athletes were automatically awarded 20 points.[120] The primary position of the Court's majority is that the undergraduate program failed for lack of "individualized consideration."[121] The *Gratz* majority was particularly displeased with the ratio of bonus points available for creative accomplishments or leadership (5) with the automatic allocation of 20 points for

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[116] 438 U.S. 265 (U.S. Supreme Court 1978).
[117] *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). All references hereinafter to *Bakke* refer to Justice Powell's opinion.
[118] 430 U.S. 188 (U.S. Supreme Court 1977).
[119] *Grutter*, 539 U.S. at 329.
[120] *Gratz*, 539 U.S. at 256.
[121] *Gratz*, 539 U.S. at 274-5.

membership in a particular ethnicity. This position reflects the Justice Lewis' concern that race only be used as a non-decisive factor that would function as "a 'plus' in a particular applicant's file."[122] However *Grutter* and *Gratz* may have affirmed and extended Justice Powell's plurality opinion in *Bakke*, the balance of the majority opinions in the Michigan cases suggest much more is involved than deciding whether *Bakke* is good law.

1. The *Gratz* Opinions (Michigan undergraduate)

In *Gratz*, the Court found Michigan's undergraduate admissions program to be in violation of the Equal Protection Clause. The majority opinion, concurring opinions, and dissenting opinions are briefly described here.

a. Majority Opinion in *Gratz*

The majority opinion in *Gratz* was authored by Chief Justice Rehnquist, traditionally understood as an opponent to racial preferences in most settings, including education. The first half of the opinion addresses whether one of the petitioners, Patrick Hamacher, lacked "standing" to sue the University because he did not attempt to enroll at UM as a transfer student.[123] "Standing" describes the qualifications of an individual seeking to sue. Justice Stevens, a member of the minority in *Gratz*, raised the issue *sua sponte*(on his own accord). The importance of the standing issue extended well beyond the equal protection law because of the multitudes of class-action suits in American law. In the majority opinion, Chief Justice Rehnquist explained that Hamacher's contention that he was "able and ready" to apply as a transfer student was more than adequate to qualify him as a representative of the entire class of potential plaintiffs harmed by the University's affirmative action program.[124]

The second half of the majority opinion details why the undergraduate admissions policies at the University of Michigan fail under the Court's strict

[122] *Bakke*, 438 U.S. at 317.
[123] *Gratz*, 539 U.S. at 260.
[124] *Gratz*, 539 U.S. at 262.

scrutiny standard of inquiry. Although the *Grutter*decision required the Court to agree that classroom diversity was a compelling interest, the *Gratz* majority was dissatisfied with Michigan's efforts to craft a narrowly tailored classification.[125] The majority opinion notes that Justice Powell's opinion in *Bakke* emphasized the "importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education."[126] The Michigan undergraduate program fails in this regard because it automatically distributed 20 points to every single applicant from an "underrepresented minority" group without engaging in the individualized evaluation described by Justice Powell.[127] The majority rejected the suggestion that such an individualized analysis would be impossible, or at least unreasonable. The fact that such an analysis is inefficient, according to the majority, is no excuse for ignoring constitutional mandates.[128]

Finally, the majority held that a violation of the Equal Protection Clause was also a violation of federal discrimination legislation.[129]

b. The Concurring Opinions in *Gratz*

The majority opinion was accompanied by three concurring opinions. Justice O'Connor, joined in part by Justice Breyer, emphasized that the primary flaw with the undergraduate admissions system was the lack of individualized attention given to all applicants through the mechanized undergraduate application process.[130] What distinguishes her position from that of the majority (and perhaps offers an explanation why only Breyer joined her opinion) is that the University could have "fixed" the flaw in their case through better record development.[131] If

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[125] *Gratz*, 539 U.S. at 269-70.
[126] *Gratz*, 539 at 271.
[127] *Id.*
[128] *Gratz*, 539 at 274-5.
[129] *Gratz*, 539 U.S. at 275, note 23.
[130] *Gratz*, 539 U.S. at 285-6 (O'Connor, concurring).
[131] *Gratz*, 539 U.S. at 279-80 (O'Connor, concurring) (noting the "apparent absence" of evidence on the record).

the school had shown that it did give individualized attention to all students, even when the 20 point boost was allocated to certain minority groups, then O'Connor seems to be willing to accept that system.

The second concurring opinion was authored by Justice Thomas. Justice Thomas argues that state-sponsored racial discrimination, however well intentioned, ought never be allowed.[132] He specifically emphasizes that the Court's opinions in *Gratz* and *Grutter* combine to outlaw discrimination between groups that would contribute to a "critical mass."[133] In other words, Thomas would prevent Michigan from discriminating against Native Americans in order to ensure that African-Americans were "adequately" represented in the school's critical mass. This interpretation is important because Thomas essentially outlines the case for members of one minority group to sue a school for granting preferences to other disadvantaged minorities groups within the critical mass.

Finally, Justice Breyer only joins the judgment of the Court. Although he joins O'Connor's concurring opinion, he also joins part of Justice Ginsburg's dissenting opinion in which she argues that a government might use racial classification when it distinguishes between policies of inclusion and exclusion.[134]

c. The Dissenting Opinions in *Gratz*

First, the *Gratz* dissenters focused on finding ways to limit the impact of the majority opinion. Although not truly a dissent, Justice Breyer's concurrence agrees so much with Justice Ginsburg's dissent that with a stronger record he clearly would have supported the University's program as he did with the law school.[135] Ginsburg's argument is that the government can distinguish between racial classifications designed to include racial minorities, and those intended to exclude. That both Breyer and O'Connor are in some agreement with Ginsburg suggests that

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[132] *Gratz*, 539 U.S. at 281 (Thomas, concurring).
[133] *Id.*
[134] *Gratz*, 539 U.S. at 281-2 (Breyer, concurring in part).
[135] *Gratz*, 539 U.S. at 282 (Breyer, concurring in part).

racial classifications designed for inclusive ends might find five or six votes in a future case. Breyer's interest in governmental intent in classification also suggests that he might be less willing to expand the *Grutter* holding to national security cases.

Justice Ginsburg's dissent offered three unique arguments. First, Ginsburg notes the omnipresence of racism, particularly directed towards Hispanics and African-Americans, by using a variety of statistical evidence in her dissent.[136] Ginsburg plainly intended to promote the notion that inclusion efforts by states ought to be evaluated differently than efforts to exclude. Second, citing to her concurring opinion in *Grutter*, Ginsburg notes the presence of international human rights documents that support an inclusive/exclusive racial classification distinction. Given the Court's traditional reluctance to rest its decisions on international legal standards, Ginsburg's insistence is noteworthy. Third, Ginsburg expresses a preference for Michigan's "accurately described, fully disclosed" program over the use of race-blind efforts to raise minority presences in the classroom, such as the ten percent rule plans or the use of indirect means to highlight race.[137]

A second important dissent is offered by Justice Stevens, who attacks the standing of both plaintiffs, but particularly questions Hamacher's status as a transfer applicant.[138] The claim is arguably intended to accomplish two goals. First, Stevens may have suspected that the conservative majority would have a hard time agreeing on a more lenient standard for a class action representative. Even though the majority managed to hold together, the result may have been a more conciliatory opinion. Second, Stevens also recognized that by forcing the majority

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[136] *Gratz*, 530 U.S. at 301 (Ginsburg, dissenting).
[137] *Gratz*, 530 U.S. at 303 (Ginsburg, dissenting). Ginsburg argues that the ten percent plans propagate segregation by discouraging parents from moving out of low performing school districts. See footnote 10. Ginsburg also expresses concern over whether admissions essays, letters of recommendations, or other aspects of the admissions policy might be used to highlight an applicant's status as a minority.
[138] *Gratz*, 539 U.S. at 284 (Stevens, dissenting).

to expend energy addressing the standing issue, Chief Justice Rehnquist would probably be forced to leave other aspects of the analysis for concurring opinions written by other authors. Although it may never be possible to prove that Stevens ever contemplated or intended this result, it may well explain why Stevens raised the issue sua sponte.

Justice Souter's dissent offers one of the only point-by-point rebuttals of the majority position. From the start, he criticizes the majority's standing argument as "indulgent."[139] Next, he argues that Michigan's undergraduate admissions "minority review" was not the insulated version found in *Bakke*, and finds the comparison inappropriate.[140] Souter questions the offensiveness of the 20 point boost, given that there are plenty of other ways to earn 20 extra points, including athletic talent.[141] Souter criticizes the majority for finding a 20 point boost to be suspicious, but not finding a 10 point boost to be equally suspicious.[142] He also suggests that there is little difference between a numbered scale and a holistic review of a candidate, and that the majority is punishing the University for its candor.

[139] *Gratz*, 539 U.S. at 292 (Souter, dissenting).
[140] *Gratz*, 539 U.S. at 293 (Souter, dissenting).
[141] *Gratz*, 539 U.S. at 294 (Souter, dissenting).
[142] *Gratz*, 539 U.S. at 296 (Souter, dissenting).

Diagram 2.2: Arguments in *Gratz*

The sum of the *Gratz* dissenters' efforts is that the majority opinion has been cordoned and criticized. In future opinions, opinion writers wishing to rely on *Gratz* will have to deal with the critiques offered by the dissent. On a second level, the dissenters made a show of numbers, suggesting that with a stronger record, the

UM (Rehnquist)
1. Hamacher had standing.
2. Undergraduate not narrowly tailored because of no individualized analysis.
3. Also a violation of federal law.

UC-1 (O'Connor)
Undergraduate's record was inadequate, 20 points could have been justified.

UC-2 (Thomas)
1. Race-based classifications should always be outlawed.
2. "Critical masses" are illegal if it advantages one minority group over another.

UC-3 (Breyer)
Sides with O'Connor's reasoning, but also supports notion of state-sponsored racial classifications for the purpose of inclusion.

UD-1 (Ginsburg)
1. Omnipresence of racism.
2. International human rights documents support inclusive racial classifications.
3. Fully disclosed preferences are better than blind programs.

UD-2 (Stevens)
Standing is an issue.

UD-3 (Souter)
1. Majority's standing argument is indulgent.
2. Michigan's process not the same as Bakke.
3. Offensiveness of 20 point boost is overstated, given the athletic talent 20 point option.
4. If 20 points is offensive, then so is 10 points.
5. No difference between scale and holistic review of candidate except candor.

majority would have lost two votes.

2. The *Grutter* Opinions (Michigan Law School)

In contrast to *Gratz*, the Court upheld the University of Michigan's law school admissions program in *Grutter.* The majority opinion, concurring opinion, and dissenting opinions in *Grutter* are reviewed here.

a. Majority Opinion in *Grutter*

The majority opinion in *Grutter*was authored by Justice Sandra Day O'Connor. In recent years, Justice O'Connor has emerged as an important "swing vote" who often resolves deadlocks between the Court's most conservative and more moderate members. In writing for the Court, O'Connor explains that the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in "obtaining the educational benefits that flow from a diverse student body" is constitutionally permissible.[143] The Court first accepts Justice Powell's plurality opinion in *Bakke* as law, insofar as it views "student body diversity" as a compelling state interest.[144] The majority notes that the analysis contains two aspects: first, a "compelling governmental interest" and second, a "narrow-tailoring requirement" which involves an individualized assessment, such that no one is treated solely on the basis of their race.[145] The Court approves of the law school's program on both counts.

First, the Court accepts the law school's argument that student body diversity is important for the benefit of the students and the community that they will eventually serve.[146] The majority suggests that education is a requirement for better citizenship. In addition, the Court notes the importance of graduate law degrees in U.S. political and professional life. The Court's argument is premised not only on the individual benefit that a law degree can provide. The Court also explains that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of

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[143] *Grutter*, 539 U.S. at 329.
[144] *Grutter*, 539 U.S. at 325.
[145] *Grutter*, 539 U.S. at 327 ("When race -based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.").
[146] *Grutter*, 539 U.S. at 331 -33.

the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[147] The Court is extremely deferential to the University's arguments about the importance of racial diversity, citing First Amendment freedoms accorded to educators.[148]

Second, the Court found that the law school admission program satisfied the "narrow-tailoring" prong of strict scrutiny analysis. The Court's analysis of the "critical mass" approach of the law school reflects its acceptance of Justice Powell's preference for Harvard University's traditional "plus-factor" system, in which race was a plus-factor, but not "determinative" of admission.[149] The Court takes pains to reinforce *Bakke's* underlying claim by noting that the law school admissions program is not a quota.[150]

However, the *Grutter* majority adds two important factors to the analysis. First, the majority requires that the University continuously evaluate whether such race-conscious systems are necessary through sunset provisions and tracking procedures. Second, the majority suggests that because 25 years passed between *Brown* and *Bakke*, and 25 more years between *Bakke* and the Bollinger cases, the Court expects affirmative action to be unnecessary within 25 more years.

b. Concurring Opinion in *Grutter*

The only concurring opinion is generated by Justice Ginsburg, who questions the need for any twenty-five year limitations. However, Ginsburg does cite international treaties to which the United States is a signatory as evidence of the importance of some "logical end point."[151] She notes that racial discrimination may involve different ethnic groups within the next twenty five years and the schools may have additional reasons to continue race-based classification schemes.

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[147] *Grutter*, 539 U.S. at 332.
[148] *Grutter*, 539 U.S. at 328.
[149] *Grutter*, 539 U.S. at 334.
[150] *Grutter*, 539 U.S. at 335 -9.
[151] *Grutter*, 539 U.S. at 344 (Ginsburg, concurring).

Ginsburg's sole footnote also offers an interesting interpretation of the majority opinion. By noting that the case has survived strict scrutiny, Ginsburg suggests that the ruling does not require that all race-based classifications or interests besides "student body diversity" be subject to the same analysis.

c. Dissenting Opinions in *Grutter*

In contrast to the critical approach taken by the *Gratz* dissenters, the conservative *Grutter* dissenters coordinated their opinions to present an "embryonic majority opinion," a term I use to describe a dissent that hopes to be fully adapted as a future majority opinion. Each author tackles a different aspect of the case, but read together, the dissent presents a clear alternative to the majority opinion.

Chief Justice Rehnquist begins the counter-argument by questioning whether the majority is changing the Court's "strict scrutiny" analysis. By suggesting that the majority has deviated or misapplied the traditional analysis because of its view that affirmative action is benign, Rehnquist challenges whether the majority has properly applied strict scrutiny.[152] He dismisses the school's "critical mass" objective as a "veil of racial balancing" and directs the main portion of his attack to an issue left undiscussed by the majority: whether the school can discriminate against one group in a critical mass in order to advantage another. Specifically, Rehnquist questions why lower percentages of Native Americans and Hispanics are accepted than African-Americans.[153] Rehnquist also challenges the lack of a defined time limit and argues that the law school's proposal permits racial preference "on a seemingly permanent basis."[154]

Justice Kennedy continues the attack, through a statistical analysis of the law school's percentage of offers to racial minorities, which have remained the

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[152] *Grutter*, 539 U.S. at 378 -9 (Rehnquist, dissenting).
[153] *Grutter*, 539 U.S. at 381. Rehnquist provides a detailed statistical critique of the Law's School's admissions from pages 382 to 385, in making the argument that the admissions program is actually "a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups." *Id.* at 386.
[154] *Grutter* 539 U.S. at 387.

same for four years. He suggests that this fact is evidence that there was no individualized consideration of all applicants, which contravenes the "individualized assessment" prong of strict scrutiny analysis.[155] Kennedy argues that as the calendar year progressed, admissions staff used daily class profile reports to ensure that proper racial balancing occurred.[156] To Kennedy, the result is tantamount to a quota system.[157] Kennedy also laments the Court's willingness to pass over other models that would allow for increased classroom diversity.[158]

Next, Justice Scalia presents the case against the use of "racial diversity" as an educational benefit, suggesting that other places are more important and better equipped to create racially-sensitive citizens.[159] Scalia takes issue with whether a state graduate educational institution should be able to employ race-based classifications to teach "generic lessons in socialization and good citizenship" and ponders why the general civil state work force should also be deprived of those lessons.[160] Scalia also predicts future litigation on the subject matter.[161] Scalia closes his dissent with a strong statement of his position: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."[162]

Finally, the balance of the counter-argument is presented by Justice Thomas, who outlines his theory of "aesthetic" racism: "The Law School's argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required

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[155] *Grutter*, 539 U.S. at 388 (Kennedy, dissenting).
[156] *Grutter*, 539 U.S. at 390 -2 (Kennedy, dissenting).
[157] *Grutter*, 539 U.S. at 394 (Kennedy, dissenting).
[158] *Grutter*, 539 U.S. at 394 -5 (Kennedy, dissenting). Although not specifically discussed, Kennedy was likely referring to percentage plans or lottery systems of selection.
[159] *Grutter*, 539 U.S. at 347 -8 (Scalia, dissenting).
[160] *Grutter*, 539 U.S. at 348 (Scalia, dissenting).
[161] *Grutter*, 539 U.S. at 349 (Scalia, dissenting).
[162] *Id.*

to achieve the educational benefits."[163] Thomas suggests that the law school is not interested in admitting students who are otherwise too poor or uneducated to participate in elite higher education.[164] Thomas argues that the Law School's motivation in maintaining its status as an elite law school, from which very few graduates actually practice in Michigan, demonstrates the very lack of a true state interest.[165] Thomas attacks the law school's reliance on LSAT and other "objective" admissions data, noting the exclusionary history of those measures.[166]

Early in his dissent, Thomas suggests that the Court's ruling approves only classroom diversity as a compelling state interest and outlaws all other bases.[167] In addition, Thomas claims that the Court's ruling requires the end of any affirmative action programs within 25 years.[168] Although clearly an effort to reinterpret the majority's opinion, Thomas' argument is based on his belief that the Court's deference to the school's opinions will be limited in some fashion.[169]

Diagram 2.3: Arguments in *Grutter*

[163] *Grutter*, 539 U.S. at 355 (Thomas, dissenting).
[164] *Grutter*, 539 U.S. at 355 n.3 (Thomas, dissenting).
[165] *Grutter*, 539 U.S. at 357 -8 (Thomas, dissenting). Thomas also takes issue with the Court's willingness to show deference to Michigan, but not to the "less fashionable" Virginia Military Institute's opinions regarding all male schools. *Id*. at 367.
[166] *Grutter*, 539 U.S. at 35368 -70 (Thomas, dissenting).
[167] *Grutter*, 539 U.S. at 351 (Thomas, dissenting).
[168] *Id.*
[169] *Grutter*, 539 U.S. at 377 (Thomas, dissenting).

Taken together, the dissenting opinions make two strong claims. First, there is a 25-year limit expressed in the majority opinion. Second, no university ought to be able to discriminate against one racial group to benefit another, especially if both are in the critical mass targets. The minority opinions also suggest that no evidence exists of actual harm to Michigan, or could exist, when

LM (O'Connor)
1. Classroom diversity is a compelling state interest. (Bakke was right).
2. Diversity promotes good citizenship.
3. Diversity promotes legitimacy in educational institutions among minorities.
4. Deference to school's views on diversity, given first amendment.
5. Program is narrowly-tailored because a critical mass is not a quota.
6. Some limit is necessary through monitoring and 25 year limit.

LC (Ginsburg)
1. No logical end point for racism, so 25 year limit is aspirational.
2. Strict scrutiny might not apply to all race-based classifications.

LD-1 (Renhquist)
1. Majority is diluting strict scrutiny analysis by yielding to school's expertise.
2. Program permits cross-minority group discrimination.
3. Lack of a time limit permits school to use racial preference on a permanent basis.

LD-2 (Kennedy)
1. Tantamount to a quota system because statistical analysis shows that percentage of offers to racial minorities is the same.
2. Other models would avoid race-based classifications and still promote minority enrollment.

LD-3 (Scalia)
1. Racial diversity is not an educational benefit central to a law school.
2. Suggests that State can expand compelling interest to other state functions.
3. Predicts future litigation over properly constituted critical masses.

LD-4 (Thomas)
1. Majority ruling has a 25 year limit.
2. Court's deference to school will be limited eventually.
3. No state interest in law school's desire to be elite.
4. Law school's diversity is merely aesthetic.
5. Law school relies on racist assessments (LSATs) to maintain elite status.
6. Law school has no interest in getting economic diversity.

racial classifications are abandoned (citing to recent experiences in Texas and California as examples). The dissenters collectively argue that affirmative action harms racial minorities by lowering expectations from and for them, leading to a *de facto* system of racial classifications measured by "actual achievement" versus credentials. Given O'Connor's vote, this cumulative opinion would have prohibited any use of race-based classifications absent national security concerns.

E. Conclusion

One basic point about legal argumentation should be clear from the review of these two cases. Supreme Court arguments can be connected across various opinions and even cases to form a larger position. In these cases, it is important to read the *Gratz* majority (which included Justices Rehnquist, Scalia, and Thomas) in light with their dissents in *Grutter*. The position of *Gratz* and *Grutter*in the larger jurisprudence of equal protection law has yet to be determined. Much like *Bakke* and *Brown*, the holdings will only be understand as they are enforced by trial courts and interpreted by various appellate courts.

The rest of this dissertation explores what citizens might have learned from that coverage. The next chapter assesses the rhetorical features of the Legal system. Chapter Four investigates the broader rhetorical notions of Law that are part of these cases. Chapter Five reports on the media coverage of the arguments discussed in this Chapter, and the relevant variables explored in Chapters Three and Four. Finally, Chapter Six discusses the impact and implications of the findings from this study.

Chapter III: The Legal System

Legal scholar Adam Gearey suggests that to say anything about Law, one must make an explicit or implicit reference to rules or standards.[170] It makes a certain amount of sense to begin a discussion about the rhetorical dimensions of Law with an examination of the Legal system. Citizens usually learn about principles of justice and fairness through their encounters with various legal systems, from the discipline of the home life to the media broadcast of a celebrity trial. Rarely do citizens come to think about Law in the abstract. Instead, most discussions about broad principles of justice and fairness are framed within the narratives of a particular legal episode, such as a criminal or civil case.

A. Overview

Using textual examples from *Gratz v. Bollinger*and *Grutter v. Bollinger*, this Chapter demonstrates how a rhetorical analysis of the Legal system can be useful as both an independent study and part of the broader comprehensive framework for interdisciplinary studies in legal rhetoric. As an independent study, this analysis provides insight into various rhetorical dimensions of the *Gratz* and *Grutter* cases. As part of the broader framework espoused in this dissertation, those same dimensions reflect the informational media cues that citizens use to make critical assessments about the Law and their Legal system.

The central question in this Chapter is:

How is the Legal system constituted in legal text?

In order to answer this question, I first provide an overview of how the Legal system operates to generate symbols and discourses that support its capacity to enforce Law. Second, I examine the notion of *legal architecture* as one way to understand the rhetorical elements of the Legal system. Next, I apply a similar analysis to the rhetorical concept of a *legal culture*. Finally, I draw conclusions on

[170] Adam Gearey, *Law and Aesthetics*, Portland, Or.: Hart, 2001, 1. ("To say anything meaningful about art one makes an explicit or implicit reference to rules and standards.").

what future independent studies of Legal systems might explore within this framework.

B. The Operation of the Legal System

"Law" may be the pool of general principles of justice and fairness that citizens agree with in the abstract, but the Legal system is the arena in which those principles are put into action. At its most basic level, the Legal system is a mechanism for resolving disputes between competing parties. The Legal system relies on the average citizen's acquiescence to the authority of officials and courts in order to provide this dispute resolution function. Concurrently, the Legal system informs citizens about what just and proper resolutions of legal conflicts should look like. Rhetorical scholar Carrie Crenshaw has observed that "law not only draws upon the reservoir of society's symbolic constructions, it also legitimizes those constructions."[171] Crenshaw's observation especially applies to the Legal system that often operates, to borrow a phrase from Sanford Levinson, as a linguistic system.[172] Levinson was referring to the U.S. Constitution, but any legal system can provide a "common language" that "forms us just as much as we purport to form it."[173] In order to understand the particular relationship between citizens and their Law, it is helpful to first become familiar with the Legal system's discursive functions.

To preview, the Legal system consists of: *written rules*, regulations, and procedures; *unwritten norms*, protocols, and rituals; and elaborate *vocabularies* that are vague and precise, all at once. In addition, various symbols of authority, from the judge's robes to the seal of a notary public, create an aesthetic of authority that supports the Legal system's continuing need for legitimacy.

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[171] Carrie Crenshaw. "The 'Protection' of 'Women': a History of Legal Attitudes Toward Women's Workplace Freedom." *Quarterly Journal of Speech* 81 (1995): 63-82. 64.
[172] Levinson, *Constitutional Faith,* 191 (referring to the Constitution as a "linguistic system"). Of course, Levinson's commentary is much more expansive, as he argues that the Constitution provides a "common language" which "forms us just as much as we purport to form it." *Id.*
[173] *Id.*

First, the Legal system most obviously traffics in written rules and regulations. The presence of legal codes or written case decisions allows citizens to know their rights and responsibilities under the Law. These written rules may be substantive in nature. For example, a citizen's constitutional right to protest the government is a written part of the First Amendment of the U.S. Constitution. At other times, the rules may merely suggest a procedure to be followed. In time, some procedural rights can become viewed as substantive rights.[174]

A good example in *Gratz* and *Grutter*of a written rule or regulation is the text of the Fourteenth Amendment of the U.S. Constitution, which states that

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[175]

Additionally, the modern "strict scrutiny" test formulated by the Court in *Korematsu* and refined in *Grutter* is another example of a written rule or regulation. Although derived from different texts (the Constitution versus Supreme Court precedents), both rules are primarily bound by their written form. As Justice O'Connor's majority opinion in *Grutter*demonstrates, any discussion about the "strict scrutiny" test must be grounded with citations to previous Court decisions or other persuasive texts about the purpose of the Fourteenth Amendment.

In addition, the Legal system relies on normative behaviors captured in unwritten norms, rituals, and protocols. Some rules are functional. For example, normative behaviors that require the litigant to sit quietly and respectfully during an opposing counsel's opening statement permit both sides to present their case.

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[174] For an example, see *Dickerson v. United States*, 310 U.S. 554 (2000) (holding that criminal defendant's expectations of receiving a *Miranda* warning expand his or her rights to be informed of the right to seek legal counsel).
[175] U.S. Constitution, XIV Amendment.

Other rules serve less obvious purposes. A judge's entry into a courtroom is usually a ridiculous exercise in watching attorneys fall over themselves to stand up. However, taking that ritual along with many of the other normative behaviors reinforces the judge's central role in providing order in a courtroom.

Perhaps the most interesting unwritten norm at play in the *Gratz* and *Grutter* decisions is the requirement that the Court's decisions account for prior precedents. Justices Rehnquist, Scalia, and Thomas all target the *Grutter* majority for abandoning the traditional strict scrutiny test. The *Grutter*majority agreed that classroom diversity could be a "compelling state interest" and was generally deferential to Michigan's claim that classroom diversity would benefit the entire student body. The dissenters each suggest that Michigan's claim is a dishonest effort to mask race preferences. By suggesting that Michigan is toying with the Court, the dissenters raise questions about the judgment of the majority.

Finally, the Legal system is most famous for its elaborate discourses with vocabularies that are simultaneously vague and precise. "Once a law is promulgated, legal discourse comes into play."[176] In general, the lexicon of a professional legal discourse is highly complex. Terms that have specific meanings in some jurisdictions may have radically different meanings in other jurisdictions. Attorneys have difficulty deciphering terms and phrases used in different jurisdictions. Lay citizens struggle all the more.

Mastering the complex vocabulary is only part of the challenge for lay citizens. When lawyers, judges, and legal commentators talk about the law, they routinely engage in a special form of reasoning and discourse that brands them as "lawyers" or "lawyerly."[177] For lay observers, this is an obvious reference to the

[176] A. Phillips, 126.
[177] Wetlaufer (1990), 1545-46.

speech mannerisms favored by lawyers. These methods of speaking create another barrier for the lay citizen to understand legal discourse.[178]

Indeed, "legal rhetoric" is often taken as a pejorative reference to the highly-mannered "legalese" used to obscure the Law or confuse otherwise law-abiding citizens as to the legal impact of certain actions. Even the judiciary occasionally utilizes strategic ambiguity. The U.S. Supreme Court's order to desegregate public elementary schools in *Brown v. Board of Education* required "all deliberate speed" rather than immediate compliance or a specified timetable.[179] In time, the *Grutter*majority's notion of a 25 year time frame might be the basis for a similar controversy.

These three levels of Legal discourse (written rules, unwritten norms, and vocabularies) are accompanied by an intricate web of symbolic performances by various individuals operating within the Legal system. In a formulation discussed more fully in the next Chapter, French legal philosopher Paul Amselek suggests that a law has three structural elements: generic normative elements; constitutive elements; and behavioral elements. The Legal system is particularly focused on matching the first and third elements. From a normative standpoint, a judge is expected to sound and act authoritative in order to inspire confidence and cooperation from all involved parties. The black robes are just an important as the raised dais from which many judges issue rulings. The powerful certainty and confidence with which Supreme Court justices write their opinions is part of this normative requirement.[180]

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[178] "There are two things wrong with almost all legal writing. One is its style. The other is its content." Frank Rodell, "Goodbye to Law Reviews," *Virginia Law Review* 23 (1936): 38-45, 38. Franz Kafka is often credited with the observation that a lawyer is a person who writes a ten thousand word document and calls it a "brief."

[179] 347 U.S. 483 (1954).

[180] Wetlaufer (1990), 1552. Susan Keller makes a comparison between judges and transsexuals that might illustrate Wetlaufer's point. Keller observes that both judges and transsexuals are performers who attempt to "impose coherent stories upon a welter of conflicting impulses" Susan E. Keller, "Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity," *Harvard Civil Rights-Civil Liberties Law Review* 34 (1999): 329-84, 336-37.

However, the judge's performance must also direct the behavior expected under the Law. The decisions must be understandable by citizens, or at least be capable of being interpreted by an attorney. The decisions must also carry a directive element as well. Justice O'Connor's call for the 25 year time limit for the continued use of racial preferences by Michigan arguably serves that particular function.

C. Legal Architecture and Legal Culture

Having demonstrated that one can look to written rules, unwritten norms, and vocabularies or performances in *Gratz* and *Grutter* for examples of legal text, the next step to understanding how the Legal system is constituted in a legal text is to look at the way the textual elements are used. A review of research literature on legal textual analysis suggests that legal text serves to bolster one of two different aspects of the Legal system. First, legal texts help describe the *architecture* of the Legal system. Second, legal texts illuminate the *culture* of the Legal system.
In this section, I introduce the concepts of legal architecture and legal culture. The *architecture* of the Legal system includes both its structural elements as well as the voice of the system's creators. The *culture* of the Legal system includes the internal cultural traits of the Legal system, but also the relationship between Legal culture and the rest of the civic world. I point to specific examples from *Gratz* and *Grutter* as examples of the variations of these concepts.

1. Legal Architecture

The first general classification for a legal rule or regulation might be as an architectural element. For the purposes of this study, legal architecture refers to the structural, foundational, and ornamental features of a legal rule or regulation that suggest substance or physical appearance of the Legal system. Louis Althusser comments that law, just like other social structures such as churches and families,

"hails" the individual "into existence by identifying one's proper locus, identity, and approved forms of interaction.[181] The mere existence of a given rule is part of the structure, just as is the willingness of otherwise disinterested parties to re-enforce the structure. Accordingly, the vast amount of legal rules are obeyed not because of a fear of legal institutional surveillance, but rather because other legal players are likely to object to deviations from the rules. As Harold Garfinkle observes, having tacitly agreed to follow certain rules, we tend to "police" each other's deviation from the rules.[182] Horn-blowing in traffic is a simple example of this form of self-regulation.

Of course, the structure of the legal system is rather squarely focused on the breaking of rules. Accordingly, legal architecture is not only concerned with what happens when the rules are being followed, but also operates on the assumption that the structural components of the system will, invariably, fail. A great deal of the analysis of legal architecture is about anticipating deviations or perversions of a given procedure, protocol, or rule. In many areas of law that rely heavily on voluntary compliance, the last and most important question is whether a rule can be fairly enforced. The Legal is constituted not only by the language of *structure*, but also by the authoritative or persuasive *voices* that offer interpretations of the internal architecture. Voice can be measured by typical rhetorical appeals to authority, but also in the various efforts to give a rule, protocol, or judicial tribunal human (and presumptively reasonable) characteristics. Diagram 3.1 below lists some of the variables that might signal the presence of structure or voice as a subset of legal architecture.

Diagram 3.1: Variables Related to Legal Architecture

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[181] Louis Althusser. "Ideology and Ideological State Apparatuses (Notes Toward an Investigation)," in *Lenin and Philosophy, and other Essays,* trans. Ben Brewster, 121-73, London: New Left Books, 1991.
[182] Harold Garfinkle, *Studies in Ethnomethodology*, Englewood Cliffs, N.J.: Prentice Hall, 1967.

Structure	Voice
Locus on conflict within a schema Notice of rank or position Adherence to procedure or processes Use of rules, regulations, or definitions	Naming of Authority Use of Singular or Plural Personification of Structure

As an example of structure, there is a battle between the justices in the *Grutter* and *Gratz* cases about whether an educational institution has a First Amendment interest in promoting diversity in the classroom. Without the protections of the First Amendment, the decisions of a school to discriminate on the basis of race would have less authority. As an example of voice, the majority and dissenting opinions will each employ voices to bolster or disrupt the authority of given parties. For example, the majority might speak in the "we" even though four justices of the Court are in disagreement. At the same time, the dissenters might directly refer to the author of the majority opinion by name in order to emphasize their separation. Both of these concepts are explored in greater depth below.

a. Architecture and Structure

Structure is a critical part of American legal reasoning because it provides the basic framework for addressing many Constitutional issues. Sanford Levinson suggests that American law is predicated on the moral authority of popular will, rather than the notion of moral right.[183] Once law becomes "stripped of any moral anchoring," the American version is instead "the product of specific political institutions enjoying power under the Constitution."[184] Institutional authority is a key aspect of any court's projection of authority. Makau and Lawrence point to a line of critical inquiry into the Supreme Court's invention of institutional strategies. Makau and Lawrence's study of evolving judicial inventional strategies "assumes a close symbiotic link between politics, economics, and judicial reasoning."[185]

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[183] Levinson, *Constitutional Faith*, 64-65.
[184] *Id.*
[185] "Administrative Judicial Rhetoric: the Supreme Court's New Thesis of Political Morality" *Argumentation and Advocacy* 30 (Spring 1994): 191-205, 191.

Structural analysis can reveal the political connections between the judicial branch and other political institutions or the public. For example, Eric Doxtader's application of Jürgen Habermas's theories of communicative action[186] and constitutionalism[187] to legal discourse is essentially a study of the structural relationships between governmental institutions and community, social, or ethnic organizations.[188] Todd McDorman has examined the reaction of the African-American community to the Dred Scott decision.[189] Because his analysis focuses on the communicative acts of the community, he partially illuminates the structural relationship between disenfranchised communities and legal apparatus like the Court. Other similar studies have examined the effects of a court ruling on the gay/lesbian/bisexual community[190] and Holocaust survivors.[191]

Supreme Courtjustices make exhaustive efforts to ground their opinions within the context of previous judicial opinions. While there may be many ways to identify the structure of a legal opinion, the use of prior precedent is certainly important. As legal historian Eileen M. O'Sullivan noted, "The use of prior decisions to explain or support a current decision, in effect folding them into the decisions, is a means of systematic self-reference. This folding in process validated not only the current decision, but the prior one as well."[192] Ensuring that a present decision accords with prior case law suggests that the Court is offering a doctrinal argument, which as Jablonski notes, is generally characterized by a subordination

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[186] Jürgen Habermas *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. Cambridge, Mass.: The MIT Press, 2000.
[187] Habermas, *Facts and Norms* (2000).
[188] Doxtader (1991); Hohmann (1998); Hohmann, "Rhetoric and Dialectic: Some Historical and Legal Perspectives." *Argumentation and Advocacy* 14 (2000): 223-34.
[189] Todd F. Dorman, "Challenging Constitutional Authority: African American Responses to *Scott v. Sandford.*" *Quarterly Journal of Speech* (1997) 83: 192-209.
[190] William N. Eskridge, "No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review." *New York University Law Review* (2000) 75: 1327-1411.
[191] Hasian (2002).
[192] Eileen M. O'Sullivan, "Legal Argument as a Non-linear Process," 436 in *Law and History*, (eds. Andrew Lewis and Michael Lobban) Oxford: Oxford University Press, 2003.

of individual personalities to doctrine, hierarchy, and tradition.[193] Posner reports that the most cited judicial opinions tend to be free of footnotes and dissenting opinions.[194]

Given the central importance of precedent to legal structure, it makes sense why a Court wishing to appear as apolitical as possible would attempt to align its decisions with previous decisions (especially those regarded as correctly decided). Conversely, one of the most effective ways for a dissenting judge to lower the impact of a majority opinion is to challenge the majority's adherence to structure (doctrinal law) and force the majority opinion author to include copious legal citations to validate his or her argument. Citations serve important rhetorical functions, such as relaying basic information, demonstrating priority or disagreement, highlighting authority, or even merely celebratory (citing to another text to enhance one's own credibility)[195] At the same time, Posner argues that "[f]ootnotes in judicial opinions tend to confuse the reader, and a dissenting opinion undermines the majority opinion not only by indicating a lack of unanimity but also by expressing criticisms of the outcome that the majority would have preferred to pass over in silence."[196] One excellent example of the technique can be seen in Justice Stevens' attack on the standing of Patrick Hamacher in *Gratz*. Rehnquist's majority opinion began with a defense of the standing argument which may have blunted his efforts to use the *Gratz* majority as a rhetorical counterpoint to the *Grutter* majority 's discussion about the merits of affirmative action.

In both *Grutter* and *Gratz*, one of the central issues is whether the majority opinions are consistent with the Court's prior applications of the "strict scrutiny" test. This variable is worth tracking in the media analysis because it is a strong

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[193] Carol J. Jablonski, "*Aggiornamento* and the American Catholic Bishops: A Rhetoric of Institutional Continuity and Change," 9 *Quarterly Journal of Speech* 9 (1989): 1-16, 14.
[194] Richard A Posner, *Frontiers of Legal Theory*, Cambridge: Harvard University Press, 2001, 438.
[195] *Id.* 422-424.
[196] *Id.* 438.

representation of the various efforts of the justices to frame their arguments within the doctrinal structure of the precedent. In *Grutter*, the "strict scrutiny" test is discussed at great length in the majority opinion, which ultimately finds that the Law School passes the strict scrutiny. It is no surprise that in writing for the majority, O'Connor emphasizes that the strict scrutiny test allows some race based classifications, "[w]hen race-based action is necessary to further a compelling governmental interest."[197] She closes her overview of strict scrutiny applications by noting that

> [n]not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the important and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.[198]

In contrast, the majority opinion in *Gratz*, which found that the University's undergraduate program failed the strict scrutiny test, emphasizes the strictness of the test. Rehnquist suggests that in order to "withstand our strict scrutiny analysis," the University must demonstrate that its program is narrowly tailored.[199] Rehnquist suggests that the test is so strict because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[200]

The dissenters in both cases attempted to cast the majority's application of the strict scrutiny test as improvident. In Rehnquist's dissent of *Grutter*, he argues that "[b]efore the Court's decision today, we consistently applied the same strict scrutiny analysis regardless of the government's purported reasons for using race and regardless of the setting in which race was used" and suggests that "[a]lthough

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[197] *Grutter*, 539 U.S. at 327.
[198] *Id.*
[199] *Gratz*, 539 U.S. at 270.
[200] *Id.*

the Court recites the language of our strict scrutiny analysis, its application of that review is unprecendented in its deference."[201] Likewise, Ginsburg's dissent of *Gratz* cites affirmative action critic Stephen Carter to emphasize the futility of Rehnquist's efforts to remove context from strict scrutiny analysis:

> To say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial oppression is to trivialize the lives and deaths of those who have suffered under racism. To pretend … that the issue presented in [*Bakke*] was the same as the issue in [*Brown*] is to pretend that history never happened and that the present doesn't exist.[202]

Because of the importance that American legal jurisprudence places on adherence to previous precedents, this study tracks media coverage of the fidelity of the "strict scrutiny" analysis as an indicator of structure within the legal architecture.

b. Architecture and Voice

The architecture of the Legal system is more than just linguistic or rational engineering. The very creation of a Legal system is an expression. Therefore, a second important variable for measuring the Legal is *voice*. As Alexy observes, if laws are to be handed down in the name of the people, the law-giver should not be "indifferent to the beliefs of those in whose name judgment is handed down."[203] The voice or voices that a judicial opinion adopts reflects the relationship between the architecture of the Legal system and the citizens within that system. Indeed, when a judge is dissenting, he or she is not speaking with the voice of full

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[201] *Grutter*, 539 U.S. at 381 (Rehnquist, dissenting).
[202] *Gratz*, 539 U.S. at 301 (Ginsburg, dissenting) citing Stephen Carter, "When Victims Happen to be Black," 97 *Yale Law Journal* 420, 433-4 (1988) (internal citations omitted).
[203] Robert Alexy, *A Theory of Legal Argumentation—The Theory of Rational Discourse as Theory of Legal Justification*, trans. Ruth Adler and Neil MacCormick, Oxford: Clarendon Press, 1989, 11.

authority.[204] Wetlaufer details some of the specific rhetorical conventions of American legal discourse, particularly as related to the courtroom performances of trial attorneys.[205] Specifically, the attorney suppresses his personal voice in the language of authority and objective tones of "reason", "science," and "logic."[206] Trial attorneys will present texts as having one singular meaning. When relating narratives for a persuasive purpose, attorneys obscure their roles as authors, preferring to present the moral of the story as a "simple revelation of objective truth." [207] Wetlaufer argues that, while attorneys often transcend these rhetorical conventions, they must nevertheless find ways of addressing these conventions.[208]

Aside from simply cataloging the particular rhetorical quirks of lawyers, the project of understanding legal rhetoric as discourse is important given the public role that legal rhetoric plays in resolving public controversies through the judicial system. Elkins argues that law is certainly not the only language suitable for expression of public concern for public goods. All too often, legal discourse and legal institutions are used for "public discourse in ways that fail to recognize the limits of law as a disciplined way of talking about public life and public goods."[209] Law does, however, constitute a "developed (and developing) public language, widely shared, although never so widely as we might assume."[210]

Voice is a crucial variable in the study of social movements because courts are often viewed as "speaking" on a matter. For example, seminal court decisions such as *Brown v. Board of Education* are often critically studied as part of a larger

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[204] See Laura Krugman Ray, "Justice Brennan and the Jurisprudence of Dissent," *Temple Law Review* 61 (1988): 307-52, 346 ("A justice writing in dissent has the license to speak with a more distinctive voice than the author of a majority opinion.").
[205] Wetlaufer (1990), 1558-1560.
[206] *Id.* 1559.
[207] *Id.*
[208] *Id.*
[209] James Elkins, "Rhetoric, Disciplines, and Stories: How Will We Know When We Have Too Much Law?" *Legal Studies Forum* 22 (1998): 519-27, 520.
[210] *Id.*

social movement.[211] Carrie Crenshaw has used judicial decisions in the areas of reproductive choice and desegregation to illustrate the legal system's responses to social calls for greater institutional sensitivity to these issues.[212] Part of the relevance of legal rhetoric to social revolutions is the manner in which an argument is developed and introduced into the public sphere. Judicial opinions can play a relevant role in the pre-genesis, inception, rhetorical crises, or consummation phase of a social movement.[213] Indeed, individual court cases can be understood as providing a public space for marginalized voices speaking on issues such as homosexual/transsexual rights,[214] feminist and/or women's issues,[215] and race.[216] Hunsaker's analysis of *Brown* is particularly illustrative of how the study of legal relationships in one social movement (racial desegregation) can carry over to other social movements (gay rights).[217]

One of the roles of rhetorical scholars and historians is to identify the various voices that come to bear on a judicial decision. One means by which voices can be measured is to track citations to prior decisions or extra-legal publications like law review articles or other scholarly reports. For example, the influence of social science experts is apparent in *Brown v. Board of Education*. In

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[211] Hunsaker (1978).
[212] Carrie Crenshaw (1995); "The Normalist of Man and Female Otherness: (Re)producing Patriarchal Lines of Argument in the Law and the News." *Argumentation and Advocacy* (1996) 32: 170-84; "Colorblind Rhetoric." *Southern Communication Journal* (1998) 63: 244-54. Although Crenshaw's work is similar to the critical stance taken by Lewis, Hasian, and Lucaites, her focus on judicial discourse as a consequence of the juridical voice differentiates these projects.
[213] Leland M. Griffin, "The Rhetoric of Historical Movements." *Quarterly Journal of Speech* (1952) 38: 184-; L. M. Gring-Pemble, "Writing Themselves into Consciousness: Creating a Rhetorical Bridge Bewteen the Public and Private Spheres." *Quarterly Journal of Speech* (1998) 84: 41-
[214] Susan E. Keller, "The Rhetoric of Marriage, Achievement, and Power: An Analysis of Judicial Opinions Considering the Treatment of Professional Degrees as Marital Property." *Vermont Law Review* (1996) 21: 409-; Hasian and Parry-Giles (1997); Keller (1999); Eskridge (2000).
[215] Crenshaw (1995, 1996); Keller (1996); Hasian and Klinger (2002).
[216] Dickens and R.E. Schwartz, "Oral Argument Before the Supreme Court: *Marshall v. Davis* in the School Segregation Cases." *Quarterly Journal of Speech* (1971) 57: 32-43; Hunsaker (1978); G. Levison, "The Rhetoric of the Oral Argument in the '*Regents of California v. Bakke*'." *Western Journal of Speech Communication* (1979) 43: 271-77; Hasian, Condit et al. (1996).
[217] Hunsaker (1978).

this study, voice can be measured by looking at the *Grutter* majority's deference to the University's assessment that diversity will yield educational benefits. In *Grutter*, the majority bolstered its finding that classroom diversity is a compelling state interest by noting a traditional deference to educational institutions on matters of academic expertise.[218] This deference is based on First Amendment principles of education autonomy discussed by Powell in his *Bakke* plurality opinion: "The freedom of a university to make its own judgments as to education includes the selection of its student body."

The question of whether the voice of the University should carry weight is not only an important part of the substantive legal analysis, but also representative of the proper voice of the judiciary. On most matters, the judiciary will defer to populist voices like a legislature or public referendum. Appellate courts routinely defer to the expertise of expert witnesses or the factual assessments of lower court trial judges. However, in areas involving fundamental rights, the Supreme Court has traditionally freed itself of such obligations to deference.[219] Nevertheless, in the *Korematsu* case, the Court gave great deference to the military's claim that discrimination against Japanese-Americans served national security interests. Prior to *Grutter*, the Court had only shown similar deference to prison officials justifying the use of racial segregation to address race-riot conditions in prisons. Whether education experts should be given the same amount of deference is ultimately a question about whether or not such voices merit deference within the architecture of the Legal system. Accordingly, references to the Court's deference to educational experts are an appropriate variable to assist in the tracking of legal architecture.

Diagram 3.3: Summary of Legal Architecture Variables in *Grutter* and *Gratz*

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[218] *Grutter*, 539 U.S. at 328 -9.

[219] A classic example of the Court's struggle with populist deference involves gay rights. In *Bowers v. Hardwick*, the Court deferred to the Georgia legislature's patently discriminatory criminal statutes directed at homosexuals. However, in *Romer v. Evans*, the Court struck down an anti-gay rights initiative sponsored by a public referendum in Colorado.

Structure	Voice
*Grutter*majority' s adherence to the "strict scrutiny" test for state-based racial classifications	University of Michigan faculty as proponents of classroom diversity

2. Legal Culture

The second broad classification scheme for legal rules or regulations embraces the notion of a legal culture. Culture refers to the living elements that give life to the Legal system. Legal institutions and actors "derive their perspectives" from cultural settings, even as they attempt to locate themselves in a "mythical space separate from the space of any particular social locale."[220] Culture also can refer to the relationship that the actors in the Legal system have with society operating in their own subcultures.[221]

Two general variables can be helpful in assessing legal culture. First, rhetorical scholars have long recognized the relationship between *time* and rhetoric. Any legal system must carefully account for the invocation of a temporal-bound notion such as tradition, so as to ensure that some laws are respected and others are viewed as anachronistic. By tracking other rhetorical constructions of time, observant scholars may be able to monitor some aspects of the culture that envelopes the Legal.

A second important variable useful in tracking the culture of the Legal system is the use of metaphors. To be sure, metaphoric analysis is so indeterminate

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[220] David M. Engel, "Injury and Identity: The Damaged Self in Three Cultures," 18, in *Between Law and Culture*. Eds. David Goldberg, Michael Musheno, and Lisa Bower, Minneapolis, University of Minnesota Press, 2001.

[221] A good example of this form of culture can be found in the gay/bi-sexual task force of the District of Columbia Police Department. The task force assists with investigations involving the gay/lesbian/bisexual community of Washington, D.C. Anne Hull, "The Stewards of Gay Washington: The D.C. police Gay and Lesbian Liaison Unit walks a tightrope, balancing empathy for a vulnerable population with lock-'em-up attitude," *Washington Post*, March 28, 2005, A01.

as to be useless in many regards. However, a careful analysis of particular metaphors used within the context of a particular legal argument can offer insight to the underlying cultural assumptions of the Legal system.[222] In addition, because metaphors are often the most colorful and memorable aspect of an otherwise dry legal opinion, they might be one of the few elements of judicial discourse that actually reaches the public.

Diagram 3.4: Variables Related to Legal Culture

Time	**Metaphor**
Call to tradition	Use of similes or metaphors
Using Dates as arguments	Parallel case law citations
Duration of ruling	Extended hypothetical
References to modernity or antiquity	analogies
Naming of eras, epochs, or period	Description of judicial authors

Diagram 3.4 above includes some of the variables that might indicate time or metaphor use as an indicator of Legal culture. As an example of time, the *Grutter* and *Gratz* opinions battle over whether a limited period of time should be part of any approved affirmative action scheme. Accordingly, both majority and minority authors will put forward various versions of when an acceptable end point might occur. Struggles over time also occur when opinion writers attempt to dismiss certain lines of cases by categorizing them in a different time period. For example, equal protection clause cases prior to the 1950s are distinguished from the "New Equal Protection" era cases in an effort to avoid their results.

[222] Rikkea Kuusisto, "Heroic Tale, Game, and Business Deal? Western Metaphors in Action in Kosovo." *Quarterly Journal of Speech* (2002) 88: 50-68; Per Fjelstad, "Legal Judgment and Cultural Motivation: Enthymematic Form in *Marbury v. Madison*." *Southern Communication Journal* (1994) 60: 22-32.

Examples of metaphors are very easy to find because, as James Boyd White has noted, legal reasoning is essentially metaphorical reasoning.[223] Anytime the Court is comparing one set of facts to a decision in another case, some level of metaphorical analyses is being employed. One very specific example of metaphoric language is the use of extended hypothetical analogies. Law students in the United States are primarily tested through essay examinations using hypothetical situations that can absurdly test a rule's limits. It is a common feature of legal discourse to use such hypotheticals in the course of regular legal argument. Accordingly, there is usually an abundance of such hypotheticals available to review. Given their colorful nature, such hypotheticals are often irresistible to media writers.

a. Intracultural Analysis

Cultural scholarship covers the spectrum of research that deals with the cultural location and characteristics of a given legal text. Rhetorical scholars have been investigating the cultural foundations of legal texts through a variety of methods. Broadly speaking, the projects can be organized in relation to the critic's position with the legal text, allowing for a spectrum that ranges from intracultural perspectives to intercultural positions. This section discusses the intracultural references to time within the Michigan decisions. The next section explains the Court's use of military academy metaphors as an intercultural variable.

A good example of an intracultural rhetorical scholar is Clarke Rountree, who has called for rhetorical scholars to gain a more sophisticated understanding of the technical operations of courts.[224] Part of that process requires that rhetorical scholars become better educated about law and specific characteristics of the legal decision-making process. Rountree is not the first rhetorical scholar to sound this

[223] James Boyd White, *Justice as Translation*, Chicago: University of Chicago Press 1990. xiii.
[224] Rountree (1995).

sort of call to arms.[225] Rountree's primary interest is in understanding how the judicial culture affects its decision-making process. He prefers a close textual analysis that emphasizes the cultural position of the judge within the context of the judge's historical setting, but also the particular cultural rules under which the judge operates. Rountree also believes that when rhetorical scholars demonstrate a mastery of the legal jargon and technical problems of jurisprudence, rhetorical scholars are more likely to be read seriously by lawyers. In that sense, Rountree urges scholars to deeply immerse themselves in legal language and culture to write better, more informed analyses.

One of the enduring contradictions of the American legal system is the conflicting promise for swift justice and slow deliberation. At one level, victims of crimes or legal transgressions are promised that the Legal system will punish, rectify, or resolve conflicts with exceeding speed. At the same time, legal decisions are expected to be thorough and mindful of wider effects on other cases. Accordingly, there is a constant intracultural tension within the Legal system when units of time are discussed. In almost every conflict, the Court is faced with the question of acting quickly to resolve the suffering of a victim versus acting resolutely in order to fully address the entire legal conflict and perhaps anticipate future issues.

In *Grutter*, the Court's majority agreed that race -based classifications were properly used by the school. However, at the end of the majority opinion, O'Connor notes that the majority took the University at its word that it would "like nothing better than to find a race-neutral admissions formula" and would end its race-based admissions program as soon as "practicable."[226] O'Connor then offers the following calculation as a suggested timeline:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of

[225] Mathias Anapol, "Rhetoric and Law: An Overview." *Today's Speech* (1970) 18: 12-20.
[226] *Grutter*, 529 U.S. at 343.

> public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[227]

The dissenters seized on the 25 year term and describe it as a "possible 25-year limitations;"[228] a "pronouncement that race-conscious admissions programs will be unnecessary 25 years from now;"[229] or a "holding that racial discrimination in higher education admissions will be illegal in 25 years."[230] Ginsburg's concurring opinion approaches the 25 year term only as a suggestion, noting that "[f]rom today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[231]

Tracking the media's notation of the 25 year limit offers an opportunity to discover how much of the Court's intracultural conflicts are highlighted for the media-consuming citizen. Paired with the attitudinal orientations described in the beginning of the Media chapter, this analysis may also reveal whether journalists framed the issue as political wrangling between Justices or as a sincere issue to be resolved.

b. Intercultural Analysis

On the other side of the culture spectrum is *inter*cultural scholarship that emphasizes the cultural location of law. These lines of research understand law as a particular culture that often requires translation from a somewhat objectivist position to be fully understood. Headlining this category is the instructive work by Marouf Hasian and his collaborators that emphasizes understanding Law as a

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[227] *Id.* (citations omitted).
[228] *Grutter*, 529 U.S. at 286 (Rehnquist, dissenting).
[229] *Grutter*, 529 U.S. at 394 (Kennedy, dissen ting).
[230] *Grutter*, 529 U.S. at 351 (Thomas, dissenting).
[231] *Grutter*, 529 U.S. at 346 (Ginsburg, concurring).

"rhetorical culture."[232] However, work in the Law and Literature and Critical Legal Studies movements also qualify as intercultural legal rhetorical criticism.

Marouf Hasian has consistently demonstrated a commitment to the rhetorical culture of law as part of a "critical legal rhetoric" that liberates legal argumentation from the hegemonic argumentative norms imposed by the legal culture.[233] In his more recent scholarship, Hasian has put critical legal rhetorical criticism to use in looking at a variety of legal texts, from court cases to revolutionary legal arguments.[234] The diversity of legal texts studied by Hasian is instructive, in that interested scholars need not study only U.S. Supreme Court opinions or mass mediated criminal trials with celebrity defendants. Hasian et. al note a set of characteristics of American legal culture:

> Law is bounded by public culture;
> Law is polysemic;
> Law is hegemonic;
> Law is vulnerable to social changes; and
> Law is usually not fair.[235]

Although "Law" is Hasian's word, he seems to be referring to the U.S. legal system in many respects. Like an intraculturalist, Hasian takes care to understand the importance of "speaking like a lawyer."[236] In law schools, there is a similar interest in understanding how the culture of law impacts the practice of law.[237] However, Hasian is more interested in understanding how "Law" is perceived outside of the circle of trained attorneys.

The Law and Literature movement is another example of scholars looking at how Law is communicated outside of the Legal system. In general, the

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[232] Hasian, Condit et al. (1996).
[233] Hasian (1994); Hasian and Croasmun (1996); Hasian (1997); Hasian, Condit et al. (1997); Hasian (1998); Hasian (2000); Hasian (2000).
[234] Hasian (1997b, 2000a, 2000b, 2003).
[235] Hasian, Condit et al. (1996), 335-37.
[236] *Id*. 323, 339.
[237] Mary Ann Glendon, *A Nation Under Lawyers*. Cambridge, Mass.: Harvard University Press, 1994; Anthony T. Kronman, *The Lost Lawyer.* Boston, Mass.: Harvard University Press, 1993; Stephen D. Smith, "Believing Like a Lawyer." *Boston College Law Review* (1999) 40: 1041-1137.

movement might be said to contain three different strands: the humanists, the hermeneutics, and the storytellers.[238] According to Baron, the humanists are interested in how exposure to literature opens up the perspectives of lawyers and jurists.[239] The hermeneutic "law-and-lits" want lawyers reading literary theory to better understand the business of textual interpretation.[240] Finally, the storytellers are interested in evaluating narratives in legal circles for their social, evidentiary, and/or epistemological value.[241] What Baron means by epistemological values is hard to tell, but her citations to Eskridge and Scheppele suggest that she understands epistemology as more subjective than perspectivist-based.[242] Baron concludes that all strands of law and literature, as well as other forms of interdisciplinary legal studies (e.g., law and history, law and society, law and economics) treat law as a "bounded entity, an independent domain" that can be fertilized through cross-disciplinary studies.[243]

For James Boyd White, one of the clearest voices in the Law and Literature movement, the "rue value of a text" is based in the community of the audience where "the author offers his reader a place to stand, a place from which he can observe and judge the characters and events of the world he creates, indeed the world itself."[244] White observes that "[w]hat is most deeply distinctive about law [is reducible] to two main features: the separation of powers and the obligation to explain (and explain in a certain way)."[245] This second notion of an obligation to explain seems to require and justify the law's historical dance with rhetoric. The interplay between the speaker's obligation and the culture within which he becomes subject to the law is a consistent part of White's work, particularly when the subject

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[238] Jane B. Baron, "Law, Literature and the Problems of Interdisciplinarity." *Yale Law Journal* (1999) 108: 1059-1085; 1063-66.
[239] *Id.*
[240] *Id.* 1065.
[241] *Id.* 1066.
[242] *Id.* 1066 footnote 27.
[243] *Id.* 1083.
[244] White (1984).
[245] *Id*. 23.

matter relates to constitutional analysis. He explains that the U.S. Constitution is a rhetorical constitution in that "it constitutes a rhetorical community, working by rhetorical processes that it has established but can no longer control. It establishes a new conversation on a permanent basis."[246]

The Legal system is not only a constructed set of processes and procedures; it also represents a living institution with its own internal culture and cultural references with other life systems. Eric Doxtader notes that institutions have a "kind of double character" by "enacting a shared identity through necessarily exclusive norms of representations."[247] "Institutional arguments are interactions that define the scope of institutional decision making and explain why particular actions are justified in light of the public's interest.[248] Doxtader points out two reasons to critique institutional argument: first, institutional argumentation "sheds light on how institutions understand their self-acknowledged obligation to the public;" and second, "critical readings of institutional argument show how institutions mediate diverse public interests and the need for systematic stability."[249] These two justifications align closely with both cultural aspects of the Legal system. At one level, cultural criticism must be turned inwards towards the Court's intracultural understanding of its role and functions. At another level, the Court's need to balance its internal culture with the needs of the external public justifies an intercultural critique.

The variable used in this study for tracking cultural references in the Legal system is metaphor. James Boyd White has noted that all legal reasoning is essentially analogical reasoning because the application of law to facts invariably involves the comparison of two different things.[250] In addition, judicial opinions are

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[246] *Id*. 246.
[247] Erik Doxtader, "Learning Public Deliberation Through the Critique of Institutional Argument," *Argumentation and Advocacy* (1995) 31:185-203, 189.
[248] *Id*.
[249] *Id*. 190.
[250] James Boyd White, *The Edge of Meaning*. Chicago: University of Chicago Press, 2001, 51.

usually written to be guideposts for future situations. Courts have the "capacity to use each judicial opinion not simply to resolve a controversy, but also to communicate continually with audiences beyond those litigants actually before the court."[251] As Levinson notes, tradition is not found "floating in the air" but is "presumably manifested in such central cultural documents as the Declaration of Independence and the Gettysburg Address, as well as, more controversially, Martin Luther King's "I have a Dream" speech.[252]

Legal metaphors sit at the intersection between legal culture and the cultures of the general public and thus are appropriate indicators of intercultural connections. Even as cultural norms change within the Legal system and the general public, metaphors can suggest links between a culture's past practices and present attitudes. As an example, modern litigation derives much of its technical terminology from its medieval roots of trial by combat or trial by ordeal. The physical practices of combat and torture were fully accepted by the legal institutions of the day.[253] Even as the modern jury trial has left behind older notions of tests by sword or burning, there remains the underlying notion that truth is tested by undergoing an ordeal. The modern metaphor may not involve loss of blood, but usually involves loss of money or reputation. Trial remains an ordeal, but with different pressure points.

For this study, one of the more interesting examples of metaphorical reasoning is the invocation of military academies. The *Grutter*majority, in upholding the Law School's use of race-based classifications, noted an amicus curie brief filed by various retired military and civilian defense leaders supporting

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[251] Don R. LeDuc, "Free Speech Decisions and the Legal Process: The Judicial Opinion in Context," *Quarterly Journal of Speech* (1976) 62:279.
[252] Levinson, *Constitutional Faith*, 35.
[253] See, Edwin J. White, *Legal Antiquities.* Littleton, Co.: Rothman, 1913/1968, 109-71 (detailing the similarities between the language and procedures used by the Church approved forms of trial by combat and torture).

affirmative action.[254] The majority quotes the brief's claim that "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the [Reserved Officer Training Corps] used limited race-conscious recruiting and admissions policies."[255] The majority then postulates that it takes "only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."[256] The majority uses the military's leadership needs as a metaphor for the general needs of civic leadership (which the Court establishes earlier is left to lawyers). Recall that the*Korematsu* holding already permits racial classifications if national security so demands. Arguably, the military schools could simply rely on that justification for recruiting minority officers, rather than appeal for a general state interest in classroom diversity.

None of the *Grutter* dissenters address the majority's use of the military academies as a metaphor for societal leadership. However, Thomas does use a different military school analogy. He notes that the Court refused to permit the Virginia Military Institute, a state-sponsored military school, to exclude women from its student body.[257] Thomas' dissent notes that the VMI decision, which presumably offered a lower standard of review, afforded the school no deference to its claims that an all-male education was an adequate state interest.[258] Thomas uses the Court's lack of deference to suggest that it favors elite law schools: "Apparently, where the status qou being defended is that of the elite establishment—here the Law School—rather than a less fashionable Southern military institution, the Court will defer without serious inquiry and without regard to the applicable legal standard."[259]

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[254] *Grutter*, 539 U.S. at 331 (citing Brief filed by Julius W. Becton, Jr.).
[255] *Id.*
[256] *Id.*
[257] *United States v. Virginia*, 518 U.S. 515 (1996).
[258] *Grutter*, 539 U.S. at 366 (Thomas, dissenting).
[259] *Id.*

Diagram 3.5: Summary of Legal Culture Variables in *Grutter* and *Gratz*

Time	Metaphor
25 year limit for use of race-based classifications at University	Military schools as an analogy for the use of race or gender classifications

D. Conclusion

A citizen reading the text of the *Gratz* and *Grutter* cases would learn more than just the arguments discussed in the previous chapter. The text of these cases also reveals something about the architecture of the Legal system, particularly related to its structure and voice. It may not be particularly surprising that the structure of the decisions are balanced on interpreting the structure of *Bakke*. However, the Court's struggle over whether to allow academics the sort of deference that military leaders received in the Japanese-American internment cases might surprise many Americans. Similarly, citizens looking at the case through the prism of cultural might be surprised at the Court's internal struggle over the 25 year time "limit" and puzzled by the various Justice's use of the military school analogy. Whatever the citizen might decide about the ultimate wisdom of the Court's decisions, he or she would be hard pressed not to be engaged by the decision.

Before proceeding to a discussion about the rhetorical notion of Law in the next chapter, it is worth noting one of the limitations of the Legal system concept. Whether using the architectural or the cultural model, there is an assumption that the Legal system has some sort of permanent status. However, there are plenty of cases in which a particular judicial tribunal is established for a limited period of review. Most war crimes tribunals are examples of these limited term arrangements. In those scenarios, the Legal system may be more mechanical in nature. Nevertheless, the rules, protocols and languages of even a temporary Legal system are important influences on the rhetoric produced at trial. Indeed, future scholarship might demonstrate that the sharp lessons of a singular tribunal like the

Nuremburg Trials may resonate more in the public consciousness than the over-exposed criminal court trial model that currently populates news and entertainment media programming.

Chapter IV: The Law

One of the emergent challenges of a global economic order is the mediation between different legal traditions, specifically Eastern and Western notions of law. Korean legal scholar Hahm Pyong-Choon notes that because European languages use the word *law* to refer to not only the rights of the individual, but justice as well, it becomes inconceivable to imagine justice without law.[260] The very threat of lawsuit ensures justice. In contrast, Professor Hahm argues that the Korean legal tradition, like many Asian cultures, aspires to a perfect harmony under which law and lawsuits are eventually unnecessary.[261] Korea's issues with the imposition of Western legal standards are hardly new. Foreign legal codes and customs are constantly being imposed on cultures. The troubles in Korea are a reminder that legal systems are ultimately fueled by a more fundamental notion of Law. Citizens can import their legal systems, but they must develop their own notion of Law for those systems to be effective.

A. Overview

This Chapter explores the notion of "Law" as a pool of generally accepted principles of justice or fairness. In doing so, this Chapter answers the question:

How citizens learn about Law from legal texts?

Using examples from *Gratz v. Bollinger* and *Grutter v. Bollinger*, I briefly describe some of the characteristics of the rhetorical notion of Law propounded here. Next, I describe the sorts of "principles of justice" that are central to a rhetorical definition of Law. Then, I explain the importance of understanding the points at which these principles come into conflict. Finally, I offer some basic conclusions on what this formulation of Law might mean for future studies in legal rhetoric.

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[260] Hahm Pyong-Choon, *The Korean Political Tradition and Law*, Seoul: Seoul Computer Press 1967, 42-43.

[261] *Id.* Professor Hahm notes that the allure of harmony may have discouraged some Korean leaders from revitalizing legal rules, ignoring the abuse of some citizens in the process. *Id.* 45, footnote 61.

B. Characteristics of a Rhetorical Notion of Law

Note that we have left the term "legal rhetoric" alone. Under the framework established by this study, there is no real need to talk about a "legal rhetoric" because the term is vacuous. If we must, "legal rhetoric" can be defined as the "use of language to describe" the Law, under Cherwitz & Hikins' definition.[262] The only refinement is the substitution of "the Law" for "reality." The substitution of Law for reality is fair, because the move recognizes that Law operates on a series of presumptions about rules. It is helpful to note that "reality" as used in this construction amounts to an objectively tested and validated knowledge claim.[263] Just as scientists elevate certain hypotheses that survive close scrutiny, lawyers value presumed legal holdings for having survived the close scrutiny of repetitive advocacy.[264] Law thus becomes a "reality symptomatically reflected" by a consensus, rather than a rule created by unanimity.[265]

As the focus of this Chapter, the working definition of Law for the purposes of this study is the set of principles of justice or fairness supported by a rough societal consensus. I do not pretend that this is the only or most obvious definition to emerge from various approaches to legal rhetorical scholarship. However, this definition has two important positive characteristics. First, it is grounded in James Boyd White's definition of Law as the pool of available arguments and narratives that are commonly thought of as legal. Professor White is an important figure in the area of Law and Literature and his influence is palpable when reviewing

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[262] Cherwitz & Hikins, 64.
[263] Earl Croasman and Richard Cherwitz, "Beyond Rhetorical Relativism," *Quarterly Journal of Speech* 68 (1982): 1-16, 14.
[264] A more nuanced version of this claim would be fully supportable by Perelman and Olbrechts-Tyteca's notion of presumption as a third starting point in dealing with reality, although it is the only starting point that can be contested with argumentation Chaim Perelman and Lynda Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*. Notre Dame, Ind.: University of Notre Dame Press, 1969, 71. Perelman has also addressed legal presumptions in his solo works. Chaim Perelman, *The Idea of Justice and the Problem of Argument*. New York, Humanities Press, 1963; Chain Perelman, *The Realm of Rhetoric.* Notre Dame, Ind., University of Notre Dame, 1982.
[265] Croasman & Cherwitz, 11-14.

contemporary law and literature studies. Second, the definition reflects some of the broader characteristics about Law as a rhetorical notion discussed by scholars other than White, including some who rarely reference the notion of rhetoric at all. In this section, I will review some of the broader characteristics of legal rhetoric that tend to support the definition of Law offered in this study.

1. Law has Ideologically Imposed Boundaries.

The study of Law is the study of artificially imposed boundaries, which makes developing a general theory of law difficult. Richard Posner suggests that legal scholars know little about the general theory of law.[266] I argue that no general theory of law exists because of the discipline's habit of specialization. To get to know a general theory of law, a scholar would need an enormous amount of time to simply read through the various legal jurisdictions, theories of jurisprudence, and the historical documents that suggest the growth of law. As Cohen notes, the problem with studying the "growth of law" is that the "lawyer must embrace a field of literature, history and science within his studies, which will make the duties of the lawyer and student extremely difficult, and involve much more time and labor than now it is thought profitable to expend in order to be a lawyer."[267]

Leaving a "general theory" of law behind, there is a similar problem trying to develop a singular definition of Law. Intercultural legal scholar Surya Prakash Sinha presents a helpful categorization of varying approaches to defining Law based on different theories of jurisprudence.[268] Her categories include: Divine/Prophetic Law; ancient[269] and modern[270] Natural Law Theory; Legal Idealism[271]; Legal Positivism[272]; Historical Theories of Law[273]; sociological and

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[266] Posner, 2-27.
[267] Morris M. Cohen, *The Growth of Law*, Chicago: Callaghan, 1882, 179-80.
[268] Surya Prakash Sinha, *What is Law? The Differing Theories of Jurisprudence*. New York: Paragon House, 1989.
[269] To include philosophers such as Aristotle, Cicero, Aquinas, Lao-Tsze, and Confucius.
[270] Some of the modern Natural Law philosophers include Genry, Margaret Mead, Morris, Cohen, and Lon Fuller.
[271] Including Kant, Hegel, and del Vechio.

psychological legal theories[274]; Legal Realism theories[275]; Phenomenology[276]; and Critical Legal Studies (CLS).[277] Sinha concludes that no singular definition of Law exists because "law is not the principle of social organization everywhere on this earth" and law is more influenced by ideology than philosophically grounded analyses.[278]

In an analysis of interdisciplinary approaches to studying law, Jane Baron concludes that allforms of interdisciplinary legal studies treat Law as a "bounded entity, an independent domain" that can fertilized through cross-disciplinary studies.[279] This, of course, is the hallmark of a rhetorical view of Law being a discrete constitutive entity. In a greater sense, by acting as if there existed a body of legal principles called "the Law," lawyers have brought into existence something akin to Law.[280] The boundaries are real, but only material because of their rhetorical construction.

Despite the astonishing number of communicatively-grounded or influenced philosophical approaches to legal criticism, the methodologies might boil down to the same basic elements. The French existentialist philosopher Paul Amselek argues in the phenomological tradition that law can be reduced to the three essential elements of the *eidos* (structure of the law):

> i) generic normative elements of law;
> ii) constitutive elements that give ethical weight to the command of the law; and

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[272] Inclding Jeremy Bentham, John Stuart Mills, Kelsen, and H.L.A. Hart.
[273] A category that includes Savigny, Maine, Marx, and Engels.
[274] Including Roscoe Pound and Leon Petrazycki.
[275] Examples of the American realists include John Dewey, William James, Oliver Wendell Holmes, Jr., Karl Llewellyn, and Jerome Frank. Scandinavian legal realists include Axel Hagerstrom, Karl Olivecrona, and Alf Ross.
[276] Charles Sanders Pierce is among the more prominent representatives of this line of jurisprudence.
[277] Sinha includes the Frankfurt School and modern critical language scholars, but shies away from naming specific contemporary critical legal scholars. Surely, such a list would include Unger, Cornel West, Crenshaw, and Randall Kennedy.
[278] Sinha, 220-221.
[279] Baron, 1083.
[280] Fuller, 98.

iii) the behavior elements of law that directs human behavior.[281]

Put one way, Amselek might be calling the essential elements of law rhetorical. Law is less a body of knowledge or an area of scholarship, but a field of agreeable playing ground. Like the agreed boundaries of a baseball game, Law is the ever-changing array of rules, regulations, rhetorical forms and styles, and specialized vocabularies that may be conscripted by "legal" advocates to affect changes in the rule of law. As Legal Realist Jerome Frank suggested, the distinction between Law and rules is that "[r]ules, whether stated by judges or others, whether in statutes, opinions or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them."[282]

If there are boundaries to Law, whether we understand them through interdisciplinary investigation or other methodological approaches, the boundaries "exist" because of the willingness of citizens to recognize them as limitations. For example, in the *Gratz* and *Grutter* oral arguments, the plaintiffs attempted to argue that the U.S. Constitution proscribes any form of state-sponsored racial classification. Justice O'Connor quickly dismissed that notion. The argument was not taken seriously because the Court recognized that the American ideological experience supports the use of some racial-classifications by the state. Examples of appropriate race consideration involve public health concerns related to ethnically restricted genetic makeup and the segregation of prisoners by race during near-riot conditions. Accordingly, the boundaries of equal protection law were informed by this ideological orientation.

2. There is a Distinction Between Legalistic and Lawful Behavior.

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[281] Paul Amselek, "La Phenomenologie et le Droit," *Archives de Philosophie du Droit*, 185 (1972) trans. as "The Phenomoenological Description of Law," in M. Natason, ed. *Phenomomenology and the Social Sciences, Vol. II*, Evanston, Ill.: Northwestern University Press, 1973, 367.

[282] Jerome Frank, *Law and the Modern Mind*, New York: Brentano's,1930, 127.

A second characteristic that informs our definition of Law is the distinction between what is legalistic and what is lawful.[283] Having already relegated all talk about systems, rules, or procedures to the definition of the Legal System, there are relatively few discussions about what Law might mean, separate and apart from the Legal system. Our evidence is that the word "legalistic" is a curse, whereas the word "lawful" is a eulogy.

James Boyd White's analysis of Law as text offers some understanding about the differences. White wishes to introduce legal thinkers to "a world in which language is always bounded by the inexpressible; in which language is uncertain, always remade; in which we are always making and remaking our own characters and our communities."[284] By studying literature, lawyers can learn about "law's gaps, rhetoric, and moral stances."[285] White grounds the inquiry into the relationship between Law and Rhetoric by treating Law as a branch of Rhetoric, rather than a system of rules.[286] His notion of rhetoric is not as a "failed science or as the ignoble art of persuasion" but as the "central art by which community and culture are established, maintained, and transformed."[287] White sees Law and Rhetoric both sharing the ultimate end of justice.[288]

As previously mentioned, White applies a variation of Aristotle's definition of rhetoric in describing law as "the particular set of resources made available by a culture for speech and argument on those occasions, and by those speakers, we think as legal."[289] Thus, laws, rules, statutes, and judicial opinions are alongside maxims, proverbs, expressions of conventional wisdom as useful tools for the opportunistic lawyer. While lawyers may generally agree on which tools are

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[283] L.H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority*, University Park, Pa.: Pennsylvania State Press, 1995, 69.
[284] White (1984), 1691.
[285] Baron, 1060.
[286] White (1985), 684.
[287] *Id*
[288] *Id.*
[289] White (1985), 684, 689.

relevant, there is never a perfect agreement.[290] While the components of legal argument are perhaps objectively discoverable through an "empirical process, their reformulation and use [is] an inventive or creative one."[291]

A moment of criticism is appropriate at this point. White's treatment of Law as a text, although insightful and useful, fails to distinguish between the systematic elements of the U.S. legal system and the broader notion of the principles of justice or fairness that are at the heart of a given conflict. This study argues that Law is limited to the latter principles and exists quite independently of any given Legal system.

What separates talk about Law from the normal discussions about legal rules and procedures? Legal scholar Stephen D. Smith notes that legal discourse, what we understand to be the talk of the Legal system, has two characteristics: first, the citation of authoritative or binding precedent to decide cases; and second, the techniques by which lawyers "invoke, interpret, avoid, or extend enacted law."[292] Clearly, these are not the discussions of citizens about which principles of justice should constitute the Law. At the same time, Smith's broader description of the legal discourse is as a "jurisprudence of faith." The rhetorical notion of Law is thus defined in part by the underlying values or beliefs that motivate the use of legal discourse. Similarly, Neil MacCormick explains how the artificiality of legal rule is a reflection of its underlying purpose: "Perhaps disappointingly for grand theorists, [legal logic] is really relatively simple and straightforward. The simple but often criticized formula 'F + R = C', or Rule plus Facts yields Conclusion' is the essential truth."[293] MacCormick's point is that rules are constructed in relationship to a pre-established value system coupled with predicted outcome. In

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[290] *Id.* 689-90.
[291] *Id.* 690.
[292] Smith, 1049-50.
[293] MacCormick, x (" Rules are hypothetical normative propositions, stipulating that if certain circumstances … obtain, then certain consequences are to (or 'must' or 'ought to') follow or be implemented.").

that sense, "these rules exist as relatively concrete formulations of more abstract principles."[294]

Turning towards *Gratz* and *Grutter*, we can look to the last two chapters of this study to discover the arguments or interesting rhetorical features of the decisions. The central arguments in the cases started with the strict scrutiny test. Michigan won the argument that classroom diversity is a compelling state interest, but the Court's decision was primarily based on deference to the educators, military, and business leaders who stressed the need for adequate minority representation in leadership roles. The legalistic result was that educators are given great deference when they conclude that race-based classifications are necessary to effect a positive learning environment for all students. However, Justice O'Connor's majority opinion in *Grutter* plainly emphasized the social benefits of minority leadership, not the importance of deference to educators under the First Amendment.

The primary weakness of White's conceptual theory of law is his reliance on public texts. As the example from *Grutter* just demonstrated, the actual legal text may only suggest what principles are at stake. The text of a Supreme Court opinion is only one of many texts that can aid in interpretation. While the public nature of the Court's opinions make them publicly accessible texts, there are other texts worth exploring. White is privileging democratic forms of legal disputes that encourage open public dialogue. Principles of justice and fairness have existed and been addressed (however adequately) in all forms of government, even those with little regard for open discussions. There is little reason to base a definition of Law on a democratically-oriented system of government. On a related concern, White's approach essentially suggests that Law requires conflict in order for courts to rule

[294] *Id.* ("That is, at least, their aspirational character.").

legitimately.[295] However, this premise is perhaps not so obvious or acceptable if courts could speak authoritatively in the absence of a root conflict. White explains further that:

> Law is the constitution of a world by the distribution of authority within it. It is a way of creating a rhetorical community over time. It is this discourse, working in the social context of its own creation, this language in the fullest sense of the term, that *is* the law. It makes use members of a common world.

Once Law is understood as a set of principles of justice generally accepted as legitimate by a community or society, there is no reason to require conflict. As the Korean example at the beginning of this Chapter demonstrates, Western societies may have an unwarranted zeal for using dispute resolution to warrant justice or fairness.

3. Principles of Justice and Fairness are Never Wrong.

A third characteristic of a rhetorical notion of Law is that the underlying principles of justice or fairness are never wrong. The question is not whether a principle is logical, moral, or correct. Rather the analysis is whether the principle is accepted in its broadest sense by a rough consensus of people. As an example, consider some of the closing lines in Justice Thomas' dissent in *Grutter*

> For the immediate future, however, the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[296]

Thomas' invocation of Justice Harlan's famous language from his own dissent in *Plessy v. Ferguson* is a good example because most Americans would agree that race should not matter. As a principle of justice, it stands even though it is not the law of the land. Justice Thomas has been no support of affirmative

[295] *See* White (1984), 264-65 (noting the centrality of conflict as a prerequisite to judicial deliberation).
[296] 539 U.S. at 377 (Thomas, dissenting).

action, but he would likely agree that there are some limited events when the use of a racial classification by a state is appropriate. Why cite Harlan if he does not agree, as a matter of law, that the Constitution should be color-blind? The short answer is that Thomas is seeking to frame affirmative action as an poorly considered exception to the broader rule of colorblindness.

The more complicated answer is that Thomas wants to make the majority's ruling unacceptable as a matter of Law. German political philosopher Jürgen Habermas has argued that the legitimacy of any court's decision rests on the intertwining of the public's expectation of legitimacy with the factually-grounded process of making and enforcing law.[297] The resulting pronouncement is described by Habermas as "Janus-faced" to citizens, leaving it up to them to decide between two possible approaches to law:

> Either they can consider legal norms merely as commands, in the sense of factual constraints on their personal scope of action, and take a *strategic* approach to the calculable consequences of possible rule violations; or they can take a *performative* attitude in which they view norms as valid precepts and comply "out of respect for the law.[298]

In a Supreme Court decision, the majority and dissenting authors compete for the citizen's orientation for strategic or performative-based obedience. The members of the majority, whether in the majority opinion or in a concurrence, are doctrinally incapable of expositing on the "negotiation" of obedience to a given rule. Conversely, the dissenter can argue for a strategic approach that gives agency to the individual. The majority can only make Law that is enforceable and acceptable[299]

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[297] Habermas, *Facts and Norms*, 447.
[298] *Id.* 448.
[299] As Habermas explains further, in order for a legal norm to be valid, the state must offer two basic guarantees simultaneously: "on the one hand, the state ensures average compliance, compelled by sanctions if necessary; on the other hand, it guarantees the institutional preconditions for the legitimate genesis of the norm itself, so that it is always at least possible to comply out of respect for the law." *Id.* 448.

and there is little if any room for the individual decision-making in that pronouncement.[300]

In Habermas' view, majority opinions are therefore different only because they are treated differently.[301] Doctrinal argument and personal arguments are thus substantively similar, if not identical, but rhetorically distinguishable because they serve different rhetorical functions. Dissents may not be the institutionally favored argument, but they are the equals of majority arguments and concurrences in deliberative democratic discourse and at times a necessary part of the process of social integration.[302] In fact, the presence of dissent is proof that "Law is not a narcissistically self-enclosed system" or that the mere legality of a law offers it legitimacy.[303]

This distinction between lawful and legalistic arguments demands further development. One immediate concern is that the treatment of arguments inside of the Legal system influences how individuals treat an argument as a matter of Law. Habermas' reliance on systematic legitimacy ignores the facts that one recognized right comes at the expense of another in the legal system. Paraphrasing Fuller, legal systems cannot be fitted plastically to new situations as they arise; they must extend over readily understood areas even at some sacrifice of aptness in individual

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[300] This is one reason why I suspect that judges in the majority, whether writing for the Court or a separate concurrence, almost never used the first person personal tense.

[301] Habermas, *Facts and Norms*, 462 ("The paradoxical achievement of law thus consists in the fact that it reduces the conflict potential of unleashed individual liberties through norms that can coerce *only so long as they are recognized as legitimate* on the fragile basis on unleashed communicative liberties.") (emphasis added).

[302] *Id.* ("Social integration thereby takes on a peculiarly reflexive shape: by meeting its need for legitimation with the help of the productive force of communication, law takes advantage of a permanent risk of dissensus to spur on legally institutionalized public discourses.").

[303] *Id.* 461. Similar concerns have been raised by other critically-minded scholars. Eileen M. O'Sullivan, "Legal Argument as a Non-linear Process." In *Law and History* (eds. Andrew Lewis and M. Lobban) Oxford: Oxford University Press, 2003; Geoffrey D. Klinger, "Law as Communicative Praxis: Toward a Rhetorical Jurisprudence." *Argumentation and Advocacy* (1994) 30: 236-47; John Louis Lucaites, "Between Rhetoric and 'the Law': Power Legitimacy and Social Change." *Quarterly Journal of Speech* (1990) 76: 435-49; Ramie McKerrow, "Critical Rhetoric: Theory and Praxis." *Communication Monographs* (1989) 56: 91-111.

cases.[304] Like language, the revelation of one legal relationship is at the cost of another. When a symbolically significant deed becomes ritualized, it also becomes a requirement. For example, the reading of Miranda rights is ritualistic and not specifically required by many jurisdictions. However, the U.S. Supreme Court ruled that because society has adopted the notion that one's rights must be read to him or her, Miranda rights are law.[305] Whereas Miranda rights were once a legal right, they are now apparently elevated to a lawful claim.

4. Principles of Justice and Fairness are Culturally Bound.

Justice Thomas' dissent accuses the majority of abandoning the severity of the strict scrutiny test because of an admiration for the elite status of the law school. He contrasts the Court's disregard for the Virginia Military Institute's claim that its single-sex status was necessary to maintain its classroom environment, concluding that the majority must have viewed Southern military schools as "unfashionable."[306] Although Thomas' claim suggests that judicial decisions should be above cultural trends, there is something of a counterargument when one looks at the rhetorical notion of Law. I argue that where the Legal system might have some cultural aspects to its internal operation or external relationship with citizens, the Law is entirely a culturally-bound concept.

Marouf Hasian Jr., a critical rhetorical scholar interested in liberating legal argumentation from the hegemonic argumentative norms imposed by the legal culture,[307] has argued with the assistance of some colleagues for the notion of Law as a rhetorical culture.[308] Hasian is closely aligned with White's liberal acceptance of non-legal texts as artifacts of legal rhetoric. Hasian also uses a concept of Law that incorporates elements of the Legal system concept advocated here. For

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[304] Fuller, 118.
[305] *Dickerson v. United States*, 331 U.S. 745 (U.S. Supreme Court 2000).
[306] A distinction between the cases is that the Court applies the strict scrutiny test to race-discrimination, but a less stringent test to gender discrimination.
[307] Hasian (1994; 1997; 1998; 2000).
[308] Hassian, Condit et al. (1996).

Hasian, the concept of law as a rhetorical culture is intended to be a middle ground in the debate between legal "professionalists" and advocates of the critical legal studies movement (CLS). According to Hasian, legal professionalists believe that legal reasoning trains attorneys to ignore their instinctive emotional and social needs to balance long-term legal rights and duties.[309] In contrast, CLS advocates portray that "rule of law" as a dominant ideology that "represents a narrow and exclusive range of sociopolitical and economic interests."[310] Taking a transcendent middle position, Hasian argues that "law is neither a rationally constructed discourse nor simply a dominant ideology, but rather an active and protean component of a hegemonically crafted rhetorical culture."[311] Law as culture offers an intriguing explanation for how principles of justice and fairness might evolve in step with societal norms.[312]

Gerald Wetlaufer specifically argues that American legal discourse can trace its cultural roots to one of three distinctive historical "communities" that are linked to particular periods of time and styles of jurisprudence.[313] In approaching legal discourse, Wetlaufer urges critics to first locate the cultural moorings of the legal author's discourse "system."[314] By identifying the cultural "position" of a legal discourse, the rhetorical criticism of law points to the possibility of a more complete cultural criticism of law, which evaluates not just the rhetorical personae lawyers adopt, but the legal institutions, legal decisions, an legal forms that shape character and identity in our society.[315]

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[309] Hasian, Condit et al (1996), 323.
[310] *Id.*
[311] *Id.*
[312] Recall the discussion from Chapter Three in which Hasian describes "Law" (which I translate as the Legal system) as having the following characteristics: bounded by public culture; polysemic; hegemonic; vulnerable to social changes; and, usually not fair. *Id.* 335-37.
[313] Gerald Wetlaufer, "Systems of Belief in Modern American Law: A View from Century's End," *American University Law Review* 49 (1999): 1-82, 3.
[314] *Id.* 3-4.
[315] Guyora Binder and Robert Weisberg , "Introduction," *Literary Criticisms of Law*, (eds. Guyora Binder and Robert Weisberg) Princeton, N.J.: Princeton University Press, 2000, 24-25.

Justice Thomas' complaint about the "trendy" Court reveals the peculiar dynamic between Law and culture. Thomas shows concern for the Court's apparent willingness to interpret the requirements of the Constitution in line with contemporary societal needs. Take the principle of justice that every applicant to Michigan should be reviewed on his or her individual merits. What counts as an individual merit certainly evolves with time. Community service, for example, is a culturally bound concept. What does not evolve is the notion that any individual consideration should be sincere. For Michigan's undergraduate admissions program, the granting of a large number of points to an applicant for being a minority ran afoul of that notion, a sin that was not culturally bound. Thomas' complaint is not measured by the Court's willingness to explore new critieria for what counts as a "compelling state interest" but rather his concern that the Court is too willing to accept the apparent sincerity of the academic advocates of the "critical mass" theory while they doubted less-fashionable supporters of VMI's all male education programs.

Hasian's perspective of law as culture is limited on two levels. First, Hasian merely understands the particular legal system of the United States when he grounds his analysis in culture. For example, in the article that first advocates the law as rhetorical culture position, Hasian and his coauthors take care to understand the importance of "speaking like a lawyer" as a key to understanding Law's cultural positioning.[316] However, this perspective confuses the culture of the legal system with the longevity of a set of argumentative tools. Lawyers have been studying rhetoric for over two thousand years[317] and not so much has changed: "The perplexing truth, at once startling and yet vaguely reassuring, is that lawyers and judges today talk and argue and justify in pretty much the same curious ways

[316] Hasian, Condit et al. (1996), 323, 339.
[317] Richard A. Rieke, "Argumentation in the Legal Process" in *Advances in Argumentation Theory and Research.* Carbondale, Ill.: Southern Illinois Press, 1982.

that they have used for generations."[318] The question to ask is what is staying the same: the rhetorical notion of Law grounded in a rhetoric or the specific legal arguments?

How can abstract principles of justice, stripped from the context of the conflicts that gave rise to them in courts, be effectively understood or articulated by citizens? Baron's view, one which ought to be appealing to rhetorical theorists for many reasons, is that "the definition of the field of 'law,' like that of any other field, will to some degree reflect or be a product of what we, as a culture, want law to be and do."[319] Fortunately, rhetorical scholarship has provided critics with a tool to diagnosis the aspirational qualities of a particular text.

Rhetoric scholar Michael Calvin McGee has articulated the concept of an "ideograph" as a condensed form of ideology that is a "high-order abstraction representing collective commitment to a particular but equivocal and ill-defined normative goal." [320] Examples of ideographs include: "law," "liberty," "tyranny," "trial by jury," "rule of law," "property," "religion," "right of privacy," or "freedom of speech."[321] The key to understanding ideographs is that different participants have differing understandings of the same ideograph, [322] but are still able to engage in discourse on the subject.[323] In discourse, the interaction of speakers with different understandings of the same ideograph can create a "dynamic tension" that allows the pursuit of individual rights in a pluralistic world.[324] When looking for

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[318] Smith (1999).
[319] Baron, 1085.
[320] Michael Calvin McGee, "The 'Ideograph': A Link Between Rhetoric and Ideology," *Quarterly Journal of Speech*, 66 (1980): 1-16, 15.
[321] *Id.* 4.
[322] *Id.* 6 ("So, in the United States, we claim a common belief in "equality," as do citizens of the Union of Soviet Socialist Republics; but "equality" is not the same word in its meaning or usage.").
[323] *Id.* ("Business and labor, Democrats and Republicans, Yankees and Southeners are *united* by the ideographs that represent the political entity "United States" and *separated* by a disagreement as to the practical meaning of such ideographs.").
[324] For an example of an ideographic analysis of the use of "equality" by Dr. Martin Luther King, Jr. and Malcolm X, see John Louis Lucaites and Celeste Michelle Condit, "Reconstructing <Equality>:

principles of justice, the starting point should be those ideographs like equality, due process, and fairness. In locating points of conflict, one looks to the location at which one advocates that one ideograph becomes distinguishable for another. That is the site of conflict. For example, Lucaites & Condit might suggest that violence is the point of conflict for the ideograph of "equality" as respectively understood by Malcolm X and Martin Luther King, Jr.

C. What Principles at Law are in Conflict in *Gratz* and *Grutter*?

We have posited that the rhetorical definition of Law is a "rough consensus" opinion regarding a pool of various arguments available and useful for resolving conflicts over justice. The Law itself encompasses the moral, technical, or scientific claims that are supported in law. As an example, the claim that lie detector test results are always valid does not enjoy the support of a rough consensus. On the other hand, a statement made against one's interest is viewed to be more trustworthy. The individual logic of the two arguments is much less important than the underlying basis for the argument. The lie detector example emphasizes the reliability of science, a notion that has not yet gained wide consensus from Americans. The statement against interest, in contrast, is based on the widely accepted premise that people generally do not intend to harm themselves by telling falsehoods.

In this project, the statements of Law worth examining provide the underlying moral, technical, or scientific basis for the claims of the majority opinions. The claims will relate to the roles of educational institutions, the problematic nature of racism, and the duty of state governments to use race-based classifications to combat the effects of hundreds of years of racial segregation. Recalling that the Law is the reservoir for arguments that have some rough social

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Culturetypal and Counter-Cultural Rhetorics in the Martyred Black Vision," *Communication Monographs* 57 (1990): 5-24.

consensus, we might identify the specific arguments in Law by noting appeals to standards or norms accepted by society.

In general, however, identifying the Law is a rhetorical analysis and any of the diverse tools of rhetorical inquiry can be relied upon. For the purposes of this project, Chaim Perelman's theory of informal argumentation can be applied to the *Gratz* and *Grutter*opinions. Perelman, like many mid -twentieth century American and Swedish judges, adopted a realist perspective towards formal legal argument. In this view, formal legal claims are supported by essential appeals to socially accepted norms. In *Grutter* and in *Gratz*, the Court's majority opinion writers explicitly identified the underlying social concerns that support or work against racial classifications. As illustrated below in Diagram 4.1, there are two salient elements of analysis: first, the *principles*of justice or fairness that underlie the legal rule in conflict; and second, the *points of conflict* which locate the specific instances and places in which two or more principles are in conflict.

Diagram 4.1: Indicia of Principles and Points of Conflict

Principles	**Points of Conflict**
Generalized statement of justice	Conflicting fact patterns
References to civic authority	Clash between rule and principle

One begins this level of analysis by identifying the two or more general principles of Law in conflict. In some cases, the principles are explicitly stated. In other cases, particularly those in a long line of similar disputes, the reference to the principles is buried under legal citation. When statements are not explicitly stated, it may be helpful to return to the Legal analysis and identify the underlying issues supporting the use of various architectural and cultural features of the Legal discourse. Metaphors are a particularly good source for clues as to the underlying legal conflict.

In *Grutter*and *Gratz*, the major principles are stated in a fairly straight-forward fashion, as the following three examples demonstrate. First, the justices struggle over whether all state-sponsored racial classifications should be subject to the highest level of scrutiny. Second, the justices debate whether some of the plaintiffs are truly representative of the class of students affected by the affirmative action program. Third, there is a crucial debate about whether the First Amendment affords educational institutions leeway in declaring that classroom diversity is a compelling state interest. It is important to note that each of these conflicts involves two competing basic notions about justice and not just the proper application of laws to facts.

After identifying the principles in conflict, the next aspect of this stage of the analysis is to identify which conflicts were resolved by the Court's decision and how those conflicts were resolved. In addition, one must identify which conflicts were avoided by the Court and, to the extent possible, attempt to identify whether the Court was still making a statement about the relative merit of the argument. As an example, the Court might subordinate an argument about one constitutional provision to another, indicating the superiority of the prefered provision.

Alexy warns that lawyers cannot dispense wisdom and justice in a senseless, unjust world.[325] However, McGee's ideographs are helpful means of identifying which principles of justice are "at play" in any given legal text. Turning toward the *Grutter* and *Gratz* cases, we can find a fairly discrete set of principles of justice by focusing on the ideographic language. The prevailing ideographs were "equality of access" and "individual consideration." Whether these ideographs have any bearing on a case involving applicants to elite educational institutions that receive thousands of applications each year is beyond the scope of this study. However, the Court managed to address the conflict

[325] Alexy, 295 ("This presupposes a rational and just social order.").

between those ideograph-centered principles of justice and offer a resolution to the underlying legal dispute.

First, the *Grutter* majority expl ains that this "case requires [the Court] to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful."[326] The specific question the *Grutter* majority answers is whether "diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[327] However, the broader issue is clearly about equality of access. The *Grutter* majority's description of the case law be gins with the Equal Protection Clause and notes that "We are a 'free people whose institutions are founded upon the doctrine of equality.'"[328] Any education benefit gained from student body diversity is viewed through the framework of equality: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[329] The majority's emphasis on civic leadership is also keyed to the notion of equality of access: "in order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[330]

In contrast, the *Gratz* majority's opening description of the question is much more specific: "We granted certiorari in this case to decide whether 'the University of Michigan's use of racial preferences in undergraduate admissions violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, or 42 U.S.C. § 1981."[331] Because the compelling interest prong had been satisfied under *Grutter*'s analysis, the *Gratz* majority

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[326] *Grutter*, 539 U.S. at 312.
[327] *Grutter*, 539 U.S. at 322.
[328] *Grutter*, 539 U.S. at 326 (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967).
[329] *Grutter*, 539 U.S. at 332.
[330] *Id.*
[331] *Gratz*, 539 U.S. at 249 (some citations omitted).

focused on whether the undergraduate admissions program was narrowly tailored. Accordingly, the *Gratz* majority focused on the need for individualized assessment by noting that Justice Powell's *Bakke* opinion "emphasized the important of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education.[332] The *Gratz* majority then holds that the undergraduate program's rule granting 20 points for race as not providing such "individualized consideration" other than a verification of minority status.[333]

Taken together, the two broad principles of justice offered by the Court are:

1. *Equality of access to higher education is important, especially in order to cultivate leaders for an ethnically diverse society.* Classroom diversity is a compelling state interest, largely because of the relationship between education and the development of social leaders.

2. *Equality demands true individual consideration*. Granting students of certain racial or ethnic backgrounds enough points to guarantee admission is not true individual consideration, even if borderline candidates are given a second individual review.

Recalling that the second aspect of this analysis calls for locating points of conflict, the ideographs of equality and individual consideration seem to begin unraveling at two keys locations in the legal text.

> 1. *Where should the opinion of educational administrators be ranked in relation to the opinions of individual applicants?* The Court ultimately gave as much deference to the education administrators' belief in the importance of classroom diversity as to the military leaders in *Korematsu*.

[332] *Gratz*, 539 U.S. at 271.
[333] *Gratz*, 539 U.S. at 271-2.

2. *At what point in the evaluation process may schools treat applicants as a class?* The Court ultimately concluded that some points awarded for race/ethnicity were acceptable, but not so many points such that racial minorities were assured on admissions.

The "breaking" of the ideographs of equality and individual consideration thus occurs at those two theoretical points where deference to educational administrators and the formation of the class are at odds. More accurately, when Gratz, Grutter, and Hamacher were not included in the University's respective law school and undergraduate classes, the freedom of Michigan's faculty to compose the optimal classroom makeup came into question.

E. Conclusion

This Chapter has explained and demonstrated the importance of revealing the principles of justice that are in conflict "underneath" a legal dispute. Legal scholars may dismiss the exercise as mere "issue spotting." However, there is an important difference between identifying generic lines of arguments that are suggested by the particular facts of a case, which is the law school approach to issue spotting, and the more delicate task of understanding what principles are at play. Were law students to spend more time thinking about these broader issues, their legal training would be undoubtedly more meaningful.

Nevertheless, this Chapter's discussion about Law as a set of principles of justice is not just helpful for rhetorical scholars. A broader question is whether the public had the opportunity to learn about how the Court resolved these issues. The media coverage detailed in the next Chapter will include an analysis of whether these principles or points of conflicts were identified.

The importance of understanding how individual citizens view Law cannot be overstated. As Cohen notes, "Law, as designating a rule of action prevailing in a given community, could have no divine origin in any sense superhuman or

preternatural. It resulted from the impact of human beings … to the existence of which human beings were a *sine qua non*."[334] As discussed in this Chapter, the leading rhetorical conceptions of Law tend to understate the importance of the relationship between individuals and their conception of Law. Much like the Legal system's need for legitimacy, the Law requires some sense of universal consensus, no matter how rough that consensus might be.

The difference between a citizenry that feels connected with the Law and a citizenry overwhelmed by the Legal system is treacherous. Lon Fuller describes the dangerous consequences:

> To the thoughtful and sensitive citizen the law can present itself in a bewildering array of moods. It can appear as the highest achievement of civilization, liberating for creative use human resources otherwise dedicated to destruction. … A shift in mood and all this bright glitter surrounding the law can collapse into dust. Law then becomes man's badge of infamy, his confession of ineradicable perfidy.[335]

The beginning of this Chapter discussed the trouble Korean political leadership encountered when they discovered that the implementation of Western-style law invariably required universal obedience to the law. Under the traditional Korean mindset, only the criminals were subject to the law. Professor Hahm noted that in order for Korean citizens to enjoy the full protections of the legal system, a decision to follow and support the notion of Law is paramount. This is an excellent example of how an individual sense of communion with the principles of justice that support the Legal system is paramount.

Before one dismisses the Korean experiences as a necessary consequence of the wholesale import of a foreign legal code, consider that American constitutional law has experienced a massive overhaul in the last fifty years. As one of the great critics of the Warren Court's decision in *Brown v. Board of Education*, Lino

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[334] Cohen, 6.
[335] Fuller, 3.

Graglia articulates a distinction between the Law and the Legal that is similar to that argued here. He recognizes that the "true meaning" of a case such as *Brown* requires the discovery of its basic principles, which are usually conflicting and at the heart of the underlying conflict. Thus, the meaning of any case is not waiting to be discovered "like a vein of gold," but must be "supplied by later decision makers."[336] Only when a court's decision is based on a principle whose validity and applicability "few will openly or persuasively challenge" will that decision be "adequately justified."[337] Graglia's theoretical basis for challenging post-*Brown* efforts to legitimate racial busing decrees spells out the basic premise of the Law/Legal distinction. The Law is the principles that we might universally agree with and the Legal is, in part, the line of cases that interpret the principles in relation to new facts and arguments.

The next chapter reports on the findings of the media content analysis of the variables discussed up to this point. Although this Chapter has not intended to offer the authoritative unified approach to studying and understanding the rhetorical notion of law, future studies should be able to use this discussion as a template for guiding more streamlined research approaches in the area.

[336] Lino A. Graglia, *Disaster by Decree*, Ithaca, NY: Cornell University Press, 1976, 19.
[337] *Id.* 30.

Chapter V: The Law, the Legal, and the Media

In this Chapter I argue that a theoretical framework for understanding legal rhetoric *must* necessarily include mass media. Talking about any modern legal system without accounting for the media is essentially ignoring the only apparatus in which the legal system is presented to citizens.[338] Legal scholar Richard Ericson suggests that, for all practical purposes, the distinction between the Legal system and news media is fairly slight.[339] The Legal system demonstrates its legitimacy to most citizens through media coverage. In turn, media's legitimacy relies on media's access to authoritative sources within the legal and political system. As institutions, both media and the Legal system have similar values, such as orderliness and public interest. Whatever differences that do exist may only be a matter of degree.

A. Overview

For the purposes of this Chapter I focus on the news media coverage of *Gratz* and *Grutter*i n order to describe how media interacts with the other aspects of the theoretical framework proposed in this dissertation. Like Chapters Three and Four, this analysis is intended to stand alone as an independent study. The primary research question is:

> What can citizens learn through individual or mass media exposure to legal texts?

This question requires a twofold response. First, what specific lessons can be learned by citizens from *Gratz* and *Grutter*? Second, what general lessons could be learned by citizens from mediated legal texts? Taken together, these questions help

[338] As explained further in this Chapter, I acknowledge that informal social networks and individual experiences provide a similar function. However, in the present day, media coverage is dominant.
[339] Richard V. Ericson, "Why Law is Like News," 195-230 in *Law as Communication* (ed. David Nelken) Aldershot, England: Dartmouth Press, 1996.

guide our initial understanding of media's role in the relationship between Law, the Legal system, and citizens.

Accordingly, this Chapter first argues for legal rhetorical scholarship to include media analyses in order to provide a more comprehensive understanding of the rhetorical functions of various legal texts. Second, I provide an example of one such analysis, using newspaper coverage of the U.S. Supreme Court's affirmative action decisions in *Gratz* and *Grutter* After offering a description of the media content analysis used here, four main themes are presented as "lessons" in response to the subpart questions posed above. The final section of this Chapter suggests prospective hypotheses for future studies in media coverage of legal conflicts.

B. Media and the Citizen, the Law and the Legal System

Most people learn about Law from exposure to television and other media of popular culture, not from direct experience. "Legal ways of seeing the world—of classifying people and their relations and experiences, of distributing authority, of giving voice—become featured in news discourse and thus a part of popular culture and common sense."[340] Yet, as Alfred Phillips argues, media coverage of a legal conflict goes both directions: "The media's inter*mediate* position between the trial and the public … not only [relays] the trial proceedings to the public but also [impacts] on the trial and ... [produces] an element of distortion."[341] At the same time media coverage can affect the Legal system, at least on a broad operational level. Legal media critic Antoine Garapon suggests that the "way in which the newspapers report on legal business in fact implies the expectancy of a democratic process which is much more direct and which is intended to force the institution to modernize its methods."[342] Hence, the substance and the tenor of the media

[340] Ericson, 220.
[341] A. Phillips, 8.
[342] Antoine Garapon, "Justice Out of Court: The Dangers of Trial by Media" 231-245, in *Law as Communication* (ed. David Nelken) Aldershot, England: Dartmouth Press, 1996, 232.

coverage are essential to understanding how and what Americans learn about the Court's decision.

A rhetorical criticism of a legal decision that does not account for media coverage may not be inherently flawed, but such a criticism is lamentably limited. It is one thing to understand how a judge arrives at a legal decision, it is another to understand how that decision is understood by citizens. Citizens are not disinterested observers, although that role is often forced upon them by institutional actors concerned about whether citizens "want" to learn about the legal system. In most cases, any citizen capable of understanding the rules of a televised athletic contest can understand legal rules. Any citizen has the capacity to weigh his or her sense of fairness and justice against the decision of any judicial tribunal. The only question is whether the media coverage gives citizens sufficient information to make that determination.

Second, the legal system is irrevocably a political system. Although court decisions like *Gratz* and *Grutter* are often framed as personal struggles, the issues almost always relate to larger political issues. If scholars are prepared to scrutinize media coverage of political campaigns, there is no discernable reason to ignore trends in judicial rulings that resemble campaigns. Justice Ginsburg's call for U.S. courts to cite international and comparative law is as much a political campaign as the latest presidential effort to reform Medicare or Social Security.

Just as political media ignore certain candidates in an election, legal reporting can ignore important voices and arguments. A rich body of research has demonstrated there are norms to general news reporting and more specialized forms of news reporting, such as foreign affairs reporting.[343] There is no reason to think

[343] Early proponents of journalism norms research include H.J. Gans, Edward Epstein, and Gaye Tuchman. H.J. Gans, *Deciding What's News*. New York: Pantheon Books (1972); Edward J. Epstein, *News From Nowhere*. New York: Village Press, 1973; Gaye Tuchman, *Making News: A Study in the Construction of Reality*. New York: Free Press, 1978.. W. Lance Bennett is the most prominent contemporary researcher of journalism norms. W. Lance Bennett, "Toward a Theory of Press-State Relations in the United States." *Journal of Communication* (1990) 40(2): 103-25; "An Introduction to Journalism Norms and Representations of Politics." *Political Communication* (1996)

that legal reporting does not also have its own norms that highlight some voices and obscure others. Scholars should be interested in knowing which voices and arguments are obscured by legal reporting. Although the *New York Times* and the *Washington Post* provided lengthy excerpts from the Supreme Court's rulings in *Gratz* and *Grutter*, the news coverage, and not the media excerpts, is how the vast majority of citizens are going to learn about the arguments used by the Court to justify the outcome. In a pair of cases like *Gratz* and *Grutter*, the length of the various opinions require that the news media coverage reduce or eliminate some arguments. The norms of news reporting, which often emphasize developing a narrative, can conversely overemphasize some arguments. The result in *Gratz* and *Grutter* is that newspapers focused on the opinions of Justice O'Connor and Justice Thomas, while largely ignoring the standing arguments raised by Justice Stevens and Justice Souter. Although characterized as "technical arguments," the debate about standing should have been fairly interesting to the reading public. After all,

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13(4): 373-84; *News: The Politics of Illusion*. White Plains, N.Y., Longman, 2001; W. Lance Bennett and Robert G. Lawrence. "News Icons and the Mainstreaming of Social Change." *Journal of Communication* (1995) 45(3): 20-39. Other scholars have focused more on how the economy of the news industry has affected the quality and caliber of news reporting. Bartholomew H. Sparrow, *Uncertain Guardians: The News Media as a Political Institution*. Baltimore, Md.: Johns Hopkins University Press, 1999; Eric Herman and Noam Chomsky. *Manufacturing Consent: The Political Economy of the Mass Media*. New York: Pantheon Books, 1988; Robert McChesney, *Rich Media, Poor Democracy*. Urbana, Ill.: University of Illinois Press, 1994.

More specific media norms that relate to foreign affairs reporting have also been the focus of several communication researchers. Johnathan Mermin, "Conflict in the Sphere of Consensus? Critical Reporting on the Panama Invasion and the Gulf War." *Political Communication* (1999) 13(2): 181-94; *Debating War and Peace: Media Coverage of U.S. Intervention in the Post-Vietnam Era*. Princeton, N.J.: Princeton University Press, 1999; James K. Hertog, "Elite Press Coverage of the 1986 U.S.-Libya Conflict: A Case Study of Tactical and Strategic Critique." *Journalism & Mass Communication Quarterly* (2000) 77(3): 612-27; Gadi Woldsfeld, *Media and Political Conflict: News from the Middle East*. New York: Cambridge University Press, 1997; John Zaller and Dennis Chiu, "Government's Little Helper: U.S. Press Coverage of Foreign Policy Crises." *Political Communication* (1996) 13(4): 385-405; Christiane Eiders and Albrecht Lüter, "Germany at War: Competing Framing Strategies in German Public Discourse." *European Journal of Communication* (2000) 15(3): 415-28; William A. Dorman and Stephen Livingston, "News and Historical Content: The Establishing Phase of the Persian Gulf Policy Debate," 63-81 in *Taken By Storm: The Media, Public Opinion, and U.S. Foreign Policy in the Gulf War*. (eds. W. L. Bennett and D. L. Paletz) Chicago: University of Chicago Press, 1994.

the essence of the debate was whether the plaintiffs were legally entitled to even file suit?

A third reason that legal rhetorical scholarship should include media analysis stems from the news media's capacity to provide attitudinal orientation towards news topics. Joseph Capella and Kathleen Hall Jamieson have argued persuasively that modern news media injects a dangerous level of cynicism in political reporting.[344] The danger of cynical reporting is that cynical citizens become disempowered and unable to participate in the political process. There is little reason to believe that legal subjects, some of which often are plainly political, are immune from this effect. In fact, the deeply felt authority of a weighty judicial ruling might even increase the citizen's feelings of powerlessness.

The effect of a citizenry with deeply cynical attitudes toward the judiciary and other elements of the Legal system could be catastrophic. Recalling the importance of public legitimacy serves in allowing the Legal system to operate with suasory force, the rise of a cynical attitude reflects a deterioration of the effectiveness of the entire Legal system. As Gearey explains, "Law may communicate in the logic of legal arguments, but it is also reliant on the image."[345] In that sense, Law is a "kind of a confidence trick, a way of making society appear … [but] if one is not aware that legal concepts are reified and abstracted, they appear to have some kind of foundational substance, a kind of autonomy or independent being." The law is more than a house of cards; as Gearey notes "[i]f the law was merely an elaborate trick, it would collapse if its subjects simply stopped believing. [There must be] more to law's hold over the social world, and hence another aspect to the operation of the image."[346]

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[344] Joseph Capella and Kathleen Hall Jamieson, *Spiral of Cynicism: the Press and the Public Good*, New York: Oxford Press, 1997.
[345] Gearey, 31.
[346] *Id.* 32.

The rise of cynicism also counteracts Legendre's notion of Law as "dogmatic communication" involving the transmission of a vital social myth.[347] When citizens develop unrelenting cynical attitudes about their legal institutions, the Law is unable to perform this myth-affirming function. Drawing from Augustine's description of the liturgical order as a structure of love, Legrende concludes that the subject of an institution must fall in love with the institution.[348] Perhaps Americans have already fallen out of love with their legal systems. Without some basic civic respect for legal institutions, it is difficult to see how citizens could transmit social narratives about justice and fairness to subsequent generations.

Finally, rhetorical scholars should be interested in understanding how media represents the U.S. legal system to the rest of the world. Garapon warns that "legal ways of seeing the world—of classifying people and their relations and experiences, of distributing authority, of giving voice—become featured in news discourse and thus a part of popular culture and common sense."[349] Jan Broekman notes that a successful legal system must "proclaim its being different from related discourses and social structures in order to function, to be coercive, to develop conflict-solving procedures, to reinforce and legitimate legal decisions and to have its teleology socially accepted."[350] So understood, the decisions of the U.S. legal system are presented through international media to other countries as a logical consequence of a conflict resolution process. The representations of legal norms passed along through the media become exemplars of model behavior, especially for the private law forums that often imitate public law.[351] This perspective is particularly important to keep in mind when considering how developing nations

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[347] Pierre Legendre, *L'Empire de la Verite: Introduction aux Espaces Dogmatiques Industriels*, Paris: Payard, 1983,132.
[348] Gearey, 41.
[349] Garapon, 220.
[350] Jan M. Broekman, "Communicating Law," 45-62, in *Law as Communication* (ed. David Nelken) Aldershot, England: Dartmouth Press, 1996, 60.
[351] Rawls.

might model the notion of "rule of law" based on media representations of U.S. legal institutions.

U.S. citizens are not the only citizens that can learn from the U.S. legal system. Given the influence of the American legal system on other societies, citizens from a vast number of countries are learning from the U.S. legal system. If Americans use the law to "represent ourselves, our social organizations, and our aspirations,"[352] what happens when cynicism infiltrates those rhetorical constructions? Garapon worries about the international influence when "young people in France are more familiar with United States law" and all of its cynical underpinnings[353] than their native French Law and legal customs. What messages are being sent to other democratic societies about the reliability of the Legal system?

C. Description of Content Analysis Methodology

The conclusions presented in this Chapter are based on my analysis of newspaper coverage of *Gratz* and *Grutter* By looking at media coverage of the entire litigation history of the two cases, certain patterns or "lessons" emerge. Although I borrow from the language of social science, this is not intended to be a statistically-valid analysis. Instead, the lessons learned from *Gratz* and *Grutter* offer support for possible research questions or hypotheses in future studies. In short, this is a descriptive exercise intended to engage conceptual thinking about media coverage of the Legal system.

In this section, I describe the "sample" of newspapers that provided my dataset. Then I describe the two broad categories of "variables" that I tracked in this study. First, I look at arguments, which include not only the arguments offered by the various Justices detailed in Chapter Two, but also the Legal and Law

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[352] Ericson, 225.

[353] Garapon, 231-32. More specifically, Garapon is worried about the effect of mass entertainment influences of American legal norms onto other nations. Thus, his concern is 'more precisely that of Beverly Hills," alluding to the international influence of the American television show *Beverly Hills 90210.*

dimensions discussed in Chapters Three and Four. Second, I look at attitudes through an analysis of media framing strategy.

1. Description of Sample

A total of 58 newspaper stories published between October 15, 1997 to June 27, 2003 formed the basic sample for this study. Most of the stories came from the *New York Times*, the *Washington Post*, and the *Detroit Free Press*. As described later in this Chapter, coverage from the *Detroit News* was added. The *New York Times* and the *Washington Post* are both leading "national" newspapers with international readerships. The *Detroit Free Press* and the *Detroit News* are regarded as "regional" newspapers largely because of their focus on regional and state issues confronting Michigan. Of course, these categorizations are largely simplifications that only speak to the limits of this study and not the professionalism or influence of any of these newspapers.

The stories were unusual in many respects. The stories ranged in length from five to sixteen paragraphs, which is longer than usual for newspaper reporting. In many cases, multiple authors worked collaboratively on the stories, also somewhat less common in newspaper reporting. Finally, most of the stories were written in anticipation of a litigation event such as a hearing or decision, rather than reporting on the event after the fact. Even the stories reporting on the Supreme Court's final decisions were largely crafted weeks before the opinions were handed down. In most other respects, the newspaper reporting was quite similar to typical reporting. All of the stories attempted to place a "lead" paragraph that summarized the news of the case. Various experts and participants in the cases were quoted directly. Most of the background for the stories appeared in the final paragraphs.

One of the primary purposes of this study has been to trace what the newspaper stories taught newspaper-reading citizens about the specific *Gratz* and

Grutter cases, the Legal system in general, and the American notion of Law. Thus, I developed coding schemes that reflected each of these dimensions. All of the codes are more explicitly described in subsequent sections of this Chapter. The first set of codes related to my analysis of the actual arguments used by the various Justices in *Gratz* and *Grutter* found in Chapter II. The second set of codes derives from the architectural and cultural features of the Legal system discussed in Chapter III. The third set of codes derives from my discussion of Law in Chapter IV. Finally, a fourth set of codes were used to track media framing strategies, discussed in greater depth later in this Chapter.

The coding process was relatively simple. This author acted as the sole coder. Each article was reviewed three times: first, the articles were screened for relevance; second, the opening, middle, and ending paragraphs of each article were reviewed under each code set; third; the coding assignments were reviewed for consistency. Absolutely no claim to statistical validity is represented here. Instead, this review is merely a descriptive exercise of the patterns of media coverage present in *Gratz* and *Grutter*. As with any rhetorical criticism, different patterns reveal themselves to different critics.

2. General Trends

Newspaper reporting, like any news media, is influenced by norms or routines of coverage. Legal reporting, particularly of U.S. Supreme Court cases, is especially likely to follow a familiar pattern of coverage. As to be expected, the peak of the media coverage of *Gratz* and *Grutter* occurred on June 4, 2003 when the Supreme Court handed down its opinions. All of the newspapers in my sample also included "preview" stories in the days leading up to the decisions, as well as coverage of the oral arguments earlier in the spring.

Interestingly, the next most significant event was the actual filing of the *Gratz* lawsuit. All of the remaining stories covered significant[354] courtroom appearances such as the initial filing of the lawsuit, the University's answer,[355] efforts by interested parties to intervene in the case, trial, renderings of the decisions of various justices, filing of appeals and granting of a writ of certorari, filing of appeal briefs, oral arguments, and the Supreme Court's decision. Much like any other newspaper reporting subject matter, legal reporting is largely event-driven.

One difference appeared that may relate to the regional or national focus of the newspaper. The *Detroit Free Press* and the *Detroit News* covered the cases with the same set of reporters throughout the history of the litigation. In contrast, the *New York Times* or *Washington Post* tended to rely on Associated Press or other wire services for early stories and then turned towards their own legal reporting staff for the Supreme Court coverage. Given the vast electronic research resources available to the reporting staff of the *Times* or the *Post*, this different approach in staffing may have had no effect. However, as discussed later, there appeared to be a tendency by the national papers to ignore connections between the later events of the litigation and some of the disputants' early arguments.

A final interesting feature of the news coverage of this particular legal conflict involved editorial and non-hard news stories. Many of the editorials and political columns that were ultimately removed from the study sample tended to review the basic set of facts in the case when discussing the issue of race in America. Several of these columns inspired letters to the editor printed in the days following publication. In addition, several references to *Gratz* or *Grutter* occurred

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[354] Plainly, the newspapers tended to cover what was perceived as a significant event and ignored the case in the meanwhile. In 1998, for example, no newspaper in the sample had a significant story on the *Gratz* lawsuit largely because the litigants were in the evidence-gathering stage.

[355] An "answer" or "response" is the Defendant's reply to a lawsuit. In federal court, defendants are expected to respond to each claim of a plaintiff's lawsuit, which often makes for an interesting pleading.

in stories covering cultural anniversaries like Martin Luther King Day or the anniversary of the *Brown v. Board of Education* ruling. Finally, profiles of individual Justices, such as Justice Scalia, Justice O'Connor, or Justice Thomas evoked references to these cases. Because of a variety of methodological concerns, these various editorials and stories were not included in the sample.[356]

3. Coding Arguments

As indicated, this study tracked three basic sets of coding variables. The first broad set of variables tracked were "arguments." For the purposes of this analysis, arguments refer to the substantive claims raised by the Justices in the majority, concurring, and dissenting opinions in *Gratz* and *Grutter* Diagram 2.3 details the 22 separate arguments tracked in this study. In preparing this list, I used the Court's own syllabi[357] for each case as a starting point and then included the counterarguments offered by various judicial authors. During the coding process at this stage, I focused on whether the basic arguments were raised, without regard to the accuracy, fairness, or source of the argument.

The point of tracking arguments is to determine how much citizens were exposed to the various legal issues in the cases. I was more interested in what newspaper-reading citizens could learn over the lifespan of the two cases than what the specific news reported on June 4, 2003, the day the Court handed down its decisions. Although results will be discussed in full later, it is interesting to note that citizens reading newspapers were exposed to the issues and major arguments raised by the Supreme Court justices long before the actual decisions were handed

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[356] The primary reason for excluding these writings was the lack of confidence in the completeness of the sample. Although the Lexis-Nexis database is comprehensive, not all newspapers insert letters to the editor or syndicated columns. For example, former President Gerald Ford wrote a column supporting the University of Michigan for the *New York Times* on August 8, 1997. Although a search revealed the letters to the editor reacting to the column, the actual column itself was not in the sample. The list of stories included in this study were cross-referenced with indexes of archived stories from each newspaper.

[357] The "syllabus" is the Court's official summary of the case, found at the beginning of a published opinion. Although not binding law, it is good evidence of the Court's perception of its own argument.

down. Although some of the more important arguments, such as standing, tended to be obscured, the news coverage of these cases was generally comprehensive.

4. Coding the Legal and the Law

The second and third sets of codes relate to the rhetorical concepts about the Legal and the Law discussed in Chapters II and III. Specially, these variables include both the Legal architectural or cultural variables and the principles-in-conflict that form the underlying notions of Law. The point of including the Legal variables is to better understand what architectural or cultural variables are used to contextualize the arguments reported. The inclusion of the principles of Law in conflict is also important to understand how citizens learn about the context of the disputes and how it might relate to them. These specific variables were summarized in Chapters III and IV.

In tracking all of these variables, I confess a liberal interpretative framework. For example, in tracking "structure" (one of the architectural variables) I allowed any reference to precedent to count. In evaluating the "principles of justice and fairness" variable, I counted fairly generic statements from the litigants or their spokespersons. In future projects, more refined and conservative measurements may suggest different results, but the more opened-ended approach was appropriate for the descriptive focus of this study.

5. Coding Media Attitudinal Frames

In addition to the actual arguments and rhetorical elements reported by media, the tenor of media coverage may be enormously influential. Therefore, I attempted to understand the general degree of cynical media coverage for these particular cases. Because I am working under the assumption that citizens learn about legal processes and the broader notion of Law through media news or entertainment, it is important to understand the level of cynicism in that media coverage. Of course, this study is further limited to news media, and specifically, newspapers.

The notion that Americans learn about law through media accords with the perception that most Americans learn about their politics through media. Americans have fewer personal experiences with politics and are increasingly reliant on mass-mediated formats such as television. Capella and Jamieson suggest that a variety of complex factors can influence whether audiences actually learn anything from political news coverage, including: educational level, audience motivation, intensity of media coverage of topic, audience's prior knowledge of topic, the reliability of news sources, and the manner in which the story is framed.[358] Media coverage of political campaigns tends to utilize one of three types of frames: the *strategic* frame focuses on the gamesmanship between various players in the contest; the *narrative* frame focuses on the personal experiences of some of the participants; and the *issue* frame focuses on the underlying substantive bases for conflicts. Note that strategic and issue framing might also be narratives, but are otherwise mutually exclusive.

Capella and Jamieson draw two conclusions about the effects of strategic framing on audience learning. First, regardless of whether framing is issue-oriented or strategic, all political news enhances learning of related political information.[359] Because all news coverage provides some prior information, audience members who are later exposed to the same or similar topic are better able to recall both substantive and strategic information. Second, strategic framing (in broadcast mode) enhances audience recall of strategic information, while issue framing (in any mode) enhances recall of substantive information.[360] There is little reason to think that framing has a different effect when the subject matter is a legal rather than political dispute.

In an unpublished pilot study of media coverage of the *Hopwood* controversy, I tested a set of coding protocols based on Capella and Jamieson's

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[358] Capella and Jamieson, 114.
[359] *Id.* 137.
[360] *Id.* 138.

research methodology. After collecting 219 media stories in the *New York Times*, the *Washington Post*, and the *Dallas Morning News* that referenced Hopwood from 1992-2002, each article was examined for evidence of issue, strategic, or narrative framing in its headline (primary), first few paragraphs (secondary), and final paragraphs (tertiary).[361] While the focus of this analysis is on strategic framing, the presence of issue and narrative framing is an important indicator of the pervasiveness of strategic frames, and thus well worth documenting. The division of issue and strategic frames follows the examples provided by Capella and Jamieson. Narrative frames, as viewed within this study, involve discussions about the cases that invoke the human stories surrounding the case.

The pilot study protocols were adapted for use in this dissertation. First, this study included media stories from the *New York Times*, the *Washington Post*, the *Detroit News*, and *the Detroit Free Press* (the closest regional newspapers to the University's main campus in Ann Arbor, Michigan). I later added the *Detroit News* when the comprehensiveness of its coverage of the cases became apparent. Second, the date range of this study runs from 1997 to 2003, which covers the general scope of the Michigan disputes. The *Hopwood* case involved a longer time period and was a touchstone in several political debates.[362] Third, this study focused on the body of the news stories and ignored the headlines.[363] Rather than reference the headline as the primary level, I split each story into three parts and

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[361] As an example of the coding scheme, the *Washington Post* reported on the U.S. Supreme Court's denial of the final appeal in the case by noting: 1) that the Supreme Court Justices rejected the State of Texas's appeal (strategic: focus on the individual deliberation, ignoring other reasons for the Court's declining to look at the case), 2) the effects of the denial on affirmative action programs in non-educational areas of law (issue: developing the broader context of the Court's denial of appeal), and 3) the impact of the decision on Cheryl Hopwood, the name sake plaintiff (narrative: focusing on Hopwood's personal story as providing deeper meaning to the case).

[362] As of this writing, *Gratz* continues as a class action for students rejected under the undergraduate admissions protocols. Attorneys for the plaintiffs are also pursuing the collection of their legal fees.

[363] The decision to ignore headlines reflects that fact that individual newspapers craft their own headlines. As a consequence, a reader of a *New York Times* affiliate paper might read the same article as a *Times* reader, but under a locally-drafted headline. Consequentially, it is difficult to make even the most general descriptive claims about the rhetoric of headlines.

ignored headlines. As a practical matter, the three level analysis was of no consequence in this study.

One limitation of this study is that I have no way to estimate how much citizens learn about the Law and their Legal systems through direct personal experience rather than media. Some subsets of the population will have more direct, personal experience with different legal processes. For example, few Americans will ever be audited by the Internal Revenue Service or be a defendant in a criminal case. A relatively larger number of Americans will likely know someone who has experienced either event. However, thanks to news and entertainment media, most American citizens are generally familiar with both types of legal proceedings.[364] Affirmative action, as a hot political issue, may be unrepresentative of the sorts of issues that citizens follow. Nevertheless, for the purposes of this study, the limitation does not minimize the lessons learned.

C. Four Lessons Learned from *Gratz* and *Grutter*

In asking what citizens can learn from media coverage of legal disputes and *Gratz* and *Grutter*in particular, there are four "lessons" that emerge from the findings of this media analysis. Each lesson is described both in terms of the specific information obtained about the *Gratz* and *Grutter*cases and also more generally about the Legal system, Law, and the citizen's relationship with both.

1. Accuracy and Distortion in Reporting on Arguments

The first lesson learned from news coverage of *Gratz* and *Grutter*is that , while the diligent newspaper-reading citizen may be exposed to most of the arguments in a given case, she or he is likely to have a distorted view of the final outcome of a legal dispute. Generally speaking, in *Gratz* and *Grutter*, read ers were

[364] As media coverage likely privileges and identifies with the experiences of its target demographic, it is likely to report more on legal experiences common to upper middle class media consumers. In that sense, IRS audits are probably over-covered. Stories on criminal matters, particularly involving violence, are also likely over-reported, but solely for entertainment purposes and not audience identification.

exposed to all of the major arguments advanced by the various justices in their Supreme Court opinions. However, media coverage failed to report on the impact of two major arguments: the standing of one of the *Gratz* plaintiffs and the impact of affirmative action in the armed forces and business. As a result, readers were left with a distorted and simplistic understanding of why race-based classifications remain constitutionally permissible in higher education.

I found that the news coverage generally addressed all of the arguments that were ultimately expressed in the Court's various opinions in *Gratz* and *Grutter*. Nevertheless, the coverage tended to gravitate to a set of arguments. Of the 449 references to arguments in the litigation, the five arguments most frequently cited by newspaper accounts are listed in Diagram 5.1.

Diagram 5.1: Most-cited Arguments in Media Coverage

Argument	Number of References
Classroom diversity is a compelling state interest (affirming Justice Powell's opinion in *Bakke*). [Majority]	44
Diversity promotes legitimacy through the development of minority leaders in society. [Majority]	33
Michigan's undergraduate admissions system is tantamount to a quota or set-aside practice. [Dissenting]	30
Race-based classifications should be outlawed. [Dissenting]	24
Michigan's undergraduate admissions system is not narrowly tailored because of the 20 point differential given to minority status. [Majority]	23

Overall, the reporting tended to emphasize arguments ultimately adopted by the opponents of Michigan's use of race-based classifications. Three of the top ten arguments were reflected in Justice O'Connor's majority opinion affirming the Law School's use of racial classifications. There is nothing particularly surprising

about the reporting of arguments found to be persuasive by the Court. One might expect that the winners receive the spoils of media coverage. What is interesting is the emphasis on reporting dissenting arguments. The remaining seven arguments came from Justices Scalia, Thomas, Kennedy, and Rehnquist, all dissenters. In fact, the newspapers reported more dissenting arguments than ultimately successful arguments of the majority.[365] This coverage may simply be the consequence of dramatically-oriented news media reporting on a narrowly-decided case.

There are several other explanations for this tendency to cite arguments that were not ultimately adopted by the Court. First, the lawsuits were initiated by opponents of affirmative action who therefore had the opportunity to frame the issue in the press from the beginning. Indeed, the *New York Times* received an advance copy of the original lawsuit against Michigan's undergraduate system and exclusive access to the plaintiffs and their attorneys at the Center for Individual Rights. Second, the arguments against affirmative action were largely arguments against the status quo, which perhaps generates more media scrutiny than arguments supporting the use of race-based classifications in higher education admissions. Although the University organized a public relations campaign, the plaintiffs in both lawsuits were supported by the Center for Individual Rights, a well organized public advocacy law firm with experience in previous affirmative action lawsuits.[366]

Finally, the "dissenting" arguments may have received more attention because they were more complicated. Although the plaintiffs attempted to argue that the Constitution prohibits the use of race-based classifications across the board,

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[365] 197 references were to arguments adopted by the supporters of race-based classifications. 252 references were to arguments against affirmative action efforts.

[366] Journalist Greg Stohr reported in his book on the two cases that the Center for Individual Rights experienced extreme financial difficulties throughout the litigation. Greg Stohr, *A Black and White Case: How Affirmative Action Survived its Greatest Legal Challenge*, Bloomberg: New York, 2004, 133. In contrast to CIR's $4 million in expenses, Michigan spent at least $8 million on legal fees, not counting discounted or pro bono work done by alumni from the Law School. *Id.* 256. It appears that the University of Michigan's alumni network and large legal defense budget overcame an experiential advantage owned by CIR.

the Court has always been willing to entertain justifications for such classifications.[367] Unable to argue for a complete end to race-based classifications, the plaintiffs were left to argue against the sea of amicus curie arguments from corporate leaders, retired military generals and admirals, and educational experts who supported the use of race-based classifications.

It is also important to examine which arguments received relatively little play in the newspapers. Diagram 5.2 details five of the arguments that received minimal attention. The standing argument advanced by Justices Stevens and Souter is one such argument; especially in light of the fact that Chief Justice Rehnquist used half of the majority opinion in *Gratz* in order to rebut the argument. One argument advanced by Justice Ginsburg received absolutely no mention in the press, perhaps for understandable reasons.[368]

Diagram 5.2: Least-cited Arguments in Media Coverage

Argument	Number of References
Justice Ginsburg's observation that international human rights documents support the use of inclusive racial classifications. [Concurring]	1
Justice O'Connor's contention that the Michigan undergraduate case could be justified with a stronger record. [Concurring]	2
Justice Breyer's argument that state-sponsored racial classifications can be justified for the purposes of inclusion more easily than exclusion. [Concurring]	3

[367] During oral arguments at the Supreme Court, Justice O'Connor quickly shut down the plaintiffs' attempt to argue for colorblindness. *Id.* 266-67.

[368] Justice Ginsburg's claim in her concurrence to *Grutter* that the Court's decision did not require strict-scrutiny to apply to all race-based classifications was not reflected in a single newspaper report. Ginsburg's claim is likely intended to preserve the argument that some race-based classifications are subject to lower levels of scrutiny, for example, in cases of "benign" discrimination. On the whole, the point is obscure and underdeveloped. It is understandable that reporters ignored the argument.

Diagram 5.2, cont.

Chief Justice Rehnquist's concern that the lack of a time limit may make affirmative action permanent. [Dissent]	3
The standing arguments offered by Justices Stevens and Souter. [Dissent]	6

Readers were exposed to a distorted emphasis on dissenting arguments over arguments that explained the positions of the Justices in the majority. However, there were other types of subtle distortion. One example is the different perspectives offered by the regional versus the national newspapers. There is every indication that the *Detroit Free Press* and the *Detroit News* provided more comprehensive and balanced coverage of the cases than the national newspapers. Both Detroit newspapers covered Michigan's initial arguments that the undergraduate plaintiffs lacked standing because of their failure to sign onto the University's wait list. Both plaintiffs had claimed that the tone of the University's rejection letter led them to believe that the wait list would have been a waste of time. However, Michigan was able to show that both plaintiffs would have been admitted had they signed onto the wait list. Although the argument skirts the constitutionality of the admissions program, it was hotly contested in the early stages of the *Gratz* trial.

The Supreme Court correspondents from the *New York Times* and the *Washington Post* never reported on this early clash, which clearly foreshadows the standing argument advanced by Justice Stevens. Even though the two standing arguments are distinguishable from each other, there was an important opportunity for citizens to reflect on whether the plaintiffs were even qualified to raise the constitutional infirmity arguments. The underlying lesson is that when reporters are assigned to the Supreme Court, they tend to report on the Supreme Court rather than the cases before it. When a reporter is assigned to follow a particular case, as was the case for the two Detroit newspapers, that specific case becomes the main

focus. This potential dynamic raises questions about whether the public is best served by legal specialists, well trained general reporters, or a combination of both.

In sum, the first lesson of *Gratz* and *Grutter* is that the types and degrees of distortion in media coverage of legal cases maybe significant and thus should be studied more closely by scholars. Focusing on these distortions not only helps us better understand what information and perspectives the average citizen gains from media exposure, but also the context in which citizens consider the arguments for and against various decisions. In addition, a careful understanding of how media outlets can contribute to these distortions is the first step to any critical analysis of media coverage of legal disputes.

2. Reporting on the Legal System

The second lesson pertains to the reporting of the Legal system. Specifically, what lessons did the average citizen learn about the Legal system from the media coverage of *Gratz* and *Grutter*? The answer is complex and perhaps somewhat contradictory. As described in Chapter III, I chose to track four variables that reflected *architectural* and *cultural* features of the Legal system: structure, voice, time, and metaphor. These variables give an indication of how the Legal system was represented to citizens in the press. In terms of represented architectural features, the media coverage was indeed fairly comprehensive: both structure and voice were highlighted. However, the media coverage seemed to underemphasize the cultural variables of time and metaphor. As discussed below, when citizens are unable to connect on a cultural level with their legal system, the dangerous notion of a legal system floating unanchored to its society is a possibility.

Simply, the media coverage of *Gratz* and *Grutter*seems to have emphasized the architectural features of the Legal system at the expense of its cultural dimensions. Specifically, the coverage contained an overwhelming number of references to structure and voice, which are architectural references that tend to

reinforce the vision of the Legal system as an orderly and authoritative construction. First, references to legal structure were present in 41 of 58 stories. Examples of these sorts of references included discussions of the strict scrutiny test, the Court's previous ruling in *Bakke*, and the mechanics of the appeal process. Given that Legal systematic discourse is usually about structures and power relationships between various governmental units, it is no surprise that structure is a primary rhetorical characteristic of the coverage.

The second variable reflecting legal architecture was *voice*. For the purposes of this study, "voice" reflected the faculty of the University of Michigan as proponents of classroom diversity. Found in 31 of the 58 stories, this variable underscores the successful argument of the University that some deference ought to be granted to universities to determine what steps are necessary to construct a diverse educationalatmosphere. In tracking this variable, I included references to scholarly studies supporting the importance of diversity to the learning environment as well as testimonials from Michigan faculty. Like the first architectural variable, this result is also somewhat expected, given the centrality of the diversity benefit studies to the University's successful case. Most of these references were a result of coverage of President Lee Bollinger, the named defendant in the *Gratz* and *Grutter*a nd the leading spokesperson for the University on the cases.[369]

In contrast to the relative abundance of references to the architectural features of the Legal system, media coverage tended to deemphasize the cultural aspects of the system. "Emphasis" is a relative term that is difficult to measure. However, a general pattern is evident in the newspaper coverage in the two cultural references tracked in this study. First, by failing to note a major internal disagreement about the significance of the 25 year limit, newspaper stories

[369] Although Bollinger was dismissed from the case in his individual capacity and left the University of Michigan for the presidency of Columbia University, the Supreme Court continued to use his name to reference the cases.

obscured what may be a major disagreement in the future of the case. Second, the newspaper coverage also missed the disjointed metaphor strategies used by the Justices of the Court to connect with their broader audiences. This general lack of attention to the cultural dimensions of the Legal system presents a distorted view of the Court's decision making process and may be cause for worry.

Recalling that the Time variable reflected the Court's intracultural understanding of its tolerance for the use of race-based classifications, it is surprising that only 17 of the 58 stories reference any aspect of the 25 year time limit discussed in Justice O'Connor's majority opinion. One explanation for this result is the number of stories included in the sample that preceded the actual decisions by the Court. However, there were many reasons to anticipate that the Court would struggle with a time limit for any permissible use of race-based classifications into the future.

Initially, both plaintiffs and the defendants noted that 25 years had passed between *Brown* (1954) and *Bakke* (1979). Second, the notion of a defined end point for the race-based classifications was a central point of discussion in both trials as well as the appellate arguments in *Grutter*. Even in the stories reviewed after the Court's decision, the accounting of the 25 year time limit was reported either as a fact or an aspirational goal. The contradictory views of the various Justices on what that time period might mean was largely ignored. This lack of attention to a particularly obvious point of disagreement among the Justices suggests a lack of appreciation by media for the Court's intracultural struggle over the proper meaning of its own invocation of a time limit. As a consequence, readers are less likely to understand the Court's ongoing internal struggles with its capacity to issue definitive decisions that offer certainty to citizens and universities.

The second cultural variable tracked in this study was the *metaphoric* references to military schools. The Court's opinions used military schools as a metaphor to communicate two different concepts. First, the Court noted that military academies used affirmative action programs to ensure a high minority

representation in the officer ranks of the armed forces. Second, Justice Thomas notes that the Court's lack of tolerance for all male military schools like the Virginia Military Institute reflected a judicial bias for the politically-correct education theories espoused by Michigan. Surprisingly, the news coverage of the cases only used military school or military references in 14 of 58 stories. The lack of attention to these metaphors is significant because both voting blocs relied on these metaphors to communicate with a broader audience outside of the legal sphere. The supporters of classroom diversity appealed to the national security interests of the public. In contrast, Justice Thomas appealed to the public's sense that the Supreme Court should be both consistent and unbiased.

If the lesson that news media favors architectural features over cultural features is true—an assertion that merits further testing—there may be good reason to question whether the public is adequately informed by press coverage of legal disputes. Cultural context is an important aspect of whether a particular legal ruling reflects the society that supports the legal system. Without an understanding of how that particular legal system interacts with societal cultural norms, citizens are left unable to assess the validity or the wisdom of the legal decision.

3. Principles of Justice and Fairness in a Vacuum

In addition to the troubling lack of cultural context in legal reporting, the third lesson concerns the lack of an ethical context. By ethical, I mean the terms by which we resolve grounded philosophical conflicts that are part and parcel of the legal system. In Chapter IV, I discussed the notion of Law as pool of principles of justice supported by a rough consensus of the public. When principles of justice come in conflict with one another, these points of conflict generate legal conflicts that require resolution by the Legal system. I selected references from *Gratz* and *Grutter* that generally reflect these two underlying rhetorical components of the decisions. The prevailing lesson described here is that, when news media fail to explain the points of conflict, citizens are left with a discussion about "principles of

justice" that are quite meaningless precisely because of the lack of an ethical context.

Recall first that this study tracked the following two principles of justice: "equality of access" and the right to individual consideration.[370] Overall, the principles of justice and points of conflict were well covered. Newspaper-reading citizens should have been able to identify the principles of justice in conflict in these cases and identify specific areas in which the conflicts gave rise. In ten of 58 articles, no principles were referenced at all. In 38 articles, equality of access was referenced. In 39 articles, the right to individual consideration was referenced. In 32 articles, both principles were highlighted.

However, principles of justice exist in a vacuum until they come into conflict within one another. These conflicts provide the ethical context by which the principles of justice might be evaluated. Thus, it is helpful to track the points of conflict at which principles of justice collide. In this study, the "question of deference" to education (or state) officials was one point of conflict. A second point of conflict was when individuals (such as applicants to a college) may be treated as a class versus as an individual. The decisions of the Court clearly indicated that some degree of deference should be accorded to Michigan's faculty in pursuing classroom diversity, but that students cannot be treated as a class when a racial identity is ultimately determinative of admission into the school.

News coverage of the cases revealed some sensitivity to points of conflict. Eleven of the 58 articles failed to note either point of conflict. The question of deference was discussed in 24 articles, while the question of treating students as a class was referenced in 35 articles. Both points of conflict were discussed in only

[370] Determining whether or not an article reflected a consideration of these principles is a subjective task. Whenever possible, philosophical expressions offered by various sources for the articles served as the basis for indicating that a principle was referenced. At other times, the statement of particular implications of the Court's decision was a basis. For example, discussions about a particular outcome on future minority enrollment at Michigan raised the principle of equality of access. In contrast, statements about the unfairness of being judged on the color of one's skin was marked as reference to the right to individual consideration.

22 of the articles, despite their clear relevance within the legal dispute. Although citizens should have understood that issues of equality and individual treatment were at issue, the news coverage generally failed to explain why questions of equality and individual consideration were in conflict.

An example of the troubling lack of an ethical context involves the predicted impact of the rulings. Although the Center for Individual Rights was clearly pushing for a wholesale ruling that all race-based classifications were unconstitutional, the majority of the Court clearly was not interested in that sort of outcome. Nevertheless, the news coverage tended to suggest that *all* forms of affirmative action were at risk. While technically true, if only because of the Court's penchant for surprise rulings, that overly dramatic positioning distorts the narrowness of the issue while, ironically, allowing successive litigants to argue that the Court's decision was actually broader. This same pattern occurred in the wake of *Brown v. Board of Education*, which was topically limited to the desegregation of elementary school students in public schools. Successive cases used *Brown* as a basis for desegregating all types of public institutions, many of which had nothing to do with elementary education. To some degree, the media coverage of *Brown* assist those successive litigants in arguing that *Brown*'s holdings extended well beyond the context of elementary school education.

In covering *Gratz* and *Grutter*, the newspaper reporters' failure to provide a context for the state's right to use race-based classifications in higher education admissions distorts the Court's fairly-narrowly written decisions. Reminding readers of the basic points of conflict may not seem like cutting-edge journalism. Nevertheless, citizens need to understand why conflicts between various principles of justice exist before they can evaluate the Court's ultimate decision. The consequence of news coverage that reports on abstract principles of justice, while ignoring the underlying points of conflict, is a confused public capable of over-reading the Court's decision as a rejection of individual consideration.

4. Deferential Coverage Lacking a Healthy Dose of Cynicism

The fourth lesson derived from media coverage of *Gratz* and *Grutter* is that citizens might be less skeptical about legal disputes than we normally assume. Recalling that Capella and Jamieson argued that media framing of a news event can influence readers' attitudes, the results of this study suggest that legal reporting is framed quite differently than political campaign reporting. The result might be a less cynical audience that lacks the capacity to critically assess the operation of the Legal system.

As described earlier in this Chapter, heavy use of strategic frames,[371] which emphasize the tactical and political purposes of actors, can lead to cynical attitudes about politics. Issue-framing[372] tends to avoid focus on the gamesmanship of political campaigns, focusing instead on the substantive issues in dispute. While there is no evidence that a focus on issue framing improves citizen's overall

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[371] The following excerpts are examples of strategic framing:
Robert Sedler, a Wayne State University law professor and expert in affirmative action, said the decision is a victory for U-M. "This is a big defeat for CIR [Center for Individual Rights], and it's a big win for affirmative action," he said. "Even if U-M's policy was unconstitutional before, it's constitutional now." (*Detroit Free Press*, Dec. 14, 2000)

The two cases [Gratz and Grutter] were expected to go to trial this fall, but several activist groups recently succeeded in claiming "intervenor" status. Their intervention amounts to a statement that they don't trust U-M to fight as hard as it might to protect preferences. They are now entitled to an evidence-gathering process that could postpone the trials for up to a year. (*Detroit Free Press*, August 2, 1999)

[372] The following excerpts are examples of issue framing:
For a black student who applies to the University of Michigan, a 3.0 high school grade point average is worth the same as a comparable white applicant's 3.5. This demonstrable minority bonus is emerging as a central issue in a legal challenge to the principle that whites and minorities should be treated differently because society values diversity. (*Chicago Tribune*, Dec. 11, 1997)

In the main opinion of the decision upholding the system for law school admissions at Michigan, O'Connor wrote, "When race-based action is necessary to further a compelling government interest, such action does not violate the constitutional guarantee of equal protection . . . "
She said that was true provided there is a compelling state interest in the goal of the affirmative action plan and that the system used is tailored narrowly and considers race as one among a variety of factors. She said the law school system met those standards, and the court could not second-guess the university's position that a "critical mass" of minority students was an important element in providing students full preparation for legal careers. (*Milwaukee Journal Sentinel,* June 24, 2003)

understanding of the political process, there is a marked reduction in cynical attitudes.

A surprising result of this study is that, unlike political reporting, strategic framing was not a predominant part of the news coverage frames. The predominant framing orientation used by news media in covering the *Gratz* and *Grutter* cases was issue framing. Over 75 percent of the 168 total frames were issue-oriented. The only deviations to this pattern occurred early in coverage of the *Gratz* suit. This overall pattern is surprising, given that a pilot study on media coverage of *Hopwood* revealed a more strategic framing orientation.

Upon closer reflection, the prevalence of issue-orientated framing may not be an aberrant result, but a reflection of legal reporting norms. Strategic framing is likely to be present when the controversy is understood as a competition for political gain. The Michigan cases clearly did not fall along any traditionally defined political lines. President Bush's intervention in the case is instructive. Although he claimed publicly that he opposed affirmative action, the actual amicus curie brief filed by the Department of Justice was more concerned with arguing that Michigan did not avail itself of alternative approaches.[373] In addition, the arguments of military generals and corporate chief executive officers also obscured traditional ideological divisions.

The early presence of strategic references in 1997 is also explained by another fact. The *Gratz* and *Grutter*plaintiffs were recruited when a conservative Michigan state representative sent out a public call for white students denied admission by the University.[374] Although referenced in the initial coverage of the lawsuits, the recruitment of the plaintiffs was largely left uncommented upon in stories of the later appellate decisions. This example, along with the failure to

[373] Stohr, 241-43.
[374] *Id.* 45-47. Stohr notes that the CIR was especially pleased that two of the three final plaintiffs were women, capable of countering the image of "angry white men." *Id.* 49.

cover the standing argument and the 25 year time limit argument, suggests that the lack of strategic framing is not because of a paucity of topics.

A final reason for reduced strategic framing may be explained by the bolstered credibility of the Center for Individual Rights ("CIR"), the Washington, D.C. public interest law firm that financed the plaintiff's cases. In *Hopwood* and in other earlier efforts, CIR was an unknown political commodity. At the time, the group's efforts to argue that one of the nation's leading public law schools was applying unconstitutional admission standards was greeted with a sense of skepticism. With the success in *Hopwood*, CIR's claims that affirmative action is unconstitutional gained some degree of credibility, leading to more issue-orientated framing.

Another finding that is related to media attitudinal framing involves the timing of the coverage.[375] Specifically, newspapers tended to focus only on the cases when significant legal actions (like the filing of the lawsuit or an appeal) or a court action occurred. Initially, this study only tracked three newspapers: the *New York Times*, the *Washington Post*, and the *Detroit Free Press*. The initial review of articles from this sample revealed some gaps in coverage. For example, only the *Free Press* offered daily coverage of the trials in *Gratz* and *Grutter*. The larger newspapers only reported on the results. In an effort to capture a broader range of articles, additional sources were added. The *Detroit News*, another local paper, had fairly comprehensive coverage.

Arguably, one of the distinctions between traditional political reporting and legal reporting is volume. Political campaigns actively seek to generate "news" through staged media events. In contrast, a legal dispute typically makes news during the progress of a case. The distinction may simply be that legal reporters are less cynical about their subjects because they have not fully exhausted them. It

[375] Mikhail A. Alexseev and W. Lance Bennett. "For Whom the Gates Open: News Reporting and Governmental Source Patterns in the United States." *Political Communication* (1995) 12: 395-412.

is worth pondering whether additional intensive legal reporting would result in overly strategic reporting.

A final finding worth noting here relates to the prevalence of narrative frames used within the *Gratz* and *Grutter*coverage. Narratives are an important story-telling tool for journalists, especially when the subject matter of a story is abstract or complicated. In this study, narrative frames were used largely to personify individual participants in the cases and to present the complexity of the various issues involved in the case.

As the following example from the *Detroit News* demonstrates, a relatively brief narrative can highlight issues of class, gender, and urbanity that are part of the affirmative action debate:

> From her 47th floor office at the Jenner & Block law firm, Lisa Scruggs can see over the city -- its skyscrapers, crawling traffic and the sailboats on Lake Michigan. It's from this office -- and the clout that comes with working at a prestigious firm -- that the 32-year-old lawyer is influencing the Midwest's urban center below, from protecting jail inmates to mentoring middle school girls.
>
> Just ask Allyce Seales, a bright 17-year-old junior with a goal of becoming a forensic scientist, but who would rather listen to hip-hop than think about her last year of high school. Scruggs is her mentor. "I know she's going to convince me to come back. She always does," Seales said between classes at the all girls charter school that Scruggs co-founded three years ago.
>
> Scruggs, an African-American and 1998 graduate of the selective University of Chicago law school, says she wouldn't be a successful trial lawyer -- and role model to hundreds of young school girls -- if not for affirmative action policies now under review by the U.S. Supreme Court.[376]

Each of the plaintiffs, aided by a coordinated public relations campaign, received similar narrative profiles that elevate the dramatic quality of their case.

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[376] *Detroit News*, June 16, 2003.

Most of the concerns raised in this study have related to context. Readers lack a sense of the cultural, ethical, or strategic context in which the legal disputes are grounded. In the absence of such contexts, readers may be tempted to draw too much from the isolated narratives meant only as illustrations. There is no reason to believe that every minority law school applicants will be as successful or civic conscious as Lisa Scruggs. Likewise, the plaintiffs' arguments should not be any stronger based on their scholastic success because the underlying issue is about what standards the State of Michigan might use in creating an undergraduate or law school class. Narratives certainly have a place in all forms of reporting, but not as a substitute for important contextual points.

D. Conclusions about Potential Future Hypotheses

In this Chapter, I have argued that rhetorical scholars ought to include a media analysis as part of a broader understanding of the relationship between citizens, their Legal system, and the Law. An analysis of media coverage surrounding the *Gratz* and *Grutter* litigation reveals a general problem with context: some arguments are overemphasized; some cultural aspects of the Legal system are relatively unexplored; and the basic principles of justice in conflict are discussed in a vacuum without regard to the context of the clash. We have also discovered that despite the strong political and ideological overtones of the underlying issues, the media coverage is not nearly as strategically-framed as typical political stories. The consequence in sum of all of these findings is that citizens are getting a distorted view of the judicial proceedings in *Gratz* and *Grutter* and therefore may not be able to weigh that outcome in any deliberative fashion.

The Legal system of the United States is almost completely reliant on the cooperation of its citizens in order to be effective. If there are possible media trends that impact the willingness of individual citizens to continue to be cooperative, the very essence of the American legal order is threatened. Americans have tended to support their judicial institutions, even when the prevailing

jurisprudence does not necessarily meet their individual self interest.[377] Without paying close attention to the type of media and popular influences that impact the public citizen's perception of the Legal system, the loss of legitimacy, if that outcome does happen, may be very difficult from which to recover.

A closer examination of the Legal system and media might yet bear out Ericson's claim that the two systems are nearly interchangeable. If judicial elections become more prevalent, there may be little reason to assume that the Legal system and the Media will not be an intertwined as the rest of the political world.[378] Media is likely a permanent part of the Law's relationship with the individual citizen. Further research into legal rhetoric demands some attention be paid to media coverage, [379] if we expect to achieve a full understanding of the communicative force of any legal system and the role of the citizen in determining what should count as Law.

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[377] Jaros, Dean and Robert Roper. "The U.S. Supreme Court: Myth Diffuse Support, Specific Support, and Legitimacy." *American Politics Quarterly* (1980) 8: 85-105.

[378] Judicial elections and judicial confirmation hearings are arguably becoming indistinctive from each other. Pamela Shoemaker and Stephen Reese. *Mediating the Message: Theories of Influences on Mass Media Content*. White Plains, N.Y.: Longman, 1991; Joseph D. Kearney, and Howard B. Eisenberg. "The Print Media and Judicial Elections: Some Case Studies from Wisconsin." *Marquette Law Review* (2002) 85: 593-778; Mark Silverstein *Judicious Choices: The New Politics of Supreme Court Confirmations*. New York: W.W. Norton, 1999.

[379] One recent study focused on the media exposure of Justice Hugo Black when his ties to the Ku Klux Klan were revealed. Martin Carcasson and James A. Aune, "Klansman on the Court: Justice Hugo Black's 1937 Radio Address." *Quarterly Journal of Speech* (2003) 89: 154-70.

Chapter VI: Conclusion

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.[380]

W.H Auden's notion of Law maybe somewhat profane but it does suggest that the Law escapes easy definition. Is Law too complicated for average citizens to understand? The central question posed by this dissertation has been, given the complexity of the modern Legal system, can citizens be expected to be effective critics of their society's notion of Law? If so, what role can rhetorical scholarship play in the effort? Following Hanns Hohmann's call for new approaches to scholarship in legal rhetoric that are grounded in civic awareness,[381] I have argued that our rhetorical notion of Law has at least three dimensions (the Legal, the Law, and the Media) that combine to inform citizens about legal texts and principles of justice. Through an examination of *Gratz v. Bollinger*and *Grutter v. Bollinger*, we learned that citizens may be receiving some highly distorted and incomplete information.

In this final chapter I discuss the broader implications of the findings of the analysis found in Chapters Three, Four, and Five. These three chapters contained independent analyses of the following questions:

(1) The Legal System: How is the legal system constituted in the text?
(2) The Law: What principles of Law are in conflict in the text?
(3) The Media: What can citizens learn from media coverage of a text?

Each of the following sections will note limitations to this study, offer suggestions for practical implementation of the findings, and speculate about future research.

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[380] W.H. Auden, *Collected Poems*, London: Faber, 1976, 208.
[381] Hohmann (1998).

A. The Legal System: How is the Legal System Constituted in the Text?

Chapter Three described the Legal system as a forum of legal dispute resolution that contains both architectural and cultural dimensions. These two dimensions reveal the fact that a legal system is both a matter of thoughtful design as well as a living space. It is too easy to forget that the Legal system is "lived in" by various judges, advocates, and even participants just as much as any other social forum.

I specifically noted that the architecture of the Court's decisions in *Gratz* and *Grutter*was highlighted by references to the variables of *structure* and *voice*. Structure was represented by the notion of judicial precedent, particularly in regards to *Regents v. Bakke*, the Court's last major decision on affirmative action in higher education. Voice was represented by the Court's deference to the First Amendment right of educators to determine how best to assemble a diverse classroom. Both of these architectural features suggest that a rhetorical design is present in the Court's decisions, understanding an appreciation for orderliness, predictability, and restraint.

The architectural implications of the *Gratz* and *Grutter*rulings were undoubtedly on the justices' collective conscience. However, the difference may have been something grounded in the cultural context of the case. Nearly a year after *Gratz* and *Grutter*were decided, Justice John Paul St evens gave a remarkable speech in which he offered his explanation for the Court's decisions. Referring to his personal notes of the conference in which *Gratz* and *Grutter*were debated, Stevens suggested that the military and CEO amicus briefs may have pulled the day. Stevens recalled thinking that nine justices would be hard pressed to ignore the "accumulated wisdom of the country's [military and business] leaders."[382]

[382] The speech is remarkable largely because the deliberations of the Court are usually kept confidential. At conferences, only the justices are permitted to enter the conference room. The

Stevens' comments strongly indicate that the Court's decisions also reflected a broad spectrum of cultural considerations, ranging from the Court's internal culture to the broader cultural relationship between the Court and society. This conclusion would run contrary to the notion of a Court far removed from public or societal influence.

The intracultural variable for this study was the discussion over the meaning of Justice O'Connor's 25 year limit. Whether viewed as an absolute ruling or an aspiration goal reveals much about the various attitudes of the Justices to the Court's proper role. If viewed as an absolute rule, the 25 year limit becomes a judicial invention or policy implementation. On the other hand, a permissive standard suggests a Court that reacts to prevalent social norms. Only time will tell which intracultural description best suits the Court, but arguably either description grants justices some degree of freedom to be "activist." The absolute rule is the Court's rather arbitrary implementation of a standard whereas the permissive standard shows a Court willing to bend to current social attitudes.

On the intercultural side of the cultural spectrum, the *Gratz* and *Grutter* cases highlighted the use of the military school metaphor. The military school metaphor represents an attempt by both sides of the debate to offer a transcendent analogy to outside audiences. The use by Thomas and Scalia harkens back to the Court's earlier decision regarding the Virginia Military Institute. Social conservatives wishing to preserve state-funded same sex education likely found that decision to be upsetting. The majority aimed for a different conservative audience, however, in raising national security issues by noting the importance of race-classifications to a diverse officer corps. The success of the majority's approach might offer an interesting interpretation of modern conservatism.

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newest justice handles tasks like answering the door and relaying messages from outsiders. For details of Stevens' speech, see Stohr, 288.

The media analysis in this study suggested that the cultural dimensions of the cases were underplayed by the newspaper reports. In hindsight, perhaps the cultural contexts of legal disputes, incorporating both the intracultural and intercultural dynamics of the Legal system, are more important than the architectural features, such as structured reasoning or precedential authority, features so often associated with legal reasoning. One suspects that the cultural context gives judges the rhetorical space to act as legal thinkers. As Justice Stevens' observations on the Court's conference for *Gratz* and *Grutter*suggests, the intervention of the military and business leaders made it difficult for the justices to simply apply legal doctrine without considering the practical implications of the ruling. Whether this same dynamic applies in other cases remains to be seen.

1. Limitations of the Legal System as a Rhetorical Conception

Two limitations weigh on both the theoretical conception of the Legal system propounded in this study as well as the application of that model to the Michigan cases. First, this study is primarily about the U.S. legal system. Despite my efforts to take as universal a view as possible, there are plainly some cultural differences between various legal systems that may have an impact on the way citizens interact with their judicial tribunals. Even within the U.S. legal system, there are significantly different experiences for individuals, depending on the particular conflict, the disputants, and the forum.

A second limitation with the notion of the Legal system presented in this dissertation is the assumed relationship between the average citizen and the Legal system. This dissertation assumes that individuals learn about their Legal system through either direct contact or through mass media. This assumption deemphasizes the many other ways in which cultural knowledge can be transmitted, even in a mass media information age. For example, mass media may portray prisons in a generally homogenized manner. However, a citizen living

within an African-American culture may learn of other portrayals of prison life through various cultural networks within an African-American community. We also do not understand how citizens deal with conflicting cultural knowledge about legal rules.

Finally, the emergence of private adjudication forums such as arbitration or private courts demonstrates the application of aspects of a Legal system to a situation that may not reflect a communal understanding of Law. In that case, these private Legal systems may not reveal the same sorts of historical, architectural, or cultural dimensions as public-oriented Legal systems. Nevertheless, the increasing presence of these private legal forums may still affect individual perceptions of the "public" legal system.

2. Implications for Future Rhetorical Studies on the Legal System

We hardly need to recommend more analysis of the legal system. Lawyers already produce thousands of well informed analyses every year. However, traditional legal doctrine tends to focus on legal architecture. What may be missing is a focus on the cultural spectrum and, in particular, the "indicia" of culture. By "indicia" I mean the cultural references used by judicial authors intended to convey a particular relationship between the legal doctrine at hand and a daily existence. In *Gratz* and *Grutter*, the use of the military school metaphor was revealing because it suggested two separate perspectives on the broader cultural relevance. In that respect, all Legal systems are grounded by an internal set of cultural indicators that may or may not impede the truth seeking and deliberation functions of the judiciary. When legal texts are read without cultural context, then they are in danger of being distorted. It seems especially nonsensical to treat cultural references as trivial, merely illustrative, or colorful when the judicial authors obviously intended the references to carry some sort of meaning.

A full understanding of the cultural context of a Legal system will require greater collaboration between rhetorical scholars and legal scholars, practicing attorneys and other legal professionals, or other participants in the Legal system. As an example, Clarke Rountree has repeatedly implored rhetorical scholars to familiarize themselves with distinctive elements of judicial rhetoric. Rountree's calls are to be heeded if rhetoric scholarship is to effectively critique abusive or ineffective rhetorical techniques used by judges. However, similar attention must be directed towards some of the other participants—such as criminal defendants, expert witnesses, jury consultants, and legal advocates—in the Legal system in order to provide a full accounting of the cultural dimensions of the system.

Two lines of future research are recommended. First, rhetorical scholars should make a concentrated effort to look for generic elements in the structural legal analysis produced by legal professionals. More than merely producing a catalogue of legal argumentative forms, this effort would attempt to offer a model for criticizing the architecture of a legal opinion. Ideally, such a critical model would not require the critic to be an expert in the legal subject matter in order to assess the strength of the judicial opinion. A good first step in this effort would be to catalogue generic elements of various types of legal texts, from judicial opinions to cease and desist letters. Rhetorical scholars need not be legal experts to assess generic elements of a case.[383]

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[383] Scholarly and media coverage of Supreme Court confirmation hearings strongly support the idea that rhetorical scholars should not be overwhelmed by legal discourse. Michael Chomiskey, "Not Guilty: The News Media in the Supreme Court Confirmation Process." *Journal of Law and Politics* (1999) 1: 1-36; Masugi, Kenneth. "Natural Right and Oversight: The Use and Abuse of "Natural Law" in the Clarence Thomas Hearings." *Political Communication* (1992) 9: 231-250; Jill Mayer and Jane Abramson, *Strange Justice: The Selling of Clarence Thomas*. Boston: Houghton Mifflin, 1994.
Trevor Parry-Giles has been especially active in this area. "Property Rights, Human Rights, and American Jurisprudence: The Rejection of John J. Parker's Nomination to the Supreme Court." *Southern Communication Journal* (1994) 60: 57-67; "Character, the Constitution, and the Ideological Embodiment of 'Civil Rights' in the 1967 Nomination of Thurgood Marshall to the Supreme Court." *Quarterly Journal of Speech* (1996) 82: 364-82; "For the Soul of the Supreme

The second line of research attends to the cultural dimensions of Legal systems. Rhetorical scholars should utilize a diversity of qualitative analytical techniques to better understand the culture of the American courtroom and the cultural connections between popular culture and the internal culture of the legal world. Ethnographic studies of courtrooms, law firms, judicial chambers, and other sites of legal text might reveal more information about the intracultural dimensions of the Legal system. Additionally, examinations of popular culture references to the Legal system may shed light on the intercultural connections. The intercultural analysis might even include direct studies of individual citizens expressing their understanding and criticism of their Legal systems. Much of this research already exists in some form in anthropological or cultural legal studies. The challenge for communication scholars is to understand those findings within the standpoint of a communicative context.

B. The Law: What Principles at Law are in Conflict in the Text?

The rhetorical parallels between legal and religious discourse are not surprising given the explanation in Chapter One of the Church's key role in preserving Roman legal codes. It is tempting when developing a rhetorically-based notion of Law to equate Law with Divinity or Sovereignty and the Constitution as a form of Holy Scripture. However, while modern U.S. citizens do show a religious zeal for the broad concept of constitutional principles, there remains a sense that U.S. citizens are quite comfortable with discrete constitutional violations geared towards principles of justice or fairness. *Gratz* and *Grutter*are essentially cases about when the State of Michigan can violate the constitutional right to equal protection. The Fourteenth Amendment can be violated, but only for the right

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Court: Progressivism, Ethics, and 'Social Justics' in the 1916 'Trial' of Louis D. Brandeis." *Rhetoric & Public Affairs* (1999) 2: 83-106; *The Character of Justice: Rhetoric, Law, and Politics in the Supreme Court Confirmation Process*. Lansing, Mich.: Michgan State University Press, 2004.

reasons. For the time being, affirmative action in education for the sake of classroom diversity appears to be among the right reasons.

If Law is more than the Constitution, what is it? This study proposes that Law represents a discrete rhetorical pool of principles of justice and fairness that are approved by a rough societal consensus. The Constitution contains several principles of justice and fairness that are clearly within the Law. However, there are extra-constitutional principles of justice, such as those expressed by the majority in *Grutter*, which can trump constitutional provisions under certain circumstances. The key to making an effective rhetorical critique of the Law is to identify both the principles of justice at play and the points of conflict between multiple principles embedded in the legal dispute.

In *Gratz* and *Grutter*, the principles in conflict concerned the clash between the individual consideration that any college applicant expects and the equality of access to higher education. For the average citizen, these points of conflict are more than merely informative detail. Instead, the points of conflict provide the context necessary to understand how the Court can preserve the use of race-classifications in some cases and not in others. To suggest that the Michigan cases were about affirmative action in higher education (a description that emphasizes the location of the conflict) is just as overly simplistic as to suggest that the cases reflect general concerns about principles of justice. Both the principles and the points of conflict must be considered together to create a meaningful context.[384]

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[384] Rhetorical scholars have recently been interested in John Quincy Adam's *Amistad* speech in which he successfully argued for the freedom of two dozen African slaves. Part of their combined excellence is the emphasis on the specific legal points of conflict that made the case so remarkable, yet not historically out of step with the jurisprudence of the day. Sean Patrick O'Rourke, Cultivating the 'Higher Law' in American Jurisprudence: John Quincy Adams, Neo-Classical Rhetoric and the 'Amistad' Case, *Southern Communication Journal* (1994) 60: 33-43; Jerald L. Banninga, John Quincy Adams on the Right of a Slave to Petition Congress," *Southern Speech Communication Journal* (1972) 38: 151-163; A. Cheree Carlson, John Quincy Adams' 'Amistad Address': Eloquence in a Generic Hybrid,"*Western Journal of Speech Communication* (1985) 49:14-26; Marouf Hasian Jr. & A. Cheree Carlson, Revisionism and Collective Memory: The Struggle for Meaning in the 'Amistad' Affair," *Communication Monographs* (2000) 67: 42-62.

For example, Justice Thomas' dissent offers a meaningful case study of how principles in conflict elevate *Gratz* and *Grutter* above a basic constitutional argument. Even though Justice Thomas was on the losing end of the constitutional argument, he still managed to argue effectively that Americans should eventually remove the classroom diversity justification from the pool of arguments that are lawful. His dissent evokes logical and personal appeals about the wisdom of permitting racial discrimination merely to provide a "balanced" classroom. His arguments reflect the conclusion that Law may be more expansive a concept than the various legal systems used to resolve conflicts, but there is still a gap between the agreement of the public on a basic principle of justice and the decision of an individual to comply with any particular aspect of a legal system.

Despite my earlier criticism of using religion as a metaphor for Law, there is at least one potential model for rhetorical legal criticism that incorporates religious metaphors. Sanford Levinson offers as a metaphor a "catholic" and "protestant" position on constitutional doctrine.[385] Levinson is not describing Catholic or Protestant beliefs but rather uses some broad theological generalizations as metaphors for two distinct models to constitutional interpretation. The protestant believes that the source of doctrine is the constitutional text itself and the text can be properly interpreted by individuals. In contrast, the catholic view is that the source of doctrine is the text of the Constitution plus unwritten tradition which is ultimately dispensed by the Supreme Court. Levinson suggests that one might be a protestant on doctrinal issues but a catholic on interpretation issues.[386] Although only proposed as a metaphor, Levinson's construction may yet suggest a broader connection between the rhetoric of religion and the rhetoric of law. In particular, parallel analyses of authority in religious and legal texts, perhaps applying some of the same media variables used

[385] Levinson, *Constitutional Faith*. 28.
[386] *Id.* 29.

in this study, might reveal important differences and similarities between the talk of judges and ministers.

1. Limitations of Law as a Rhetorical Conception

Of the three stages of the analysis presented in this dissertation, the analysis of the Law is the least developed. As a rhetorical notion, Law is perhaps inherently difficult to define with any precision. Additional refinement is necessary to fully develop the concept of Law as both a rhetorical theory as well as a jurisprudential theory. The central limitation is in the use of legal discourse as a general rhetorical expression. Jack Balkin has argued that the development of new technologies in legal research will reinforce what he sees as the common law's "fondness for conceiving, categorizing, and imagining law in terms of topics."[387] With what appears to be a rapidly expanding production of legal texts (and topics), legal rhetorical scholars have plenty of artifacts to research. But Balkin also warns that, in performing rhetorical criticism of law, scholars should be careful to note their own topical or heuristic-driven limitations.[388] When applying non-legal paradigms, such as rhetorical theory, to legal language, or vice versa, Balkin notes that "we subtly change the nature of legal argument and legal analysis."[389] Because this study is a rhetorical criticism at heart, Balkin's concerns carry less weight. However, in future studies that emphasize more quantitative approaches to studying legal language, the danger of distorting meaning cannot be overstated.

A more technical limitation of this particular study is the emphasis on two companion cases. Principles of justice develop over time. Therefore, it may be rather unhelpful to use two contemporaneous Supreme Court texts, such as *Gratz* and *Grutter*, to make broad claims about such principles. Conversely, a

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[387] Jack M. Balkin, "A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason," in *Law's Stories: Narratives and Rhetoric in the Law* 211-224, eds. P. Brooks and P. Gewirth, New Haven: Yale University Press, 1996, n. 23.
[388] *Id.* 223-24 ("As the old saying goes, when all you have is a hammer, everything starts to look like a nail.").
[389] *Id.*

longitudinal study may obscure some of the cultural touchstones that are important to this analysis as well. Thus, a fully developed study might need to incorporate both situated understandings about principles of justice and historically grounded notions of justice. Tracking a limited line of cases might offer a compromise between these two approaches.

2. Implications for Future Studies on the Rhetorical Notion of Law

There are two practical implications for future research on the rhetorical notion of law. First, legal scholars may conclude that a different emphasis in legal education on case analysis might be necessary. One of the earliest skills taught in an American law school is the art of "briefing" a case, or providing a brief succinct description. Briefing tends to emphasize "holdings" and determinative facts over broader themes. As part of their training in briefing, law students might be encouraged to identify some of the principles at play in a given case and to locate the points of conflict.[390] The effort to reflect on some of the underlying philosophical aspects of a case might encourage legal professionals to view the case as more than an argumentative tool, but rather as a broader reflection of the prevailing issues in a particular matter.

Second, communication scholars interested in legal disputes must conversely become more familiar with existing legal research on rhetoric and communication issues. I have already suggested that the rhetorical notion of Law described here needs to be more adequately cross-evaluated against leading jurisprudential theories of Law. The professed personal relationship between individual citizens and Law remains unexplored in this study. More questions should be asked about how individuals view the Law and their relationship with the Law and the Legal system. Finally, the notion of Law as a projected ideal in mass

[390] This focus on principle-spotting reflects William L. Bennett's 1979 argument that any courtroom trial is essentially a rhetorical "transformation" of evidence into a broader rhetorical claim. "Rhetorical Transformation of Evidence in Criminal Trials: Creating Grounds for Legal Judgment," *Quarterly Journal of Speech* (1979) 65:311-323.

media demands further scrutiny. Because news media and fictional entertainment often adhere to fairly predictable generic patterns, it is reasonable to think that certain *tropes*of Law and justice are consistently replicated for the average media consumer.[391] A comparison between the Court's notions of Law and that which is expressed in various media forms would be useful. A similar consideration of Law as a topic of discussion by specific cultural communities is also warranted.

C. The Media: What can Citizens Learn from Media Coverage of a Text?

When discussing theories of legal and social legitimacy, both communication and legal scholars often make the mistake of not analyzing the means by which a citizen receives news of a legal decision. As an example, evaluating the U.S. Supreme Court's decision in *Bush v. Gore*, Theodore Prosise and Craig Smith argued in a 2001 article in *Rhetoric and Public Affairs* that the Court's violation of the "boundaries of the legitimate linguistic possibilities" had lead to a damaging of the ethos of the Court and the judiciary in general, and the Bush presidency. Their study, which evaluated the professed rationales offered by the *per curiam*, concurring, and dissenting opinions of the Court, concludes that, because of the Court's "inability to reach a consensus on a matter of such national import, the Court appeared craven and may have irreparably damaged its

[391] Rhetorical scholars have a veritable treasure chest of generic forms to examine in legal texts, from the dissent to the oral argument. Carol J. Jablonski, "*Aggiornamento* and the American Catholic Bishops: A Rhetoric of Institutional Continuity and Change," 9 *Quarterly Journal of Speech* 9 (1989): 1-16; Michael R. Hagan, "*Roe v. Wade*: The Rhetoric of Fetal Life." *Central States Speech Journal* (1976) 27: 192-99; Gayle Lewis Levison, "The Rhetoric of the Oral Argument in the '*Regents of California v. Bakke*'." *Western Journal of Speech Communication* (1979) 43: 271-77; Don R. LeDuc, "Free Speech Decisions and the Legal Process: The Judicial Opinion in Context," *Quarterly Journal of Speech* (1976) 62:279; Henry L. Ewbank, "The Constitution: Burkeian, Brandeisian, and Borkian Perspectives." *Southern Communication Journal* (1996) 61: 220-32; Milton Dickens, and Ruth E. Schwartz, "Oral Argument Before the Supreme Court: *Marshall v. Davis* in the School Segregation Cases." *Quarterly Journal of Speech* (1971) 57: 32-43.

credibility."[392] Regardless of how one feels about the result in *Bush v. Gore*, Prosise and Smith's conclusion makes the crucial mistake of assuming that citizens read the Court's decisions in the same way as interested scholars, rather than through the filter of media and personal discussions.

When talking about the Court's public legitimacy, one must ask what the public learned from the decision. Although the authors cite a public opinion poll from the day of the Court's rendering of its final decision, there is no effort to examine how citizens came to understand the Court's ruling. Their identification of the rhetorical contradictions within and between the various opinions and previous judicial writings is thus presented out of context. Until an analysis of the public's "reception" of the Court's ruling can be better understood, Prosise and Smith's analysis only really touches on the internal legal discourse of the Court (and the broader American legal system, up to a point). What citizens really know about the case is unknown, as is their ability to evaluate the decision in light of the broader principles of justice embedded in their rhetorical conception of Law.

Largely because of my frustration with studies similar to Prosise and Smith, the final part of this study focused on the media coverage of the Court's decisions in *Gratz* and *Grutter* The main point of the analysis was to urge rhetorical scholars to consider the impact that media plays in disseminating important information about judicial texts. Not surprisingly, the media covered some arguments more intensely than others. The media also tended to focus on architectural issues within the Legal system and principles of justice in the Law. What was missing was the relative cultural indicia for both the Legal system and the Law. Although the military academies' use of race-classifications was very important to the Court's decisions, the media tended to underplay that argument, often favoring Justice Thomas' intensely personal dissent in *Grutter*

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[392] Theodore O. Prosise and Craig R. Smith, "The Supreme Court's Ruling in *Bush v. Gore*: A Rhetoric of Inconsistency." *Rhetoric & Public Affairs* (2001) 4:605-632, 632. In the second the last paragraph, the authors state all of the justices appeared guilty of "self-serving political motives." *Id.*

An important finding of this study was the heavy reliance on issue framing by the news media. Because issue framing tends to emphasize substantive matters in a given political conflict, this approach would seem to be an encouraging sign that judicial reporting is not nearly as cynically-oriented as political campaign reporting. However beneficial the emphasis on issue-framing might be, there may be a problem when a judicial decision on a plainly political issue offers no strategic framing to speak of. When the judiciary's political activities are treated with more deference than the activities of other political actors, citizens are presented with an imbalanced, and possibly distorted, understanding of the issue and the court's actions.

The results of this study may simply be evidence that news media do not equate judicial decisions with political events. Nevertheless, *Gratz* and *Grutter* certainly represented an important political issue. A more complete answer may be that reporters are like most citizens, being relatively unwilling to question the legitimacy of the Court's rulings. Given the damage that strategic framing can do to an institution or its members, journalists may feel some trepidation applying that frame to a venerated institution like the Supreme Court.[393] Perhaps this aberration should be welcomed by scholars that are concerned by the lack of civic engagement, suppressed in some part by excessively cynical attitudes towards politics. At the same time, a little cynicism towards the judiciary might be in order from time to time.

The increase in the production of legal texts is not only a challenge for rhetorical legal scholars. The speed and volume of the production of legal texts challenges the capacity of the average citizen to monitor the work of the Legal system. As Balkin describes, with each legal text comes a proliferation of "legal

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[393] Stephen D. Reese argues that the notion of objectivity tends to force even the most cynical reporters to limit their criticism of government. "The News Paradigm and the Ideology of Objectivity: A Socialist at the Wall Street Journal." *Critical Studies in Mass Communication* (1990) 7: 390-409.

truth and legal reality" that directs how people live their lives, shapes their imaginations, and potentially smothers competing "truths or realities."[394] I have described these truths in Chapter IV as the principles of justice or fairness that comprise the Law (as abstracted). Balkin's concern is that citizens are likely to allow legal discourse to structure moral behavior, much like computer software structures one's use of computer technology: "Law is at its most powerful when it is most cultural, when it is most invisible."[395] Yet my assumption is that U.S. citizens would not like their legal system to become so embedded into their culture and everyday life that the "legal perspective" becomes the common perspective.

In order for any legal system not to become completely "invisible," citizens will rely on media coverage of legal disputes. To that end, news media are presently unprepared to report fairly and fully on legal disputes. Fortunately, the problems are surmountable. First, media organizations need to be proactive in legal reporting. This study has made apparent a trend in reporting on legal cases only when "significant" litigation events occur. Media need not wait for the pageantry of a courtroom appearance to inform the public about the issues in the case. As Bob Woodward and Carl Berstein's reporting in Watergate aptly demonstrated, reporters are fully capable of newsgathering in the absence of public hearings. In fact, much of the importance of a story is often lost by the time a hearing comes to pass. For example, the *New York Times* "scooped" the story about the initial filing of the undergraduate lawsuit because the Center for Individual Rights offered an exclusive. However, reporters need not have waited for the entirely predictable lawsuit.[396] They could have noted that CIR's public

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[394] Jack M. Balkin, "The Proliferation of Legal Truth," *Harvard Journal Law & Public Policy* (2003) 26:5-18, 5-6.
[395] *Id.* 113.
[396] Indeed, Stohr reports that when the plaintiffs filed the undergraduate lawsuit at the federal district courthouse in Detroit, one the court clerks said, "We've been waiting for this." Stohr, 57.

recruitment of potential plaintiffs or Michigan's quiet revamping of its admission system and hiring of an elite Washington, D.C. law firm.[397]

1. Limitations Related to the Study of Law and Media

The media analysis in this study is limited in a number of methodological ways. First, my project has been descriptive, with no pretense of offering statistically-rigorous generalizations. Second, the focus on a limited sample of newspapers and news magazines cannot completely account for the means by which most Americans receive their legal news. Third, the reporting on this case dovetails with the Fifth Circuit Court of Appeals decision in the *Hopwood* case; hence, a full accounting of the media news coverage from that reporting would provide a more complete picture of what was being reported about affirmative action in higher education over the decade prior to the Michigan decisions.

A second limitation of this study is its exclusive focus on news media with no attention paid to popular entertainment media.[398] The prevalence of movies and television shows with legal related storylines, as well as law-specific programming, indicates that perhapsmost of the cultural information received by citizens does not come from reporting on Supreme Court decisions. Moreover, as noted previously, there is a general lack of attention to the interpersonal network of community members that often pass along information about the Legal system. These last two sources of information are not captured in this study. Nevertheless, I believe that

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[397] *Id.* 39, 48-50. Gratz, Grutter, and Hamacher were selected from over 200 applicants after a multi-stage screening process. Stohr reports that CIR was unable to sue the University's medical school for lack of an appropriate candidate. *Id.* 49.

[398] Rod Hart argues that television offers a completely different learning context than print media. Roderick P. Hart, *Seducing America: How Television Charms the Modern Voter*. Thousand Oaks, Cal.: Sage Publications, 1999. See also Shanto Iyengar, *Is Anyone Responsible?: How Television Frames Political Issues*. Chicago: University of Chicago Press, 1991. Likewise, nontraditional media forms may have a significant impact on citizen's perceptions of the Law and Legal system. Jack M. McLeod, "The Impact of Traditional and Nontraditional Media Forms in the 1992 U.S. Presidential Election." *Journalism & Mass Communication Quarterly* (1996) 73: 401-16.

the same basic tropes and rhetorical pressures that inform newspaper reporting are also at the heart of other news and fictional narratives.

A third limitation that pervades the entire study is a lack of appreciation for the popular viewpoint of Law and justice. It is difficult to assess how "popular" notions of justice differ from the notions found in legal opinions; it is difficult to view the official version as authoritative. The consequence, according to Garapon is that "authority no longer embodies real social relationships but cultural mythologies about those relationships."[399] Law becomes in popular culture "a 'normal' part of public conversation in the media, to be represented as well as obeyed and resisted," arguably without regard to the wisdom of such obedience or adherence. Rather than understanding the Legal system as a regulation of their behavior, people experience the law "as a form of knowledge they use to visualize themselves, their experiences and their place in the authoritative structure of society."[400] The failure to appreciate this fourth dimension (the popular law, perhaps) limits the full reach of this three-pronged approach to understanding legal rhetoric.

2. Implications for Future Rhetorical Studies in Law and Media

As one communication scholar has suggested: "the best antidote for a sophistic rhetor is a sophisticated rhetoree, and we had best get at the business of providing such an antidote."[401] Can news media provide an "antidote" to the distance between legal texts and the average citizen? I argue that news media can

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[399] Garapon, 204.

[400] *Id.* 224. See also Jeffrey P. Jones, "Forums for Citizenship in Popular Culture," 193-210, in *Politics, Discourse, and American Society: New Agendas*. (eds. R. P. Hart and B. H. Sparrow) Lanham, Md.: Rowman & Littlefield, 2001. I am also reminded of the importance of individual, private discourse in developing emergent rhetorical strategies. Law may begin in the disciplinary decisions of the private home. Lisa M. Gring-Pemble, "Writing Themselves into Consciousness: Creating a Rhetorical Bridge Bewteen the Public and Private Spheres." *Quarterly Journal of Speech* (1998) 84: 41-61; Jerry Frug, "Argument as Character." *Stanford Law Review* (1988) 40: 869-927.

[401] Gary L. Cronkhite, "Rhetoric, Communication, and Psychoepistemology," in *Rhetoric: A Tradition in Transition*. (ed. Walter R. Fisher), East Lansing: Michigan State University Press, 1974, 262.

provide citizens with the tools and information necessary to make critical evaluations of legal texts and particularly judicial decisions. Garapon similarly argues that news about law constitutes justice as the fulfillment of institutional needs and thereby helps legitimate the legal institution.[402]

The main problem with legal reporting is that citizens must relearn various features of the Legal system for every story. For example, any discussion about race-classifications requires some discussion about the strict scrutiny test. These reminders are helpful, but a waste of resources for the legal reporter. Instead, news media should strive for a model of legal reporting that provides updates on emerging decisions, but also features that contextualize the case, the legal standards at play, and some of the participants' strategic motives. In short, news reporting should evolve into a format that can inform citizens without becoming bogged down in the small nuances of legal procedures. If readers of *Sports Illustrated* can understand a story about baseball without fully understanding the concept of a balk or a pitcher's E.R.A., then surely citizens can learn about Supreme Court decisions (or other legal events) without needing a course in civil procedure. Reporting the architectural elements of the Legal system or merely the principles of justice fails to provide the readers with the necessary cultural context for understanding the broader issues.

In many respects, news magazines and some Supreme Court correspondents have already demonstrated the capacity to write about Law without writing only about the Legal system. However, this effort should be coming from local and regional newspapers reporting on local and regional legal decisions. The Supreme Court's opinions, while obviously important, represent only the smallest sliver of legal decisions produced in the United States. Citizens should be able to connect

[402] Garapon, 204

on an individual basis with the Law at play in every case, regardless of whether the matter is before the Supreme Court or the local justice of the peace.

D. Conclusion

This examination of what constitutes Legal rhetoric began as a response to Hohmann's call for an approach to legal rhetoric liberated from the trappings of the "dried-up and bleached-out nature of rationalistic academic discourse that is purged of explicit personal and affective elements and thus of any recognizable human context."[403] In recognizing and developing the rhetorical distinctions between the Law and the Legal system, this study is but the first step towards developing a body of scholarship on legal rhetoric that begins with a set of common assumptions. The challenge is to ensure that future scholarship on legal rhetoric does not fall prey to the pull of inaccessible language and jargon that already riddles legal discourse.

Another challenge facing scholars interested in legal rhetoric is the enormous energy required to fully evaluate legal texts, place them within their proper cultural and ethical contexts, and evaluate the average citizen's capacity to receive and understand the Legal system. This study references only a handful of the many scholarly efforts at understanding the phenomenon of legal rhetoric in the modern world. If any progress is to be made, scholars must begin the process of creating a set of interdisciplinary common notions. The Law/Legal distinction offers one such method of facilitating a common discussion among scholars using vastly different methodologies and artifacts. As Jack Balkin has noted, the Law is a difficult partner for interdisciplinary scholars, precisely because it is, at heart, more of a profession than an intellectual discipline.[404] The next textbook for legal

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[403] *Id.*

[404] Jack M. Balkin. "Interdisciplinarity as Colonization." *Washington & Lee Law Review* (1996) 53: 949-958.

communication will require careful thought so as not to ignore any of the many interesting strands that help comprise the study of legal rhetoric.[405]

However legal rhetorical scholarship evolves, Legal systems need the cooperation of citizens in order to be successful. Citizens need information and perspective from media in order to assess whether the Legal system's resolution of legal conflicts is ultimately satisfactory. Manuchehr Sanadjian provides an example in Iran of how an uninformed citizenry can unintentionally derail any efforts at systematic community justice.[406] Sanadadjian witnessed a public flogging of three village men for violating national Islamic laws against gambling, which was legal under village customs. The Islamic officials picked official witnesses and attempted to keep the rest of the villagers at a respectful distance. The criminals took their punishments with passivity and subversive silence, in contrast to the display of pain and anguish expected by the Islamic court. As a second beating was ordered, the crowd of villagers erupted in jubilant applause for the criminals' show of strength. Confused, the justice officers quieted the crowd with threats of punishment. The silent witnessing of a punishment expected by the Islamic court was a foreign concept to the villagers, who had no idea how to behave at such a public spectacle. Instead of a demonstration of justice, the court's actions seemed arbitrary and mean-spirited.

The clash between culture, legal rhetoric, and the Legal system described in this example is not terribly removed from American courtrooms filled with

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[405] Richard Rieke and Robert Stutman's previous efforts at putting the discipline in order, at least from the standpoint of organizing a textbook, heavily relied on argumentation as a central theme. Although it is clear that argumentation theory alone will not suffice to explain the various interactions between Law, Media, the Legal system, and the public citizen, their organizational scheme will continue to influence the presentation of the topic of legal communication to students in the future. Richard A. Rieke, "Argumentation in the Legal Process." In *Advances in Argumentation Theory and Research.* (eds. J. R. Cox and C. Willard) Carbondale, Ill.: Southern Illinois Press, 1982; Richard A, Rieke, and Robert K. Stutman. *Communication in Legal Advocacy*. Columbia, S.C.: University of South Carolina Press, 1990.

[406] Manuchehr Sanadjian, "A Public Flogging in South-western Iran: Juridical Rule, Abolition of Legality and Local Resistance," 157-183 in *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity*. (ed. Olivia Harris) London: Routledge, 1996.

uninformed or unimpressed parties. This dissertation began with a discussion about what the ancient rhetoricians Corax and Tisias might think about modern legal discourse. They might be most shocked by the willingness of citizens to tolerate a Legal system they can neither understand nor explain. W.H Auden's poetic depiction of the paradox of legal authority is more than mere cynicism. A rhetorical conception of "the Law," supported largely by the public's general acceptance of principles of justice, exists separate and apart from the Legal system of rules. The architecture or culture of the Legal system gives rule-makers like Auden's windbag of a jurist the capacity to resolve conflicts between principles of justice. "The Law is the Law," but only to a certain point. Sooner or later, the Law either becomes something revered and protected by citizens or it becomes a nuisance.

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Appendix One: Gratz v. Bollinger

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JENNIFER GRATZ and PATRICK HAMACHER, Petitioners v. LEE BOLLINGER et al.

No. 02-516

SUPREME COURT OF THE UNITED STATES

539 U.S. 244; 123 S. Ct. 2411; 156 L. Ed. 2d 257; 2003 U.S. LEXIS 4801; 71 U.S.L.W. 4480; 91 Fair Empl. Prac. Cas. (BNA) 1803; 84 Empl. Prac. Dec. (CCH) P41,416; 2003 Cal. Daily Op. Service 5362; 16 Fla. L. Weekly Fed. S 387

April 1, 2003, Argued
June 23, 2003, Decided

JUDGES: Rehnquist, C. J. delivered the opinion of the Court, in which O'Connor, Scalia, Kennedy, and Thomas, JJ., joined. O'Connor, J., filed a concurring opinion, in which Breyer, J., joined in part. Thomas, J., filed a concurring opinion. Breyer, J., filed an opinion concurring in the judgment. Stevens, J., filed a dissenting opinion, in which Souter, J., joined. Souter, J., filed a dissenting opinion, in which Ginsburg, J., joined as to Part II. Ginsburg, J., filed a dissenting opinion, in which Souter, J., joined, and in which Breyer, J., joined as to Part I.

OPINIONBY: REHNQUIST [*249]

OPINION: [**2417] [*249] Chief Justice **Rehnquist** delivered the opinion of the Court.

[***HR1A] [1A] [***HR2A] [2A] We granted certiorari in this case to decide whether "the University of Michigan's use of racial preferences in [*250] undergraduate admissions violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 USC § 2000d [42 USCS § 2000d]), or 42 USC § 1981 [42 USCS § 1981]." Brief [*251] for Petitioners i. Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court's decision upholding the guidelines.

I

A

Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian. Gratz, who applied for admission for the fall of 1995, was notified in January of that year that a final decision regarding her admission had been delayed until April. This delay was based upon the University's determination that, although Gratz was "'well qualified,'" she was "'less competitive than the students who had been admitted on first review.'" App. to Pet. for Cert. 109a. Gratz was notified in April that the LSA was unable to offer her admission. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999. Hamacher applied for admission to the LSA for the fall of 1997. A final decision as to his application was also postponed because, though his "'academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission.'" *Ibid.* Hamacher's application was subsequently denied in [***270] April

1997, and he enrolled at Michigan State University. n1

n1 Although Hamacher indicated that he "intended to apply to transfer if the [LSA's] discriminatory admissions system [is] eliminated," he has since graduated from Michigan State University. App. 34.

[*252] In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan [**2418] against the University of Michigan, the LSA, n2 James Duderstadt, and Lee Bollinger. n3 Petitioners' complaint was a class-action suit alleging "violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment . . ., and for racial discrimination in violation of 42 USC § § 1981, 1983, and 2000d *et seq.* [42 USCS § § 1981, 1983, and 2000d *et seq.*]" App. 33. Petitioners sought, *inter alia*, compensatory and punitive damages for past violations, declaratory relief finding that respondents violated petitioners' "rights to nondiscriminatory treatment," an injunction prohibiting respondents from "continuing to discriminate on the basis of race in violation of the Fourteenth Amendment," and an order requiring the LSA to offer Hamacher admission as a transfer student. n4 *Id.,* at 40.

n2 The University of Michigan Board of Regents was subsequently named as the proper defendant in place of the University and the LSA. See *id.,* at 17.

n3 Duderstadt was the president of the University during the time that Gratz's application was under consideration. He has been sued in his individual capacity. Bollinger was the president of the University when Hamacher applied for admission. He was originally sued in both his individual and official capacities, but he is no longer the president of the University. *Id.,* at 35.

n4 A group of African-American and Latino students who applied for, or intended to apply for, admission to the University, as well as the Citizens for Affirmative Action's Preservation, a nonprofit organization in Michigan, sought to intervene pursuant to Federal Rule of Civil Procedure 24. See App. 13-14. The District Court originally denied this request, see *id.,* at 14-15, but the Sixth Circuit reversed that decision. See *Gratz* v. *Bollinger*, 188 F.3d 394 (1999).

The District Court granted petitioners' motion for class certification after determining that a class action was appropriate pursuant to Federal Rule of Civil Procedure 23(b)(2). The certified class consisted of "those individuals who applied for and were not granted admission to the College of [*253] Literature, Science and the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission." App. 70-71. And Hamacher, whose claim the District Court found to challenge a "'practice of racial discrimination pervasively applied on a classwide basis,'" was designated as the class representative. *Id.,* at 67, 70. The court also granted petitioners' motion to bifurcate the proceedings into a liability and damages phase. *Id.,* at 71. The liability phase was to determine "whether [respondents'] use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution." *Id.,* at 70. n5

n5 The District Court decided also to consider petitioners' request for injunctive and declaratory relief during the liability phase of the proceedings. App. 71.

[***271] B

The University has changed its admissions guidelines a number of times during the period relevant to this litigation, and we summarize the most significant of these changes briefly. The University's Office of Undergraduate Admissions (OUA) oversees the LSA admissions process. n6 In order to promote consistency in the review of the large number of applications received, the OUA uses written guidelines for each academic year. Admissions counselors make admissions decisions in accordance with these guidelines.

n6 Our description is taken, in large part, from the "Joint Proposed Summary of Undisputed Facts Regarding Admissions Process" filed by the parties in the District Court. App. to Pet. for Cert. 108a-117a.

OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum [**2419] strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the University [*254] has considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits "virtually every qualified . . . applicant" from these groups. App. to Pet. for Cert. 111a.

During 1995 and 1996, OUA counselors evaluated applications according to grade point average combined with what were referred to as the "SCUGA" factors. These factors included the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an applicant's geographical residence (G), and an applicant's alumni relationships (A). After these scores were combined to produce an applicant's "GPA 2" score, the reviewing admissions counselors referenced a set of "Guidelines" tables, which listed GPA 2 ranges on the vertical axis, and American College Test/Scholastic Aptitude Test (ACT/SAT) scores on the horizontal axis. Each table was divided into cells that included one or more courses of action to be taken, including admit, reject, delay for additional information, or postpone for reconsideration.

In both years, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions outcomes based upon their racial or ethnic status. n7 For example, as a Caucasian in-state applicant, Gratz's GPA 2 score and ACT score placed her within a cell calling for a postponed decision on her application. An in-state or out-of-state minority applicant with Gratz's scores would have fallen within a cell calling for admission.

n7 In 1995, counselors used four such tables for different groups of applicants: (1) in-state, nonminority applicants; (2) out-of-state, nonminority applicants; (3) in-state, minority applicants; and (4) out-of-state, minority applicants. In 1996, only two tables were used, one for in-state applicants and one for out-of-state applicants. But each cell on these two tables contained separate courses of action for minority applicants and nonminority applicants whose GPA 2 scores and ACT/SAT scores placed them in that cell.

[*255] In 1997, the University modified its admissions procedure. Specifically, the formula for calculating an applicant's GPA 2 score was restructured to include additional point values under the "U" category in the

SCUGA factors. Under this new system, applicants could receive points [***272] for underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying (for example, men who sought to pursue a career in nursing). Under the 1997 procedures, Hamacher's GPA 2 score and ACT score placed him in a cell on the in-state applicant table calling for postponement of a final admissions decision. An underrepresented minority applicant placed in the same cell would generally have been admitted.

Beginning with the 1998 academic year, the OUA dispensed with the Guidelines tables and the SCUGA point system in favor of a "selection index," on which an applicant could score a maximum of 150 points. This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject).

Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance here, under a "miscellaneous" category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group. The University explained that the [**2420] "'development of the selection index for admissions in 1998 changed only the mechanics, not the substance of how race and ethnicity were considered in admissions.'" App. to Pet. for Cert. 116a.

[*256] In all application years from 1995 to 1998, the guidelines provided that qualified applicants from underrepresented minority groups be admitted as soon as possible in light of the University's belief that such applicants were more likely to enroll if promptly notified of their admission. Also from 1995 through 1998, the University carefully managed its rolling admissions system to permit consideration of certain applications submitted later in the academic year through the use of "protected seats." Specific groups--including athletes, foreign students, ROTC candidates, and underrepresented minorities--were "protected categories" eligible for these seats. A committee called the Enrollment Working Group (EWG) projected how many applicants from each of these protected categories the University was likely to receive after a given date and then paced admissions decisions to permit full consideration of expected applications from these groups. If this space was not filled by qualified candidates from the designated groups toward the end of the admissions season, it was then used to admit qualified candidates remaining in the applicant pool, including those on the waiting list.

During 1999 and 2000, the OUA used the selection index, under which every applicant from an underrepresented racial or ethnic minority group was awarded 20 points. Starting in 1999, however, the University established an Admissions Review Committee (ARC), to provide an additional level of consideration for some applications. Under the new system, counselors may, in their [***273] discretion, "flag" an application for the ARC to review after determining that the applicant (1) is academically prepared to succeed at the University, n8 (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University's composition [*257] of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography. After reviewing "flagged" applications, the ARC determines whether to admit, defer, or deny each applicant.

n8 LSA applicants who are Michigan residents must accumulate 80 points from the selection index criteria to be flagged, while out-of-state applicants need to accumulate 75 points to be eligible for such consideration. See App. 257.

C

[***HR3A] [3A] The parties filed cross-motions for summary judgment with respect to liability. Petitioners asserted that the LSA's use of race as a factor in admissions violates Title VI of the Civil Rights Act of 1964, 78 Stat 252, 42 USC § 2000d [42 USCS § 2000d], and the Equal Protection Clause of the Fourteenth Amendment. Respondents relied on Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), to respond to petitioners' arguments. As discussed in greater detail in the Court's opinion in *Grutter* v *Bollinger, post,* at 156 L Ed 2d 304, 123 S Ct 2325, Justice Powell, in *Bakke*, expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. See 438 US 265, 317, 57 L Ed 2d 750, 98 S Ct 2733. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. Respondent-intervenors asserted that the LSA had a compelling interest in remedying the University's past and current discrimination against minorities. n9 [***HR3B] [3B]

n9 The District Court considered and rejected respondent-intervenors' arguments in a supplemental opinion and order. See 135 F. Supp. 2d 790 (ED Mich. 2001). The court explained that respondent-intervenors "failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the LSA's race-conscious admissions programs." *Id.*, at 795. We agree, and to the extent respondent-intervenors reassert this justification, a justification the University has *never* asserted throughout the course of this litigation, we affirm the District Court's disposition of the issue.

[**2421] [*258] The District Court began its analysis by reviewing this Court's decision in *Bakke.* See 122 F. Supp. 2d 811, 817 (ED Mich. 2001). Although the court acknowledged that no decision from this Court since *Bakke* has explicitly accepted the diversity rationale discussed by Justice Powell, see 122 F. Supp. 2d, at 820-821, it also concluded that this Court had not, in the years since *Bakke*, ruled out such a justification for the use of race. 122 F. Supp. 2d, at 820-821. The District Court concluded that respondents and their *amici curiae* had presented "solid evidence" that a racially and ethnically diverse student body produces significant educational benefits such that achieving such a student body constitutes a compelling governmental interest. See *id.*, at 822-824.

The court next considered whether the LSA's admissions guidelines were narrowly tailored to achieve [***274] that interest. See *id.*, at 824. Again relying on Justice Powell's opinion in *Bakke*, the District Court determined that the admissions program the LSA began using in 1999 is a narrowly tailored means of achieving the University's interest in the educational benefits that flow from a racially and ethnically diverse student body. See 122 F. Supp. 2d, at 827. The court emphasized that the LSA's current program does not utilize rigid quotas or seek to admit a predetermined number of minority students. See *ibid.* The award of 20 points for membership in an underrepresented minority group, in the District Court's view, was not the functional equivalent of a quota because minority candidates were not insulated from

review by virtue of those points. See *id*., at 828. Likewise, the court rejected the assertion that the LSA's program operates like the two-track system Justice Powell found objectionable in *Bakke* on the grounds that LSA applicants are not competing for different groups of seats. See 122 F. Supp. 2d, at 828-829. The court also dismissed petitioners' assertion that the LSA's current system is nothing more than a means by which to achieve racial balancing. See *id*., at 831. The court explained that the LSA does not seek to [*259] achieve a certain proportion of minority students, let alone a proportion that represents the community. See *ibid.*

The District Court found the admissions guidelines the LSA used from 1995 through 1998 to be more problematic. In the court's view, the University's prior practice of "protecting" or "reserving" seats for underrepresented minority applicants effectively kept nonprotected applicants from competing for those slots. See *id*., at 832. This system, the court concluded, operated as the functional equivalent of a quota and ran afoul of Justice Powell's opinion in *Bakke.* n10 See 122 F. Supp. 2d, at 832.

n10 The District Court determined that respondents Bollinger and Duderstadt, who were sued in their individual capacities under Rev Stat § 1979, 42 USC § 1983 [42 USCS § 1983], were entitled to summary judgment based on the doctrine of qualified immunity. See 122 F. Supp. 2d, at 833-834. Petitioners have not asked this Court to review this aspect of the District Court's decision. The District Court denied the Board of Regents' motion for summary judgment with respect to petitioners' Title VI claim on Eleventh Amendment immunity grounds. See *id*., at 834-836. Respondents have not asked this Court to review this aspect of the District Court's decision.

Based on these findings, the court granted petitioners' motion for summary judgment with respect to the LSA's admissions programs in existence from 1995 through 1998, and respondents' motion with respect to the LSA's admissions programs for 1999 and 2000. See *id*., at 833. Accordingly, [**2422] the District Court denied petitioners' request for injunctive relief. See *id*., at 814.

The District Court issued an order consistent with its rulings and certified two questions for interlocutory appeal to the Sixth Circuit pursuant to 28 U.S.C. § 1292(b) [28 USCS § 1292(b)]. Both parties appealed aspects of the District Court's rulings, and the Court of Appeals heard the case en banc on the same day as *Grutter*v *Bollinger.* The Sixth Circuit later issued an opinion in *Grutter*, upholding the admissions program used by the University of Michigan Law School, and the petitioner in that case sought a writ of certiorari from this Court. Petitioners asked this Court to grant certiorari in this case as [*260] well, despite the [***275] fact that the Court of Appeals had not yet rendered a judgment, so that this Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances. We did so. See 537 US 1044, 537 U.S. 1043, 154 L. Ed. 2d 514, 123 S. Ct. 617 (2002).

II

[***HR4A] [4A] As they have throughout the course of this litigation, petitioners contend that the University's consideration of race in its undergraduate admissions decisions violates § 1 of the Equal Protection Clause of the Fourteenth Amendment, n11 Title VI, n12 and 42 USC § 1981 [42 USCS § 1981]. n13 We consider first whether petitioners have standing to seek declaratory and injunctive relief, and, finding that they do, we next consider the merits of their claims.

n11 The Equal Protection Clause of the Fourteenth Amendment

explains that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." n12 Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 USC § 2000d [42 USCS § 2000d].

n13 Section 1981(a) provides that:
"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

A

Although no party has raised the issue, Justice Stevens argues that petitioners lack Article III standing to seek injunctive relief with respect to the University's use of race in undergraduate admissions. He first contends that because Hamacher did not "actually apply for admission as a transfer student[,] his claim of future injury is at best 'conjectural or hypothetical' rather than 'real and immediate.'" *Post,* at 156 L Ed 2d, at 291 (dissenting opinion). But whether Hamacher "actually applied" for admission as a transfer student is not [*261] determinative of his ability to seek injunctive relief in this case. If Hamacher had submitted a transfer application and been rejected, he would still need to allege an intent to apply again in order to seek prospective relief. If Justice Stevens means that because Hamacher did not apply to transfer, he must never *really* have intended to do so, that conclusion directly conflicts with the finding of fact entered by the District Court that Hamacher "intends to transfer to the University of Michigan when defendants cease the use of race as an admission preference." App. 67. n14

n14 This finding is further corroborated by Hamacher's request that the District Court "require the LSA College to offer [him] admission as a transfer student." App. 40.

[***HR5] [5] It is well established that intent may be relevant to standing in an Equal Protection challenge. In *Clements* v. *Fashing,* 457 U.S. 957, 73 L. Ed. 2d 508, 102 S. Ct. 2836 (1982), for example, we considered a challenge to a provision of the Texas Constitution requiring the immediate resignation of certain state officeholders upon their announcement of candidacy for another office. We concluded that the [**2423] plaintiff officeholders had Article III standing because they had alleged that they *would have announced their candidacy* for other offices were it not for the "automatic [***276] resignation" provision they were challenging. *Id.,* at 962, 73 L Ed 2d 508, 102 S Ct 2836; accord, *Turner* v. *Fouche,* 396 U.S. 346, 361-362, n. 23, 24 L. Ed. 2d 567, 90 S. Ct. 532 (1970) (plaintiff who did not own property had standing to challenge property ownership requirement for membership on school board even though there was no evidence that plaintiff had applied and been rejected); *Quinn* v. *Millsap,* 491 U.S. 95, 103, n. 8, 105 L. Ed. 2d 74, 109 S. Ct. 2324 (1989) (plaintiffs who did not own property had standing to challenge property ownership requirement for membership on government board even though they lacked standing to challenge the requirement "as applied"). Likewise, in *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U.S. 656, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993), we considered whether an association challenging an ordinance that gave preferential treatment to certain [*262] minority-owned businesses in the award of

city contracts needed to show that one of its members would have received a contract absent the ordinance in order to establish standing. In finding that no such showing was necessary, we explained that "the 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . . And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of contract." *Id*., at 666, 124 L Ed 2d 586, 113 S Ct 2297. We concluded that in the face of such a barrier, "to establish standing, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Ibid.*

[***HR4B] [4B] In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. When Hamacher applied to the University as a freshman applicant, he was denied admission even though an underrepresented minority applicant with his qualifications would have been admitted. See App. to Pet. for Cert. 115a. After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions.

[***HR6A] [6A] Justice Stevens raises a second argument as to standing. He contends that the University's use of race in undergraduate transfer admissions differs from its use of race in undergraduate freshman admissions, and that therefore Hamacher lacks standing to represent absent class members challenging the latter. *Post,* at 156 L Ed 2d, at 291 (dissenting opinion). [*263] As an initial matter, there is a question whether the relevance of this variation, if any, is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a). The parties have not briefed the question of standing versus adequacy, however, and we [***277] need not resolve the question today: Regardless of whether the requirement is deemed one of adequacy or standing, it is clearly satisfied in this case. n15

n15 Although we do not resolve here whether such an inquiry in this case is appropriately addressed under the rubric of standing or adequacy, we note that there is tension in our prior cases in this regard. See, *e.g.*, Burns, Standing and Mootness in Class Actions: A Search for Consistency, 22 U. C. D. L. Rev. 1239, 1240-1241 (1989); *General Telephone Co. of Southwest* v.*Falcon* , 457 U.S. 147, 149, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982) (Mexican-American plaintiff alleging that he was passed over for a promotion because of race was not an adequate representative to "maintain a class action on behalf of Mexican-American applicants" who were not hired by the same employer); *Blum* v. *Yaretsky*, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982) (class representatives who had been transferred to lower levels of medical care lacked standing to challenge transfers to higher levels of care).

[**2424] From the time petitioners filed their original complaint through their brief on the merits in this Court, they have consistently challenged the University's use of race in undergraduate admissions and its asserted justification of promoting "diversity." See, *e.g.*, App. 38; Brief for Petitioners 13. Consistent with this challenge, petitioners requested injunctive relief prohibiting respondent "from

continuing to discriminate on the basis of race." App. 40. They sought to certify a class consisting of all individuals who were not members of an underrepresented minority group who either had applied for admission to the LSA and been rejected or who intended to apply for admission to the LSA, for all academic years from 1995 forward. *Id.,* at 35-36. The District Court determined that the proposed class satisfied the requirements of the Federal Rules of Civil Procedure, including the requirements of numerosity, commonality, and typicality. See Fed. Rule Civ. Proc. 23(a); App. 70. The court further concluded that Hamacher was an adequate representative [*264] for the class in the pursuit of compensatory and injunctive relief for purposes of Rule 23(a)(4), see App. 61-69, and found "the record utterly devoid of the presence of . . . antagonism between the interests of . . . Hamacher, and the members of the class which [he] seeks to represent," *id.,* at 61. Finally, the District Court concluded that petitioners' claim was appropriate for class treatment because the University's "'practice of racial discrimination pervasively applied on a classwide basis.'" *Id.,* at 67. The court certified the class pursuant to Federal Rule of Civil Procedure 23(b)(2), and designated Hamacher as the class representative. App. 70.

Justice Stevens cites *Blum* v. *Yaretsky,* 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), in arguing that the District Court erred. *Post,* at 156 L Ed 2d, at 293. In *Blum*, we considered a class action suit brought by Medicaid beneficiaries. The named representatives in *Blum* challenged decisions by the State's Medicaid Utilization Review Committee (URC) to transfer them to lower levels of care without, in their view, sufficient procedural safeguards. After a class was certified, the plaintiffs obtained an order expanding class certification to include challenges to URC decisions to transfer patients to *higher* levels of care as well. The defendants argued that the named representatives could not represent absent class members challenging transfers to higher levels of care because they had not been threatened with such transfers. We [***278] agreed. We noted that "nothing in the record . . . suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers." 457 US, at 1001, 73 L Ed 2d 534, 102 S Ct 2777. And we found that transfers to lower levels of care involved a number of fundamentally different concerns than did transfers to higher ones. *Id.,* at 1001-1002, 73 L Ed 2d 534, 102 S Ct 2777 (noting, for example, that transfers to lower levels of care implicated beneficiaries' property interests given the concomitant decrease in Medicaid benefits, while transfers to higher levels of care did not).

[***HR6B] [6B] [***HR7A] [7A] [*265] In the present case, the University's use of race in undergraduate transfer admissions does not implicate a significantly different set [**2425] of concerns than does its use of race in undergraduate freshman admissions. Respondents challenged Hamacher's standing at the certification stage, but *never* did so on the grounds that the University's use of race in undergraduate transfer admissions involves a different set of concerns than does its use of race in freshman admissions. Respondents' failure to allege any such difference is simply consistent with the fact that no such difference exists. Each year the OUA produces a document entitled "COLLEGE OF LITERATURE SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS," which sets forth guidelines for all individuals seeking admission to the LSA, including freshman applicants, transfer applicants, international student applicants, and the like. See, *e.g.,* 2 App. in No. 01-1333 etc. (CA6), pp 507-542. The guidelines used to evaluate transfer applicants specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to the University's stated goal of diversity are *identical* to that used to evaluate freshman applicants. For example, in 1997, when the class was certified and the District Court

found that Hamacher had standing to represent the class, the transfer guidelines contained a separate section entitled "CONTRIBUTION TO A DIVERSE STUDENT BODY." 2 *id.*, at 531. This section explained that any transfer applicant who could "*contribute to a diverse student body* " should "generally be admitted" even with substantially lower qualifications than those required of other transfer applicants. *Ibid.* (emphasis added). To determine whether a transfer applicant was capable of "contributing to a diverse student body," admissions counselors were instructed to determine whether that transfer applicant met the "criteria as defined in Section IV of the 'U' category of [the] SCUGA" factors used to assess [*266] freshman applicants. *Ibid.* Section IV of the "U" category, entitled "Contribution to a Diverse Class," explained that "the University is committed to a rich educational experience for its students. A diverse, as opposed to a homogenous, student population enhances the educational experience for all students. To insure a diverse class, significant weight will be given in the admissions process to indicators of students contribution to a diverse class." 1 *id.,* at 432. These indicators, used in evaluating freshman and transfer applicants alike, list being a member of an underrepresented minority group as establishing an applicant's contribution to [***279] diversity. See 3 *id.,* at 1133-1134, 1153-1154. Indeed, the *only* difference between the University's use of race in considering freshman and transfer applicants is that all underrepresented minority freshman applicants receive 20 points and "virtually" all who are minimally qualified are admitted, while "generally" all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest that justifies its consideration of the race of its undergraduate applicants. n16 [***HR7B] [7B]

n16 Because the University's guidelines concededly use race in evaluating both freshman and transfer applications, and because petitioners have challenged *any* use of race by the University in undergraduate admissions, the transfer admissions policy is very much before this Court. Although petitioners did not raise a narrow tailoring challenge to the transfer policy, as counsel for petitioners repeatedly explained, the transfer policy is before this Court in that petitioners challenged any use of race by the University to promote diversity, including through the transfer policy. See Tr. of Oral Arg. 4 ("The [transfer] policy is essentially the same with respect to the consideration of race"); *id.*, at 5 ("The transfer policy considers race"); *id.*, at 6 (same); *id.*, at 7 ("The transfer policy and the [freshman] admissions policy are fundamentally the same in the respect that they both consider race in the admissions process in a way that is discriminatory"); *id.*, at 7-8 ("The University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor").

[***HR6C] [6C] [**2426] [*267] Particularly instructive here is our statement in *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982), that "if [defendant-employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test *clearly* would satisfy the . . . requirements of

Rule 23(a)." *Id.,* at 159, n. 15, 72 L Ed 2d 740, 102 S Ct 2364 (emphasis added). Here, the District Court found that the sole rationale the University had provided for any of its race-based preferences in undergraduate admissions was the interest in "the educational benefits that result from having a diverse student body." App. to Pet. for Cert. 8a. And petitioners argue that an interest in "diversity" is not a compelling state interest that is *ever* capable of justifying the use of race in undergraduate admissions. See, *e.g.*, Brief for Petitioners 11-13. In sum, the same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines. n17 We therefore agree with the District Court's [*268] carefully considered [***280] decision to certify this class-action challenge to the University's consideration of race in undergraduate admissions. See App. 67 ("'It is a singular policy . . . applied on a classwide basis'"); cf. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 469, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978) ("The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action" (internal quotation marks omitted)). Indeed, class action treatment was particularly important in this case because "the claims of the individual students run the risk of becoming moot" and the "the class action vehicle . . . provides a mechanism for ensuring that a justiciable claim is before the Court." App. 69. Thus, we think it clear that Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification, demonstrates that he may maintain this class-action challenge to the University's use of race in undergraduate admissions.

n17 Indeed, as the litigation history of this case demonstrates, "the class-action device saved the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano* v. *Yamasaki,* 442 U.S. 682, 701, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979). This case was therefore quite unlike *General Telephone Co. of Southwest* v.*Falcon* , 457 U.S. 147, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982), in which we found that the named representative, who had been passed over for a promotion, was not an adequate representative for absent class members who were never hired in the first instance. As we explained, the plaintiff's "evidentiary approaches to the individual and class claims were entirely different. He attempted to sustain his individual claim by proving intentional discrimination. He tried to prove the class claims through statistical evidence of disparate impact. . . . It is clear that the maintenance of respondent's action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'" *Id.,* at 159, 72 L Ed 2d 740, 102 S Ct 2364 (quoting *American Pipe & Constr. Co.* v. *Utah,* 414 U.S. 538, 553, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974)).

B

[***HR1B] [1B] Petitioners argue, first and foremost, that the University's use of race in undergraduate admissions violates the Fourteenth Amendment. Specifically, they contend that this Court has only sanctioned the use of racial classifications to remedy identified discrimination, a justification on which respondents have never relied. Brief for Petitioners 15-16. Petitioners further argue that "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." *Id.,* at 17-18, 40-41. But for the reasons set forth today in

*Grutter*v *Bollinger, post,* at 156 L Ed 2d 304, 123 S Ct 2325, the Court [**2427] has rejected these arguments of petitioners. [*269] Petitioners alternatively argue that even if the University's interest in diversity can constitute a compelling state interest, the District Court erroneously concluded that the University's use of race in its current freshman admissions policy is narrowly tailored to achieve such an interest. Petitioners argue that the guidelines the University began using in 1999 do not "remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke*." Brief for Petitioners 18. Respondents reply that the University's current admissions program *is* narrowly tailored and avoids the problems of the Medical School of the University of California at Davis program (U. C. Davis) rejected by Justice Powell. n18 They claim that their program "hews [***281] closely" to both the admissions program described by Justice Powell as well as the Harvard College admissions program that he endorsed. Brief for Respondents 32. Specifically, respondents contend that the LSA's policy provides the individualized consideration that "Justice Powell considered a hallmark of a constitutionally appropriate admissions program." *Id.*, at 35. For the reasons set out below, we do not agree.

n18 U. C. Davis set aside 16 of the 100 seats available in its first year medical school program for "economically and/or educationally disadvantaged" applicants who were also members of designated "minority groups" as defined by the university. "To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants." *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 274, 289, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (principal opinion). Justice Powell found that the program employed an impermissible two-track system that "disregarded . . . individual rights as guaranteed by the Fourteenth Amendment." *Id*., at 315, 57 L Ed 2d 750, 98 S Ct 2733. He reached this conclusion even though the university argued that "the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups" was "the only effective means of serving the interest of diversity." *Ibid.* Justice Powell concluded that such arguments misunderstood the very nature of the diversity he found to be compelling. See *ibid.*

[***HR8A] [8A] [*270] It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 224, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). This "'standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification.'" *Ibid.* (quoting *Richmond* v. *J. A. Croson Co.,* 488 U.S. 469, 494, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (plurality opinion)). Thus, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand,* 515 U.S., at 224, 132 L Ed 2d 158, 115 S Ct 2097. [***HR1C] [1C] [***HR8B] [8B] To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admission program employs "narrowly tailored measures that further compelling governmental interests." *Id*., at 227, 132 L Ed 2d 158, 115 S Ct 2097. Because "racial classifications are simply too pernicious to permit any but the most exact connection

between justification and classification," *Fullilove* v. *Klutznick*, 448 U.S. 448, 537, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (Stevens, J., dissenting), our review of whether such requirements have been met must entail "'a most searching examination.'" *Adarand*, *supra,* at 223, 132 L Ed 2d 158, 115 S Ct 2097 (quoting *Wygant* v. *Jackson Bd. of Ed.,* 476 U.S. 267, 273, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion of Powell, J.)). We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity [**2428] that respondents claim justifies their program.

In *Bakke*, Justice Powell reiterated that "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." 438 US at 307, 57 L Ed 2d 750, 98 S Ct 2733. He then explained, however, that in his view it would be permissible for a university to employ an admissions program in which "race or ethnic background may be [*271] deemed a 'plus' in a particular applicant's file." *Id*., at 317, 57 L Ed 2d 750, 98 S Ct 2733. He explained that such a program might allow for "the file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, [***282] with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism." *Ibid.* Such a system, in Justice Powell's view, would be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.*

[***HR1D] [1D] Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. See *id*., at 315, 57 L Ed 2d 750, 98 S Ct 2733. See also *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 618, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990) (O'Connor, J., dissenting) (concluding that the FCC's policy, which "embodied the related notions that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [the applicant is] 'likely to provide [a] distinct perspective,'" impermissibly value[d] individuals" based on a presumption that "persons think in a manner associated with their race"). Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application.

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of [*272] points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *Bakke*, 438 U.S., at 317, 57 L Ed 2d 750, 98 S Ct 2733, the LSA's automatic distribution of 20 points has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant. *Ibid.* n19

n19 Justice Souter recognizes that the LSA's use of race is decisive in practice, but he attempts to avoid that fact through unsupported speculation about the self-selection of minorities in the applicant pool. See

Post, at 156 L Ed 2d, at 297-298 (dissenting opinion).

Also instructive in our consideration of the LSA's system is the example provided in the description of the Harvard College Admissions Program, which Justice Powell both discussed in, and attached to, his opinion in *Bakke*. The example was included to "illustrate the kind of significance attached to race" under the Harvard College program. *Id*., at 324, 57 L Ed 2d 750, 98 S Ct 2733. It provided as follows:

> "The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic [**2429] achievement was [***283] lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent* [*273] *upon race but sometimes associated with it.*" *Ibid.* (emphasis added).

This example further demonstrates the problematic nature of the LSA's admissions system. Even if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. See App. 234-235. At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants the individualized selection process described in Harvard's example. Instead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing LSA applications would simply award both A and B 20 points because their applications indicate that they are African-American, and student C would receive up to 5 points for his "extraordinary talent." n20

> n20 Justice Souter is therefore wrong when he contends that "applicants to the undergraduate college are [not] denied individualized consideration." *Post*, at 156 L Ed 2d, at 297. As Justice O'Connor explains in her concurrence, the LSA's program "ensures that the diversity contributions of applicants cannot be individually assessed." *Post*, at 156 L Ed 2d, at 287.

Respondents emphasize the fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration by the ARC. We think that the flagging program only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. Again, students A, B, and C illustrate the point. First, student A would never be flagged. This is because, as the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted. Student A, an applicant "with promise of superior academic performance," would certainly fit this description. Thus, the result of the automatic distribution of 20 points is that the University [*274] would never consider student A's individual background, experiences, and

characteristics to assess his individual "potential contribution to diversity," *Bakke, supra,* at 317, 57 L Ed 2d 750, 98 S Ct 2733. Instead, every applicant like student A would simply be admitted.

It is possible that students B and C would be flagged and considered as individuals. This assumes that student B was not already admitted because of the automatic 20-point distribution, and that student C could muster at least 70 additional points. But the fact that the "review committee can look at the applications individually and ignore the points," once an application is flagged, Tr. of Oral Arg. 42, is of little comfort under our strict scrutiny analysis. The record does not [***284] reveal precisely how many applications are flagged for this individualized consideration, but it is undisputed that such consideration is the exception and not the rule in the operation of the LSA's admissions program. See App. to Pet. for Cert. 117a ("The ARC reviews only a portion of all of the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the EWG"). n21 [**2430] Additionally, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a "plus" that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.

> n21 Justice Souter is mistaken in his assertion that the Court "takes it upon itself to apply a newly formulated legal standard to an undeveloped record." *Post*, at 156 L Ed 2d, at 298, n 3. He ignores the fact that the respondents have told us all that is necessary to decide this case. As explained above, respondents concede that only a portion of the applications are reviewed by the ARC and that the "bulk of admissions decisions" are based on the point system. It should be readily apparent that the availability of this review, which comes *after* the automatic distribution of points, is far more limited than the individualized review given to the "large middle group of applicants" discussed by Justice Powell and described by the Harvard plan in *Bakke*. 438 U.S., at 316, 57 L Ed 2d 750, 98 S Ct 2733 (internal quotation marks omitted).

[*275] Respondents contend that "the volume of applications and the presentation of applicant information make it impractical for [LSA] to use the . . . admissions system" upheld by the Court today in *Grutter.* Brief for Respondents 6, n 8. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See *J. A. Croson Co.*, 488 U.S., at 508, 102 L Ed 2d 854, 109 S Ct 706 (citing *Frontiero* v. *Richardson*, 411 U.S. 677, 690, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) (plurality opinion of Brennan, J.) (rejecting "'administrative convenience'" as a determinant of constitutionality in the face of a suspect classification)). Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

[***HR1E] [1E] [***HR2B] [2B] We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. n22 We further find that the admissions policy also violates [***285] Title VI and [*276] 42 USC § 1981 [42 USCS § 1981]. n23 Accordingly, we reverse [**2431] that portion of the District Court's decision granting respondents summary judgment with respect to liability and remand

the case for proceedings consistent with this opinion.

n22 Justice Ginsburg in her dissent observes that "one can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue." *Post*, at 156 L Ed 2d, at 303. She goes on to say that "if honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." *Post*, at 156 L Ed 2d, at 303. These observations are remarkable for two reasons. First, they suggest that universities--to whose academic judgment we are told in *Grutter* v*Bollinger, post,* at 156 L Ed 2d 304, 123 S Ct 2325, we should defer--will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.

[***HR2C] [2C]

n23 We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. See *Alexander* v.*Sandoval* , 532 U.S. 275, 281, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001); *United States* v. *Fordice*, 505 U.S. 717, 732, n. 7, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992); *Alexander* v.*Choate* , 469 U.S. 287, 293, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985). Likewise, with respect to § 1981, we have explained that the provision was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U.S. 273, 295-296, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976). Furthermore, we have explained that a contract for educational services is a "contract" for purposes of § 1981. See *Runyon* v. *McCrary*, 427 U.S. 160, 172, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976). Finally, purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981. See *General Building Contractors Assn., Inc.* v. *Pennsylvania,* 458 U.S. 375, 389-390, 73 L. Ed. 2d 835, 102 S. Ct. 3141 (1982).

It is so ordered.

CONCURBY: O'CONNOR; THOMAS; BREYER

CONCUR: Justice **O'Connor,** concurring. *

* Justice Breyer joins this opinion, except for the last sentence.

I

Unlike the law school admissions policy the Court upholds today in *Grutter* v*Bollinger , post,* 156 L Ed 2d 304, 123 S Ct 2325, the procedures employed by the University of Michigan's (University) Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. Cf. *Regents of Univ. of Cal.* v. *Bakke,* 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (principal opinion of Powell, J.). The law school considers the various diversity qualifications of each applicant,

including race, on a case-by-case basis. See *Grutter* v *Bollinger, post,* at 156 L Ed 2d 304, 123 S Ct 2325. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or [*277] qualities of each individual applicant. Cf. *ante*, at 156 L Ed 2d, at 282, 283. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter, post*, at 156 L Ed 2d 304, 123 S Ct 2325, requires: consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups. Cf. *ante*, at 156 L Ed 2d 304, 123 S Ct 2325 (citing *Bakke, supra*, at 324, 57 L Ed 2d 750, 98 S Ct 2733)).

On cross-motions for summary judgment, the District Court held that the admissions policy the University instituted in 1999 and continues to use today passed constitutional muster. See 122 F. Supp. 2d 811, 827 (ED Mich. 2001). In their [***286] proposed summary of undisputed facts, the parties jointly stipulated to the admission policy's mechanics. App. to Pet. for Cert. 116a-118a. When the university receives an application for admission to its incoming class, an admissions counselor turns to a Selection Index Worksheet to calculate the applicant's selection index score out of 150 maximum possible points--a procedure the University began using in 1998. App. 256. Applicants with a score of over 100 are automatically admitted; applicants with scores of 95 to 99 are categorized as "admit or postpone"; applicants with 90-94 points are postponed or admitted; applicants with 75-89 points are delayed or postponed; and applicants with 74 points or fewer are delayed or rejected. The Office of Undergraduate Admissions extends offers of admission on a rolling basis and acts upon the applications it has received through periodic "mass actions." App. 256.

In calculating an applicant's selection index score, counselors assign numerical values to a broad range of academic factors, as well as to other variables the University considers important to assembling a diverse student body, including race. Up to 110 points can be assigned for academic performance, [*278] and up to 40 points can be assigned for the other, nonacademic factors. Michigan residents, for example, receive 10 points, and children of alumni receive 4. Counselors may assign an outstanding essay up to 3 points and may award up to 5 points for an applicant's personal achievement, leadership, or public service. Most importantly for this case, an applicant automatically receives a 20 point bonus if he or she possesses any one of the following "miscellaneous" factors: membership [**2432] in an underrepresented minority group; attendance at a predominantly minority or disadvantaged high school; or recruitment for athletics.

In 1999, the University added another layer of review to its admissions process. After an admissions counselor has tabulated an applicant's selection index score, he or she may "flag" an application for further consideration by an Admissions Review Committee, which is composed of members of the Office of Undergraduate Admissions and the Office of the Provost. App. to Pet. for Cert. 117a. The review committee meets periodically to discuss the files of "flagged" applicants not already admitted based on the selection index parameters. App. 275. After discussing each flagged application, the committee decides whether to admit, defer, or deny the applicant. *Ibid.*

Counselors [*279] may flag an applicant for review by the committee if he or she is academically prepared, has a selection index score of at least 75 (for non-Michigan residents) or 80 (for Michigan residents), and possesses one of several qualities valued by the University. These qualities include "high class rank, unique life experiences,

challenges, circumstances, interests or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography." App. to Pet. for Cert. 117a. Counselors also have the discretion to flag an application if, notwithstanding a high selection index score, something in the applicant's file suggests that the applicant may not be suitable for admission. App. 274. Finally, in "rare circumstances," an admissions counselor may flag an applicant with a selection index score [***287] below the designated levels if the counselor has reason to believe from reading the entire file that the score does not reflect the applicant's true promise. *Ibid.*

II

Although the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments--a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race. Of course, as Justice Powell made clear in *Bakke*, a university need not "necessarily accord" all diversity factors "the same weight," 438 US at 317, 57 L Ed 2d 750, 98 S Ct 2733, and the "weight attributed to a particular quality may vary from year to year depending on the 'mix' both of the student body and the applicants for the incoming class," *id.,* at 317-318, 57 L Ed 2d 750, 98 S Ct 2733. But the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class. See *Grutter* v *Bollinger, post*, at 156 L Ed 2d 304, 123 S Ct 2325 ("The Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions"). The only potential source of individualized consideration appears to be the Admissions Review Committee. The evidence in the record, however, reveals very little about how [*280] the review committee actually functions. And what evidence there is indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review. As the Court points out, it is undisputed that the "'[committee] reviews only a portion of all the applications. The bulk [**2433] of admissions decisions are executed based on selection index score parameters set by the [Enrollment Working Group].'" *Ante*, at 156 L Ed 2d 304, 123 S Ct 2325 (quoting App. to Pet for Cert. 117a). Review by the committee thus represents a necessarily limited exception to the Office of Undergraduate Admissions' general reliance on the selection index. Indeed, the record does not reveal how many applications admissions counselors send to the review committee each year, and the University has not pointed to evidence demonstrating that a meaningful percentage of applicants receives this level of discretionary review. In addition, eligibility for consideration by the committee is itself based on automatic cut-off levels determined with reference to selection index scores. And there is no evidence of how the decisions are actually made--what type of individualized consideration is or is not used. Given these circumstances, the addition of the Admissions Review Committee to the admissions [***288] process cannot offset the apparent absence of individualized consideration from the Office of Undergraduate Admissions' general practices.

For these reasons, the record before us does not support the conclusion that the University of Michigan's admissions program for its College of Literature, Science, and the Arts--to the extent that it considers race--provides

the necessary individualized consideration. The University, of course, remains free to modify its system so that it does so. Cf. *Grutter*v *Bollinger, post*, 156 L Ed 2d 304, 123 S Ct 2325. But the current system, as I understand it, is a nonindividualized, mechanical one. As a result, I join the Court's opinion reversing the decision of the District Court.

[*281] Justice **Thomas,** concurring.

I join the Court's opinion because I believe it correctly applies our precedents, including today's decision in *Grutter* v *Bollinger, post*, 156 L Ed 2d 304, 123 S Ct 2325. For similar reasons to those given in my separate opinion in that case, see *post,* 156 L Ed 2d 304, 123 S Ct 2325 (opinion concurring in part and dissenting in part), however, I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.

I make only one further observation. The University of Michigan's College of Literature, Science, and the Arts (LSA) admissions policy that the Court today invalidates does not suffer from the additional constitutional defect of allowing racial "discrimination among [the] groups" included within its definition of underrepresented minorities, *Grutter, post*, at 156 L Ed 2d 304, 123 S Ct 2325 (opinion of the Court); *post*, at 156 L Ed 2d 304, 123 S Ct 2325 (Thomas, J., concurring in part and dissenting in part), because it awards all underrepresented minorities the same racial preference. The LSA policy falls, however, because it does not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants. Under today's decisions, a university may not racially discriminate between the groups constituting the critical mass. See *ibid.; Grutter, post*, at 156 L Ed 2d 304, 123 S Ct 2325 (opinion of the Court) (stating that such "racial balancing . . . is patently unconstitutional"). An admissions policy, however, must allow for consideration of these nonracial distinctions among applicants on both sides of the single permitted racial classification. See *ante*, at 156 L Ed 2d 304, 123 S Ct 2325 (opinion of the Court); *ante*, at 156 L Ed 2d 304, 123 S Ct 2325 (O'Connor, J., concurring).

Justice **Breyer,** concurring in the judgment.

I concur in the judgment of the Court though I do not join its opinion. I join Justice O'Connor's opinion except insofar as it joins that of the Court. I join Part I of Justice Ginsburg's dissenting opinion, but I do not dissent from the [*282] Court's reversal of the District Court's [**2434] decision. I agree with Justice Ginsburg that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, *post*, at 156 L Ed 2d, [***289] at 301, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally, see U. S. Const., Amdt. 14.

DISSENTBY: STEVENS; SOUTER; GINSBURG

DISSENT: Justice **Stevens,** with whom Justice **Souter** joins, dissenting.

Petitioners seek forward-looking relief enjoining the University of Michigan from continuing to use its current race-conscious freshman admissions policy. Yet unlike the plaintiff in *Grutter* v*Bollinger, post* , p 156 L Ed 2d 304, 123 S Ct 2325, n1 the petitioners in this case had already enrolled at other schools before they filed their class-action complaint in this case. Neither petitioner was in the process of reapplying to Michigan through the freshman admissions process at the time this suit was filed, and neither has done so since. There is a total absence of evidence that either petitioner would receive any benefit from the prospective relief sought by their lawyer. While some unidentified members of the class may very well have standing to seek prospective relief, it is clear

that neither petitioner does. Our precedents therefore require dismissal of the action.

n1 In challenging the use of race in admissions at Michigan's law school, Barbara Grutter alleged in her complaint that she "has not attended any other law school" and that she "still desires to attend the Law School and become a lawyer." App. in No. 02-241, p 30.

I

Petitioner Jennifer Gratz applied in 1994 for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as an undergraduate for the 1995-1996 freshman class. After the University delayed action on her application and then placed her name on an extended waiting list, Gratz decided to attend the University of Michigan at Dearborn instead; she graduated in 1999. [*283] Petitioner Patrick Hamacher applied for admission to LSA as an undergraduate for the 1997-1998 freshman class. After the University postponed decision on his application and then placed his name on an extended waiting list, he attended Michigan State University, graduating in 2001. In the complaint that petitioners filed on October 14, 1997, Hamacher alleged that "he intends to apply to transfer [to the University of Michigan] if the discriminatory admissions system described herein is eliminated." App. 34.

At the class certification stage, petitioners sought to have Hamacher represent a class pursuant to Federal Rule Civil Procedure 23(b)(2). n2 See App. 71, n 3. In response, Michigan contended that "Hamacher lacks standing to represent a class seeking declaratory and injunctive relief." *Id.*, at 63. Michigan submitted that Hamacher suffered "'no threat of imminent future injury'" given that he had already enrolled at another undergraduate institution. n3 *Id.*, at 64. The District Court rejected Michigan's contention, concluding that [***290] Hamacher had standing to seek injunctive relief because the complaint alleged that he intended to apply to Michigan as a transfer student. See *id.*, at 67 ("To the extent that plaintiff Hamacher reapplies to the University of Michigan, he will again face the same 'harm' in that race will continue to be a factor in admissions"). [**2435] The District Court, accordingly, certified Hamacher as the sole class representative and limited the claims of the class to injunctive and declaratory relief. See *id.*, at 70-71.

n2 Petitioners did not seek to have Gratz represent the class pursuant to Federal Rule Civil Procedure 23(b)(2). See App. 71, n 3.

n3 In arguing that Hamacher lacked standing, Michigan also asserted that Hamacher "would need to achieve a 3.0 grade point average to attempt to transfer to the University of Michigan." *Id.*, at 64, n 2. The District Court rejected this argument, concluding that "Hamacher's present grades are not a factor to be considered at this time." *Id.*, at 67.

In subsequent proceedings, the District Court held that the 1995-1998 admissions system, which was in effect when both petitioners' applications were denied, was unlawful but [*284] that Michigan's new 1999-2000 admissions system was lawful. When petitioners sought certiorari from this Court, Michigan did not cross-petition for review of the District Court's judgment concerning the admissions policies that Michigan had in place when Gratz and Hamacher applied for admission in 1994 and 1996 respectively. See Brief for Respondents 5, n 7. Accordingly, we have before us only that portion of the District Court's judgment that upheld Michigan's new freshman admissions policy.

II

Both Hamacher and Gratz, of course, have standing to seek damages as compensation for the alleged wrongful denial of their respective applications under Michigan's old

freshman admissions system. However, like the plaintiff in *Los Angeles* v. *Lyons,* 461 U.S. 95, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983), who had standing to recover damages caused by "chokeholds" administered by the police in the past but had no standing to seek injunctive relief preventing future chokeholds, petitioners' past injuries do not give them standing to obtain injunctive relief to protect third parties from similar harms. See *id.*, at 102 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects" (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974))) . To seek forward-looking, injunctive relief, petitioners must show that they face an imminent threat of future injury. See *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 210-211, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). This they cannot do given that when this suit was filed, neither faced an impending threat of future injury based on Michigan's new freshman admissions policy. n4

n4 In responding to questions about petitioners' standing at oral argument, petitioners' counsel alluded to the fact that Michigan might continually change the details of its admissions policy. See Tr. of Oral Arg. 9. The change in Michigan's freshman admissions policy, however, is not the reason why petitioners cannot establish standing to seek prospective relief. Rather, the reason they lack standing to seek forward-looking relief is that when this suit was filed, neither faced a "real and immediate threat" of future injury under Michigan's freshman admissions policy given that they had both already enrolled at other institutions. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 210, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) (quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 105, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)). Their decision to obtain a college education elsewhere distinguishes this case from Allan Bakke's single-minded pursuit of a medical education from the University of California at Davis. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978); cf. *DeFunis* v. *Odegaard,* 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974) *(per curiam).*

[*285] Even though there is not a scintilla of evidence that the freshman admissions [***291] program now being administered by respondents will ever have any impact on either Hamacher or Gratz, petitioners nonetheless argue that Hamacher has a personal stake in this suit because at the time the complaint was filed, Hamacher intended to apply to transfer to Michigan once certain admission policy changes occurred. n5 See App. 34; see also Tr. of Oral [**2436] Arg. 4-5. Petitioners' attempt to base Hamacher's standing in this suit on a hypothetical transfer application fails for several reasons. First, there is no evidence that Hamacher ever actually applied for admission as a transfer student at Michigan. His claim of future injury is at best "conjectural or hypothetical" rather than "real and immediate." *O'Shea* v.*Littleton* , 414 U.S., at 494, 38 L Ed 2d 674, 94 S Ct 669 [*286] (internal quotation marks omitted); see also ***Lujan*** v.*Defenders of Wildlife* , 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).

n5 Hamacher clearly can no longer claim an intent to transfer into Michigan's undergraduate program given that he graduated from college in 2001. However, this fact alone is not necessarily fatal to the instant class action because we have recognized that, if a named class representative has standing at the time

a suit is initiated, class actions may proceed in some instances following mootness of the named class representative's claim. See, *e.g., Sosna* v. *Iowa*, 419 U.S. 393, 402, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975) (holding that the requisite Article III "case or controversy" may exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot"); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1976). The problem in this case is that neither Gratz nor Hamacher had standing to assert a forward-looking, injunctive claim in federal court at the time this suit was initiated.

Second, as petitioners' counsel conceded at oral argument, the transfer policy is not before this Court and was not addressed by the District Court. See Tr. of Oral Arg. 4-5 (admitting that "the transfer admissions policy itself is not before you--the Court"). Unlike the University's freshman policy, which is detailed at great length in the Joint Appendix filed with this Court, the specifics of the transfer policy are conspicuously missing from the Joint Appendix filed with this Court. Furthermore, the transfer policy is not discussed anywhere in the parties' briefs. Nor is it ever even referenced in the District Court's Dec. 13, 2000, opinion that upheld Michigan's new freshman admissions policy and struck down Michigan's old policy. Nonetheless, evidence filed with the District Court by Michigan demonstrates that the criteria used to evaluate transfer applications at Michigan differ significantly from the criteria used to evaluate freshman undergraduate applications. Of special significance, Michigan's 2000 freshman admissions policy, for example, provides for 20 points to be added to the selection index scores of minority applicants. See *ante*, at 156 L Ed 2d, at 282. In contrast, Michigan does not use points in its transfer policy; some applicants, including minority and socioeconomically disadvantaged applicants, "will generally be admitted" if they possess certain qualifications, including a 2.5 undergraduate grade point average (GPA), sophomore standing, and a 3.0 high school GPA. 10 Record 16 (Exh. C). Because of these differences, Hamacher cannot base his right to complain about the *freshman* admissions policy on his hypothetical injury under a wholly separate *transfer* policy. For "if the right to complain of *one* administrative deficiency automatically conferred [***292] the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis* v. *Casey*, 518 U.S. 343, 358-359, n. 6, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996) [*287] (emphasis in original); see also *Blum* v.*Yaretsky* , 457 U.S. 991, 999, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar"). n6

n6 Under the majority's view of standing, there would be no end to Hamacher's ability to challenge any use of race by the University in a variety of programs. For if Hamacher's right to complain about the *transfer* policy gives him standing to challenge the *freshman* policy, presumably his ability to complain about the *transfer* policy likewise would enable him to challenge Michigan's *law school* admissions policy, as well as any other race-based admissions policy used by Michigan.

Third, the differences between the freshman and the transfer admissions policies make it extremely unlikely, at best, that an injunction requiring respondents to modify

the freshman admissions program would have any impact on Michigan's transfer policy. See *Allen* v. *Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984) [**2437] ("Relief from the injury must be 'likely' to follow from a favorable decision"); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 222, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974) ("The discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied"). This is especially true in light of petitioners' unequivocal disavowal of any request for equitable relief that would totally preclude the use of race in the processing of all admissions applications. See Tr. of Oral Arg. 14-15.

The majority asserts that petitioners "have challenged *any* use of race by the University in undergraduate admissions"--freshman and transfer alike. *Ante*, at 156 L Ed 2d, at 279, n 16 (emphasis in original). Yet when questioned at oral argument about whether petitioners' challenge would impact both private and public universities, petitioners' counsel stated: "Your Honor, I want to be clear about what it is that we're arguing for here today. *We are not suggesting an absolute* [*288] *rule forbidding any use of race under any circumstances.* What we are arguing is that the interest asserted here by the University, this amorphous, ill-defined, unlimited interest in diversity is not a compelling interest." Tr. of Oral Arg. 14 (emphasis added). In addition, when asked whether petitioners took the position that the only permissible use of race is as a remedy for past discrimination, petitioners' lawyer stated: "I would not go that far . . . . There may be other reasons. I think they would have to be extraordinary and rare. . . ." *Id.*, at 15. Consistent with these statements, petitioners' briefs filed with this Court attack the University's asserted interest in "diversity" but acknowledge that race could be considered for remedial reasons. See, *e.g.*, Brief for Petitioners 16-17.

Because Michigan's transfer policy was not challenged by petitioners and is not before this Court, see *supra*, [***293] at 156 L Ed 2d, at 291, we do not know whether Michigan would defend its transfer policy on diversity grounds, or whether it might try to justify its transfer policy on other grounds, such as a remedial interest. Petitioners' counsel was therefore incorrect in asserting at oral argument that if the University's asserted interest in "diversity" were to be "struck down as a rationale, then the law would be [the] same with respect to the transfer policy as with respect to the original [freshman admissions] policy." Tr. of Oral Arg. 7-8. And the majority is likewise mistaken in assuming that "the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions." *Ante*, at 156 L Ed 2d, at 278. Because the transfer policy has never been the subject of this suit, we simply do not know (1) whether Michigan would defend its transfer policy on "diversity" grounds or some other grounds, or (2) how the absence of a point system in the transfer policy might impact a narrow tailoring analysis of that policy.

[*289] At bottom, petitioners' interest in obtaining an injunction for the benefit of younger third parties is comparable to that of the unemancipated minor who had no standing to litigate on behalf of older women in *H. L.* v. *Matheson,* 450 U.S. 398, 406-407, 67 L. Ed. 2d 388, 101 S. Ct. 1164 (1981), or that of the Medicaid patients transferred to less intensive care who had no standing to litigate on behalf of patients objecting to transfers to more intensive care facilities in *Blum* v. *Yaretsky,* 457 U.S., at 1001, 73 L Ed 2d 534, 102 S Ct 2777. To have standing, it is elementary that the petitioners' own interests must be implicated. Because neither petitioner has a personal stake in this suit for prospective relief, neither has standing.

III

It is true that the petitioners' complaint was filed as a class action and that Hamacher [**2438] has been certified as the representative of a class, some of whose

members may well have standing to challenge the LSA freshman admissions program that is presently in effect. But the fact that "a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40, n. 20, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 502, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)); see also 1 A. Conte & H. Newberg, Class Actions § 2:5 (4th ed. 2002) ("One cannot acquire individual standing by virtue of bringing a class action"). n7 Thus, in *Blum*, we squarely held that the interests of members of the class could not satisfy the requirement that the class representatives have a personal interest in obtaining the particular equitable relief being sought. The class in [*290] *Blum* included [***294] patients who wanted a hearing before being transferred to facilities where they would receive more intensive care. The class representatives, however, were in the category of patients threatened with a transfer to less intensive care facilities. In explaining why the named class representatives could not base their standing to sue on the injury suffered by other members of the class, we stated:

> n7 Of course, the injury to Hamacher would give him standing to claim damages for past harm on behalf of class members, but he was certified as the class representative for the limited purpose of seeking injunctive and declaratory relief.
>
> "Respondents suggest that members of the class they represent have been transferred to higher levels of care as a result of [utilization review committee] decisions. Respondents, however, 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' *Warth* v. *Seldin*, 422 U.S. 490, 502 [45 L. Ed. 2d 343, 95 S. Ct. 2197] (1975). Unless these individuals 'can thus demonstrate the requisite case or controversy between themselves personally and [petitioners], "none may seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U.S. 488, 494 [38 L. Ed. 2d 674, 94 S. Ct. 669] (1974).' *Ibid.*" 457 U.S., at 1001, n. 13, 73 L Ed 2d 534, 102 S Ct 2777.

Much like the class representatives in *Blum*, Hamacher--the sole class representative in this case--cannot meet Article III's threshold personal-stake requirement. While unidentified members of the class he represents may well have standing to challenge Michigan's current freshman admissions policy, Hamacher cannot base his standing to sue on injuries suffered by other members of the class.

IV

As this case comes to us, our precedents leave us no alternative but to dismiss the writ for lack of jurisdiction. Neither petitioner has a personal stake in the outcome of the case, and neither has standing to seek prospective relief on behalf of unidentified class members who may or may not [*291] have standing to litigate on behalf of themselves. Accordingly, I respectfully dissent.

Justice **Souter,** with whom Justice **Ginsburg** joins as to Part II, dissenting.

I agree with Justice Stevens that Patrick Hamacher has no standing to seek declaratory or injunctive relief against a freshman admissions policy that will never cause him any harm. I write separately to note that even the Court's new gloss on the

law of standing should not permit it to reach the issue it decides today. And because a majority of the Court has chosen to address the merits, I also add a word to say that even if the merits were reachable, [**2439] I would dissent from the Court's judgment.

I

The Court's finding of Article III standing rests on two propositions: first, that both the University of Michigan's undergraduate college's transfer policy and its freshman admissions policy seek to achieve student body diversity through the "use of race," *ante*, at 156 L Ed 2d, at 275-280, and second, that Hamacher has standing to challenge the transfer policy on the grounds that diversity can never be a "compelling state interest" justifying the use of race in any admissions decision, freshman or transfer, *ante*, [***295] at 156 L Ed 2d, at 279. The Court concludes that, because Hamacher's argument, if successful, would seal the fate of both policies, his standing to challenge the transfer policy also allows him to attack the freshman admissions policy. *Ante*, at 156 L Ed 2d, at 279, n 16 ("Petitioners challenged any use of race by the University to promote diversity, including through the transfer policy"); *ibid.* ("'The University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor'" (quoting Tr. of Oral Arg. 7-8)). I agree with Justice Stevens's critique [*292] that the Court thus ignores the basic principle of Article III standing that a plaintiff cannot challenge a government program that does not apply to him. See *ante*, at 156 L Ed 2d, at 292-292, and n 6 (dissenting opinion). n1

n1 The Court's holding arguably exposes a weakness in the rule of *Blum* v. Yaretsky, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), that Article III standing may not be satisfied by the unnamed members of a duly certified class. But no party has invited us to reconsider *Blum*, and I follow Justice Stevens in approaching the case on the assumption that *Blum* is settled law.

But even on the Court's indulgent standing theory, the decision should not go beyond a recognition that diversity can serve as a compelling state interest justifying race-conscious decisions in education. *Ante*, at 156 L Ed 2d, at 280 (citing *Grutter* v *Bollinger, post*, at 156 L Ed 2d 304, 123 S Ct 2325). Since, as the Court says, "petitioners did not raise a narrow tailoring challenge to the transfer policy," *ante*, at 156 L Ed 2d, at 279, n 16, our decision in *Grutter* is fatal to Hamacher's sole attack upon the transfer policy, which is the only policy before this Court that he claims aggrieved him. Hamacher's challenge to that policy having failed, his standing is presumably spent. The further question whether the freshman admissions plan is narrowly tailored to achieving student body diversity remains legally irrelevant to Hamacher and should await a plaintiff who is actually hurt by it. n2

n2 For that matter, as the Court suggests, narrow tailoring challenges against the two policies could well have different outcomes. *Ante*, at 156 L Ed 2d, at 279. The record on the decisionmaking process for transfer applicants is understandably thin, given that petitioners never raised a narrow tailoring challenge against it. Most importantly, however, the transfer policy does not use a points-based "selection index" to evaluate transfer applicants, but rather considers race as one of many factors in making the general determination whether the applicant would make a "'contribution to a diverse student body.'" *Ante*, at 156 L Ed 2d, at 278 (quoting 2 App. in No. 01-1333 etc. (CA6), p 531 (capitalization omitted)). This limited glimpse into

the transfer policy at least permits the inference that the University engages in a "holistic review" of transfer applications consistent with the program upheld today in *Grutter* v *Bollinger, post*, at 156 L Ed 2d 304, 123 S Ct 2325.

[*293] II

The cases now contain two pointers toward the line between the valid and the unconstitutional in race-conscious admissions schemes. *Grutter* reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases. On the other hand, Justice Powell's opinion in [**2440] *Regents of Univ. of Cal.* v. [***296] *Bakke,* 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class. Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record.

The record does not describe a system with a quota like the one struck down in *Bakke*, which "insulated" all nonminority candidates from competition from certain seats. *Bakke*, *supra*, at 317, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.); see also *Richmond* v. *J. A. Croson Co.,* 488 U.S. 469, 496, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (plurality opinion) (stating that *Bakke* invalidated "a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities"). The *Bakke* plan "focused *solely* on ethnic diversity" and effectively told nonminority applicants that "no matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the [set-aside] special admissions seats." *Bakke*, *supra*, at 315, 319, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.) (emphasis in original).

The plan here, in contrast, lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic [*294] disadvantage, athletic ability, and quality of a personal essay. *Ante*, at 156 L Ed 2d, at 272. A nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20-point bonus. Cf. *Johnson* v. *Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 638, 94 L. Ed. 2d 615, 107 S. Ct. 1442 (1987) (upholding a program in which gender "was but one of numerous factors [taken] into account in arriving at [a] decision" because "no persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants" (emphasis deleted)).

Subject to one qualification to be taken up below, this scheme of considering, through the selection index system, all of the characteristics that the college thinks relevant to student diversity for every one of the student places to be filled fits Justice Powell's description of a constitutionally acceptable program: one that considers "all pertinent elements of diversity in light of the particular qualifications of each applicant" and places each element "on the same footing for consideration, although not necessarily according them the same weight." *Bakke*, *supra*, at 317, 57 L Ed 2d 750, 98 S Ct 2733. In the Court's own words, "each characteristic of a particular applicant [is] considered in assessing the applicant's entire application." *Ante*, at 156 L Ed 2d, at 282. An unsuccessful nonminority applicant cannot complain that he was rejected "simply because he was not the right color"; an applicant who is rejected because "his combined qualifications . . . did not outweigh

those of the [***297] other applicant" has been given an opportunity to compete with all other applicants. *Bakke*, *supra*, at 318, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.).

The one qualification to this description of the admissions process is that membership in an underrepresented minority is given a weight of 20 points on the 150-point scale. On the face of things, however, this assignment of specific points does not set race apart from all other weighted considerations. Nonminority students may receive 20 points for athletic ability, socioeconomic disadvantage, attendance at a socioeconomically [*295] disadvantaged or predominantly minority high school, or at the Provost's discretion; they may also receive 10 points for being residents of Michigan, [**2441] 6 for residence in an underrepresented Michigan county, 5 for leadership and service, and so on.

The Court nonetheless finds fault with a scheme that "automatically" distributes 20 points to minority applicants because "the only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." *Ante*, at 156 L Ed 2d, at 282. The objection goes to the use of points to quantify and compare characteristics, or to the number of points awarded due to race, but on either reading the objection is mistaken. The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," *Grutter, post*, at 156 L Ed 2d 304, 123 S Ct 2325; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.

Nor is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in *Bakke*. Of course we can conceive of a point system in which the "plus" factor given to minority applicants would be so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system, see 438 U.S., at 319, n. 53, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). But petitioners do not have a convincing argument [*296] that the freshman admissions system operates this way. The present record obviously shows that nonminority applicants may achieve higher selection point totals than minority applicants owing to characteristics other than race, and the fact that the university admits "virtually every qualified under-represented minority applicant," App. to Pet. for Cert. 111a, may reflect nothing more than the likelihood that very few qualified minority applicants apply, Brief for Respondents Bollinger et al. 39, as well as the possibility that self-selection [***298] results in a strong minority applicant pool. It suffices for me, as it did for the District Court, that there are no *Bakke*-like set-asides and that consideration of an applicant's whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage.

Any argument that the "tailoring" amounts to a set-aside, then, boils down to the claim that a plus factor of 20 points makes some observers suspicious, where a factor of 10 points might not. But suspicion does not carry petitioners' ultimate burden of persuasion in this constitutional challenge, *Wygant* v. *Jackson Bd. of Ed.,* 476 U.S. 267, 287-288, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion of Powell, J.), and it surely does not warrant condemning the college's admissions scheme on this record. Because the District Court (correctly, in my

view) did not believe that the specific point assignment was constitutionally troubling, it made only limited and general findings on other characteristics of the university's admissions practice, such as the conduct of individualized review by the Admissions Review Committee. 122 F. Supp. 2d 811, 829-830 (ED Mich 2000). As the Court indicates, we know very little about the actual role of the review committee. *Ante*, at 156 L Ed 2d, at 283-284 ("The record does not reveal precisely how many applications are flagged for this individualized [**2442] consideration [by the committee]"); see also *ante*, at 156 L Ed 2d, at 287 (O'Connor, J., concurring) ("The evidence in the record . . . reveals very little about how the review committee actually functions"). The point system cannot operate as a *de facto* set-aside if the [*297] greater admissions process, including review by the committee, results in individualized review sufficient to meet the Court's standards. Since the record is quiet, if not silent, on the case-by-case work of the committee, the Court would be on more defensible ground by vacating and remanding for evidence about the committee's specific determinations. n3

n3 The Court surmises that the committee does not contribute meaningfully to the University's individualized review of applications. *Ante*, at 156 L Ed 2d, at 283-284. The Court should not take it upon itself to apply a newly-formulated legal standard to an undeveloped record. Given the District Court's statement that the committee may examine "any number of applicants, including applicants other than under-represented minority applicants," 122 F. Supp. 2d 811, 830 (ED Mich 2000), it is quite possible that further factual development would reveal the committee to be a "source of individualized consideration" sufficient to satisfy the Court's rule, *ante*, at 156 L Ed 2d, at 287 (O'Connor, J., concurring). Determination of that issue in the first instance is a job for the District Court, not for this Court on a record that is admittedly lacking.

Without knowing more about how the Admissions Review Committee actually functions, it seems especially unfair to treat the candor of the admissions plan as an Achilles' heel. In contrast to the college's forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it is worth considering the character of one alternative thrown up as preferable, because supposedly not based on race. Drawing on admissions systems used at public universities in California, Florida, and Texas, the [***299] United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan. Brief for United States as *Amicus Curiae* 18; Brief for United States as *Amicus Curiae* in *Gruttervs Bollinger*, O. T. 2002, No. 02-241, pp 13-17.
While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage. n4 It [*298] is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.

n4 Of course it might be pointless in the State of Michigan, where minorities are a much smaller fraction of the population than in California,

Florida, or Texas. Brief for Respondents Bollinger et al. 48-49.

III

If this plan were challenged by a plaintiff with proper standing under Article III, I would affirm the judgment of the District Court granting summary judgment to the college. As it is, I would vacate the judgment for lack of jurisdiction, and I respectfully dissent.

Justice **Ginsburg,** with whom Justice **Souter** joins, dissenting. *

* Justice Breyer joins Part I of this opinion.

I

Educational institutions, the Court acknowledges, are not barred from any and all consideration of race when making admissions decisions. *Ante*, at 156 L Ed 2d, at 280; see *Grutter* v *Bollinger, post*, at 156 L Ed 2d 304, 123 S Ct 2325. But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. *Ante*, at 156 L Ed 2d, at 281 (quoting [**2443] *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 224, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995); *Richmond* v. *J. A. Croson Co.,* 488 U.S. 469, 494, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (plurality opinion)). This insistence on "consistency," *Adarand*, 515 U.S., at 224, 132 L Ed 2d 158, 115 S Ct 2097, would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law, see *id.*, at 274-276, and n 8,132 L Ed 2d 158, 115 S Ct 2097 (Ginsburg, J., dissenting). But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

[*299] In the wake "of a system of racial caste only recently ended," *id.*, at 273, at 273, 132 L Ed 2d 158, 115 S Ct 2097 (Ginsburg, J., dissenting), large disparities [***300] endure. Unemployment, n1 poverty, n2 and access to health care n3 vary disproportionately by race. Neighborhoods and schools remain racially divided. n4 African-American and Hispanic children are all too often educated in poverty-stricken [*300] and underperforming institutions. n5 Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. n6 Equally credentialed job applicants receive different receptions depending on their race. n7 Irrational prejudice is still encountered in real estate [**2444] markets n8 and consumer transactions. n9 [***301] "Bias both [*301] conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." *Id.,* at 274, 132 L Ed 2d 158, 115 S Ct 2097 (Ginsburg, J., dissenting); see generally Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 Calif. L. Rev. 1251, 1276-1291 (1998).

n1 See, *e.g.,* U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2002, p 368 (2002) (Table 562) (hereinafter Statistical Abstract) (unemployment rate among whites was 3.7% in 1999, 3.5% in 2000, and 4.2% in 2001; during those years, the unemployment rate among African-Americans was 8.0%, 7.6%, and 8.7%, respectively; among Hispanics, 6.4%, 5.7%, and 6.6%).

n2 See, *e.g.,* U. S. Dept of Commerce, Bureau of Census, Poverty in the United States: 2000, p 291 (2001) (Table A) (In 2000, 7.5% of non-Hispanic whites, 22.1% of African-Americans, 10.8% of Asian-Americans, and 21.2% of Hispanics

were living in poverty); S. Staveteig & A. Wigton, Racial and Ethnic Disparities: Key Findings from the National Survey of America's Families 1 (Urban Institute Report B-5, 2000) ("Blacks, Hispanics, and Native Americans . . . each have poverty rates almost twice as high as Asians and almost three times as high as whites.").

n3 See, *e.g.,* U. S. Dept. of Commerce, Bureau of Census, Health Insurance Coverage: 2000, p 391 (2001) (Table A) (In 2000, 9.7% of non-Hispanic whites were without health insurance, as compared to 18.5% of African-Americans, 18.0% of Asian-Americans, and 32.0% of Hispanics.); Waidmann & Rajan, Race and Ethnic Disparities in Health Care Access and Utilization: An Examination of State Variation, 57 Med. Care Res. and Rev. 55, 56 (2000) ("On average, Latinos and African Americans have both worse health and worse access to effective health care than do non-Hispanic whites . . . .").

n4 See, *e.g.,* U. S. Dept. of Commerce, Bureau of Census, Racial and Ethnic Residential Segregation in the United States: 1980-2000 (2002) (documenting residential segregation); E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 4 (Jan. 2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (all Internet materials as visited June 2, 2003, and available in Clerk of Court's case file), ("Whites are the most segregated group in the nation's public schools; they attend schools, on average, where eighty percent of the student body is white."); *id.*, at 28 ("Almost three-fourths of black and Latino students attend schools that are predominantly minority . . . . More than one in six black children attend a school that is 99-100% minority . . . . One in nine Latino students attend virtually all minority schools.").

n5 See, *e.g.,* Ryan, Schools, Race, and Money, 109 Yale L. J. 249, 273-274 (1999) ("Urban public schools are attended primarily by African-American and Hispanic students"; students who attend such schools are disproportionately poor, score poorly on standardized tests, and are far more likely to drop out than students who attend nonurban schools.).

n6 See, *e.g.,* Statistical Abstract 140 (Table 211).

n7 See, *e.g.,* Holzer, Career Advancement Prospects and Strategies for Low-Wage Minority Workers, in Low-Wage Workers in the New Economy 228 (R. Kazis & M. Miller eds. 2001) ("In studies that have sent matched pairs of minority and white applicants with apparently equal credentials to apply for jobs, whites routinely get more interviews and job offers than either black or Hispanic applicants."); M. Bertrand & S. Mullainathan, Are Emily and Brendan More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination (Nov. 18, 2002), http://gsb.uchicago.edu/pdf/bertrand.pdf; Mincy, The Urban Institute Audit Studies: Their Research and Policy Context, in Clear and Convincing Evidence: Measurement of Discrimination in America 165-186 (M. Fix & R. Struyk eds. 1993).

n8 See, *e.g.,* M. Turner et al., Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000, pp i, iii

(Nov. 2002), http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (paired testing in which "two individuals--one minority and the other white--pose as otherwise identical homeseekers, and visit real estate or rental agents to inquire about the availability of advertised housing units" revealed that "discrimination still persists in both rental and sales markets of large metropolitan areas nationwide"); M. Turner & F. Skidmore, Mortgage Lending Discrimination: A Review of Existing Evidence 2 (1999) (existing research evidence shows that minority homebuyers in the United States "face discrimination from mortgage lending institutions.").

n9 See, *e.g.,* Ayres, Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause, 94 Mich. L. Rev. 109, 109-110 (1995) (study in which 38 testers negotiated the purchase of more than 400 automobiles confirmed earlier finding "that dealers systematically offer lower prices to white males than to other tester types").

The Constitution instructs all who act for the government that they may not "deny to any person . . . the equal protection of the laws." Amdt. 14, § 1. In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. See *Wygant* v. *Jackson Bd. of Ed.,* 476 U.S. 267, 316, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (Stevens, J., dissenting). Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated. See Carter, When Victims Happen To Be Black, 97 Yale L. J. 420, 433-434 (1988) ("To say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in [*Regents of Univ. of Cal.* v.*Bakke,* 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) was the same as the issue in [*Brown* v. *Board of Education,* 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954) is to pretend that history never happened and that the present doesn't exist."). Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 931-932 (CA2 1968) (footnote omitted). But where race is considered "for the purpose of achieving equality," *id*., at 932, no automatic proscription is in order. [*302] For, as insightfully explained, "the Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Bd. of Ed.,* 372 F.2d 836, 876 (CA5 1966) (Wisdom, J.); see Wechsler, The Nationalization Of Civil Liberties And Civil Rights, Supp to 12 Tex. Q. 10, 23 [**2445] (1968) (*Brown* may be seen as disallowing racial classifications that "impl[y] an invidious assessment" while allowing such classifications [***302] when "not invidious in implication" but advanced to "correct inequalities"). Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality. See *Grutter, post*, at 156 L Ed 2d 304, 123 S Ct 2325 (Ginsburg, J., concurring) (citing the United Nations-initiated Conventions on the Elimination of All Forms of Racial

Discrimination and on the Elimination of All Forms of Discrimination against Women). The mere assertion of a laudable governmental purpose, of course, should not immunize a race-conscious measure from careful judicial inspection. See *Jefferson County*, 372 F.2d at 876 ("The criterion is the relevancy of color to a legitimate governmental purpose."). Close review is needed "to ferret out classifications in reality malign, but masquerading as benign," *Adarand*, 515 U.S., at 275, 132 L Ed 2d 158, 115 S Ct 2097 (Ginsburg, J., dissenting), and to "ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups," *id.*, at 276, 132 L Ed 2d 158, 115 S Ct 2097.

II

Examining in this light the admissions policy employed by the University of Michigan's College of Literature, Science, and the Arts (College), and for the reasons well stated by [*303] Justice Souter, I see no constitutional infirmity. See *ante*, at 156 L Ed 2d, at 295-299 (dissenting opinion). Like other top-ranking institutions, the College has many more applicants for admission than it can accommodate in an entering class. App. to Pet. for Cert. 108a. Every applicant admitted under the current plan, petitioners do not here dispute, is qualified to attend the College. *Id.*, at 111a. The racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day, see *supra*, at 156 L Ed 2d, at 299-301. There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. See Brief for Respondents 10; Tr. of Oral Arg. 41-42 (in the range between 75 and 100 points, the review committee may look at applications individually and ignore the points). Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race. Cf. Liu, The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1049 (2002) ("In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants."). n10

n10 The United States points to the "percentage plans" used in California, Florida, and Texas as one example of a "race-neutral alternative" that would permit the College to enroll meaningful numbers of minority students. Brief for United States as *Amicus Curiae* 14; see Commission on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education 1 (Nov. 2002), http://www.usccr.gov/pubs/percent2/percent2.pdf (percentage plans guarantee admission to state universities for a fixed percentage of the top students from high schools in the State). Calling such 10 or 20% plans "race-neutral" seems to me disingenuous, for they "unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system." Brief for Respondents 44; see C. Horn & S. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences 14-19 (2003), http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf. Percentage plans depend for their effectiveness on continued racial

segregation at the secondary school level: They can ensure significant minority enrollment in universities only if the majority-minority high school population is large enough to guarantee that, in many schools, most of the students in the top 10 or 20% are minorities. Moreover, because such plans link college admission to a single criterion--high school class rank--they create perverse incentives. They encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages. See Selingo, What States Aren't Saying About the 'X-Percent Solution,' Chronicle of Higher Education, June 2, 2000, p A31. And even if percentage plans could boost the sheer numbers of minority enrollees at the undergraduate level, they do not touch enrollment in graduate and professional schools.

[***303] [**2446] [*304] The stain of generations of racial oppression is still visible in our society, see Krieger, 86 Calif. L. Rev., at 1253, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment--and the networks and opportunities thereby opened to minority graduates--whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished. See, *e.g.,* Steinberg, Using Synonyms for Race, College Strives for Diversity, [*305] N. Y. Times, Dec. 8, 2002, section 1, p 1, col. 3 (describing admissions process at Rice University); cf. Brief for United States as *Amicus Curiae* 14-15 (suggesting institutions could consider, *inter alia*, "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays"). If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises. n11

n11 Contrary to the Court's contention, I do not suggest "changing the Constitution so that it conforms to the conduct of the universities." *Ante*, at 156 L Ed 2d, at 284, n 22. In my view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race. See *supra*, at 156 L Ed 2d, at 301-302. Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.

* * *

For the reasons stated, I would affirm the judgment of the District Court.

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BARBARA GRUTTER, Petitioner v. LEE BOLLINGER et al.

No. 02-241

SUPREME COURT OF THE UNITED STATES

539 U.S. 306; 123 S. Ct. 2325; 156 L. Ed. 2d 304; 2003 U.S. LEXIS 4800; 71 U.S.L.W. 4498; 91 Fair Empl. Prac. Cas. (BNA) 1761; 84 Empl. Prac. Dec. (CCH) P41,415; 2003 Cal. Daily Op. Service 5378; 16 Fla. L. Weekly Fed. S 367

April 1, 2003, Argued
June 23, 2003, Decided

JUDGES: O'Connor, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined, and in which Scalia and Thomas, JJ., joined in part insofar as it is consistent with the views expressed in Part VII of the opinion of Thomas, J. Ginsburg, J., filed a concurring opinion, in which Breyer, J., joined. Scalia, J., filed an opinion concurring in part and dissenting in part, in which Thomas, J., joined. Thomas, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined as to Parts I-VII. Rehnquist, C. J., filed a dissenting opinion, in which Scalia, Kennedy, and Thomas, JJ., joined. Kennedy, J., filed a dissenting opinion.

OPINIONBY: O'CONNOR [*311]

OPINION: [**2331] Justice **O'Connor** delivered the opinion of the Court.

[***HR1A] [1A] [***HR2A] [2A] This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

[*312] I

A

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class [*313] of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial [*314] promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." App. 110. More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Ibid.* In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See *Regents of Univ. of Cal.* v. *Bakke,* 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). [*315] Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy. The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." App. 111. The policy requires admissions officials to evaluate each applicant based on all the information

available in the file, including a personal statement, letters of recommendation, [**2332] and an essay describing the ways in which the applicant will contribute to the life and diversity of the [***324] Law School. *Id.*, at 83-84, 114-121. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. *Id.*, at 112. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems." *Id.*, at 111.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. *Id.*, at 113. Nor does a low score automatically disqualify an applicant. *Ibid.* Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. *Id.*, at 114. So-called "'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution." *Ibid.*

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Id.*, at 118. [*316] The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." *Id.*, at 118, 120. The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.*, at 120. By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensure their ability to make unique contributions to the character of the Law School." *Id.*, at 120-121.

The policy does not define diversity "solely in terms of racial and ethnic status." *Id.*, at 121. Nor is the policy "insensitive to the competition among all students for admission to the Law School." *Ibid.* Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession." *Ibid.*

B

[***HR3] [3] Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of [***325] Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 [*317] until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat 252, 42 USC § 2000d [42 USCS § 2000d]; and Rev Stat § 1977, as amended, 42 USC § 1981 [42 USCS § 1981]. Petitioner further alleged that her application was rejected because the Law School uses race as a "predominant" factor, [**2333] giving applicants who belong to certain minority groups "a significantly greater chance of admission than students with

similar credentials from disfavored racial groups." App. 33-34. Petitioner also alleged that respondents "had no compelling interest to justify their use of race in the admissions process." *Id.*, at 34. Petitioner requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race. *Id.*, at 36. Petitioner clearly has standing to bring this lawsuit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville,* 508 U.S. 656, 666, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993) .

The District Court granted petitioner's motion for class certification and for bifurcation of the trial into liability and damages phases. The class was defined as "'all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School.'" App. to Pet. for Cert. 191a-192a.

The District Court heard oral argument on the parties' cross-motions for summary judgment on December 22, 2000. Taking the motions under advisement, the District Court indicated that it would decide as a matter of law whether the Law School's asserted interest in obtaining the educational benefits that flow from a diverse student body was compelling. [*318] The District Court also indicated that it would conduct a bench trial on the extent to which race was a factor in the Law School's admissions decisions, and whether the Law School's consideration of race in admissions decisions constituted a race-based double standard.

During the 15-day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors. *Id.*, at 206a. Shields testified that at the height of the admissions season, he would frequently consult the so-called "daily reports" that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). *Id.*, at 207a. This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational [***326] benefits of a diverse student body. *Ibid.* Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students. *Ibid.*

Erica Munzel, who succeeded Shields as Director of Admissions, testified that "'critical mass'" means "'meaningful numbers'" or "'meaningful representation, '" which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. *Id.*, at 208a-209a. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. *Id.*, at 209a. Munzel also asserted that she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores. *Ibid.*

The current Dean of the Law School, Jeffrey Lehman, also testified. Like the other Law School witnesses, Lehman did [*319] not quantify critical mass in terms of numbers or percentages. *Id.*, at 211a. He indicated that critical mass means numbers [**2334] such that underrepresented minority students do not feel isolated or like spokespersons for their race. *Ibid.* When asked about the extent to which race is considered in admissions, Lehman testified that it varies from one applicant to another. *Ibid.* In some cases, according to Lehman's testimony, an applicant's race may play no role, while in others it may be a "'determinative'" factor.

Ibid.

The District Court heard extensive testimony from Professor Richard Lempert, who chaired the faculty committee that drafted the 1992 policy. Lempert emphasized that the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom. *Id.*, at 213a. When asked about the policy's "'commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,'" Lempert explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination. *Ibid.* Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers. *Ibid.*

Kent Syverud was the final witness to testify about the Law School's use of race in admissions decisions. Syverud was a professor at the Law School when the 1992 admissions policy was adopted and is now Dean of Vanderbilt Law School. In addition to his testimony at trial, Syverud submitted several expert reports on the educational benefits of diversity. Syverud's testimony indicated that when a critical mass of underrepresented minority students is present, [*320] racial stereotypes lose their force because nonminority students learn there is no "'minority viewpoint'" but rather a variety of viewpoints among minority students. *Id.*, at 215a.

[***327] In an attempt to quantify the extent to which the Law School actually considers race in making admissions decisions, the parties introduced voluminous evidence at trial. Relying on data obtained from the Law School, petitioner's expert, Dr. Kinley Larntz, generated and analyzed "admissions grids" for the years in question (1995-2000). These grids show the number of applicants and the number of admittees for all combinations of GPAs and LSAT scores. Dr. Larntz made "'cell-by-cell'" comparisons between applicants of different races to determine whether a statistically significant relationship existed between race and admission rates. He concluded that membership in certain minority groups "'is an extremely strong factor in the decision for acceptance,'" and that applicants from these minority groups "'are given an extremely large allowance for admission'" as compared to applicants who are members of nonfavored groups. *Id.*, at 218a-220a. Dr. Larntz conceded, however, that race is not the predominant factor in the Law School's admissions calculus. 12 Tr. 11-13 (Feb. 10, 2001).

Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a "'very dramatic,'" negative effect on underrepresented minority admissions. App. to Pet. for Cert. 223a. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. *Ibid.* Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. *Ibid.* Under this scenario, underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent. *Ibid.*

[**2335] [*321] In the end, the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. Applying strict scrutiny, the District Court determined that the Law School's asserted interest in assembling a diverse student body was not compelling because "the attainment of a racially diverse class . . . was not recognized as such by *Bakke* and is not a remedy for past discrimination." *Id.*, at 246a. The District Court went on to hold that even if diversity

were compelling, the Law School had not narrowly tailored its use of race to further that interest. The District Court granted petitioner's request for declaratory relief and enjoined the Law School from using race as a factor in its admissions decisions. The Court of Appeals entered a stay of the injunction pending appeal.

Sitting en banc, the Court of Appeals reversed the District Court's judgment and vacated the injunction. The Court of Appeals first held that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest. According to the Court of Appeals, Justice Powell's opinion with respect to diversity comprised the controlling rationale for the judgment of this Court under the analysis set forth in *Marks* v. *United States,* 430 U.S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977). The Court of Appeals also held that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor" and because the Law School's program was "virtually identical" [***328] to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion. 288 F.3d 732, 746, 749 (CA6 2002).

Four dissenting judges would have held the Law School's use of race unconstitutional. Three of the dissenters, rejecting the majority's *Marks* analysis, examined the Law School's interest in student body diversity on the merits and concluded it was not compelling. The fourth dissenter, writing separately, found it unnecessary to decide whether diversity was a compelling interest because, like the other dissenters, [*322] he believed that the Law School's use of race was not narrowly tailored to further that interest.

[***HR4A] [4A] We granted certiorari, 537 U.S. 1043, 537 U.S. 1043, 154 L. Ed. 2d 514, 123 S. Ct. 617 (2002), to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. Compare *Hopwood* v. *Texas*, 78 F.3d 932 (CA5 1996) (*Hopwood I*) (holding that diversity is not a compelling state interest), with *Smith* v. *University of Wash. Law School,* 233 F.3d 1188 (CA9 2000) (holding that it is).

II

A

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." *Id.*, at 325, 57 L Ed 2d 750, 98 S Ct 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. *Id.*, at 408, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Stevens, J., joined by Burger, C. J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). Justice Powell provided a fifth vote not only for invalidating the set-aside program, but [**2336] also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court in *Bakke* was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving [*323] the competitive consideration of race and ethnic origin." *Id.*, at 320, 57 L Ed 2d 750, 98 S Ct 2733. Thus, we reversed that part of the lower court's judgment that enjoined the university "from any consideration of the race of any applicant." *Ibid.*

Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the

touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious [***329] policies. See, *e.g.*, Brief for Judith Areen et al. as *Amici Curiae* 12-13 (law school admissions programs employ "methods designed from and based on Justice Powell's opinion in *Bakke*"); Brief for Amherst College et al. as *Amici Curiae* 27 ("After *Bakke*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion . . . and set sail accordingly"). We therefore discuss Justice Powell's opinion in some detail.

Justice Powell began by stating that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Bakke*, 438 U.S., at 289- 290, 57 L Ed 2d 750, 98 S Ct 2733. In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.*, at 299, 57 L Ed 2d 750, 98 S Ct 2733. Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.

First, Justice Powell rejected an interest in "'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession'" as an unlawful interest in racial balancing. *Id.*, at 306-307, 57 L Ed 2d 750, 98 S Ct 2733. Second, Justice Powell rejected an interest in remedying societal discrimination [*324] because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.*, at 310, 57 L Ed 2d 750, 98 S Ct 2733. Third, Justice Powell rejected an interest in "increasing the number of physicians who will practice in communities currently underserved," concluding that even if such an interest could be compelling in some circumstances the program under review was not "geared to promote that goal." *Id.*, at 306, 310, 57 L Ed 2d 750, 98 S Ct 2733.

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." *Id.*, at 311, 57 L Ed 2d 750, 98 S Ct 2733. With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." *Id.*, at 312, 314, 57 L Ed 2d 750, 98 S Ct 2733. Justice Powell emphasized that nothing less than the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.*, at 313, 57 L Ed 2d 750, 98 S Ct 2733 (quoting *Keyishian* v. *Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967)). In seeking the "right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 US, at 313, 57 L Ed 2d 750, 98 S Ct 2733. Both "tradition and experience lend support [***330] to [**2337] the view that the contribution of diversity is substantial." *Ibid.*

Justice Powell was, however, careful to emphasize that in his view race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.*, at 314, 57 L Ed 2d 750, 98 S Ct 2733. For Justice Powell, "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that [*325] can justify the use of race. *Id.*, at 315, 57 L Ed 2d 750, 98 S Ct 2733. Rather,

"the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Ibid.*

In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks.* In that case, we explained that "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." 430 US, at 193, 51 L Ed 2d 260, 97 S Ct 990 (internal quotation marks and citation omitted). As the divergent opinions of the lower courts demonstrate, however, "this test is more easily stated than applied to the various opinions supporting the result in [*Bakke*]." *Nichols* v. *United States*, 511 U.S. 738, 745-746, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994) . Compare, *e.g., Johnson* v. *Board of Regents of Univ. of Ga*., 263 F.3d 1234 (CA11 2001) (Justice Powell's diversity rationale was not the holding of the Court); *Hopwood* v.*Texas* , 236 F.3d 256, 274-275 (CA5 2000) (*Hopwood II*) (same); *Hopwood I*, 78 F.3d 932 (same), with *Smith* v. *University of Wash. Law School,* 233 F.3d 1199 (Justice Powell's opinion, including the diversity rationale, is controlling under *Marks*).

[***HR4B] [4B] We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks.* It does not seem "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols* v. *United States*, *supra*, at 745-746, 128 L Ed 2d 745, 114 S Ct 1921. More important, for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

[*326] B

[***HR5] [5] [***HR6] [6] The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws. " U.S. Const., Amdt. 14, § 2. Because the Fourteenth Amendment "protects *persons*, not *groups*," all "governmental action based on race--a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited--should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc.* v.*Pena,* 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) (emphasis in original; internal [***331] quotation marks and citation omitted). We are a "free people whose institutions are founded upon the doctrine of equality." *Loving* v. *Virginia,* 388 U.S. 1, 11, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) (internal quotation marks and citation omitted). It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc.* v. *Pena,* 515 U.S., at 227, 132 L Ed 2d 158, 115 S Ct 2097.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *IbidIbid.* This means that such classifications are constitutional only if they are narrowly tailored to further compelling [**2338] governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond* v. *J. A. Croson Co.,* 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*

Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc.* v. *Pena*, *supra,* at 237, 132 L Ed 2d 158, 115 S Ct 2097 (internal quotation marks and citation omitted). Although all governmental [*327] uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." 515 U.S., at 229-230, 132 L Ed 2d 158, 115 S Ct 2097. But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Id.*, at 230, 132 L Ed 2d 158, 115 S Ct 2097. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

[***HR7] [7] Context matters when reviewing race-based governmental action under the Equal Protection Clause. See *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343-344, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960) (admonishing that, "in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). In *Adarand Constructors, Inc.* v *Pena,* we made clear that strict scrutiny must take "'relevant differences' into account. " 515 US, at 228, 132 L Ed 2d 158, 115 S Ct 2097. Indeed, as we explained, that is its "fundamental purpose." *Ibid.* Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental [***332] decisionmaker for the use of race in that particular context.

III

A

[***HR8A] [8A] With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have [*328] throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." Brief for Respondents Bollinger et al. i. In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.

[***HR1B] [1B] [***HR4C] [4C] [***HR8B] [8B] We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke.* It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. See, *e.g., Richmond* v. *J. A. Croson Co., supra*, at 493, 102 L Ed 2d 854, 109 S Ct 706 (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of [**2339] racial hostility"). But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

[***HR8C] [8C] The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici.* Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex

educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. See *Regents of Univ. of Mich.* v. *Ewing,* 474 U.S. 214, 225, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985); *Board of Curators of Univ. of Mo.* [*329] v. *Horowitz,* 435 U.S. 78, 96, n. 6, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978); *Bakke,* 438 U.S., at 319, n. 53, 57 L Ed 2d 750, 98 S Ct 2733 [*330] (opinion of Powell, J.).

[***HR8D] [8D] [***HR9] [9] We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. See, *e.g., Wieman* v. *Updegraff*, 344 U.S. 183, 195, 97 L. Ed. 216, 73 S. Ct. 215 (1952) (Frankfurter, J., concurring); *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957); *Shelton* v. *Tucker*, 364 U.S. 479, 487, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.,* 385 U.S., at 603, 17 L Ed 2d 629, 87 S Ct 675. In announcing the principle of student body diversity as a compelling state interest, Justice Powell [***333] invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, *supra*, at 312, 57 L Ed 2d 750, 98 S Ct 2733. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seeks to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 US, at 313, 57 L Ed 2d 750, 98 S Ct 2733 (quoting *Keyishian* v. *Board of Regents of Univ. of State of N. Y., supra*, at 603, 17 L Ed 2d 629, 87 S Ct 675). Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary." 438 U.S., at 318-319, 57 L Ed 2d 750, 98 S Ct 2733.

[***HR8E] [8E] [***HR10] [10] As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse, " the Law School seeks to "enroll a 'critical mass' of minority students." Brief for Respondents Bollinger et al. 13. The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke*, 438 U.S., at 307, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. *Ibid.; Freeman* v. *Pitts,* 503 U.S. 467, 494, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992) ("Racial balance is not to be achieved for its own sake"); *Richmond* v. *J. A. Croson Co.,* 488 U.S., at 507, 102 L Ed 2d 854, 109 S Ct 706. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

[***HR8F] [8F] These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to [**2340] break down racial stereotypes, and "enables [students] to better understand persons of different races." App. to Pet. for Cert. 246a. These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." *Id.,* at 246a, 244a.

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning

outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Brief for American Educational Research Association et al. as *Amici Curiae* 3; see, *e.g.*, W. Bowen & D. Bok, The Shape of the River (1998); Diversity Challenged: Evidence on the Impact of Affirmative Action (G. Orfield & M. Kurlaender eds. 2001); Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities (M. Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003).

These benefits are not theoretical [***334] but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as *Amici Curiae* 5; [*331] Brief for General Motors Corp. as *Amicus Curiae* 3-4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "based on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. *Id.*, at 5. At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." *Ibid.* (emphasis in original). To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." *Id.*, at 29 (emphasis in original). We agree that "it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." *Ibid.*

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. *Plyler* v. *Doe*, 457 U.S. 202, 221, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982). This Court has long recognized that "education . . . is the very foundation of good citizenship." *Brown* v. *Board of Education,* 347 U.S. 483, 493, 98 L. Ed. 873, 74 S. Ct. 686 (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that "ensuring that public institutions are open and available to all segments of American [*332] society, including people of all races and ethnicities, represents a paramount government objective." Brief for United States as *Amicus Curiae* 13. And, "nowhere is the importance of such openness more acute than in the context of higher education." *Ibid.* Effective participation by members of all racial and ethnic groups in the civic life of our Nation is [**2341] essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. *Sweatt* v.*Painter* , 339 U.S. 629, 634, 94 L. Ed. 1114, 70 S. Ct. 848 (1950) (describing law school as a "proving ground for legal learning and practice"). Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. See Brief for Association of American [***335] Law Schools as *Amicus Curiae* 5-6. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and

nearly 200 of the more than 600 United States District Court judges. *Id.*, at 6.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." See *Sweatt* v. *Painter*, *supra*, at 634, 94 L Ed 1114, 70 S Ct 848. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society [*333] may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." Brief for Respondent Bollinger et al. 30. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

B

[***HR11] [11] Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw* v. *Hunt,* 517 U.S. 899, 908, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996) (internal quotation marks and citation omitted). The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond* v. *J. A. Croson Co.,* 488 U.S., at 493, 102 L Ed 2d 854, 109 S Ct 706 (plurality opinion).

[***HR12A] [12A] Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry [*334] must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice Kennedy's assertions, we do not [***336] "abandon[] strict scrutiny," see *post*, at 156 L Ed 2d, at 374 (dissenting opinion). Rather, as we have already [**2342] explained, *ante*, at 156 L Ed 2d, at 331, we adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to take such "relevant differences into account." 515 US, at 228, 132 L Ed 2d 158, 115 S Ct 2097 (internal quotation marks omitted).

To be narrowly tailored, a race-conscious admissions program cannot use a quota system--it cannot "insulate each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke, supra*, at 315, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulating the individual from comparison with all other candidates for the available seats." *Id.,* at 317, 57 L Ed 2d 750, 98 S Ct 2733. In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of

the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Ibid.*
[***HR1C] [1C] [***HR12B] [12B] [***HR13A] [13A] We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See *id.*, at 315-316, 57 L Ed 2d 750, 98 S Ct 2733. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. *Ibid.* Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. *Ibid.*
[***HR13B] [13B] [***HR14A] [14A] [***HR15] [15] [*335] We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." *Richmond* v. *J. A. Croson Co., supra*, at 496, 102 L Ed 2d 854, 109 S Ct 706 (plurality opinion). Quotas "'impose a fixed number or percentage which must be attained, or which cannot be exceeded,'" *Local 28 of Sheet Metal Workers* v. *EEOC,* 478 U.S. 421, 495, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (1986) (O'Connor, J., concurring in part and dissenting in part), and "insulate the individual from comparison with all other candidates for the available seats." *Bakke, supra*, at 317, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). In contrast, "a permissible goal . . . requires only a good-faith effort . . . to come within a range demarcated by the goal itself," *Sheet Metal Workers* v. *EEOC*, *supra*, at 495, 92 L Ed 2d 344, 106 S Ct 3019, and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "competes with all other qualified applicants," *Johnson* v. *Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 638, 94 L. Ed. 2d 615, 107 S. Ct. 1442 (1987). Justice Powell's distinction between [***337] the medical school's rigid 16-seat quota and Harvard's flexible use of race as a "plus" factor is instructive. Harvard certainly had minimum *goals* for minority enrollment, even if it had no specific number firmly in mind. See *Bakke, supra*, at 323, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.) ("10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States"). What is more, Justice Powell flatly rejected the argument that Harvard's program was "the functional equivalent of a quota" merely because it had some "'plus'" for race, or gave greater "weight" to race than to some other factors, in order to achieve student body diversity. 438 U.S., at 317-318, 57 L Ed 2d 750, 98 S Ct 2733.
[***HR14B] [14B] [**2343] The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program [*336] into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." *Id.*, at 323, 57 L Ed 2d 750, 98 S Ct 2733. "Some attention to numbers," without more, does not transform a flexible admissions system into a rigid quota. *Ibid.* Nor, as Justice Kennedy posits, does the Law School's consultation of the "daily reports," which keep track of the racial and ethnic composition of the class (as well as of residency and gender), "suggest[] there was no further attempt at individual review save for race itself" during the final stages of the admissions process. See *post*, at 156 L Ed 2d, at 373 (dissenting opinion). To the contrary, the Law School's admissions

officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports. Brief for Respondents Bollinger et al. 43, n 70 (citing App. in Nos. 01-1447 and 01-1516 (CA6), p 7336). Moreover, as Justice Kennedy concedes, see *post*, at 156 L Ed 2d, at 372, between 1993 and 2000, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.

The Chief Justice believes that the Law School's policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass. *Post*, at 156 L Ed 2d, at 371-375 (dissenting opinion). But, as the Chief Justice concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year. See *post*, at 156 L Ed 2d, at 375 (dissenting opinion).

[***HR16] [16] That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" [*337] factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way [***338] that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke*, *supra*, at 318, n. 52, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.) (identifying the "denial . . . of the right to individualized consideration" as the "principal evil" of the medical school's admissions program).

[***HR13C] [13C] [***HR17] [17] Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz* v *Bollinger, ante*, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. See *ante*, at 156 L Ed 2d 257, 123 S Ct 2411 (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan, which considered race but "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity"). Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according [**2344] them the same weight." *Bakke, supra*, at 317, at 317, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.).

[***HR13D] [13D] [***HR18A] [18A] We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect [*338] to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences. See App. 120.

[***HR18B] [18B] The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to

student body diversity. To the contrary, the 1992 policy makes clear "there are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. *Id.*, at 118-119. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic--*e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." *Id.*, at 83-84. All applicants have the opportunity [***339] to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. See Brief for Respondents Bollinger et al. 10; App. 121-122. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this [*339] flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. Justice Kennedy speculates that "race is likely outcome determinative for many members of minority groups" who do not fall within the upper range of LSAT scores and grades. *Post*, at 156 L Ed 2d, at 371 (dissenting opinion). But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors. See 438 US, at 316, 57 L Ed 2d 750, 98 S Ct 2733 ("'When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor'").

[***HR19A] [19A] [***HR20] [20] Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant* v. *Jackson Bd. of Ed.,* 476 U.S. 267, 280, n. 6, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (alternatives must serve the interest "'about as well'"); *Richmond* v. *J. A. Croson Co.,* 488 U.S., at 509- 510, 102 L Ed 2d 854, 109 S Ct 706 [**2345] (plurality opinion) (city had a "whole array of race-neutral" alternatives because changing requirements "would have [had] little detrimental effect on the city's interests"). Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. See *id.*, at 507, 102 L Ed 2d 854, 109 S Ct 706 (set-aside plan not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means"); *Wygant* v. *Jackson Bd. of Ed.*, *supra*, at 280, n. 6, 90 L Ed 2d 260, 106 S Ct 1842 (narrow tailoring [*340] "requires consideration" of "lawful alternative and less restrictive means").

[***HR13E] [13E] [***HR19B] [19B] We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis [***340] for all applicants on

undergraduate GPA and LSAT scores." App. to Pet. for Cert. 251a. But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission. The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State. Brief for United States as *Amicus Curiae* 14-18. The United States does not, however, explain how such plans could work for graduate and professional schools. More-over, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

[***HR21] [21] [***HR22A] [22A] [*341] We acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke,* 438 U.S., at 298, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id*., at 308, 57 L Ed 2d 750, 98 S Ct 2733. To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Metro Broadcasting, Inc.* v. *FCC,* 497 U.S. 547, 630, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990) (O'Connor, J., dissenting).

[***HR22B] [22B] [***HR23] [23] We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See *Bakke, supra*, at 317, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a "plus" factor in the context of [**2346] individualized consideration, a rejected applicant

> "will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname . . . . His qualifications would [***341] have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." 438 US, at 318, 57 L Ed 2d 750, 98 S Ct 2733.

[***HR13F] [13F] [***HR22C] [22C] We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.

[***HR24] [24] [***HR25A] [25A] [***HR26] [26] We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all

governmentally imposed discrimination based on race." *Palmore* v. *Sidoti,* [*342] 466 U.S. 429, 432, 80 L. Ed. 2d 421, 104 S. Ct. 1879 (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits." Brief for Respondents Bollinger et al. 32.

[***HR25B] [25B] In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. Cf. *United States* v. *Lopez,* 514 U.S. 549, 581, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995) (Kennedy, J., concurring) ("The States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"). The requirement that all race-conscious admissions programs have a termination point "assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Richmond* v. *J. A. Croson Co.,* 488 U.S., at 510, 102 L Ed 2d 854, 109 S Ct 706 (plurality opinion); see also Nathanson & Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, [*343] 58 Chicago Bar Rec. 282, 293 (May-June 1977) ("It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all").

[***HR1D] [1D] We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its [***342] race-conscious admissions program as soon as practicable. See Brief for Respondents Bollinger et al. 34; *Bakke, supra*, at 317-318, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary). It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed [**2347] increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV

[***HR1E] [1E] [***HR2B] [2B] In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Consequently, petitioner's statutory claims based on Title VI and 42 USC § 1981 [42 USCS § 1981] also fail. See *Bakke, supra*, at 287, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.) ("Title VI . . . proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *General Building Contractors Assn., Inc.* v. *Pennsylvania,* 458 U.S. 375, 389-391, 73 L.

Ed. 2d 835, 102 S. Ct. 3141 (1982) (the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause). The judgment [*344] of the Court of Appeals for the Sixth Circuit, accordingly, is affirmed.
It is so ordered.

CONCURBY: GINSBURG; SCALIA (In Part); THOMAS (In Part)

CONCUR: Justice **Ginsburg,** with whom Justice **Breyer** joins, concurring.

The Court's observation that race-conscious programs "must have a logical end point," *ante*, at 156 L Ed 2d, at 341, accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422-423 (June 1996), endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G. A. Res. 2106, 20 U. N. GAOR Res. Supp (No. 14) 47, U. N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Ibid*; see also Art. 1(4) (similarly providing for temporally limited affirmative action); Convention on the Elimination of All Forms of Discrimination against Women, Annex to G. A. Res. 34/180, 34 U. N. GAOR Res. Supp (No. 46) 194, U. N. Doc. A/34/46, Art. 4(1) (1979) (authorizing "temporary special measures aimed at accelerating *de facto* equality" that "shall be discontinued when the [***343] objectives of equality of opportunity and treatment have been achieved").
The Court further observes that "it has been 25 years since Justice Powell [in *Regents of Univ. of Cal.* v.*Bakke,* 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) first approved the use of race to further an interest in student body diversity in the context of public higher education." *Ante*, at 156 L Ed 2d, at 342. For at least part of that [*345] time, however, the law could not fairly be described as "settled," and in some regions of the Nation, overtly race-conscious admissions policies have been proscribed. See *Hopwood* v. *Texas*, 78 F.3d 932 (CA5 1996); cf. *Wessmann* v. *Gittens*, 160 F.3d 790 (CA1 1998) ; *Tuttle* v. *Arlington Cty. School Bd.*, 195 F.3d 698 (CA4 1999); *Johnson* v. *Board of Regents of Univ. of Ga.*, 263 F.3d 1234 (CA11 2001). Moreover, it was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery. See *Brown* v. *Board of Education,* 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954); cf. *Cooper*v. *Aaron,* 358 U.S. 1, 3 L. Ed. 2d 5, 78 S. Ct. 1401, 79 Ohio Law Abs. 452 (1958).
It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest [**2348] values and ideals. See, *e.g., Gratz* v *Bollinger, ante,* at 156 L Ed 2d 257, 123 S Ct 2411 (Ginsburg, J., dissenting); *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 272-274, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) (Ginsburg, J., dissenting); Krieger, Civil Rights Perestroika: Intergroup Relations after Affirmative Action, 86 Calif. L. Rev. 1251, 1276-1291, 1303 (1998) . As to public education, data for the years 2000-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. See E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? p 4 (Jan. 2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDrea m.pdf

(as visited June 16, 2003, and available in Clerk of Court's case file). And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. See *id.,* at 11; Brief for National Urban League et al. as *Amici Curiae* 11-12 (citing General Accounting Office, Per-Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area, 17 (2002)).

[*346] However strong the public's desire for improved education systems may be, see P. Hart & R. Teeter, A National Priority: Americans Speak on Teacher Quality 2, 11 (2002) (public opinion research conducted for Educational Testing Service); The No Child Left Behind Act of 2001, Pub L 107-110, 115 Stat 1425, 20 USC § 7231 [20 USCS § 7231], it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. [***344] As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action. *

* As the Court explains, the admissions policy challenged here survives review under the standards stated in *Adarand Constructors, Inc* . v.*Pena,* 515 U.S. 200, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995), *Richmond* v. *J. A. Croson Co.,* 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989), and Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke,* 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). This case therefore does not require the Court to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review. Cf. *Gratz, ante,* at 156 L Ed 2d 257, 123 S Ct 2411 (Ginsburg, J., dissenting); *Adarand,* 515 U.S., at 274, n. 8, 132 L Ed 2d 158, 115 S Ct 2097 (Ginsburg, J., dissenting). Nor does this case necessitate reconsideration whether interests other than "student body diversity," *ante*, at 156 L Ed 2d, at 330, rank as sufficiently important to justify a race-conscious government program. Cf. *Gratz, ante,* at 156 L Ed 2d 257, 123 S Ct 2411 (Ginsburg, J., dissenting); *Adarand,* 515 U.S., at 273-274, 132 L Ed 2d 158, 115 S Ct 2097 (Ginsburg, J., dissenting).

DISSENTBY: REHNQUIST; Kennedy; Scalia (In Part); Thomas (In Part)

DISSENT:

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

[**2365contd] [***364contd] Chief Justice **Rehnquist,** with whom Justice **Scalia,** Justice **Kennedy,** and Justice **Thomas** join, dissenting.

I agree with the Court that, "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest. *Ante*, at 156 L Ed 2d, at 335; see also *Fullilove* v. *Klutznick*, 448 U.S. 448, 498, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (Powell, J., concurring) ("Even if the government proffers a compelling interest to support reliance upon a suspect classification,

the means selected must be narrowly drawn to fulfill the governmental [*379] purpose"). I do not believe, however, that the University of Michigan Law School's (Law School) means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a "'critical mass'" of underrepresented minority students. Brief for Respondents Bollinger et al. 13. But its actual program bears no relation to this asserted goal. Stripped of its "critical mass" veil, the Law School's program is revealed as a naked effort to achieve racial balancing.

As we have explained many times, """any preference based on racial or ethnic criteria must necessarily receive a most searching examination."'" *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 223, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U.S. 267, 273, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion of Powell, J.)). Our cases establish that, in order to withstand this demanding inquiry, respondents must demonstrate that their methods of using race "'fit'" a compelling state interest "with greater precision than any alternative means." *Id.*, at 280, n. 6, 90 L Ed 2d 260, 106 S Ct 1842; *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 299, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (opinion of Powell, J.) ("When [political judgments] touch upon [**2366] an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest").

Before the Court's decision today, we consistently applied the same [***365] strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used. We rejected calls to use more lenient review in the face of claims that race was being used in "good faith" because "'more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.'" *Adarand*, *supra*, at 226, 132 L Ed 2d 158, 115 S Ct 2097; *Fullilove*, *supra*, at 537, 65 L Ed 2d 902, 100 S Ct 2758 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"). We likewise rejected [*380] calls to apply more lenient review based on the particular setting in which race is being used. Indeed, even in the specific context of higher education, we emphasized that "constitutional limitations protecting individual rights may not be disregarded." *Bakke*, *supra*, at 314, 57 L Ed 2d 750, 98 S Ct 2733.

Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference. Respondents' asserted justification for the Law School's use of race in the admissions process is "obtaining 'the educational benefits that flow from a diverse student body.'" *Ante*, at 156 L Ed 2d, at 332 (quoting Brief for Respondents Bollinger et al. i). They contend that a "critical mass" of underrepresented minorities is necessary to further that interest. *Ante*, at 156 L Ed 2d, at 333. Respondents and school administrators explain generally that "critical mass" means a sufficient number of underrepresented minority [*381] students to achieve several objectives: To ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes. See App. to Pet. for Cert. 211a; Brief for Respondents Bollinger et al. 26. These objectives indicate that "critical mass" relates to the size of the student body. *Id.*, at 5 (claiming that the Law School has enrolled "critical mass," or "enough minority students to provide meaningful integration of its classrooms and residence halls"). Respondents further claim that the Law School is achieving "critical mass." *Id.*, at 4 (noting that the Law School's goals have been "greatly furthered by the presence of . . . a 'critical mass' of" minority students in the

student body).

In practice, the Law School's program bears little or no relation to its asserted goal of achieving "critical mass." Respondents explain that the Law School seeks to accumulate a "critical mass" of *each* underrepresented minority group. See, *e.g.*, *id.*, at 49, n 79 ("The Law School's . . . current policy . . . provides a special commitment to enrolling a 'critical mass' of 'Hispanics'"). But the record demonstrates that the Law School's admissions practices with respect to these groups differ dramatically and cannot be defended under any consistent use of the term "critical mass." From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, [***366] and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if [**2367] all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case, * how can this possibly constitute a "critical mass" of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups.

> * Indeed, during this 5-year time period, enrollment of Native American students dropped to as low as *three* such students. Any assertion that such a small group constituted a "critical mass" of Native Americans is simply absurd.

[*382] These different numbers, moreover, come only as a result of substantially different treatment among the three underrepresented minority groups, as is apparent in an example offered by the Law School and highlighted by the Court: The school asserts that it "frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected." *Ante*, at 156 L Ed 2d, at 335 (citing Brief for Respondents Bollinger et al. 10). Specifically, the Law School states that "sixty-nine minority applicants were rejected between 1995 and 2000 with at least a 3.5 [Grade Point Average (GPA)] and a [score of] 159 or higher on the [Law School Admissions Test (LSAT)]" while a number of Caucasian and Asian-American applicants with similar or lower scores were admitted. Brief for Respondents Bollinger et al. 10. Review of the record reveals only 67 such individuals. Of these 67 individuals, *56* were Hispanic, while only 6 were African-American, and only 5 were Native American. This discrepancy reflects a consistent practice. For example, in 2000, 12 Hispanics who scored between a 159-160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. App. 200-201. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted. *Id.*, at 198. Likewise, that same year, 16 Hispanics who scored between a 151-153 on the LSAT and earned a 3.00 or higher applied for admission and only 1 of those applicants was admitted. *Id.*, at 200-201. Twenty-three similarly qualified

African-Americans applied for admission and 14 were admitted. *Id.*, at 198.

These statistics have a significant bearing on petitioner's case. Respondents have *never* offered any race-specific arguments explaining why [***367] significantly more individuals from one underrepresented minority group are needed in order to achieve "critical mass" or further student body diversity. They certainly have not explained why Hispanics, who they [*383] have said are among "the groups most isolated by racial barriers in our country," should have their admission capped out in this manner. Brief for Respondents Bollinger et al. 50. True, petitioner is neither Hispanic nor Native American. But the Law School's disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of "critical mass" is simply a sham. Petitioner may use these statistics to expose this sham, which is the basis for the Law School's admission of less qualified underrepresented minorities in preference to her. Surely strict scrutiny cannot permit these sort of disparities without at least some explanation.

Only when the "critical mass" label is discarded does a likely explanation for these numbers emerge. The Court states that the Law School's goal of attaining a "critical mass" of underrepresented minority students is not an interest in merely "'assuring within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *Ante*, at 156 L Ed 2d, at 333 (quoting *Bakke*, 438 U.S., at 307, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.)). The Court recognizes that such an interest "would amount to outright racial balancing, which is patently unconstitutional." *Ante*, at 156 L Ed 2d, at 333. The Court concludes, however, [**2368] that the Law School's use of race in admissions, consistent with Justice Powell's opinion in *Bakke*, only pays "'some attention to numbers.'" *Ante*, at 156 L Ed 2d, at 337 (quoting *Bakke*, *supra,* at 323, 57 L Ed 2d 750, 98 S Ct 2733).

But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." As the tables below show, 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. [***368] [*384]

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537401.1%1310181.4%19993400250.7%1280131.0%20003432351.0%1249141.1% [**2369] [***369] [*385] For example, in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American. This correlation is striking. Respondents themselves emphasize that the number of underrepresented minority students admitted to the Law School would be significantly smaller if the race of each applicant were not considered. See App. to Pet. for Cert. 223a; Brief for Respondents Bollinger et al. 6 (quoting App. to Pet. for Cert. of Bollinger et al. 299a). But, as the examples above illustrate, the measure of the decrease would differ dramatically among the groups. The tight correlation between the percentage of applicants and admittees of a given race, therefore, must result from careful race based planning by the Law School. It suggests a formula for admission based on the aspirational assumption that all applicants are equally qualified academically, and therefore that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool. See Brief for Respondents Bollinger et al. 43, n 70 (discussing admissions officers' use of "periodic reports" to track "the racial composition of the developing class").

Not only do respondents fail to explain this phenomenon, they attempt to obscure it. See *id.*, at 32, n 50 ("The Law School's minority enrollment percentages . . . diverged from the percentages in the applicant pool by as much as 17.7% from 1995-2000"). But the divergence between the percentages of underrepresented minorities in the applicant pool and in the *enrolled* classes is not the only relevant comparison. In fact, it may not be the most relevant comparison. The Law School cannot precisely control which of its admitted applicants decide to attend the university. But it can and, as the numbers demonstrate, clearly does employ racial preferences in extending offers of admission. Indeed, the ostensibly flexible nature of the Law School's admissions program [*386] that the Court finds appealing, see *ante*, at 156 L Ed 2d, at 337-338, appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.

I do not believe that the Constitution gives the Law School such free rein in the use of race. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional." *Ante,* at 156 L Ed 2d, at 333.

Finally, I believe that the Law School's program fails strict scrutiny because it is devoid of any reasonably precise time limit on the Law School's use of race in admissions. We have emphasized that we will consider "the planned duration of the remedy" in determining whether a race-conscious program is constitutional. *Fullilove,* 448 U.S., at 510, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J. concurring); see also *United States* [***370] v. *Paradise*, 480 U.S. 149, 171, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the . . . duration of the relief"). Our previous cases have required some limit on the duration of programs such as this because discrimination on the basis of race is invidious.

The Court suggests a possible 25-year limitation on the Law School's [**2370] current program. See *ante*, at 156 L Ed 2d, at 341. Respondents, on the other hand, remain more ambiguous, explaining that "the Law School of course recognizes that race-conscious programs must have reasonable

durational limits, and the Sixth Circuit properly found such a limit in the Law School's resolve to cease considering race when genuine race-neutral alternatives become available." Brief for Respondents Bollinger et al. 32. These discussions of a time [*387] limit are the vaguest of assurances. In truth, they permit the Law School's use of racial preferences on a seemingly permanent basis. Thus, an important component of strict scrutiny--that a program be limited in time--is casually subverted.

The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws. We have said that when it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that; it is not merely a question of "fit" between ends and means. Here the means actually used are forbidden by the Equal Protection Clause of the Constitution.

Justice **Kennedy**, dissenting.

The separate opinion by Justice Powell in *Regents of Univ. of Cal.* v*Bakke* is based on the principle that a university admissions program may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. 438 U.S. 265, 289-291, 315-318, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). This is a unitary formulation. If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way. The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.

Justice Powell's approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission. *Bakke*, *supra*, at 312-314, 57 L Ed 2d 750, 98 S Ct 2733; *ante*, at 156 L Ed 2d, at 332-333. Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among [*388] students can further its educational task, when supported by empirical evidence. *Ante*, at 156 L Ed 2d, at 333-335.

It is unfortunate, however, that the Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify [***371] the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard. *Bakke*, *supra*, at 291, 57 L Ed 2d 750, 98 S Ct 2733 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"). This Court has reaffirmed, subsequent to *Bakke*, the absolute necessity of strict scrutiny when the state uses race as an operative category. *Adarand Constructors, Inc.* v. Pena, 515 U.S. 200, 224, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) ("Any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny"); *Richmond* v. *J. A. Croson Co.,* 488 U.S. 469, 493-494, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989); see *id.*, at 519, 102 L Ed 2d 854, 109 S Ct 706 (Kennedy, J., concurring in part and concurring in judgment) ("Any racial preference must face the most rigorous scrutiny by the courts").

The Court confuses deference to a university's definition [**2371] of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it

is pursued. Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality. The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns.

The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's [*389] assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented. The dissenting opinion by The Chief Justice, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, "patently unconstitutional." *Ante*, at 156 L Ed 2d, at 333; see also *Bakke*, 438 U. S, at 307, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). It remains to point out how critical mass becomes inconsistent with individual consideration in some more specific aspects of the admissions process.

About 80 to 85 percent of the places in the entering class are given to applicants in the upper range of Law School Admissions Test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15 to 20 percent of the seats, race is likely outcome determinative for many members of minority groups. That is where the competition becomes tight and where any given applicant's chance of admission is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real [***372] potential to compromise individual review.

The Law School has not demonstrated how individual consideration is, or can be, preserved at this stage of the application process given the instruction to attain what it calls critical mass. In fact the evidence shows otherwise. There was little deviation among admitted minority students during the years from 1995 to 1998. The percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%. The number of minority students to whom offers were extended varied by just a slightly greater magnitude of 2.2%, from the high of 15.6% in 1995 to the low of 13.4% in 1998. [*390] The District Court relied on this uncontested fact to draw an inference that the Law School's pursuit of critical mass mutated into the equivalent of a quota Grutter v. Bollinger, 137 F. Supp. 2d 821, 851 (ED Mich. 2001). Admittedly, there were greater fluctuations among enrolled minorities in the preceding years, 1987-1994, by as much as 5 or 6%. The percentage of minority offers, however, at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range. The greater variance during the earlier years, in any event, does not dispel suspicion that the school engaged in racial balancing. The data would be consistent with an inference that the Law School modified its target only twice, in 1991 (from 13% to 19%), and then again in 1995 (back from 20% to 13%). The intervening year, 1993, when the percentage dropped to 14.5%, could be an aberration, caused by the school's miscalculation as to how many applicants with offers would accept or by its redefinition, made in April 1992, of which minority groups were entitled to race-based preference. See Brief for Respondents Bollinger et al. 49, n 79. [**2372]

YearPercentageof enrolledminoritystudents198712.3%198813.6%198914.4%199013.4%199119.1%199219.8%199314.5%199420.1%199513.5%199613.8%199713.6%199813.8%The narrow fluctuation band raises an inference that the Law School subverted individual determination, and strict [*391] scrutiny requires the Law School to overcome the inference. Whether the

objective of critical mass "is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status," and so risks compromising individual assessment. *Bakke*, 438 US, at 289, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). In this respect the Law School program compares unfavorably with the experience of Little Ivy League colleges. *Amicus* Amherst College, for example, informs us that the offers it extended to students of African-American background during the period from 1993 to 2002 ranged between 81 and 125 out of 950 offers total, resulting in a fluctuation from 24 to 49 matriculated students in a class of about 425. See Brief for Amherst College et al. as *Amici Curiae* [***373] 10-11. The Law School insisted upon a much smaller fluctuation, both in the offers extended and in the students who eventually enrolled, despite having a comparable class size.

The Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way. *Adarand Constructors*, 515 U.S. 200, 224, 132 L Ed 2d 158, 115 S Ct 2097. At the very least, the constancy of admitted minority students and the close correlation between the racial breakdown of admitted minorities and the composition of the applicant pool, discussed by The Chief Justice, *ante*, at 156 L Ed 2d, at 324-328, require the Law School either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment. The Law School does neither. The obvious tension between the pursuit of critical mass and the requirement of individual review increased by the end of the admissions season. Most of the decisions where race may decide the outcome are made during this period. See *supra*, at 156 L Ed 2d, at 371. The admissions officers consulted the daily reports which indicated the composition of the incoming class along racial lines. As Dennis Shields, Director of Admissions from 1991 to 1996, stated, "the further [he] went into the [admissions] season the more frequently [he] would [*392] want to look at these [reports] and see the change from day-to-day." These reports would "track exactly where [the Law School] stood at any given time in assembling the class," and so would tell the admissions personnel whether they were short of assembling a critical mass of minority students. Shields generated these reports because the Law School's admissions policy told him the racial make-up of the entering class was "something [he] needed to be concerned about," and so he had "to find a way of tracking what's going on."

The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself. The admissions officers could use the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School.

The Law School made no effort to guard against this danger. It provided no guidelines to its admissions personnel on how to reconcile individual assessment with the directive to admit a critical mass of minority students. The admissions program could have been structured to eliminate at least some of the risk that the promise of individual evaluation was not being kept. The daily consideration of racial breakdown of admitted students is not a feature of affirmative-action programs used by other institutions of higher learning. The Little Ivy League colleges, for instance, do not keep ongoing tallies of racial or ethnic composition of their entering students. See Brief for Amherst College et al. as *Amici Curiae* 10.

To be constitutional, a university's compelling interest in a diverse student body must be achieved by a [***374] system where individual assessment is safeguarded through the entire process. There is no constitutional objection to the goal of [*393] considering race as one modest factor among many others to achieve diversity, but an

educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking. The Law School failed to comply with this requirement, and by no means has it carried its burden to show otherwise by the test of strict scrutiny.

The Court's refusal to apply meaningful strict scrutiny will lead to serious consequences. By deferring to the law schools' choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration. Constant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution. Dean Allan Stillwagon, who directed the Law School's Office of Admissions from 1979 to 1990, explained the difficulties he encountered in defining racial groups entitled to benefit under the School's affirmative action policy. He testified that faculty members were "breathtakingly cynical" in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans. Many academics at other law schools who are "affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds." Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 34 (2002) (citing Levinson, Diversity, 2 U. Pa. J. Const. L. 573, 577-578 (2000); Rubenfeld, Affirmative Action, 107 Yale L. J. 427, 471 (1997)). This is not to suggest the faculty at Michigan or other law schools do not pursue aspirations they consider laudable and consistent with our constitutional [*394] traditions. It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decisionmaking. Prospective students, the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation.

It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now. *Ante*, at 156 L Ed 2d, at 341-342. If it is intended to mitigate the damage the Court does to the concept of strict scrutiny, neither petitioners nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century. Deference is antithetical to strict scrutiny, not consistent with it.

As to the interpretation that the opinion contains its own self-destruct mechanism, [**2373] the majority's abandonment of strict scrutiny undermines this objective. Were the courts to apply a searching standard to race-based [***375] admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School's profession of its own good faith. The majority admits as much: "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." *Ante*, at 156 L Ed 2d, at 341 (quoting Brief for Respondent Bollinger et al. 34).

If universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review. The unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid. The perpetuation, of course, would be the worst of all outcomes. Other programs do exist which will be more effective in [*395] bringing about the harmony and mutual

respect among all citizens that our constitutional tradition has always sought. They, and not the program under review here, should be the model, even if the Court defaults by not demanding it.

It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place. If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review. For these reasons, though I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.

[**2348contd] [***344contd] Justice **Scalia**, with whom Justice **Thomas** joins, concurring in part and dissenting in part.

I join the opinion of The Chief Justice. As he demonstrates, the University of Michigan Law School's mystical [*347cont] "critical mass" justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.

I also join Parts I through VII of Justice Thomas's opinion. n** I find particularly unanswerable his central point: that the [**2349] allegedly "compelling state interest" at issue here is not the incremental "educational benefit" that emanates from the fabled "critical mass" of minority students, but rather Michigan's interest in maintaining a "prestige" law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.

n** Part VII of Justice Thomas's opinion describes those portions of the Court's opinion in which I concur. See *post*, at 156 L Ed 2d, at 361-364.

I add the following: The "educational benefit" that the University of Michigan seeks to achieve by racial discrimination consists, according to the Court, of "'cross-racial understanding,'" *ante*, at 156 L Ed 2d, at 333, and "'better prepar[ation of] students for an increasingly diverse workforce and society,'" *ibid.*, all of which is necessary not only for work, but also for good "citizenship," *ante*, at 156 L Ed 2d, at 334. This is not, of course, an "educational benefit" on which students will be graded on their Law School transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding). For it is a lesson of life rather than law--essentially the same lesson taught to (or rather learned by, for it cannot be "taught" in the usual sense) people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. If properly considered an "educational benefit" at all, it is surely not one that [***345] is either uniquely relevant to law school or uniquely "teachable" in a formal educational setting. *And therefore:* If it is appropriate for the University [*348] of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate--indeed, *particularly* appropriate--for the civil service system of the State of Michigan to do so. There, also, those exposed to "critical masses" of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized--indeed, should be praised--if they also "teach" good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of

a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.

Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," *ante*, at 156 L Ed 2d, at 337, and sufficiently avoids "separate admissions tracks" *ante*, at 156 L Ed 2d, at 336, to fall under *Grutter* rather than *Gratz.* Some will focus on whether a university has gone beyond the bounds of a "'good faith effort'" and has so zealously pursued its "critical mass" as to make it an unconstitutional *de facto* quota system, rather than merely "'a permissible goal.'" *Ante*, at 156 L Ed 2d, at 336 (quoting *Sheet Metal Workers* v.*EEOC* , 478 U.S. 421, 495, 92 L Ed 2d 344, 106 S Ct 3019 (1986) O'Connor, J., concurring in part and dissenting in part)). Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter*; and while the opinion accords "a degree of deference to a university's academic decisions," *ante*, at 156 L Ed 2d, at 332, "deference does not imply [*349] abandonment or abdication of judicial review," *Miller-El* v. *Cockrell*, 537 U.S. 322, 340, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003).) Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter.* (Tempting targets, one would suppose, will be those [**2350] universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses--through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical [***346] mass." I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

Justice **Thomas**, with whom Justice **Scalia** joins as to Parts I-VII, concurring in part and dissenting in part.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority:

> "In regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice.* The American people have always been anxious to know what they shall do with us . . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of [*350] their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . Your interference is doing him positive injury." What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, reprinted in 4 The Frederick Douglass Papers 59, 68 (J. Blassingame & J.

McKivigan eds. 1991) (emphasis in original).

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny."

No one would argue that a university could set up a lower general admission standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admission standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti. Nevertheless, I concur in part in the Court's opinion. First, I agree with the Court insofar as its decision, which approves of only [*351] one racial classification, confirms that further use of race in admissions remains unlawful. Second, I agree with the Court's holding that racial discrimination in higher education admissions will be [***347] illegal in 25 years. See *ante*, at 156 L Ed 2d, at 342 (stating that racial discrimination will no longer be narrowly tailored, or [**2351] "necessary to further" a compelling state interest, in 25 years). I respectfully dissent from the remainder of the Court's opinion and the judgment, however, because I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.

I

The majority agrees that the Law School's racial discrimination should be subjected to strict scrutiny. *Ante*, at 156 L Ed 2d, at 331. Before applying that standard to this case, I will briefly revisit the Court's treatment of racial classifications.

The strict scrutiny standard that the Court purports to apply in this case was first enunciated in *Korematsu* v. *United States,* 323 U.S. 214, 89 L. Ed. 194, 65 S. Ct. 193 (1944) . There the Court held that "pressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." *Id.,* at 216, 89 L Ed 194, 65 S Ct 193. This standard of "pressing public necessity" has more frequently been termed "compelling governmental interest," n1see, *e.g., Regents of Univ. of Cal.* v.*Bakke,* 438 U.S. 265, 299, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (opinion of Powell, J.). A majority of the Court has validated only two circumstances where "pressing public necessity" or a "compelling state interest" can possibly justify racial discrimination by state actors. First, the lesson of *Korematsu* is that national security constitutes a "pressing public necessity," though the government's use of race to advance that objective must be narrowly tailored. Second, the Court has recognized as a compelling state interest a government's effort to remedy [*352] past discrimination for which it is responsible. *Richmond* v. *J. A. Croson Co.,* 488 U.S. 469, 504, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989).

n1 Throughout I will use the two phrases interchangeably.

The contours of "pressing public necessity" can be further discerned from those interests the Court has rejected as bases

for racial discrimination. For example, *Wygant* v. *Jackson Bd. of Ed.,* 476 U.S. 267, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986), found unconstitutional a collective-bargaining agreement between a school board and a teachers' union that favored certain minority races. The school board defended the policy on the grounds that minority teachers provided "role models" for minority students and that a racially "diverse" faculty would improve the education of all students. See Brief for Respondents, O. T. 1984, No. 84-1340, pp 27-28; 476 US, at 315, 90 L Ed 2d 260, 106 S Ct 1842 (Stevens, J., dissenting) ("An integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white faculty"). Nevertheless, the Court found that the use of race violated the Equal Protection Clause, deeming both asserted state interests insufficiently compelling. *Id.*, at 275-276, at 275-276, 90 L Ed 2d 260, 106 S Ct 1842 (plurality opinion); *id.*, at 295, 90 L Ed 2d 260, 106 S Ct 1842 (White, J., concurring in judgment) ("None of the interests asserted by the [school [***348] board] . . . justify this racially discriminatory layoff policy"). n2

n2 The Court's refusal to address *Wygant*'s rejection of a state interest virtually indistinguishable from that presented by the Law School is perplexing. If the Court defers to the Law School's judgment that a racially mixed student body confers educational benefits to all, then why would the *Wygant* Court not defer to the school board's judgment with respect to the benefits a racially mixed faculty confers?

An even greater governmental interest involves the sensitive role of courts in child custody determinations. In *Palmore* v. *Sidoti,* 466 U.S. 429, 80 L. Ed. 2d 421, 104 S. Ct. 1879 (1984), the Court held that even the best interests of a child did not constitute a compelling state interest that would allow a state court to award custody to the father because the mother was in a mixed-race marriage. *Id.*, at 433, 80 L Ed 2d 421, 104 S Ct 1879 [**2352] (finding the interest "substantial" but [*353] holding the custody decision could not be based on the race of the mother's new husband).

Finally, the Court has rejected an interest in remedying general societal discrimination as a justification for race discrimination. See *Wygant*, *supra,* at 276, 90 L Ed 2d 260, 106 S Ct 1842 (plurality opinion); *Croson,* 488 U.S., at 496-498, 102 L Ed 2d 854, 109 S Ct 706 (plurality opinion); *id.*, at 520-521, 102 L Ed 2d 854, 109 S Ct 706 (Scalia, J., concurring in judgment). "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" because a "court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, *supra,* at 276, 90 L Ed 2d 260, 106 S Ct 1842 (plurality opinion). But see *Gratz* v. *Bollinger, ante,*156 L Ed 2d 257, 123 S Ct 2411 (Ginsburg, J., dissenting).

Where the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a "pressing public necessity." Cf . *Lee* v. *Washington,* 390 U.S. 333, 334, 19 L. Ed. 2d 1212, 88 S. Ct. 994 (1968) *(per curiam)* (Black, J., concurring) (indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination); *Croson*, *supra,* at 521, 102 L Ed 2d 854, 109 S Ct 706 (Scalia, J., concurring in judgment) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination]").

The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places

citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." [*354] *Adarand Construction, Inc.* v. *Pena,* 515 U.S. 200, 240, 132 L Ed 2d 158, 115 S Ct 2097 (1995) (Thomas, J., concurring in part and concurring in judgment).

II

Unlike the majority, I seek to define with precision the interest being [***349] asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity," Brief for Respondents Bollinger et al. 14. This statement must be evaluated carefully, because it implies that both "diversity" and "educational benefits" are components of the Law School's compelling state interest. Additionally, the Law School's refusal to entertain certain changes in its admissions process and status indicates that the compelling state interest it seeks to validate is actually broader than might appear at first glance.

Undoubtedly there are other ways to "better" the education of law students aside from ensuring that the student body contains a "critical mass" of underrepresented minority students. Attaining "diversity," whatever it means, n3 is the [*355] mechanism [**2353] by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational "benefits" *not* simply the forbidden interest in "racial balancing," *ante*, at 156 L Ed 2d, at 333, that the majority expressly rejects?

n3 "Diversity," for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an "aesthetic." That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.

I also use the term "aesthetic" because I believe it underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged. Cf . *Orr* v. *Orr,* 440 U.S. 268, 283, 59 L. Ed. 2d 306, 99 S. Ct. 1102 (1979) (noting that suspect classifications are especially impermissible when "the choice made by the State appears to redound . . . to the benefit of those without need for special solicitude"). It must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.

A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic--so much so that the majority uses them interchangeably. Compare *ante*, at 156 L Ed 2d, at 332 ("The Law School has a compelling interest in attaining a diverse student body"), with *ante*, at 156 L Ed 2d, at 335 (referring to the "compelling interest in securing the *educational benefits* of a diverse student body" (emphasis added)). The Law School's argument, as facile as it is, can only be understood in one way: Classroom

aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the *educational benefits* that are the end, or allegedly compelling state interest, not "diversity." But see *ante*, at 156 L Ed 2d, at 335 (citing the need for "openness and integrity of the educational institutions that provide [legal] training" without reference to any consequential educational benefits).

One must also consider the Law School's refusal to entertain changes to its current admissions system that [***350] might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity," which would in turn "require the Law School to become a very different institution, and to sacrifice a core part of its educational mission." Brief for Respondents Bollinger et al. 33-36. In other words, the Law School seeks to improve marginally the education it offers [*356] without sacrificing too much of its exclusivity and elite status. n4

> n4 The Law School believes both that the educational benefits of a racially engineered student body are large and that adjusting its overall admissions standards to achieve the same racial mix would require it to sacrifice its elite status. If the Law School is correct that the educational benefits of "diversity" are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School's reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.

The proffered interest that the majority vindicates today, then, is not simply "diversity." Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution. Unless each constituent part of this state interest is of pressing public necessity, the Law School's use of race is unconstitutional. I find each of them to fall far short of this standard.

III

A

A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a "compelling interest in securing the educational benefits of a diverse student body." *Ante*, at 156 L Ed 2d, at 335. No serious effort is made to explain how these [**2354] benefits fit with the state interests the Court has recognized (or rejected) as compelling, see Part I, *supra,* or to place any theoretical constraints on an enterprising court's desire to discover still more justifications for racial discrimination. In the absence of any explanation, one might expect the Court to fall back on the judicial policy of *stare decisis.* But the Court eschews even this weak defense of its holding, shunning an analysis of the extent to which Justice Powell's opinion in *Regents of Univ. of Cal.* v.*Bakke,* 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), [*357] is binding, *ante*, at 156 L Ed 2d, at 330, in favor of an unfounded wholesale adoption of it.

Justice Powell's opinion in *Bakke* and the Court's decision today rest on the fundamentally flawed proposition that racial discrimination can be contextualized so that a goal, such as classroom aesthetics, can be compelling in one context but not in another. This "we know it when we see it" approach to evaluating state interests is not capable of judicial application. Today, the Court insists on radically expanding the range of permissible uses of race to something as trivial (by comparison) as the assembling of a law school class. I can only presume that the majority's failure to justify its decision by reference to any principle arises from the absence of any such principle. See Part VI, *infra.*

B

Under the proper standard, there is no pressing public necessity in maintaining a public law school at [***351] all and, it follows, certainly not an elite law school. Likewise, marginal improvements in legal education do not qualify as a compelling state interest.

1

While legal education at a public university may be good policy or otherwise laudable, it is obviously not a pressing public necessity when the correct legal standard is applied. Additionally, circumstantial evidence as to whether a state activity is of pressing public necessity can be obtained by asking whether all States feel compelled to engage in that activity. Evidence that States, in general, engage in a certain activity by no means demonstrates that the activity constitutes a pressing public necessity, given the expansive role of government in today's society. The fact that some fraction of the States reject a particular enterprise, however, creates a presumption that the enterprise itself is not a compelling state interest. In this sense, the absence of a public, American Bar Association (ABA) accredited, law school in [*358] Alaska, Delaware, Massachusetts, New Hampshire, and Rhode Island, see ABA-LSAC Official Guide to ABA-Approved Law Schools (W. Margolis, B. Gordon, J. Puskarz, & D. Rosenlieb, eds. 2004) (hereinafter ABA-LSAC Guide), provides further evidence that Michigan's maintenance of the Law School does not constitute a compelling state interest.

2

As the foregoing makes clear, Michigan has no compelling interest in having a law school at all, much less an *elite* one. Still, even assuming that a State may, under appropriate circumstances, demonstrate a cognizable interest in having an elite law school, Michigan has failed to do so here.

This Court has limited the scope of equal protection review to interests and activities that occur within that State's jurisdiction. The Court held in *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 83 L. Ed. 208, 59 S. Ct. 232 (1938), that Missouri could not satisfy the demands of "separate but equal" by paying for legal training of blacks at neighboring state law schools, while maintaining a segregated law school within the State. The equal protection

> "obligation is imposed by the Constitution upon the States severally as governmental entities--each responsible for its own laws establishing the rights and duties of persons within its borders. It [**2355] is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance *by what another State may do or fail to do.* That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system." *Id.,* at 350, 83 L Ed 208, 59 S Ct 232 (emphasis added).

The Equal Protection Clause, as interpreted by the Court in *Gaines*, does not permit States to justify racial discrimination on the basis of what the rest of the Nation "may do or fail to do." The only interests that can satisfy the Equal [*359] Protection Clause's demands are those found within a State's jurisdiction.

The only cognizable state interests vindicated by operating a public law school are, therefore, the education of that State's citizens and the training [***352] of that State's lawyers. James Campbell's address at the opening of the Law Department at the University of Michigan on October 3, 1859, makes this clear:

> "It not only concerns *the State* that every one should have all reasonable facilities for preparing himself for any honest position in life to which he may aspire, but it also concerns *the community* that the Law should be taught and understood . . . . There is not an office *in the State* in which serious legal inquiries may not frequently arise . . . . In all these

> matters, public and private rights are constantly involved and discussed, and ignorance of the Law has frequently led to results deplorable and alarming . . . . In the history of *this State*, in more than one instance, that ignorance has led to unlawful violence, and the shedding of innocent blood." E. Brown, Legal Education at Michigan 1859-1959, pp 404-406 (1959) (emphasis added).

The Law School today, however, does precious little training of those attorneys who will serve the citizens of Michigan. In 2002, graduates of the University of Michigan Law School made up less than 6% of applicants to the Michigan bar, Michigan Lawyers Weekly, available at http://www.michiganlawyersweekly.com/barpassers0202.cfm,barpassers0702.cfm (all Internet materials as visited June 13, 2003, and available in Clerk of Court's case file), even though the Law School's graduates constitute nearly 30% of all law students graduating in Michigan. *Ibid.* Less than 16% of the Law School's graduating class elects to stay in Michigan after law school. ABA-LSAC Guide 427. Thus, while a mere 27% of the Law School's 2002 entering class are from Michigan, see [*360] University of Michigan Law School Website, available at http://www.law.umich.edu/prospectivestudents/Admissions/index.htm, only half of these, it appears, will stay in Michigan.

In sum, the Law School trains few Michigan residents and overwhelmingly serves students, who, as lawyers, leave the State of Michigan. By contrast, Michigan's other public law school, Wayne State University Law School, sends 88% of its graduates on to serve the people of Michigan. ABA-LSAC Guide 775. It does not take a social scientist to conclude that it is precisely the Law School's status as an elite institution that causes it to be a way-station for the rest of the country's lawyers, rather than a training ground for those who will remain in Michigan. The Law School's decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan. Again, the fact that few States choose to maintain elite law schools raises a strong inference that there is nothing compelling about elite status. Arguably, only the public law schools of the University of Texas, the University of California, Berkeley (Boalt Hall), and the University of Virginia maintain the same reputation for excellence as the Law School. n5 Two of [**2356] these States, Texas and California, are so large that they could reasonably be expected to provide [***353] elite legal training at a separate law school to students who will, in fact, stay in the State and provide legal services to its citizens. And these two schools far outshine the Law School in producing in-state lawyers. The University of Texas, for example, sends over three-fourths of its graduates on to work in the State of Texas, vindicating the State's interest (compelling or not) in training Texas' lawyers. *Id.,* at 691.

> n5 Cf. U. S. News & World Report, America's Best Graduate Schools 28 (2004 ed.) (placing these schools in the uppermost 15 in the Nation).

[*361] 3

Finally, even if the Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest in either its existence or in its current educational and admissions policies.

IV

The interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions "standards" that, in turn, create the Law School's "need" to discriminate on the basis of race. The Court validates these admissions standards by concluding that alternatives that would require "a dramatic sacrifice of . . . the academic quality of all admitted students," *ante*, at 156 L Ed 2d, at 340, need not be

considered before racial discrimination can be employed. n6 In the majority's view, such methods are not required by the "narrow tailoring" prong of strict scrutiny because that inquiry demands, in this context, that any race-neutral alternative work "'about as well.'" *Ante*, at 156 L Ed 2d, at 339 (quoting *Wygant*, 476 U.S., at 280, n. 6, 90 L Ed 2d 260, 106 S Ct 1842). The majority errs, however, because race-neutral alternatives must only be "workable," *ante*, at 156 L Ed 2d, at 339, and do "about as well" *in vindicating the compelling state interest.* The Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest, and, as I have demonstrated, it is not. See Part III-B, *supra.* Therefore, the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system--it cannot have it both ways.

n6 The Court refers to this component of the Law School's compelling state interest variously as "academic quality," avoiding "sacrifice [of] a vital component of its educational mission," and "academic selectivity." *Ante*, at 156 L Ed 2d, at 339-340.

With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, [*362] see Brief for United States as *Amicus Curiae* 13-14, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination. The Law School concedes this, but the Court holds, implicitly and under the guise of narrow tailoring, that the Law School has a compelling state interest in doing what it wants to do. I cannot agree. First, under strict scrutiny, the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference, grounded in the First Amendment or anywhere else. Second, even if its "academic selectivity" must be maintained at all costs along with racial discrimination, the Court ignores the fact that other top law schools have succeeded in meeting their aesthetic [***354] demands without racial discrimination.

A

The Court bases its unprecedented deference to the Law School--a deference antithetical to strict scrutiny--on an idea of "educational autonomy" grounded in the First Amendment. *Ante*, at 156 L Ed 2d, at 333. In my view, there is no basis for a right of public [**2357] universities to do what would otherwise violate the Equal Protection Clause.

The constitutionalization of "academic freedom" began with the concurring opinion of Justice Frankfurter in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957). Sweezy, a Marxist economist, was investigated by the Attorney General of New Hampshire on suspicion of being a subversive. The prosecution sought, *inter alia*, the contents of a lecture Sweezy had given at the University of New Hampshire. The Court held that the investigation violated due process. *Id.*, at 254, 1 L Ed 2d 1311, 77 S Ct 1203. Justice Frankfurter went further, however, reasoning that the First Amendment created a right of academic freedom that prohibited the investigation. *Id.*, at 256-267, at 256-267, 1 L Ed 2d 1311, 77 S Ct 1203 (opinion concurring in result). Much of the rhetoric in Justice Frankfurter's opinion was devoted to the personal right of Sweezy to free speech. See, *e.g., id.*, at 265, 1 L Ed 2d 1311, 77 S Ct 1203 ("For a citizen to be [*363] made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling"). Still, claiming that the United States Reports "need not be burdened with proof," Justice Frankfurter also asserted that a "free society" depends on "free universities" and "this means the exclusion of governmental intervention in the intellectual life of a university." *Id.*, at 262, 1 L Ed 2d 1311, 77 S

Ct 1203. According to Justice Frankfurter: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Id.,* at 263, 1 L Ed 2d 1311, 77 S Ct 1203 (citation omitted).

In my view, "it is the business" of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines--including the idea that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause. The majority fails in its summary effort to prove this point. The only source for the Court's conclusion that public universities are entitled to deference even within the confines of strict scrutiny is Justice Powell's opinion in *Bakke.* Justice Powell, for his part, relied only on Justice Frankfurter's opinion in *Sweezy* and the Court's decision in *Keyishian* v. *Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967), to support his view that the First Amendment somehow protected a public university's use of race in admissions *Regents of University of California v. Bakke*, 438 U.S. 265, at 312, 57 L Ed 2d 750, 98 S Ct 2733. *Keyishian* provides no answer to the question whether the Fourteenth Amendment's restrictions are relaxed when applied to public universities. [***355] In that case, the Court held that state statutes and regulations designed to prevent the "appointment or retention of 'subversive' persons in state employment," 385 US, at 592, 17 L Ed 2d 629, 87 S Ct 675, violated the First Amendment for vagueness. The statutes covered all public employees and were not invalidated only as applied to university [*364] faculty members, although the Court appeared sympathetic to the notion of academic freedom, calling it a "special concern of the First Amendment." *Id.*, at 603, 17 L Ed 2d 629, 87 S Ct 675. Again, however, the Court did not relax any independent constitutional restrictions on public universities.

I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of the Constitution's ban on racial discrimination. The majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court.

[**2358] B

1

The Court's deference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences. The Court relies heavily on social science evidence to justify its deference. See *ante,* at 156 L Ed 2d, at 333-335; but see also Rothman, Lipset, & Nevitte, Racial Diversity Reconsidered, 151 Public Interest 25 (2003) (finding that the racial mix of a student body produced by racial discrimination of the type practiced by the Law School in fact hinders students' perception of academic quality). The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students. See, *e.g.,* Flowers & Pascarella, Cognitive Effects of College Racial Composition on African American Students After 3 Years of College, 40 J. of College Student Development 669, 674 (1999) (concluding that black students experience superior cognitive development at Historically Black Colleges (HBCs) and that, even among blacks, "a substantial diversity moderates the cognitive effects of attending an HBC"); Allen, The Color of Success: African-American College Student [*365] Outcomes at Predominantly White and Historically Black Public Colleges and Universities, 62 Harv. Educ. Rev. 26, 35 (1992) (finding that black students attending HBCs report higher academic achievement than those attending predominantly white

colleges).

At oral argument in *Gratz* v.*Bollinger* , *ante,*156 L Ed 2d 257, 123 S Ct 2411 , counsel for respondents stated that "most every single one of [the HBCs] do have diverse student bodies." Tr. of Oral Arg. in No. 02-516, p 52. What precisely counsel meant by "diverse" is indeterminate, but it is reported that in 2000 at Morehouse College, one of the most distinguished HBC's in the Nation, only 0.1% of the student body was white, and only 0.2% was Hispanic. College Admissions Data Handbook 2002-2003, p 613 (43d ed. 2002) (hereinafter College Admissions Data Handbook). And at Mississippi [***356] Valley State University, a public HBC, only 1.1% of the freshman class in 2001 was white. *Id.,* at 603. If there is a "critical mass" of whites at these institutions, then "critical mass" is indeed a very small proportion.

The majority grants deference to the Law School's "assessment that diversity will, in fact, yield educational benefits," *ante*, at 156 L Ed 2d, at 332. It follows, therefore, that an HBC's assessment that racial homogeneity will yield educational benefits would similarly be given deference. n7 An HBC's rejection of white applicants in order to maintain racial homogeneity seems permissible, therefore, under the majority's view of the Equal Protection Clause . But see *United States* v. *Fordice,* 505 U.S. 717, 748, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992) (Thomas, J., concurring) ("Obviously, a State cannot maintain . . . traditions by closing particular institutions, historically white or historically black, to particular racial groups"). Contained within today's majority opinion is the seed of a new constitutional [*366] justification for a concept I thought long and rightly rejected--racial segregation.

n7 For example, North Carolina A&T State University, which is currently 5.4% white, College Admissions Data Handbook 643, could seek to reduce the representation of whites in order to gain additional educational benefits.

2

Moreover one would think, in light of the Court's decision in *United States* v. *Virginia,* 518 U.S. 515, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996), that before being given license to use racial discrimination, the Law School would be required to radically reshape its admissions process, even to the point of sacrificing some elements of its character. In *Virginia*, a majority of the Court, without a word about academic [**2359] freedom, accepted the all-male Virginia Military Institute's (VMI) representation that some changes in its "adversative" method of education would be required with the admission of women, *id.*, at 540, 135 L Ed 2d 735, 116 S Ct 2264, but did not defer to VMI's judgment that these changes would be too great. Instead, the Court concluded that they were "manageable." *Id.*, at 551, n. 19, 135 L Ed 2d 735, 116 S Ct 2264. That case involved sex discrimination, which is subjected to intermediate, not strict, scrutiny. *Id.*, at 533, 135 L Ed 2d 735, 116 S Ct 2264; *Craig* v. *Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). So in *Virginia*, where the standard of review dictated that greater flexibility be granted to VMI's educational policies than the Law School deserves here, this Court gave no deference. Apparently where the status quo being defended is that of the elite establishment--here the Law School--rather than a less fashionable Southern military institution, the Court will defer without serious inquiry and without regard to the applicable legal standard.

C

Virginia is also notable for the fact that the Court relied on the "experience" of formerly single-sex institutions, such as the service academies, to conclude that admission of women to VMI would be "manageable." 518 U.S., at 544-545, 135 L Ed 2d 735, 116 S Ct 2264. Today, however, the majority ignores the "experience" of those institutions that

have been [***357] forced to abandon explicit racial discrimination in admissions. [*367] The sky has not fallen at Boalt Hall at the University of California, Berkeley, for example. Prior to Proposition 209's adoption of Cal. Const., Art. 1, § 31(a), which bars the State from "granting preferential treatment . . . on the basis of race . . . in the operation of . . . public education," n8 Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics. n9 University of California Law and Medical School Enrollments, available at http://www.ucop.edu/acadadv/datamgmt/lawmed/law-enrolls-eth2.html. Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. Apparently the Law School cannot be counted on to be as resourceful. The Court is willfully blind to the very real experience in California and elsewhere, which raises the inference that institutions with "reputation[s] for excellence," *ante*, at 156 L Ed 2d, at 332, 338, rivaling the Law School's have satisfied their sense of mission without resorting to prohibited racial discrimination.

n8 Cal. Const., Art. 1, § 31(a), states in full:
"The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." See *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692 (CA9 1997).

n9 Given the incredible deference the Law School receives from the Court, I think it appropriate to indulge in the presumption that Boalt Hall operates without violating California law.

V

Putting aside the absence of any legal support for the majority's reflexive deference, there is much to be said for the view that the use of tests and other measures to "predict" academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a true [*368] meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" [**2360] meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities. The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race. So while legacy preferences can stand under the Constitution, racial discrimination cannot. n10 I will not twist the Constitution to invalidate legacy preferences or otherwise impose my vision of higher education admissions on the Nation. The majority should [***358] similarly stay its impulse to validate faddish racial discrimination the Constitution clearly forbids.

n10 Were this Court to have the courage to forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly become less popular--a possibility not lost, I am certain, on the elites (both individual and institutional) supporting the Law School in this case.

In any event, there is nothing ancient, honorable, or constitutionally protected about "selective" admissions. The University of

Michigan should be well aware that alternative methods have historically been used for the admission of students, for it brought to this country the German certificate system in the late-19th century. See H. Wechsler, The Qualified Student 16-39 (1977) (hereinafter Qualified Student). Under this system, a secondary school was certified by a university so that any graduate who completed the course offered by the school was offered admission to the university. The certification regime supplemented, and later virtually replaced (at least in the Midwest), the prior regime of rigorous [*369] subject-matter entrance examinations. *Id.,* at 57-58. The facially race-neutral "percent plans" now used in Texas, California, and Florida, see *ante*, at 156 L Ed 2d, at 340, are in many ways the descendents of the certificate system. Certification was replaced by selective admissions in the beginning of the 20th century, as universities sought to exercise more control over the composition of their student bodies. Since its inception, selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators. The initial driving force for the relocation of the selective function from the high school to the universities was the same desire to select racial winners and losers that the Law School exhibits today. Columbia, Harvard, and others infamously determined that they had "too many" Jews, just as today the Law School argues it would have "too many" whites if it could not discriminate in its admissions process. See Qualified Student 155-168 (Columbia); H. Broun & G. Britt, Christians Only: A Study in Prejudice 53-54 (1931) (Harvard).

Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests. Thus, Columbia could claim (falsely) that "'we have not eliminated boys because they were Jews and do not propose to do so. We have honestly attempted to eliminate the lowest grade of applicant [through the use of intelligence testing] and it turns out that a good many of the low grade men are New York City Jews.'" Letter from Herbert E. Hawkes, dean of Columbia College, to E. B. Wilson, June 16, 1922 (reprinted in Qualified Student 160-161). In other words, the tests were adopted with full knowledge of their disparate impact. Cf. *DeFunis* v. *Odegaard,* 416 U.S. 312, 335, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974) *(per curiam)* (Douglas, J., dissenting).

Similarly no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admissions Test (LSAT). Nevertheless, law schools [*370] continue to use the test and then attempt to "correct" for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School's continued adherence to measures [**2361] it knows produce racially skewed results is not entitled to deference by this Court. See Part IV, *supra.* The Law School itself admits that the test is imperfect, as it must, given that it regularly admits students who score at or below [***359] 150 (the national median) on the test. See App. 156-203 (showing that, between 1995 and 2000, the Law School admitted 37 students--27 of whom were black; 31 of whom were "underrepresented minorities"--with LSAT scores of 150 or lower). And the Law School's *amici* cannot seem to agree on the fundamental question whether the test itself is useful. Compare Brief for Law School Admission Council as *Amicus Curiae* 12 ("LSAT scores . . . are an effective predictor of students' performance in law school") with Brief for Harvard Black Law Students Association et al. as *Amici Curiae* 27 ("Whether [the LSAT] measures objective merit . . . is certainly questionable").

Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision. The Law School may freely continue to employ the LSAT and other allegedly merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these

standards hand-in-hand with racial discrimination. An infinite variety of admissions methods are available to the Law School. Considering all of the radical thinking that has historically occurred at this country's universities, the Law School's intractable approach toward admissions is striking.

The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution. And the same Court that had the courage to order the desegregation of all public schools in the South now fears, on the basis of platitudes [*371] rather than principle, to force the Law School to abandon a decidedly imperfect admissions regime that provides the basis for racial discrimination.

VI

The absence of any articulated legal principle supporting the majority's principal holding suggests another rationale. I believe what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, see *Adarand*, 515 U.S., at 239, 132 L Ed 2d 158, 115 S Ct 2097 (Scalia, J., concurring in part and concurring in judgment), and that racial discrimination is necessary to remedy general societal ills. This Court's precedents supposedly settled both issues, but clearly the majority still cannot commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications. Putting aside what I take to be the Court's implicit rejection of *Adarand*'s holding that beneficial and burdensome racial classifications are equally invalid, I must contest the notion that the Law School's discrimination benefits those admitted as a result of it. The Court spends considerable time discussing the impressive display of *amicus* support for the Law School in this case from all corners of society. *Ante*, at 156 L Ed 2d, at 333-334. But nowhere in any of the filings in this Court is any evidence that the purported "beneficiaries" of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences. [***360] Cf. Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L. Rev. 1583, 1605-1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its "beneficiaries" are underperforming in the classroom).

The silence in this case is deafening to those of us who view higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp, [*372] credentialing process. The [**2362] Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a facade--it is sufficient that the class looks right, even if it does not perform right.

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions. See T. Sowell, Race and Culture 176-177 (1994) ("Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education"). Indeed, to cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue--in selection for the Michigan Law Review, see University of Michigan Law School Student Handbook 2002-2003, pp 39-40 (noting the presence of a "diversity plan" for admission to the review), and in hiring at law firms and for judicial clerkships--until the "beneficiaries" are no longer tolerated. While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or

become better lawyers) than if they had gone to a less "elite" law school for which they were better prepared. And the aestheticists will never address the real problems facing "underrepresented minorities," n11 instead continuing their social experiments on other people's children.

n11 For example, there is no recognition by the Law School in this case that even with their racial discrimination in place, black *men* are "underrepresented" at the Law School. See ABA-LSAC Guide 426 (reporting that the Law School has 46 black women and 28 black men). Why does the Law School not also discriminate in favor of black men over black women, given this underrepresentation? The answer is, again, that all the Law School cares about is its own image among know-it-all elites, not solving real problems like the crisis of black male underperformance.

[*373] Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engenders attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race." *Adarand*, 515 U.S., at 241, 132 L Ed 2d 158, 115 S Ct 2097 (Thomas, J., concurring in part and concurring in judgment). "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." *Ibid.*

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. See Brief for Respondents Bollinger et al. 6. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma--because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination. Is this what the Court means by "visibly open"? *Ante*, at 156 L Ed 2d, at 335.

Finally, the Court's disturbing reference to the importance of the country's law [**2363] schools as training grounds meant to cultivate "a set of leaders with legitimacy in the eyes of the citizenry," *ibid.,* through the use of racial discrimination deserves discussion. As noted earlier, the Court has soundly [*374] rejected the remedying of societal discrimination as a justification for governmental use of race. *Wygant*, 476 U.S., at 276, 90 L Ed 2d 260, 106 S Ct 1842 (plurality opinion); *Croson*, 488 U.S., at 497, 102 L Ed 2d 854, 109 S Ct 706 (plurality opinion); *id.*, at 520-521, 102 L Ed 2d 854, 109 S Ct 706 (Scalia, J., concurring in judgment). For those who believe that every racial disproportionality in our society is caused by some kind of racial discrimination, there can be no distinction between remedying societal discrimination and erasing racial disproportionalities in the country's leadership caste. And if the lack of proportional racial representation among our leaders is not caused by societal discrimination, then "fixing" it is even less of a pressing public necessity.

The Court's civics lesson presents yet another example of judicial selection of a theory of political representation based on skin color--an endeavor I have previously rejected. See *Holder* v. *Hall,* 512 U.S. 874, 899, 129 L. Ed. 2d 687, 114 S. Ct. 2581 (1994) (Thomas,

J., concurring in judgment). The majority appears to believe that broader utopian goals justify the Law School's use of race, but "the Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis*, 416 U.S., at 342, 40 L Ed 2d 164, 94 S Ct 1704 (Douglas, J., dissenting).

VII

As the foregoing makes clear, I believe the Court's opinion to be, in most respects, erroneous. I do, however, find two points on which I agree.

A

First, I note that the issue of unconstitutional racial discrimination among the groups the Law School prefers is not presented in this case, because petitioner has never argued that the Law School engages in such a practice, and the Law School maintains [***362] that it does not. See Brief for Respondents Bollinger et al. 32, n 50, and 6-7, n 7. I join the Court's opinion insofar as it confirms that this type of racial discrimination remains unlawful. *Ante,* at 156 L Ed 2d, at 330-332. Under today's [*375] decision, it is still the case that racial discrimination that does not help a university to enroll an unspecified number, or "critical mass," of underrepresented minority students is unconstitutional. Thus, the Law School may not discriminate in admissions between similarly situated blacks and Hispanics, or between whites and Asians. This is so because preferring black to Hispanic applicants, for instance, does nothing to further the interest recognized by the majority today. n12 Indeed, the majority describes such racial balancing as "patently unconstitutional." *Ante*, at 156 L Ed 2d, at 333. Like the Court, *ante*, at 156 L Ed 2d, at 337, I express no opinion as to whether the Law School's current admissions program runs afoul of this prohibition.

n12 That interest depends on enrolling a "critical mass" of underrepresented minority students, as the majority repeatedly states. *Ante*, at 156 L Ed 2d, at 324, 325, 326, 333, 335, 337, 339; cf. *ante*, at 156 L Ed 2d, at 335 (referring to the unique experience of being a "racial minority," as opposed to being black, or Native American); *ante,* at 156 L Ed 2d, at 337 (rejecting argument that the Law School maintains a disguised quota by referring to the total number of enrolled underrepresented minority students, not specific races). As it relates to the Law School's racial discrimination, the Court clearly approves of only one use of race--the distinction between underrepresented minority applicants and those of all other races. A relative preference awarded to a black applicant over, for example, a similarly situated Native American applicant, does not lead to the enrollment of even one more underrepresented minority student, but only balances the races within the "critical mass."

B

The Court also holds that racial discrimination in admissions should be given another [**2364] 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest. *Ante*, at 156 L Ed 2d, at 341. While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now. The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white [*376] students is shrinking or will be gone in that timeframe. n13 In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black. n14 In 1993 blacks constituted 1.1% of law school applicants in that score range, though they represented 11.1% of all applicants. Law School Admission [***363] Council, National Statistical Report (1994)

(hereinafter LSAC Statistical Report). In 2000 the comparable numbers were 1.0% and 11.3%. LSAC Statistical Report (2001). No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years. Nor is the Court's holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time. n15

n13 I agree with Justice Ginsburg that the Court's holding that racial discrimination in admissions will be illegal in 25 years is not based upon a "forecast," *post*, at 156 L Ed 2d, at 344 (concurring opinion). I do not agree with Justice Ginsburg's characterization of the Court's holding as an expression of "hope." *Ibid.*

n14 I use a score of 165 as the benchmark here because the Law School feels it is the relevant score range for applicant consideration (absent race discrimination). See Brief for Respondents Bollinger et al. 5; App. to Pet. for Cert. 309a (showing that the median LSAT score for all accepted applicants from 1995-1998 was 168); *id.*, at 310a-311a (showing the median LSAT score for accepted applicants was 167 for the years 1999 and 2000); University of Michigan Law School Website, available at http://www.law.umich.edu/prospectivestudents/Admissions/index.htm (showing that the median LSAT score for accepted applicants in 2002 was 166).

n15 The majority's non sequitur observation that since 1978 the number of blacks that have scored in these upper ranges on the LSAT has grown, *ante*, at 156 L Ed 2d, at 342, says nothing about current trends. First, black participation in the LSAT until the early 1990's lagged behind black representation in the general population. For instance, in 1984 only 7.3% of law school applicants were black, whereas in 2000 11.3% of law school applicants were black. See LSAC Statistical Reports (1984 and 2000). Today, however, unless blacks were to begin applying to law school in proportions greater than their representation in the general population, the growth in absolute numbers of high scoring blacks should be expected to plateau, and it has. In 1992, 63 black applicants to law school had LSAT scores above 165. In 2000, that number was 65. See LSAC Statistical Reports (1992 and 2000).

[*377] Indeed, the very existence of racial discrimination of the type practiced by the Law School may impede the narrowing of the LSAT testing gap. An applicant's LSAT score can improve dramatically with preparation, but such preparation is a cost, and there must be sufficient benefits attached to an improved score to justify additional study. Whites scoring between 163 and 167 on the LSAT are routinely rejected by the Law School, and thus whites aspiring to admission at the Law School have every incentive to improve their score to levels above that range. See App. 199 (showing that in 2000, 209 out of 422 white applicants were rejected in this scoring range). Blacks, on the other hand, are nearly guaranteed admission if they score above 155. *Id.*, at 198 (showing that 63 out of 77 black applicants are accepted with LSAT scores above 155). As admission prospects approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score. It is far from certain that the LSAT test-taker's behavior is responsive to the Law School's admissions policies. n16 [**2365] Nevertheless, the possibility remains that this racial discrimination will help fulfill the bigot's prophecy about black underperformance--just

as it confirms the conspiracy theorist's belief that "institutional racism" is at fault for every racial disparity in our society.

> n16 I use the LSAT as an example, but the same incentive structure is in place for any admissions criteria, including undergraduate grades, on which minorities are consistently admitted at thresholds significantly lower than whites.

I therefore can understand the imposition of a 25-year time limit only as a holding that the deference the Court pays to the Law School's educational judgments and refusal to change its admissions policies will itself expire. At that point these policies will clearly have failed to "'eliminate [*378] the [perceived] need for any racial or ethnic'" discrimination because the academic credentials gap will still be there. *Ante*, at 156 L Ed 2d, at 341 (quoting Nathanson & Bartnika, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chicago Bar Rec. 282, 293 (May-June 1977)). The Court defines this time limit in terms of narrow tailoring, [***364] see *ante*, at 156 L Ed 2d, at 342, but I believe this arises from its refusal to define rigorously the broad state interest vindicated today. Cf. Part II, *supra.* With these observations, I join the last sentence of Part III of the opinion of the Court.

* * *

For the immediate future, however, the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson,* 163 U.S. 537, 559, 41 L. Ed. 256, 16 S. Ct. 1138 (1896) (Harlan, J., dissenting). It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment.