

First, this study asserts that the Supreme Court is a rhetorical institution, dependent upon rhetoric for its inventional needs and its credibility while simultaneously cloaking its reliance on rhetorical invention in a rhetoric of formalistic inevitability. As such, it attends to how the legal invention process, explicated by classical rhetorical theorists and manifest in contemporary legal practice, enhances understanding of Powell's decision.

Second, the project examines how Powell pulled from far-reaching rhetorical and ideological environments for his "diversity" rationale. Here, the study traces public discourses about race and examines *Bakke*'s legal briefs, outlining the appeals to multiculturalism, colorblindness, race consciousness, and individualism that comprised Powell's inventional warehouse. A critical scrutiny of Powell's opinion-writing process reveals an inventional program guided by an ideological negotiation of these competing and compelling rhetorics of race and education in the United States.

Third, this project argues that Powell's opinion-writing process is a corporate, rather than individual, process. Examining the negotiations between Powell, his law clerks, and fellow justices further illuminates the rhetorical nature of the Court, as well as the ideological influences upon individual Court opinions.

The study concludes by explicating how *Bakke* reflects the ways that the Supreme Court works as part of a broader rhetorical culture, constructing its decisions from the materials of public arguments and the architecture of jurisprudential norms. Finally, the study explores the ideological circulation of Powell's decision: divorcing the goal of diversity from the justification of past discrimination.

RHETORICAL CONTINGENCY AND AFFIRMATIVE ACTION:
THE PATHS TO DIVERSITY IN
REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE

By

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Table of Contents

Acknowledgements	ii
Table of Contents	iv
Introduction	1
Understanding the Rhetoric of <i>Bakke</i>	6
Equality, Education, and Affirmative Action.....	11
Portrayals of <i>Bakke</i> 's Legal Relevance.....	16
The Rhetorical Supreme Court.....	20
Outline for Study	25
Conclusion.....	28
Chapter One: Rhetorical Invention and Supreme Court Opinion Writing	52
Classical Roots of Contemporary Legal Rhetoric	57
Epistemological Bases of Rhetorical Invention	73
The Supreme Court and Rhetorical Invention.....	80
The Starting Places of Supreme Court Arguments.....	88
“Facts” of the Case	92
Interpretation	93
Precedent.....	95
Other Justices’ Arguments	99
Public Culture	100
The Artifacts of Supreme Court Invention	101
Authority	102
History.....	103
Legal Culture.....	105
Legal Fictions	106
Conclusion.....	107
Chapter Two: American Rhetorical Traditions about Racial Equality	148
Ideological Foundations of the <i>Bakke</i> Case	150
American Multiculturalism	152
Individualist Ideology.....	156
Race Consciousness.....	161
Rhetorics of Assimilation and Race Consciousness in 20 th Century	
Public Discourse.....	165
Early Legal Challenges to Affirmative Action Policies	196
Conclusion.....	208

Chapter Three: The Rhetorical Environments of Bakke	239
Functions of <i>Amicus</i> Briefs	245
Ideological Alignments in <i>Bakke</i>	248
Individual, Colorblind Competition.....	250
Race Consciousness as a Social and Educational Good.....	272
Conclusion.....	298
Chapter Four: Mapping the Middle Ground in <i>Bakke</i>; Justice Powell’s Inventive Process and the Ideological Articulation of “Diversity”	322
Taking Inventory of Legal <i>Topoi</i>	327
Pre-Bench Memo: A Search for Authority	330
The Bench Memo: A Search for <i>Stasis</i>	333
Collaborative Invention	353
Powell’s Pragmatic Conservatism	362
Interpretive Choices.....	366
Constructing and Limiting Authority	373
Negotiating the Written Opinion	378
Conclusion.....	390
Conclusion: The Rhetorical Supreme Court and the Legacy of “Diversity”	418
The Final Opinions in <i>Bakke</i>	422
<i>Bakke</i> ’s Legacies	432
Bibliography	461

Introduction

On the morning of June 28, 1978, nervous energy swept the main courtroom of the U.S. Supreme Court building as Justice Lewis F. Powell Jr. spoke. The anxious crowd awaited the Court's decision on *Regents of the University of California v. Bakke*, a closely watched case questioning the constitutionality of affirmative action in higher education. The case brought to the fore persistent questions about equal opportunity, quotas, white privilege, discrimination, and the role of race in higher education that had simmered in American legal discourse for centuries. *Washington Post* reporter Jacqueline Trescott described the scene in the courtroom: "In the massive, grand Supreme Court Building, a siege is underway. A media vigil. Waiting for *Bakke*, a countdown that grows more tense as the court nears the term's end, has the press corps jittery each morning the court sits."¹ After providing a brief background of the case, Powell leaned toward the microphone to announce the decision of the Court. "I will now try to explain how we divided on this issue," he said. "It may not be self-evident."²

The *Bakke* case was complex from its beginning. Allan Bakke, a 32-year-old white male Vietnam veteran, was rejected by each of the eleven medical schools to which he applied in 1973.³ One of these schools, the University of California at Davis (UC-Davis), had reserved sixteen of the 100 available seats for economically or educationally disadvantaged students. During this program's existence, none of the reserved seats were filled by a white student. Bakke applied again to UC-Davis in 1974. UC-Davis interviewed him both years, but rejected him both times. Bakke's

test scores and grade point average fell within the range of those accepted to UC-Davis, although his interview scores put him out of the upper range. Both white and minority applicants with better and worse interview scores than Bakke were admitted to the university.

Bakke hired lawyer Reynold Colvin and brought suit in the summer of 1974. They argued to the Yolo County Superior Court that Bakke should be admitted to the UC-Davis medical school because the dual-admission program violated the Fourteenth Amendment by denying him equal protection under law. The Regents of the University of California filed a counter-complaint, asking that the program be reviewed and declared valid. The Yolo County Superior Court found that the UC-Davis admissions program was invalid and that Bakke has been discriminated against based on his race. However, because the court found insufficient evidence to show that Bakke would have been admitted but for the special program, it did not order him admitted to the school.⁴

The decision pleased neither Bakke nor UC-Davis. Bakke sought admittance, and UC-Davis wanted their program declared constitutionally valid. Both sides appealed. The California Supreme Court bypassed the Court of Appeals and took the case directly due to the “importance of the issues involved.”⁵ In September 1976, the California Supreme Court affirmed six-to-one the lower court’s decision regarding the unconstitutional nature of the UC-Davis special program. Citing the Equal Protection Clause of the Fourteenth Amendment, the majority argued that the protection against racial discrimination applied to any person, regardless of majority or minority status.⁶ Additionally, the California Supreme Court ordered UC-Davis to

prove that Bakke would not have been admitted even without the special program; otherwise, UC-Davis was required to admit him.

The Board of Regents of the University of California appealed the ruling to the United States Supreme Court. Their question to the Supreme Court was whether the Equal Protection Clause of the U.S. Constitution forbids universities from creating limited admissions programs to help those minorities affected by decades of discrimination, in an attempt to remedy the effects of said discrimination. Bakke's lawyer petitioned the Court to deny *certiorari*, claiming that the lower court had decided correctly.

In addition to Bakke and the Regents, more than one hundred individuals and organizations included their names in a record fifty-eight *amicus* briefs filed for the case.⁷ Some briefs encouraged the Court to overturn the California Supreme Court decision and allow the affirmative action program to continue in order to help historically disadvantaged students gain admission and to promote a diverse student body; others wanted the Supreme Court to stem the tide of "reverse discrimination" by issuing a decisive opinion on the issue.⁸ Several parties petitioned the Court to deny *certiorari* because they considered *Bakke* a weak test case for affirmative action in higher education.⁹

Several members of the U.S. Supreme Court were inclined to agree with those who argued against granting *certiorari*.¹⁰ They had narrowly avoided issuing a decision about affirmative action in higher education several years before in *DeFunis v. Odegaard* (1974). Former Justice William Douglas had chastised his fellow justices for doing so when he dissented at length from the Court's decision to dismiss

the case and asserted that, given the facts of the admissions policy, “we have no choice but to evaluate the Law School’s case as it has been made.”¹¹ Conference discussions about *Bakke*, then, focused on the necessity to hear the case, coming as it did so soon after *DeFunis*.¹² Moreover, most of the justices who found the program unsavory did not want to decide on the constitutionality of the program at all, hoping to resolve this issue statutorily under Title VI of the Civil Rights Act.¹³ Justice Thurgood Marshall rejected formal legalistic decision-making for *Bakke*, however, proclaiming that the “legality of affirmative action simply could not be resolved without consideration of the historical, legal, and sociological context of past racial policies and practices.”¹⁴

Justice Powell’s apologetic beginning to the Court’s announcement of the *Bakke* opinion was warranted. Powell’s opinion for the Court bridged its main voting blocs. In all, six different opinions were penned in the case. Two groups of justices were evenly divided on the case: one group, led by Justice William Brennan, felt that race was a permissible consideration in order to overcome the legacy of discrimination, while another bloc, following Justice John Paul Stevens, argued that the use of race in college admissions violated Title VI of the Civil Rights Act of 1964. Powell wrote the deciding opinion that drew in part from each camp, arguing that while affirmative action in college admissions is constitutionally acceptable, it is only permissible when narrowly focused on the goal of diversity and implemented without the use of quotas. Because the program at UC-Davis failed under these standards, it was unconstitutional, and the university was thus ordered to admit Bakke into its medical school. Many who were following the case – especially legal

scholars and admissions officers – found the fractured results disappointing and nonsensical. However, when the *Bakke* decision is considered as an instance of public discourse and as an act of deliberation, it emerges as a strategic compromise sensitive to conflicting public needs and values with regard to race conscious policies enacted within educational settings.

This project situates the *Bakke* case within its broader rhetorical environment of ongoing public discourses about race, law, and education in order to explicate the inventional process through which Justice Powell, in his final opinion, pulled upon the public concept of diversity as the most justifiable answer to the question of affirmative action’s permissibility in higher education. Because Justice Powell’s opinion was the guiding one for the Supreme Court, and because his opinion most actively attempted to build on the shared premises of other arguments about affirmative action, this study centers on Powell’s decision-making process. I treat this case as a form of public address; one that conforms to the rules and expectations of legal argumentation while negotiating the political and public values enmeshed in the case. As such, I extend the timeline of the “process” beyond its legal emergence in the 1970s, attending to the case’s rhetorical and situational backgrounds. This project begins with a history of the rhetorical invention process in legal discourse, illuminating the long tradition of rhetorical invention in legal argument, as well as the sublimation of the rhetorical nature of legal argument to the rhetoric of certainty during the disciplinary separation of rhetoric, philosophy, and jurisprudence. Next, I reconstruct the foundational and emergent public arguments about race, law, and education in the United States which comprise the wider field of argument from

which the *Bakke* discourses emerged. These histories are followed by an examination of how these arguments and their corresponding assumptions were pulled through the legal briefs of the numerous interested parties in *Bakke*, as well as through Justice Powell's memoranda and draft opinions. In doing so, I examine how Powell chose from the available means of persuasion those arguments that best matched his goals, given the social and institutional constraints and opportunities surrounding the case.

Understanding the Rhetoric of Bakke

Legal scholars have debated *Bakke*'s controversial questions about race, its worth as a legacy of *Brown v. Board of Education* (1954), its relevance to subsequent interpretations of the Fourteenth Amendment, its lack of a clear majority decision, its constitutional ramifications, its potential for being overturned, and its potential impact on other decisions.¹⁵ Because of the long-standing controversy over affirmative action, the fractured results were considered by many to be disappointing. Measured against jurisprudential norms, Powell's opinion is inelegant at best and a disaster at worst.¹⁶ Common arguments include observations that Powell misread the Civil Rights Act of 1964, misinterpreted the Fourteenth Amendment, ignored precedents, supplanted constitutional interpretation with political and personal beliefs, and attempted to create constitutional values where they did not previously exist. In legal scholarship, *Bakke* has been meticulously discussed from the time it was granted *certiorari* by the Supreme Court, to its 30-year anniversary, and through the most recent legal challenge to affirmative action's constitutionality in 2003.¹⁷ However, despite the widespread dissatisfaction with Justice Powell's opinion, the two most recent cases regarding affirmative action in higher education – *Gratz v. Bollinger*

(2003) and *Grutter v. Bollinger* (2003) – were decided along the same rubric as Justice Powell’s conclusion.¹⁸ Racial classifications cannot be used in a “nonindividualized, mechanical way,” the Supreme Court maintained, but they may be used as one factor in considering the overall contribution an individual student offers to the university, by means of a diverse student body.¹⁹ Moreover, the diversity justification offered by Justice Powell was upheld as precedent by Chief Justice John Roberts in a 2007 case, *Parents Involved in Community Schools v. Seattle School District No. 1*, regarding the assignment of students to public schools according to racial categories – even as Roberts used it to render unconstitutional the program under question.²⁰

The widespread interest in the *Bakke* case is best explained because of its convergence of social, political, and legal struggles about which principles should guide our thoughts and actions about racial inequities in the United States. Richard K. Sherwin notes that notorious legal cases “are social dramas that take place on a field of embattled discourse where contested stories, metaphors, and character types vie for dominance in the culture at large.”²¹ In turn, “the nation uses these events for addressing psychological and social agendas on a large scale.”²² Amidst public debates about the values of colorblindness, race consciousness, individual merit, and equal opportunity, Powell settled on a seemingly tame ‘diversity’ as the most compelling reason to consider race in college admissions.

In this study, I argue that the U.S. Supreme Court is best understood as a rhetorical institution, wherein actors use forensic justifications to forward deliberative decisions, conscious of and reflecting the surrounding cultural milieu. In doing so, I

extend the goals articulated by Craig Allen Smith and Kathy B. Smith, who argue that “by emphasizing institutionalized rhetorical patterns we recognize that one’s position in the institutional structure provides opportunities and audiences in exchange for conformity with normative rhetorical expectations.”²³ Exploring Powell’s inventional process sheds light on those areas of contingency and doubt in the arguments surrounding affirmative action that must be reconciled by the time the final opinion is published. As Peter Goodrich asserts, “Law...is a genre of rhetoric which suppresses its moments of invention” and Gerald B. Wetlaufer describes law thusly: “the particular rhetoric that law embraces is the rhetoric of foundations and logical deductions...one that relies, above all else, upon the denial that it is rhetoric that is being done.”²⁴ Yet, during the review process, “judges and lawyers alike face the rhetorical challenge of ‘saying what the law is,’ which is a rhetorical activity rather than a contemplative exercise, a question of argumentation rather than dialectical demonstration.”²⁵ Thus, argues John Day, “the United States Supreme Court is an interesting microcosm of public, deliberative argument. Supreme Court justices must constantly walk the fine line between argument invention and deference to previous lines of Court precedent.”²⁶

Examining the rhetorical invention process of a particular Supreme Court case also forwards the ongoing mission of rhetorical critics who are interested in revealing the rhetoricity of legal practices without reducing them to the charges of personal subjectivity that most legal scholars fear, and of which critical legal theorists have been accused of promoting.²⁷ Those who deny the existence of rhetoric within legal theory or practice hold an “impoverished view of rhetoric” to begin with, argues

James Arnt Aune.²⁸ Francis J. Mootz III agrees, asserting that, “ironically, viewing law as intrinsically and irredeemably rhetorical reaffirms its integrity and legitimacy as a practice of securing reasonable adherence, even as it rejects, once and for all, conceptualist and formalist approaches to law.”²⁹ Mootz argues that this is true because judicial reasoning actually more closely mirrors moral reasoning. Chaïm Perelman reconciles the need for legal reasoning to appear non-rhetorical when it must, in fact, rely on argumentation in order to reach acceptable conclusions, asserting that:

The essential value of legal security distinguishes legal reasoning from other forms of practical reasoning. In this type of reasoning one has always sought to minimize the intervention of the will which is very often identified with the arbitrary and the irrational. But the personal factor cannot be eliminated from legal reasoning. Like all argumentation, being the function of the people who argue, its value will depend, in the final analysis, upon the integrity and intelligence of the judges who determine its specific nature.³⁰

Rhetorical theorists from Aristotle to Perelman assert that rhetorical activity begins with rhetorical invention. This is as true in legal argument as in other fields, because the legal principles and particulars of the case must be worked against “a storehouse of arguments and strategies that generally are deemed acceptable and persuasive by the audiences to whom they speak.”³¹ Most analyses of *Bakke* focus on the arguments given in the final Supreme Court opinion, a shared territory of this study. However, this study extends the scope of legal argumentation to Justice Powell’s internal memoranda, with the understanding that, in Supreme Court

decisions, “later construction of a syllogistic justification is only the tip of the rhetorical iceberg that has resulted in the decision, and undue attention to this latter phase of judging clouds the nature of the rhetorical process in adjudication.”³² Janice Schuetz argues that the communication discipline “seldom examines a large segment of the political process or the development of one argument through the hierarchy of the decisional process,” and this study contributes to that mission.³³

This project takes note of the complex relationships among courts and their publics, the rhetorical trajectories of the parties involved, the public values that were subsumed into legal arguments, the Supreme Court’s debates and decisions over those values, and the ways in which the justices justified their decisions in appropriate institutional ways. In doing so, this study examines how various political actors, and ultimately Justice Powell in his final opinion, negotiated the rhetorical grounds on which he justified the constitutionality of affirmative action policy. As a result, what previously had been viewed as an ideological commitment to equality – treating every person the same way – was shifted to a commitment to diversity – recognizing the value of difference – as a constitutionally permissible goal. As Robert Post asserts, “Powell’s opinion...was designed to work as an ideological construct, not merely as a functional one.”³⁴

Just as ideas of equality and justice did not originate within Supreme Court chambers, neither did the negotiation of the term diversity begin or end with Powell’s opinion. While the Supreme Court may have helped to legitimize diversity as a public value, it did not create the value. Stephen Macedo notes that “[d]iversity is the great issue of our time: nationalism, religious sectarianism; a heightened

consciousness of gender, race, and ethnicity; a greater assertiveness with respect to sexual orientation; and a reassertion of the religious voice in the public square are but a few” of the ways in which the United States engages with diversity.³⁵ Affirmative action is but one framework under which diversity works, and diversity has not always been part of affirmative action’s mission.

Equality, Education, and Affirmative Action

Affirmative action is a public policy program that developed as a tangible solution to the disjunction between a rhetorical commitment to equality and ongoing disparities in opportunities for discriminated-against groups to take part in employment, military service, and education in the United States. Most parties engaged in arguments about affirmative action value equality in some sense; but these different senses of equality make a profound difference. John Lucaites and Celeste Condit have asserted that part of the strength of the appeal to equality lies in its ambiguous definitional status that allows different communities to value different conceptions of equality simultaneously, while also allowing a unified theme for all.³⁶ However, these differences become problematic once a formal definition is needed to enact a specific goal. For instance, to those who are against affirmative action, equality generally means pledging to treat everyone the same, regardless of race. On the other hand, proponents of affirmative action argue that in order to achieve equitable results, we must recognize differences, especially in past treatment. For much of affirmative action’s history, the reasoning has been that, because certain groups have been treated unequally in the past, these groups should be given special

consideration in order to account for that history and to help them reach a place where they can compete equally.

The justifications for affirmative action have varied, to a certain extent, by the environments in which the policies are implemented. Within Supreme Court decisions, the racial composition of schools has been a special concern, as American schools have been viewed as training grounds for responsible adult citizenship. Former Chief Justice Earl Warren wrote for a unanimous court in *Brown v. Board of Education* (1954) that “education is perhaps the most important function of state and local governments... It is the very foundation of good citizenship.”³⁷ Former Supreme Court Justice Sandra Day O’Connor echoed this belief when she argued in 2003 that the Court has “repeatedly acknowledged the overriding importance of preparing students for work and citizenship,” with education being pivotal to this goal as it holds “a fundamental role in maintaining the fabric of society.”³⁸ Chief Justice Roberts asserted the continuity of this belief in 2007, arguing that “in upholding the admissions plan in *Grutter*...this Court relied upon considerations unique to institutions of higher education,” noting that in light of “the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”³⁹ This tendency has made legal challenges to educational policies about race a key strategy in attempts at social change.

For instance, when the NAACP launched a campaign in the 1930s to break *Plessy v. Ferguson*’s (1896) separate-but-equal doctrine and its segregationist legacies, the organization did so by concentrating on access to schools. One large

victory came with *Missouri Ex Rel. Gaines v. Canada* (1938) and the successful argument that aspiring African American student Lloyd Gaines should be admitted into the state law school because there was no black equivalent to that school. This opinion was reaffirmed by *Sipuel v. Board of Regents of the University of Oklahoma* (1948), which applied the same reasoning to an Oklahoma law school. In response, universities intent on keeping their students segregated quickly set up black law schools or segregated classrooms within existing schools.

Two Supreme Court decisions in 1950 dealt serious blows to the separate-but-equal doctrine. *McLaurin v. Oklahoma State Regents of Higher Education* (1950) declared that segregated graduate instruction violated George W. McLaurin's equal protection of the laws. In *Sweatt v. Painter* (1950) the Supreme Court decided that the makeshift black law school set up in lieu of segregation did not provide equal educational benefits, in part because segregated schools have negative effects on both blacks' and whites' understanding of their roles as integrated citizens.⁴⁰

In *Brown v. Board of Education* (1954), the Warren Court produced a long fought-for unanimous opinion, striking down *Plessy's* separate-but-equal doctrine. Amidst the justices' concerns that calling for desegregation would incite violence, political upheaval, and institutional discredit, the Supreme Court announced that racial segregation in schools was unconstitutional. Arguments about benefits of racial integration in education, and the necessity to take affirmative steps for integration to occur, were central to the *Brown* decision. Thus, the most recognizable theme of the earlier movements had been the value of integration, legally validated by *Brown*.

Yet, in the middle 1960s, federal workers, legal professionals, scholars, and civil rights organizations were disturbed by the lack of progress toward the equal outcomes that race-neutral policies had promised, and pushed for more direct, *affirmative* action to alleviate disparities.⁴¹ School districts continued to delay and stifle integration, and in 1968 the Supreme Court struck down the passive “freedom-of-choice” plan of a Virginia school district in *Green v. County School Board*.⁴² Yet the Court was more ambivalent in its decisions about more active steps toward school integration – especially after Earl Warren retired in 1969 and Warren E. Burger was appointed to replace him as chief justice. In 1971, the Supreme Court unanimously declared busing acceptable when there was a proven history of segregation within the school district.⁴³ Three years later, however, a split Court held that busing policies should not cross district lines between the city of Detroit and its suburbs.⁴⁴

Russell Nieli notes that, “[In] the late 1960s, a major shift occurred in American thinking about the desirability of the then-current policy of government-enforced racial and ethnic neutrality in the areas of hiring, promotion, and university admissions.”⁴⁵ Legislation such as the Civil Rights Act of 1964, the Voting Rights and Immigration Acts of 1965, and the Fair Housing Act of 1968 forbade discrimination and called for equal treatment of all groups. Yet amidst these gains, widespread urban rioting occurred, and the results of the 1968 Kerner report from the National Advisory Commission on Civil Disorders pointed to African American frustration not just with overt discrimination, but also with disproportionate poverty, unemployment, poor education and housing, and systemic police bias.⁴⁶ It became clear to some that abandonment of discriminatory practices does not erase the legacy

of those practices. The recommendations of the Kerner commission included fostering programs that carried an immediate impact “in order to close the gap between promise and performance” for all minority groups.⁴⁷

The enactment of such programs began to draw lawsuits from whites who felt that minority set-asides, preferences, or affirmative hiring of minorities discriminated against them because of race.⁴⁸ *DeFunis v. Odegaard* (1974) was one of these cases, addressing the practice of affirmative action in higher education.⁴⁹ Marco DeFunis, a white male, was twice rejected by the University of Washington School of Law, which had a policy of considering separately African American, Hispanic American, Native American, and Filipino American applications. The school placed different weights on grades and compared the minority applicants to each other rather than the entire pool, with target percentage goals for minority student admittees.⁵⁰ DeFunis filed suit, claiming that the law school’s program constituted “reverse discrimination.” The Supreme Court agreed to take the case, both because of interest in the issue and due to concern that they would appear avoidant if they did not take it.⁵¹ However, by the time oral arguments were made, DeFunis was in his last semester of law school. A majority of the court declared the case moot, amid strong dissents from four of its members, who argued that DeFunis’ situation was not specific to him, but reflected a larger constitutional issue that would need to be addressed.⁵²

Thus, when *Bakke* made its way to the high court in 1977, the justices felt pressure to take the case.⁵³ Most of the justices were the same ones who had narrowly avoided issuing a decision in *DeFunis*. After a tumultuous 1960s with

notable legislative civil rights gains for women, African Americans, Native Americans, and Latinos, the United States amassed some carefully crafted (and bitterly negotiated) legislation that rendered the equal treatment of all its citizens enforceable by law. What, exactly, those laws should look like became a source of contention even before the Civil Rights Act of 1964 was affirmed.⁵⁴ How, legally, to enforce equality was the question of the day. Civil rights activist Morris Abram reports that, by the late 1960s to the mid-1970s, much of the civil rights leadership and their political liaisons were frustrated by the slow pace of progress and “had become increasingly preoccupied with equality of *results*.”⁵⁵ Yet others, including some among the civil rights community, found this version of equality onerous to the Constitution and counter-productive to the integrationist movement toward equality.⁵⁶ The discourse surrounding the *Bakke* case, including the *amicus* briefs, Supreme Court conference discussions, Supreme Court opinions, and subsequent public reaction, reflected these robust tensions.

Portrayals of *Bakke*'s Legal Relevance

Most research about *Bakke* comes from legal practitioners, and thus focuses largely on technical, specialized aspects of legal reasoning and consequences including the legal traditions that may explain Powell's decision.⁵⁷ For instance, Kirk Kolbo lauds Powell's finding that the UC-Davis program was invalid, because according to Kolbo “it is a settled feature of equal-protection analysis that government has the burden of justifying any racial and ethnic classifications under the ‘strict-scrutiny’ standard, meaning that it must prove that the classifications are supported by a ‘compelling’ interest and that they are narrowly tailored to achieve

that interest.”⁵⁸ Legal scholar Michael Rosman traces Justice Powell’s constitutional justification while critiquing it for its solitary status: “Justice Powell . . . applied strict scrutiny to the Davis program . . . conclud[ing] that ‘academic freedom,’ although not a specifically enumerated Constitutional right, was a ‘special concern’ of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny.”⁵⁹ This type of research provides insight into legal doctrine and accepted forms of legal reasoning, both of which are important to this project because they reflect particular motivations and audiences that justices must consider when framing their arguments. However, they grant the constitutional justifications offered in the published opinions as the entirety of the reasoning process.

Other research explains the major public sentiments of the time, mostly with the purpose of critiquing or justifying Powell’s decision either because of his legal realist principles that considered such public sentiment or because of his narrow-mindedness that forced him to ignore such sentiments.⁶⁰ Girardeau Spann argues that affirmative action cases do not even merit judicial review, making the *Bakke* case a blatant exercise in politics.⁶¹ Conversely, Elizabeth Anderson critiques the *limited* scope of Powell’s opinion because, “Powell’s argument excluded integrationist practices intended to advance racial justice in ways that do not operate through the educational benefits of diversity.”⁶² These studies provide a wealth of knowledge about jurisprudential norms and modes of justification, although they focus “upon the internally generated doctrinal and institutional changes at the expense of attention to external sources of normative values.”⁶³ To the extent that these analyses recognize larger rhetorical influence, they generally critique the justices for their legal realism.

This charge implies that Supreme Court reasoning can – and should – be completely removed from public discourse, and that any similarities between public arguments and Supreme Court decisions reveal a conscious choice by those justices to forward particular political or social values. At the same time, opponents of the *Bakke* decision point to public opinion polls also showing opposition to affirmative action as evidence that the decision was wrong. For instance, Rosman argues that growing public distaste in race-conscious decision-making, as evidenced in poll numbers, can be traced to Justice Powell’s expansion of affirmative action from African Americans to a wider category of minorities.⁶⁴

Several studies of the *Bakke* case trace it thematically: two to three main ideas usually culled from either other editorials about affirmative action, from the main litigants in *Bakke*, in cases surrounding *Bakke*, or from the opinions of the justices in these cases.⁶⁵ For instance, Laurence H. Tribe, a law professor and lawyer who has argued many cases before the Supreme Court, wrote about the *Bakke* case in order to “extract several distinct themes from the *Bakke* decision” – namely those of equal protection, procedural fairness, and structural justice – then to “speculate on their independent significance for the future.”⁶⁶ These analyses, though useful, treat Supreme Court cases as if they are an end unto themselves – not generally recognizing Supreme Court opinions as more publicly regarded and highly jargonized forms of arguments already circulating within the public.

The majority of *Bakke* analyses attribute the “fractured” decision to be the near-fatal weakness of affirmative action itself, rather than viewing the decision as one that allows a flexible and polyvalent reading more sustainable with multiple

groups than an up-or-down decision.⁶⁷ For instance, Rosman argues that, amongst other problems with Justice Powell's decision, "the first problem with the 'academic freedom' rationale is that no other member of the Court adopted it. Thus, its value as precedent has always been questionable."⁶⁸ The lack of a clear majority opinion is considered a weakness, in large part because most of these scholars are thinking of legal reasoning, wherein the appearances of certainty, of clear precedent, and of unanimity are the ultimate goals in maintaining its authority.⁶⁹ "It is easy to be skeptical about the Supreme Court's affirmative action cases," Cass R. Sunstein grants in his essay about the deliberative aspects of Supreme Court decisions. "From the standpoint of the rule of law, the cases are truly a mess."⁷⁰

From a rhetorical standpoint, however, the *Bakke* case is a marker for a shift from reliance on equality to the celebration of diversity in the consideration of racial inequities. Scholars of rhetoric recognize the contingency of truth and the *degrees* of agreement and disagreement that come with deliberative discourse.⁷¹ Many law studies focus on what they call the "diversity rationale," a term of substantive interest in this project. However, the legal analyses begin and end the exploration at diversity's constitutionality, with perhaps a stretch into its effects on law. Similarly, several books trace the import and effects of *Bakke*, affirmative action, and diversity in higher education.⁷² Instead, this project traces the importance of the decision in the opposite direction: what Powell's conclusion of diversity reveals about the rhetorical invention process within Supreme Court opinion writing, and the latter's social embeddedness as a mode of discourse.

The Rhetorical Supreme Court

Approaching the *Bakke* case from a rhetorical standpoint highlights the dynamic relationship between legal actions and public thought. As Austin Sarat and Thomas R. Kearns argue, contentious cases “open up the question of politics and of law’s connection to the world of contingency.”⁷³ Law, Wetlaufer notes, “is the very profession of rhetoric,” although it builds its reputation on denying its central feature.⁷⁴ The law is “not only a particular field to which rhetoric can be applied; it is also rhetorical through and through.”⁷⁵ Whereas rhetoric is contingent, legal discourse diminishes this contingency by speaking in the language of certainty, using highly technical language, and appealing to “pre-set” legal rules and norms beyond which legal actors proclaim they cannot venture. Thus, Marouf Hasian Jr. argues that “legal formalism hides the constitutive nature of America’s judicial rules and norms.”⁷⁶

Because the Supreme Court serves an appellate role, it often makes the final legal decision on looming questions such as the viability of affirmative action. At the Supreme Court level, many cases that garner public attention are those that reflect competing public values.⁷⁷ The ability to appeal perceived injustices to the Supreme Court affords the Court the opportunity to negotiate, change, dismiss, or reconceive looming conflicts of the day. Moreover, the adversarial format of legal conflict necessitates a winner and a loser, promising resolution by its very structure.⁷⁸ Within the justices’ opinions, the “rhetorical use of language is seen as inducing, by symbolic or figurative means, the co-operation and accommodation of social and institutional forces whose real affinities are antagonistic and conflictual.”⁷⁹ The Supreme Court

gains its authority from its role in accommodating these forces, in “helping to guide the nation...with respect to those long-term ‘value-questions’ that are so vital to the maintenance of a just political order.”⁸⁰

This authority itself is one constructed by the Supreme Court. Because the Supreme Court has no enforcement power, it must find support for its assertions through its own constructed authority. As Jeffery Mondak and Shannon Smithey note:

The Supreme Court is an inherently weak institution. To give impact to its decisions, the Court depends on legislators for funding, the executive for enforcement, and the public for compliance. This last relationship—between the Supreme Court and the public—provides the Court with its most daunting obstacles....Despite the Supreme Court’s nominal insulation from the American people, the Court’s justices have strong incentives to be concerned with their public standing.⁸¹

Thus, the Supreme Court must “establish its authority as being something less than naked power, but something more than advisory influence” in order for decisions to be viewed as legitimate.⁸² A key rhetorical feature of the Court is its need to motivate support for its decisions in lieu of forcibly imposing them. Perelman notes that, in democratic societies, “the role of the judge, servant of existing laws, is to contribute to the acceptance of the system. He shows that the decisions which he is led to take are not only legal, but are acceptable because they are reasonable.”⁸³ Gerald N. Rosenberg describes a Supreme Court constrained by broader social conditions, including matters of public opinion.⁸⁴ In cases of public interest, the need

to sound reasonable extends beyond legal practitioners involved with the case to a wider audience who may not know the legal precedents or doctrinal habits relating to the subject area. In cases such as this, “the authority of the court opinion is not a given—it must be earned; and the audiences from which assent must be won are often multiple.”⁸⁵

Because judicial opinions are the public venue for explicating the justices’ reasoning and conclusions, most legal and rhetorical analyses focus on them as the relevant discourse in judicial decision-making. Such an approach often treats legal texts as solitary and complete, often isolated from their social contexts by legal philosophies that expect neutrality. This habit is unrealistic and unreflective of the legal process in cases of social importance. Although Michael Klarman assures readers that justices do not make decisions solely based on public opinion, he notes that “because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”⁸⁶ Hasian points out the incomplete rhetorical history of focusing solely on judicial opinions, remarking that, “often we are left with judicial edicts that have simply withstood the push and pull that comes from the centripetal and centrifugal forces of competing audience positions.”⁸⁷ James Boyd White explains that it is less valuable to treat judicial opinions as a legal field of study than it is to conceive of law “as a ‘culture of argument’—or, what is much the same thing, as a language, as a set of ways of making sense of things and acting in the world.”⁸⁸

Moreover, treating Supreme Court opinions as representative of the entirety of the authors’ reasoning process truncates the elaborate negotiation between justices

and disallows more pragmatic considerations which would not be prudent – or relevant – to work into the final opinions. Justices must make their final opinions consonant with accepted forms of legal decision-making, but that does not mean that the reasons given in the opinions were the only factors (or even the main factors) considered when deciding how to vote in the first place. Judicial opinions are public justifications for rulings, written with a sense of textual inevitability that undermines the contingent nature of judicial argument.⁸⁹ A thorough examination of archival materials, such as memoranda among the justices, and between each justice and his or her law clerks, as well as drafts of the justices’ opinions and the responses offered to them, accords a better understanding of the forms of reasoning that prompted the decisions that preceded the penning of the opinions. These memoranda reveal which premises, warrants, forms and sources of evidence, and overarching goals guided the justices’ arguments: for instance, concerns about public perceptions of the Court, consideration of editorials and respected legal scholars writing about the issues, negotiations and compromises between the justices about what issues within the case will be covered by whom (and who is the most credible to speak on them), and, most importantly, which ideas of justice were to be privileged in the case.

While the public was generally unaware and unconcerned with the *Bakke* case until it reached the Supreme Court, the ongoing struggles about race and equal opportunity that brought about the University’s policy and Allan Bakke’s reaction to the policy were already part of the public culture. The rhetorical significance of the case does not end with the decision itself, because “when a court renders an opinion or an agency makes a ruling, it not only resolves a particular dispute, it

validates...one way of looking at the world, one way of speaking and thinking.”⁹⁰

The shared resources among legal and public discourses are particularly salient in Supreme Court cases because, as Bernard Schwartz describes the Court, it is “both a mirror and a motor—reflecting the development of the society which it serves and helping to move that society in the direction of the dominant jurisprudence of the day.”⁹¹

Indeed, constitutional interpretation lies in the tension between textual and contextual factors, and exploring this tension is the mission of public address scholarship. Thomas Rosteck argues that public texts should be considered as forms of “culture in practice...not as objects to deconstruct, but forms of activity inseparable from wider social relations.”⁹² Stephen Browne considers it one of the fundamental goals of the critic to explore the negotiation of the “productive tension between form and content, text and context, coherence and fragmentation,” and while Stephen E. Lucas charges that the critic’s primary focus should be on the text itself, he grants that each text’s linguistic, social, and textual contexts are what give meaning to it.⁹³ Furthermore, Richard K. Sherwin argues that, “law’s stories, images, and characters leach back into the culture at large.”⁹⁴ Because legal institutions such as the Supreme Court are part of the larger national culture with which they deal, they cannot be separated from those symbolic, ideological habits of the mind that inhabit the communities in which they are involved.⁹⁵

By expanding the analysis to *Bakke*’s social context, the *amicus* briefs, and debates among justices, this study considers the arguments of the various publics that were manifest in the discovery and selection process by which Justice Powell decided

how to decide. Supreme Court decision-making does not rely entirely on precedent, nor does it rest wholly on personal preferences. These processes are evidenced in part through memos and conference notes that reveal, according to Del Dickson, “an intricate and shifting composite of law, politics, policy, principle, efficiency, expedience, pragmatism, dogmatism, reason, passion, detachment, individual personality, group psychology, institutional forces, and external pressures.”⁹⁶ Robert A. Ferguson argues that, whereas a court decision necessarily truncates the stories of the various parties, the “complete chronicle of a courtroom event...comes closer to evoking the overall range of communal pressures than the crafted conclusion of the presiding judge.”⁹⁷

Outline for Study

This study examines how Justice Powell sifted through the arguments surrounding affirmative action policies in the 1970s to settle on diversity as a constitutionally justifiable platform upon which affirmative action in higher education could rest. It does so by exploring the goals, constraints, and purposes of the various parties to the *Bakke* case as they utilize the linguistic resources available to them, culminating in the *Bakke* decision. These linguistic resources have been shaped by centuries of struggles for civil rights, and that contextual history is considered as well.

Chapter One provides a theoretical exposition on the rhetorical invention process in legal contexts. In doing so, it traces how the rhetorical invention process explicated by classical rhetorical theorists, separated from the rhetorical process and placed under the umbrella of philosophy, then reconceived by contemporary rhetorical scholars, influences legal practice in ways that offer an enhanced

understanding of Powell's perplexing *Bakke* conclusion. Chapter One also explicates the common starting places of Supreme Court arguments – that is, contemporary sites of rhetorical invention in appellate legal argument.

Chapter Two provides an exposition of the development of affirmative action as a concept and a policy, situating the *Bakke* case within the broader scope of public arguments about twentieth century race relations. Although values such as equality as tend to be treated as universal, when policies purporting to embody those principles are brought into legal question, their contingent nature is made more visible, because “criticism and justification are always found in a historically determined context.”⁹⁸ This chapter highlights that historical context, examining discourses about colorblindness, race consciousness and racial pride, assimilation, diversity, and reparations for discrimination in order to detail the rhetorical history of affirmative action. As these concepts were reflected in law, the Supreme Court was asked to respond to conflicting arguments about which remedies would best resolve existing economic, social, and civil liberty disparities between races. Chapter Two also traces early legal challenges to affirmative action, ending with the educational policies and legal challenges that became the *Bakke* case.

Chapter Three analyzes the publicly available party briefs and *amicus* briefs submitted to the Supreme Court in *Bakke* in order to draw out the argumentative scene from which Justice Powell crafted his arguments. Thus, Chapter Three highlights the disparate arguments about the merits or harms of affirmative action in higher education specifically. These arguments include references to other types of “preferences” already instilled in law and policy regarding athletes and children of

alumni; definitions of merit which benefit middle- and upper-class applicants even as their language appears race and class-neutral; the benefits of a diverse student body; the continuing need to rectify past discrimination; the denial of individualism by group consideration and numerical goals; and the “reverse discrimination” of such policies.⁹⁹ These individual arguments are also textual embodiments of ideological beliefs about racial identity, professional and social progress, and the law’s role in negotiating the relationship between individual and collective identities, and Chapter Three interrogates those ideological markers and their interdependencies.

Chapter Four focuses on those arguments that Justice Powell considered as he worked toward his final opinion in *Bakke*. These texts, retrieved from the Justice Lewis Powell Archives at Washington and Lee University, include the correspondence among the justices, between Justice Powell and law clerks, personal notes about the case, and drafts of his final opinion.¹⁰⁰ Chapter Four narrates Powell’s process of discovery and judgment of existing arguments and institutional constraints as he worked from deciding *how* to decide to the justification of his conclusions. Sarat and Kearns speak to the importance of internal documents analyzing legal arguments: “trial transcripts display the full range of the available rhetorical resources of a community and its historical epoch; they enable us to understand the central argumentative preoccupations of a culture as well as the limits on what can be spoken about within law’s ambit.”¹⁰¹ Accordingly, the chapter explores how Justice Powell and his law clerk engaged in the classical invention process of working the specifics of the case against legal *topoi*, considering counterarguments and repercussions to the possibilities before them. Chapter Four

also traces the coauthorship process with his clerk and colleagues as Powell crafted a judgment that would forward the institutional needs of the Court as well as the needs of the public.

I conclude this project with a discussion of how the *Bakke* case reflects the ways in which the Supreme Court works as part of a broader rhetorical culture, while upholding the public expectations of judicial decision-making, to construct their decisions using the materials of public arguments, and the architecture of jurisprudential norms. This examination is important to the understanding of legal rhetoric as part of a larger rhetorical culture. As Hasian points out, if one is to take seriously “the constitutive nature of rhetoric in a constitutional democracy, then you must look at ‘reciprocal dialogue’ in ‘public conversation.’”¹⁰² Studying legal discourses, reconceived as discursive fields rather than singular and isolated texts, can provide insight into the shift from equality to diversity as the justification for affirmative action. Finally, the conclusion argues that an important ideological function of Powell’s reliance on diversity was to immerse the concept of race conscious within the structures of individualist ideology and meritocracy, thus separating the justification of affirmative action from its roots in social justice.

Conclusion

The *Bakke* case brings together ideas of justice central to the American public and centered around one of our most longstanding controversies: the “race problem.” Mootz finds the topic of affirmative action to be ideal for a study of law because:

the question of affirmative action challenges our sense of justice quite unlike other public policy questions...because it brings sharply into relief the

antinomic commonplaces of liberty and equality that are the mainsprings of our nomos, equally implicating our social acknowledgment of responsibility for one's situation as just desert and an entitlement to assistance as a matter of right.¹⁰³

Studying the inventional mechanisms Justice Powell used as he wrote the Supreme Court's guiding decision in *Bakke* helps to explicate the process Mootz describes. The construction of Powell's justification about affirmative action in higher education uncovers an argumentation process by which individual judges reconcile objectivity with compassion, their roles as judges with their roles as citizens. Perelman describes the role of the judge thusly:

A just judge is not an objective and disinterested spectator whose judgments are just because in describing faithfully what he sees they conform to some exterior reality. The judge cannot stop at letting the facts speak for themselves: He must take a position with respect to them. The just judge is impartial; having no tie with any of the litigants before him, he applies to all of them the juridical rules prescribed by the legal system. Yet the judge is not a simple spectator, for he has a mission, which is to state the law. Through his decisions he must make the norms of the community respected.¹⁰⁴

Aside from its historical and legal import, the role of the *Bakke* case in popularizing 'diversity' as a positive value should pique interest because it performs a task central to rhetoric: situating the individual in the collective, creating cohesion out of difference, whether that difference is real or perceived. Rhetorical acts help to constitute a collective subject through "narratives that foster identity superseding

individual/class interests.”¹⁰⁵ The commitment to diversity performs this task, in part, by asking the American public to treat those disparate interests as the cohesive force that brings us together. *Bakke*, as the legal forum’s articulation of our commitment to diversity, pits individual rights against group rights, and in this conflict perhaps sees rhetoric in its premier form – reconciling individual and collective interests. For, as Trevor Parry-Giles notes, “Individuals are only aware of collectivity because rhetorical leaders offer parameters for community.”¹⁰⁶

Notes

¹ Jacqueline Trescott, “Waiting for *Bakke*: Jitters at the Supreme Court,” *Washington Post*, June 23, 1978, D1.

² William Greider, “The Scene; An Hour of History, Yes, But Without the Thunderclap,” *Washington Post*, June 29, 1978, A1.

³ According to Howard Ball, Bakke’s main concern about being rejected for medical school was his age, not affirmative action programs at the schools to which he was applying. Before applying, he inquired with the universities about their policies on the ages of students. The concern was shared by most of the medical schools to which he applied: most of those who gave reasons for his rejection cited his age as the primary factor in their decision. After his initial rejection by UC-Davis, Peter C. Storandt, an assistant to the chair of the admissions committee, suggested that if Bakke were rejected a second time he should explore the course DeFunis had taken in challenging the constitutionality of the special admissions program. Bakke later sent the assistant a thank you letter for his suggestion, and the two kept in contact throughout the litigation. See Howard Ball, *The Bakke Case: Race, Education, and Affirmative Action* (Lawrence: University Press of Kansas, 2000), and Timothy J. O’Neill, *Bakke & the Politics of Equality: Friends and Foes in the Classroom of Litigation* (Middletown, CT: Wesleyan University Press, 1985).

⁴ Ball, *Bakke Case*, 56-58; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) at 265.

⁵ *Bakke v. Regents of the University of California*, 18 Cal.3d 34 (1976) at 39.

⁶ *Bakke v. Regents*, 18 Cal.3d 34.

⁷ Both Howard Ball and Michael Selmi attest to the record-setting status of the number of briefs. “Tellingly, the number of *amicus* briefs filed ultimately established a Court record, with many of the briefs exceeding a hundred pages in length,” argued Selmi. See Ball, *Bakke Case*, 33-34; Michael Selmi, “The Life of *Bakke*: An Affirmative Action Retrospective,” *Georgetown Law Journal* 87 (1999): 987.

⁸ Ball, *Bakke Case*, 1-46.

⁹ The most notable of these briefs came from “A Group of Fifteen Organizations,” including the National Urban League, NOW, the National Bar Association, the National Conference of Black Lawyers, La Raza National Lawyers Association, the Mexican-American Legal Defense and Education Fund, and the Puerto Rican Legal Defense and Education Fund. They considered issues not addressed in other briefs, including the low chance that Bakke would have been admitted even if there were not a special admissions program taking up sixteen slots; moreover, this relatively weak case could affect race relations and civil rights gains that had taken decades to build. See Ball, *Bakke Case*, 68-85, for summary descriptions of the major *amicus* briefs. See also Chapter Three.

Additionally, Ron Simmons points out that although many universities thought a Supreme Court decision about affirmative action was inevitable, those who understood the EEO regulations best were sure the UC-Davis program was in trouble, whereas those who had affirmative action programs but little understanding of EEO regulations thought that the Supreme Court would support the UC-Davis program.

See Ron Simmons, *Affirmative Action: Conflict and Change in Higher Education after Bakke* (Cambridge, MA: Schenkman, 1982), 41-42.

¹⁰ Four justices voted not to hear the case: Justices William J. Brennan, Thurgood Marshall, Harry Blackmun, and Chief Justice Warren E. Burger. Justice Brennan thought the case was weak, and Marshall and Blackmun agreed with him. Chief Justice Burger, a nervous chief by several justices' accounts, wanted to avoid race issues altogether. Biographer John C. Jeffries, Jr. describes the details of the controversy, as seen by Justice Powell, in his biography of Powell; See John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner's Sons, 1994), 460. Even after they decided to grant *certariori*, Justice Brennan sent an early memo arguing that they remand the case back to a lower court to determine whether Bakke would have been admitted if not for the special program. Memorandum from Justice Brennan, 13 December 1977, *Bakke* memos file, drawer 26, folder 1, Justice L. Powell Archives, Washington and Lee University, Lexington, VA.

Justice Powell felt strongly that the Supreme Court should take the case, but a memo from one of his clerks suggested that the case was a not even as clear-cut as the *DeFunis* case they had just declined to review. After reviewing the petition to grant *certiorari*, one of Justice Powell's clerks wrote that "This is not *DeFunis* and the case should be approached with some caution. All things considered, however, a grant is probably appropriate." "Note from Ginty," 14 January 1977, correspondence files, drawer 26, folder 1, Justice L. Powell Archives, Washington and Lee University, Lexington, VA.

¹¹ Justice Douglas offered an entire analysis and opinion of the constitutionality of the University of Washington's policy in his dissent to the Court's decision that declared the *DeFunis* case moot. It was far from merely a dissent on the point of mootness. See *DeFunis v. Odegaard*, 416 U.S. 312 (1974). This drew criticism that Justice Douglas moved beyond what was required of him – just as Justice Powell's opinion has been criticized for going beyond the question of the case to offering suggestions about what he felt a good affirmative action policy would look like.

¹² Del Dickson, ed. *The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions* (New York: Oxford University Press, 2001), 738-741. This book is a collection of Justices' notes from selected conference proceedings – including *Bakke*.

¹³ Justices Byron White, Brennan, and John Paul Stevens wanted to decide *Bakke* based on Title VI. Their arguments were summarized – and refuted – by Powell clerk Bob Comfort in his memo to Justice Powell entitled “Comments on Justice Stevens's Title VI Memo,” memorandum for Justice Powell, 19 September 1977, *Bakke* memos file, drawer 26, folder 1, Justice L. Powell Archives, Washington and Lee University, Lexington, VA. See Chapter Four for a more detailed account.

¹⁴ Memorandum from Marshall, October Term 1977, box 195, Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington, DC

¹⁵ A representative sampling of these analyses is the symposium on *Bakke* published by the *California Law Review* in 1979, including: Derrick A. Bell, Jr., “*Bakke*: Minority Admissions and the Usual Price of Racial Remedies,” *California*

Law Review 67 (1979): 3-19; Robert G. Dixon, Jr., “*Bakke*: A Constitutional Analysis,” *California Law Review* 67 (1979): 69-86; and Robert M. O’Neil, “*Bakke* in Balance: Some Preliminary Thoughts,” *California Law Review* 67 (1979): 143-170. Bell described the lack of minority voices on either side of the bench and in most legal analyses after the decision, as well as the initial resistance to appealing *Bakke* to the Supreme Court. Dixon explored the “significant doctrinal importance” on the “constitutional evolution on race matters” (69). O’Neil marched through Powell’s justifications, pointing out legal doctrine and Powell’s inconsistencies with them, providing guidance along the way for how the justices might decide on similar cases in the future.

¹⁶ See, for example: Jennifer M. Bott, who argues that Justice Powell’s relative indecision about how closely courts should scrutinize the use of race in affirmative action policies caused great confusion in lower courts of the future in “From *Bakke* to *Croson*: The Affirmative Action Quagmire and the D.C. Circuits Approach to FCC Minority Preference Policies,” *George Washington Law Review* 58 (1990): 845-875; Kirk O. Kolbo, a legal scholar and lawyer who represented petitioners Jennifer Gratz and Barbara Grutter in the 2003 affirmative action cases testing *Bakke* as a precedent, argues here that Powell’s decision failed even to produce a coherent rationale for the Court due to its level of vagary and, as a result, has been abused by universities bent on racial preferences, in “Constitutional Law Symposium: Leaving *Bakke*,” *Drake Law Review* 51 (2003): 715-729; Robert Post, admitting that, understood on a purely functional level, the *Bakke* decision lacks severely in elegance, especially with its “Harvard plan” reference which conflates

numbers with individual diversity, in “Introduction: After *Bakke*” in “Race and Representation: Affirmative Action,” special issue, *Representations* 55 (1996): 1-12; and Abigail Thernstrom and Stephan Thernstrom, positing that while the decision in *Bakke* “turned what should have been an easy question into an agonizing one,” the blame does not rest solely on Powell because, “one should never count on the U.S. Supreme Court to think and write clearly - or even to tell the whole truth and nothing but. Its most famous decisions involving racial equality in the last half century, starting with *Brown v. Board of Education*, are, to put it delicately, a mess.” See Thernstrom and Thernstrom, “Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education,” *Constitutional Commentary* 21 (2004): 251.

¹⁷ In 2003, two cases challenging affirmative action policies at the University of Michigan were considered by the Supreme Court. One case, *Gratz v. Bollinger*, 539 U.S. 244 (2003), challenged the undergraduate admissions program, and the other, *Grutter v. Bollinger*, 539 U.S. 306 (2003), challenged the Law School admissions program. The Supreme Court followed the precedent set in *Bakke*, opining that the undergraduate admission program was unconstitutional because it placed a blanket numerical value on racial categories, whereas the law school used race as one of many individual factors in considering students on a case-by-case basis.

A representative example of the articles tracing the legacy of *Bakke* is the symposium published by *Constitutional Commentary* in 2004 entitled “Symposium: From *Brown* to *Bakke* to *Grutter*: Constitutionalizing and Defining Racial Equality,” *Constitutional Commentary* 21 (2004). See Elizabeth S. Anderson, “Racial

Integration as Compelling Interest,” 15-27, arguing that *Grutter* returned affirmative action to the integrationist ideal put forth in *Brown* and ignored in *Bakke*; Kevin R. Johnson, “The Last Twenty Five Years of Affirmative Action?” 171-190, asserting that the Supreme Court’s 2003 hopes that affirmative action will be unnecessary in 25 years are felled by Powell’s separation of affirmative action from the need to remedy past discrimination; Daria Roithmayr, “Tacking Left: A Radical Critique of *Grutter*,” 191-220, arguing that *Grutter* privileges white interests by claiming them (whites) as the main beneficiaries of a diverse classroom; Girardeau A. Spann, “The Dark Side of *Grutter*,” 221-250, positing that colorblind doctrine should be held constitutionally suspect because it has become our culture’s newly preferred form of racial discrimination (222); and Thernstrom and Thernstrom, “Secrecy and Dishonesty,” 251-270, arguing that racial preferences are incommensurate with the authors of and agitators for twentieth century civil rights legislation. Rather, Thernstrom and Thernstrom argued, these policies were created and implemented with misleading language and with “as much secrecy as possible” by people outside of grass roots civil rights organizations.

¹⁸ In *Gratz v. Bollinger* (2003), the Supreme Court concluded that the University of Michigan undergraduate program was unconstitutional because it accorded a set number of points to students based on their preferred minority status, making race a decisive factor and not merely a “plus” as Powell’s decision recommended. In *Grutter v. Bollinger* (2003), the Supreme Court decided that the University of Michigan’s law school program was acceptable because “the Law School’s program was virtually identical to the Harvard admissions program

described approvingly by Justice Powell,” and that “the Court endorses Justice Powell’s view that student body diversity is a compelling state interest in the context of university admissions.” *Grutter v. Bollinger*, 539 U.S. at 307.

¹⁹ *Grutter v. Bollinger*, Justice O’Connor, concurring, at 280.

²⁰ In his opinion for the Court, Chief Justice John Roberts explicitly recognizes the diversity justification articulated by Powell in *Bakke*: “The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education,” upheld in *Grutter* and originally articulated in *Bakke*. However, Roberts argued that *Bakke* also focused on the value of diversity in higher education, not primary education as was the topic of the current case. Additionally, Roberts asserted that Powell’s decision made clear that diversity did not equal “simple ethnic diversity,” but all of those factors that might contribute to a diverse student body. Because the policy under question decided student admission based on race alone, Roberts found it lacking. *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. at 13, 14.

²¹ Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (Chicago: University of Chicago Press, 2000), 74.

²² Janna Malamud Smith, *Private Matters* (New York: Addison-Wesley, 1997), 92.

²³ Craig Allen Smith and Kathy B. Smith, “The Rhetoric of Political Institutions,” in *New Directions in Political Communication: A Resource Book*, ed. David L. Swanson and Dan Nimmo (Newbury Park, CA: Sage, 1990), 225.

²⁴ Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996), 112; Gerald B. Wetlaufer, "Rhetoric and its Denial in Legal Discourse," *Virginia Law Review* 76 (1990): 1445, 1555.

²⁵ Francis J. Mootz III, "Rhetorical Knowledge in Legal Practice and Theory," *Southern California Interdisciplinary Law Journal* 6 (1998): 571.

²⁶ John C. Day, "Individualism and the Public Sphere? A Case Study in Legal Argument" in *Argument in a Time of Change: Definitions, Frameworks, and Critiques, Proceedings from the Conference on Argumentation*, ed. James F. Klumpp (Annandale, VA: National Communication Association, 1997), 353.

²⁷ Mootz wrestles with the question of whether or not law can survive the interpretive turn in legal theory focused on legal positivism, yet coupled with an acknowledgement of the subjectivity of human existence within historical and social contexts. Mootz critiques postmodernists and deconstructionist legal theorists for dodging the question, or as he puts it, for "shrug[ging] their shoulders without regret." See Mootz, "Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition," *Yale Journal of Law and Humanities* 11 (1999): 369.

²⁸ James Arnt Aune, "On the Rhetorical Criticism of Judge Posner," *Hastings Constitutional Law Quarterly* 23 (1996): 658.

²⁹ Mootz, "Rhetorical Knowledge," 568.

³⁰ Chaim Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, trans. John Petrie (Dordrecht, Holland: D. Reidel, 1980), 134-135.

³¹ Mootz, "Rhetorical Knowledge," 572.

³² Mootz, "Rhetorical Knowledge," 574.

³³ Janice Schuetz, "Overlays of Argument in the Legislative Process," *Journal of the American Forensic Association* (1986): 223-234.

³⁴ Post, "Introduction: After *Bakke*," 3.

³⁵ Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Society* (Cambridge, MA: Harvard University Press, 2000), 1.

³⁶ Celeste Michelle Condit and John Louis Lucaites, *Crafting Equality: America's Anglo-African Word* (Chicago: University of Chicago Press, 1993).

³⁷ Chief Justice Earl Warren, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) at 493.

³⁸ Justice Sandra Day O'Connor, *Grutter v. Bollinger*, 331.

³⁹ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. at 16.

⁴⁰ Abraham L. Davis and Barbara Luck Graham, *The Supreme Court, Race, and Civil Rights* (Thousand Oaks, CA: Sage, 1995), 79-81.

⁴¹ Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 68-72; Russell Nieli, "Introduction," in *Racial Preference and Racial Justice: The New Affirmative Action Controversy*, ed. Russell Nieli (Washington, DC: Ethics and Public Policy Center, 1991), ix; and J. Harvie Wilkinson III, *From Brown to Bakke* (New York: Oxford University Press, 1979), 216-217.

⁴² *Green v. County School Board*, 391 U.S. 430 (1968). Jeffries argues that by the time *Green* was heard by the Supreme Court, "no longer was it enough for school

officials merely to *allow* integration; now school boards had an *affirmative obligation* to desegregate.” See Jeffries, *Powell*, 171.

⁴³ *Swann V. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

⁴⁴ *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁴⁵ Nieli, “Introduction,” ix.

⁴⁶ *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam, 1968).

⁴⁷ *Report of National Advisory Commission*, 27.

⁴⁸ Davis and Graham, *Supreme Court, Race*, 248-249.

⁴⁹ *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Previous cases had addressed issues of integration and of disparate learning environments. However, *DeFunis* was the first to challenge preferential programs in higher education.

⁵⁰ Ball, *Bakke Case*, 24.

⁵¹ Dickson, ed. *The Supreme Court in Conference*, 736.

⁵² Justice Brennan’s dissent, with which Justices Douglas, White, and Marshall concurred, traced the circumstances that made the *DeFunis* case relevant (as opposed to moot), then asserted that he could “thus find no justification for the Court’s straining to rid itself of this dispute.” Furthermore, Brennan argued that “in endeavoring to dispose of this case as moot, the Court clearly disserves the public interest.” *DeFunis v. Odegaard*, 416 U.S. 312 (1974) at 349, 350.

⁵³ Memoranda between the justices show how *DeFunis*, and the negative publicity from its ultimate rejection, weighed on the justices. Michael Selmi summarizes well the argument whether to grant *certiorari* for *Bakke* in the wake of

DeFunis: “Justice Powell ...opposed any form of remand [for *Bakke*] because he feared such a move might make it appear that the Supreme Court was ‘ducking’ the issue for the second time in three years.” Chief Justice Burger attempted to sooth this concern by issuing his own memorandum noting: “With all deference to the distinguished array of counsel who have been plunged into a very difficult case on a record any good lawyer would shun, I see no reason why we should let them (aided by the mildly hysterical media) rush us to judgment.” Selmi, “The Life of *Bakke*,” 991. For more details on the justices’ discussion on whether to grant *certiorari*, see endnote 13, as well as Chapters Three and Four.

⁵⁴ For instance, debates became heated during the Johnson administration, when more liberal administrators wanted to develop a federal commission with powers to withhold money from agencies or to sue them for discriminatory employment practices. On the other hand, the President’s more conservative advisors recoiled from federal intrusion on business and what they viewed as a dangerous shift in policy implementation away from simply forbidding discrimination toward mandating integration. Some forty years later, one observer deemed this trend an “illegitimate incursion of government power into the private realm.” See Lee Cokorinos, *The Assault on Diversity: An Organized Challenge to Racial and Gender Justice* (Lanham, MD: Rowman & Littlefield, 2003), 16.

Herman Belz notes that the resulting compromise struck in the Johnson administration was that “the Civil Rights Act conferred a private right, enforceable by the courts” instead of “a public right of equal employment opportunity enforceable by an administrative agency.” This “private right” proved to be liberating for future

presidents who were not eager to step into the civil rights firestorm. However, it caused delay and consternation for individuals seeking redress. See Herman Belz, *Affirmative Action from Kennedy to Reagan* (Washington, DC: Washington Legal Foundation, 1984), 2.

⁵⁵ Morris B. Abram, “Fair Shakers and Social Engineers,” in *Racial Preference and Racial Justice: The New Affirmative Action Controversy* (Washington DC: Ethics and Public Policy Center, 1991), 32; emphasis in the original.

⁵⁶ Abram, “Fair Shakers,” 32; Paul Craig Roberts and Lawrence M. Stratton, *The New Color Line: How Quotas and Privilege Destroy Democracy* (Washington, DC: Regnery, 1997), preface.

⁵⁷ See, for example, descriptions in endnote 29 of the analyses of Anderson, “Racial Integration as Compelling Interest,” and Johnson, “Last Twenty Five Years”; see also Ryan James Hagemann, “Comment: Diversity as a Compelling State Interest in Higher Education: Does *Bakke* Survive Affirmative Action Jurisprudence?” *Oregon Law Review* 79 (2000): 493-525; Kolbo, “Leaving *Bakke*”; and Post, “After *Bakke*”. Anderson argues that the diversity argument won because the *de jure-de facto* distinction was an important one to the law, and the Davis Medical School had not been found to have violated the constitutional prohibition on *de jure* segregation; thus, the school had no constitutional duty to integrate its student body. Hagemann traces the arguments in *Bakke* along the legislative intents and judicial traditions that address race and higher education. Johnson describes how the justifications offered for affirmative action make it unlikely that the Court’s anticipation of not needing affirmative action 25 years after *Grutter* (2003) would be embraced by universities,

or upheld by future courts; Kolbo criticizes the decision for its “lack of objective standards” (719) and unclear guidance as to what permissible considerations of race should look like; Post, explains the main features of each opinion in *Bakke*, laying out the standards set by Powell and analyzing the level of political nuance Powell displayed in his decision.

⁵⁸ Kolbo, “Leaving *Bakke*,” 718-719.

⁵⁹ Michael E. Rosman, “Thoughts on *Bakke* and Its Effect on Race-Conscious Decision-Making,” *University of Chicago Legal Forum* 45 (2002): 52.

⁶⁰ See, for example, the “Affirmative Action Law Symposium” published by the *Georgia Law Review* in the summer of 1987, including: William Bradford Reynolds, arguing that “history...painfully demonstrates that we have suffered whenever the courts have strayed from the principle of equality under law,” like in the 1970s, when “the fashionable excuse for deviating from the non-discrimination principle was found in the sugar-coated phrase ‘affirmative action.’” Reynolds, “An Equal Opportunity Scorecard,” *Georgia Law Review* 21 (1987): 1007-1008. Judge Robert Henham argued to the contrary, asserting that “no meaningful discussion of affirmative action can take place without first recognizing some of the problems that confront members of the minority community.” Henham, “Affirmative Action from a State Perspective: Old Myths and New Realities,” *Georgia Law Review* 21 (1987): 1097; Walter E. Williams argued that “courts and agencies have mandated numerical results based merely upon what they consider a statistical finding of discrimination,” an act wrong because it goes against the principles of equality, moves beyond the legitimate scope of the courts, and leaves open to interpretation “what theory of

ethnic proportions” we should adopt. Williams, “The False Civil Rights Vision,” *Georgia Law Review* 21 (1987): 1127.

⁶¹ Spann asserts that “Because the Constitution says absolutely nothing about affirmative action, the Supreme Court should have absolutely nothing to say about it either.” Girardeau A. Spann, “Writing Off Race,” *Law and Contemporary Problems* 62 (2000): 468.

⁶² Anderson, “Racial Integration as Compelling Interest,” 27.

⁶³ Mark Warren Bailey, *Guardians of the Moral Order* (Dekalb: Northern Illinois University Press, 2004), 14.

⁶⁴ Rosman, “Thoughts on *Bakke*,” 47.

⁶⁵ Hagemann argues that two main themes string together affirmative action cases: the assumption articulated in President Lyndon B. Johnson’s Howard University address that we need to “level the playing field,” and that higher education has special needs that allow the consideration of race in their admissions practices in “Does *Bakke* Survive?”; law professor Douglas Scherer lays out the main arguments for the six *Bakke* opinions, highlighting the important statutory and constitutional moves made as he goes along in “*Bakke* Revisited: What the Court’s Decision Means—and Doesn’t Mean,” *Human Rights* 7 (1978): 22-29; Rowland L. Young traces the six opinions to conclude that, from a legal prospective, *Bakke* is largely meaningless because of its narrow holding. Thus, “*Bakke* ... is no *Brown v. Board of Education*,” despite the press’s fondness for labeling it a landmark decision, argued Young in “Supreme Court Report: What Does *Bakke*’s Sound and Fury Signify?” *American Bar Association Journal* 64 (1978): 1277-1284.

⁶⁶ Laurence H. Tribe, “Comment: Perspectives on *Bakke*: Equal Protection, Procedural Fairness, or Structural Justice?” *Harvard Law Review* 92 (1978-1979): 865.

⁶⁷ One exception to the general rule of the literature described above is Ball’s book, *The Bakke Case*, which thoroughly examines the case from both a legal and a political perspective, delving into the memos of the justices as they negotiated the *Bakke* decision. Ball offers a detailed, if legally insulated account of the *Bakke* case, mostly from legal professionals. Likewise, Hagemann acknowledges the judicial holding power of the opinion, asserting that, “if *Bakke* contributes anything to the contemporary debate over affirmative action, it is the fact that the narrowly tailored use of race by institutions of higher education has never been overruled by the Court. It is good law.” Hagemann, “Does *Bakke* Survive?” 500.

⁶⁸ Rosman, “Thoughts on *Bakke*,” 53.

⁶⁹ Curt A. Levey’s remarks in his piece on affirmative action are representative of this type of argument:

Whatever the advantages of a diverse student body might be, I do not think you can base the diversity rationale on the Supreme Court's decision in *Regents of the University of California v. Bakke*, because, at the end of the day, there was only one Justice, Justice Powell, who endorsed the diversity rationale... In a fractured opinion, such as the one in *Bakke*, you can combine different parts of the opinion to get a majority, but only where there is a common denominator. But in *Bakke*, there is no common denominator because the four Justices in the Brennan opinion, while voting to uphold the

racial preferences at issue, did not endorse the diversity rationale. Those four Justices went off on different grounds, specifically the rationale of remedying societal discrimination.

See Levey, "Affirmative Action: Racial Preferences in Admissions: Myths, Harms, and Alternatives," *Albany Law Review* 66 (2003): 492.

⁷⁰ Cass R. Sunstein, "Public Deliberation, Affirmative Action, and the Supreme Court," *California Law Review* 84 (1996): 1185.

⁷¹ For more on the contingent nature of rhetoric, see: Maurice Charland, "Finding a Horizon and Telos: The Challenge to Critical Rhetoric," *Quarterly Journal of Speech* 77 (1991): 71-74; Raymie E. McKerrow, "Critical Rhetoric: Theory and Praxis," *Communication Monographs* 56 (1989): 91-112; and Chaim Perelman, *The Realm of Rhetoric* (Notre Dame: University of Notre Dame Press, 1982).

⁷² William G. Bowen and Derek Curtis Bok, *The Shape of the River* (Princeton: Princeton University Press, 1998); Richard Delgado, *The Coming Race War: And Other Apocalyptic Tales of America after Affirmative Action and Welfare* (New York: New York University Press, 1996); Terry Eastland and William J. Bennett, *Counting by Race: Equality from the Founding Fathers to Bakke and Weber* (New York: Basic Books, 1979); Gary Orfield and Michal Kurlaender, ed. *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Cambridge, MA: Harvard Education Publishing, 2001); Simmons, *Conflict, Change After Bakke*; Susan Welch and John Gruhl, *Affirmative Action and Minority Enrollments in Medical and Law Schools* (Ann Arbor: University of Michigan Press, 1998).

⁷³ Austin Sarat and Thomas R. Kearns, ed. Editorial Introduction in *The Rhetoric of Law* (Ann Arbor: University of Michigan Press, 1996), 6.

⁷⁴ Wetlaufer, "Rhetoric and Its Denial," 1554, 1555.

⁷⁵ Victoria Kahn, "Rhetoric and the Law," *Diacritics* 19 (1989): 34.

⁷⁶ Marouf Hasian Jr., *Legal Memories and Amnesias in America's Rhetorical Culture* (Boulder, CO: Westview, 2000), 4-5.

⁷⁷ It is important to note that most Supreme Court cases do *not* gather public attention, for various reasons. Even the justices acknowledge that good portions of the cases they hear are boring, albeit important.

⁷⁸ Sarat and Kearns argue in the introduction of the book *The Rhetoric of Law* that, as satisfying as legal resolution might be, this structure of conflict and opposition also "defeats even the most sustained and well thought out efforts to use law in projects of reconciliation and harmony," 17.

⁷⁹ Peter Goodrich, "Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language," *Oxford Journal of Legal Studies* 4 (1984): 89.

⁸⁰ Robert G. McCloskey, *The American Supreme Court*. ed. Daniel Boorstin (Chicago: University of Chicago Press, 1960), 16.

⁸¹ Jeffery J. Mondak and Shannon Ishiyama Smithey, "The Dynamics of Public Support for the Supreme Court," *The Journal of Politics* (1997): 1114.

⁸² Michael J. Petrick, "The Supreme Court and Authority Acceptance," *The Western Political Quarterly* 21 (1968): 5.

⁸³ Perelman, *Justice, Law, and Argument*, 121.

⁸⁴ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991).

⁸⁵ Peter Brooks, "The Law as Narrative and Rhetoric" in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996): 21.

⁸⁶ Klarman, *From Jim Crow to Civil Rights*, 5.

⁸⁷ Hasian Jr., *Legal Memories*, 13.

⁸⁸ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), 90 and xiii.

⁸⁹ Robert Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law & the Humanities* 2 (1990): 215.

⁹⁰ Sarat and Kearns, *The Rhetoric of Law*, 9, summarizing one of James Boyd White's conclusions from *Justice as Translation*.

⁹¹ Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), preface.

⁹² Thomas Rosteck, "Form and Cultural Context in Rhetorical Criticism: Re-Reading Wrage," *Quarterly Journal of Speech* 84 (1998): 479.

⁹³ Stephen H. Browne, "Reading, Rhetoric and the Texture of Public Memory," *Quarterly Journal of Speech* 81 (1995): 249; Stephen E. Lucas, "The Renaissance of American Public Address: Text and Context in Rhetorical Criticism." *Quarterly Journal of Speech* 74 (1988): 241-260.

⁹⁴ Sherwin, *When Law Goes Pop*, 5.

⁹⁵ Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites, “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* 82 (1996): 323-42.

⁹⁶ Dickson, ed. *The Supreme Court in Conference*, xxvii.

⁹⁷ Robert A. Ferguson, “Becoming American: High Treason and Low Invective in the Republic of Laws” in *The Rhetoric of Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1996), 104.

⁹⁸ Perelman, *Justice, Law, and Argument*, 61.

⁹⁹ Anderson, “Racial Integration as Compelling Interest”; Ball, *Bakke Case*; Dickson, ed. *The Supreme Court in Conference*; Robert F. Drinan, “Affirmative Action under Attack” in *Racial Preference and Racial Justice: The New Affirmative Action Controversy* (Washington DC: Ethics and Public Policy Center, 1991); John R. Howard, “Affirmative Action in Historical Perspective,” in *Affirmative Action’s Testament of Hope: Strategies for a New Era in Higher Education* (Albany, NY: State University of New York Press, 1997), 19-46; Charles Krauthammer, “Why We Need Race Consciousness” in *Racial Preference and Racial Justice*; Kolbo, “Leaving *Bakke*”; Roberts and Stratton, *The New Color Line*; Michael Selmi, “The Life of *Bakke*”, 1003; Turner, “Too-Many-Minorities”; Welch and Gruhl, *Minority Enrollments*.

¹⁰⁰ Because Justice Powell was the only supporter of the diversity reasoning, this study examines his papers most closely. Justice Powell’s papers are housed at Washington and Lee University. There are five boxes of papers relating to the *Bakke*

case or to correspondence and notes about cases during the term when *Bakke* was decided. “Supreme Court case files 1972-1987,” Series 10.6, Boxes 46 and 47 “Supreme Court cases” and Boxes 191 and 192 “Powell papers.” Additionally, Series 10.2.2, “Correspondence with fellow justices 1972-1977” includes many memos from the time that *Bakke* was being considered. Finally, Collection 2, Box 26 of the Powell Collection includes the “Bakke Decision Scrapbook 1977-1978.”

¹⁰¹ Sarat and Kearns, *Rhetoric of Law*, 17.

¹⁰² Hasian, *Legal Memories*, 3.

¹⁰³ Mootz, “Law in Flux,” 364.

¹⁰⁴ Perelman, *Justice, Law, and Argument*, 67.

¹⁰⁵ Maurice Charland, “Constitutive Rhetoric: The Case of the *Peuple Québécois*,” *Quarterly Journal of Speech* 73 (1987): 133-150.

¹⁰⁶ Trevor Parry-Giles, “Ideology and Poetics in Public Issue Construction: Thatcherism, Civil Liberties, and ‘Terrorism’ in Northern Ireland,” *Communication Quarterly* 43 (1995): 182-196.

Chapter One:

Rhetorical Invention and Supreme Court Opinion Writing

The Supreme Court made a difficult decision in 1978 to grant *certiorari* in the case of *Regents of the University of California v. Bakke*, a case which questioned the constitutionality of a race-conscious admissions policy at the University of California at Davis. The student who initiated the case was a white male who had been denied admission to the UC-Davis Medical School. At that time, UC-Davis had a separate admissions program for considering the applicants who indicated that they were either economically disadvantaged or underrepresented minorities. When the case reached the Supreme Court, several justices were hoping to decide *Bakke* on narrow statutory grounds, without dealing with broader constitutional issues.¹ Even the more conservative justices were reluctant to strike down the practice of affirmative action altogether, but they did not want to declare the use of race constitutionally acceptable because, in part, of the precedent it would set. Justice William H. Rehnquist complained, for example, in a memo written to his fellow justices that “the University’s admissions policy in this case seems to me to make its ‘affirmative action’ program as difficult to sustain constitutionally as one conceivably could be.”²

Justice Lewis F Powell Jr., however, cautioned against stopping short of constitutional arguments in their decision:

[T]here is no evidence that this problem will ‘go away’. When *DeFunis* was here three years ago, we avoided – I thought on sound grounds – the

constitutional issue. We were criticized then for leaving the hundreds of state colleges, universities and graduate schools without guidance. The need for resolution of this issue certainly has not lessened. Inevitably, after some presently indeterminate time – perhaps another two or three years – the constitutional issue will again be before us.³

Chief Justice Warren Burger summarized the Supreme Court’s concerns in a confidential memo, in which he offered a challenge to the justices: “The program excluded Bakke from the medical school on the basis of race and this is not disputed. I am open to being shown how, consistent with the prior decisions of the Court, we can escape the significance of this fact...If it is to take years to work out a rational solution of the current problem, so be it. That is what we are paid for.”⁴

Although *Bakke* was a particularly high-profile and complex case, Bernard Jacob argues that “the opportunity for reconsideration, innovation, rejection, and amendment appears as a moment in the basic structure of every legal problem,” because “each legal situation begins in conflict and uncertainty, and no single answer is immediately apparent.”⁵ To Aristotle, this uncertainty is where rhetoric begins as well, for there cannot be debate without doubts: the rhetor “will be concerned not with all, but [only] those which can both possibly come to pass and [possibly] not. As to whatever necessarily exists or will exist or is impossible to be or to have come about, on these matters there is no deliberation.”⁶

Chief Justice Burger’s call to action highlights the complexities and ambivalences of the inventional process within the Supreme Court. In their final opinions, justices must issue decisions reflecting the circumstances of the particular

case – as opposed to their feelings about the law or practice as a whole – and their decisions should be consonant with previous rulings. Because of institutional expectations crafted by a confluence of political theory, legal philosophy, and pseudo-scientific epistemological frameworks, the final opinions are often written in the language of certainty and grounded in ideas of legislative intent and informed interpretation. Yet in complex cases dealing with controversial social issues like affirmative action, a policy unconsidered by the authors of the Constitution and only vaguely referenced in federal legislation, institutional standards alone do not meet the needs of the case.

Met by institutional expectations that often work against creative solutions, Supreme Court justices nevertheless encounter novel problems that reframe or recontextualize old doctrine, rendering the existing precedents and accepted interpretations inadequate. Justices must find solutions that appear to already exist; solutions that uphold the expectations of judicial review, that avoid the appearance of “legislating from the bench,” and fit within the existing flow of discourse (both public and legal) surrounding the issue. A central focus of this study is on what inventional practices justices invoke as they enact and articulate rhetorical spaces in legal doctrine.

Jacob asserts that a primary value of the contemporary use of inventional *topoi* is to complicate what seems at first non-deliberative, or that which legal theory glosses over in its neatness. According to Jacob, “Theory unrestrained will...cover over the real facts of the problem, or will treat the problem as no problem. It is precisely this tendency that a topical consciousness is meant to resist.”⁷ A return to

classical rhetoricians benefits those interested in legal argument, because “we can turn to [Aristotle’s] the *Rhetoric*...and enrich this definition of ‘problem’ in a way that may help us to justify this insistence on intellectual messiness and disorder as one of the purposes of the topical method.”⁸ Josina M. Makau describes the study of argumentation as ideal for those interested in legal argument because it is “a marriage between the ancient field of rhetoric, on the one hand, and contemporary philosophical inquiry on the other. Argumentation theory provide[s] fertile ground for interdisciplinary explorations of ethical and effective decision making in practical contexts.”⁹

Constrained by the limits of a less-than-perfect affirmative action plan and a public need for an authoritative answer to the question of affirmative action’s constitutionality, a divided group of justices who wanted neither to support this particular plan nor forbid the use of affirmative action altogether sought to craft a creative solution in *Bakke*. The majority of the task fell to Justice Powell, whose court opinion was the deciding vote in the case, and whose mission it was to bridge the reasoning of the two groups of justices. Powell’s final opinion has been both celebrated and reviled since it was opined. Despite fractured voting blocs in the case, Powell’s deciding opinion withstood a direct court challenge in 2003, and has been used as a platform for affirmative action programs across the country. The present question becomes how Powell negotiated the standards of appellate court reasoning, multiple and conflicting authorship, and a deluge of *amicus* briefs to carve out a justification for affirmative action without undermining the credibility of the Court.

Thus, this project explores the inventional process undertaken by Justice Powell as he crafted the deciding opinion in *Bakke*. Makau argues that the *Bakke* case is fascinating because “the Court’s complex decision in this case, with its five ‘minority’ opinions, reflects perhaps better than any other decision, the Court’s responsiveness to the rhetorical complexities inherent in this area of adjudication.”¹⁰ This chapter situates judicial opinion writing in general, and Powell’s *Bakke* opinion in particular, within the larger framework of theories of rhetorical invention and legal reasoning. In doing so, it contributes to the mission put forth by Karl Wallace to study invention as “a fresh examination of systemic ways through which persons engaged in communication may be directed to sources of information and argument and to modes of perception, interpretation, and judgment.”¹¹ This chapter describes how contemporary judicial argument, crafted from a range of sources, interfaces dialectic with the rhetorical, forensic with deliberative, institutional and subject-specific *topoi* with creative thought, and single-authorship with collective writing in order to “discover and select among the arguments available for use in the particular situation at hand.”¹² In doing so, it illuminates how the novel legal conclusion was reached in the *Bakke* case by a fundamentally rhetorical, inventional process during deliberations and during the process whereby Powell researched, edited, and crafted his final opinion.

Classical Roots of Contemporary Legal Rhetoric

The study and practice of legal rhetoric has a long history; classical rhetorical scholar George A. Kennedy places the roots of the rhetorical tradition with the needs and abilities of citizens in Athens, during the fifth century B.C.E.¹³ The newly emerging Athenian democracy carried two features central to the development of rhetorical theory: an expectation of adult male citizens to participate in political and legal activities, and the “literate revolution” which made written suggestions for speechmaking accessible to significant numbers of the population.¹⁴ Athenian law courts held juries in numbers between 201 and 501 people, and male citizens were expected to argue on their own behalf (or on the behalf of their female family members) for both the prosecution and the defense sides. There were few written documents, except for statements taken from witnesses and read aloud in court. Although one could buy speeches to deliver before the court, there were no lawyers to hire.¹⁵

Given the constraints of the Athenian legal system, there was a need for instruction on how to create and deliver successful legal arguments. This need was met in several ways. One way to learn the art of judicial oratory was to imitate a successful orator, either by buying and memorizing legal speeches, or by paying to study with a sophist, where imitation was also central.¹⁶ Several notable Sophists went beyond imitation to teach functional elements of public speaking, including organization, style, and philosophies. Gorgias, for instance, believed that certain stylistic features would make a speaker more persuasive, and sought to teach them to Athenians.¹⁷ Isocrates combined teaching types of speech with the belief that each

speech and its parts must be specific to the situation and to the speaker; a speech that was too formulaic was useless.¹⁸ Particularly useful to the invention process was the sophistic focus on the concept of *kairos*, defined as “the right moment” or “the opportune.”¹⁹ For most Sophists, conflict and situational contingencies were the starting place of discourse.²⁰ The early style of sophistic teaching was criticized by Aristotle, among others, for its “lack of conceptualization of technique and the formation of rules.”²¹

The earliest attempts to offer technical instruction on public speaking have been attributed to Corax and Tisias of Syracuse.²² For a fee, they offered oral instruction on techniques of argumentation and presentation, focused mostly on courtroom arguments. According to Michael Frost, “the chief contribution that Corax made to the art of rhetoric was the formula he proposed for the *parts of a judicial speech* – proem, narration, arguments (both confirmation and refutation), and peroration – the arrangement that becomes a staple of all later rhetorical theory.”²³ Originally taught in oral form, these lessons were written down, sold, and reached Athens, where similar books in “the art of speech” were published.²⁴

The focus of arguments before the court, and thus on early rhetorical instruction about legal argument, centered on arguments based on levels of probability. This focus emerged in part because of the flood of citizens rushing the courts to claim property overtaken during tyrannical rule, for which there was no documentary evidence.²⁵ Corax and Tisias-inspired technical books were prescriptive in nature, focusing mostly on judicial rhetoric via suggestions for organization and

parts of argument, and sometimes accompanied by examples.²⁶ Aristotle addressed the insufficient nature of these rhetorical handbooks in *On Rhetoric*:

As things are now, those who have composed *Arts of Speech* have worked on a small part of the subject [of rhetoric]; for only *pisteis* [logical proofs] are artistic (other things are supplementary), and these writers say nothing about enthymemes, which is the ‘body’ of persuasion, while they give most of their attention to matters external to the subject; for verbal attack and pity and anger and such emotions of the soul do not relate to fact but are appeals to the juryman.

As a result, if all trials were conducted as they are in some present-day states and especially in those well governed, [the handbook writers] would have nothing to say...some [trial courts] even adopt the practice and forbid speaking outside the subject...rightly so providing; for it is wrong to warp the jury by leading them into anger or envy or pity; that is the same as if someone made straightedge rule crooked before using it.²⁷

Socrates and his student Plato distrusted both sophistic teaching and the technical rhetoric handbooks.²⁸ They studied and taught philosophical thinking, and saw the practice of rhetoric as at odds with the goals of philosophy. However, Plato’s student Aristotle saw the two more closely joined.²⁹ As an introduction to the description of political *topoi* that can be used in deliberative arguments, Aristotle describes rhetoric as “a combination of analytical knowledge and knowledge of characters and that on the one hand is like dialectic, on the other like sophistic discourses.”³⁰ In this blend of theory and practice (*praxis*) can be seen a major

difference between Plato's and Aristotle's interests in political theory: Aristotle had an "interest in political theory [that was] clearly developed out of Plato's work but again was more pragmatic, based on a study of existing constitutions in their historical development and defining the checks and balances that might create stability in a mixed constitution rather than imagining an ideal state, as Plato did in the *Republic* and *Laws*." ³¹

Aristotle's *Rhetoric*, and subsequently Cicero's *On Invention*, reveals a more complex relationship between philosophical dialectic and situation-specific rhetoric. In Aristotle's *Rhetoric*, he proclaims that "rhetoric is an *antistrophos* [counterpart] to dialectic; for both are concerned with such things as are, to a certain extent, within the knowledge of all people and belong to no separately defined science...A result is that all people, in some way, share in both; for all, to some extent, try both to test and maintain an argument [as in dialectic] and to defend themselves and attack [as in rhetoric]." ³² Aristotle defined rhetoric not merely by its persuasive effect but also by its inventional tools to aid in discovery and judgment; logical conclusions about philosophical truths arrived at dialectically may not win before a broader audience without rhetorical strategies, he argued, such as the ability to "argue persuasively on either side of a question...in order that it may not escape our notice what the real state of the case is." ³³ Furthermore, the abstract principles of justice established by laws may, in their abstraction, become incapable of speaking to the nuance of specific situations if one does not allow for the situation-specific argumentative forms of rhetoric, which bring equity to the justice of laws. ³⁴

Some argue that Aristotle's categorization and systemization of Plato's rich ideas of logic, law, and philosophy also served as the basis for the scientific approach to logic and, by extension, to the law. Huntington Cairns argues, for instance, that "the systemization of formal logic as a distinct domain of knowledge, if not as an independent science, is undeniably an achievement of Aristotle...For jurisprudence, Aristotle's works represent the first example of the use of a precise scientific method in the exploration of legal propositions."³⁵ At the very least, argues Janet M. Atwill, the bridge that Aristotle's works built between philosophy and rhetoric called into question the proper home for invention: "When Aristotle defined rhetoric as the art of observing the available means of persuasion, he placed the art in a particular place between theory and practice, subjectivism and empiricism, the aesthetic and utilitarian. *These binary oppositions have never served invention very well.*"³⁶

Cicero, in his early treatise *On Invention*, mirrored Aristotle's philosophical-rhetoric connection:

After long thought, I have been led by reason itself to hold this opinion first and foremost, that wisdom without eloquence does too little for the good of states, but that eloquence without wisdom is generally highly disadvantageous and is never helpful. Therefore if anyone neglects the study of philosophy and moral conduct...his civic life is nurtured into something useless to himself and harmful to his country; but the man who equips himself with the weapons of eloquence...will be a citizen most helpful and most devoted both to his own interests and those of his community.³⁷

As a follow-up to his dialectic-focused *Topics*, Aristotle focused in the *Rhetoric* on how to construct public arguments in specific situations: namely, in political, legal, and ceremonial circumstances. He did so, in part, by highlighting the common starting points of arguments in each genre, referred to as the rhetorical *topoi*. Aristotle differentiated between general topics, *loci communes* or “common places” and the special topics belonging to specific types of oratory or sciences, both “associated with a concern to help a speaker’s inventive efforts and involve the grouping of relevant material, so that it can be easily found again when required.”³⁸ Aristotle recommended that rhetors explore these *topoi* as a starting place of public arguments. This belief was shared by other classical rhetoricians, who “knew that they must fully investigate and understand the facts of a case and the applicable law before arguments or an argumentative strategy could be chosen.”³⁹

When explaining the invention process for forensic discourse, Aristotle identified four main issues that became the basis for forensic argument for centuries. The first goal of the speaker in the forensic invention process was to figure out which of these issues was at the center of the dispute – the *stasis* of the issue.⁴⁰ In arguing about written laws, the issues included whether or not the act occurred, whether or not the act caused harm, the extent of the harm, and the justifiability of the act.⁴¹ The proof used to support arguments for any of these issues take on two forms, according to Aristotle: “some are *atechnic* [‘nonartistic’], some *entechnic* [‘embodied in art, artistic’]. I call *atechnic* those that are not provided by ‘us’ [i.e., the potential speaker] but are preexisting: for example, witnesses, testimony of slaves taken under

torture, contracts, and such like; and artistic whatever can be prepared by method and by ‘us’; thus, one must *use* the former and *invent* the latter.”⁴²

Forbes Hill observes that Aristotle’s approach to invention was relatively formulaic:

Throughout the *Rhetoric*, Aristotle conceives of invention as a conscious choice from a fixed stock of alternatives. He does not recognize creative imagination, or insight issuing from the unconscious in a dream, or inspiration from above. His word for invention—*heuresis*—puts the emphasis on finding rather than creating.⁴³

Chaïm Perelman and Lucie Olbrechts-Tyteca contrast Hill’s assertion with the argument that the classical *loci* have been misused and thus depreciated in value.⁴⁴

The consequence of this type of thinking for argumentation studies, argue Perelman and Olbrechts-Tyteca, includes “a tendency to forget that *loci* form an indispensable arsenal on which a person wishing to persuade another will have to draw, whether he likes it or not.”⁴⁵ Eileen A. Scallen similarly argues that Greco-Roman rhetoricians offer nuance to contemporary legal scholars because of their “blend of the utilitarian use of rhetoric and the creative quality of rhetoric.”⁴⁶ Jacob concludes that the very *utility* of topics come from their seeming simplicity: “When we speak of topics, we are speaking of a collection of generalities that are definitely not organized into a system or under some single schema. Inadequacy of this sort permits one to focus on the actual problems.”⁴⁷

Hill’s observation can also be explained by considering the structure of the Greek legal system. The intended audience for all of the rhetorical textbooks on

judicial rhetoric was that of the male citizenry, with the goal of discovering, choosing, and delivering arguments to juries. James Boyd White argues the lack of established precedents in Greece meant that the *topoi* were especially important, because to a certain extent “every question would be argued as an original matter, without the advantage of the collective experiences over time that the judicial opinion provides.”⁴⁸ Michael Frost describes the function of the classical invention process:

At the invention stage of the rhetorical process, [classical rhetoricians] simply wanted to ensure that important facts and arguments were not overlooked... Comprehensive as their analysis was, Greco-Roman rhetoricians never regarded their suggestions as anything more than starting points for discovering the available arguments in a given case. Based on their own practical experience, they were acutely aware, and repeatedly reminded their readers, that advocates must be creative, resourceful, and flexible in devising arguments.⁴⁹

The transition from Greek to Roman periods brought with it a shift from citizens speaking on their own behalf to professional advocates paid by “clients” in court.⁵⁰ A.H.J. Greenhidge described the primary differences between Greek and Roman law, delineated by the “growth of material law” and “growth of the forms by which it is asserted.”⁵¹ The Greek legal system lacked in material law, but compensated with the “cheerful simplicity of the infant state,” whereas the Roman legal system codified laws, but did so with “over-strained centralization and...indefinite stages of appeal.”⁵² James Boyd White uses the Greek legal system as an example of what the law would look like if it were something that judges just

performed, and did not explain: like in Athens, with no judges, juries of hundreds, no deliberation, no reliable way of evoking precedent, and no appeal.⁵³

Unlike the Greek system, the Roman legal system distinguished between the roles of judge and jury, and between questions of law and questions of fact.⁵⁴ The Roman step of abstracting principles from the raw material of law opened those principles to criticism, manipulation, and change: “This process of abstraction is important not merely for the simplicity of formulation which it makes possible, but also because principles, unlike rules, are fertile: a lawyer can by combining two or more principles create new principles and therefore new rules.”⁵⁵ Along with the codification of laws came the codification of rhetorical invention: Roman rhetoricians made “a significant move away from topics as a set of alternative prompts across types of discourse to ones that were text bound to develop a type of discourse or a section of the text, i.e., to provide content. This move blurred the distinction between special and common topics.”⁵⁶ In *Rhetorica ad Herennium*, for example, topics became increasingly subsumed under types of discourses (judicial, deliberative, and epideictic) and to parts of the text (introduction, narration, division, distribution, proof, and conclusion).⁵⁷

Roman legal arguments began to focus on the dialectical features of argument as common laws became codified, and the principles behind them came into question.⁵⁸ With the changes in the law courts came early judicial writing.

According to Former U.S. Court of Appeals judge Patricia Wald:

[Contemporary] judicial opinion writing has roots in both Roman and early English law... Roman adjudication was divided between the *praetor*, or

magistrate, and the *iudex*, a lay arbitrator. Upon receiving the pleadings of parties to a lawsuit, the *praetor* would craft those pleadings into a formula, which instructed the *iudex* on how to decide the case. The formula was not unlike jury instructions, although it left both questions of law and fact to the *iudex*, who then decided the case without written record. The Roman jurists – learned statesmen with no official role – were the other main writers of the system. These jurists rendered advice to both litigants and *praetors* and published treatise-like commentaries describing the resolution of real and hypothetical problems.⁵⁹

As legal institutions changed, so did the legal questions under consideration. This, in turn, prompted an alternative exploration of different sources of discovery for arguments. For instance, Cicero's early work entitled *On Invention* highlighted in meticulous detail the rhetorical forensic *topoi*. Extending on Aristotle's *topoi* and referring to Aristotle, Gorgias and Hermagoras throughout, Cicero identified four general starting places, or "controversies," of legal argument: the issue will always be either a question of fact, about a definition, about the nature of the act, or about legal processes.⁶⁰ Within this, however, Cicero focused in detail on the interpretation of texts, a focus influenced by the increasing codification of laws in Roman jurisprudence. The five main issues involved in the interpretation of texts included an exploration of the relationship between the words and the intent of the author; the degree of conflict between two or more laws; ambiguities or multiple meanings in a text; questions regarding the meaning of a word, or a definitional argument; and

finally, reasoning by analogy, or exploring the moments when, “from what has been written something is discovered which has not been written.”⁶¹

Later in his life, a jurist friend requested Cicero’s advice on how to construct effective legal arguments.⁶² Cicero, at this time having filled the roles of Roman *aedile* and *praetor* – *aediles* were magistrates dealing with the public works and the marketplace and the *praetors* administered civil law – turned to the more philosophical, dialectical *topoi* set out by Aristotle’s *Topics* when he wrote to his friend.⁶³ According to Hanns Hohmann, “the rhetorical *topoi*... would have been unsuitable for Cicero’s purposes... because Trebatius, as a Roman jurist... was interested first and foremost in questions of law, rather than questions of fact.”⁶⁴ Chaïm Perelman explains further that “the role of the Roman *praetor* was not to invent new law, but to apply the supposedly pre-existing one, even if the latter had not yet been officially enacted.”⁶⁵ The *praetor* did so by looking for comparable situations, or “reasonable rules in accordance with the nature of things... when Roman law was not applicable, because the case to be settled had not been foreseen, the *praetor* had to discover rules that would be equitable.”⁶⁶ Roman legal reasoning, then, was rooted in inductive reasoning, from which jurists examined specific real and hypothetical situations in order to form larger conclusions about the ways that laws should work.⁶⁷

Classical orators analyzed “with characteristic thoroughness” judicial audiences when crafting their legal arguments.⁶⁸ Legal reasoning was also practical reasoning; rather than formulaic equations, classical rhetoricians encouraged in legal actors rhetorical thought “characterized by reasonableness and by the taking into

consideration diverse aspirations and multiple interests, defined by Aristotle as *phronesis* or prudence, and...so brilliantly manifested in law, in Roman *jurisprudencia*.”⁶⁹ Rather than using the rhetorical and dialectical *topoi* as tools to be pulled from a shelf, classical rhetorical scholars explored the ways that particular audiences and situations could be met by fundamental assumptions, and conversely how particular audiences and situations lent new meanings to traditional arguments. This, asserts Michael Leff, “is the difference between viewing rhetoric as an activity conducted in public and rhetoric as a subject to be learned in school.”⁷⁰

Topoi were part of the Roman educational process from at least the third century B.C.E., and the *trivium* of grammar, rhetoric, and dialectic were used as staples of a liberal arts education in the early Middle Ages, even after the social structure that supported the public orator had evaporated.⁷¹ The pagan and political roots of rhetorical theory became burdens on the discipline, however, in the increasingly Christian beliefs of the fourth and fifth centuries.⁷² The underlying bases for knowledge in antiquity rested on the reasoning of educated men, a secular source rather than the Scriptural basis of knowledge that had gained acceptance by the time of St. Augustine (354-430).⁷³ Moreover, rhetorical tools could be used to turn people away from God, making it dangerous to the growing Christian orthodoxy.⁷⁴ Augustine argued in *De Doctrina Christina* (396-426) that the rhetorical canon could be usefully put into the service of ministry, especially to combat those who would use eloquence to draw people away from the word of God.⁷⁵ For Augustine, the rhetorical inventional process, as outlined in classical works, could still be used with scripture serving as the starting point of discourse.

The ancient notions of rhetorical invention – as well as arrangement, style, and delivery – were similarly usurped throughout the Middle Ages to meet the evolving needs of oral and written discourse. Portions of (largely Ciceronian) rhetorical treatises were used to offer suggestions for letter writing, for the art of preaching, and for grammar, under the “basic postulate of the medieval arts of discourse: that the past should serve the particular needs of the present.”⁷⁶ To the extent that secular oral discourse diminished in importance under the emerging feudal system, so too did its practice outside of elite schools. In their place, letters became increasingly influential as the primary means of negotiating legal and social agreements, and the organizational and stylistic recommendations of classical works were incorporated into written form.⁷⁷ According to Charles F. Briggs, the development of “more specialized rhetorical arts, like *dictamen* and preaching, also probably had an effect on the relative neglect of rhetoric in the university curriculum during these years.”⁷⁸ The study of grammar, which in Roman times had been an introduction into the study of rhetoric and in Augustine’s time as an introduction to the study of scripture, became both more complex and foundational to discourse as the written form became a primary form of communication.⁷⁹ In centuries following the collapse of the Roman Empire, surviving fragments of Roman law and Greek philosophy supplemented Christian beliefs to form local common and official law.⁸⁰ There was little synthesized law, and thus little need for the study for legal rhetoric, as politics, communication, law, and economies were almost entirely local; “prior to the late eleventh century, there was no body of law, no *corpus juris*...that was applicable throughout Europe, either in practice or in theory.”⁸¹

In the eleventh century, however, three sources of law convened in Europe. The first source was the new system of canon law of the Roman Catholic Church, which applied throughout Roman Catholic Europe; co-emerging with canon law was the systemization of feudal law, which was local and variant. The final source of law involved the eleventh century rediscovery of a digest of late Roman law compiled by sixth century Emperor Justinian.⁸² Justinian's Digest covered three main areas: an introduction to Roman law written for first year law students, which explained general legal propositions in a systematic arrangement; a compilation of major imperial legislation, including his own; and a vast compilation of writings from Roman jurists.⁸³ Although the rediscovered Roman law digest had no directly positivist force on medieval Europe, it motivated the establishment of universities to study and teach their tenets, and "all the new legal systems, including especially the canon law and the law merchant, came under the strong influence of the new learning of the Romanist jurists."⁸⁴ Thus, the "vocabulary and structures of Roman and canon law shaped [medieval] academic and secular law."⁸⁵ Medieval jurists used Roman law as the foundations for their doctrine, modifying it largely within the existing strictures of the classical framework in order to meet their needs.⁸⁶

More importantly for the present study, the use of Roman laws and casebooks as sources for and a structure of legal knowledge, instead of using the particulars of the case to work to solutions as the classical rhetoricians had done, shifted the function of legal reasoning and divorced the study of legal discourse from the body of rhetoric.⁸⁷ Until this time, "rhetoric was critical for law and the training of legal professionals throughout Europe. Indeed," argues Theodor Viehweg, "only with the

emergence of law as a university discipline in Bologna did law cease to be a subdivision of rhetoric and become a subject in its own right.”⁸⁸ The study of law had become an educational goal and a profession of its own, and for the medieval Glossators who annotated newly found Roman texts, “the object of legal science became...not the factual situations thrown up by society but the texts of Roman law;” legal knowledge became “a matter of categorization, interpretation, and analysis.”⁸⁹ The emerging university lecture format of legal education encouraged the gloss and efficiency evidenced in Justinian’s introduction to Roman law students, at the expense of the detailed search for practical solutions to everyday legal life evidenced in the classical jurists’ textbooks and digests.⁹⁰ Students still learned rhetoric through glossaries and translations as part of their primary education, and the study of topics was central to rhetorical studies.⁹¹

A more general separation of argument invention from rhetorical studies took root in the sixteenth-to-eighteenth century academic tug-of-war between theological scholasticism, the humanist movement, and the preoccupation with method.⁹² The most representative, and widely produced, scholar endorsing this separation was Renaissance humanist and arts professor Peter Ramus.⁹³ At the time Ramus was being educated, “the humanists were replacing the practical medieval rhetoric with a more elaborate art designed to teach perfect Latin expression as a literary and stylistic instrument.”⁹⁴ Ramus furthered this emerging definition of rhetoric as ornament by endorsing a mathematical, diagrammatic logic that divorces the inventional process from rhetoric altogether, placing invention under the category of dialectic, and dialectic within the field of philosophy: “Ramist dialectic,” according to Walter J.

Ong, “is constructed in the interests of a ‘simplification’ inspired by the topical logic tradition and the vague but powerful premathematicism connected with this tradition.”⁹⁵ Because Ramus placed *topoi* exclusively under the purview of dialectic, he found it redundant to teach rhetorical invention, as well. Thus, Ramus’ popular and widespread works relegated rhetoric to the study of style and delivery.⁹⁶

Ramus’ works are representative of “the rationalist traditions of medieval philosophy [wherein] rhetoric [is] stripped of any epistemological importance, its sole value understood as the means of influencing and persuading through the use of language.”⁹⁷ Ong asserts that “when Ramus decrees that [dialectic and rhetoric] must be disengaged from one another once and for all in theory (but always united in practice), he engages some of the most powerful and obscure forces in intellectual history.”⁹⁸ Corresponding to this is the wide circulation given the advent of movable type, out of which “an epistemology based on the notion of truth as ‘content’ begins to appear.”⁹⁹ Copies of Ramus’ attack on Aristotle’s rhetoric and writings of his followers, explicating his dichotomized, diagrammatic logic, spread throughout central Europe and took root in seventeenth century New England universities such as Harvard.¹⁰⁰

Amid, and even preceding, these Ramistic studies, a political-theological battle was foraging over the underlying source of legal authority. Martin Luther and his followers sought to supplant the primacy of Roman Catholic canon law with a more Protestant notion of law. It was therefore no coincidence, then that:

a large number of sixteenth-century Protestant jurists, many of them closely associated with Luther himself, were deeply concerned to explore the nature

of law and to find clues to its unity and integrity – and more than that, to establish its ‘method,’ by which they meant the scientific explication and systemization of the basic legal concepts and principles which give rise to specific legal rules. It was not only a matter of jurisprudential concern, but also a matter of political concern, in the highest sense, to find a new objective basis for the legitimacy...of legal regulation.¹⁰¹

Chief among these jurists was Luther’s friend, Philip Melanchthon, a Protestant Reformer. Melanchthon’s interest was in topics; and while his general topics were well known, as they were pulled from Aristotle, Cicero, and fifteenth-century philosopher Rudolphus Agricola, his novel contribution was the belief that particular branches of knowledge – including law – had within them basic topics of their own.¹⁰² Harold J. Berman and Charles J. Reid argue that the separation of law from the classical rhetorical tradition was strongly influenced by Melanchthon’s “new legal science...and especially by his ‘topical method.’...These *loci communes*, such as genus and species, causes and effects, similarities and contraries, are applicable not only to language and philosophy, as the rhetoricians and humanists had taught, but also, according to Melanchthon, to specific branches of knowledge such as theology and law.”¹⁰³ By the end of the Middle Ages, the rhetorical basis of legal argument had given way to an idea of law as a science rather than an art.¹⁰⁴

Epistemological Bases of Rhetorical Invention

Before the 1700s, Aristotle’s rhetorical theory, including the inventional process, “shaped the intellectual presuppositions of educated men, whether or not they were conscious of his influence.”¹⁰⁵ As such, argues Stephen A. Siegel, “since

jurisprudence was considered an epistemological problem, Aristotle, who until the scientific revolution supplied criteria for the rational resolution of such problems, logically would influence the jurisprudence of the period.”¹⁰⁶ Whereas Greco-Roman rhetoricians privileged invention as a primary and central step in the rhetorical process, the exploration of rhetorical invention, and the level of nuance accorded to the invention process, have fluctuated in importance throughout rhetoric’s history.¹⁰⁷ Sharon Crowley argues that “rhetorical invention goes in and out of fashion because it is intimately tied to current developments in ethics, politics, and the epistemology of whatever culture it serves. It has ties to ethics and politics because rhetoric is always situated within human affairs.”¹⁰⁸ As Western culture turned to a more individualist political and ethical philosophy and to a scientific epistemology, so too did the notions of rhetorical invention.¹⁰⁹

American legal thought is heavily influenced by a scientific approach to decision-making: within legal theory, this approach is called legal positivism, which rests the legitimacy of each legal decision upon its coherence with the written law.¹¹⁰ Largely a product of the late-nineteenth and twentieth centuries, the rise in legal positivism coincides with the increasing focus on science as the premier rational form of reasoning and shares its focus on ridding its systems of any “unscientific components.”¹¹¹ Once the legal rules are formalized, then they can be applied “in a formal, quasi-mathematical manner,” thus “lending an air of inevitability to judicial decisions” because they assert that if a law is applied correctly to the facts of the case, will lead to the legally correct result.¹¹²

Frank J. D'Angelo posits that contemporary notions of invention mirror Cartesian logic. He describes the contemporary idea of the invention process as “a solitary act in which the individual, drawing upon innate knowledge and mental structures, searches for the truth, using introspective self-examination and heuristic methods of various kinds.”¹¹³ This belief in internally derived truth, combined with the “persistence of the romantic myth of the inspired writer,” has resulted in a notion of invention “as a closed, one-way system; assumes and promotes the concept of the atomic self as inventor; abstracts the writer from society; neglects studies of writers in social contexts; and fails to acknowledge that invention is collaborative.”¹¹⁴

The fertility of new legal principles only occurs with a corresponding value of inventional playfulness and belief in the contingent nature of human values and knowledge.¹¹⁵ This, in part, is why Perelman laments the effects of formulaic approaches to reasoning on the invention process, and on argumentation theory as a whole. Perelman traces the genesis of this tradition to a Cartesian epistemology, in which the individual rhetor has extremely limited reasoning agency, because in scientific systems, where knowledge is “provable,” “the will of the investigator can in no way modify the conclusions to which the examination of the system has led.”¹¹⁶ Thus, argues Perelman, “the evolution of rhetoric and of the theory of argumentation follows the fate of the epistemological status of *opinion* as opposed to *truth*,” the result of which is that “the theory of argumentation was almost entirely neglected by post-Cartesian logic and philosophy.”¹¹⁷

The primary consequence for legal argumentation is that, in this view, the ideal judge is “an infallible machine, giving the answer when furnished with the

elements of the problem, without being concerned to know what is at stake or who might benefit from any possible error.”¹¹⁸ Other consequences include a move away from the intellectual exploration of ethics, according to Makau: “Ironically, pursuing the path of logical positivism has a tendency to foster a sense of cynicism regarding the possibility of identifying (or developing) viable guidelines for ethical reflection and practice.”¹¹⁹

In response to this positivist inventional shift, Karen Burke LeFevre offers a contrasting view of the invention process; one that reconceives of invention as a necessarily social act. LeFevre argues that “invention often occurs through the socially learned process of an internal dialogue with an imagined other, and the invention process is enabled by an internal social construct of audience, which supplies premises and structures of beliefs that guide the writer.”¹²⁰ Perelman and Lucie Olbrechts-Tyteca name this internal construct the universal audience, a “universality and unanimity imagined by the speaker” of an ideal audience moved only by reasons “of a compelling character...[that] are self-evident, and possess an absolute and timeless validity, independent of local and historical contingencies.”¹²¹ Even as a mental construct, “the notion of an ideal audience influences practical reasoning and ultimately behavior, and particularly on how it influences both the style and substance of legal reasoning and even actually constrains the behavior of judges and other officials.”¹²² Perelman and Olbrechts-Tyteca note the cultural-situatedness of such a construct: “each individual, each culture, has...its own conception of the universal audience,” and that readers could “learn from it what men, at different times in history, have regarded as *real*, *true*, and *objectively valid*.”¹²³ Crowley asserts that

rhetorical invention begins by envisioning the all-knowing, perfectly reasoned audience; thus, “theories of rhetorical invention must also be articulated with current thinking about how people change their minds or make discoveries—that is, with some currently accepted theory of knowledge.”¹²⁴

The act of self-deliberation endemic to the invention process can thus be seen as an extension of general argumentation, and “agreement with oneself” as “merely a particular case of agreement with others.”¹²⁵ This is true, argues Perelman, because “human knowledge never begins at zero with a *tabula rasa*,” rather, “knowledge finds itself placed in the cultural milieu, in tradition and in discipline.”¹²⁶ Francis J. Mootz III agrees, positing jurisprudential knowledge as “a social activity – a ground-without-foundation upon which justice may be constructed – rather than the result of a purely contemplative undertaking. Under this view, justice is not a pristine concept requiring philosophical clarification, but rather is a *practical engagement* in politics that is historically conditioned and subject to the restrictions of human finitude.”¹²⁷ Mootz, among others, posits the underlying epistemology of the Supreme Court as rhetorical, and sees the contingent nature and cultural dependence of “rhetorical knowledge” as “a good starting point for thinking about legal practice and legal theory.”¹²⁸ Rhetorical knowledge, according to Mootz, “is distinguished from habit or convention by its inventive representation and reinscription of the ‘prejudices’ of situatedness. Surveying accepted topics, norms, and opinions as resources for confronting the demands of the present, rhetorical actors continually conjoin these constitutive features of themselves and their society in unique ways.”¹²⁹

Perelman and Olbrechts-Tyteca accord a level of sincerity and rigor to self-deliberation, making it “highly desirable to consider self-deliberation as a particular kind of argumentation,” without reaffirming a Cartesian search of inner truth via dispassionate demonstration.¹³⁰ It is particularly useful to consider this deliberative process, they argue, because it casts a wider intentional net:

when a person is thinking, his mind would not be concerned with pleading or with seeking only those arguments that support a particular point of view, but would strive to assemble all arguments that seem to it to have some value, without suppressing any, and then, after weighing the pros and cons, would decide on what, to the best of its knowledge and belief, appears to be the most satisfactory solution.¹³¹

Perelman and Olbrechts-Tyteca argue that a fundamental step in argumentation is to explore the broad scope of possibilities within the self, then add justification that meets the needs of the external audience.¹³² They speak directly to the judicial process when explicating this invention process: “It is a common, and not necessarily regrettable, occurrence even for a magistrate who knows the law to formulate his judgment in two steps: the conclusions are first inspired by what conforms most closely with his sense of justice, the technical motivation being added on later.”¹³³ Charles A. Miller concurs that critics of the Supreme Court are “certainly not wrong if they suggest that the reason for a decision might not be the same as the reasoning in the opinion.”¹³⁴ In making this assertion, the authors admonish readers not to think that the *post-hoc* justification of a personal decision equates to arbitrariness. “Must we conclude in this case that the decision was made

without any preceding deliberation?” ask Perelman and Olbrechts-Tyteca. “Not at all,” they continue, “as the pros and cons may have been weighed with the greatest care, though not within the frame of considerations based on legal technicalities... Strictly legal reasons are adduced only for the purpose of justifying the decision to another audience.”¹³⁵ Makau extends Perelman’s focus on audience when she argues that “the interplay between a particular audience, the communicator’s own inclinations, and the ‘universal audience’ *‘makes the inventional process and the argumentation that flows from it rational.’*”¹³⁶

According to John Rawls, “[legal] justification seeks to convince others, or ourselves, of the reasonableness of the principles upon which our claims and judgments are founded.”¹³⁷ And it is rhetorical argument, argues Kurt M. Saunders, which motivates the legal justification, because “the judge must choose among probabilities, not certainties, while focusing on the societal audience.”¹³⁸

In practical argumentation, justification involves a heuristic search; that is, the arguer searches among the many available arguments to find those that will most likely persuade the audience to accept the claim. Justification provides reasons for accepting the claim. Similarly, a lawyer must justify a claim by generating arguments based on the evidence and available legal authority.¹³⁹

Public audiences expect justifications in Supreme Court decisions. Yet:

our expectation that judges justify their decisions is only part of our more elaborate theory of the judicial process. We expect judges to justify their decisions but to recognize also that the judicial decision is significant for more than just the arguments adduced... We distinguish between the holding of the

case and the explanation for the holding. Whether the deciding judge's rationale is silly or cogent, the decision may serve as precedent for later judges.¹⁴⁰

These justifications may have a persuasive effect on the author as well. In the process of considering all arguments that could be used against the conclusion, and by searching for justifications that would best support the conclusion, "*these new reasons may intensify his conviction*, protect it against certain lines of attack he had not thought of originally, make its significance clearer."¹⁴¹ Thus, Scallen asserts, "One cannot practically separate the moment of adjudication from the process of justification."¹⁴² Whereas published opinions of the Court are written to suggest a formulaic reasoning process, a deeper investigation of the opinion writing process reveals highly contingent acts of self-deliberation, of open exploration of alternatives, and of active persuasion between justices.

The Supreme Court and Rhetorical Invention

The opinion writing process undertaken by Justice Lewis F. Powell Jr. in the *Regents of the University of California v. Bakke* decision reveals an inventional process of the rhetorical valence that LeFevre and Perelman describe. Supreme Court justices' acts of invention are not those of the isolated authors pouring over documents and assessing validity based on brain power alone. The published opinions often read as such, written as they are with a sense of textual inevitability that undermines the contingent nature of judicial argument.¹⁴³ This seeming contradiction can be resolved by considering the rhetorical invention process undertaken by justices as they weigh the available tools and materials with which

they can craft their final opinions. Marouf Hasian Jr. argues that judicial opinions are, by themselves, incomplete histories, because they contain only those artifacts that have survived internal struggles over their strengths and weaknesses.¹⁴⁴ Similarly, James Boyd White asserts that:

only the judge himself can tell you what facts counted for him, or did not count; what paradigm or template he applied to it; or how he resolved the tension, present in nearly every case, between the claims that can rationally be made on one side and those that can be made on the other. Of course you can guess at these things from the outside, for purposes of description and prediction, but your account can never have the authority of the judge's own.¹⁴⁵

Justices must make their final opinions consonant with accepted forms of legal decision-making, but that does not mean that the reasons given in the opinions were the only factors considered when deciding how to vote in the first place.

In appellate court decision-making, the place where self-deliberation meets justification is the written opinion. Without it, self-deliberation could proceed to judgment without the need to justify through statute, precedent, and legal dogmatics why the decision is proper. Wald writes about the hermeneutic force of opinion writing when lamenting the move of some appellate judges away from written opinions.¹⁴⁶ The process of opinion writing brings to the surface potential problems with the decision, asserts Wald. The process of opinion writing,

more than the vote at conference or the courtroom dialogue, puts the writer on the line, reminds her with each tap of the key that she will be held responsible

for the logic and persuasiveness of the reasoning and its implications for the larger body of circuit or national law. Most judges feel that responsibility keenly; they literally agonize over their published opinions, which sometimes take weeks or even months to bring to term. It is not so unusual to modulate, transfer, or even switch an originally intended rationale or result in midstream because “it just won’t write.”¹⁴⁷

As seen from Perelman and Olbrechts-Tyteca, the justification of the initial decision, constructed with audiences in mind, can also be a creative process. Famed jurist Benjamin N. Cardozo argues that, “it is when the colors do not match...when there is no decisive precedent, that the serious business of the judge begins.”¹⁴⁸

When no precedent stands out as an ideal one, argues Warren E. Wright, “the judge’s freedom of choice begins, for now, like a legislator who chooses one political means over another, he must (1) determine a principle and (2) choose the path along which he will extend it.”¹⁴⁹ Yet in order to maintain the credibility of the court, “the one thing a judge never admits in the moment of decision is freedom of choice.”¹⁵⁰ That makes the choice no less significant, as the judge “must...determine the path or direction along which the principle is to move and develop, if it is not to wither and die.”¹⁵¹

These choices are complicated by the fact that audiences to which the Supreme Court must appeal are multiple. Makau explores the array of audiences to which the Supreme Court must speak, including other present and future justices, lower courts, legal administrators, legislators, litigants, and legal scholars.¹⁵² The possibility of disagreement by some of these audiences can have varying impacts,

from “the possibility of constitutional or other structural changes,” to confusion when applying the decision with the lower courts, to general dissatisfaction with the Supreme Court amongst the general public.¹⁵³ Moreover, George C. Christie argues that “judges are part of an elite profession and as such very conscious of the expectations of their co-professionals. How a judge conceives of his profession and of his role within that profession will figure very prominently in the vision he has of the audience he is addressing.”¹⁵⁴

In addition to multiple audiences, justices must choose between multiple precedents, created at different times and reflecting different situational contingencies. Makau argues that, “in these instances, Justices are forced to make choices, ‘often framed in competing political constructs’...In making these critical choices, the Justices face the challenge of generating new ideas within competing perceptual frameworks. This challenge places judicial reasoning well within the domain of the rhetoric as epistemic movement.”¹⁵⁵

Exploring the justification process with consideration of these multiple audiences can bring to mind potential, previously unconsidered counter-arguments, strengthen support for the decision in the mind of the rhetor, and reframe the argument in a manner previously ignored: all inventional goals. Wald explains about the judicial writing process that:

it is not uncommon, then, for our prose, even certain idiosyncratic expressions, often to become frozen, for writing styles to reveal personalized boilerplate. The same issues recur in cases over the years, and we tend to think about them in the same ways... A judge, recognizing a familiar fact pattern,

goes into automatic pilot. It takes a brand new issue about which one feels strongly or which excites one intellectually to provoke fresh new modes of expression.¹⁵⁶

Thus, Perelman asserts that a modern theory of argument must account for the written word, in contrast to the classical focus on the publicly spoken speech: “It goes without saying, of course, that a modern study of argumentation would go far beyond the limits of certain aspects of the ancients’ rhetoric, while at the same time it would pass over certain aspects which held the attention of these masters of rhetoric.”¹⁵⁷ He offers as an example the fact that the ancients limited their studies to spoken words in public settings: “there is no need to limit oneself to the spoken word or to limit one’s audience to a crowd in the marketplace,” especially because “the modern role of printing makes it important to lay special stress today on printed texts.”¹⁵⁸ Today, argues Perelman, “discussion between two individuals or even personal deliberation belongs to a general theory of argumentation. The scope of modern rhetoric will go far beyond that of classical rhetoric.”¹⁵⁹ Yet,

what must be retained from traditional rhetoric is the idea of *audience*, which immediately comes to mind when we think of discourse. Every discourse is directed to an audience; and too often we forget that the same is true of all writing. A discourse is conceived of in terms of an audience. But the material absence of readers can make a writer think he is all alone in the world, while as a matter of fact his text is always conditioned, consciously or unconsciously, by the persons whom he means to address.¹⁶⁰

It is through the interplay between *amicus* briefs, past cases, general knowledge of the world, self-deliberation, consideration of social consequences (as posited by self and others), interaction with law clerks who often draft the opinions, and arguments with the other justices that the inventional process occurs.¹⁶¹ Invention, argues LeFevre, “is powerfully influenced by social collectives, such as institutions, bureaucracies, and governments, which transmit expectations and prohibitions, encouraging certain ideas and discouraging others.”¹⁶² For instance, Golden and Makau have concluded from studies of Supreme Court reasoning four general steps in the Supreme Court reasoning process:

Justices employ the following pattern of reasoning: 1) examination of the facts in light of statutes, rules, and precedents; 2) analysis of attitudes, beliefs, values, and needs of the composite audience; 3) invention of arguments, including a critical assessment of their strength or relevance; and 4) justification of reasons utilized in rendering the decision.¹⁶³

The Supreme Court has institutional expectations and constraints that impose additional criteria on rhetorical invention and written justification. These constraints include a specific interaction between author and a text that (s)he is interpreting, the issues of co-authorship, and judicial rules and expectations of interpretation. Yet these habits do not alter the definition of invention posited by LeFevre, who argues that “invention becomes explicitly social when writers involve other people as collaborators, or as reviewers whose comments aid invention, or as ‘resonators’ who nourish the development of ideas. To create discourses such as contracts, treaties, and business proposals, two or more writers *must* invent together.”¹⁶⁴ The Supreme

Court's reliance on constitutional interpretation, precedent, and briefs explaining factual and historical contexts reveal its strong reliance on intertextuality, "the interdependence of texts as sources of their meaning."¹⁶⁵

Hasian asserts that "this type of approach invites the scholar to examine how empowered judges, lawyers, and everyday citizens borrow their arguments from the discourse that is already circulating within the public sphere."¹⁶⁶ Legal authors "borrow their arguments" from public arguments as well as shared ideological frameworks that serve as the basis for shared belief.¹⁶⁷ This is true because, as a form of rhetorical action, legal discourse "is a complex business that occurs at several levels simultaneously. If [a concept] surfaces most clearly in specific discursive products, it also operates more broadly within the cultural and ideological formation that embeds these products."¹⁶⁸ Supreme Court justices, as members of the public culture, share the ideologies embedded within the larger communities.

As a political institution, the Supreme Court is also reflective of society, as it embodies ideologies of the larger culture in its laws, policies, prohibitions, and practices. Finally, at the Supreme Court level, the cases that garner public attention are often those that feature competing political ideologies. Within the law, ideology "draws its power from its ability to connect and combine diverse mental elements (concepts, ideas, etc.) into combinations that influence and structure the perception and cognition of social agents."¹⁶⁹ As an authoritative source of judgment, it also points the audience(s) toward certain values and away from alternative world-views.¹⁷⁰

Thus, Barry Nicholas argues that “no system of law can be fully understood in isolation from the history of the society which it serves and regulates.”¹⁷¹ As discussed earlier in this chapter, “judicial argumentation serves important epistemic functions. That is, as the Court is influenced by the composite audience, so is the audience influenced by the Court’s reasoning.”¹⁷² Although Supreme Court justices work under strong institutional expectations, “an institutional order amounts to a shared framework of understanding and interpretation among persons in some social setting. As a normative order, it is in continuous need of interpretation, and as a practical one, in continuous need of adaptation to current practical problems.”¹⁷³ Oliver Wendell Holmes wrote of this need in the introduction to his book *The Common Law*:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.¹⁷⁴

The topics of Greco-Roman times reflected Greco-Roman culture through legal traditions, the intended audiences, and the parameters of acceptable speaker ethos. As material, social, and philosophical features of cultures change, so do their laws; and with them change the commonplaces and forms of argument about those

laws and the values they represent.¹⁷⁵ Jack M. Balkin notes the following about contemporary inventional commonplaces:

As common tools of legal understanding, topics offer us a glimpse into the background assumptions that we share in understanding and dealing with legal problems. We can study changes in legal culture by noting the entry of new topics into legal discourse. We can tell that our background culture is changing when the topics we use to formulate and discuss legal problems change.¹⁷⁶

Both classical and contemporary rhetorical scholars warn of using the general starting places of argument as an inclusive project on the limits of rhetorical invention. Leff offers a reminder of Quintilian's assertion that "the main resource for rhetorical invention arises from the specific case at hand, since 'the majority of proofs are to be found in the special circumstances of individual cases and have no connection with any other dispute.'"¹⁷⁷ The choices of where to search for starting places of successful arguments are guided by the circumstances of the case and by the experience of each judge.¹⁷⁸ The inventional starting places of legal arguments that become central to one Supreme Court justification can be unconvincing, irrelevant, or unsuitably vague for another case.

The Starting Places of Supreme Court Arguments

The Supreme Court inventional process, then, becomes the search for appropriate starting places on which to build an acceptable justification for the final opinions. The starting places will vary in significance and applicability depending on the specifics of the case; that is, "a legal decision is based on associative

reflections which ‘circle around’ every case, considering the viewpoints and arguments (*topoi*) usually connected with the situation in question – rather than on logical subsumptions.”¹⁷⁹ Rawls explicates the process when he argues that “to justify a conception of justice...is to give him a proof of its principles from premises that we both accept, these principles having in turn consequences that match our considered judgments.”¹⁸⁰ The proof alone is not justification; rather, “a proof simply displays logical relations between propositions. But proofs become justification once the starting points are mutually recognized, or the conclusion is so comprehensive and compelling as to persuade us of the soundness of the conception expressed by their premises.”¹⁸¹

The starting points of legal justification, and thus the beginning of the inventional process, should focus on audiences. Perelman and Olbrechts-Tyteca call these starting points the *premises* of argumentation, asserting that “when a speaker selects and puts forward the premises that are to serve as foundation for his argument, he relies on his hearers’ adherence to the propositions from which he will start.”¹⁸² Their descriptions of premises have been viewed as a contemporary legacy of classical commonplaces of argument.¹⁸³ However, “whether viewed as Aristotle’s topics, Cicero’s commonplaces, Stephen E. Toulmin’s warrants, Perelman’s loci, or clusters of implicitly accepted norms, the particular audiences’ shared beliefs and expectations regarding the judicial function form a composite view reflective of the philosophy operating in the Supreme Court adjudicative context.”¹⁸⁴ A successful rhetor considers those facts, theories, values, and preferences that are shared by the audiences. These starting places are informed, or given meaning, by their contexts

and justifications – they are not free-standing principles.¹⁸⁵ To the extent that the situations are similar, the starting place may be shared: for instance, in contemporary constitutional interpretation, similar starting places of argument as those outlined in Cicero’s *On Invention* can be discerned.

Yet institutional factors influence the premises that rhetors are likely to rely on when researching, creating, and eliminating potential arguments. There are certain beliefs “which the members of that society suppose to be shared by every reasonable being,” assert Perelman and Olbrechts-Tyteca in reference to the hypothetical ideal audience. “But, beside beliefs of this kind, there are agreements that are peculiar to the members of a particular discipline, whether it be of scientific or technical, juridical or theological nature,” and those agreements “may be the result of certain conventions or of adherence to certain texts, and they characterize certain audiences.”¹⁸⁶

These disciplinary particularities will limit the form, scope and number of premises that a rhetor can use.¹⁸⁷ Robert Alexy explains the limited grounds that any legal rhetor can cover if (s)he wants the final argument to be accepted: “Legal discourse can be distinguished from general practical discourse in that the former is, in short, restricted in its scope by statute, precedent, legal dogmatics, and—in the case of actual judicial proceedings—by procedural legislation and regulations.”¹⁸⁸ This means that, even when a judge finds during self-deliberation that a particular legal presumption keeps justice from occurring, “in law, the manner of contesting legal assumptions by the administration of counter-proof is rarely left entirely to the evaluation of the judge. The rules of evidence established by the law furnish

assumptions of which the judge must take account, whatever his inner conviction.”¹⁸⁹

The very form and structure of the judicial opinion influences the inventional process of the content within: so much so that Cardozo argued that the form of a judicial opinion “makes it what it is.”¹⁹⁰

In legal texts, legal principles and particulars of the case must be worked against “a storehouse of arguments and strategies that generally are deemed acceptable and persuasive by the audiences to whom they speak,” and audiences of judicial opinions expect particular justifications, formulated in particular ways.¹⁹¹ Moreover, final opinions are written in an institutionally specific form, first outlining the “facts” and questions of the case, then offering a judgment, then providing legal justifications for that judgment. Yet Makau and David Lawrence argue these institutional constraints can – and have – motivated creative judicial arguments.¹⁹² Judges may use the form of the legal opinion to confer institutional authority on new ideological formations; “although the judicial opinion is written with a foregone conclusion in mind, it is written in a carefully arranged order so that its arguments, separately and together, support the conclusion in a way that is natural to our ways of thinking about law.”¹⁹³ This is true because of “the power of discourse to blend form and meaning into local unities that ‘textualize’ the public world and invite audiences to experience that world as the text represents it.”¹⁹⁴ What is seen during the inventional process of a case like *Bakke*, then, is Powell considering the institutional starting places of legal argument and using them to create a new framework through which to justify affirmative action.

“Facts” of the Case

Former Chief Justice Burger’s opening comment on what he saw as the obvious factual underpinnings of *Bakke* make the importance of what Aristotle would call *atechnic* proofs clear. In the legal inventional process, consideration of the “facts” of the case provides more than background; they form the bases for articulating the problem or question that is to be explored. Perelman and Olbrechts-Tyteca define “facts” in rhetorical discourse as what has been previously agreed upon, and not all justices may agree on the “facts” of the case. Nevertheless, final opinions generally begin with a description of the facts of the case, and court briefs always lay out the details in a manner that best suits them. Thus, they serve as an inventional tool:

Constructing the facts is a wholly legitimate element of the appellate judge's job. After all, one cannot simply reprint the record of the trial below, and the task of interpreting and condensing the record requires that the judge frequently dip his pen into the well of rhetoric...This is not just a matter of being selective about which facts to emphasize (or even to mention), but also a matter of characterization; the facts can—and indeed must—be retold to cast a party as an innocent victim or an undeserving malefactor, to tow the storyline into the safe harbor of whatever principles of law the author thinks should control the case...In virtually all cases, the judge shapes her raw material. She picks her rhetoric to foreshadow the result. Institutional constraints in the judging process require it.¹⁹⁵

In the memoranda and final opinions for *Bakke*, justices construct vastly different narratives from the same raw materials, as those characterizations support their conclusions. They also reach the limits of certain lines of argument because they do not have the factual bases to support them. For instance, in his notes Powell laments the failure of the *amicus* briefs to provide evidence of past racial bias within their admissions procedures. Had that been evident, Powell wrote to his law clerk and to his fellow justices, then the UC-Davis dual track system would have been more easily justifiable.

Interpretation

The needs for consistency and for deference to constitutional principles make adherence to important texts – namely the Constitution – a primary institutional goal in the Supreme Court. The most pressing factor in legal arguments in general, argue Perelman and Olbrechts-Tyteca, is the interpretation of texts:

In disciplines in which texts form the connecting link, certain notions, such as those of self-evidence and fact, acquire a special meaning...

Legal...argumentation has to be developed within a definite system; this brings certain problems to the foreground, namely those relating to the interpretation of texts... What is essential is that texts of positive law...regardless of their origin or basis... form the starting point of new reasonings.¹⁹⁶

At the same time, it is relatively rare that the legal question asked can be answered only by consulting a text. Miller explains: “If a legal document is supposed to control the outcome of a case and its unadorned text is perfectly plain,

then legal interpretation stops right there.”¹⁹⁷ But this is rare, because “although some causes of the Constitution are perfectly clear today, most have required considerable interpretation. The constitutional text continues as a touchstone of interpretation, but it is not by itself sufficient as a principle of adjudication.”¹⁹⁸ A more common starting place is with established doctrine, defined by Miller as “formulas extracted from a combination of the constitutional text and a series of related cases” that serve as “intermediaries between the Constitution and a case that may come before the Court.”¹⁹⁹ In addition to doctrine guiding opinions, judges may alter their decisions or rationales in a particular case in order to protect what they consider to be important doctrine.²⁰⁰

The temporal focus of textual interpretation has inventional utility, as well, and judges may choose to emphasize past, present, or future-looking aspects of texts. Scallen explains: “Modern debates have treated interpretation as a combined deliberative and judicial question, sometimes emphasizing a reading of a text that would provide the most useful effects in the future, and sometimes emphasizing a particular reading as the ‘historically’ accurate one, in the sense of the drafter’s original intent or purpose.”²⁰¹

The roles of ambiguity in the law, of contradictory legal principles, and of differences between the letter and spirit of laws have been long highlighted by classical rhetoricians as starting points of successful arguments.²⁰² The ambiguity of interpretive frameworks serves as a useful inventional tool. As is necessary to get to their preferred conclusions, justices can explain their interpretive authority as expansive – one in which the constitution is dynamic, with an ability to meet

contemporary needs – or restrictive, wherein they cannot depart from the established language or interpreted doctrine of the laws, the Constitution, or the Court.²⁰³

Justice Powell both expanded and constricted the scope and utility of the Equal Protection Clause as he worked toward his final opinion in *Bakke*, and he pulled upon an interpretation of the First Amendment to include the protection of academic freedom. Because varying interpretations of the Equal Protection Clause formed a major area of disagreement among the justices – the Brennan group read the Equal Protection Clause as allowing race conscious set-aside programs like the one at UC-Davis, whereas Powell was concerned about working specific racial considerations into the interpretation of the clause – he crafted a narrative of the Equal Protection Clause that began with growth, and ended with restrictions. True, Powell argued, the Equal Protection Clause was written with African Americans in mind, but its growth in protections has expanded since its inception to such an extent that it can no longer be used to protect specifically chosen minority groups: it must apply equally to everyone, all the time.²⁰⁴

Precedent

Because precedents have become a primary source of justification in Supreme Court legal arguments, they are crucial to the inventional process. As a basis for justification, precedents offer a sense of consistency, an authoritative foundation, and an implicit promise that justices are relying on long-upheld legal reasoning, not their own biases, in decision making. Yet the interpretation of previous opinions serve an inventional purpose of “opening new possibilities of understanding without injuring

old ones,” since new cases often derive from different contexts that provide new meanings to old opinions.²⁰⁵

According to Perelman, “the law draws its authority from the sources whence it emanates, [and] the least contested source of moral and juridical norms is custom...A mode of behavior that has been adopted without protest creates a precedent, and no one will object to actions that conform to precedents.”²⁰⁶ Legal precedents are judicially equivalent to social traditions or customs, asserts Perelman: “When a given social arrangement has been accepted...and when people have conformed to it long enough to have made it customary or traditional, then it is regarded as normal and just to adhere to this arrangement and unjust to deviate from it.”²⁰⁷ Moreover, the “basic, shared expectations” that form a social basis for knowledge are often “best realized by judicial adherence to precedent,” according to Makau. “It is not surprising, then, that to a large extent, precedent serves as a starting point from which all judicial reasoning proceeds.”²⁰⁸

Whereas an appeal to common knowledge may be a strong starting point in general arguments, “what common sense accepts as a fact may be devoid of any legal consequence.” Thus, a judge “has no authority to declare a fact established simply because he has acquired positive knowledge of it outside the proceeding.”²⁰⁹ Rather successful judges, like all arguers, often seek starting places of argument that are already agreed upon with their audiences; in the technical language of the law and amongst legal audiences, these premises are called *precedent*. Legal philosopher H.L.A. Hart describes how the premise of precedent works:

[There is] a connection between justice and one of the most salient features of argument in every field: namely, the primary role played by precedent. No argument, least of all moral argument, takes place in a void; when the disputants approach each other they already owe allegiance to certain common principles of both thought and conduct and are eager to classify the instant case under familiar traditional general rubrics and then to treat it as other cases so classified in the past have been treated.²¹⁰

The heavy reliance on precedent as a justification of legal argument often results in assertions that uphold traditional modes of thought. A judge must “make his decision in conformity with the relevant legal presumptions,” and “these presumptions safeguard the *status quo*.”²¹¹ Moreover, a reliance on past decisions can constrain rhetors from speaking to the nuances of the present.²¹² “In other words,” argues Eric Charles White, “the impulse to repeat, which ratifies the comfortable notion that knowledge is in principle finite, encourages us to speak not *to* the present occasion (the locus of genuine novelty) but *from* (in imitation of) the purely ideal constructs of our memories.”²¹³

Yet even as the reliance on precedent works against the potential to reject traditional presumptions, judges are also bound by a particular value: justice. A particular judge’s idea of justice may be at odds with the law (s)he is considering. Thus, “legal reasoning shows all the tensions created by the desire to conciliate stability with change, the need for continuity with adaptation, and security with equity and the common good. The essential value of legal security distinguished legal reasoning from other forms of practical reasoning.”²¹⁴ And in the events where

precedent conflict with progress, the pull of progress often wins: “since constitutional law depends even more on its soundness than its firmness, in a conflict between precedent and progress, precedent will, more quickly than in other fields of law, yield to progress.”²¹⁵

While institutional factors influence the form of arguments offered and the types of reasoning considered acceptable, in cases where there is no clear precedent these starting places are choices that each judge makes. Wright argues that, “in the absence of clear precedent, these methods become the stock from which the judge makes what amounts to legislative choices; his official opinion then is the rhetorical medium for defending his choices—even as the rhetoric of the speech on the legislative floor is designed to justify the congressman’s choices.”²¹⁶ A judge can choose a number of pathways along which to extend her argument, and she chooses different resources to support that extension: if the judge rests on the origins of the principle, then historical narratives and precedents become more important; if the principle has sociological import to the judge, then she will evoke the attitudes and needs of the community. Judges are guided by the case specifics, by experience, and by institutional norms, argues Wright: “But there is a choice.”²¹⁷

Bakke was one such case, where no clear precedent spoke to the legal questions presented. Yet precedent has become such an established tool for articulating the authority of decisions in particular, and the Court in general, that in cases of great controversy precedents need to be found. In his search for a useable precedent, Powell found his support in a 1948 case that argued constitutional support

for the notion of academic freedom: this Powell tied to the goal of diversity as he crafted his final opinion.

Other Justices' Arguments

In appellate courts, judges often consider the leanings of their colleagues when considering where to guide their opinions. In cases such as *Bakke*, where disagreement reigns from the beginning, other justices' opinions become a crucial starting place in the inventional process. This is true both for internal harmony and for external credibility. Craig Allen Smith and Cathy B. Smith explain:

Justices need to persuade their fellow justices to muster the majority vote. Coalitions have formed around similar judicial and ideological conceptions throughout the history of the Court, because the long tenure of the justices permits continuing working relationships....After reading the drafted opinions the justices bargain and compromise to work out a majority opinion.²¹⁸

The compromise is often worked out in the rationale, if enough justices can agree to the result.²¹⁹ Otherwise, conflicting rationales can reveal the very ambiguity of the interpretive process that the opinion's rhetoric often denies, as well as compromising the force of a majority opinion.²²⁰ Speaking of the rational compromise, Wald explains that: "Her best lines are often left on the cutting room floor...If alternative rationales are available to support a result, the one that can garner a majority of judges will be chosen, even if it is not the writer's preferred one."²²¹ This compromise is often necessary because "the function of putting the Constitution effectively into practice is a necessarily collaborative one, which often

requires compromise and accommodation. It also emphasizes the practical, frequently strategic aspects of the Court's work."²²²

Because Powell was aware early in the process that he would be writing the deciding opinion of the Court – one that needed to bridge the disparate opinions of his colleagues – his knowledge of other justices' opinions was fundamental to Powell's opinion writing process. Powell needed to meet the concerns of each bloc of votes, finding a legal justification and appropriate language that would bridge the differences. For instance, he and his law clerk, Bob Comfort, limited the repeated use of the term "strict scrutiny" in Powell's opinion in hopes of coaxing Justice William Brennan to join in parts of the holding.²²³

Public Culture

Justice Powell found the bridge between the disparate opinions in the pages of the *amicus* briefs. The "diversity" justification written into the final opinion originated from sources outside the Court. This feature of the opinion highlights that fact that, while the above-mentioned argumentative particularities exist with legal argumentation, they do not separate the practice in its entirety from general practices of argument; nor does the focus on legal audiences negate the need to consider more general audiences. Walter R. Fisher asserts that "one establishes one's rationality in specific fields by knowing and using the warrants indigenous to that field and adhering to the particular rules of advocacy followed in it."²²⁴ Yet, even given the constraining features of legal justification, "the actual process of justification or deliberation should proceed (and in ideal cases does indeed proceed) according to the

criteria of general practical discourse, and that legal justification only serves as a secondary legitimation of any conclusions arrived at in this way” Alexy argues.²²⁵

Although a judge [is] concerned with technicalities...he is not entirely immune to arguments addressed to him as a member of a particular, but not specialized, social group or as a member of the universal audience: this appeal to his moral sense may lead him to discover new arguments that are valid in his conventional framework, or to see in a new light the arguments already before him.²²⁶

This dynamic is especially true in appellate judicial arguments of importance, when authors must consider both public audiences and legal audiences. Because an argument proceeds from “that which is accepted, that which is acknowledged as true, as normal and probable, as valid agreement,” it thereby “*anchors itself in the social*, the characterization of which will depend on the nature of the audience.”²²⁷ Studies on judicial reasoning have revealed that “Supreme Court inventional strategies both reflect and help create cultural norms, particularly those that govern institutional ethics and the ostensible grounds for institutional decision making.”²²⁸ Finally, “the composite audience expects the Court to balance the need for doctrinal consistency against...compelling social demands. [T]he Court is also expected to protect interests that emerge historically.”²²⁹ This expectation lays the groundwork for new starting points of legal argument to emerge.²³⁰

The Artifacts of Supreme Court Invention

The singular goal of Supreme Court invention is not the written decision about a particular case. Of the same inventional tools, the Supreme Court uses written

opinions to construct and maintain its own authority, a legal culture, various publics, particular histories, and legal fictions that uphold the forms, authority, and logic of the legal culture. These constructions are necessary to the internal logic of the opinions, as in the instance of legal fictions. Moreover, they form the basis for public acceptance of legal opinions.

Authority

Because the Supreme Court has no enforcement body, a key rhetorical feature for the Court is its need to motivate support for its decisions in lieu of forcibly imposing them. Thus, opinions must continuously invest time explaining or constructing their sphere of authority within which justices can make legitimate their decisions. Miller argues that “the public authority of the Supreme Court is one of the distinguishing features of American political life. This authority is maintained through the general acceptance of the Court’s decisions and the reasons offered for these decisions.”²³¹ The hermeneutic autonomy alone of a text “so ordered,” builds the authoritative force of the institution.²³² Yet the Supreme Court must “establish its authority as being something less than naked power, but something more than advisory influence” in order for its decisions to be legitimated.²³³ Perelman notes that, in democratic societies, “the role of the judge, servant of existing laws, is to contribute to the acceptance of the system. He shows that the decisions which he is led to take are not only legal, but are acceptable because they are reasonable.”²³⁴

The Supreme Court builds its own power of judicial review by interpreting the Constitution’s construction of its authority with a rhetoric of inevitability. Robert McCloskey observes the context-driven, interpretive quality of the Supreme Court’s

authority: “we have seen that both the meaning of the Constitution and the nature of the Supreme Court’s authority were left in doubt by the framers, that circumstances nonetheless conspired to favor the early growth of both constitutionalism and judicial power, but that those same circumstances also helped to set the terms within which these institutions would develop.”²³⁵ In *Marbury v. Madison* (1803), Chief Justice John Marshall’s opinion established both the primacy of the Constitution over legislative acts as “one of the fundamental principles of our society,” and that, in a conflict of laws, “the courts *must* decide on the operation of each...so if a law be in opposition to the Constitution...the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.”²³⁶

Yet once decision-making processes become institutionalized, “two problems almost automatically arise, the problem of identity and that of change. The problem of identity concerns the possibility of settling at any moment in time whether any particular norm or normative proposition is relevant and binding for institutional adjudicators.”²³⁷ This notion of identity becomes complicated when the pressure for change occurs, and when it does “it is almost inevitable that an announcement of such a change will have to take the form of some kind of generally stated norm that is to be applied so as to override prior recognized reasons to the extent of any conflict. Again, this *can become institutionalized*.”²³⁸

History

In the construction and maintenance of its authority, the Supreme Court invents, and makes use of, specific constructions of history. “When the Court’s work is scrutinized in public, that is, when the Court’s authority is being confirmed or

criticized, the use of history is also a matter of concern,” argues Miller. “The Constitution itself is a product of the nation’s past, and the Supreme Court, as the accepted interpreter of the Constitution, has become the public interpreter of American political history.”²³⁹ This role of interpreter means that “the nature of law, particularly constitutional law, and the function of the Supreme Court in American society both contain a large element of viewing the present in terms of the past.”²⁴⁰

As they write, judges choose views of the past that best support their conclusions. Shifts in temporal orientation change the meaning and import of the histories described by the Court. Miller describes two major uses of history within the Supreme Court: “general history may be seen as both [1] the history which serves to explicate the meaning of the original Constitution (and the amendments) as drafted and ratified and [2] the history which serves to reveal conditions in the nation since the ratifications, conditions that the justices believe have a bearing on later interpretation of the Constitution.”²⁴¹ One consequence of the different historical orientations is the continuing split between intentionalist and realist arguments. “The problem of the Supreme Court’s use of history as a principle of adjudication in constitutional law is, in formal terms, a problem of legal theory,” argues Miller.²⁴² “Intentionalist arguments and controversies remain, despite glimmerings about their limitations,” asserts Ferguson, “precisely because the judicial rhetoric of inevitability cannot do without a directed or selective sense of history.”²⁴³

The selective use of history to justify particular opinions serves more than a justificatory function: it “affirms or denies the significance of past events for the activities of the present.”²⁴⁴ According to Hasian, the evaluative and temporal

functions of this move mean that the Supreme Court is inventing more than a selective history: it constructs public memories. Legal memories, according to Hasian, “are even larger units of analysis because they build on both ‘mythic plot structures’ and ‘narratives.’ Memories are the rhetorical structures that influence the way entire generations selectively think about the relationship between the past, present, and future.”²⁴⁵ Whether called history or memories, it remains that when justices use stories of the past to justify their decisions, “the Court contributes to the public’s view of the American past as much as, and sometimes even more than, professional historians and other historical writers do.”²⁴⁶

Legal Culture

Legal discourse is more than a discipline and a set of vocabulary: it also constructs social norms, characters, standards of judgment, and particular worldviews.²⁴⁷ James Boyd White encourages the reading of judicial opinions “as cultural and rhetorical texts, that is, with an eye to the kind of political and ethical community they build with their readers and to the contribution they make to the discourse of the law.”²⁴⁸ This feature of law is constitutive in nature, “for through its forms of language and of life the law constitutes a world of meaning and action: it creates a set of actors and speakers and offers them possibilities for meaningful speech and action that would not otherwise exist; in so doing it establishes and maintains a community, defined by its practices of language.”²⁴⁹

One characteristic of the constructed legal culture is the composition of particular characters within the framework, language, and logic of the legal culture. Glenda Conway explores “the ways in which rhetorical structures within the

[Supreme Court] opinion texts serve to create—and rank—communities of competing voices” because, according to Conway, “...*no* textual representations of a person can be ‘real.’ People in texts necessarily are bound to be artificial constructions; indeed, all representations of people—whether they appear in written form or in any other avenue of communication—are constructed.”²⁵⁰ Conway argues, then, that one can never fully capture the people they attempt to represent. Additionally, Conway asserts that Supreme Court justices use this creative license to support their arguments and to weaken counterarguments: “In a judicial opinion, significantly, how characters look and speak occurs within the context of the Court’s acceptance or rejection of their arguments. That is, such characterizations happen both *within* the Court’s language and *in* the Court’s language.”²⁵¹

Legal Fictions

Justices invent hypothetical situations, speculate as to framers’ intents, broaden and narrow the scope of the legal question, or broaden and narrow the authority of the Court to aid in the justification of their decisions.²⁵² Perelman explains: “The judge...especially if he is sitting in a court of final review, has recourse to a fiction. The device of a fiction, which is expressly a refusal to apply the rule in certain situations, can realistically be considered as a modification of the field of application of the rule by an official who does not have the legal power to modify it expressly.”²⁵³ Another legal fiction available to judges occurs “when the facts can be viewed in different lights...A decision to view the facts of a case in a certain light amounts to fixing more precisely the field of application of a rule or the scope of a precedent.”²⁵⁴

Justices also invent explanations of lawmakers' and the framers' intents in order to justify their opinions. Miller describes one particular "use of history" within the Supreme Court as the construction of the framers' intent, concluding that "the intent theory of constitutional interpretation is a miserable legal fiction."²⁵⁵ Drucilla Cornell sees this legal fiction as less of a smokescreen than a consequence of the indeterminacy of texts and the rhetorical nature of judicial opinion writing: "Once we recognize that the process of recollection of legal principle is never mere exposition but involves the imagination and positing of the very ideals to be read into a legal text, we can no longer choose between competing interpretations on the basis of an appeal to what is just 'there.'"²⁵⁶ Recognition of this fact need not result in relativistic despair, however:

All interpretations entail an inevitable moment of fictionality. As a result we cannot prove the truth of a particular...principle. We can only evoke its power and justify its rightness through argumentation. This does not mean that all interpretations are equally effective in the synchronization of competing ideals. It does mean that only through argument can we show that one interpretation is better than another.²⁵⁷

Conclusion

As he constructed his opinion in *Bakke*, Justice Powell explored the range of topics available to him. He examined the jurisprudential commonplaces: precedents, legislative histories, the proper "standards" or guiding legal principles, and "facts" of the case. He studied the opinions of those who held legal, personal, or public credibility to him, including *amicus* briefs from law professors, the Attorney

General's office, the NAACP, memoranda from other justices, and writings from his favorite legal scholar Alexander Bickel and his law clerk Bob Comfort.²⁵⁸ He considered large ideological issues of equality, colorblindness, race consciousness, retribution, and reverse discrimination as arguments about them manifested in the briefs, in editorials, in law articles, and in memoranda. Finally, he considered how these arguments worked within the framework of acceptable constitutional interpretation, given the historical and legal contingencies brought to bear on the questions before him. He did so because "rhetorical invention demands painstaking attention to the particular case and the unique circumstances associated with it," and because "the goal is not mechanistic application of the theoretical apparatus to particular cases, but the cultivation of an ability to encounter cases as circumstances demand."²⁵⁹ Circumstances, in turn, alter legal and popular notions of acceptable reasons: "reasons considered good at one period of time and in one milieu are not in another; they are socially and culturally conditioned as are the convictions and the aspirations of the audience they must convince. Any preliminary study of legal history and jurisprudence suffices to show this."²⁶⁰ Thus, argues White:

the study of the judicial opinion...is a moment at which the law is made real, a moment when the welter of statutes and precedents and maxims and other materials of the past are brought to bear with force and clarity upon an actual dispute...The great contribution of the judicial mind is not the vote but the judicial opinion, which gives meaning to the vote.²⁶¹

The *Bakke* decision has been variously maligned and celebrated, its rationales ignored and copied, and its demise predicted and time-stamped.²⁶² Yet, Makau argues:

what this decision did—carefully apply precedent as a tool to balance the politically volatile nature of the immediate case against the rigorous demands of the Court’s composite audience—is worth noting in legal history. The decision demonstrates clearly how the Court uses its most powerful rhetorical tool, adherence to precedent, to fulfill the complex rhetorical demands of even the most controversial of Civil Liberties cases.²⁶³

Notes

¹ Justices White, Brennan, and Stevens wanted to decide based on Title VI of the Civil Rights Act. Their arguments were summarized – and refuted – by Powell clerk Bob Comfort in his memo to Justice Powell entitled “Comments on Justice Stevens’s Title VI Memo,” Memorandum for Justice Powell, 19 September 1977, *Bakke* memos file, Drawer 26, Folder 1, Justice L. Powell Archives, Washington and Lee University, Lexington, VA.

² Justice William H. Rehnquist, “Memorandum to the Conference: Re: No. 76-811 *Regents of the University of California v. Allan Bakke*.” 10 November, 1977, Drawer 26, II. Intra-chambers memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

³ Justice Lewis F. Powell Jr. “Memorandum to the Conference, No. 76-811 *Regents v. Bakke*,” 5 January, 1978, Drawer 26, II. Intra-chambers memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 6.

⁴ Chief Justice William E. Burger, “Confidential memorandum to the Conference Re: No. 76-811 *Regents of the University of California v. Allan Bakke*,” 21 October, 1977, Drawer 26, II. Intra-chambers memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 2, 6.

⁵ Bernard Jacob, “Book Review: Ancient Rhetoric, Modern Legal Thought, and Politics: A Review Essay on the Translation of Viehweg’s ‘Topics and Law’” *Northwestern University Law Review* 89 (1995): 1643. Although this article as appears under the heading “book review” in the *Northwestern University Law Review*, its content is that of a review essay (as described in the latter part of the

article's title). In it, Jacob compares the concepts of Viehweg's book to Perelman's ideas of rhetorical jurisprudence, forming substantive conclusions about the judicial invention process.

⁶ Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. George A. Kennedy (New York: Oxford University Press, 1991), 52.

⁷ Jacob, "Ancient Rhetoric," 1666.

⁸ Jacob, "Ancient Rhetoric," 1667.

⁹ "A Conversation about Communication Ethics with Josina M. Makau" *Exploring Communication Ethics: Interviews with Influential Scholars in the Field*, ed. Patricia Arneson (New York: Peter Lang, 2007), 70.

¹⁰ Josina M. Makau, "The Supreme Court and Reasonableness," *Quarterly Journal of Speech* 70 (1984): 390.

¹¹ Karl Wallace, "Topoi and the Problem of Invention," *Quarterly Journal of Speech* 58 (1972): 387.

¹² Fred J. Kauffeld, "Rhetorical Invention and the Speaker's Selections of Arguments" in *Argument in a Time of Change: Definitions, Frameworks, and Critiques* ed. James F. Klumpp (Annandale, VA: National Communication Association, 1997), 35.

¹³ George A. Kennedy, *Classical Rhetoric & Its Christian and Secular Tradition from Ancient to Modern Times*, 2nd ed. (Chapel Hill: University of North Carolina Press, 1999), 20.

¹⁴ Richard L. Enos places greater importance on the literate revolution: the link between writing and the spirit of intellectual exploration. "What becomes

apparent in [the] evolution of education in the fifth century B.C.E. is the transformation of the notion of literacy through rhetorical invention,” and through the application of writing technologies to “civic functions such as the law and the recording of political deliberations.” (189) Thus, Enos argues, “the real revolution in literacy in Athens was not so much the introduction of writing into the culture of the fourth century B.C.E. Athens, but rather the transformation of writing from a craft and functional skill to an intellectual enterprise worth of the rhetorical school of Isocrates.” (190) See Enos, “Literacy in Athens during the Archaic Period: A Prolegomenon to Rhetorical Invention,” in *Perspectives on Rhetorical Invention*, ed. Janet M. Atwill and Janice M. Lauer (Knoxville: University of Tennessee Press, 2002), 190.

¹⁵ Kennedy, *Classical Rhetoric*, 14-20.

¹⁶ Kennedy, *Classical Rhetoric*, 30-31.

¹⁷ James J. Murphy, “The Origins and Early Development of Rhetoric,” in *A Synoptic History of Classical Rhetoric*, ed. James J. Murphy (Davis, CA: Hermagoras Press, 1983), 11-13.

¹⁸ Murphy, “Origins and Early Development,” 14-15.

¹⁹ This definition comes from Eric Charles White, *Kaironomia: On the Will-to-Invent* (Ithaca, NY: Cornell University Press, 1987), 13. White, and others, note that there is no direct English equivalent for the Greek word *kairos*. See also Debra Hawhee, “Kairotic Encounters” in *Perspectives on Rhetorical Invention*, ed. Janet M. Atwill and Janice M. Lauer, (Knoxville: University of Tennessee Press, 2002), 18.

²⁰ Janice M. Lauer, *Invention in Rhetoric and Composition* (West Lafayette, IN: Parlor Press, 2004), 13. It has also been suggested that the Sophistic notion of *kairos* deals with the time-orientation of the selected argument: Edward Schiappa refers to an early Sophistic compilation of notes, collectively entitled *Dialexeis*, that describes *kairos* as the recognition that “all things are seemly when done at the right time, but shameful when done at the wrong time” (7). Schiappa argues that the Sophistic notion of invention – especially *kairos* – occurred well before the term “rhetoric” first appeared, a fact to which Schiappa attributes great significance, as the theorization of discourse through the art of rhetoric had not yet dichotomized the fields of thinking into rhetoric and philosophy. See Schiappa, “*Rhêtorikê*: What’s in a Name? Toward a Revised History of Early Greek Rhetorical Theory,” *Quarterly Journal of Speech* 78 (1992): 1-15.

Eric Charles White argues persuasively that *kairos* is the missing link in contemporary inventional processes: see White, *Kaironomia*. For more on *kairos*, see also: John Poulakos, “Toward a Definition of Sophistic Rhetoric,” *Philosophy and Rhetoric* 16 (1986): 34-47.

²¹ Kennedy, *Classical Rhetoric*, 32. See Schiappa, “*Rhêtorikê*”.

²² Kennedy asserts persuasively that Corax and Tisias were likely the same person. Because the name “corax” meant “the crow,” Kennedy concludes that the “inventor of rhetoric” referred to in later rhetorical works was likely Tisias, who because of his arguing abilities earned the nickname “Tisias the Crow.” Kennedy also notes that the “rhetorical teaching attributed to Tisias by Plato seems identical to that attributed to Corax by Aristotle.” See Kennedy, *Classical Rhetoric*, 21. Cicero

refers only to Tisias in his book entitled *On Invention*: “Aristotle collected the early books on rhetoric, even going back as far as Tisias, well known as the originator and inventor of the art.” Cicero, *On Invention*, trans. H. M. Hubbell (Cambridge: Harvard University Press, 1949), 171.

²³ Michael Frost, “Introduction to Classical Legal Rhetoric: A Lost Heritage” *Southern California Interdisciplinary Law Journal* 8 (1999): 616.

²⁴ Again, there is some debate about how central Corax and/or Tisias were to the development of the written handbooks. Kennedy asserts that written notes were taken of Corax’s lectures, which then made their way to Athens. James J. Murphy, who is more conservative in his adoption of what he argues are mainly legends of Corax and Tisias inscribed in the works of Aristotle, Cicero, and Quintilian, posits that even if a Sicilian handbook made its way to Athens, “the Sicilian ambassador Gorgias, who opened a school of rhetoric in Athens in 431 B.C., succeeded at least in part because Athenians were already deeply interested in discourse. This interest was surely not a Sicilian invention.” Murphy, “Origins and Early Development,” 7.

²⁵ Frost, “Introduction to Classical Legal Rhetoric,” 616.

²⁶ Kennedy, *Classical Rhetoric*, 22.

²⁷ Aristotle, *On Rhetoric*, 29-30.

²⁸ George A. Kennedy, “*Prooemion*,” in *On Rhetoric: A Theory of Civic Discourse* by Aristotle, trans. George A. Kennedy (New York: Oxford University Press, 1991), viii. Schiappa posits that Plato’s strategic first use of the word rhetoric pitted rhetoric against philosophy as independent disciplines: “The new word *rhêtorikê* was a useful label for Plato to use to stress the political aspects of Isocrates’

training while diminishing the intellectual content...From the very beginning Rhetoric was defined at cross-purposes with the emerging rival discipline of philosophy.” (10) Schiappa argues that this definitional move has both dichotomized the two subjects and led, as the naming of all disciplines do, to the codification, classification, and exclusion of what “rhetoricians” do and do not study. Schiappa, “*Rhétoriké*,” 1-15.

²⁹ Forbes I. Hill concludes from his comprehensive overview of Aristotle’s corpus on rhetoric that: “The explicit statement of the moral basis for arguments given in these central sections on goods and virtues, the grounding of this moral basis in the rationalized system of the *Nicomachean Ethics*, and the interconnection of the value premises with formal logic—all provide supporting evidence for the often repeated statement that Aristotle did not write a handbook for rhetoric but philosophical rhetoric.” See Hill, “The Rhetoric of Aristotle” in *A Synoptic History of Classical Rhetoric*, ed. James J. Murphy (Davis, CA: Hermagoras Press, 1983), 72-73.

³⁰ Aristotle, *On Rhetoric*, 53.

³¹ Kennedy, “Introduction,” in *On Rhetoric*, 4. Geoffrey Klinger also posits that Aristotle “represents the pragmatic synthesis of rhetoric and philosophy” whose “conceptions of the law were informed by a confluence of dialectic, rhetoric, ethics, politics, even poetics.” Geoffrey D. Klinger, “Law as Communicative Praxis: Toward a Rhetorical Jurisprudence,” *Argumentation and Advocacy* 30 (1994): 236.

³² Aristotle, *On Rhetoric*, 29.

³³ Aristotle, *On Rhetoric*, 34. Aristotle argues that although truth and justice are “by nature stronger than their opposites,” nevertheless if “judgments are not made in the right way” then truth and justice can be defeated.

³⁴ Aristotle conceived of law as “either specific [*idion*] or common [*koinon*]. I call specific the written law under which people live in a polis and common whatever, though unwritten, seems to be agreed to among all” (88). There are things “omitted by the specific and written law. Fairness, for example, seems to be just; but fairness is justice that goes beyond the written law” (105). Thus, “rigid application of the written law may sometimes go against its intent and be inequitable” (105). Aristotle, *On Rhetoric*.

³⁵ Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore: Johns Hopkins University Press, 1949), 78.

³⁶ Janet M. Atwill, “Introduction: Finding a Home or Making a Path,” *Perspectives on Rhetorical Invention*, ed. Janet M. Atwill and Janice M. Lauer (Knoxville: University of Tennessee Press, 2002), xi. Emphasis added.

³⁷ Cicero, *On Invention*, trans. H. M. Hubbell (Cambridge: Harvard University Press, 1949), 5. Cairns further asserts that Cicero believed “a science of law must be based on the fundamental principles of philosophy.” (132)

³⁸ Chaïm Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Purcell Weaver (Notre Dame, IN: University of Notre Dame Press, 1969), 8

³⁹ Michael Frost, “Greco-Roman Legal Analysis: The Topics of Invention.” *St. Johns Law Review* 66 (1992-1993): 111.

⁴⁰ George L. Pullman argues that the notion of *stasis* is as relevant today as it was during Aristotle's time, especially in judicial and deliberative proceedings, which generally have overlap, but in certain situations occur simultaneously: as in the case of the Anita Hill-Clarence Thomas hearings that were the subject of Pullman's study. Pullman defines *stasis* as "the discursive pause created when a difference of opinion arises. Heuristically, *stasis* is a series of hierarchically arranged questions that can be used to locate specific differences of opinion within a broader disagreement." There are implications for the correct application of *stasis* as a heuristic: "if...appropriately applied, the questions asked will locate resolvable differences of opinion and so facilitate agreement. However, if the heuristic is misapplied, it will introduce unanswerable questions and so locate unresolvable differences of opinion, hindering agreement the way static interferes with reception." Pullman, "Deliberative Rhetoric and Forensic *Stasis*: Reconsidering the Scope and Function of an Ancient Rhetorical Heuristic in the Aftermath of the Thomas/Hill Controversy," *Rhetoric Society Quarterly* 25 (1995): 224.

⁴¹ Aristotle, *Rhetoric*, 87-117.

⁴² Aristotle, *Rhetoric*, 37. Italics in the original. The mention of the testimony of slaves under torture as a form of nonartistic proof (evidence that rhetors may count as already existing) reveals the cultural influence of facts and truths that make epistemological differences central to understanding rhetorical invention. Epistemological features of rhetorical invention are discussed in more detail later in the chapter.

⁴³ Hill, "The Rhetoric of Aristotle," 57.

⁴⁴ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 84. They argue of the classical *topoi* that endless school exercises have mistreated the *loci* to the extent that “...we notice only its banality and fail to appreciate its argumentative value.”

⁴⁵ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 84.

⁴⁶ Eileen A. Scallen, “Classical Rhetoric, Practical Reasoning, and the Law of Evidence,” *American University Law Review* 44 (1995): 1722.

⁴⁷ Jacob, “Ancient Rhetoric,” 1666.

⁴⁸ James Boyd White, “What’s an Opinion For?” in “Judicial Opinion Writing,” special issue, *University of Chicago Law Review* 62 (1995): 1363.

⁴⁹ Frost, “Introduction to Classical Legal Rhetoric,” 617-618.

⁵⁰ Kennedy, *Classical Rhetoric*, 25.

⁵¹ A.H. J. Greenidge, *The Legal Procedure of Cicero’s Time* (New York: Augustus M. Kelley, 1971), 4.

⁵² Greenidge, *The Legal Procedure*, 3-4.

⁵³ James Boyd White, “What’s an Opinion For?” 1364.

⁵⁴ Greenidge, *The Legal Procedure*, 15. Greenidge argues that the creation of a Roman civil court “in itself expresses a theory of justice, and its composite character contains the germ of that distinction which has now become well-nigh universal—the distinction between judge and jury, law and fact.”

⁵⁵ Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 1.

⁵⁶ Lauer, *Invention in Rhetoric and Composition*, 22.

⁵⁷ Pseudo-Cicero, *Rhetorica ad Herennium*, trans. Harry Caplan (Cambridge: Harvard University Press, 1954).

⁵⁸ Although Roman law saw the rapid emergence of codified laws and written judgments, written laws also existed in ancient Greece. Greeks in the newly emerging democratic state (5th and 4th centuries B.C.E) held conflicting views of written laws.

Deborah Tarn Steiner describes this tension in *The Tyrant's Writ: Myths and Images of Writing in Ancient Greece* (Princeton: Princeton University Press, 1994), asserting that although written laws made standards of justice visible, ancient Greeks also felt that their existence “threatens to obscure its single or collective authors, and introduces a new authority to supplant the citizen's voice” (7).

Aristotle held that unwritten laws such as equity served as guardians against the vagaries of written laws and as useful tools to take the peculiarities of individual situations into account, because legislators cannot possibly account for every possible situation. There are things, argues Aristotle in *Rhetoric*, “omitted by the specific and written law. Fairness, for example, seems to be just; but fairness is justice that goes beyond the written law” (105). Aristotle also believed that the constrictive nature of the written law might work against the goals of justice: “Rigid application of the written law may sometimes go against its intent and be inequitable” (105).

Scallen concludes that “Aristotle's pragmatic response to the potential tyranny of legal text was to demonstrate that it could be made more flexible and equitable through the use of rhetoric. Such fairness was reached through constructing

arguments about a text by looking to different sources of interpretation.” Scallen, “Classical Rhetoric,” 1728-1729.

⁵⁹ Patricia Wald, “The Rhetoric of Results and the Results of Rhetoric: Judicial Writings” in “Judicial Opinion Writing,” special issue, *University of Chicago Law Review* 62 (1995): 1371. In addition to her twenty year term on the U.S. Court of Appeals for the District of Columbia, during which she was the Chief Judge for five years, Wald served as a member of the President’s Commission on the Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction from 2004-2005. Wald was also the Assistant Attorney General for Legislative Affairs during the Carter administration, and served as a judge on the International Criminal Tribunal for the former Yugoslavia from 1999 to 2001.

⁶⁰ Cicero considered invention to be “the most important of all divisions,” and defined invention as, “the discovery of valid of seemingly valid arguments to render one’s cause plausible.” (19) Cicero outlines the four main controversies in *On Invention* 21-23, and he discusses Aristotle, Gorgias and Hermagoras in detail on pages 7-17.

⁶¹ Cicero, *On Invention*, 35.

⁶² Barry Nicholas describes the role of the jurist and the nature and power of the juristic interpretation in *An Introduction to Roman Law*:

The Roman jurists have no exact parallel in the modern world. In the formative years of the later Republic they were men from the leading families who undertook the interpretation of the law as part of their contribution to public life. They were not professional men in our sense...they were

statesmen who were learned in the law. They advised the Praetor in the formulation of his Edict and in the granting of remedies in individual cases; they advised the *iudex* in the hearing and decision of a case; and they advised private individuals in the drawing up of documents ...and also in the conduct of cases before the Praetor and the *iudex*. But they were advisors, not practitioners; and in particular they did not appear in court to argue cases.(29)

That was for the advocate, and “though a distinguished advocate, such as Cicero, might have a very fair knowledge of the law, his main interest was in the art of persuasion rather than in the science of law.” (28-29).

⁶³ The descriptions of Roman administrative roles came from Nicholas, *An Introduction to Roman Law*, 4. It was in his role as *praetor* that Cicero’s judicial inventional tools were honed. Nicholas describes in detail the role of *praetor*:

The Praetor has no more than any other magistrate the power to make law: his power was only over the remedies, i.e., the means by which the law was enforced. But this power enabled him indirectly to alter the law....

Today...the right, not the remedy, is the primary concept. The law is made up of rights (and correlative duties), and remedies are merely the procedural clothing of these rights. But this was not the approach of the Roman lawyer. He thought in terms of remedies rather than rights, of forms of action rather than of causes of action. A claim could only be pursued in a court of law if it could be expressed in a recognized form...the important practical consequence [is] that the man who controls the granting of remedies controls also the development of the law. In Rome that man was the Praetor.

By creating a new form of action or extending an old form to new facts he could in effect create new rights. In form there was merely a new remedy, in substance there was new law. (19-20)

Cicero wrote *On Invention* when he was quite young, likely as an exercise while taking notes from his instructor, and later criticized it as overly didactic and simple. Hill, “The Rhetoric of Aristotle,”¹⁰⁵. Cicero’s friend was Gaius Trebatius Testa, a well-known jurist who served with Caesar under Cicero’s recommendation, according to Hubbell’s introduction of Cicero’s *Topics*, which is the extended letter that Cicero wrote to Trebatius. Cicero explains in the first pages of *Topics* his intent to describe Aristotle’s *Topics* to Trebatius, as per Trebatius’ request. However, Hubbell argues in his introduction that the resulting handbook blends Aristotle’s *Topics* with *Rhetoric*, some topics of Stoic origin, and a classification scheme given in Cicero’s own the *Orator* (377-378). The fact that Cicero wrote *Topics* while he was sailing, and appears to have composed it entirely from memory, could explain the overlap. Hubbell, “Introduction” in *Topics*, 377.

⁶⁴ Hanns Hohmann, “Logic and Rhetoric in Legal Argumentation: Some Medieval Perspectives,” *Argumentation* 12 (1998): 40.

⁶⁵ Chaïm Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (Dordrecht, Holland: Reidel, 1980), 30.

⁶⁶ Perelman, *Justice, Law, and Argument*, 29.

⁶⁷ Geoffrey Samuel, *Epistemology and Method in Law* (Hampshire, U.K.: Ashgate, 2003), 26.

⁶⁸ Frost, “Introduction to Classical Legal Rhetoric,” 619.

⁶⁹ Francis J. Mootz III, "Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition," *Yale Journal of Law and Humanities* 11 (1999): 322-323.

⁷⁰ Michael Leff, "Up from Theory: Or I Fought the *Topoi* and the *Topoi* Won," *Rhetoric Society Quarterly* 26 (2006): 206.

⁷¹ Theodor Viehweg, *Topics and Law: A Contribution to Basic Research in Law*, trans W. Cole Durham, Jr. (New York: Peter Lang, 1994), 17-18; James J. Murphy, *Rhetoric in the Middle Ages: A History of Rhetorical Theory from St. Augustine to the Renaissance* (Berkeley: University of California Press, 1974), 43-46.

⁷² Murphy, *Rhetoric in the Middle Ages*, 46.

⁷³ Sharon Crowley, *The Methodical Memory: Invention in Current-Traditional Rhetoric*. (Carbondale: Southern Illinois University Press, 1990), 2; Murphy, *Rhetoric in the Middle Ages*, 46. Crowley makes this point when explaining the cultural-specific epistemological basis of theories of rhetorical invention: "For example, in *On Christian Doctrine* St. Augustine named Scripture as the proper locus of invention for Christian rhetoric, since he believed that text to be the primary source of human knowledge about the will of God." (2)

⁷⁴ Murphy, *Rhetoric in the Middle Ages*, 51.

⁷⁵ Murphy, *Rhetoric in the Middle Ages*, 57-60.

⁷⁶ Murphy, *Rhetoric in the Middle Ages*, 87.

⁷⁷ Murphy, *Rhetoric in the Middle Ages*, 194-210.

⁷⁸ Charles F. Briggs, "Aristotle's *Rhetoric* in the Later Medieval Universities: A Reassessment," *Rhetorica* 25 (2007): 250.

⁷⁹ Murphy, *Rhetoric in the Middle Ages*, 137-138.

⁸⁰ Harold J. Berman and Charles J. Reid, Jr. "Roman Law in Europe and the *Jus Commune*: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century," *Syracuse Journal of International Law and Commerce* 20 (1994): 3.

⁸¹ Berman and Reid, "Roman Law in Europe," 3.

⁸² Berman and Reid, "Roman Law in Europe," 3, discuss the emergence of canon and feudal law. Kenneth Pennington gives a lengthy description of the rediscovery of the Justinian digest in "Roman and Secular Law in the Middle Ages," in *Medieval Latin: An Introduction and Bibliographical Guide*, ed. Frank Anthony Carl Mantello and A.G. Rigg (Washington, DC: Catholic University of America Press, 1996), 254-266.

⁸³ See Pennington, "Roman and Secular Law," 254-266 and Samuel, *Epistemology and Method in Law*, 26-27.

⁸⁴ Berman and Reid, "Roman Law in Europe," 4. The authors argue that the Justinian Digest gave a system of reasoning to the interpretation and writing of laws, which were learned by jurists in Italian and French universities before returning to their provinces to become advisors to princes.

⁸⁵ Pennington, "Roman and Secular Law," 255.

⁸⁶ Richard M. Fraher asserts that medieval lawyers struggled to "develop more flexible rules...than the unworkable laws preserved in the learned tomes of Roman and canon law" in "Conviction According to Conscience; The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof," *Law and History*

Review 7 (1989): 24; both Murphy and Pennington also discuss the medieval jurists' need to carve flexibility out of laws and procedures written for a culture and political environment that no longer existed.

⁸⁷ Stephen A. Seigel differentiates between two periods of premodern legal thought as they relate to the consumption of Roman law. The first, which he calls "the classical," from 1450-1650, is defined by the shared belief that "the validity of the law lay in its wisdom, and ancient rules were merely the primary source from which jurists debated and derived a case's just disposition." (21) The second period he called "the decadent" (1650-1800): "In the decadent era...the validity of the law—at least the common law as opposed to statute—lay in its certainty, and ancient rules were seen as more directly determinative regardless of their wisdom." (21) Stephen A. Siegel, "The Aristotelian Basis of English Law: 1450-1800," *New York University Law Review* 56 (1981): 21.

⁸⁸ Viehweg, *Topics and Law*, xv.

⁸⁹ Samuel, *Epistemology and Method in Law*, 27-28.

⁹⁰ Samuel, *Epistemology and Method in Law*, 28; see also Walter J. Ong, "The Pedagogical Juggernaut," in *Ramus, Method, and the Decay of Dialogue: From the Art of Discourse to the Art of Reason* (Cambridge: Harvard University Press, 1958), 141-165.

⁹¹ See Viehweg, *Topics and Law*, 50-52.

⁹² See Wilber Samuel Howell, "Ramus and English Rhetoric: 1574-1681," *Quarterly Journal of Speech* (1951): 299-310; Jean Dietz Moss, "Review of Peter Ramus's Attack on Cicero: Text and Translation of Ramus's *Brutinae Quaestiones*"

Rhetoric Society Quarterly 23 (1993): 115-117; Ong, "The Pedagogical Juggernaut," 53-165; Viehweg, *Topics and Law*, 51-55; and Craig Walton, "Ramus and the Art of Judgment," *Philosophy & Rhetoric* 3 (1970): 152-164.

⁹³ Ong argues that it is difficult to label Ramus and the intellectual movement he inspired, because: "In its entire perspective, Ramism is not properly a philosophy or a theology or a type of classical humanism or a literary school, although it affects philosophy, theology, and literature, and many other things besides. Its central element is a logic or dialectic which cannot be taken very seriously by any competent logician." *Ramus, Method, Dialogue*, 7.

⁹⁴ Ong, *Ramus, Method, Dialogue*, 21.

⁹⁵ Ong, *Ramus, Method, Dialogue*, 270.

⁹⁶ Ong, *Ramus, Method, Dialogue*, 297.

⁹⁷ Richard McNabb, "Remapping Medieval Rhetoric: Reading Boethius from a Grassian Perspective," *Rhetoric Society Quarterly* 28 (1998): 80.

⁹⁸ Ong, *Ramus, Method, Dialogue*, vii.

⁹⁹ Ong, *Ramus, Method, Dialogue*, 315.

¹⁰⁰ See Ong, *Ramus, Method, Dialogue*, 3-8.

¹⁰¹ Berman and Reid, "Roman Law in Europe," 16-17.

¹⁰² Berman and Reid, "Roman Law in Europe," 18.

¹⁰³ Berman and Reid, "Roman Law in Europe," 17.

¹⁰⁴ Samuel, *Epistemology and Method in Law*, 28.

¹⁰⁵ Siegel, "Aristotelian Basis of English Law," 30-31.

¹⁰⁶ Siegel, “Aristotelian Basis of English Law,” 31. The privileging of invention was due, in part, to the Aristotelian conception of knowledge as contingent, and thus explorable and arguable, at least in the field of law. Lauer argues that the belief in the contingent nature of knowledge is a Greco-Roman legacy: “Since Greek times, rhetoric has always functioned in the realm of probability....*dissoi logoi* represented the Sophists’ epistemology of probability—that there were two contradictory propositions on every matter. They argued these two sides of a matter, relying on the situation to determine the just or unjust, the truth or falsehood, and making decisions on the basis of *kairos*,” *Invention in Rhetoric and Composition* (7-8). In Greek jurisprudence, most facts and issues were debatable. The system was built, in part, on the distrust of “tangible” evidence and from fear of the tyrannical effects of written laws on the citizenry. Additionally, the formal study of rhetoric came from the need to engage in the legal and political spheres. Thus rhetoric and jurisprudence were closely tied epistemologically.

¹⁰⁷ Hohmann, “Logic and Rhetoric,” 39. For instance, the revival of interest in the Roman law in the Middle Ages focused on texts can be explained by “the increasing professionalization of the law after the revival of legal studies in Bologna since the beginning of the 12th century [and] was accompanied by a growing emphasis on the argumentative justification of the solution to legal problems discussed in debates among the legists, the scholars studying and reviving the Roman law.”

¹⁰⁸ Crowley, *The Methodical Memory*, 1.

¹⁰⁹ Vincent A. Wellman argues that a focus on legal and political theory and philosophy distracts from the actual process of jurisprudential argument, often put forth by those who wish to support or disprove a particular theory or norm. Wellman posits this claim:

Although scholars in law and philosophy have recognized the importance of judicial justification, they have seldom examined the judicial reasoning as an independent question of jurisprudence....Legal theorists have taken their respective positions on judicial argumentation in order to support or challenge the broader theory of law in which their conception of judicial reasoning figures. They have not sought to uncover, for its own sake, the nature and criteria of successful justification.

Despite this valid criticism of the focus on legal philosophy at the expense of judicial argumentation habits, such matters are important for epistemological reasons. First, to the extent judges consider legal or extra-legal philosophies to be reflective of the world, they will incorporate those assumptions into their reasoning process. Second, in positing arguments judges attempt to conform their reasonings to acceptable forms of jurisprudential argument; whether the leading legal theories of the day are explicitly referenced or folded into the judge's legal education and experience, they will likely serve as bases for justifications before legal audiences. Wellman, "Practical Reasoning and Judicial Justification: Toward an Adequate Theory," *University of Colorado Law Review* 57 (1985): 46-47.

¹¹⁰ Adam Thurschwell, "Reading the Law," in *The Rhetoric of Law* (Ann Arbor: University of Michigan Press, 1996), 292-295.

¹¹¹ Marouf Hasian Jr., *Legal Memories and Amnesias in America's Rhetorical Culture* (Boulder, CO: Westview, 2000), 7. Hasian argues that “the establishment of law schools after the Civil War ensured that legal science would become an object of study for only a select few,” and that “in the last three decades of the nineteenth century...the law had become a scientific calling...worked furiously to find the best ways of ridding the legal system of its unscientific components” (6, 7).

¹¹² Joseph W. Dellapenna and Kathleen Farrell, “Law and the Language of Community: On the Contributions of James Boyd White,” *Rhetoric Society Quarterly* 21 (1991): 38-58.

¹¹³ Frank J. D'Angelo, “Foreward” in Karen Burke LeFevre, *Invention as a Social Act* (Carbondale: Southern Illinois University Press, 1987), x.

¹¹⁴ D'Angelo, “Foreward,” x.

¹¹⁵ Robert L. Scott explores the ethical component to a rhetorical epistemology in his germinal articles: “On Viewing Rhetoric as Epistemic,” *Central States Speech Journal* 18 (1967): 9-17 and “On Viewing Rhetoric as Epistemic: Ten Years Later,” *Central States Speech Journal* 27 (1976): 258-266.

In his first article, Scott surmised that “truth is not prior and immutable but is contingent” (13). He also invoked the responsibility that has become this theory’s normative function: “When so taken, it calls for a commitment to a standard” (13). That standard, according to Scott, is comprised of three ethical obligations: toleration, will, and responsibility. Faced with uncertainty, one must tolerate disagreement in order to participate in the potentiality of knowing. Secondly, humans must have the will to actively engage in the process of the creation of contingent truth. Finally, the

deprivation of inevitability through knowledge of truth's contingency makes humans responsible for the acts s/he makes according to what s/he thinks to be true.

When Scott revisited the subject ten years later, he maintained the same “basically ethical thrust” as the first. In this article, Scott argued that in order to “keep it from being simply blind self-interest, wishfulness, or chaotic” – relativistic – rhetoric’s focus must be on assent (259). Such a stance does not preclude dissent as a result. Instead a commitment to rhetoric as a way of knowing enables “one to take more fully the responsibilities generated by living with others” (260).

¹¹⁶ Chaïm Perelman, *The Idea of Justice and the Problem of Argument*, trans. John Petrie (London: Routledge & Kegan Paul, 1963), 90.

¹¹⁷ Perelman, *The Idea of Justice*, 90.

¹¹⁸ Perelman, *The Idea of Justice*, 62. Neil MacCormick’s book entitled *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005), similarly explores the rhetorical epistemology that supports legal reasoning: “In law, subjective conviction is possible on occasion, where...a certain body of arguments points firmly to a certain conclusion, and all the counter-arguments that have been put to us ...seem fatally weak by comparison. This can be a shared or intersubjective certainty, when a community of experts shares such a view, to the point even of treating it as practically axiomatic. But such a shared conviction, such a shared attitude of being certain about something, is not what is meant by certainty in the other sense: that which is certainly true, whether anyone actually believes it or not.” (15)

¹¹⁹ “A Conversation,” 69.

¹²⁰ Karen Burke LeFevre, *Invention as a Social Act* (Carbondale: Southern Illinois University Press, 1987), 2. LeFevre argues that Socrates embraces the notion the universal audience: Socrates envisioned “a view that invention occurs through an inner dialogue with an internalized other; it is an ‘infinite conversation’ similar to what Buber describes as taking place between Socrates’ I and his *daimonion* [Thou].” (10) LeFevre further points out the irony that “such an interchange is essential to Socratic thought, which comes to us by way of Plato. On the other hand, we find also in Plato a contrasting view of the individual as alone in the search for truth.” For Plato, “invention is seen as a private, asocial act of recollection aimed at uncovering the ultimate truth; invention, in this case, does not require others.” (11)

¹²¹ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 31-32.

¹²² George C. Christie, *The Notion of an Ideal Audience in Legal Argument* (Dordrecht: Kluwer Academic Publishers, 2000), 5.

¹²³ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 33, italics in the original.

¹²⁴ Crowley, *The Methodical Memory*, 2.

¹²⁵ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 41.

¹²⁶ Perelman, *The Idea of Justice*, 131.

¹²⁷ Francis J. Mootz III, “Rhetorical Knowledge in Legal Practice and Theory,” *Southern California Interdisciplinary Law Journal* 6 (1998): 496. Emphasis added.

¹²⁸ Mootz, “Rhetorical Knowledge,” 548. The foundational essay on the rhetorical nature of social knowledge is Robert L. Scott’s essay entitled, “On Viewing

Rhetoric as Epistemic,” *Central States Speech Journal* 18 (1967). Scott does not claim to have created a new rhetorical philosophy, but rather a clear articulation of some percolating assumptions. Pushing back against the Platonic and Cartesian notions of immutable and provable truth, Scott joins Toulmin’s theorizing on analytic/substantial arguments and Ehninger and Brockriede’s description of cooperative critical inquiry to surmise that “truth is not prior and immutable but is contingent” (13). See endnote 115 for more on Scott’s arguments.

¹²⁹ Mootz, “Rhetorical Knowledge,” 552.

¹³⁰ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 41.

¹³¹ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 41.

¹³² They are not alone in making this argument. When Vincent Wellman wrote about judicial justification in “Practical Reasoning,” he offered the following:

“I distinguish judicial justification from the more general category of legal reasoning. In particular, I argue that our concern over a court’s justification for a decision focuses on the validity of the arguments adduced in support of the decision. Judicial justification is therefore distinct from the cognitive or psychological stages that an individual judge may go through before reaching a conclusion in a particular case.” (45)

¹³³ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 43.

¹³⁴ Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge: Harvard University Press, 1969), 9.

¹³⁵ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 43.

¹³⁶ Makau, “The Supreme Court and Reasonableness,” 379. Emphasis added.

¹³⁷ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 580.

¹³⁸ Kurt M. Saunders, "Law as Rhetoric, Rhetoric as Argument," *Journal of the Association of Legal Writing Directors* 3 (Fall 2006):170-171.

¹³⁹ Saunders, "Law as Rhetoric," 166.

¹⁴⁰ Wellman, "Practical Reasoning," 53. James Boyd White suggests that this separation between opinion and result is a common one: "In speaking of criticism of judicial opinions I mean to accept, though only for the moment, the rather common separation of the opinion from the result, the form from the content, and to focus upon the former: the text in which the judge explains or justifies or otherwise talks about the decision that he, and his court, have reached in the particular case." White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), 91.

¹⁴¹ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 44, emphasis added.

¹⁴² Scallen, "Classical Rhetoric," 1731.

¹⁴³ Robert A. Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law & the Humanities* 2 (1990): 215.

¹⁴⁴ Hasian, *Legal Memories and Amnesias*, 13.

¹⁴⁵ James Boyd White, "What's an Opinion For?" 1366.

¹⁴⁶ Wald, "The Rhetoric of Results," 1374-1375. Wald asserts that "there is indeed a worrisome 'lost horizon' aspect to no-opinion dispositions. Even when judges agree on a proposed result after reading briefs and hearing argument, the true test comes when the writing judge reasons it out on paper (or on computer)."

¹⁴⁷ Wald, “The Rhetoric of Results,” 1375.

¹⁴⁸ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 21.

¹⁴⁹ Warren E. Wright, “Judicial Rhetoric: A Field of Research,” *Speech Monographs* 31 (1964): 65.

John C. Day echoes this conclusion in his article “Individualism and the Public Sphere?: A Case Study in Legal Argument” in *Argument in a Time of Change: Definitions, Frameworks, and Critiques*, ed. James F. Klumpp (Annendale, VA: NCA, 1997): “While this is not to say that justices have complete discretion to decide cases in any way that they choose, they do have some degree of ‘free play’ in making their decisions” (353).

¹⁵⁰ Ferguson, “Judicial Opinion as Literary Genre,” 206-207.

¹⁵¹ Cardozo, *The Nature of the Judicial Process*, 28.

¹⁵² Makau, “The Supreme Court and Reasonableness,” 379-396.

¹⁵³ Christie, *Notion of Ideal Audience*, 19.

¹⁵⁴ Christie, *Notion of Ideal Audience*, 20.

¹⁵⁵ Josina M. Makau, “Adapting the Judicial Model of Reasoning to the Basic Argumentation and Debate Course,” *Communication Education* 34 (1985): 228.

¹⁵⁶ Wald, “The Rhetoric of Results,” 1385.

¹⁵⁷ Perelman, *The Idea of Justice*, 138.

¹⁵⁸ Perelman, *The Idea of Justice*, 139.

¹⁵⁹ Perelman, *The Idea of Justice*, 139.

¹⁶⁰ Perelman, *The Idea of Justice*, 139, italics in the original.

¹⁶¹ William O. Douglas, *The Court Years 1937-1975* noted that, “[a]s the years passed, it became more and more evident that the law clerks were drafting opinions.” Saunders, in “Law as Rhetoric, Rhetoric as Argument,” 164-176, argues that legal arguments depend on evidence including briefs from the parties involved, from *amicus* briefs on interested parties, and from information related to the case researched by the law clerks. Legal arguments also depend on “available legal authority to justify the acceptance of a claim,” according to Saunders. See also: Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005).

¹⁶² LeFevre, *Invention as a Social Act*, 2.

¹⁶³ Makau, “Adapting the Judicial Model,” 228, paraphrasing from James L. Golden and Josina M. Makau, “Perspectives in Judicial Reasoning,” in *Explorations in Rhetoric*, ed. Ray E. McKerrow (Glenview, IL: Scott, Foresman and Co., 1982), 157-178.

¹⁶⁴ LeFevre, *Invention as a Social Act*, 2.

¹⁶⁵ Lauer, *Invention in Rhetoric and Composition*, 10. Michael Calvin McGee explicates the rhetorical basis of intertextuality in contemporary culture, described the term “text” as problematic in modern times because it treats bits of discourse as “finished, whole, object[s] of critical analysis and consumption by an audience or readers,” thus reifying a text/context dichotomy. He posits that we look instead at the relationships between the apparently finished discourse and its sources (other texts and discourses), its cultural roots, and its influence. See McGee, “Text, Context, and

the Fragmentation of Contemporary Culture,” *Western Journal of Speech Communication* 54 (1990): 274-289.

¹⁶⁶ Hasian, *Legal Memories and Amnesias*, 13.

¹⁶⁷ Ideology is a collection of interrelated convictions, produced in political language and preserved in historical documents, that control and influence the beliefs and behaviors of the public, including the rulemakers, rule-enforcers, and the rules-subjects. See Edwin Black, “The Second Persona,” *Quarterly Journal of Speech* 56 (1970): 109-119, and Michael Calvin McGee, “The ‘Ideograph’: A Link between Rhetoric and Ideology,” *Quarterly Journal of Speech* 66 (1980): 1-16.

¹⁶⁸ Michael Leff and Andrew Sachs, “Words the Most Like Things: Iconicity and the Rhetorical Text,” *Western Journal of Speech Communication* 54 (1990): 256.

¹⁶⁹ Alan Hunt, “Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law,” *Law & Society Review* 1985: 16.

¹⁷⁰ Philip Wander, “The Ideological Turn in Modern Criticism.” *Central States Speech Journal* 34 (1983): 1-18 and “The Third Persona: An Ideological Turn in Rhetorical Theory.” *Central States Speech Journal* 35 (1984): 197-216.

¹⁷¹ Nicholas, *An Introduction to Roman Law*, 3.

¹⁷² Makau, “Adapting the Judicial Model,” 229.

¹⁷³ MacCormick, *Rhetoric and the Rule of Law*, 6.

¹⁷⁴ Oliver Wendell Holmes, *The Common Law*, ed. Mark DeWolfe Howe (Cambridge: The Belknap Press of Harvard University Press, 1963), 5.

¹⁷⁵ Karlyn Kohrs Campbell highlights the simultaneous ubiquitous and indigenous features of rhetoric, and points the cultural backdrop of rhetoric as the explanation for it:

Rhetoric is ubiquitous....The challenge is to discover its cultural forms and functions. [Secondly,] rhetoric is indigenous, linked to cultural history, traditions, and values. We recognize that Aristotle describes a rhetoric of the ancient Greek polis; all rhetoric and the theory that underlies it are as closely linked to time and place and culture as was Aristotle's....[W]e should be searching for the assumptions that inform the use of discourse in a particular cultural time and place.

See Campbell, "Cultural Challenges to Rhetorical Criticism" Symposium: Interdisciplinary Perspectives on Rhetorical Criticism in *Rhetoric Review* (2006): 360.

¹⁷⁶ Jack M. Balkin, "A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1999), 222.

¹⁷⁷ Leff, "Up from Theory," 207.

¹⁷⁸ Wright, "Judicial Rhetoric," 65.

¹⁷⁹ Katharina Sobota, "System and Flexibility in Law," *Argumentation* 5 (1991): 276.

¹⁸⁰ Rawls, *A Theory of Justice*, 580-581.

¹⁸¹ Rawls, *A Theory of Justice*, 581.

¹⁸² Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 65.

¹⁸³ Frost explains that Perelman is possibly the only contemporary rhetorician to blend classical inventional theory with contemporary legal rhetoric to good effect: “Only rarely...do modern rhetoricians or scholars devote much attention to how classical rhetoric applies to modern judicial or legal discourse. One exception is Chaïm Perelman, a widely respected, legally trained Belgian philosopher, whose *The Idea of Justice and the Problem of Argument* analyzes judicial uses of legal precedent in order to illuminate connections between classical and modern methods of legal argument. Perelman's *The Idea of Justice* and his *The New Rhetoric: A Treatise on Argumentation* emphasize, in ways that are reminiscent of the classical techniques of legal argument, modes of ‘nonformal logic which [can] ‘induce or increase the mind's adherence to theses presented for its assent.’” Frost, “Introduction to Classical Legal Rhetoric,” 635.

Similarly, Richard Leo Enos argues in a symposium on “Interdisciplinary Perspectives on Rhetorical Criticism: Classical Rhetoric and Rhetorical Criticism,” *Rhetoric Review* (2006) argues that “Chaïm Perelman and Lucie Olbrechts-Tyteca’s *The New Rhetoric: A Treatise on Argumentation* has extended the principles of Aristotelian rhetoric, offering much more sensitive and sophisticated heuristics for evaluating argumentation than classical systems provide.” (364)

¹⁸⁴ Makau, “The Supreme Court and Reasonableness,” 381.

¹⁸⁵ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 98-99. The authors explain that a singular *locus*, paired with a particular topic, situation, or another *locus*, may result in an entirely different argument than if the topic or situation changed. For instance, “associations and justifications of *loci* are sometimes the product of

circumstances, but such an endeavor may result from the adoption of a metaphysical position and may be characteristic of a certain outlook.” Thus “the same hierarchy, when given another justification, may lead to a different vision of reality.”

¹⁸⁶ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 99.

¹⁸⁷ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 65.

¹⁸⁸ 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, 1989), 18-19.

¹⁸⁹ Perelman, *The Idea of Justice*, 107.

¹⁹⁰ Benjamin N. Cardozo, “Law and Literature,” *Yale Law Journal* 48 (1939): 491. Cardozo continues: “We are merely wasting out time, so many [lawyers] will inform us, if we both about form when only substance is important. I suppose this might be true if any one could tell us where substance ends and form begins....Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity....The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance. They are tokens of the thing’s identity.” (490-491)

¹⁹¹ Mootz, “Rhetorical Knowledge,” 572.

¹⁹² Makau and Lawrence conclude that “[our] uncovering [of] three judicial inventional strands—a rhetoric of efficiency, a revised rhetoric of reasonableness, and appeals to tradition and majoritarian ethics—reveals how judicial discourse has been used to redefine the Court’s role and the world-view presumed for its audiences.”

Josina M. Makau and David Lawrence, “Administrative Judicial Rhetoric: The

Supreme Court's New Thesis of Political Morality," *Argumentation & Advocacy* 30 (1994): 191.

¹⁹³ Miller, *Supreme Court Uses of History*, 14.

¹⁹⁴ Leff and Sachs, "Words the Most Like Things," 270.

¹⁹⁵ Wald, "The Rhetoric of Results," 1386, 1377.

¹⁹⁶ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 101.

¹⁹⁷ Miller, *Supreme Court Uses of History*, 15.

¹⁹⁸ Miller, *Supreme Court Uses of History*, 15. Kenneth Burke speaks to the task of making sometimes contradictory and abstract promises of constitutional language meet the needs of the particular: "a constitution may, for instance, propound a set of generalized rights and duties, and all these may be considered as a grand promissory unity... Yet when, in the realm of the practical, a given case comes before the courts, you promptly find that this merger or balance or equilibrium among the Constitutional clauses becomes transformed into a conflict among the clauses—and to satisfy the promise contained in one clause, you must forego the promise contained in another." Burke, *A Grammar of Motives* (Berkeley: University of California Press, 1969), 349.

¹⁹⁹ Miller, *Supreme Court Uses of History*, 15.

²⁰⁰ Wald asserts in "The Rhetoric of Results" that, "In a close case, a would-be dissenter may agree to go along with a disfavored result if a disfavored rationale is avoided." (1379)

²⁰¹ Scallen, "Classical Rhetoric," 1726-1727. Wright agrees in his article "Judicial Rhetoric," where he argues that "American judicial rhetoric takes as its

content some of the subject matter that Aristotle in the *Rhetoric* allocated to forensic oratory and some that he assigned to political oratory. In other words, its concern is both with wrong doing and with such political issues as defense and ways and means.” (66) Wright notes the inventional benefits of such shared territory: “Not only does this duality affect decisions but also this duality provides the judges with two general sources for the material of their opinions.” (66-67)

²⁰² Aristotle, *On Rhetoric*, 110-11; Cicero, *On Invention*, 25-35; Pseudo-Cicero, *ad Herennium*, trans. Harry Caplan (Cambridge: Harvard University Press, 1954), 83-87.

²⁰³ L. H. LaRue devotes one chapter each – entitled respectively “The Story of Limits” (42-69) and “The Story of Growth” (70-92) – to this judicial habit in his book *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park: Pennsylvania State University Press, 1995).

²⁰⁴ Early in his description of the clause, Powell described the language as highly malleable: “the concept of ‘discrimination,’ like the phrase ‘equal protection of the laws,’ is susceptible to *varying interpretations*,” a fact which allowed it to “*flourish as a cornerstone* in the Court's defense of property and liberty of contract.”²⁰⁴ Yet, later in his opinion, Powell limits such open interpretation by stressing the dangers of interpreting statutes in light of social issues: “By hitching the meaning of the Equal Protection Clause to these *transitory considerations*, we would be holding, as a constitutional principle, that judicial scrutiny ... may vary with the ebb and flow of political forces.” Powell, *Regents v. Bakke* at 298, emphasis added.

²⁰⁵ Viehweg, *Topics and Law*, 30. Viehweg argues that this is true of constitutional interpretation, as well.

²⁰⁶ Perelman, *Justice, Law, and Argument*, 27.

²⁰⁷ Perelman, *Justice, Law, and Argument*, 27.

²⁰⁸ Makau, “The Supreme Court and Reasonableness,” 382.

²⁰⁹ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 102.

²¹⁰ H.L.A. Hart, “Introduction” in Chaïm Perelman, *The Idea of Justice and the Problem of Argument*, trans. John Petrie (Routledge & Kegan Paul Limited: London, 1963), x-xi.

²¹¹ Perelman, *The Idea of Justice*, 104.

²¹² This was, in part, why precedent was not a foundational concept to Greco-Roman jurisprudence. Greek legal argument did not have the benefit of time or of extensive written laws on which to develop precedents. Moreover, there were no authoritative bodies or figures such as judges or higher courts on which to base *stare decisis*. Roman jurisprudence used starting points similar to precedent, but for reasons of authority rather than consistency: well-respected jurists who had previously written their opinions about particular cases were sometimes appealed to in future cases. However, there was no “rule of law” that established an expectation of consistency across time, and justifications for decisions were not generally offered, precluding robust precedential development.

²¹³ Eric Charles White, *Kaironomia*, 17-18.

²¹⁴ Perelman, *Justice, Law, and Argument*, 135.

²¹⁵ Miller, *Supreme Court Uses of History*, 17.

²¹⁶ Wright, “Judicial Rhetoric,” 65.

²¹⁷ Wright, “Judicial Rhetoric,” 65.

²¹⁸ Craig Allen Smith and Kathy B. Smith, “The Rhetoric of Political Institutions,” in *New Directions in Political Communication: A Resource Book*, ed. Davis L. Swanson and Dan Nimmo (Newbury Park, CA: Sage, 1990), 231-232.

²¹⁹ Wald, “The Rhetoric of Results,” 1377-1378. Wald offers: “Predictably, then, most judges will compromise their preferred rationale and rhetoric to gain a full concurrence from other members of the panel.” (1377)

²²⁰ Wald, “The Rhetoric of Results,” 1377. See also Ferguson, “Judicial Opinion as Literary Genre.”

²²¹ Wald, “The Rhetoric of Results,” 1378.

²²² Richard H. Fallon, Jr., *Implementing the Constitution* (Cambridge: Harvard University Press, 2001), 5.

²²³ Powell wrote to Comfort about Comfort’s attempt at a draft opinion in *Bakke*: “Part II addresses primarily the level of scrutiny issue. Without Brennan it is sometimes difficult to obtain majority consensus on standards (perhaps terminology) of E/P analysis. Altho [*sic*] I think *all* racial clarifications must be subjected to same level of scrutiny, I would like to minimize the repetitive use of phrases such as ‘strict scrutiny.’ Racial classifications are ‘suspect’; therefore they may be sustained only when the...state interest is substantial enough to be deemed compelling in the public interest.” Justice Lewis F. Powell, Jr., notes on revisions, entitled “Bob,” undated, Bakke files, IV: Drafts – Memos to conference, Justice L. Powell Archives, Washington and Lee University, Lexington, VA.

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- ²²⁴ Walter R. Fisher, "Rationality and the Logic of Good Reasons," *Philosophy and Rhetoric*, 13 (1980): 128.
- ²²⁵ Alexy, *A Theory of Legal Argumentation*, 19.
- ²²⁶ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 104.
- ²²⁷ Perelman, *The Idea of Justice*, 156, italics in the original.
- ²²⁸ Makau and Lawrence, "Administrative Judicial Rhetoric," 191.
- ²²⁹ Makau, "The Supreme Court and Reasonableness," 382.
- ²³⁰ Don R. Le Duc, "'Free Speech' Decisions and the Legal Process: The Judicial Opinion in Context," *Quarterly Journal of Speech* 62 (1976): 279.
- ²³¹ Miller, *Supreme Court Uses of History*, 6.
- ²³² Peter Brooks, "The Law as Narrative and Rhetoric" in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), 20; Peter Goodrich, "Semiotics, Dialectic, and the Law: Historical Aspects of Legal Interpretation," 61 *Indiana Law Journal* 331 (1986): 331-354.
- ²³³ Michael J. Petrick, "The Supreme Court and Authority Acceptance," *The Western Political Quarterly* 21 (1968): 5.
- ²³⁴ Perelman, *Justice, Law, and Argument*, 121.
- ²³⁵ Robert G. McCloskey, *The American Supreme Court*, ed. Daniel Boorstin (Chicago: University of Chicago Press, 1960), 23.
- ²³⁶ *Marbury v. Madison* 5 U.S. 137 (1803) at 177-178. Emphasis added.
- ²³⁷ MacCormick, *Rhetoric and the Rule of Law*, 4.
- ²³⁸ MacCormick, *Rhetoric and the Rule of Law*, 5. Emphasis added.

²³⁹ Miller, *Supreme Court Uses of History*, 6.

²⁴⁰ Miller, *Supreme Court Uses of History*, 20.

²⁴¹ Miller, *Supreme Court Uses of History*, 25.

²⁴² Miller, *Supreme Court Uses of History*, 1.

²⁴³ Ferguson, “Judicial Opinion as Literary Genre,” 215.

²⁴⁴ Miller, *Supreme Court Uses of History*, 25.

²⁴⁵ Hasian, *Legal Memories and Amnesias*, 13.

²⁴⁶ Miller, *Supreme Court Uses of History*, 25.

²⁴⁷ By offering parameters of a “legal culture,” I hope not to reify the bifurcation of legal culture from public culture. Like Hasian, I agree that “we need to appreciate the ways in which reasoning within a courtroom or a legislative chamber interacts with the broader ‘rhetorical culture,’” and I discuss the reliance upon publicly shared ideologies and arguments later in this Chapter. See Hasian, *Legal Memories and Amnesias*, 13.

²⁴⁸ James Boyd White, *Justice as Translation*, xvi.

²⁴⁹ James Boyd White, *Justice as Translation*, xiv.

²⁵⁰ Glenda Conway, “Inevitable Reconstructions: Voice and Ideology in Two Landmark U.S. Supreme Court Opinions,” *Rhetoric & Public Affairs* 6 (2003): 489, italics in the original.

²⁵¹ Conway, “Inevitable Reconstructions,” 490.

²⁵² Peter Brooks and Paul Gewirtz, ed. *Law’s Stories: Narrative and Rhetoric in the Law*, (New Haven: Yale University Press, 1999); Drucilla L. Cornell, “Institutionalization of Meaning, Recollective Imagination, and the Potential for

Transformative Legal Interpretation,” *University of Pennsylvania Law Review* 136 (1988): 1135-1229; Duncan Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology,” *Journal of Legal Education* 36 (1986): 518-562; Miller, *Supreme Court Uses of History*; Theodore O. Prosise and Greg R. Miller, “Argument Fields as Arenas of Discursive Struggle,” *Argumentation & Advocacy* 32 (1996): 111-129.

²⁵³ Perelman, *Justice, Law, and Argument*, 78. This legal fiction has been used since ancient Rome. The Roman Praetor, who had no authority to write or change laws, suggested to Roman judges what legal actions were relevant and available in particular cases. According to Nicholas, “By creating a new form of action or extending an old form to new facts [the Praetor] could in effect create new rights. In form there was merely a new remedy, in substance there was new law” (19-20). See footnote 63 for more details.

²⁵⁴ Perelman, *Justice, Law, and Argument*, 78.

²⁵⁵ Miller, *Supreme Court Uses of History*, 4.

²⁵⁶ Cornell, “Institutionalization of Meaning,” 1135-1229.

²⁵⁷ Cornell, “Institutionalization of Meaning,” 1222.

²⁵⁸ When accessing Justice Powell’s archival materials as a primary source, as an author I realize that these materials are themselves mediated. They were submitted by Justice Powell himself to the law library for which he is an alumnus. In her essay, Barbara A. Biesecker, “On Historicity, Rhetoric: The Archive as Scene of Invention” *Rhetoric & Public Affairs* 9 (2006), she warns researchers against the perils of “fetishizing” archival materials. Because it physically exists, is tangibly “real,” we

can be tempted to jump the step of questioning the *construction* of history because it doesn't seem constructed – it seems “a glimpse of the past *as it was*” (126, quoting Renaissance scholar James A. Knapp). Beiseker does not think that such an observation “reduce[es] the contents of the archives to ‘mere’ literature or fiction...but [rather] delivers that content over to us as the elements of rhetoric.”

(130) Thus, archival researchers should remind ourselves of the inventional nature of archived collections, and “that the archival object is, as Jacques Derrida explained some time ago, given to us as a trace” (126).

²⁵⁹ Leff, “Up from Theory,” 208.

²⁶⁰ Perelman, *Justice, Law, and Argument*, 131.

²⁶¹ James Boyd White, *Justice as Translation*, 90, 91.

²⁶² In 2003, Justice O'Connor expressed hope that, in 25 more years we would no longer need affirmative action, so that the *Bakke* and *Grutter* decisions would be moot. “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 increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” *Grutter v. Bollinger* 539 U.S. 306 (2003).

²⁶³ Makau, “The Supreme Court and Reasonableness,” 390-391.

Chapter Two:

American Rhetorical Traditions about Racial Equality

Regents of the University of California v. Bakke (1978) represented the convergence of social, political, and legal struggles over which ideological principles should guide our thoughts and actions about racial inequities in the United States. Richard K. Sherwin notes that “notorious legal cases” such as *Bakke* “are social dramas that take place on a field of embattled discourse where contested stories, metaphors, and character types vie for dominance in the culture at large.”¹ In *Bakke*, narratives about “the American dream,” the history of slavery, immigration and assimilation, and the role of higher education in social and economic progress comprised the field of discourse. As these dimensions were reflected in law, the Supreme Court was asked to respond to conflicting arguments about which remedies would best resolve existing economic, social, and civil liberty disparities between races.

This chapter examines the relationship between race and American law, the contextual factors surrounding the *Bakke* case, the rhetorical trajectories of the parties involved, and the public values that were manifested in the legal arguments. In doing so, this chapter also explicates how various political actors, and ultimately Justice Lewis Powell in his decision, shifted the rhetorical grounds on which actions were justified to alleviate ongoing racial inequalities from the ideological commitment to “equality” to the commitment to “diversity” as a constitutionally laudatory – or, at

least permissible – goal. As Robert Post asserts, “Powell’s opinion...was designed to work as an ideological construct, not merely as a functional one.”²

Although values such as equality might be appreciated as universal, when policies purporting to embody those principles into question one discovers that “criticism and justification are always found in a historically determined context.”³ This chapter highlights that historical context, examining the discourses about colorblindness, race consciousness and racial pride, assimilation, diversity, and multiculturalism in order to trace the rhetorical history of affirmative action justifications. Michael McGee outlined the mutually reinforcing dimensions of any ideology: one being a “grammar” consisting of “a historically-defined diachronic structure of ideograph-meanings expanding and contracting from birth of the society to its ‘present,’” and the other a rhetorical architectonic consisting of “a situationally-defined synchronic structure of ideograph clusters constantly reorganizing itself to accommodate specific circumstances while maintaining its fundamental consonance and unity.”⁴ This chapter traces the diachronic and synchronic dimensions of race as the ideological structure, because, as McGee argues, “both of these structures must be understood and described before one can claim to have constructed a theoretically precise explanation of a society’s ideology, of its repertoire of public motives.”⁵ It does so because the *Bakke* decision cannot be read as separate from the social and political forces occurring at the time of the decision; likewise, the emergence and negotiation of the value of diversity pre-existed Powell’s particular iteration of it in relation to education. Affirmative action is but one framework under which diversity works, and it has not always been part of affirmative action’s mission.

Ideological Foundations of the Bakke Case

The arguments surrounding the *Bakke* case, both pre- and post-opinion, reveal the symbiotic relationship between public arguments and those arguments addressed to and through legal institutions. Exploring how the various communities interested in the use of race as a consideration in college admissions justified their arguments to the Supreme Court, which ideological factors were at stake, how the justices wrestled with the arguments from these communities and with their own concerns, and how the opinions, once handed down, were presented to the public, as well as subsequent public usages of the arguments, can help to explicate this relationship.

The *Bakke* decision is not only an answer to a question; it is a marker for a significant ideological shift from reliance on equality to the celebration of diversity in the consideration of racial inequities. Considering the widespread use of the term “diversity,” such an exploration can contribute to an understanding of shifting ideological commitments when motivated citizens attempt to alleviate disparities bearing the imprint of systematic racism. What has been called the “diversity rationale” by legal scholars takes on broader public meaning after consideration of the rhetorical invention process that led to the conclusion. The law articles begin and end the exploration at diversity’s constitutionality, with perhaps a stretch into its effects on law, at the expense of exploring how the commitment to diversity came to be considered in the first place.

Instead, this chapter focuses on the emergence of diversity as a proposed nationwide ideological commitment sanctioned by the Supreme Court. As with the *Bakke* case, most scholarship that examines the concept of diversity does it from a

constitutional perspective, treating that document from a legal formalist perspective – it either does or does not allow for diversity, for instance, or it either is or is not color-blind.⁶ Such studies provide little recognition of the constitutive function of the law in any way.⁷ Laws and their interpretations construct physical, moral, and ideological meanings of racial categories in ways that codify, manipulate, and sometimes contradict broader social conceptions of race.⁸

Ideological critiques of rhetorical discourses have been a central effort for contemporary rhetorical critics. Ideology is a collection of interrelated convictions, produced in political language and preserved in historical documents, that control and influence the beliefs and behaviors of the public, including both the ruler(s) and the ruled.⁹ It points the audience(s) toward certain values and away from alternative world-views.¹⁰ Ideology, defined in this way, is more of a social process than a deterministic force. Ideology “draws its power from its ability to connect and combine diverse mental elements (concepts, ideas, etc.) into combinations that influence and structure the perception and cognition of social agents.”¹¹ Thus, an ideological focus recognizes the naturalized political assumptions that work in and through texts, subject to change through confrontation with social exigencies and conflicting ideological beliefs.

Ideological criticism shares the mission of rhetorical history because tracing ideological strains in arguments attempts “to describe human life from the perspective of history – from our knowledge that our values, judgments of preceding generations may function to constrain or liberate presently living generations.”¹² Furthermore, ideological criticism focuses our minds on the competing tensions or contradictions

of our society.¹³ The negotiation of these tensions is particularly well suited to the public address form, where leaders are primary actors in reifying political ideology, but must also negotiate the demands of various publics.

This demand is as true for legal leaders as it is for political leaders. For the same reasons, ideological criticism is well suited for addressing legal discourses as a form of public address.¹⁴ Laws do not merely impose the wills of those in power on the public: they introduce individual and collective subjectivities by making publics the bearers of particular rights and duties.¹⁵ By assuming particular needs and duties, and by casting itself as the giver and defender of those rights and duties, the legal process itself has ideological force. Additionally, the subject matter of legal discourse – especially at the Supreme Court level – often carries ideological weight. The *Bakke* case is intriguing because it reflects the continuing struggle within civil rights movements and in institutional responses to these movements: an attempt to balance integrationist ideals with the need for reparations and the maintenance of an autonomous identity.¹⁶

American Multiculturalism

Despite belief that multiculturalism is a mid- to late-twentieth century enlightenment, it is the term, not the social phenomenon, which is new.¹⁷ A multiplicity of cultures has been a social reality for at least as long as colonies of various immigrants settled on land inhabited by native Americans, each with their own cultural habits. Contemporary usages of the term “multiculturalism” evoke 19th and 20th century debates over assimilation and cultural pride; and because the term is relatively new, “many incorrectly conclude that multiculturalism is therefore a fairly

new social phenomenon, the product of a changing world and of changing government policies.”¹⁸

Vincent N. Parrillo argues that such an assumption stems from two fallacies. The first is a fallacy of cultural homogeneity, holding the idea that the thirteen colonies were “almost entirely populated by immigrants and their descendents from the British Isles” who largely shared cultural beliefs and habits, and thus either required no assimilation or quickly merged cultures.¹⁹ The extension of this misconception is the belief that “the cultural diversity that exists in America is...different, more widespread, and resistant to assimilation – something to be celebrated, respected and maintained, say its proponents – thus making it, in the eyes of alarmed others, not only a new construction but somehow also a threat to the cohesiveness of American society.”²⁰

However, early “white” colonial settlements had separate ethnic enclaves, and their names reflect their native ethnicities, including New England, New Belgium, New Netherland, New Sweden, New Iberia, New Orleans, and New Smyrna.²¹ Some enclaves became multicultural quickly – like Philadelphia and New Amsterdam (Manhattan) – while others, including Germans and Scots-Irish, maintained separate communities for quite some time.²² Additionally, the proportion of people whose ethnicities were not part of these traditionally-considered colonial ethnic groups was substantially higher than today’s numbers. According to Parrillo:

As the colonial period drew to a close, 53% of the population in the 13 colonies belonged to racially and culturally distinct minorities, more than twice the proportion in 1990. The 1990 census tabulations show Asians at

3%, blacks at 12%, Hispanics at 9%, and Native Americans at 1% for a total of 25%. In 1776, just African and Native Americans equaled that figure. Racial and ethnic outgroups thus comprised a greater portion of the total population than in the 1990s.²³

A second and related fallacy is “the erroneous assumption that what occurred in the past were fleeting moments of heterogeneity that yielded to fairly rapid assimilation.”²⁴ The changing conceptualization of race, the variant values placed on racial, ethnic, and cultural groups, especially the broadening and constricting category of “white,” have contributed to the perception of homogeneity. In the United States, the fluidity of racial categories is evidenced by the emergence or disappearance of certain categories as their social status was negotiated.²⁵ Anti-miscegenation laws, the definition of slaves as property of whites, and appeals of various racial and ethnic groups to be considered white or, at least, not black, in order to receive better treatment indicate the simultaneously privileged and fluid status of whiteness.²⁶ The classification of whiteness changes with the make-up of the nation, but the status of whiteness has remained at the top of the social hierarchy, conferring privileges of both the material and psychological sort.²⁷ For members of racial or ethnic groups not considered “white,” the options have generally been a choice between attempts to assimilate or to argue for cultural pluralism.²⁸

Disparate treatment based on racial classification has been met with calls for “equality;” yet variant notions of equality, tied to the similarly abstract concept of justice, are central to the conflict about how to alleviate racial disparities. Chaïm Perelman’s *Justice, Law, and Argument*, discusses the idea of justice as a value

foundational to legal rhetoric and synchronically linked to the idea of equality. Perelman describes at least six distinct conceptions of justice: to each the same thing, to each according to his/her merits, to each according to his/her works, to each according to his/her rank, and to each according to his/her legal entitlement.²⁹ The rhetorical force of the term rests in its multiplicity, which allows different communities to value different conceptions of equality simultaneously, while allowing a unified theme for all.³⁰ Yet its multiplicity makes it cumbersome to achieve in practice, because “to everyone the idea of justice inevitably suggests the notion of a certain equality...But this perfect equality, as everyone once realises, cannot be achieved in practice.”³¹

Most parties interested in affirmative action profess to value “equality” in some sense, but the different iterations of equality, like the different iterations of justice outlined by Perelman, contribute to dramatically different outcomes in the conversation. Opponents of affirmative action argue that the same standards must be applied equally, without regard to race, while proponents of affirmative action focus on the equality of results. Some proponents of affirmative action have called the act “equalization,” with an attempt to resolve the conflict by tying the equality of opportunity to the equality of results via a timeline with a goal for when the results are reached.³² Terry Eastland and William J. Bennett note the centrality of equality to all parties in *Bakke*:

For whatever disagreements the *amici* and other parties on both sides had among themselves in *Bakke*, they all agreed that equality as an ideal has a

special status in American history, and that the meaning of equality as an ideal is what should govern interpretation of the Fourteenth Amendment.³³

These differences emerge from diachronic and synchronic linkages between equality and other historically determined and contextually-driven ideologies. Justice Powell's evocation of diversity as the primary principle justifying affirmative action can be better understood by examining its ideographic clusters, epistemological undercurrents and their rhetorical legacies, and situational exigencies.

The most consistent appeals have been the rhetorics of assimilation and of race consciousness. As Gary Peller argues, the collective memory of civil rights gains constructs "a sense of linear evolution [that] has lent an aura of inevitability to the story, as if progression from the racial caste system of American slavery to the widespread acceptance of integration and the transcendence of race consciousness as the unquestioned goals of social progress was historically determined."³⁴ Yet the struggle for racial justice "has been neither linear nor inevitable."³⁵

Individualist Ideology

Variant approaches to racial equality occur, in part, because the group-status of racial categories is read as onerous to individualism, a major tenet of liberal political ideology.³⁶ Peller argues:

the struggle against racism can be related in a way that follows the basic script of liberal progress more generally. Race consciousness is associated with status-based social coercion, where individuals are treated in a particular way because of the arbitrary fact of membership in a social group they did not

choose...Freedom from racial discrimination is but one instance of the historical move from status to contract, from case to individual liberty.³⁷

American individualism stems from a liberal humanist tradition that privileges the self as rational, discrete from the larger social world (s)he inhabits, and with the agency to pursue his or her goals at will.³⁸ This combination of valuing individual hard work – especially in economic competition – with the belief that individual agency is the primary means and deciding factor of achievement discourages an understanding of collective disadvantage because of historical circumstances.³⁹

Because liberal ideology privileges individual agency as the source of power, the arguments in which it is embedded favor individualism over collective action, and critique appeals to group membership as the basis for rights. Appeals to colorblindness as a goal or outcome of laws and policies, then, pull from notions of individualism and separation from the larger social world. Race, according to colorblind belief, is a group category, and to categorize someone by race is to ignore his or her individual characteristics and agency.⁴⁰ Carl Cohen offers a good example of this reasoning: “Bigots, of course, will draw distinctions by race in their private lives. But private opinions, however detestable, are not public business. Under rules to be enforced by our body politic, bigotry is forbidden.”⁴¹

Questioning the legitimacy of race as a socially relevant category has been a consistent integrationist strategy. Carrie Crenshaw defines the rhetoric of colorblindness as “a cultural ideal that circumscribes our moral imaginings of a modern world without color prejudice.”⁴² Similar to the multiple conceptions of equality, Bryan K. Fair points out that two different notions of colorblindness exist.

The first was meant to eliminate a racial caste system that was entrenched in law – the elimination of laws that were intended to discriminate based on race will lead to racial equality.⁴³ A well-noted example of this usage is Justice John Marshall Harlan’s dissent to the separate-but-equal doctrine established in *Plessy v. Ferguson* (1896).⁴⁴ Far from denying the importance of race in culture or in law, Harlan was critiquing the fact that “the White race deems itself to be the dominant race in this country” and the majority opinion’s disregard for the fact that purpose of the Fourteenth Amendment was to protect African Americans.⁴⁵ Contemporary uses of colorblindness, however, coalesce around “the refusal of legislators, jurists, and most of American society to acknowledge the causes” and restricting the use of racial classifications in order to eliminate the effects of racial discrimination.⁴⁶

Late nineteenth and early twentieth century arguments about racial disparities used appeals to individualism to mediate the charge of “special privileges” for group membership. Soon after Congress established the Freedman’s Bureau, passed the Civil Rights Act of 1866, and ratified the Fourteenth and Fifteenth Amendments, conferring upon African Americans citizenship, due process, and voting rights, these Reconstruction acts were met with contempt by the Supreme Court, which held in the 1883 *Civil Rights Cases* that:

when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he *takes the rank of a mere citizen*, and *ceases to be the special favorite of the laws*...⁴⁷

The persuasive value of individualism was embraced by Booker T. Washington, who saw it as step toward integration with white society. For Washington, education was a key to credibility for black Americans, because assimilation would occur through proof of worth, and education a way to prove worth. In his “Cotton States Exposition Address” delivered in September 1895, Washington argued for the need of education and hard work in order to be fully accepted into white society. Speaking to an audience of both white and black members, Washington placed individual effort above group pressure, rejecting “sentimentalism” of writing a poem in favor of individual work ethic and other “manly virtues” as the key to liberation:

No race can prosper till it learns that there is as much dignity in tilling a field as in writing a poem... The wisest among my race understand that the agitation of questions of social equality is the extremest folly, and that progress in the enjoyment of all the privileges that will come to us must be the result of severe and constant struggle rather than of artificial forcing. No race that has anything to contribute to the markets of the world is long, in any degree, ostracized. It is important and right that all privileges of the law be ours, but it is vastly more important that we be prepared for the exercise of those privileges. The opportunity to earn a dollar in a factory just now is worth infinitely more than the opportunity to spend a dollar in an opera house.”⁴⁸

Washington’s speech was largely considered a success by white newspapers.⁴⁹ At the same time, W.E.B. Du Bois critiqued Washington for his desire to placate the white South, leading to a path based on adjustment and submission. Group cohesion

and group pressure mattered, argued Du Bois, because substantive change could not occur at the individual level and – perhaps more importantly – Washington’s rhetoric of accommodation assumed that the end goal was to mimic white America, a strategy that disvalued the worth of black Americans.

Du Bois’s critique of Washington highlights the centrality of racial identity to the American tradition. In contrast with the liberal sense of individualism, the construction of racial categories has been central to placement within American social hierarchies. Even before the United States declared itself a sovereign nation, laws regulated the relationships between Europeans, Native Americans, and African Americans: “in those early years, the idea that race, instead of culture, determined an individual’s place in society became fixed.”⁵⁰ At the same time, the fluidity of racial categories is evidenced by the emergence or disappearance of certain categories as their social status was negotiated.⁵¹ Thus, Ian F. Haney López notes, “races are not biologically differentiated groupings but rather social constructions,” more about social identity and value than any scientific heuristic.⁵²

Racial categories find their meaning through social relations, and because they exist largely through discourse, they change meanings through discourse.⁵³ The fluid definition of race is especially salient when it comes to contemporary discussions of whiteness. The assumption of white superiority has been evoked in legal discourses through many avenues over the history of the United States. For example, Article I, Section 2 of the Constitution calculated representation and taxation by the number of free persons, excluded Native Americans, and counted all others into three fifths. The racial make-up of “free persons” was cleared of doubt by the first definition of

naturalized citizenship by Congress in 1790, which was limited to “free white person(s).”⁵⁴

The amorphous status of whiteness has increased, however, after egalitarian pushes for fair treatment of citizens of all races forced political and legal discourses to acknowledge and condemn such overt racial preferences.⁵⁵ Not aligned with any particular cultural traditions, whiteness is defined by its margins, by what it is not.⁵⁶ T. Alexander Alienikoff asserts that “to be born white is to be free from confronting one's race on a daily, personal, interaction-by-interaction basis.”⁵⁷ Yet Steven D. Farough points out that, as the nation's racial and ethnic makeup diversifies and race consciousness becomes more accepted in our national culture, whiteness also becomes more visible.⁵⁸ Its visibility opens it to critique, to change – and to the ability to demand equal treatment.

Race Consciousness

Critics of liberal colorblind ideology, such as Christopher Newfield, argue that such logic fails to recognize that “individual identity [is] simultaneously voluntary *and* involuntary,” and ignores “the history of racial progress in the United States derived at every point from race-conscious critiques of existing arrangements.”⁵⁹ Proponents of racial pluralism have claimed, not that individual identity and choice were irrelevant, but that:

hybridity, mobility, and freedom *coexisted* with a group-based life that societies assigned to the members of groups, particularly those that were disfavored. That meant that democracy depended on the recognition of the

political and economic realities created by that group life—by systemic racial inequalities, by ongoing racial disparities, by racism past and present.⁶⁰

The appreciation of pluralism has been as central to American democracy as has the sense of individualism evidenced in liberal political theory. In fact, contemporary political theorists assert that the combination of free association and multiple group associations form the “central elements of liberal and democratic aspects of [American] politics” by setting faction against faction in the free market of ideas that assured no single group total power.⁶¹

Some twentieth century attacks on racial domination have rejected the value of colorblindness in favor of race-consciousness; an articulation of racial worth, embracing non-white racial identity and working within that identity to attain economic, rhetorical, and political power that was otherwise difficult to come by. Race-consciousness appears as both an identity-forming theme and as a call to the national community to acknowledge and resolve discriminatory practices.⁶² The push for the merits of race-consciousness as both rhetorical strategy and coordinating action gained traction amid frustration with the inability to get the nation past its discriminatory practices. Garvey was an early proponent of separation via the back-to-Africa movement, using anti-assimilationist race-science arguments popular with white Americans of the early twentieth century as the foundation for his proposal:

Men and women of the white race, do you know what is going to happen?
You are either going to deceive and keep the Negro in your midst until you have perfectly completed your wonderful American civilization...your race pure and unmixed, [until you] cast him off to die in a whirlpool of economic

starvation...or, you simply mean by the largeness of your hearts to assimilate fifteen million Negroes into the social fraternity of the American race, that will neither be white nor black. Don't be alarmed! We must prevent both consequences. No real race loving white man wants to destroy the purity of his race, and no real Negro conscious of himself, wants to die, hence there is room for an understanding...The Negro must have a country, and a nation of his own....We have found a place, it is Africa and as black men for three centuries have helped white men build America, surely generous and grateful white men will help black men build Africa.⁶³

Race consciousness has taken various forms and is linked to divergent worldviews.⁶⁴ For some, like Garvey, racial separation was the answer to the futility of assimilation. Yet Black nationalism has taken different forms, including Booker T. Washington's separatist ideas of black advancement, among urban communities in response to Garvey's organizing efforts in the 1930s, in the Black Muslim movement, and among the middle class following Du Bois's critique of the NAACP's integrationist policy advocacy.⁶⁵ Martin Luther King Jr., a leader generally seen as the spokesperson for an idealistic integrated society based on colorblind legal practices, explained the logic of Black Power in his 1967 book: "for centuries the Negro has been caught in the tentacles of white power. Many Negroes have given up faith in the white majority because 'white power' with total control has left them empty-handed. So in reality the call for Black Power is a reaction to the failure of white power."⁶⁶

For some, the need for racial integrity was met through appeals to racial pluralism, an end-goal in itself; advocates for racial pluralism – including Du Bois, Angela Davis, Stuart Hall and Patricia Williams – saw racial identity “as a fluctuating sociocultural phenomenon that both acknowledged settled historical patterns of differentiation and...multiple identities” and found the solution to racial domination in mutual appreciation for multiple cultural identities.⁶⁷

For others, race consciousness was a needed step toward the goal of integration.⁶⁸ A belief in race-conscious solutions does not mean that all advocates of race consciousness eschew colorblind integration as a goal. King consistently galvanized the African American community behind an integrationist vision “fused with images of religious and moral transcendence” that appealed to central features of the African American community as the vehicle for national change.⁶⁹ A number of affirmative action proponents base their arguments of race consciousness on the goal of a fully integrated, colorblind society.⁷⁰ These arguments usually come from two directions: first, that current workplaces and universities have few enough minorities to foster a tokenism mentality, and that continued affirmative action efforts will accustom our eyes, so to speak, to color; and second, that affirmative action is needed until the economic and social effects of past discrimination are substantively overcome, after which America can live by colorblindness doctrine.

As an official arbiter of conflict, legal discourse has been a central scene of contested meanings of race and a gateway in attempts to eliminate racial injustice. Crenshaw asserts that “court decisions have historically bestowed or undermined the symbolic and material legitimacy of [conceptions of race and racism], often

maintaining and protecting white privilege.”⁷¹ To argue that the law contributes to the construction of race in certain ways is not to assert that the legal construction of race is a coherent or totalizing act. As James Boyd White suggests, the law is but one discursive community among many that contribute to our national understanding of race.⁷² Not only is it influenced by political and social discourses, but there is rarely a unified definition of race that emerges from any single legal discourse. Instead, argues López, “the legal construction of race pushes in many different directions on a multitude of levels, sometimes along mutually reinforcing lines but more often along divergent vectors, occasionally entrenching existing notions of race but also at other times or even simultaneously fabricating new conceptions of racial difference.”⁷³ Messages that the public receives from the Supreme Court about the importance of race as a category may sometimes be contradictory; for instance, “court decisions might appear to negate certain social patterns...while being essentially compatible with socioeconomic conditions that continue racial discriminatory practices.”⁷⁴

Rhetorics of Assimilation and Race Consciousness in 20th Century Public Discourse

As the epistemological traditions of societies change, so too do the authorities who are marshaled to uphold and restructure racial categories, including science, religion, government, or law.⁷⁵ Paul Rego asserts that: “Many economists, sociologists, political scientists, and historians, from 1865 to 1901, had applied Darwin’s theories of adaptability and change to their own disciplines and...made ‘survival of the fittest’ not just the law of nature but also the law of society.”⁷⁶ For race scientists, “all moral, mental, physical, social, and cultural abilities were inherited from one’s parents,” and they argued that different races were either

“sexually repelled by one another,” or a best “extremely biologically undesirable.”⁷⁷ Because race was defined as a biologically predetermined state, under which morals and culture were engrained, not only were interracial families considered undesirable; similarly improbable was the possibility of social or cultural assimilation.

Abolitionists such as former slave and renowned orator Frederick Douglass addressed this biological construction of ethnocultural worth, combating the assertion that African Americans were less “human” than European Americans to white audiences – one of many fallacious arguments that had been used to justify slavery and Jim Crow.⁷⁸ In Douglass’s commencement address to mostly white audience of the Western Reserve College, entitled “The Claims of the Negro, Ethnologically Considered,” he methodically countered the ethnological claims that blacks were not human, using geographical, historical, and ethnological evidence.⁷⁹ Marcus Garvey, another leading orator with more separationist goals than the mostly assimilationist arguments of Douglass, similarly met these claims of biological inferiority, pleading with white audiences to recognize the humanity of African Americans, or, if not, to let African Americans return to Africa: “Negroes are human beings – the peculiar and strange opinions of writers, ethnologists, philosophers, scientists, and anthropologists notwithstanding...Let the white race stop thinking that all black men are dogs and not to be considered as human beings.”⁸⁰

Dennis J. Downey argues that the late nineteenth to early twentieth century advocacy of assimilation “was initially a liberal response to exclusionist arguments that suggested the impossibility of assimilating non-‘Nordic’ races into American society and reflected changing ideas about human social differences.”⁸¹ James

Golden and Richard Rieke consider the rhetoric of assimilation to be the most “durable or universal” rhetorical strategy with which to achieve freedom, equality, and dignity, because its appeals to Christianity, its basis in the liberal ideology of personal worth through education and hard work, and its advocacy for slow-working legislative and judicial action to ensure equality and freedom through law were all conservative enough to be relatively non-threatening to resistant white audiences and accommodating enough embrace multiple audiences.⁸²

Angela Ray complicates this summary of the rhetoric of assimilation, arguing that although “we customarily think of cultural assimilation as a means by which individuals are changed through absorption in the traditions and practices of a group,” such an assumption “presupposes the free choice of the individual to join the group, the acceptance of the individual by the group, and relative parity in power among group members, old and new.”⁸³ This model does not explain how assimilation is to occur when one group has been oppressed by a dominant group; thus, “it does not explain the purposes and goals of those U.S. abolitionist and early civil rights advocates who assumed an assimilationist-integrationist position.”⁸⁴ Ray observes that Douglass “both enacted and argued for social change that did not merely adapt African Americans to the norms of a fixed white American culture but rather challenged cultural fixedness itself, promoting an ‘American’ culture encompassing differences, in which biological variation did not determine cultural hierarchies.”⁸⁵

The promotion of an American culture which encompassed differences was a shared mission at the turn of the century, evidenced by the huge popularity of a play entitled “The Melting Pot,” which ran in the United States from 1908 to 1909. British

author and political activist Isreal Zangwill penned the script, which he eventually dedicated to Theodore Roosevelt, who was a big fan of the play.⁸⁶ Zangwill, the child of Jewish parents who emigrated to England from Russia, based the play on the metaphor of a crucible: a fairly violent process of melting down metals to extract their pure essence, to mix metals, and to pour them into molds. Zangwill's play dramatized what he saw as God's mission of removing the "barbarian" features of fifty European "tribes" that he identified, thus forging a new "American mold" devoid of any lingering ethnic or cultural habits from immigrants' pre-American homelands.⁸⁷ This metaphor was critiqued, first for suggesting that metallurgy mixes different metals – it in fact purifies each metal and blends purer versions – and second, for advocating such a mix. A 1918 report in the *New York Times* on the dinner of the Intercollegiate Menorah Association quoted Jewish community leader Louis Marshall as saying that Zangwill's vision is a faulty one; the melting pot "produces mongrelism," an effect contrary to the nation's goals because "our struggle should be not to create a hybrid civilization, but to preserve the best elements that constitute the civilization we are all seeking, the civilization of universal brotherhood."⁸⁸

The discourse of Theodore Roosevelt reflects the tension between the belief in race science and the want for a civic nationalism of unified culture.⁸⁹ Unlike the strongest proponents of racial purity, Roosevelt embraced Zangwill's melting pot metaphor of racial and religious hybridity – assuming that the races to be mixed were of European origin.⁹⁰ Roosevelt's melting pots "always, and deliberately, excluded

one or more races—usually blacks, often Asians and American Indians.”⁹¹ Roosevelt explained the line drawn between acceptance and rejection in an editorial:

I have no sympathy with mere dislike of immigrants; there are classes and even nationalities of them which stand at least on an equality with the citizens of native birth, as the last election showed. But in the interest of our workingmen we must in the end keep out laborers who are ignorant, vicious, and with low standards of life and comfort, just as we have shut out the Chinese [1883 Chinese Exclusion Act].⁹²

Immigrants from acceptable backgrounds were expected to leave their homeland allegiances at Ellis Island, according to Roosevelt:

The mighty tide of immigration to our shores has brought in its train much of good much of evil; and whether the good or the evil shall predominate depends mainly on whether these newcomers do or do not throw themselves heartily into our national life, cease to be Europeans, and become Americans like the rest of us... where immigrants do not heartily and in good faith throw in their lot with us, but cling to the speech, the customs, the ways of life, and the habits of thought of the Old World which they have left, they thereby harm both themselves and us. If they remain alien elements, unassimilated, and with interests separate from ours, they are mere obstructions.⁹³

Similarly, Woodrow Wilson criticized the idea of “hyphenated Americans”: “Some Americans need hyphens in their names, because only part of them has come over; but when the whole man has come over, heart and thought and all, the hyphen drops

of its own weight out of his name. This man was not an Irish-American; he was an Irishman who became an American.”⁹⁴

For Roosevelt and Wilson, the integration of new immigrants into a unified American culture was integral to the goals of nationhood. Vanessa Beasley argues that this has been a defining feature of presidential discourse: “If the stresses of living in a highly pluralistic democracy have convinced the American people that they share no common ties, then U.S. presidents, as symbolic guardians of the common good, may be in a unique position to reassure citizens that there is in fact a ‘national reason and rationality,’ and that they, too, are part of it.”⁹⁵ For this reason, both Roosevelt and Wilson rejected some of the more blatant separationist arguments that come from various American publics. For Roosevelt, the anti-Japanese sentiments that led to the “Gentlemen’s Agreement” of 1907, which barred further immigration of Japanese workers, were based on ignorant class struggles, even as he supported the Chinese Exclusion Act and endorsed racist constructions of Chinese Americans.⁹⁶ Wilson, as well as Presidents Cleveland and Taft, vetoed immigration restriction laws until Congress gained enough votes to override Wilson’s veto.⁹⁷

At the same time that African American leaders and white Presidents were arguing for assimilation, the rapid increase in immigration rates, especially from Southern and Eastern Europe, was met with an uprise in nativist feelings, paired with scientific methodologies that were evoked to support the separation of lesser-valued racial and ethnic group members.⁹⁸ The late nineteenth to early twentieth century advocacy of assimilation was largely targeted at these southern and eastern European immigrants, as well as Asian immigrants, and eventually embodied in the symbol of

‘Americanization’ articulated by Roosevelt. The Americanization movement, asserts Downey, began as a settlement movement seeking to assist large number of immigrants with adjusting to American society, especially to the poor industrial conditions into which many immigrants found work. Institutionalized under the North American Civic League in 1907, “Americanization” reformers brought in business and industry interests because of their associations with immigrant labor.⁹⁹ This merger meant that “initial motivations to assist immigrants were joined by motivations to rationalize labor supply,” a motivation further complicated by World War I, when war preparedness became a central focus.¹⁰⁰ With the wartime focus came increased nationalism and xenophobia, paired with the continuing need for immigrant labor, the new Americanization meant assimilating as rapidly as possible, while removing all traces of ‘foreignness’.¹⁰¹

Protestant missionaries were a large part of the assimilation movement, and worked both in conjunction with and at odds with the race science/eugenics movements. Both race scientists and missionaries held as their primary goals a “cure” for racial and cultural differences. For missionaries, the cure was conversion to Christianity, whereas race scientists promoted the separation or elimination of “lesser” races and cultures. Yet whereas earlier missionary discourses had focused on Western cultural superiority as assimilation, “the new missionary racial project which emerged by the 1920s placed theological value upon diversity and mutuality between racial and religious groups, and struggled...with the competing, and much more popular, racial project of exclusion, domination, and aggression.”¹⁰² Jennifer Snow explains:

Long years of experiencing a much greater and more complex world had a cumulative, transformative effect on missionary discourse. Where missionaries had once emphasized homogeneity through conversion, missionary theorists in the first decades of the twentieth century began, instead, to explore the virtues of diversity in race, religion, and culture.¹⁰³

In a rhetorical shift criticized as mere “sentimentalism” by proponents of eugenics, early twentieth century missionaries began to move from older assimilationist “melting pot” ideal, toward “a view of the world as a mosaic of many colors and cultures.”¹⁰⁴ Protestant minister Robert E. Speer was at the forefront of this liberal assimilationist movement, writing pamphlets criticizing the anti-Japanese Alien Land Law of 1917, giving speeches advocating the benefits of racial and cultural assimilation, including intermarriage between races, and writing two books addressing American misconceptions of race, in which he cited sources including W.E.B. Du Bois, Confucius, Booker T. Washington, Mirza Saeed Kahn, John Dewey, Franz Boas, Sir Narayan Charnavarkar, Cicero, and Marcus Garvey.¹⁰⁵ Pulling on his global travels, Speer concluded that race “was not an easily definable reality, perhaps not a reality at all. Race was perhaps simply an ‘obsession’ for some people, who assigned colors and characteristics of superiority and inferiority to ‘blood’ and believed that it assured hereditary status.”¹⁰⁶

Because the United States’ clearest racial obsession, with all of its status ramifications, had been the line drawn between black and white, citizens whose racial makeup fell somewhere in between were left to push for legal and social recognition of their individual and group identities.¹⁰⁷ For instance, the foundation for the *Plessy*

v. Ferguson (1896) case came from the frustration of a group of Louisiana natives with which Homer Plessy identified, called *Comite des Citoyens*. The *Comite des Citoyens*, a Creole group of mixed African, European, and Indian descent, considered themselves neither black nor white. The state of Louisiana enacted the Separate Car Act in 1890 requiring railroads to provide equal but separate cars for whites (European Americans) and blacks (African Americans), and the *Comite des Citoyens* objected to the black/white segregations that denied their separate identity.¹⁰⁸ They joined with several railroad companies (objecting to the economic burden of the act) that decided to test the constitutionality of the statute by choosing Plessy, a man with one-eighth black heritage and light-colored skin, to board the white car, announce that he was black, and refuse to move to the seats designated for blacks.

The Supreme Court's eight-to-one decision affirmed the states' rights to segregate based on race (leaving up to the states the method of determining what is considered "colored,") and further asserted that the practice of segregated railcars did not equate to a "badge of slavery" for the races, and was thus constitutional.¹⁰⁹ Justice Henry Billings Brown, who authored the opinion, articulated the race-science anti-assimilationist argument that the races did not want to mix, and that so long as each race had equal access, they were not required to.¹¹⁰ Justice Harlan's famous 1896 dissent to the separate-but-equal doctrine legitimized in *Plessy v. Ferguson* reveals integrationist arguments circulating at the turn of the century: "our Constitution is colorblind, and neither knows nor tolerates classes among citizens." Harlan also appealed to popular knowledge of the rhetorical motivations – the assumption of and protection of white superiority – behind the evocation of separate-

but-equal policies: “*Everyone knows* that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons.”¹¹¹

In contrast with this colorblind argument, Speer and others argued not that race was irrelevant, but that there is much to be gained by an appreciation for multiple cultures. The turn toward non-Western cultures for potential answers to urban industrial malaise was “crystallized in the philosophy of cultural relativism, popularized by Ruth Benedict in her widely read *Patterns of Culture* ([1934] 1959).”¹¹² Benedict argued as Speer did, “that relativism was demanded by the age in which they lived.”¹¹³ Seen this way, arguments for cultural assimilation devalued – or abolished – unique and valuable cultural identities. The influence of this pluralist mindset can be seen in the Indian Reorganization Act (IRA) of 1934, initiated by the commissioner for the Bureau of Indian Affairs as an “assault on assimilation,” with the goal of ending “the federal government’s official policy promoting assimilation of Native Americans and [seeking] to reinvigorate the communal societies and cultures that had been a target for extirpation for the previous century.”¹¹⁴

In the early twentieth century, this appreciation of cultural diversity and disdain for race science was met by a tide of rising race hatred, stemming from popularized race science and the belief that foreigners were communist radicals aiming for an American equivalent of the Bolshevik Revolution.¹¹⁵ Pluralist arguments were met with an increasing national obsession with the idea of “mongrelism,” a eugenics-centered belief in the debilitating capacity of interracial

mixing, especially between Protestant whites (at this time still western and northern Europeans, and excluding southern and eastern Europeans) and Jews or any non-whites (as defined by region of origin above).¹¹⁶ The Immigration Restriction Act of 1924 made permanent through strict quotas several temporary attempts to keep out unwanted immigrant groups (Jews and Italians, in particular) by eliminating immigration from Asia and restricting immigration from Southern and Eastern Europe to a pre-influx period of 1890.¹¹⁷ Prominent eugenicist Harry H. Laughlin testified before the committee drafting the Act, where he argued: “We in this country have been so imbued with the idea of democracy, or the equality of all men, that we have left out of consideration the matter of blood or natural inborn hereditary mental and moral differences. No man who breeds pedigreed plants and animals can afford to neglect this thing, as you know.”¹¹⁸ During these immigration debates, African Americans “constituted the invisible racial other,” largely unmentioned except as a point of measurement about assimilability: by pro-restrictionists to prove the lack of worth for immigrants in question, or by anti-restrictionists to show that southern-eastern Europeans “were capable—unlike blacks—of assimilating to American values and institutions.”¹¹⁹

Thus, when Martha Lum, an American-born child of Chinese ancestry, was in 1924 denied entrance to the Mississippi public school of her choosing and told that she needed to attend a “colored” school because, according to the school superintendent, she was not white, the family sued, claiming they were not “colored.” Their arguments used the color black as a fault line, asserting that in Mississippi “colored” meant black: thus, the family argued, “that she is not a member of the

colored race, nor is she of mixed blood, but that she is pure Chinese; [and] that she is, by the action of the board of trustees and the state superintendent, discriminated against directly.”¹²⁰ In an opinion written by former President and then-Justice William Howard Taft, the Supreme Court affirmed the lower court’s decision that she was not white, based on precedent set by cases dealing with segregation between white and black Americans. Citing *Plessy v Ferguson* as precedent, Taft wrote:

Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we cannot think that the question is any different, or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment.¹²¹

Given the use of racial categories to subjugate those not classified as white, early twentieth century appeals to integration were evoked less for their goals of individual liberty than they were in eliminating legally-endorsed group barriers to equal treatment. Peller speaks to the radical roots of integration as a method for eliminating racial domination, in hopes that color blindness would alleviate racial domination: “for [early integrationists], the ideology of integrationism was not experienced as simply the working out of a liberal theory of enlightenment; instead, integrationism provided a frame for articulating their more deeply rooted, existential revulsion to racial domination.”¹²² For instance, Booker T. Washington privileged education as the key to integrating African Americans into American society: he

lamented the lack of schools for black children and began the Tuskegee Institute as a means of insuring quality education for African American men, and thus their increased ability to succeed as American citizens. This persisting belief has made legal challenges to educational policies about race a key strategy in attempts at social change.

Thus, when the National Association for the Advancement of Colored People launched a campaign in the 1930s to break *Plessy v. Ferguson*'s separate-but-equal doctrine and its segregationist legacies, the organization did so by using integrationist arguments and by concentrating on access to schools.¹²³ Culminating in *Brown v. Board of Education* (1954), a series of Supreme Court cases adopted these arguments. One large victory came with *Missouri Ex Rel. Gaines v. Canada* (1938) and the successful argument that aspiring African American student Lloyd Gaines should be admitted into the state law school because there was no black equivalent to that school. This opinion was reaffirmed by *Sipuel v. Board of Regents of the University of Oklahoma* (1948), which applied the same reasoning to an Oklahoma law school. In response to the *Sipuel* decision, universities intent on keeping their students segregated quickly set up black law schools or segregated classrooms within existing schools. Two years later, Chief Justice Fred Vinson wrote for a unanimous Court in *Sweatt v. Painter* (1950), a case challenging this practice:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the

exchange of views with which the law is concerned.¹²⁴

In *McLaurin v. Oklahoma State Regents of Higher Education*, also in 1950, Vinson reiterated the full court's belief in the educational value of racial integration. *McLaurin* disputed the constitutionality of restricting African American graduate students' use of libraries, classrooms, and the cafeteria, and Vinson argued that, in addition to the tangible differences of educational materials deprived of students in *Sweatt*, segregation violated African American students' rights to "engage in discussions and exchange views with others students."¹²⁵ By "prohibiting the intellectual commingling of students, the restrictions handicapped [the appellant] in his pursuit of effective graduate instruction."¹²⁶

What is particularly important about these precursors to *Brown v. Board*, according to Goodwin Liu, is that:

they acknowledged the value of integration in *educational* terms. The Court understood that one of the most important educational resources available to a student is the opportunity to interact with other students. If this fact provides a reason why public universities may not segregate on a racial basis, then it also provides a reason why public universities may voluntarily take race into account in deciding whom to admit.¹²⁷

At the same time that the legal push for school integration was occurring, public sentiment was shifting from the strict "Americanism" assimilationist perspective of the turn of the century to a more pluralist perspective. Claude S. Fischer and Michael Hout argue that:

Something...changed in the United States between the end of World War II and the turn of the century. We label it an appreciation of differences, but we have no direct measures of it beyond the survey questions we used to document its arrival. By the end of the century, great majorities of Americans were telling poll-takers that racial and ethnic diversity strengthened their communities and was a major reason for America's success.¹²⁸

World War II also issued a significant change in conception of racial and ethnic pluralism because of the global critiques of colonialism that brought into high relief the disparate treatment of racial and ethnic minority groups within the United States:

It was not until after World War II that the tension between coercive assimilation and democracy become widely accepted, as nationalism increasingly lent support to the concept of racial/ethnic democracy—due first to the war against fascism and then to international scrutiny during the cold war...It was only in the postwar era that 'cultural pluralism' became a term and a concept which worked its way into the vocabulary and imagery of... leaders of ethnic communal groups.¹²⁹

This vision, according to Newfield, was a product of the "economic 'golden age' that followed the global chaos and destruction of the Great Depression and World War II...It was propelled by widespread social activism and the various civil rights movements that sought universal access to its ideals of social development."¹³⁰ Post-World War II civil rights movements played on this contradiction between democratic idealism and *de jure* segregation.¹³¹ These various civil rights movements

included both colorblind and race-conscious ideologies. The legacy of Douglass's arguments for political and legal equality as the tools for racial integration was embraced by Du Bois and served as the mission for the NAACP. At the same time the NAACP was putting forth the legal and political strategies evidenced in the above-mentioned school cases, the separationist arguments evoked in Black Nationalist discourse, grew a strong base under the leadership and legacy of Marcus Garvey.¹³²

Political leaders who were hesitant to support legal and political promises of equal treatment had to overcome both social pressures to acknowledge substantive inequities, and political pressures in the form of votes and other political needs. For instance, in a post-World War II United States still focused on the military, various social and political pressures led President Harry Truman to act. At the same time that A. Philip Randolph was threatening African American draft resistance, political pressure increased to win African American votes in the upcoming election.¹³³ As a response, Truman drafted Executive Orders 9980 and 9981, establishing a federal review board to review cases of alleged discrimination in federal government employment and calling for equal opportunity in the armed forces.¹³⁴ Truman's Justice Department arguments for ending segregation in the amicus brief submitted for *Brown v. Board* included the international implications of segregation in "Communist propaganda mills" and its effects on foreign visitors who were mistaken for blacks and denied food and lodging.¹³⁵

In *Brown v. Board*, the questions went well beyond the constitutionality of school desegregation; rather, Mark Tushnet argues, "the fundamental question was

this: What does the equal protection clause protect against or, even more broadly, what notion of equality are Americans committed to?”¹³⁶ According to Tushnet, two versions of equality lay at the center of *Brown v. Board II* (1955), the goal of which was to determine the remedy for segregation practices held unconstitutional in *Brown v. Board* (1954). One version of equality – the principle of nondiscrimination that is evoked in desegregation arguments – demanded that policies intended to adversely affect racial minorities be done away with. Another version – the principle of anti-subordination evoked in integrationist policies – “required the elimination of practices that contributed to the subordination of racial and other minorities, whether intended or not.”¹³⁷

Supreme Court opinions have fluctuated on which version of equality they found to be constitutionally justifiable; more often than not, they conflate the two. For instance, the *Brown* decision blurred the distinctions by conflating the unconstitutionality of *de jure* segregation with the decision’s articulation of segregation’s main harmful impact: that segregation “has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated system.”¹³⁸ Tushnet notes that “the loss was measured not against what children would learn in schools to which they were assigned without regard to race but rather against what they would learn in integrated schools.”¹³⁹ In this reasoning, the positive value on racial pluralism becomes the justification, rather than the colorblind principle of nondiscrimination.

By the time President Dwight D. Eisenhower was inaugurated, organized civil rights protests were on a rapid upswing. Civil rights organizations including the

NAACP chose Rosa Parks to serve as the public face of the 1955 Montgomery bus boycott, escalating the movement into mass protests and organized pressure on federal and local governments and labor unions. This pressure, in part, encouraged a recalcitrant Eisenhower to continue pushing through the desegregation of the armed forces. The energy of the movement built throughout the last four years of Eisenhower's term and into Kennedy's presidency with an "agitation designed to break down the abstract notion that discrimination was just another political issue."¹⁴⁰ Yet even amidst the growing social and political pressure, presidents like Eisenhower were reluctant to use the presidential platform to implement civil rights policy. For Eisenhower, issues such as school desegregation were inappropriate uses of executive power because he found the problems to be local and state ones.¹⁴¹ Of course, since state and local governments have "proven to be the most unresponsive and recalcitrant, particularly in the South," civil rights leaders could not accept this as a solution and were forced to pressure for change at the federal level.¹⁴²

The 1960s saw remarkable gains in legislation forbidding discrimination and calling for equal treatment based on race, color, or national origin, including the Civil Rights Act of 1964, the Voting Rights and Immigration Acts of 1965, and the Fair Housing Act of 1968. The limits of race-neutral promises began to be realized, however, as the assassination of Martin Luther King Jr. and continuing poverty and discrimination lent greater credence to proponents of race-conscious policies that would provide concrete help to groups who disparately affected. The Kerner report from the National Advisory Commission on Civil Disorders, commissioned by President Johnson in 1967 and released one month before widespread riots following

King's assassination, pointed to the African American frustrations, not just with overt discrimination but also disproportionate poverty, unemployment, poor education and housing, and systematic police bias. It became clear to some that abandonment of discriminatory practices does not erase the legacy of those practices. The recommendations of the Kerner commission included fostering programs that carried an immediate impact "in order to close the gap between promise and performance" for all minority groups, although the focus on the report was on African Americans living in urban ghettos.¹⁴³

These events lent credence to arguments that race-conscious steps would need to be taken in order for discriminated-against groups to be able to enter the mainstream successfully.¹⁴⁴ Marouf A. Hasian Jr. and Thomas K. Nakayama argue that, "in place of classical liberal notions of neutrality and color blindness...many critics claim that radical social change can only come from 'race consciousness' and a recognition of the institutional nature of racism."¹⁴⁵ Supporters of race consciousness argued that it is "a perverse description" that race-conscious policies, such as affirmative action, aim at achieving a racially conscious society, because "American society is *currently* a racially conscious society."¹⁴⁶ Colorblindness in policy does not save us from racism in practice, argue proponents, and so we must have race-conscious policies to alleviate racism.

Affirmative action became one policy manifestation of this ideological shift, as, "after years of civil rights policies that created equal opportunity on paper but left the basic structures of inequality virtually untouched, the law required policies strong enough to actually change the outcomes."¹⁴⁷ John F. Kennedy's Executive Order

10925 mandated that government contractors should not only “not discriminate against any employee or applicant for employment because of race, creed, color, or national origin,” but also that each contractor “will take affirmative action to ensure that applicants are employed.”¹⁴⁸ Several days after Medgar Evers was shot to death, Kennedy sent his Civil Rights Act of 1963 to Congress, which called for a Presidential Committee on Equal Employment Opportunity. Frustrated by continued discrimination from labor unions, the NAACP organized protests against the building trade unions in Philadelphia.¹⁴⁹ Kennedy implored his newly created Presidential Committee on Equal Employment Opportunity to investigate and monitor the hiring practices of the Philadelphia building trade unions.¹⁵⁰ His assassination kept him from knowing the outcome of the investigation.

Former vice president and newly sworn-in President Lyndon B. Johnson immediately assured civil rights leaders that headway with civil rights would continue. The Civil Rights Act of 1964 is one of the most important pieces of congressional legislation in the twentieth century.¹⁵¹ The sections most often cited for civil rights policy are Titles VI and VII, which insure equal employment opportunities for Federal employees, and equal opportunities for programs supported by Federal funds, “without discrimination because of race, color, religion, sex, or national origin.”¹⁵² Titles VI and VII have been used both as support for and evidence against race-conscious policies such as affirmative action. The language has been used to support various affirmative action policies – such as Nixon’s Philadelphia Plan and various university admissions policies – and has given constitutional grounding for lawsuits against discriminatory employment and

acceptance practices.¹⁵³ However, the enactment of such policies has drawn lawsuits from white Americans, including Allan Bakke, who feel that minority set-asides, preferences, or affirmative hiring of minorities discriminate against them on the basis of race.¹⁵⁴

Johnson took federal measures to encourage growth from seeds of affirmative action approaches planted in the 1964 Civil Rights Act. He did so in the form of Executive Order 11246, which expressed the government's commitment to promote "equal employment opportunity" in agencies receiving federal government contracts.¹⁵⁵ Although order did not endorse numerical goals or timetables specifically, the Labor Department's Office of Federal Contract Compliance (OFCC), began in 1965 requiring bidders for federal contracts to submit affirmative action plans.¹⁵⁶ Further testing the line of the "no quota" section of the 1964 Civil Rights Act, the OFCC in 1967 developed a series of numerical goals for construction contractors in several cities, including Philadelphia. Experiments with city-based affirmative action plans never left the ground or quickly died. However, the proposal for the Philadelphia Plan held clearer goals and strict enforcement, including the withholding of contracts until minority hiring was guaranteed, and was later revived under President Nixon as an early success at race-conscious policy.¹⁵⁷

Lyndon Johnson also justified race conscious action in his commencement address at Howard University entitled "To Fulfill These Rights." Working within the accepted ideology of individualized competition providing for the American dream by evoking a metaphor of a competition – a race – Johnson articulated the justification for affirmative action:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair... To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.¹⁵⁸

Several Supreme Court cases during the 1960s-70s reflected this push toward race-conscious measures. According to Tushnet, “The Court’s long abstention from school desegregation cases meant that the Court confronted the choice between the anti-discrimination and anti-subordination approaches in a new political environment.”¹⁵⁹ School districts continued to delay and stifle integration, and in *Green v. County School Board* (1968), the Supreme Court ran out of patience with the passivity of school boards’ integration steps, seemingly in direct defiance of *Brown v. Board II*’s mandate to “determine admission to public schools on a nonracial basis” and with “all deliberate speed.”¹⁶⁰ After a decade of abstention from school desegregation cases, the Supreme Court took on *Green*, a case dealing with a popular desegregation plan called the “freedom-of-choice” plan because it allowed students to choose which school they would like to attend.¹⁶¹ The Supreme Court concluded that

the plan perpetuated a dual system, as not a single white student enrolled in the black school, and only 15% of black students had chosen the white school.¹⁶²

However, more active steps, such as mandatory busing, “were met with hostility and white flight to more rural and suburban neighborhoods.”¹⁶³ President Richard M. Nixon was a vocal opponent of busing, and the White House threatened to fire federal officials who continued to urge busing.¹⁶⁴ The Supreme Court was inconsistent on its support for such direct action, as well. In *Swann v. Charlotte-Mecklenburg Board of Education* (1971), a unanimous Supreme Court decision declared that busing was acceptable when the school district’s history revealed segregation.¹⁶⁵ In addition to the *Swann* decision, Tushnet asserts that:

Green in 1968 and *Griggs* in 1971 were the high points of the Court’s commitment to an integrationist or anti-subordination view of equality. Analytical difficulties associated with the anti-subordination approach, and a political backlash against the more expansive claims of the civil rights movement, pushed the Supreme Court, with a new set of members appointed by more conservative presidents, to move fairly rapidly to—or back to—the anti-discrimination principle.¹⁶⁶

Just three years later, in a 5-4 decision of *Milliken v. Bradley* (1974), the Supreme Court limited busing between districts by invalidating plans to bus students between largely black Detroit and its neighboring white suburbs. Chief Justice Warren E. Burger’s opinion argued that, because discrimination within Detroit was not the responsibility of the outer districts, those outer districts should not be subjected to busing. In doing so, J. Harvie Wilkinson argues, the Supreme Court

motivated white flight to the suburbs and, more importantly for affirmative action policies, “began to lift from white America responsibility for the ghetto. *Milliken v. Bradley* was an act of absolution. Segregated Detroit schools were not the suburbs’ creation and thus not their burden.”¹⁶⁷

Integrationist strategies found their limits in non-legal arguments, as well, stemming from the increasingly vocal critique of the underlying assumptions that supported integrationist arguments. Peller notes the importance of recognizing not only the rhetorical strategy of integrationist arguments, but also their ideological functions: “Integrationist assumptions do not manifest themselves solely in self-conscious legal and political arguments about race, but instead provide the filter for how we experience, perceive, and construct a broad range of social relations and institutional practices.”¹⁶⁸ Some assumptions about the merits of integration – including the idea that non-integrated cultures would be saved or improved by their proximity to an idealized white culture – were a target of critiques by proponents of race consciousness as the basis for sound educational policy.¹⁶⁹ Thus, race-consciousness also came as a reaction to the culture-deficiency model of social-scientific educational research forwarded in the 1950s, tainted with the underlying assumptions that black culture was detrimental to black children, and that increased interaction with white culture would save them.¹⁷⁰ Stokely Carmichael targeted this assumption, proclaiming that “‘integration’ also means that black people must give up their identity, deny their heritage. . . . The fact is that integration, as traditionally articulated, would abolish the black community.”¹⁷¹ In his “Black Power” speech delivered at Berkeley, he offered a critique of the focus on universities as the source

of racial uplift:

Are we willing to be concerned about the black people who will never get to Berkeley, who will never get to Harvard, and cannot get an education, so you'll never get a chance to rub shoulders with them and say, "Well, he's almost as good as we are; he's not like the others?" The question is, "How can white society begin to move to see black people as human beings?" I am black, therefore I am; not that I am black and I must go to college to prove myself. I am black, therefore I am.¹⁷²

The widest liberal response to the legal limits of colorblind ideology to abolish discrimination has been a return to the merits of cultural pluralism, contemporarily seen in the appreciation of diversity. Nathan Glazer has called attention to "the ways in which all Americans—regardless of race, religion, political affiliation, lifestyle, or moral orientation—have come to speak the language of tolerance and respect for cultural diversity in the contemporary, post-civil rights era."¹⁷³ Parrillo argues that late-twentieth century advocacy for multiculturalism, formerly cultural pluralism, is a positively connotated term "publicly cloaked in the romanticism of the melting pot myth by assimilationists...depicted in 20th-century analysis as a temporary social phenomenon involving convergent ethnic subcultures."¹⁷⁴

The justificatory roots of diversity are both complimentary and at odds with integrationist arguments. Integrationist arguments rely on recognition of discrimination as the reason for segregation and the disparate effects of segregation on the groups considered "inferior," whereas diversity arguments confer the positive

effects of racial integration in schools on whites and on American society as a whole. Unlike integrationist arguments, the value of diversity comes from its race-consciousness and the values that different world-views and life experiences might bring to the communal table. Yet diversity confers only an *individual* benefit, not a collective one. Deprived of its justification in the history of group discrimination, Peller's notion of the simultaneously voluntary and involuntary aspects of group membership is lost in the race-as-one-factor approach.

The *Brown* decision validated arguments that combined the rejection of segregation as a discriminatory practice with the potential for educational benefits for all. In fact, Liu argues that the “conception of student diversity as an educational resource [found in *Brown v. Board*] clearly animates Justice Powell's articulation of the diversity rationale in *Bakke*.”¹⁷⁵ Powell had a history of combining the two before *Bakke*, as well, as is seen in his concurring opinion in a 1973 desegregation case, affirming the school boards' right to “exceed minimal constitutional standards” with a goal of “promoting the values of an integrated school experience.”¹⁷⁶ Yet, in legal policy and doctrine:

there are few moments when diversity for diversity sake, the protection of difference, has been the overriding goal. Generally, color blindness, gender blindness, blindness to differences of sexual preference—these have been the beacons of our law. Law has been unable or unwilling to foster activity a society in which cultural pluralism and identity politics could flourish.¹⁷⁷

Rather than relying on an integrationist ideal recognizing the legacy of and continuing effects of racism, Powell's articulation of diversity in *Bakke* limited the

consideration of race to an educational benefit.¹⁷⁸ Some argue that abandoning integration as an argument may be a strategic, as opposed to ideological, shift on Powell's part: because the Court continued to uphold the *de jure/de facto* segregation categories, continuing the need to prove active segregationist policies or intents, Powell made the move to diversity, with integrationist motives warranting his claim.¹⁷⁹ This point notwithstanding, the diversity argument Powell set forth in *Bakke* limit the scope of considering race while extending the beneficiaries to whites as well as those who have been discriminated against, and making diversity as much more about utilitarian goals than moral obligation.¹⁸⁰ As Anderson notes, "Powell's detachment of the diversity argument from explicit concerns of racial justice had enormous cultural consequences."¹⁸¹

Indeed, critics of the turn toward diversity argue that it has all of the agency-centered arguments on individual rights and their correlative assumptions – that we are free to choose our group identities – which early twentieth century assimilationist discourses carried. An appreciation of diverse cultures as an end goal "has diverted attention away from more fundamental structural problems of racism and social inequality that have landed disproportionately and unjustly on African Americans."¹⁸² A century removed from the institution of slavery, with the legal protection of equal rights written into the Constitution and supported by the Civil Rights Acts of the 1960s, the naturalized assumptions of individual agency paired with liberal political ideology encourage a line of reasoning concluding that racial discrimination must occur on the conscious level, rather than the result of systematic social institutional privilege.¹⁸³ If an individual does not feel overtly racist sentiments, then (s)he

concludes that (s)he is not part of a racist system, and thus should not be punished for the misfortunes of others. A focus on appreciation, rather than existing inequities, removes the group orientation that has often led to social change, and equalizes all cultures – again, ignoring historical, institutional, or structural disparities between groups.

Critics of race consciousness are equally as adamant, and arguments about the merits of assimilation and concerns about the divisive effects of celebrating cultural differences are central to these critiques. The founders celebrated the democratic qualities of setting faction against faction in the free market of ideas, and yet were concerned about the possibility of excessive infighting and group affiliations that overshadowed a sense of national community.¹⁸⁴ Thus, Beasley argues, “the founders did not choose to embrace pluralism as much as they decided to try to control its excesses.”¹⁸⁵ Similarly, some opponents of affirmative action do so under the argument that the focus on race balkanizes the country, forces its citizens to focus on difference rather than similarities, and becomes problematic when we must decide which races should be given preferential treatment. David A. Hollinger’s book *Postethnic America: Beyond Multiculturalism* exemplifies this argument when he frames multiculturalism as move entrenching a “rigid, fixed idea of identity” and argues for favoring “voluntary over involuntary affiliations.”¹⁸⁶ In a similar vein, the Supreme Court has adopted the policy of treating with a high level of suspicion any law or policy that employs race as a category – a treatment that regards race consciousness as inherently problematic, and sets a high bar for justifying its use.¹⁸⁷ Race-conscious measures also evoke the argument of “reverse discrimination,”

charging that affirmative action takes the same discriminatory practices used against African Americans, Asian Americans, Native Americans, Jews, and others in the past and now discriminates against Whites.¹⁸⁸

These series of assumptions are recurrent in discourses surrounding *Bakke*. Philip F. Rubio asserts that “the notion of ‘individual versus group rights’ has become the cornerstone of conservative arguments against affirmative action.”¹⁸⁹ The lawsuit’s justificatory grounding in the denial of equal opportunity assumes that individual equality and opportunity pre-existed the application process, thus making affirmative action programs such as that of UC-Davis violative of individual rights. The affirmation of such an argument by the courts on the grounds that UC-Davis had never been shown to be overtly discriminatory toward the groups they had targeted validates the value of conscious agency at the expense of larger socially instantiated and lingering discrimination. Additionally, some opponents of affirmative action claim that such programs abandon individualism as the unit of concern, and replace it with groups of people organized by stereotype.¹⁹⁰ As Morris B. Abram remarks, meritocracy “rewards the individual for attainment and avoids patronage and spoils systems.”¹⁹¹

Another structural problem masked in educational diversity arguments includes the focus on Ivy League universities as the model for educational diversity; as Carmichael pointed out, one should not have to attend Harvard in order to prove oneself worthy. Moreover, Marcia G. Synnott argues that affirmative action policies have “proved to be a boon for the recruitment of black and other minority students at many of the nation’s most prestigious private and flagship state universities,” who

can achieve a diversity of ethnic and racial backgrounds without the diversity of economic incomes that has been the most consistent signal of institutional racism.¹⁹² Harvard, for instance, “can devote considerable resources to admissions decisions and can plausibly argue that it compares each applicant against every other applicant from a number of perspectives.”¹⁹³ Justice Powell’s diversity rationale heavily relied on the arguments offered in the *amici curiae* brief submitted by Columbia, Harvard, Stanford, and the University of Pennsylvania, institutions which, because of their prestige, high standards, and coffers, can pull the highest score earners from all racial, ethnic, cultural, religious, and economic backgrounds without having to consider the structural differences that constrain the full academic potential of economically and socially disadvantaged groups.¹⁹⁴

Moreover, the differences between the nationalist and integrationist approaches to race relations, which during the late 1960s and early 1970s were coming to a crucial juncture.¹⁹⁵ “At that time,” argues Peller, “black nationalism arguably had overtaken integrationism as the dominant ideology of racial liberation among African-Americans, while virtually all liberal and progressive whites embraced a theory of integration as the ultimate definition of racial justice.”¹⁹⁶ Integration became part of a larger ideological structure committed to impersonality and objectivity, justified through a meritocratic “narrative of legitimation, a language for concluding that particular social practices are fair because they are objective and unbiased.”¹⁹⁷ This meritocratic legitimation helped to bring about the increasing professionalization of education, wherein “graduate schools teaching expertly tested

methods of instruction replace traditional training of teachers through contact with older faculty.”¹⁹⁸ According to Peller:

Centralism and professionalism became responsive images to the liberal perception of the previous problems with education – the idea that localism and parochialism compromised neutrality and objectivity. And the underlying assumption was that once public education eradicated the influences of locality and bias, it would achieve a neutral, acultural form that, precisely because of its impersonality, would treat everyone alike.¹⁹⁹

The binding of integration to professional objectivity and meritocracy provided a strong argument against special admissions policies such as the one at UC-Davis. If race was an irrelevant category, then how could it be used to choose some students over others? An additional problem involved applying integration arguments – which had long been the successful argument for diversifying schools – to higher education. Integrationists had not previously needed to tackle counter-arguments about the scarcity of resources that became central to discussions about affirmative action policies in graduate-level professional schools, most recently in Justice Douglas’s dissent from the *DeFunis v. Odegaard* opinion, *Bakke*’s predecessor.²⁰⁰ Moreover, the integrationist arguments that had been radical at the turn of the century, and progressive in the 1950s, was becoming a conservative platform, dissociated with an understanding of the historical notions of race that justified race-consciousness. Placed against meritocratic arguments about individual hard work and test scores, proponents of race consciousness not only faced the principle of scarcity: they also faced an epistemology that privileged quantitative tests – with the scientific

neutrality that they evoked – over qualitative, or even historical, factors. As with all Supreme Court rhetoric, these ideological tensions are worked against the particular “facts” and circumstances of the individual case at hand, although the rhetorical implications extend well beyond the case, both into longer-standing legal precedents and into public discourse about race, merit, and educational goals.

Early Legal Challenges to Affirmative Action Policies

The Supreme Court took a long break from issues of race and education after the landmark *Brown v. Board of Education* (1954), and its implementation-oriented partner, *Brown II* (1955). When the Supreme Court granted certiorari in *Bakke*, both the Court and the political landscape had changed.²⁰¹ Organized pressure such as the legal campaigns launched by the NAACP saw a confluence of governmental, legal, and constitutional efforts to remedy the effects of discrimination on minority groups in the 1960s. These efforts included the Civil Rights Act of 1964, invigorated readings of the Thirteenth and Fourteenth Amendments, and executive orders and the agencies that implemented them, including the Department of Labor, the Equal Employment Opportunity Commission (EEOC), and the Department of Health, Education, and Welfare (HEW). The documents most directly under question in *Bakke* were the Civil Rights Act of 1964 and the Fourteenth Amendment, but they were by no means the exclusive focus of the *amicus* briefs. The Fourteenth Amendment had become a touchstone for equal rights litigation, both in efforts to integrate schools and businesses and efforts to combat the race-conscious policies intended to make integration a reality. President Johnson’s Executive Order 11246, the Department of Labor’s Office of Federal Contract Compliance, the Department of

Health, Education, and Welfare, the Fourteenth Amendment (and occasionally the Thirteenth Amendment), as well as previous Supreme Court and circuit court decisions were referenced repeatedly in the *Bakke* briefs.

As would be noted by the Regents in their briefs for *Bakke*, circuit courts had on several occasions affirmed the voluntary use of affirmative action policies, and each of these cases had been denied certiorari by the U.S. Supreme Court as recently as 1971, with the 8th Circuit Court's decision in *Carter v. Gallagher*.²⁰² In *US v. Jefferson Country Board of Education* (1966), the 5th Circuit condemned the bifurcation of desegregation and integration arguments, holding that race-neutral freedom-of-choice school desegregation plans did not equal desegregation. Rather, schools must go beyond neutrality and take affirmative steps to mix students of different races, the outcome of which "is a high priority educational goal."²⁰³ Furthermore, Judge John Minor Wisdom argued against the "narrow reading" of the Fourteenth Amendment that construed it solely as an individual right, a dictum first articulated in *Briggs v. Elliott* (1952):

Segregation is a group phenomenon. Although the effects of discrimination are felt by each member of the group, any discriminatory practice is directed against the group as a unit and against individuals only as their connection with the group involves anti-group action...[As] a group-wrong...the mode of redress must be group-wide to be adequate.²⁰⁴

In *Norwalk Core v. Norwalk Redevelopment Agency* (1968), the 2nd Circuit Court of Appeals concluded that:

classification by race...is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which...has been drawn for the purpose of maintaining racial inequality. *Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent that it is necessary to avoid unequal treatment by race, it will be required.*²⁰⁵

The immediate predecessor to the *Bakke* case was *DeFunis v. Odegaard* (1974), and it was the first Supreme Court case to address the practice of affirmative action in higher education.²⁰⁶ Marco DeFunis was twice rejected to the University of Washington law school, which at that time had a policy of considering separately African American, Hispanic American, Native American, and Filipino American applications. The school placed different weights on undergraduate grades and compared the minority applicants to each other rather than the entire pool, with the goal of between 15 to 20 percent minority student admittees.²⁰⁷ DeFunis filed suit, claiming that the law school's racial preference system violated his rights under the Equal Protection Clause of the Fourteenth Amendment and constituted "reverse discrimination." During this time, however, a lower court had ordered the law school to admit DeFunis, and he planned to graduate in 1974. Amid both interest in the case and concern that they would appear avoidant if they did not take it, the Supreme Court granted the case and heard oral arguments.²⁰⁸ However, by the time oral arguments were made, DeFunis was in his last semester of law school. A majority of the court declared the case moot, amid strong dissents from four of its members, who

argued that DeFunis' situation was not specific to him, but reflected a larger constitutional issue that would need to be addressed at some point.

In 1973 Allan Bakke, a 32-year-old white male Vietnam veteran and mechanical engineer, was rejected to the eleven medical schools to which he applied. He applied again to University of California at Davis (UC-Davis) in 1974. UC-Davis interviewed him both years, but rejected him both times. Bakke's test scores and grade point average fell within the range of those accepted to UC-Davis, although his interview scores put him out of the upper range. At the time that Bakke was applying, the UC-Davis medical school had decided that the best way to increase the number of minority students admitted was to reserve sixteen of the 100 available seats for economically or educationally disadvantaged students. Their stated policy was that economically disadvantaged whites met this category, although none of the 272 whites who applied under the program was admitted during the time the dual-admission program existed. Both white and minority applicants with better and worse scores than Bakke were admitted to the university.²⁰⁹

After Bakke appealed unsuccessfully to the Department of Health, Education, and Welfare – the preliminary process for alleging discrimination at the time – Bakke's lawyer Reynold Colvin brought suit in the summer of 1974 with the Yolo County Superior Court. In his complaint to the Yolo County Superior court, Bakke claimed that he “was and is in all respects duly qualified for admission to said Medical School and the sole reason his applications were rejected was on account of his race, to-wit, Caucasian or white, and not for reasons applicable to persons of every race.”²¹⁰ The suit requested that Bakke be admitted to the UC-Davis medical

school because the dual-admission program was in violation of the Fourteenth Amendment of the U.S. Constitution, article I, section 21 of the California Constitution, and Title VI of the 1964 Civil Rights Act; in simpler terms, the special admissions program denied him equal protection under law.

UC-Davis was defended by the general counsel for the University of California, a man named Donald L. Reidhaar whom had previously expressed doubt about the constitutionality of the program.²¹¹ On behalf of the Regents, Reidhaar argued in a brief to the Yolo County Superior Court that “the special admissions program does not violate Title VI of the Civil Rights Act of 1964 and, indeed, the regulations issued under that Act specifically *permit* giving special consideration to minority group members in admissions for the purpose of increasing their participation in educational programs.”²¹²

The Yolo County Superior Court found that the UC-Davis admissions program constituted a racial quota and was thus violated state and U.S. constitutions and of Title VI of the Civil Rights Act. The judgment fell short of ordering Bakke admitted, however. For this reason, both Bakke and the Regents appealed the ruling to the California Supreme Court. In September 1976, the state Supreme Court affirmed the lower court’s decision six-to-one, citing the Fourteenth Amendment’s Equal Protection Clause, which the majority found to apply to any person, regardless of color. They also ordered the UC-Davis prove that Bakke would not have been admitted without the special program: otherwise, they were required to admit him. The Regents stipulated that they could not prove that Bakke would not have been admitted had there been no special admissions program, although they had offered

pages of deposition testimony from the trial court arguing otherwise. They claim to have stipulated this so that, if they lost, they would not have to go back to trial court – instead, they could take the case directly to the Supreme Court, where the constitutionality of the program altogether would be decided.²¹³

Writing for the majority opinion, Justice Stanley Mosk argued that the Regents had set up a false dichotomy in its defense of the UC-Davis program instead of working to coming up with a nuanced solution to the racial disparities seen in the admissions system; that any special program should be based on race-neutral disadvantage, unless the university had a history of discrimination, which UC-Davis did not attempt to prove; and finally, that the precedents offered by UC-Davis were not persuasive, because they were based on cases wherein prior discrimination had been an issue. Wrote Mosk, “the University is not required to choose between a racially neutral admission standard applied strictly according to grade point averages and test scores, and a standard which accords preferences to minorities because of their race.”²¹⁴ Moreover, argued Mosk, there was nothing constraining UC-Davis to use the quantitative measures that were keeping minority group members out; they can set their own definition of “qualified”:

While minority applicants may have lower grade point averages and test scores than others, we are aware of no rule of law which requires the University to afford determinative weight in admissions to these quantitative factors. In practice, colleges and universities generally consider matters other than strict numerical ranking in admission decisions.²¹⁵

However, an applicant, no matter what his race, “had a constitutional right to have his application considered on its individual merits in a racially neutral manner,” concluded Mosk, citing language from *DeFunis*.²¹⁶

The dissenting opinion, written by Justice Mathew Tobriner, also serves as an effective summary of most *amicus* brief arguments supporting the Regents. In his dissent, Tobriner evoked the difference between invidious and benign racial classifications, arguing that while institutions found guilty of past discrimination might be required to adopt benign remedial programs based on racial classifications, there is nothing preventing an institution from voluntarily doing so in the absence of such proof.²¹⁷ The majority’s argument that the UC-Davis program is constitutionally suspect is “is not supported by (1) existing case law, (2) the history and purpose of the Fourteenth Amendment or (3) the jurisprudential rationale justifying strict judicial review,” summarized Tobriner.²¹⁸

Moreover, the educational goals of a diverse student body benefiting society carried more weight for Justice Tobriner than did a colorblind – and thus white – student body with the highest test scores:

In implementing the special admission program at issue here, the medical school determined that in light of the contemporary needs of the medical profession and of society generally, the attainment of a racially integrated, diverse medical school student body, made up of qualified students of all races, is more important than the perpetuation of a segregated medical school composed of students with the highest objective academic credentials.²¹⁹

Tobriner also pointed out the irony of drawing the line on preferential admissions at race, a line that in his interpretation the Fourteenth Amendment had attempted to erase:

To date, courts have always respected a college or professional school's determination that the educational benefits of a diverse student body justify a departure from adherence to strict objective academic credentials for a particular group of applicants; such 'preferential' policies have perhaps most commonly been adopted to promote geographic diversity, but similar admission preferences have regularly been employed to serve less compelling interests, for example to give preference to an applicant's athletic ability or to his relationship to an alumnus or institutional benefactor... There is, indeed, a very sad irony to the fact that the first admission program aimed at promoting diversity ever to be struck down under the Fourteenth Amendment is the program most consonant with the underlying purposes of the Fourteenth Amendment.²²⁰

Tobriner cited Supreme Court decisions recognizing the legacy of discrimination on the disadvantage minority students face in standardized educational tests, concluding that such findings show the active discrimination by the institution implementing the program is unnecessary.²²¹ Finally, Tobriner argued that, by stretching beyond the question of what is constitutionally permissible into judgment about whether or not the judges thought the policy would be effective, the majority had overstepped its bounds. In the early strains of what would become the "academic freedom" foundation of Powell's argument, Tobriner found that "it is the educational

authorities, not the courts, that are empowered to render policy judgments. The very difference of opinion among fair-minded and responsible educators and scholars suggests that policy decisions in this area should be left to the discretion of individual educational institutions.”²²²

The Board of Regents of the University of California appealed the ruling to the U.S. Supreme Court. Their question offered to the Supreme Court was whether the Equal Protection clause of the Constitution forbids universities from creating limited admissions programs to help those minorities groups whom the university considered to be affected by decades of discrimination in an attempt to remedy said discrimination. Bakke’s lawyer petitioned the Court to deny *certiorari*, claiming that it was of no interest to them because the lower court had decided correctly, because the alleged conflict between the California Supreme Court and other state Courts did not warrant Supreme Court attention, and because no one was denied their constitutional rights under the California Supreme Court’s decision.²²³ Meanwhile, the laws, precedents, amendments, and policies referenced in the early stages of *Bakke* became crucial sources of authority for those appealing to the Supreme Court, and provided a labyrinth of potential avenues down which the *amici* and justices could wander.

President Johnson’s Executive Order 11246, for instance, was “conceived in the belief that positive (‘affirmative’) actions were needed, in addition to nondiscrimination, in order to prevent indefinite perpetuation of inequalities caused by past discrimination” by requiring equal employment opportunity in agencies receiving federal government contracts.²²⁴ This was a crucial shift in the justification

of race conscious policies, because it moved from assurances and enforcement of non-discrimination – with specific remedies tailored to provable acts of discrimination – to attempts to remedy the structural effects of discrimination by affirmatively recruiting and hiring minority group members. Although the order did not endorse numerical goals or timetables specifically, the Labor Department’s Office of Federal Contract Compliance (OFCC) began in 1965 requiring bidders for federal contracts to submit affirmative action plans.²²⁵ The Department of Labor’s Revised Order Number 4 governed employment practices in industry and higher education.

A ruling upholding an accusation of reverse discrimination would have broader ramifications on other affirmative action programs. It was with this concern in mind that the Equal Employment Advisory Council (EEAC) asked that the Supreme Court in their *amicus* brief to give guidance for those “who must reconcile affirmative action requirements with potential reverse discrimination liability.”²²⁶ A non-profit organization established in 1976 to aid private employers and trade and industry associations in negotiating governmental non-discrimination regulations and to build affirmative action plans, the EEAC also serves as a liaison between private organizations, the Equal Employment Opportunity Commission (established by requirement of Title VII of the Civil Rights Act of 1964), and the Office of Federal Contract Compliance. The EEAC argued that court decisions and federal regulations, including Executive Order 11246, compel affirmative action programs where underrepresentation exists, regardless of the cause. Moreover, specific goals and timetables of the sort maligned by Bakke were required in order to avoid severe sanctions. In their brief, the EEAC requested that:

the Court...annunciate in its decision in the case a rule that, as a general matter, a defendant in a ‘reverse discrimination’ suit will not be held liable to nonminority or male claimants if: a) its affirmative action plan was adopted in a good faith attempt to comply with the requirements of Title VII, Executive Order 11246, a consent decree or other court of agency requirements, or b) its actions in implementing the plan were reasonably related to these good faith objectives.²²⁷

Indeed, as the *Bakke* case was being considered by the Supreme Court, the EEOC proposed new rules in 1977 that would “give employers protection from reverse discrimination charges filed with EEOC, if they had Affirmative Action plans that passed the agency’s criteria for reasonability.”²²⁸

In his dissent from the California Supreme Court’s decision in *Bakke*, Judge Tobriner agreed that Executive Order 11246 permits the use of affirmative action without a history of discrimination at that institution, and that precedent supports this interpretation: “...the ‘Executive Order’ cases upholding federally compelled ‘affirmative action’ employment programs for government contractors, courts have sanctioned the coercive implementation of benign racial classification schemes in the absence of any showing that a particular employer has engaged in racial discrimination in the past.”²²⁹

A more direct overseer of affirmative action in higher education was the Department of Health, Education, and Welfare (HEW), the original body to which Bakke appealed after his rejections from UC-Davis. HEW had previously issued regulations on how to implement Title VI of the Civil Rights Act of 1964, the section

in question in *Bakke*. The section under question reads: “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.”²³⁰ However, as the Regents argued to the Yolo County Superior Court: “*implementing* regulations issued...by the Department of Health, Education, and Welfare provide that recipients of federal financial assistance, such as the University of California, ‘may properly give special consideration to race, color or national origin to make the benefits of its program more widely available...’.”²³¹ The regulations stated that “even in the absence of such prior discrimination a recipient in administering a program may take affirmative action to overcome the effects and conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”²³² More importantly, argued the Regents, HEW’s regulations specifically stated that:

the assurance required by this section shall extend to admission practices...with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students...of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals.²³³

In the few years between the *DeFunis* and *Bakke* cases, other contextual and legal factors worked in Bakke’s favor. Worsening economic conditions made graduate schools more appealing, which in turn made competition fiercer.²³⁴ Between 1968 and 1976, the unemployment rate for young, college-educated

Americans rose from one to three percent.²³⁵ The middle class felt poorer, making arguments about white privilege less sympathetic. Amidst the economic downturn, federal funds to higher education were increasing – as were race conscious admissions programs. At the time of *DeFunis*, the Supreme Court had yet to decide the question of whether whites were protected by antidiscrimination laws under Title VII of the Civil Rights Act of 1964. But in 1976, they held in *McDonald v. Sante Fe Trail Transportation Co.* – an employment case not directly challenging affirmative action policies – that all victims of racial discrimination were protected, including whites.²³⁶ Thus, affirmative action programs were finding federal support at the same time that professional job markets became more unstable, and when courts were more receptive to discrimination claims made by whites.

Conclusion

Although the educational value of diversity was first legitimated by the Supreme Court in the twentieth century, educators in the nineteenth century began reaching out to children of new immigrants, members of religious minorities, and, in smaller numbers, African Americans.²³⁷ Because immigration has been both a necessity and a commitment that the United States has made, a corollary appreciation of cultural diversity has long been a strategic and ideological response. Likewise, because pluralism has long been a part of the American political system, working against class systems in order to protect multiple interests, pluralist arguments carry strong ideological weight. At the same time, the primacy of individual rights has been seen both as a promise to achieve gains with hard work, and as a protection against disparate group treatment, especially when those group associations are

involuntary. For instance, Justice Brennan argued in his opinion against *Bakke* that “we cannot let color blindness become myopia that masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens.”²³⁸

Geoff Eley and Ronald G. Suny argue that “creative political action is required to transform a segmented and disunited population into a coherent nationality, and though potential communities of this kind may clearly precede such interventions (so that they are rarely interventions in a vacuum), the interventions remain responsible for combining the materials into a larger collectivity.”²³⁹ The Supreme Court, thus, intervenes when called upon to creatively combine the nation’s multiple interests, such as colorblindness and race consciousness, individualism and collectivity. As Paul A. Freund argues:

It is an awesome mission, reflecting the concern for the Framers and the members of the first Congress for maintaining the rule of law and the supremacy of the Constitution and laws passed pursuant to it, and manifesting a faith that, as a multiplicity of interests would diffuse the conflicts bound to persist in the Union, structured institutions and procedures for adjudication would domesticate them.²⁴⁰

Notes

¹ Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (Chicago: University of Chicago Press, 2000), 74.

² Robert Post, "Introduction: After *Bakke*" in "Race and Representation: Affirmative Action," special issue, *Representations* 55 (1996): 3.

³ Chaïm Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, trans. John Petrie (Dordrecht, Holland: D. Reidel, 1980), 61.

⁴ Michel Calvin McGee, "The 'Ideograph': A Link Between Rhetoric and Ideology," *Quarterly Journal of Speech* 66 (1980): 14.

⁵ McGee, "Ideograph," 14.

⁶ There are some notable exceptions. For instance, Martin D. Carcieri points out that "diversity is arguably consistent with First Amendment values, and constitutional law has always been at least as much a matter of the practical accommodation of conflicting interests as the reflection of perfectly coherent principles." Carcieri, "The Wages of Taking *Bakke* Seriously: Federal Judicial Oversight on the Public University Admissions Process," *Brigham Young University Education and Law Journal* (2001): 171.

⁷ Kirk O. Kolbo, "Constitutional Law Symposium: Leaving *Bakke*," *Drake Law Review* 51 (2003): 715-729.

⁸ See Ian F. Haney López, *White By Law: The Legal Construction of Race* (New York: New York University Press, 1996).

⁹ This characterization of ideology combines the definitions of: Edwin Black, "The Second Persona," *Quarterly Journal of Speech* 56 (1970): 109-119, in which he

cited Marx's definition of ideology as a "network of interconnected convictions that functions...epistemically and that shapes identity by determining how he views the world" and McGee, "Ideograph," who combines materialist and symbolist conceptions of ideology by asserting that "ideology is transcendent," having influence on the beliefs and behaviors of both the ruler and the ruled.

¹⁰ Philip Wander, "The Ideological Turn in Modern Criticism," *Central States Speech Journal* 34 (1983): 1-18 and "The Third Persona: An Ideological Turn in Rhetorical Theory," *Central States Speech Journal* 35 (1984): 197-216.

¹¹ Alan Hunt, "Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" in *Law & Society Review* (1985): 16.

¹² Michael Calvin McGee, "Another Philippic: Notes on the Ideological Turn in Criticism," *Central States Speech Journal* 35 (1984): 43-50.

¹³ Stephen H. Browne, "Reading, Rhetoric and the Texture of Public Memory," *Quarterly Journal of Speech* 81 (1995), and James Jasinski, "A Constitutive Framework for Rhetorical Historiography: Toward an Understanding of the Discursive (Re)Constitution of 'Constitution' in *The Federalist Papers*," in *Doing Rhetorical History*, ed. Kathleen Turner. (Tuscaloosa: University of Alabama Press, 1998), 73-92.

¹⁴ Diana Adlam, ed. *Law, Politics and Justice: Politics and Power* (London: Routledge, 1981); Paul Hirst, *On Law and Ideology* (London: Macmillan, 1979); Hunt, "Ideology of Law," 11-38.

¹⁵ Louis Althusser, *For Marx*, trans. Ben Brewster (New York: Pantheon, 1969): 233.

¹⁶ James L. Golden and Richard D. Rieke, *The Rhetoric of Black Americans* (Columbus, OH: C.E. Merrill, 1971); Manning Marable, *Race, Reform, and Rebellion: The Second Reconstruction in Black America, 1945-1982* (Jackson: University Press of Mississippi, 1984); Philip F. Rubio, *A History of Affirmative Action 1619-2000* (Jackson: University Press of Mississippi, 2001), 138.

¹⁷ Vincent N. Parrillo, "Diversity in America: A Sociohistorical Analysis," *Sociological Forum* (1994): 524.

¹⁸ Parrillo, "Diversity in America," 523.

¹⁹ Parrillo, "Diversity in America," 524.

²⁰ Parrillo, "Diversity in America," 524.

²¹ Parrillo, "Diversity in America," 528.

²² Parrillo, "Diversity in America," 529.

²³ Parrillo, "Diversity in America," 531. Parrillo further explains that there was great cultural diversity within these "outgroups," as well: for instance, African slaves came from several different tribal backgrounds, and spoke about a hundred languages or dialects. Maintaining this cultural diversity was important to slave owners, as the lack of common culture and language reduced the threat of slave rebellions. It was during the 1730s that a cogent African American culture began to evolve, becoming more cohesive after end of slave trade. Parrillo, "Diversity in America," 527.

²⁴ Parrillo, "Diversity in America," 524, 526.

²⁵ Jacobson gives the examples of Celts, Slavs, Hebrews, and Mediterraneans as groups who have fallen from social consciousness as they became Caucasian in status. These groups have lost their social meaning, and thus as not “races” by American estimations any longer. Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge: Harvard University Press, 1998), 2.

²⁶ See *Loving v. Virginia*, 388 U.S. 1 (1967) for a summary of anti-miscegenation laws and the Supreme Court ruling them unconstitutional; *Dredd Scott v. Sandford*, 60 U.S. 393 (1857); and *Lum v. Rice*, 275 U.S. 78 (1927).

²⁷ Marouf A. Hasian, Jr. and Thomas K. Nakayama, “The Fictions of Racialized Identities” in *Judgment Calls: Rhetoric, Politics, and Indeterminacy*, ed. John M. Sloop and James P. McDaniel (Boulder, CO: Westview, 1998), 185; López, *White by Law*, “Chapter 7: The Value of Whites to Whiteness,” 197-202.

²⁸ Michael Omi and Howard Winant, “The Evolution of Modern Racial Awareness” in *A Reader on Race, Civil Rights, and American Law: A Multiracial Approach*, ed. Timothy Davis, Kevin R. Johnson, and George A. Martínez (Durham, NC: Carolina Academic Press, 2001), 3.

²⁹ Perelman, *Justice, Law, and Argument*, 2-5.

³⁰ Celeste Michelle Condit and John Louis Lucaites, *Crafting Equality: America’s Anglo-African Word* (Chicago: University of Chicago Press, 1993).

³¹ Perelman, *Justice, Law, and Argument*, 7.

³² Ron Simmons, *Affirmative Action: Conflict and Change in Higher Education after Bakke* (Cambridge, MA: Schenkman, 1982), 37-38.

³³ Terry Eastland and William J. Bennett, *Counting By Race: Equality from the Founding Fathers to Bakke and Weber* (New York: Basic Books, 1979), 19.

³⁴ Gary Peller, "Frontier of Legal Thought III: Race Consciousness," 1990 *Duke Law Journal* (1990): 764.

³⁵ Peller, "Frontier of Legal Thought III," 764.

³⁶ Martha Augoustinos, Keith Tuffin, and Danielle Every, "New Racism, Meritocracy and Individualism: Constraining Affirmative Action in Education," *Discourse & Society* 16 (2005): 315-340.

³⁷ Peller, "Frontier of Legal Thought III," 774.

³⁸ Steven D. Farough, "Structural Aporia and White Masculinities: White Men Respond to the White Male Privilege Critique," *Race, Gender & Class* 10(2003): 38; Michel Foucault, *Discipline and Punish: the Birth of the Prison* trans. Alan Sheridan, (New York: Pantheon, 1977); Ronald Kahn and Ken I. Kersh, ed. *The Supreme Court & American Political Development* (Lawrence: University Press of Kansas, 2006); Michael J. Sandel, *Liberalism and the Limits of Justice* 2nd ed (NY: Cambridge University Press, 1998); and Patricia Williams and Laura Chrisman, ed. *Colonial Discourse and Post-Colonial Theory: A Reader* (New York: Harvester Wheatsheaf, 1993).

³⁹ James C. Foster and Mary C. Segers, ed. *Elusive Equality: Liberalism, Affirmative Action, and Social Change in America* (Port Washington, NY: Associated Faculty, 1983). Foster, Segers, and others in this book assert that the major problem with American liberalism is its close correlation with what they call "proprietary equality," of the individual opportunity to accumulate property of different sorts (4).

Thus, affirmative action is particularly devastating to this tradition because its justifications – at least, until *Bakke*, when rectifying past discrimination was rejected by Justice Powell – reflect a failure of this mission.

⁴⁰ T. Alexander Alienikoff, “A Case for Race-Consciousness,” *Columbia Law Review* 91 (1991): 1063.

⁴¹ Carl Cohen, “Racial Preference is Against the Law,” *Affirmative Action and Racial Preference: A Debate* (New York: Oxford University Press, 2003), 24.

⁴² Carrie Crenshaw, “Colorblind Rhetoric,” *Southern Communication Journal* 63 (1998): 244.

⁴³ Bryan K. Fair, *Notes of a Racial Caste Baby: Colorblindness and the End of Affirmative Action* (New York: New York University Press, 1997), xxii.

⁴⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴⁵ Justice John Marshall Harlan, *Plessy v. Ferguson*, 163 U.S. 537 (1896) at 559; Crenshaw, “Colorblind Rhetoric,” 247.

⁴⁶ Fair, *Notes of a Racial Caste Baby*, xxiii. See also Crenshaw, “Colorblind Rhetoric,” 248.

⁴⁷ *1883 Civil Rights Cases*, 109 U.S. 3 (1883), Justice Bradley opining. Emphasis added. Even those who supported the affirmative actions taken in the reconstruction amendments were anxious to see “special treatment” over as soon as possible. In defense of the harsh penalties for disfranchising African American male voters in the Fourteenth Amendment, Thaddeus Stevens predicted that it might take “two, three, possibly five years before they [Southern white voters] conquer their prejudices sufficiently to allow their late slaves to become their equals at the polls.”

Philip F. Rubio, *A History of Affirmative Action 1619-2000* (Jackson: University Press of Mississippi, 2001), 53, quoting Stevens from Eric Foner, *Nothing but Freedom: Emancipation and its Legacy* (Baton Rouge: Louisiana State University Press, 1983), 54.

⁴⁸ Washington, "Cotton States Exposition Address," delivered on September 18, 1895 in Atlanta, GA. Published in Ronald F. Reid and James F. Klumpp, *American Rhetorical Discourse* 3rd ed. (Long Grove, IL: Waveland, 2005), 506, 508.

⁴⁹ Golden and Rieke, *Rhetoric of Black Americans*, 115.

⁵⁰ Annette Gordon-Reed, ed. *Race on Trial: Law and Justice in American History* (New York: Oxford University Press, 2002), 4.

⁵¹ Jacobson, *Whiteness of a Different Color*, 2.

⁵² López, *White by Law*, xiii. See also Michael Omi and Howard Winant, "Evolution of Modern Racial Awareness," 3-5.

⁵³ See Hasian and Nakayama, "The Fictions of Racialized Identities"; Jacobson, *Whiteness of a Different Color*; López, *White by Law*; Thomas Nakayama and Robert L. Krizek, "Whiteness: A Strategic Rhetoric," *Quarterly Journal of Speech* 81 (1995): 291-309.

⁵⁴ Naturalization Act of 1790, 1 Stat. 103 (26 March 1790).

⁵⁵ See Hasian and Nakayama, "The Fictions of Racialized Identities."

⁵⁶ See Nakayama and Krizek, "Whiteness: A Strategic Rhetoric."

⁵⁷ Alienikoff, "A Case for Race-Consciousness," 1066.

⁵⁸ Farough, "Structural Aporia and White Masculinities," 39.

⁵⁹ Christopher Newfield, *Unmaking the Public University: The Forty Year Assault on the Middle Class* (Cambridge: Harvard University Press, 2008), 110.

⁶⁰ Newfield, *Unmaking the Public University*, 109. Emphasis added.

⁶¹ Vanessa B. Beasley, "Making Diversity Safe for Democracy: American Pluralism and the Presidential Local Address, 1885-1992," *Quarterly Journal of Speech* 87 (2001): 26. Beasley summarizes the arguments of Avigail Eisenberg, *Reconstructing Political Pluralism* (Albany: State University of New York, 1995) in this passage.

⁶² Karlyn Kohrs Campbell, "The Rhetoric of Radical Black Nationalism." *Central States Speech Journal* 23 (1971): 151-160; Richard B. Gregg, "The Ego-Function of the Rhetoric of Protest." *Philosophy and Rhetoric* 4 (1971): 71-91.

⁶³ Marcus Garvey, "An Appeal to the Soul of White America," (New York: United Negro Improvement Association, 1923).

⁶⁴ See Peller, "Frontier of Legal Thought III," 783; Golden and Reike; Gary Gerstle, *American Crucible: Race and Nation in the Twentieth Century* (Princeton, NJ: Princeton University Press, 2001).

⁶⁵ Peller, "Frontier of Legal Thought III," 783-785.

⁶⁶ Martin Luther King Jr., *Where Do We Go From Here: Chaos or Community?* (Boston: Beacon Press, 1967), 32-33.

⁶⁷ Newfield, *Unmaking the Public University*, 109.

⁶⁸ Golden and Reike, *Rhetoric of Black Americans*, 280-284.

⁶⁹ Peller, "Frontier of Legal Thought III," 825.

⁷⁰ For examples of these arguments, see James P. Sterba, “Defending Affirmative Action, Defending Preferences,” in *Affirmative Action and Racial Preference: A Debate*, ed. Carl Cohen and James P. Sterba (Oxford: Oxford University Press, 2003), 200-203; and Ronald Dworkin, “Are Quotas Unfair?” *Racial Preference and Racial Justice: The New Affirmative Action Controversy* (Washington DC: Ethics and Public Policy Center, 1991), 175.

⁷¹ Crenshaw, “Colorblind Rhetoric,” 245.

⁷² James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990).

⁷³ López, *White by Law*, 81.

⁷⁴ James F. Scott, “*Brown* and *Bakke*: The Relation between Judicial Decisions and Socioeconomic Conditions,” *Phylon* 41 (1980): 237.

⁷⁵ See Christine B. Hickman, “The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census” in *Race, Civil Rights, and American Law*, 7-19; Jacobson, *Whiteness of a Different Color*, 3; Omi and Winant, “Evolution of Modern Racial Awareness,” 3-5; López, “The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice,” in *Race, Civil Rights, and American Law*, 21-31.

⁷⁶ Paul M. Rego, *American Ideal: Theodore Roosevelt’s Search for American Individualism* (Lanham, MD: Lexington Books, 2008), 29.

⁷⁷ Jennifer C. Snow, “From Homogeneity to Diversity: Missionary Responses to Scientific Racism,” in *Protestant Missionaries, Asian Immigrants, and Ideologies of Race in America, 1850-1924* (New York: Routledge, 2006), 28.

⁷⁸ Angela G. Ray, "Frederick Douglass on the Lyceum Circuit: Social Assimilation, Social Transformation?" *Rhetoric & Public Affairs* 5 (2002): 625-648; see also Golden and Reike, *Rhetoric of Black Americans*.

⁷⁹ Frederick Douglass, "The Claims of the Negro, Ethnologically Considered," delivered on July 12, 1854 in Cleveland, Ohio, published as a pamphlet by Lee, Mann & Company in 1854, and reprinted in Golden and Reike, *Rhetoric of Black Americans*, 56-73. Douglass acknowledged the hypocrisy of such the need to prove black personhood in his speech "What to a Slave on the Fourth of July," when he argued that American laws, used in a disparately harsh manner against blacks, confirmed American acknowledgement of personhood. Douglass, "What to a Slave on the Fourth of July?" delivered in Rochester, New York, July 5, 1852 and published in Ronald F. Reid and James F. Klumpp, *American Rhetorical Discourse* 3rd ed. (Long Grove, IL: Waveland, 2005), 340-343.

⁸⁰ Garvey, "An Appeal to the Soul of White America."

⁸¹ Dennis J. Downey, "From Americanization to Multiculturalism: Political Symbols and Struggles for Cultural Diversity in Twentieth-Century American Race Relations," *Sociological Perspectives* 42 (1999): 255.

⁸² Golden and Rieke, *Rhetoric of Black Americans*, 51, 51-52. Golden and Rieke dedicate a chapter of their book to the rhetoric of assimilation.

⁸³ Angela G. Ray, "Frederick Douglass on the Lyceum Circuit: Social Assimilation, Social Transformation?" *Rhetoric & Public Affairs* 5 (2002): 625.

⁸⁴ Ray, "Frederick Douglass," 625.

⁸⁵ Ray, "Frederick Douglass," 626.

⁸⁶ Gerstle, *American Crucible*, 50-51.

⁸⁷ Rubin G. Rumbaut, "On the Past and Future of American Immigration and Ethnic History: A Sociologist's Reflection on a Silver Jubilee," *Journal of American Ethnic History* 25 (2006): 160-167.

⁸⁸ "Assail Zangwill Theory: The 'Melting Pot,' Louis Marshall Says, Is No Solution of Problems" *New York Times* 8 April, 1918: 10. The goal of the Menorah movement articulated at this meeting reflected this goal: "to study and advance Jewish ideals and culture," originating at Harvard in 1907. Louis Marshall was part of this movement in his role as president of the American Jewish Committee, but his interests were not limited to the preserving Jewish culture alone. An early cultural pluralist, Marshall saw the benefits of cultural freedom and preservation for *all* cultures in America, and he worked with the NAACP toward this goal. Additionally, Marshall pushed for vetoes of the Immigration Acts whose goals were to limit immigrants whose races were considered less "pure" by the race-science politicians who reigned the day. From "Guide to the Papers of Louis Marshall" (1905-1933) P-24; American Jewish Historical Society, Newton Centre, MA and New York, NY. <http://www.ajhs.org>.

⁸⁹ In his book *American Ideals*, Roosevelt argued that the fate of African Americans was predetermined to fail because of their genetic tendencies toward laziness and criminality, but nevertheless dependent for any success they could gain on individual efforts rather than on group help. See Paul M. Rego, *American Ideal: Theodore Roosevelt's Search for American Individualism* (Lanham, MD: Lexington Books, 2008), 151. Gary Gerstle claims that a combination the contradictory ideals of

civic nationalism – the belief in American exceptionalism based on the political idea’s enshrined in its founding documents – and a racial nationalism – a belief that “conceives of America in ethnoracial terms, as a people held together by common blood and skin color” – have “shaped the history of the American nation in the twentieth century.” Gerstle, *American Crucible*, 4,5.

⁹⁰ In *American Ideals*, Roosevelt lists acceptable “blood” – including Irish, German, and Scandinavian – to be melded into the American mold. Theodore Roosevelt, *American Ideals and Other Essays, Social and Political Volume 1* (Philadelphia, PA: Gabbie and Company, 1903), 33-35. Gerstle, *American Crucible*, 6.

⁹¹ Gerstle, *American Crucible*, 6.

⁹² Theodore Roosevelt, “How Not to Help Our Poorer Brother,” *Review of Reviews* Jan 1897.

⁹³ Roosevelt, *American Ideals* 30.

⁹⁴ Woodrow Wilson, “True Americanism Versus Hyphenated Americanism,” address given on May 16, 1914. Published in Edgar Eugene Robinson and Victor J. West, *The Foreign Policy of Woodrow Wilson, 1913-1917* (New York: Macmillan, 1918), 217.

⁹⁵ Beasley, “Making Diversity Safe for Democracy,” 28.

⁹⁶ Gerstle, *American Crucible*, 61.

⁹⁷ Gerstle, *American Crucible*, 96.

⁹⁸ Downey, “From Americanization to Multiculturalism,” 255.

⁹⁹ Downey, “From Americanization to Multiculturalism,” 255.

¹⁰⁰ Downey, “From Americanization to Multiculturalism,” 256.

¹⁰¹ Downey, “From Americanization to Multiculturalism,” 256.

¹⁰² Snow, “From Homogeneity to Diversity,” 29. Snow acknowledges that protestant missionary discourse far from unproblematic, still holding ethnocentric beliefs in “low culture” of “unconverted, non-white companions”(28). Yet within this discourse existed pluralist arguments that rejected cultural worth based on racial classification – arguments that did not win the day, but which were strongly voiced and persistent.

¹⁰³ Snow, “From Homogeneity to Diversity,” 29.

¹⁰⁴ Snow, “From Homogeneity to Diversity,” 53. The charge “sentimentalism” carried with it gendered implications which were particularly negative in connotation when juxtaposed with Roosevelt’s arguments about the “manly virtues” of the American spirit, which would fail if Americans did not have the strength of will to fight these “effeminate” tendencies. Roosevelt, *American Ideals*.

¹⁰⁵ Snow, “From Homogeneity to Diversity,” 37.

¹⁰⁶ Snow, “From Homogeneity to Diversity,” 39.

¹⁰⁷ Omi and Winant, “Evolution of Modern Racial Awareness,” 3;

¹⁰⁸ Thomas J. Davis, “Race, Identity, and the Law: *Plessy v. Ferguson*” in *Race on Trial: Law and Justice in American History*, ed. Annette Gordon-Reed (New York: Oxford University Press, 2002), 61.

¹⁰⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896) at 551.

¹¹⁰ *Plessy v. Ferguson*.

¹¹¹ *Plessy v. Ferguson* at 557. Emphasis added.

¹¹² Downey, "From Americanization to Multiculturalism," 257.

¹¹³ Downey, "From Americanization to Multiculturalism," 257.

¹¹⁴ Downey, "From Americanization to Multiculturalism," 258.

¹¹⁵ Gerstle argues that these beliefs were strengthened by the fact that many American labor protesters were immigrants, because immigrants generally took the lowest-paid labor jobs. However, in the wake of the Bolshevik Revolution and other attempts at socialist revolutions in Germany and Hungary, these immigrants were viewed as communist radicals attempting their own revolution on American soil.

Gerstle, *American Crucible*, 96-99.

¹¹⁶ Gerstle, *American Crucible*, 105-126.

¹¹⁷ "An act to limit the migration of aliens into the United States..." (approved May 26, 1924). *The Statutes at Large of the United States of America, from December, 1923 to March, 1925*. Vol. XLII, Part 1, pp. 153-169 (Washington, D.C.: Government Printing Office, 1925). See also Downey, "From Americanization to Multiculturalism," and Gerstle, *American Crucible*.

¹¹⁸ Harry H. Laughlin, "Analysis of American's Modern Melting Pot," Statement to U.S. Congress, House, Committee on Immigration and Naturalization, 67th Congress, Nov. 21, 1922; cited in Gerstle, *American Crucible*, 108.

¹¹⁹ Gerstle, *American Crucible*, 121.

¹²⁰ *Gong Lum v. Rice*, 275 U.S.78 (1927) at 81.

¹²¹ *Gong Lum v. Rice* at 87.

¹²² Peller, "Frontier of Legal Thought III," 812.

¹²³ The stated goal of the NAACP in its year of establishment, 1908, reflects the assimilationist goals in its legal focus on equality: “to secure for all people the rights guaranteed in the 13th, 14th, and 15th Amendments to the United States Constitution, which promised an end to slavery, the equal protection of the law, and universal adult male suffrage...to ensure the political, educational, social and economic equality of minority group citizens of United States and eliminate racial prejudice...through democratic processes.” National Association for the Advancement of Colored People Website, “History,” accessed 2-27-09.

¹²⁴ *Sweatt v. Painter* 339 U.S. 629 (1950) at 634.

¹²⁵ *McLaurin v. Oklahoma State Regents for Higher Education* 339 U.S. 637 (1950) at 641.

¹²⁶ *McLaurin* at 641.

¹²⁷ Goodwin Liu, “Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test,” *Harvard Civil Rights – Civil Liberties Law Review* 33 (1998): 387.

¹²⁸ Claude S. Fischer and Michael Hout, *Century of Difference: How America Changed in the Last One Hundred Years* (New York: Russell Sage Foundation, 2006), 54.

¹²⁹ Downey, “From Americanization to Multiculturalism,” 257.

¹³⁰ Newfield, *Unmaking the Public University*, 3-4.

¹³¹ Downey, “From Americanization to Multiculturalism,” 259.

¹³² Peller, “Frontier of Legal Thought III,” 825.

¹³³ Rubio, *A History of Affirmative Action*, 96, 120; Dean J. Kotlowski, *Nixon's Civil Rights: Politics, Principle, and Policy* (Cambridge: Harvard University Press, 2001), 4.

¹³⁴ Steven R. Goldzwig, "Civil Rights and the Cold War: A Rhetorical History of the Truman Administration's Desegregation of the United States Army" in *Doing Rhetorical History* (Tuscaloosa: University of Alabama Press, 1998) 143-169.

Although the language of Executive Order 9981 fell short of a call for desegregation, the interpretation of the order led to new desegregation policies within the military branches. Large-scale noncompliance with the executive order caused the process to be continued by Presidents Eisenhower and Kennedy.

¹³⁵ Abraham L. Davis and Barbara Luck Graham, *The Supreme Court, Race, and Civil Rights* (Thousand Oaks: Sage, 1995), 117.

¹³⁶ Mark Tushnet, "The Supreme Court's Two Principles of Equality: From *Brown* to 2003," in *From Grassroots to the Supreme Court: Brown v. Board of Education and American Democracy*, ed. Peter F. Lau (Durham, NC: Duke University Press, 2004), 340.

¹³⁷ Tushnet, "The Supreme Court's Two Principles," 340.

¹³⁸ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) at 494.

¹³⁹ Tushnet, "The Supreme Court's Two Principles," 345.

¹⁴⁰ Kotlowski, *Nixon's Civil Rights*, x.

¹⁴¹ James C. Harvey, *Black Civil Rights During the Johnson Administration* (Jackson: University of Mississippi Press, 1973), 4.

¹⁴² Harvey, *Black Civil Rights*, 3.

¹⁴³ *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam, 1968), 27.

¹⁴⁴ Alienikoff, “A Case for Race-Consciousness,” 1060-1125.

¹⁴⁵ Hasian and Nakayama, “The Fictions of Racialized Identities,” 182.

¹⁴⁶ Dworkin, “Are Quotas Unfair?” 178. Emphasis added.

¹⁴⁷ Gary Orfield, “Introduction” in *Diversity Challenged: Evidence on the Impact of Affirmative Action*, ed. Gary Orfield and Michal Kurlaender (Cambridge: Harvard Education Publishing, 2001), 2.

¹⁴⁸ John F. Kennedy, Executive Order 10925, “Establishing the President’s Committee on Equal Opportunity,” (6 March, 1961). Executive orders have the benefit of bypassing legislation while “determin[ing] the conditions under which the federal government will do business.” This makes executive orders potentially far-reaching because every big company, most universities/colleges and hospitals, and nonprofits are government contractors. They can, however, be widely ignored, especially if the orders do not create enforcement organizations to see that they are carried out. See Nathan Glazer, “Racial Quotas,” *Racial Preference and Racial Justice: The New Affirmative Action Controversy* (Washington DC: Ethics and Public Policy Center, 1991), 11-12.

¹⁴⁹ Kotlowski, *Nixon’s Civil Rights*, 101.

¹⁵⁰ Kotlowski, *Nixon’s Civil Rights*, 101; Rubio, *A History of Affirmative Action*, 144.

¹⁵¹ See Harvey, *Black Civil Rights*; Kotlowksi, *Nixon's Civil Rights*; Rubio, *A History of Affirmative Action*; Davis and Graham, *The Supreme Court, Race, and Civil Rights*, 117.

¹⁵² *Civil Rights Act of 1964*, 42 U.S.C. §§ 2000(d)-(e), Public Law 88-352, 88th Congress, H.R. 7152 (02 July, 1964).

¹⁵³ See *Griggs v. Duke Power Co.* 401 U.S. 424 (1971) for the first constitutional test of Title VII, and its upholding by the Supreme Court.

¹⁵⁴ Davis and Graham, *The Supreme Court, Race, and Civil Rights*, 248-249.

¹⁵⁵ Lyndon B. Johnson. *Executive Order 11246 – Equal Employment Opportunity*, 24 September, 1965; see also Kotlowksi, *Nixon's Civil Rights*, 101.

¹⁵⁶ See Kotlowksi, *Nixon's Civil Rights*, 101; Linda Faye Williams, “Tracing the Politics of Affirmative Action,” *The Affirmative Action Debate*, ed. George E. Curry (Reading, MA: Addison-Wesley, 1996), 244.

¹⁵⁷ Sunita Parikh, *The Politics of Preference: Democratic Institutions and Affirmative Action in the United States and India* (Ann Arbor: University of Michigan Press, 1997), 103-105.

¹⁵⁸ Lyndon B. Johnson, “To Fulfill These Rights,” Howard University, Washington, DC. 4 June, 1965.

¹⁵⁹ Tushnet, “The Supreme Court’s Two Principles,” 347.

¹⁶⁰ *Brown v. Board of Education of Topeka (Brown II)*, 349 U.S. 294 (1955), 300-301. Jeffries argues that by the time *Green* was heard by the Supreme Court, “no longer was it enough for school officials merely to *allow* integration; now school boards had an *affirmative obligation* to desegregate.” See Jeffries, *Powell*, 171.

¹⁶¹ *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

¹⁶² *Green v. Board*.

¹⁶³ John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner's Sons, 1994), 314-318. See also Bruce J. Shulman, *The Seventies* (New York: The Free Press, 2001), 56-57 and J. Harvie Wilkinson III, *From Brown to Bakke* (New York: Oxford University Press, 1979), 131-249.

¹⁶⁴ Gary Orfield, *Must we Bus? Segregated Schools and National Policy* (Washington, DC: Brookings, 1978), 291.

¹⁶⁵ *Swann V. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

¹⁶⁶ Tushnet, "The Supreme Court's Two Principles," 348.

¹⁶⁷ Wilkinson, *From Brown to Bakke*, 224. Jeffries noted that a lower court judge said about the case "that the Supreme Court has 'abandoned the ideals of *Brown* at the sign reading 'City Limits,'" *Powell*, 314.

¹⁶⁸ Peller, "Frontier of Legal Thought III," 779.

¹⁶⁹ Peller, "Frontier of Legal Thought III," 803. "At a more general and abstract level of nationalist analysis, the repudiation of the dominant ideology of public education corresponded to a thoroughgoing critique of the epistemological assumptions of liberalism as a whole."

¹⁷⁰ See Gary Peller, "Cultural Imperialism, White Anxiety, and the Ideological Realignment of *Brown*" in *Race, Law, and Culture: Reflection on Brown v. Board of Education* ed. Austin Sarat (Oxford: Oxford University Press, 1997) 206-208, and Newfield, *Unmaking the Public University*, 29.

¹⁷¹ Stokely Carmichael and Charles V. Hamilton, *Black Power: The Politics of Liberation in America* (New York: Random House, 1967), 54-55.

¹⁷² Stokely Carmichael, "Black Power," speech delivered October 1966, Berkeley, CA.

¹⁷³ Douglas Hartmann and Joseph Gerteis, "Dealing with Diversity: Mapping Multiculturalism in Sociological Terms," *Sociological Theory* 23 (2005): 218.

¹⁷⁴ Parrillo, "Diversity in America," 524.

¹⁷⁵ Liu, "Affirmative Action in Higher Education," 387.

¹⁷⁶ Justice Lewis F. Powell Jr., concurring in part with the decision in *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

¹⁷⁷ Austin Sarat and Thomas R. Kearns, "Responding to the Demands of Difference: An Introduction," in *Cultural Pluralism, Identity Politics, and the Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1999), 11.

¹⁷⁸ Elizabeth S. Anderson, "From *Brown* to *Bakke* to *Grutter*: Constitutionalizing and Defining Racial Equality: Racial Integration as a Compelling Interest," *Constitutional Commentary* 21 (2004): 23.

¹⁷⁹ Anderson, "From *Brown* to *Bakke* to *Grutter*," 25-26.

¹⁸⁰ Abigail Thernstrom and Stephan Thernstrom note the potential demeaning quality of diversity – that the purpose for having students of color around is so that whites can learn from them. They quote a pro-affirmative action student, who argues that "the whole argument over what whites will learn from the presence of a critical mass suggests that "diversity" is for the educational benefit of whites. It's offensive

to students of color. It sounds as if we're just in college to enrich the education of white students" (262). Abigail Thernstrom and Stephan Thernstrom, "Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education," *Constitutional Commentary* 21 (2004): 251-274.

¹⁸¹ Anderson, "From *Brown* to *Bakke* to *Grutter*," 27.

¹⁸² Hartmann and Gerteis, "Dealing with Diversity," 218-219.

¹⁸³ See Farough, "Structural Aporia and White Masculinities."

¹⁸⁴ Beasley, "Making Diversity Safe for Democracy," 26-27.

¹⁸⁵ Beasley, "Making Diversity Safe for Democracy," 27.

¹⁸⁶ Newfield, *Unmaking the Public University*, 108-110.

¹⁸⁷ The concept of "strict scrutiny" against legislation that discriminates against discrete and insular minorities, was first argued in a footnote of *US v. Carolene Products Co.* (1938) then applied and expanded in *Hirabayashi v. US* (1944). The strict scrutiny principle argued that such discrimination must be narrowly tailored and necessary to accomplish a compelling interest. The application of strict scrutiny in *Hirabayashi* recognized that not all races were treated as if they were "created equal" and that, for this reason, certain minority groups need particular attention so that they are not disproportionately harmed. The strict scrutiny standard was to become key in *Bakke*, when Justice Powell made the decisive argument to expand strict scrutiny to all racial categorizations.

¹⁸⁸ See, for example, Paul Craig Roberts and Lawrence M. Stratton, *The New Color Line: How Quotas and Privilege Destroy Democracy*, Paperback ed. (Washington, DC: Regnery Publishing, 1997); Shelby Steele, *The Content of Our*

Character: A New Vision of Race in America (New York: St. Martin's, 1990); and Steele, *A Dream Deferred: The Second Betrayal of Black Freedom in America* (New York: HarperCollins, 1998).

¹⁸⁹ Rubio, *A History of Affirmative Action*, 127.

¹⁹⁰ Neili, "Ethnic Tribalism and Human Personhood," 86.

¹⁹¹ Morris B. Abram, "Fair Shakers and Social Engineers," in *Racial Preference and Racial Justice: The New Affirmative Action Controversy* (Washington DC: Ethics and Public Policy Center, 1991), 34.

¹⁹² Marcia G. Synnott, "The Evolving Diversity Rationale in University Admissions: From *Regents v. Bakke* to the University of Michigan Cases," *Cornell Law Review* 90 (2005): 470.

¹⁹³ Synnott, "The Evolving Diversity Rationale," 471.

¹⁹⁴ Synnott, "The Evolving Diversity Rationale," 470.

¹⁹⁵ Gary Peller, "Frontier of Legal Thought III," 761.

¹⁹⁶ Peller, "Frontier of Legal Thought III," 761.

¹⁹⁷ Peller, "Frontier of Legal Thought III," 775-782, 775.

¹⁹⁸ Peller, "Frontier of Legal Thought III," 781.

¹⁹⁹ Peller, "Frontier of Legal Thought III," 782.

²⁰⁰ *Defunis v. Odegaard*, 416 U.S. 312 (1974).

²⁰¹ Mark Tushnet, "The Supreme Court's Two Principles," 347.

²⁰² *Carter v. Gallagher*, 452 F.2d 315 (1971) appealed a ruling that kept a fire department from administering testing procedures that were found to be racially discriminatory, until 20 minority applicants were hired. The 2nd Circuit Court

reversed the absolute preference number of 20, but upheld the waiver of the tests and the affirmative, race conscious steps taken to hire minority firefighters.

²⁰³ *United States v. Jefferson County Board of Education et al.* 372 F. 2d 836 (1966). In his opinion, Judge John Minor Wisdom disparaged attempts to differentiate between “desegregation” and “integration,” a definitional tactic often used by school districts in the wake of *Brown v. Board*. In doing so, Wisdom also argued against the narrow “individual rights” reading of the Fourteenth Amendment:

The mystique that has developed over the supposed difference between “desegregation” and “integration” originated in *Briggs v. Elliott* (1955): “The Constitution...does not require integration. It merely forbids [segregation]”... This dictum is a product of the narrow view that Fourteenth Amendment rights are only individual rights; that therefore Negro school children individually must exhaust their administrative remedies and will not be allowed to bring class action suits to desegregate a school system...

The Supreme Court did not use either the terms “desegregation” or “integration” in *Brown*... There is not one Supreme Court decision which can be fairly construed to show that the Court distinguished “desegregation” from “integration”, in terms or by even the most gossamer implication. Counsel for the Alabama defendants assert that “desegregation” and “integration” are terms of art... They can do so only by narrowing the definitions to the point of inadequacy. Manifestly, the duty to desegregate schools extends beyond the mere “admission” of Negro students on a non-racial basis. As for

“integration”, manifestly a desegregation plan must include some arrangement for the attendance of Negroes in formerly white schools.

...an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; *racial mixing of students is a high priority educational goal.* (5, emphasis added.)

²⁰⁴ *US v. Jefferson.*

²⁰⁵ *Norwalk Core v. Norwalk Redevelopment Agency* (1968) 2nd Circuit Court of Appeals 395 F.2d 920, at 931-932. Emphasis added.

²⁰⁶ Previous cases had addressed issues of integration and of disparate learning environments. However, *DeFunis* was the first to challenge preferential programs in higher education.

²⁰⁷ Howard Ball, *The Bakke Case: Race, Education, and Affirmative Action* (Lawrence: University Press of Kansas, 2000), 24.

²⁰⁸ Del Dickson, ed. *The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions* (New York: Oxford University Press, 2001), 736. This book is a compilation of notes taken by justices during conference.

²⁰⁹ See Ball, *Bakke*, and “Declaration of George H. Lowrey, MD,” *Allan Bakke vs. Regents of the University of California*, filed by Regents on August 29, 1974, No. 31287 (Yolo County Superior Court, 1976). Published in the compilation of the complete record of the litigation in *Allan Bakke v. The Regents of the University of California*. Alfred A. Slocum, ed. *Bakke versus Regents of the University of California* Volume I (Dobbs Ferry, NY: Oceana Publications, 1978),

87-97. All further briefs, opinions, and petitions have been pulled from this publication, which copied the original pagination and page numbering from each of the *amicus curiae* briefs, depositions, petitions, and opinions. I will cite all subsequent legal documents according to their original numbers.

²¹⁰ Petitioner’s Complaint for Mandatory, Injunctive, and Declaratory Relief, *Allan Bakke vs. Regents of the University of California*, No. 31287 (Yolo County Superior Court, 1976), 4.

²¹¹ Reidhaar wrote in a letter to president of University of California that, in his opinion, “both the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Title VI of the Civil Rights Act of 1964 and regulations issued thereunder prohibit a state university from granting preference in student admissions on the basis of race.” O’Neil, 28-29.

²¹² “Memorandum of Points and Authorities in Opposition to the Issuance of Preliminary Injunction or Writ of Mandate,” filed by Donald Reidhaar on behalf of Regents, August 30, 1974, *Allan Bakke vs. Regents of the University of California*, No. 31287 (Yolo County Superior Court, 1976), Slocum Vol 1, 120. Emphasis in original.

²¹³ “Stipulation,” submitted by Donald L. Reidhaar on behalf of the Regents of the University of California, *Bakke v. Regents of the University of California*, 30 August, 1976, Supreme Court of the State of California, 23311 (Super. Ct. No. 31287). The reasoning for the stipulation was offered in the “Petition for Rehearing, and, In the Alternative, Motion for Stay,” filed by Reidhaar on behalf of the Regents on Sept 30, 1976.

²¹⁴ Judge Stanley Mosk, *Bakke v. Regents of the University of California*, August 30, 1976, Supreme Court of the State of California, 23311 (Super. Ct. No. 31287), 71.

²¹⁵ Mosk, *Bakke*, 71.

²¹⁶ Mosk, *Bakke*, 72, citing *DeFunis v. Odegaard* (1974) 416 US at 336-337.

²¹⁷ Judge Mathew Tobriner, *Bakke v. Regents of the University of California*, August 30, 1976, Supreme Court of the State of California, 23311 (Super. Ct. No. 31287), 82-93.

²¹⁸ Tobriner, *Bakke*, 97.

²¹⁹ Tobriner, *Bakke*, 83.

²²⁰ Tobriner, *Bakke*, 83.

²²¹ Tobriner citing *South Carolina v. Katzenbach* (1966) 383 U.S. 201; *Gaston Country v. US* (1969) 395 US 285; and *Griggs v. Duke Power* (1971) 404 U.S. 424 as precedents: 92-93.

²²² Tobriner, *Bakke*, 108.

²²³ “Answer to Petition for Rehearing,” filed by Reynold Colvin on behalf of Allan Bakke, *Bakke v. Regents of the University of California*, 13 October, 1976 (Sup. Ct. No 31287).

²²⁴ Quote is from Allan P. Sindler, *Bakke, DeFunis, and Minority Admissions: The Quest for Equal Opportunity* (New York: Longman, 1978), 18; See also Lyndon B. Johnson, “Executive Order 11246 – Equal Employment Opportunity” (24 Sept. 1965) 30 *Federal Register* 3 CFR, 12319, 12935, 1964-1965 Comp, pg. 339, and Kotlowski, *Nixon’s Civil Rights*, 101.

²²⁵ Kotlowksi, *Nixon's Civil Rights*, 101; Linda Faye Williams, "Tracing the Politics of Affirmative Action," *The Affirmative Action Debate*, ed. George E. Curry (Reading, MA: Addison-Wesley, 1996), 244.

²²⁶ *Amicus Curiae* Brief of the Equal Employment Advisory Council, *Bakke* 32.

²²⁷ *Amicus Curiae* Brief of the EEAC, *Bakke*, e 6.

²²⁸ Sindler, *Bakke, DeFunis, and Minority Admissions*, 23-24.

²²⁹ Judge Torbiner, dissent in *Bakke v. Regents of the University of California*, August 30, 1976, Supreme Court of the State of California, 23311 (Super. Ct. No. 31287)

²³⁰ Title VI, "Civil Rights Act of 1964," 42 U.S.C. §2000(d).

²³¹ "Memorandum of Points and Authorities in Opposition to the Issuance of Preliminary Injunction or Writ of Mandate," filed by Donald Reidhaar on behalf of Regents, August 30, 1974, *Allan Bakke vs. Regents of the University of California*, No. 31287 (Yolo County Superior Court, 1976), Slocum Vol 1, 119. Reidhaar was citing (38 Fed. Reg. 17979, July 9, 1973 45 C.F.R. § 80.5(j).) (119) Emphasis added.

²³² 38 Fed. Reg. 17979, July 9, 1973 45 C.F.R. § 80.3(b)(vii)(6); made applicable to admissions at 45 C.F.R. § 80.4(d)(1) and (2) and at 45 C.F.R. § 80.5(e).

²³³ 38 Fed. Reg. 17979, July 9, 1973 45 C.F.R. § 80.4(d)(1) and (2). In a recent interview, Justice Ruther Bader Ginsburg discussed concerns about affirmative action and merit. Ginsburg credits the push from the Department of Health, Education and Welfare as the reason that she became the first tenured woman at Columbia University:

[In] 1972, every law school was looking for its woman. Why? Because Stan Pottinger, who was then head of the office for civil rights of the Department of Health, Education and Welfare, was enforcing the Nixon government contract program. Every university had a contract, and Stan Pottinger would go around and ask, How are you doing on your affirmative-action plan? William McGill, who was then the president of Columbia, was asked by a reporter: How is Columbia doing with its affirmative action? He said, It's no mistake that the two most recent appointments to the law school are a woman and an African-American man...I was the woman. *I never would have gotten that invitation from Columbia without the push from the Nixon administration.* I understand that there is a thought that people will point to the affirmative-action baby and say she couldn't have made it if she were judged solely on the merits. But when I got to Columbia I was well regarded by my colleagues even though they certainly disagreed with many of the positions that I was taking. They backed me up: If that's what I thought, I should be able to speak my mind.

Ginsburg was quoted in: Emily Bazelon, "The Place of Women on the Court," Interview with Justice Ruth Bader Ginsburg, *New York Times Magazine*, 12 July, 2009: MM22.

²³⁴ Scott, "*Brown and Bakke*," 243.

²³⁵ Scott, "*Brown and Bakke*," 243.

²³⁶ *McDonald v. Sante Fe Trail Transportation Company* 96 S. Ct. 2574 (1976).

²³⁷ Neil L. Rudenstine, “Student Diversity and Higher Learning” in *Diversity Challenged: Evidence on the Impact of Affirmative Action*, ed. Gary Orfield and Michal Kurlaender (Cambridge: Harvard Education Publishing, 2001), 32.

²³⁸ Justice William J. Brennan, Jr., *University of California Regents v. Bakke* 438 U.S. 265 (1978) at 327.

²³⁹ Geoff Eley and Ronald Grigo Suny, “Introduction: From the Moment of Social History to the Work of Cultural Representation,” in *Becoming National: A Reader* ed. Geoff Eley and Ronald Grigor Suny (New York: Oxford University Press, 1996), 7.

²⁴⁰ Paul A. Freund, “Editor’s Foreward.” *History of the Supreme Court of the United States – Antecedents and Beginnings to 1801* Vol 1. ed. Julius Goebel Jr. (New York: Macmillan, 1971), xiii.

Chapter Three:

The Rhetorical Environments of *Bakke*

While law functions on one level to reconcile differences among competing interests in society, its form and content are influenced, on another, by social demands made on the legal system by various interest groups. The prevailing form of legal thought, then, reflects the interplay between the legal system and the broader institutional order.¹

In the same year as *Brown v. Board of Education* (1954), the Supreme Court voted on a rule that increased the difficulty for submitting *amicus curiae*, or “friends of the court,” briefs. The number of amicus briefs had increased dramatically in the early twentieth century, as organized interest groups – both private and governmental – increasingly pursued social change through the legal process.² The habit, combined with an increased workload, had come to annoy some of the justices, and in 1949 they implemented a rule, formalized in the 1954 vote, that required either the consent of the parties to the case or an appeal to the Supreme Court in order to file a brief. To this rule, Justice Black dissented: “I have never favored the almost insuperable obstacle of rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against the *amicus curiae* briefs.”³

If the public interest is served by the submission of *amicus* briefs, then the *Bakke* case served the public well, with a record-breaking 58 briefs filed. By 1977, when *Bakke* reached the Supreme Court, the Solicitor General had relaxed the 1954 rules on granting access via *amicus* briefs. The number and length of briefs reveals a pattern that Samuel Krislov claims that “mirrors the change in tactics and structure of interest articulation in American politics as a whole that occurred during the latter quarter of the nineteenth century.”⁴ The late nineteenth century, argues Krislov, “...saw a transformation of dominant modes of interest activity. The emphasis shifted from personal, face-to-face contacts...to impersonal, organized, and systematic, bureaucratically undertaken and oriented activity.”⁵

Many disparate interests were involved in *Bakke*, in part because the central issue – voluntary affirmative action programs in higher education – the Supreme Court had thus far avoided. Given the prevalence of the practice, mandated by executive orders and federal contracting guidelines for federal employees, the social and political pressures for racial equality of the 1960s and 1970s, the drastically increasing applications to graduate schools, and conservative backlash against race-conscious policies, *Bakke* symbolized a convergence of questions about scarcity, fairness, qualifications, competition and representation. Allan P. Sindler summarizes the interest in the case:

Lacking any solid or reliable body of precedent for its justification, affirmative action was, as one observer aptly put it, ‘a fragile commodity’ that had ‘a sort of tenuous existence between the lines of the Constitution.’ Its programs had expanded so rapidly within a decade that authoritative judicial

resolution of the several disputes it provoked inevitably had lagged well behind. Few definitive lines had been established between what was constitutionally permissible in the generic name of affirmative action and what was impermissible. As a consequence, *Bakke* acted as a magnet for all disputants in the larger controversy, who took the opportunity to press on the Court widely divergent views of where those lines should be drawn.⁶

Justice Powell's evocation of diversity as the primary principle justifying affirmative action can be better understood by examining its inventional *topoi*, the materials and arguments at his disposal as he crafted the final opinion. Discourse about racial justice has oscillated between the rhetorics of integration and of race consciousness, and the discourse of the 1950s and 1960s had been among the most heated. The conundrum befalling the Supreme Court, then, was to reconcile government led and sometimes required affirmative action policies with the publicly re-emerging conservative focus on individual competition, a value consistently privileged by the Supreme Court.

The particular subject around which the *Bakke* case centered – graduate school admissions – brought into high relief those tensions. First, education had long been the battle ground for racial equality for proponents of both colorblindness and race consciousness. The legal system had been a primary scene of that battle, and the Supreme Court had often acknowledged the special role of education in the United States. Yet in *Bakke*, the education under question was specialized, highly competitive professional education, a circumstance that brought arguments about scarcity and competition to the forefront. Graduate schools were increasingly seen as

the ticket to an upper middle-class life in an increasingly professionalized American workforce, and the results-oriented degree worked against the idealistic educating-for-citizenry arguments of the desegregation cases. Third, the health disparities between white and racial minority communities, and correlationally between affluent-to-middle class and poor communities, made the structural inequities discussed in the 1968 Kerner report from the National Advisory Commission on Civil Disorders painfully clear.⁷ Structural inequities are not easily rectified, however, and are hard to “prove” using the individual discrimination standards set up by anti-discrimination policies. Moreover, the results-oriented policies that had been the main counterweight to these structural inequalities were losing favor against an economic downturn, wherein middle-class whites saw the “results” of affirmative action policies in increased competition for jobs and college admissions.

The *amicus* briefs in *Bakke* were textual products of this larger rhetorical environment, reflecting institutional and individual, insider and outsider, legal and political perspectives on the fairness of affirmative action. The dominant issues of the *Bakke* case brought forth conflicts much broader and older than the constitutionality of affirmative action in higher education: it confronted the tension between the rights of the individual and the state’s pursuit of the common good. Using the particulars of the UC-Davis program as a starting point, these briefs spoke from particular subjectivities in the language of the law, performing the democratic problem within the contextual specifics of the case and in the argumentative forms of the law.

This chapter traces the arguments offered in these briefs, detailing the rhetorical environment in which Powell's particular articulation of the meaning and value of race developed. It examines how the social conditions and ideologies comprising the rhetorical environment were reflected in the legal arguments of the *amicus* briefs from various parties of interest. As John Lucaites argues, "The problem of legal interpretation is not... a matter of searching for the theoretical foundations of meaning, but is instead a matter of observing the way(s) in which meaning is negotiated by socially, politically, and ideologically interested speakers and audiences in particular and contingent circumstances."⁸ As such, this chapter frames the major arguments with the social, political, and ideological forces that the arguments rely upon.

Because legal opinions, as with other forms of public address, occur as texts-in-context, their meanings are drawn from – or even comprised of – their surroundings, Marouf Hasian Jr. argues that scholars should "should treat legal formations as 'fragments' that allow critics to trace discursive reconfigurations that are adapted to changing social conditions... constitutional artifacts are simply containers of meaning, that can have either expansive or restrictive readings."⁹ Thus, as the *amici* forward legalistic arguments about the appropriate statutory and constitutional bases for decisions, the level of scrutiny that race-conscious policies merit, the right to compete for public university spaces, and the freedoms and responsibilities that university administrators have in deciding the make-up of their student bodies, they are doing more than applying different legal theories to the same

information: they are reading acceptable legal justifications through competing lenses of social realities.

Ideologies are reflected in legal arguments via linguistic manifestations in legal doctrine, constructions of race, articulations of the relationship between state and institutions, and the construction of the individual in his/her relationship to society.¹⁰ Alan Hunt argues that the power of ideology is drawn from “its ability to connect and combine diverse mental elements (concepts, ideas, etc.) into combinations that influence and structure the perception and cognition of social agents.”¹¹ The legal positions forwarded by the *amici* are “containers of meaning,” filled with pre-existing beliefs about the relationship between individuals, groups and the courts, about the role of race in American society, the value of individual agency, and the role of education in social progress. As Barry Nicholas argues, “no system of law can be fully understood in isolation from the history of the society which it serves and regulates.”¹²

Chapter Two traced several links to equality, including those of liberal individualist ideology and race-conscious multiculturalism. The *amicus* briefs in *Bakke* reveal further links, within a triad of three overlapping ideological frameworks on each side, each giving meaning to their interpretations of laws, policies, and precedents. For those supporting *Bakke* and opposing the UC-Davis program, the appeals to individualism, merit, and colorblindness framed their choices of legal authorities, their views of the nature of education, and the unimportance – or harm – of racial considerations. For those supporting the Regents and affirmative action programs, the practical and philosophical needs for race-consciousness, the

educational value of diversity, and the progressive social needs of integrated graduate schools enjoined for a historically-oriented conception of race, either seeking to remedy racial inequities or extolling the cultural benefits of group categories.¹³ The focus on individualism and hard work – both consistent with twentieth century epistemology and liberal ideology – was met head on with the value of cultural pluralism, a value that had waxed and waned in nineteenth-to-twentieth century America, amid the particulars of a mid-thirties white male who wanted to be a doctor and a medical school looking to keep its student body from being *de facto* segregated due to a flood of medical school applicants.

Functions of Amicus Briefs

Amicus briefs have become a valuable step in the Supreme Court justices' rhetorical invention process. The function of these briefs also serves as a complement to the primary concerns of the *Bakke* case, because they highlight the complexities of judicial review under a federal system: a review process that mediates conflicting state and national interests as well as conflicting private suits with constitutional ramifications. According to Krislov, "the creation of a complex federal system meant not only that state and national interests were potentially in conflict, but also that an even greater number of conflicting public interests were potentially unrepresented in the course of private suits."¹⁴ It has become increasingly important under a federal system of judicial review that third parties be able to voice their concerns, because constitutional disputes often take the form of litigation between private citizens, the specifics of which may in turn "shape the constitutional contours of the federal system."¹⁵ The ability of such arguments to be submitted to the Supreme Court is one

of the primary functions of the briefs – to assure that individuals or organizations with a stake in the case, but not represented by either party, will be heard.

Amicus curiae briefs – or “friends of the court” briefs – are an ancient practice, traditionally used by neutral third parties to inform judges about issues not offered by the two parties. The Deans of the University of California Law Schools took this traditional approach in their brief:

*It is not our purpose to adduce arguments on the merits of the constitutional issue presented...that is, we believe, appropriately left to the parties...It is our purpose to provide information to the Court, which we believe will be useful to it, as to the potential impact of the decision below...We fear that [those arguing against certiorari] may not have fully grasped the potential impact of the decision below on the admission of minority students to professional schools, and in particular, to law schools. As deans of our representative schools, we are keenly aware of the potential consequences and we think it is our duty to inform the court as best we can.*¹⁶

In an attempt to keep within the tradition of neutrality – at least the appearance of neutrality – *amicus* briefs were “authored” by lawyers, with organizational “sponsors” supporting the brief. However, by the 1930s, “the open identification of an *amicus* brief with an organizational sponsor was quite commonplace.”¹⁷ Krislov concluded about the significance of the move:

The attribution of a brief to an organization belies the supposedly lawyerlike role of the *amicus*, but realistically embraces and ratified the transformation of the actual pattern of behavior and its new function. The *amicus* is no longer a

neutral, amorphous embodiment of justice, but an active participant in the interest group struggle.¹⁸

Just as collective interests became more commonplace before the Supreme Court, so too did more extra-legal arguments within the briefs themselves become more frequent. Briefs grew in length, and offered a variety of social-scientific and statistical evidence, as well as articulating the political and social implications of the cases. Briefs were increasingly written in the “Brandeis brief” style. Named after Louis D. Brandeis, who crafted the style in his brief supporting a ten-hour work-day limit for women in Oregon in *Muller v. Oregon* (1908) in his pre-associate justice days, his brief was jurisprudentially significant because it offered a host of social and economic data as well as official reports in order to justify the law. Lucius J. Barker notes that, “By filing this ‘brief of one hundred and thirteen pages, of which only two pages could be construed as strictly legal argument,’ Brandeis wrought significant changes in American jurisprudence relative to the kinds of data appropriate for judicial decisionmaking.”¹⁹

In keeping with the Brandeis brief style, Michael Selmi notes that one of the most striking features of the *Bakke* briefs is the relative lack of legal argument, compared to the overtly political and effects-oriented arguments put forth.²⁰ The *amicus* brief of the Queens Jewish Community Council and the Jewish Rights Council lamented this trend when it argued that “current affirmative action programs are essentially an outgrowth of some of the *curious reasoning* indulged by the Court in its rationale in *Brown v. Board of Education*,” a decision notable for its use of sociological evidence about student self-concept to justify the desegregation of

schools.²¹ Such a reliance on sociological and psychological evidence, instead of a direct condemnation of *Plessy v. Ferguson* (1896), has led us to the possibility of having “our fundamental rights rise, fall, or change along with the latest fashions of psychological literature,” argued the Queens Jewish Community Council.²²

Despite the concern about extra-legal arguments, the ability for third parties to file their arguments to the Supreme Court is crucial, because as Robert Post asserts, in the absence of “an institutional form of agency empowered to speak on behalf of the group...the group interests protected by the right must thus be articulated by individual members of the ethnic group. *In such circumstances, the absence of authoritative institutional presence renders the formulation of group interests highly susceptible to official interpretations of the state.*”²³

Ideological Alignments in Bakke

Several social, political, and legal shifts had occurred in the brief years between *DeFunis*, the earliest higher education case granted certiorari by the Supreme Court, and *Bakke*. The economic recession worsened, increasing competition in graduate schools and making economic arguments about scarcity more prominent and more sympathetic.²⁴ The claim of “reverse discrimination” issued by *DeFunis* and unaddressed by the Supreme Court, “hardened opposing positions due to the economic recession, the dearth of federal funds for higher education, the questionable results of special admissions programs utilizing preferential racial criteria, and the increasing realization among white applicants that they too have a right not to be discriminated against,” according to Larry Lavinsky.²⁵

Thus, the *Bakke* case occurred at a moment in American history where the themes most readily embraced by the civil rights movements of the 1960s – those of equal opportunity – met with strong obstacles in its enactment in policy and in law. The complex social influences of economic downturn, race-conscious legislation and policies, increased competition in schools, progressive educational goals, and conservative backlash worked within larger ideological frameworks of individualism and multiculturalism to form the main arguments about the *Bakke* case. Those *amici* who argued in favor of Bakke did so using three main arguments, all centering around the liberal political ideology privileging the individual as an agent-centered force: those of individual rights, of colorblindness (guided by definitions of race that deny historical and cultural meanings), and of meritocracy based on quantitative standards. Briefs articulating these ideologies read affirmative action and university goals of diversity as markers for liberal excess that demean white America and the principle of individual agency. They invoke scientific values of neutrality and testability as standards for education, and finds social goals to be onerous to the educational process. To the extent that race need be considered, argue pro-Bakke briefs, all races should be treated the same way, and any treatment of individuals with consideration of race is discriminatory. Steeped in a liberal political ideology that pairs a protestant work ethic with a strong belief in individual agency, opponents of the Davis program believed that individual characteristics constituted the single deciding factor in achievement – a belief that discouraged an understanding of collective disadvantage because of historical circumstances.²⁶ Race is an irrelevant factor for this mindset,

because it is a group category, diminishing the primacy of individual agency as the motivating factor.²⁷

Individual, Colorblind Competition

Three underlying assumptions exist in pro-Bakke arguments, according to James F. Scott, including: 1) desegregated schools have led to equal access in the educational qualification process; 2) entrance tests are objective and “internally and pragmatically valid”; and 3) “societal norms defining ascriptive criteria of mobility and intergroup competition have given way to those of achievement and merit.”²⁸

Taken together, these assumptions comprise the three ideologies that run across most pro-Bakke briefs: those of colorblindness, of individualism, and of meritocracy.

These three ideologies can be unified under what James C. Foster has called “proprietary equality,” a concept based on the idea of possessive individualism and functioning ideologically because it “unites a ‘realistic’ acceptance of inequality based upon the [Hobbesian] equality of human avarice with an ‘idealistic’ blindness to inequality resulting from [Lockean] formally equal rights. These two dimensions of liberal-capitalism coexist in ways which, if seldom harmonious, are functionally complementary.”²⁹

Race-Neutral Treatment. Many supporters of the California Supreme Court’s decision argued the dangers of racial classifications as an affront to individual rights. According to colorblind or “race-neutral” proponents, racial classifications are irrelevant, foster identity politics at the expense of individualism, engender continuing racial animosities, and commit the same errors as past discrimination against racial minorities by discriminating against whites. While some *amici* evoked

a direct reading of the “colorblind” metaphor – that justice is blind to race – others evoked a more complicated metaphor of a mosaic of colors, each special and unidentifiable as a “special” color. For instance, the *amicus* brief of the Polish American Congress et al. questioned the ability to distinguish between the many discriminated-against groups in American history, given the “great mosaic that makes up America,” filled with “all kinds of people: farmers, actors, retired persons, youngsters, adventurers, settlers, Italian Americans, Mexican Americans, Polish Americans, Blacks, White, Orientals and on and on.”³⁰ The justices need not be colorblind, argued the *amici*: for good eyesight sees more than black and white, but recognizes nuance. They went on to ask the Supreme Court to provide a historical distinction “between a Black being called a ‘Nigger’ and a Polish American being called a ‘Pollack’, whether telling a Black or Mexican American he cannot qualify is substantially more degrading than telling a Polish American the same thing,” and that Polish Americans have no greater stake on the “special categories” claim than “Italian Americans, Arab Americans, [and] Jewish Americans just to name a few.”³¹ If justices could not provide a method for differentiating between claims, argued the Polish American Congress et al., then they should affirm the lower court’s decision.

Colorblind proponents also asserted that universities could achieve similar social goals through race-neutral admissions measures such as increasing the number of student seats and considering the economic disadvantage of the applicants, without regard to their race. The California Supreme Court argued from this premise, asserting that the UC-Davis program failed because it was not a necessary and exclusive solution to the lack of diversity in schools.³² The university might increase

the flexibility of its quantitative admissions standards, argued California Supreme Court Justice Stanley Mosk, or might “increase minority enrollment by instituting aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races who are interested in pursuing a medical career and have an evident talent in doing so.”³³

Articulating a notion of race that separates it from any meaningful social attributes, the American Federation of Teachers offered similar solutions to Justice Mosk’s decision, favoring economically or educationally disadvantaged applicants regardless of race, and remedial programs, recruitment, waiving admission fees, and increasing student enrollments. They noted that “racial neutrality does not require racial blindness, although it does not permit racial preference.”³⁴ Law school applicant Ralph Galliano affirmed non-racial solutions to social goals, conceding that “the existence of a properly administered special admissions program is highly justified and equally desirable,” while arguing that “its purpose should be to admit those promising individuals whose background is of cultural, economic and educational difference rather than those members of specific minority groups solely because they are members of certain groups regardless of background factors.”³⁵

Different conceptions of race framed the extent to which *amici* read both the goals of the UC-Davis special admissions program and the laws and amendments aimed at regulating the use of race in policy. Legal scholar Ronald Dworkin posits that varying interpretations of “legality” come from different ideological ties to other values; to the extent that judges synchronically link legality with these different values, then differing legal philosophies emerge.³⁶ For colorblind proponents –

generally those filing pro-Bakke briefs, but also those who see affirmative action as a temporarily necessary solution – race is a category that is irrelevant at best and discriminatory at worst, at least at a social level. This belief translated into specific choices in precedents and legal doctrine read from a legal formalist, textually-bound perspective. Legal artifacts include Justice Harlan’s dissent in *Plessy v. Ferguson*, the “individual rights” interpretation of the Fourteenth Amendment, and the application of the “strict scrutiny” standard to *any* racial classification. Neil Gotanda identifies several distinct meanings of race in legal discourse that entrench these different perspectives, moving along a spectrum from biological to cultural, as well as a spectrum of increasing social importance. These conceptions of race are not mutually exclusive; one can see race as having cultural implications which are explained in part by historical events and which thus demand special status in the eyes of the law. Variant approaches to racial equality occur, in part, because the group-status of racial categories is read as onerous to individualism, a major tenet of liberal political ideology.³⁷

One conception of race uses physical or geographical descriptions such as skin color or country of ancestral origin to categorize, but considers race “unrelated to ability, disadvantage, or moral culpability” or social attributes such as “culture, education, wealth, or language.”³⁸ Gotanda argues that the “unconnectedness to social attributes” is the defining characteristic of what he labels “formal-race.”³⁹ This conception of race is the one evoked by proponents of colorblind policies. For instance, the American Federation of Teachers argued that, whereas individual merit is “one of society’s key concepts,” race is an “accident of birth” that does not matter

and should not be considered.⁴⁰ The Committee on Academic Non-Discrimination and Integrity argued that, because all races are the same, then all treatment must be the same, as did Bakke: “If the Constitution prohibits exclusion of blacks and other minorities on racial grounds it cannot permit the exclusion of whites on racial grounds.”⁴¹ Peller asserts that this notion of race is a key feature of the integrationist perspective, wherein racism is rooted in “the cognitive process that attributes social significance to the arbitrary fact of skin color... The key image here is of irrationalism.”⁴² The specter of irrationalism was evoked in Bakke’s brief, characterizing the problem of classifying races as having “grave” and “evil” consequences consistent with formal-race categories alone. Bakke questioned which minority groups will be favored, and how their authenticity should be certified, a series of questions mirrored in several *amicus* briefs, and which Justice Powell would mimic in his final opinion:

There...arises the question of numerous groups not covered by petitioner’s quota: Filipinos? Samoans? Hawaiians? Moroccans? Lebanese? There are also a wide variety of ethnic sub-groups contained within the so-called ‘majority,’ who themselves have been disadvantaged or discriminated against in the past...And who is a member of a racial group? Need one be a ‘full-blooded’ American Indian to qualify? Or is one grandparent sufficient? Or one great-grandparent? Are we to become involved in the testing of legal rights according to bloodlines?⁴³

Amici Timothy Hoy employed the same notion of race by question how various racial or ethnic groups are defined, with subtitles including “Who is Black?”,

“Who is an American Indian?” and “Defining Other Classifications” before working to the conclusion that these irrelevant and indefinable categories are subject to fraudulent claims because they students self-designate.⁴⁴

Historical notions of race conceive of race in relation to its past treatment of members of that racial group. Because of the historical use of race to embody racial subordination, the Supreme Court regards the use of race to confer status as highly suspect, and subject to “strict scrutiny,” especially when used in “prejudice against discrete and insular minorities.”⁴⁵ A good number of *amici* do, as well: as the American Federation of Teachers argued, “Once we conclude that there is ‘good’ discrimination and ‘bad’ discrimination, we have ceased to become true to our principles.”⁴⁶ Gotanda notes, “The state’s use of racial categories is regarded as so closely linked to illegitimate racial subordination that it is automatically judicially suspect.”⁴⁷ This presumption has worked against laws and policies that, like affirmative action, have used racial classifications as the basis for improving disparities caused by discrimination unless they can prove a clear history of that discrimination. Some briefs argued that, because UC-Davis did not prove that their institution had discriminated against minorities in the past, they could not now privilege these groups.⁴⁸ The Brief of *Amicus Curiae* of the Polish American Congress, the National Advocates Society, and the National Medical and Dental Association critiqued the “special favorite minority status” of black, Hispanic, and Asian groups and questioning the basis for those choices because, they claimed, most minority groups had been discriminated against in the past.

A third conception of race “is the traditional notion of race as an indicator of social status,” a concept contemporarily disfavored but nevertheless used in legal arguments during “efforts aimed at eradicating *intentional* forms of racial subordination with their implication of racial inferiority.”⁴⁹ Because status is often entrenched in law, as was certainly the case with *de jure* racial discrimination, the Supreme Court has both legal doctrine and legal vocabulary addressing status-race. In the *Bakke* case, the terms “invidious” and “benign” reflected the concerns about status-race; the former using race to confer social status, and the latter to eliminate social hierarchies, or at least those used in ways that seem not to confer status or judgment upon racial differences. Several briefs argued that the program either did or did not stigmatize the groups benefiting from the UC-Davis program. *Amicus* briefs from Congressman Harry Waxman and from the Committee on Academic Nondiscrimination and Integrity argued that one effect of the “quota” programs would be the stigmatizing effects on the beneficiaries of the programs. The Cleveland State University Chapter of the Black American Law Student Association argued that, as students who have benefited from an affirmative action program, they can personally attest to the lack of stigmatizing effects due to the program’s categorization of them based on race. The Black Law Students Union of Yale University Law argued that the program was neither invidious to whites nor stigmatizing to racial minority members, as did the *amicus* brief for the National Medical Association, National Bar Association, and National Association for Equal Opportunity in Higher Education and the *amicus* brief for the American Civil Liberties Union of Northern California and Southern California.

Under the same logic, however, the *lack* of historical discrimination against whites meant that they did not need the same level of protection than did subjugated groups. Supporters of the UC-Davis program argued that the program was constitutionally permissible because its classifications were benign in intent: they do not stigmatize whites, and their classifications of minority groups were benign in intent.⁵⁰ The *amicus* brief for the Board of Governors at Rutgers et al. asserts as much, arguing first that any individual right Bakke held in the Fourteenth Amendment was overridden by the promise of “eradication of all badges and incidents of servitude” in the Thirteenth Amendment, and second that because whites are not part of a “discrete and insular minority,” Bakke has not been deprived of any constitutionally protected rights.⁵¹

Arguments of “reverse discrimination” evoke status-race, however, as they assert that special admissions programs like the UC-Davis program invidiously discriminate against whites, stigmatizing them and placing them at a disadvantage solely on the basis of race. Several pro-Bakke briefs evoked the charge of reverse discrimination by arguing that consideration of race – at least of minority status as a factor – actively constitutes discrimination against whites. Bakke briefs never mentioned the phrase “reverse discrimination,” but many other pro-Bakke briefs did. The charge of reverse discrimination from Bakke’s supporters places whiteness as a special category, one increasingly under attack as its benefits were being challenged from multiple fronts. Thomas Nakayama and Robert Krizek describe a defining feature of whiteness as its privilege of invisibility: aligned with any particular cultural traditions, whiteness is defined by its margins, by what it is not.⁵² Alexander

Alienikoff asserts that “to be born white is to be free from confronting one's race on a daily, personal, interaction-by-interaction basis.”⁵³ However, decades of fighting for fair treatment of citizens of all races forced political and legal discourses to acknowledge and condemn overt racial preferences, and in doing so drew attention to this area of invisibility, and the power that came with it.⁵⁴ Affirmative action policies allowed whites to confront race in a way they had seldom had to consider, especially policies such as the UC-Davis program that held separate admissions programs for targeted minority groups, thereby making whites the “other.” In this environment of rhetorical negotiation of race, wherein public discussions of group identity and historical treatment were increasingly common amidst the legal, political, grassroots, and cultural movements, different articulations of race emerged, each negotiating the role of race to the individual and society. These sometimes conflicting articulations became major points of disagreement as they manifested in the *amicus* briefs in *Bakke*.

Richard L. Plaut wrote in 1967 of the origins of affirmative action policies as a form of “reverse discrimination” and its connotative shift from a legitimate response favoring historically disadvantaged minority groups (as in, reversing the *act* of discrimination against African Americans by favoring them in recruitment) to an illegitimate attack on whites (reversing the *object* of discrimination from African Americans to Caucasians):

New programs have mostly been established for ‘disadvantaged’ students, usually with the Negro student primarily in mind, because Negroes are the largest and most easily identified among the disadvantaged but, at the same

time including many non-Negroes. With the entrance of the Federal Government into this area, 'reverse discrimination' (in favor of minority groups) practices during most of these years, particularly by the colleges, quietly but with pride, is now starting, unfortunately I believe, to become almost the same 'dirty' word as discrimination in the conventional sense (against minority groups).⁵⁵

Vice President Spiro Agnew evidenced this definitional shift when he condemned preferential admissions policies in two speeches in 1970: "For each youth unprepared for college curriculum who is brought in under a quota system, some better-prepared student is denied entrance. Admitting the obligation to compensate for past deprivation and discrimination, it just does not make sense to atone by discriminating against and depriving someone else."⁵⁶ Academic and professional sources also described concern with affirmative action policies, and they too were cited in briefs, including Bakke's.⁵⁷ Lavinsky lamented the failure of universities to heed Justice Douglas's plea to choose applicants "on an individual basis, rather than according to racial classifications" in circumstances where the schools had not been proven to discriminate against nonwhites.⁵⁸ Although legal scholar John Hart Ely supported race-conscious solutions to racial disparities, he was frank about the consequences, including the fact that some white students would be rejected from scarce graduate school spots because they were born white.⁵⁹ Fellow legal scholar Richard A. Posner argued, to Bakke-supporters' delight, that race-conscious programs' justification of diversity has racist origins in itself, because it stereotypes members of minority races by assuming that specific cultural

characteristics are held amongst all members of a race, instead of treating each person as an individual.⁶⁰

The rhetoric of legal backfire was a consistent strategy when arguing against race-conscious programs, providing a spatial metaphorical symmetry with the “reverse discrimination” claims. Robert A. Hillman describes the rhetoric of legal backfire as “constitut[ing] the position that a law produces or will produce results directly contrary to one or more of those intended,” a common argument because “the multiplicity of goals of a law allows critics to seize upon at least one goal difficult or impossible to measure instrumentally and therefore a prime candidate for a backfire claim.”⁶¹ Evoking the notion of race as a dangerous category, the Order of the Sons of Italy in America, as well as a brief from Congressman Henry Waxman, argued that race-conscious programs themselves perpetuate racism. Their characterizations of race were a bit different – the Sons of Italy thought that any use of race was onerous, and that “racial tests for admissions...have deleterious effects on society,”⁶² whereas the university could accomplish similar goals by race neutral means. Similarly, the Queens Jewish Community Council argued that group preferences would “engender racial tensions and prejudice.”⁶³ Waxman, on the other hand, argued that the use of this particular special admissions program would have stigmatizing effects because it treats all members of the targeted minority groups as equally disadvantaged.⁶⁴

Individual Rights. Because race should not be a defining feature to American identity, then special treatment incurred because of a racial category is necessarily violative of individual rights, argued pro-Bakke briefs. The value and primacy of individual rights has been a central concern of the Supreme Court, lending strength to

one the most common arguments in the briefs: the claim that rights conferred by the Fourteenth Amendment are individually held – as opposed to group – rights. Non-racial individual identity is the central theme around which the briefs focused. In his party brief to the Supreme Court, Bakke relied heavily on this argument: namely, that his individual equal protection, guaranteed under the Fourteenth Amendment, was violated. The brief presents this as the central question before the Supreme Court, arguing that the case:

...presents a constitutional conflict in which this Court must decide whether the right of equal protection, granted by the Fourteenth Amendment to ‘any person,’ does indeed extend to individuals such as Allan Bakke or, instead, applies only to certain racial and ethnic groups...To cast aside a long history of individual freedom and replace it with a system of privileges based upon ancestry would mark a radical departure from the previous decisions of this Court.⁶⁵

If they find for the latter, argues the brief, then the Court would be supporting a practice which “uproots individual constitutional freedoms and replaces them with a destructive system of group rights.”⁶⁶

Disparate groups and individuals warned against the dangers of replacing individualism with group identity, including rejected Florida law school candidate Ralph Galliano, Young Americans for Freedom, the American Federation of Teachers, and college senior and law school hopeful Timothy J. Hoy, who said that the “very root of American beliefs in the primacy of rights of the individual.”⁶⁷ The Queens Jewish Community Council and the Jewish Rights Council argued similarly

in their brief supporting Bakke and the California Supreme Court decision. This brief evoked a particularly authoritative claim, as it argued that “this concept of group statistical rights...is precisely the kind of system which for so many centuries was used to disadvantages members of the group we represent—the Jewish people.”⁶⁸

They warned of the danger of:

submerging the rights of the human individual which are sacred to our social system in favor of the interests of an amorphous group...It is a disturbing sign of our times that the newly rising preference for group over individual rights has so confounded the approach of some of our courts and governmental agencies to due process and Equal Protection questions that the rights of the individual, so long considered sacred and central to our Anglo-American heritage, stand in serious danger of becoming lost.⁶⁹

The allegation that the UC-Davis special admissions program was a quota was a consistent argument, as well, and was similarly onerous from two ideological perspectives: it violated individual treatment, and it failed to uphold meritocratic admissions based purely on “objective” grade point averages and test scores.

Opponents claimed that they could not “compete” for a set number of seats because of a single factor – race. Thus, quotas privilege particular groups over others, and disadvantages those not in the “favored” groups.⁷⁰ This argument hinges on the primacy of individual agency, although particular arguments varied in their acceptance of race as a factor at all. Bakke’s brief, for instance, argued that there was a difference between affirmative action programs and quota systems; the former being acceptable, but the latter being unconstitutional. Affirmative action programs

allow competition for all spots, so individuals are not deprived of an opportunity to compete. On the other hand, the Queens Jewish Community Council and the Jewish Rights Council pointed out that Harvard, which submitted their affirmative action plan for consideration as an appropriate use of race toward the ends of a diverse student body, had proposed in the 1920s using quotas to limit the number of Jews who could attend Harvard.⁷¹ In 1922, Harvard President Abbott Lawrence Lowell attempted to limit the admission numbers of Jewish students, justifying his decision by arguing that the university would lose the ability to pass on the “Harvard flavor” that was its greatest draw if more than 15% of its student population “whose parents have come to this country without our background,” and who worked and socialized together instead of with the “traditional” Harvard student body.⁷² In response, Judge Julian Mack expressed concern about the “nature and character of the tests, and the limitations...to be placed upon any one or more groups, however differentiated from other groups in American life,” a concern which was “fundamentally a consideration of the place and the obligations of Harvard College and Harvard University in the life of the American people and in the future.”⁷³

Quantitative Meritocracy. In addition to arguments about the violation of individual rights, pro-Bakke briefs argued that affirmative action programs violated meritocratic principles by subverting the competitive process. Amid the economic recession, competition for graduate school spots was already fierce, making the set-aside seats that much more coveted and economic arguments of scarcity more prominent and more sympathetic.⁷⁴ Between 1968 and 1976, the unemployment rate for young, college-educated Americans rose from one to three percent.⁷⁵ Affirmative

action programs were finding legal support at the same time that professional job markets became more unstable, making competition for jobs and the need for advanced education more salient. Unlike in the post-World War II era, job growth and employment possibilities did not seem endless.⁷⁶ Paul R. Spikard notes that, “in the 1960s, when the economy was expanding, affirmative action seemed painless. But in the middle 1970s we realized that if some were to gain then others must lose.”⁷⁷ Thus, one of the central issues in *Bakke* became the question of the appropriate goals and values of higher education in a capitalist democracy: how should universities decide how to allocate resources, and toward what ends?

Bakke and his supporters considered competition between students to be the appropriate standard. The ability to compete for all seats to the university is an individual right, argued Bakke, and thus the UC-Davis affirmative action program “implies that rights of education, training and consequent career opportunities, ideally open to all on an equal opportunity basis, will now be officially categorized by group membership.”⁷⁸ In his party brief to the U.S. Supreme Court, Bakke’s lawyer explained Bakke’s working-class roots, strong work ethic, and veteran status before arguing that:

...under normal circumstances, Allan Bakke would be eligible to compete for all of those spaces. In this case, however, petitioner has formally adopted a preferential racial quota and has set aside 16 of the places for members of designated racial and ethnic minority groups. In so doing, petition has prevented Bakke, solely because of his race, *from competing* for the 16 quota spaces.⁷⁹

Alfred Slocum, a constitutional law scholar, asserts that the scarcity of medical school slots made an emerging habit of the Supreme Court to read the Fourteenth Amendment as an individual right – one which would protect any individual against the tyranny of group categorization – that much more likely, and he summarized the effects here:

it is argued by Bakke proponents that the ‘protection’ of the Fourteenth Amendment when it imposes a ‘preference’ on the basis of race, particularly when the sought-after objective is scarce or limited, collides with the individual rights of Whites who, it is felt, have earned the right to be included by virtue of individual merit. The California Supreme Court agreed and saw the question as a limitation of the Fourteenth Amendment’s elasticity.⁸⁰

The rhetoric of scarcity became central to both the supporters and opponents of affirmative action policies in higher education, and, as James Arnt Aune notes, “there is nothing new about the connection between rhetoric and economics.”⁸¹ The same is true of the relationship between law and economics, wherein proponents of the Law and Economics movement have advanced the theory that “jurists and lawyers [do and should] treat the law as a mirror of the economic ‘marketplace’ of life,” a rhetoric which, like the law itself, gains much of its persuasive power from its “anti-rhetorical” posture.⁸² The appeal to scarcity works within the marketplace metaphor, and is “persuasive in that it seems to offer a means of settling complex disputes by appealing to an impersonal marketplace that need not listen to the voices of the disempowered” by divorcing issues from questions of abstract rights and replacing them “with more ‘pragmatic’ vocabularies that remind us of the *limits* of resources

(and rights).”⁸³ The scarcity principle was not the solely a pro-Bakke concern: limited resources were felt by both parties by virtue of the fact that the case took place in the state of California, where the population size made the highly prestiged public university system very competitive. Robert O’Neil speculates that, had Bakke been living in Montana instead of California, the *Bakke* case never would have happened.⁸⁴ Like most states, California universities held a percentage of their slots for California residents. For Bakke, the allocation of 16 spaces out of 100 made an already scarce resource that much more out of reach. O’Neil discusses in a 1971 review of preferential admissions policies the conundrum of higher education policy makers: “...the pressure for expansion of minority enrollments collides directly with the rising academic aspirations and expectations of many lower middle class whites for whom college has for the first time in generations become a serious prospect.”⁸⁵

That some people of color would receive special consideration due to hardship seemed unjust to whites who perceived personal hardship, as well; especially when that hardship was paired with the ideals of quantitative judgment. The Committee on Academic Non-Discrimination and Integrity combined the argument of job scarcity with the arbitrariness of race and the importance of test scores, asserting that “many thousands of talented students who have worked hard to develop their talents are being cruelly denied their rights of self-fulfillment and to meaningful careers by admissions decisions that favor far less qualified members of arbitrarily selected minority groups.”⁸⁶ Similarly, the brief representing a number of police officer organizations, including the Fraternal Order of Police, argued that the “quota” system

implemented by UC-Davis was particularly egregious because of the scarcity of resources available to medical school applicants.⁸⁷

The combination of a strong belief in individual agency and meritocracy meant that racial considerations stood out amongst other, more entrenched, inequities in the competitive process. George Lipsitz describes other meritocratic omissions by Bakke: “Bakke did not challenge the legitimacy of the thirty-six white students with GPAs lower than his who secured acceptance to the UC-Davis medical school the year he applied, nor did he challenge the enrollment of five students admitted because their parents had attended or given money to the school.”⁸⁸ The established practices of nepotism and privilege, long a part of the system, did not strike Bakke – or others arguing against affirmative action policies – as unfair, or at least too established to confront. Cheryl Harris notes that Bakke’s case rested upon the expectation “that he would never be disfavored when competing with minority candidates, although he might be disfavored with respect to other more privileged whites.”⁸⁹ For instance, legacy admits account for twenty percent of Harvard undergraduate students, and a study by the Department of Education revealed that, between 1981 and 1988, legacy admits had “significantly lower grades and scores on standardized tests than the average nonlegacy candidate admitted to that institution.”⁹⁰

A second component of the meritocratic principle evident in the pro-Bakke briefs was that of quantitative judgment, tied to a Cartesian epistemology that views the path to knowledge as a scientific process and the ideal judge “an infallible machine, giving the answer when furnished with the elements of the problem, without being concerned to know what is at stake or who might benefit from any possible

error.”⁹¹ Given the quantitative standards of the primary university admissions criteria – grade point averages and test scores – the meritocratic logic followed that the higher numerical score meant that the individual was better qualified. That someone with lower numbers would be admitted, especially for non-quantitative factors such as race, was offensive to this standard of judgment.

A consistent argument from Bakke and his supporters included the assertion that Bakke was more qualified for admission to the medical school than were some of the special program admittees. By the time the case reached the U.S. Supreme Court, the Regents has stipulated that they could not reach the burden of proof required by the California Supreme Court, that Bakke would *not* have been admitted had there been no special program. Hence, this argument was not central to Bakke’s briefs to the Supreme Court. For the *amici*, however, this “fact” was crucial to the issue of affirmative action, and both sides staked strong claims on two systems of judgment: either colorblind, quantitative meritocracy, or qualitative, contextual, and profession-driven factors. Those arguing for quantitative meritocracy forged strong moral claims in its defense; for instance, the American Federation of Teachers asserted that “one of society’s key moral concepts [was] that an individual’s success is a product solely of his merit and that accidents of birth such as race are irrelevant to successful performance.”⁹² Rejected law student Timothy Hoy quoted Thomas Jefferson when describing the ideal of merit as “natural aristocracy among men” before stating that “*amicus* asks no more than to let his and the applications of *every* other applicant who cannot prove disadvantage stand or fall on their merits—grade-point average...LSAT

or...MCAT score, recommendations from their professors, and other criteria which the schools themselves have empirically established...”⁹³

Because many professional schools in addition to UC-Davis implemented affirmative action programs, a large number of *amicus* briefs came from law and medical school admissions officers, faculty, administrators, and students. There were far more – nineteen in total – *amicus* briefs representing law school interests (either law school, law students, law faculty, or in one case a soon-to-be-applicant to law school) than medical schools, at a paltry five briefs. This deluge may have been counterproductive, argues Selmi, because “the law school admission process appeared to be considerably more quantitative in nature than the medical school admissions process.”⁹⁴ Medical schools regularly interviewed applicants and rated the interviews on a wide range of qualities, including maturity, analytical reasoning, and enthusiasm, making race one of many influences on their decisions. For law schools, on the other hand, “race seemed to be one of approximately three factors – grades and LSAT scores being the other two – that were actually considered.”⁹⁵ On the other hand, the similarities between the professional schools in the drastic increase of applicants, as well as the growing interest in increasing minority group student numbers, made their briefs relevant.

Until the early 1960s, competition for professional schools (law and medical schools) was sparse. A law school applicant in the 1950s, holding a college degree and a C-plus grade average, “was virtually assured of entry into some American Bar Association-approved law school.”⁹⁶ At Berkeley’s law school, named Boalt, an undergraduate grade point average of a B earned a student an automatic admission in

1960, and only those applicants with less than a B average were required to take the Law School Aptitude Test (LSAT).⁹⁷ Furthermore, “the LSAT was developed as a tool for aiding predictions as to whether an applicant, if admitted, would be able to meet a school’s *minimum level of performance*;” it was not developed to determine a competitive maximum edge.⁹⁸

Similarly, some medical schools had a shortage of applicants in the mid-1950s, and the MCAT served only to establish a minimum bar, above which students were expected successfully to complete medical school. A 1964 study measuring the predictive qualities of successful physicians showed no predictive value in successful completion of medical school or in professional success above the minimum MCAT score.⁹⁹ However, in the decade between 1966 and 1976, applicants more than doubled in number while the number of openings only increased by two-thirds, and professional schools began using test scores as competitive measurements instead of minimum disqualifications.¹⁰⁰

The increased reliance on test scores as competitive tools, especially in law schools, offered a more stark contrast between quantitative and subjective measures in graduate school applications. Targeting on the “empirical” nature of merit as a more valid standard of judgment, Hoy and several pro-Bakke briefs argued the insufficiency of non-quantitative standards. Both Ralph Galliano and the Committee on Academic Non-Discrimination and Integrity submitted *amici* briefs arguing for the use of test scores only. The Committee on Academic Non-Discrimination and Integrity argued that the effect of non-empirical admissions policies “lowers professional standards,” an argument which the brief of the Young Americans for

Freedom furthered by asserting that the lower standards were particularly dangerous in the medical profession, when graduates would be responsible for human lives.¹⁰¹

The Queens Jewish Community Council and the Jewish Rights Council contrasted empirical tests with the university's larger goals: "even standards of individual excellence...have virtually been scrapped in favor of sociological goals."¹⁰²

This argument from the Queens Jewish Community Council highlights the duality of the backlash against race-conscious policies and suspicion of the underlying vision of universities as civic and political educators. Christopher Newfield notes that the critique began "just as the American middle class was starting to become multiracial, and as public universities were moving with increasing speed toward meaningful racial integration."¹⁰³ The progressive ideology underlining this idea, combined with the rapid increase in numbers of students attending college, troubled free-market conservatives, who argued that "the traditions of the Left are being absorbed into the agenda of 'progressive reform,' and the structure of American society is being radically, if discreetly, altered."¹⁰⁴ That universities were embracing multiculturalism and incorporating pluralistic values into courses and majors was also seen as a turn from the individual competition enshrined in the "American dream" narrative to a group-oriented ideology wherein group identity, especially ethnic and racial identity, became a source of pride rivaling that of national pride.¹⁰⁵

The progressive movement about which conservatives worried was quite visible in California, where universities like Berkeley were frequent sites of community and student protests, and the left-leaning orientation of the gatherings had drawn the attention of conservatives. Ronald Reagan's gubernatorial campaign

targeted the protests at the California universities, and one of his first acts upon election was to fire the president of the University of California, Clark Kerr, who Reagan felt did not have proper control of the protests and free speech rallies at UC-Berkeley.¹⁰⁶ The affirmative action program that University of Washington president Charles Odegaard had promised to student protesters resulting in him being named directly in a lawsuit that became the immediate predecessor to *Bakke: DeFunis v. Odegaard*. Marco DeFunis himself joined on an *amicus* brief of the Young Americans for Freedom in *Bakke*.¹⁰⁷ And in August of 1971, a Virginia corporate lawyer named Lewis F. Powell wrote a long confidential memo entitled “Attack on the American Free Enterprise System” to the Chair of the U.S. Chamber of Commerce Education Committee lamenting the anti-conservative and anti-capitalist arguments coming, not from “revolutionaries who would destroy the entire system,” but from “perfectly respectable elements of society,” including the college campus and academic journals.¹⁰⁸ Powell, concerned about the declining influence of business in politics, academia, and the media, pointed out that “the campuses from which much of the criticism emanates are supported by tax funds generated largely from American business,” and the “boards of trustees of our universities overwhelmingly are composed of men and women who are leaders in the system.”¹⁰⁹ Two months after penning the memorandum, Powell was nominated by President Nixon to the U.S. Supreme Court.

Race Consciousness as a Social and Educational Good

Briefs articulating support for the Regents, UC-Davis, or affirmative action in general ask the Court to read this case as a university, bestowed with the authority to

determine the needs of its student body, carrying out its mission by striving to meet the goals of social justice by embracing race consciousness as a necessary and valuable feature of American life and advocating diversity as a valid educational objective. Although particular justifications differ in the pro-Regents briefs, the primary assumption bringing them together is the need for race consciousness in policy decisions. The primary justification for allowing race as a consideration was that of academic freedom, in pursuit of the goals of remediating social racism and toward the academic end of diversity.

Many briefs supporting UC-Davis touched upon a primary twentieth-century goal of high education – the promotion of effective citizenship. After the Civil War, an increase in national wealth and a competitive eye toward a university-rich Europe increased interest in the university’s role in three areas: offering vocational skills, expanding research, and increasing liberal culture, the latter defined by Robert K. Fullinwider and Judith Lichtenberg as emphasizing “aesthetic and intellectual appreciation and the development of character.”¹¹⁰ From the beginning of this uneasy triumvirate, there was tension between the three; if one of the end goals was to provide students with specialized skills for a workforce, then what purpose did a literature class serve? The movement from a rather aristocratic conception of liberal culture in its pre-twentieth century iteration to its contemporary justification – its service to civic and political ends – was one response to this tension.¹¹¹ Today, “universities have multiple missions, deriving from and aiming at multiple goods,” based upon varying weights given to three general purposes: education for work, education for citizenship, and education for living.¹¹²

Newfield argues that this trilogy became an important part of the middle class ideal, especially in a hopeful post-Great Depression and post-World War II era facing economic upturn and renewed commitment to multiculturalism, fostered by various civil rights movements, as foundational to the American narrative. In his book about the changing nature of the public university, Newfield describes the middle class as:

the numerical majority of the population whose contact with college was interwoven with the mainstream and politically powerful ideal that this majority was to have interesting work, economic security, and the ability to lead satisfying and insightful lives in which personal and collective social development advanced side by side....This vision was of a full political, economic, and cultural capability.¹¹³

Rather than being aristocratic in nature, the twentieth century public research university “sought to combine nearly universal access with the highest quality in teaching and research, and saw access and quality as not only compatible but, in a profound way, as mutually reinforcing.”¹¹⁴

The U.S. Supreme Court had affirmed this view of education as central, not only to economic upward mobility, but also to effective and enlightened citizenry. The most publicly known articulation of this value came from Chief Justice Earl Warren in *Brown v. Board of Education* (1954), when he opined:

Today, education is perhaps the most important function of state and local governments...It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his

environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹¹⁵

In 1971, the Supreme Court affirmed the need to take race-conscious affirmative steps to integrate schools in order to ready them for a multicultural American life, arguing in *Swann v. Charlotte*: “School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that *in order to prepare students to live in a pluralistic society* each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.”¹¹⁶ They also affirmed the special role of education in *San Antonio School District v. Rodriguez* (1973), as the Regents reminded the Supreme Court by citing it in their brief: “The reminder [that schools need freedom to make admissions decisions] has special pertinence in dealing with the ‘myriad of intractable economic, social, and even philosophical problems’ which education presents.”¹¹⁷

Academic Freedom. Briefs supporting the Regents relied on the presumption offered in *San Antonio v. Rodriguez* to assert the university system’s continuing need for the freedom to define the academic factors most beneficial to its students. Within the University of California system, a fair amount of freedom was already given, as each campus’s faculty could decide how to best construct and run its admissions process. This independence was central to the arguments in *Bakke*. The University of California system was decentralized when it came to admissions decisions and

policies (especially at the professional schools). Thus, each school made a decision about whether to have a special admissions program, and how the program would work.¹¹⁸ UC-Davis chose to offer a special admissions program for economically or educationally disadvantaged minority students.

In keeping with the progressive ideals of public universities articulated by Newfield, the Regents, along with briefs from several other universities, argued that this freedom was essential to meeting the needs of its student population and the needs of society at large. Citing precedents such as *Swann v. Charlotte* and the Supreme Court of Washington in *DeFunis v. Odegaard*, which found “the state interest in eliminating racial imbalance within public legal education to be compelling,” the Regents’ brief argued that such decisions “leave the states free, either to set the admissions criteria for state institutions by legislative action or else to allow each public institution to set its own criteria according to the faculty’s choice of educational objectives.”¹¹⁹ “Liberty,” continued the Regents, “is still a major element of every constitutional equation” and “the Constitution does not charge the federal courts with detailed supervision of the admissions policies and practices of state colleges and universities,” which practice affirmative action programs for reasons, with different goals and degrees of flexibility.¹²⁰ Although different schools used race conscious programs with different motives, such as alleviating personal disadvantage, remediation for a history of discrimination, or the benefits of interracial association, “this Court should not shut off the study, debate and experimentation by undertaking to prescribe, upon further findings, a detailed set of constitutional rules.”¹²¹ In support for this argument, they cited Justice Powell’s dissent from a

1977 Supreme Court opinion, *Bates v. State Bar of Arizona*, in which he stated, “One of the great virtues of federalism is the opportunity it affords for experimentation and innovation, with freedom to discard or amend that which proves unsuccessful or detrimental to the public good.”¹²² The institution of education holds special pertinence, argued the Regents as they cited another Supreme Court opinion, because of it is “dealing with the ‘myriad of intractable economic, social, and even philosophical problems’ which education presents.”¹²³

Likewise, the National Association of Minority Contractors and the Minority Contractors Association of Northern California asserted that, while they were neither for nor against the admissions program, they believe that “the program is a constitutionally permissible exercise of non-judicial, government authority,” and that the Supreme Court should “reserve to the non-judicial branches the task of establishing society’s goals and allocated its scarce public resources.”¹²⁴ The State of Washington and University of Washington argued for “educational discretion” in determining which factors would benefit students.

A collective brief from Columbia University, Harvard University, Stanford University, and the University of Pennsylvania defined both the university’s mission, and large space historically given to the university in achieving it:

A university’s highest function is to give people of great talent and motivation the opportunity to participate, as students and as teachers, in rigorous intellectual...inquiry—and thereby simultaneously to enlarge today’s corpus of knowledge and creative works, and to develop tomorrow’s cohorts of physicians and poets, physicists and planners, philosophers and politicians.

In pursuing this function and these goals, colleges and universities, with rare exceptions, historically have been accorded freedom from external influence and intrusion. Our society has recognized that higher education can flourish only so long as educators have substantial independence to formulate and implement the policies by which it is transmitted...When...the problem is central to the educational process as is the determination of the qualification of students, when educators are searching in good faith for solutions, and when applicable legal norms are in doubt, we believe that the cause of education, and hence the welfare of our society, are best served by judicial restraint.¹²⁵

The Justice Department supported the freedom to experiment forwarded by the Regents and other university *amici* in their briefs. Given the deluge of white applicants and the myriad goals of higher education, the Justice Department argued that “professional schools therefore must have discretion to seek to make judgments about applicants that cannot be captured in a simple formula,” suggesting that “the wisdom of deference to the answer given by the admissions committees charged with making such decisions every day.”¹²⁶ Similarly, the Board of Governors at Rutgers et al. posited the negative effects on universities, were *Bakke* lower court’s decision upheld: “affirmance of the *Bakke* decision will stultify the ability of political institutions to respond to the social reality of race-based inequality.”¹²⁷

Non-Quantitative Admissions Considerations. The progressive argument for education as training for pluralistic citizenship became more complicated when the focus came to graduate schools with a professional (as opposed to scholarly or

cultural) focus. Scott argued about college education in general, and professional schools in particular, that “because of the greater reliance on formal educational training for job placement in an organizational society, competition for educational opportunities becomes practically synonymous with competition for occupational status.”¹²⁸

Sindler attributes the increased interest in occupation-oriented graduate education to several factors, including the post-Sputnik interest in scientific education, followed by an economic downturn that made a medical career a much more lucrative alternative to graduate school. By 1976, “the average income of doctors grew rapidly to over \$60,000 a year..., more than twice that of lawyers, which visibly made medicine the best-paid profession in the country.”¹²⁹ Thus, during the 1975-76 school year, the 114 medical schools in the United States received over 366,000 applications, with an average of 2711 applicants for 135 seats at each school.¹³⁰ This was paired with an increase in the unemployment rate; Scott noted that “between 1968 and 1976, the unemployment rate for persons 25 to 34 who had four or more years of college training increased from 1.0 to 3.1 percent.”¹³¹ Thus, more college graduates were going back to school.

For professional schools, the drastic increase in applications meant that the percentages of white applicants with higher test scores virtually blocked from consideration the smaller number of minority group students with high test scores. If schools were to choose purely on test scores – tests that were not developed to be discerning at the high end of the scales, and which had little predictive value at that end – then they would have white students only. The absence of color was especially

severe at medical schools, which were in essence – though not necessarily in policy – segregated into the early 1960s. For instance, in 1961-62, 600 of 771 black medical students attended all-black medical schools at Howard University in Washington, DC and Meharry Medical College in Nashville, Tennessee.

Professional schools began to increase numbers of minority students with special admissions efforts that considered race as one factor in the selection of quantitatively qualified students, beginning in the late 1960s. As early as 1948, the National Scholarship Service and Fund for Negro Students was established to help black students gain admission and financial aid to integrated schools.¹³² Newfield argues that the post-World War II commitment to public higher education reflected the epistemological benefits of multiculturalism, and the liberal humanist belief in liberal education as a gateway to responsibility citizenry and middle-class economic growth.¹³³ Brainerd Alden Thresher noted the public interest component that should be taken into account, during his publication about college recruitment:

...the ‘systems’ view of the entire process...involves the interaction of all the colleges and universities with each other and with secondary schools as they appraise and deliver their annual crop of students coming forward out of society; it involves not only the ‘manpower’ demands of the economy in a narrow sense, but also the demands of the entire polity for an increasingly literate society, an increasingly knowledgeable electorate, and a citizenry with a depth of cultural awareness that would scarcely have been thought of a generation ago.¹³⁴

Many universities undertook affirmative action programs voluntarily – as opposed to those required by administrative or judicial order – and their efforts “reflected a mix of motives,” including a strong desire to see minorities succeed in their discipline, voluntary compensation over past discrimination, pressure from civil rights organizations and student protests to increase admissions, and political support and pressure in the form of the Civil Rights Act of 1964, Executive Order 11246, and federal mandates for all agencies receiving federal funds to submit affirmative action plans.¹³⁵ Most comprehensive studies of higher education concluded with recommendations to increase opportunities for members of racial minority groups: these studies included the “Assembly on University Goals and Governance: A First Report,” (1971); The Carnegie Commission on Higher Education in a publication entitled “A Chance to Learn: An Action Agenda for Equal Opportunity in Higher Education,” (1970); the report of the President’s Commission on Campus Unrest (1970); and the “Report on Higher Education to the Secretary of Health, Education and Welfare” (1971), all of which were cited in briefs supporting the UC-Davis program. Pressure came from the grassroots, as well: for instance, members of the Black Student Union at the University of Washington stormed the office of university president Charles Odegaard in May 1968. They demanded that the university admit more minority students, a request that Odegaard made happen.¹³⁶

Professional and academic publications also showed great interest in the status of minority group enrollment in professional schools, and the *amicus* briefs in *Bakke* marshaled those sources toward their claims – mostly claims supporting the UC-Davis program, or at least the need for targeted race-conscious admissions programs

in general. Ely opined in the *University of Chicago Law Review* that: “If we are to have even a chance of curing our society of the sickness of racism, we will need a lot more Black professionals. And whatever the complex of reasons, it seems we will not get them in the foreseeable future unless we take blackness into account and weight it positively when we allocate opportunities.”¹³⁷ Studies also included Thresher’s book, published by the College Entrance Examination Board in 1966 and entitled *College Admissions and the Public Interest*. In it, Thresher noted that “schools routinely have given preference to applicants who will bring distinction and diversity to the school because of special talents, skills and motivations” including leadership skills and students who were in-state residents, for whom there were often quotas.¹³⁸ Thus, special treatment was already given for a variety of competitive and social reasons, argued Thresher, and affirmative action programs fit nicely into such preferences.

The topic of the twelfth annual College and University Self-Study Institute, held in at the University of California, Berkeley in 1970, was “The Minority Student on Campus: Expectations and Possibilities.” The published version, cited in Justice Mathew Tobriner’s dissent to the California Supreme Court decision on *Bakke*, included discussions about non-curricular and curricular programs of minority students, pluralism on campus, and questions of power and priorities.¹³⁹ The Association of American Medical School Colleges solicited applicants for medical school affirmative action programs in the 24th edition of their annual publication of “Medical School Admission Requirements, U.S.A. and Canada” in 1974-75.¹⁴⁰ In 1973, the Educational Testing Service published the 5th edition of a pamphlet entitled “Graduate and Professional School Opportunities for Minority Students,” which

“provides information on medical school programs for minority students including recruitment, admission, academic aid, summer enrichment, and financial aid.”¹⁴¹

During the time that *Bakke* was being considered by the courts, the push for racial diversity in higher education was showing varied results. On the positive side, the enrollments at the two black medical schools, which had accounted for about 78% of black medical students in the 1961-62 school year, by 1975-76 accounted for only 19%: the rest were in integrated schools.¹⁴² According to Sindler, “this shift reflected the adoption by over 90 percent of medical schools of special recruiting and admissions programs aimed at stepping up enrollment of blacks and other minorities.”¹⁴³ However, despite these efforts, “the goal of minority enrollment in 1975 set by a task force of the Association of American Medical Colleges in 1970 still has not been met; 12 percent of first-year enrollment for four minority groups (blacks, Mexican-Americans, mainland Puerto Ricans, and American Indians...). The actual proportion varied narrowly between 8.5 and 10.1 percent from 1971-1972 through 1975-1976.”¹⁴⁴

Between the need to choose among a flood of graduate school candidates whose acceptance had long been based on entrance scores and grades, and a want to increase students of minority status who would be drowned out by the increase in applications, “the issues of the affirmative action debate are organized around the same structural opposition between reason and bias... To integrate institutions [meant to] compromise meritocratic standards either temporarily (remedy-based)... or permanently, by diffusing merit with other ends such as diversity.”¹⁴⁵ Thus, briefs from supporters of the UC-Davis program argued for the academic freedom to be able

to answer these multiple needs and for broader definitions of meritocratic qualifications that are based on the specific needs of the profession.

A common argument coming from professional schools and other UC-Davis supporters, then, included the need to consider non-quantitative factors that would make for better professionals. This was particularly necessary, argued these briefs, because many more students qualified though test scores and grade point averages than could possibly be admitted. A representative example of this argument comes from the *amicus* brief of the Association of American Medical Colleges:

The primary purpose of the medical school admission process is to select from among applicants deemed qualified to study medicine those who, in the judgment of a duly constituted admissions committee, will become physicians most likely to contribute to the needs of the country or the state of medical care. This purpose necessarily implies that some subjective judgments must be made in assessing the needs of the state and the likelihood that one individual, more than another also qualified for medical study, will tend to serve those needs. Many criteria should be applied to aid in this difficult evaluation process, including relevant personal characteristics. When the institution's goals include training professionals to serve a presently underserved minority population, the consideration of race as one of many measuring tools is relevant 'rationally related' to the enunciated purpose, and in pursuit of a 'compelling state interest'...Nonobjective standards other than grade point average and test scores have long been used in selecting those applicants to whom admission to medical school is offered.¹⁴⁶

The *amicus* brief for the Black Law Students Association at UC-Berkeley critiqued the heavy use of MCAT scores, especially when opponents of the program argued that the minority candidates admitted were “less qualified.” In their brief, they argued that: 1) the Medical College Admission Test (MCAT) does not identify “more qualified” candidates, only those who meet minimum academic qualifications; and 2) a higher MCAT score than the minimum passing score is not predictive of success, either in medical school or in the profession.¹⁴⁷ Similarly, the National Employment Law Project asserted that the exclusive reliance on grade point averages and MCAT scores would exclude most minority applicants because of disparate primary education backgrounds, a fact compounded by a number of studies showing that the “admission criteria which impact adversely on minority applicants do not bear any proven relationship to physician or medical school performance.”¹⁴⁸ The *amicus* brief for the Antioch School of Law argued that, in addition to tests not being predictive of professional competence, race is a relevant factor in the medical profession because proper communication skills involve factors of race, culture, class, and national origin, without which doctors would be ineffective.¹⁴⁹ Finally, the Regents’ brief asserted that the “less qualified” argument was specious because, while “it is accurate to say that a minority admissions program results in selecting for admission from among many fully-qualified candidates some fully-qualified minority applicants who not have been chosen under earlier color-blind criteria for selection...such arguments otherwise confuse ‘qualification’ with ‘selection.’”¹⁵⁰ Those arguing that the program violates meritocracy “assume, contrary to fact, that there is *some abstract and universal measure* of who is ‘better qualified’ for all

purposes.”¹⁵¹ Qualifications have long considered public need, and are continuing to do so here, argued the Regents; but there must be additional qualifying factors in order to choose between so many applicants.

Because the Supreme Court had previously concluded that equal access to schools was a constitutional right, and the deprivation of access discriminatory, proponents of the affirmative action program placed also argued about the discriminatory effects of striking down such policies.¹⁵² In doing so, these arguments placed the university as a primary enforcer of the mission of *Brown v. Board of Education*. Given disparities in education for targeted minority groups, insisting on race-neutral policies that rely primarily on entrance exams is the basic equivalent of segregation, argued several *amici*: “In light of the general pattern of poor test performance of black students, the practical consequence of its use can be as particularistic as was the obvious use of racial background in the past.”¹⁵³ The National Employment Law Project argued that abandoning the special admissions program would result in unlawful discrimination, because of the disparate impact of past discrimination on grade point averages and test scores.¹⁵⁴ Anti-discrimination laws and the legacy of *Brown v. Board* disallowed such effects, argued these proponents. The Regents equated an upholding of the California Court’s decision with reverting to pre-Brown segregation:

This case concerns whether faculties will be permitted by the judiciary to continue to make such discretionary judgments about basic educational policy and to continue, voluntarily, to make a meaningful effort to carry out the country’s commitment to the principles of *Brown v. Board of Education*. An

affirmance of the judgment below would—put bluntly—represent an abandonment of the minority students who have seen the hope but not yet the promise of *Brown*.¹⁵⁵

The ability to consider race in order to achieve institutional goals was particularly important given the increased competition in schools, argued UC-Davis supporters. Pro-Regents scarcity arguments framed the increased competition for professional school seats as a market flooded with white applicants, who by virtue of sheer numbers blocked the upper-end of GPAs and test scores. The *amicus* brief from the Deans of the University of California Law Schools offered tables and charts supporting the “explosive growth” of highly qualified applicants, and concluded that graduate schools would have hardly any people of color if not for race-conscious goals and special admissions programs because of the number of highly qualified students applying.¹⁵⁶ The Justice Department argued similarly, noting that because there were so many white applicants, only slightly lesser minority test scores would mean an all-white student body. Thus, argued the brief, “professional schools therefore must have discretion to seek to make judgments about applicants that cannot be captured in a simple formula,” including factors such as “motivation, self-discipline, personal interests, and the extent to which applicants can diversify and enrich the profession.”¹⁵⁷

The Regents’ brief addressed the scarcity argument forwarded by pro-Bakke briefs, but ultimately rejected it as a standard for judgment. Far from the “simplistic assertions” that Bakke was excluded solely based on his race, Regents argued that the

very individual meritocratic competition that Bakke insisted had been denied to him had, in fact, kept him from getting in:

Respondent failed to gain admission because there were approximately thirty applicants for every place available at Davis and his credentials were judged not to be strong enough to win him one of the places available to him...[He was] denied for exactly the same kinds of reasons that the Admissions Committee in making selection decisions denied many other well qualified non-disadvantaged applicants, whites and minorities.¹⁵⁸

More importantly, however, the Regents shifted the goals of higher education from those of allotting a scarce commodity to a larger social goal. "Selection for admissions is *not simply a rationing of benefits*," argued Regents; "it involves decisions concerning the characteristics of the kinds of students and graduates of professional schools which society needs."¹⁵⁹ They continue:

Here, in today's society, because of the past, being black, chicano, Asian or American Indian, is a fact and a highly relevant personal attribute. *Race or color is relevant to educational and social policies and therefore to admissions*, not because being black, chicano, Asian or American Indian is inherently better or worse, or makes one more deserving or less deserving than anyone else, but because decades of hostile discrimination, *de jure* as well as *de facto*, isolated the minorities in barrios and black or yellow ghettos and on Indian reservations, yielded inferior education, denied the minorities access to the more rewarding occupations and thus withheld from succeeding generations the examples which stimulate self-advancement. *The Equal*

*Protection Clause does not require the Court to BLIND itself to what the world already knows.*¹⁶⁰

Race Consciousness. What the world already knew about race depended on the worldview of the people you asked. Briefs supporting UC-Davis attempted to establish the primacy of race consciousness as a feature of twentieth century American life, or at least of twentieth century American university life. The rejection of colorblind ideology enjoined this belief. The Deans of the University California Law Schools asserted that the need for race-consciousness was the single feature that united the various programs at stake in *Bakke*: “These ‘special admissions’ programs differ somewhat among the schools, both in the procedures used and in the size of the program. They do have one common characteristic: they deliberately rely upon race or cultural background; almost without exception all persons admitted are members of minority groups.”¹⁶¹ This is true, argued the Deans, because a race-neutral solution to a racially-born inequality is “footless”: “If there is a race-blind method of selection in a unitary program which will select out a meaningful number of persons from a relatively small group of minority applicants in competition with a much larger group of whites, we do not know what it is.”¹⁶² Furthermore, argued the brief from the National Employment Law Project, “the special admission program did not *create* racial categories; it made rational adjustments in selection procedures to equalize admission opportunities among the ‘qualified’ applicants.”¹⁶³ To do otherwise is disingenuous, argued the Regents in their petition to grant *certiorari*. For the Regents, it should be:

Attempting to disguise those effects by advancing transparently ineffectual ‘alternatives’ in an unacceptable way to deal with so fundamental a problem. Apart from the risk that it may breed cynicism about the rule of law, such an approach invites much the same kinds of evasive responses that this Court has found difficult to deal with in implementing *Brown*.¹⁶⁴

Pro-UC-Davis briefs argued that colorblind admissions processes were ineffective for several reasons: they were based on an unrealistic understanding of race; they failed to account for racial disparities in educational opportunities at lower levels; they constrained universities from achieving their goal of racially diverse student populations; and they disvalued a crucial component of American society – multiculturalism.

Critics of colorblind ideology, such as Newfield, argue that such logic fails to recognize that “individual identity [is] simultaneously voluntary *and* involuntary,” and ignores “the history of racial progress in the United States derived at every point from race-conscious critiques of existing arrangements.”¹⁶⁵ In contrast to notions of race articulated in the pro-Bakke briefs, proponents of racial pluralism have claimed that, although individual identity and choice were relevant to discussions of racial identity, nevertheless:

hybridity, mobility, and freedom *coexisted* with a group-based life that societies assigned to the members of groups, particularly those that were disfavored. That meant that democracy depended on the recognition of the political and economic realities created by that group life—by systemic racial inequalities, by ongoing racial disparities, by racism past and present.¹⁶⁶

Proponents of race consciousness in *Bakke* describe race more as an experience, inseparable from each person's identity and providing benefits and disadvantages whether they are acknowledged or not. This understanding of race leads to contextually-driven interpretations of race-related legal doctrine and policy, including the social context surrounding the Thirteenth and Fourteenth Amendments, as well as the Civil Rights Act of 1964. Moreover, they articulate more legal realist applications of laws and constitutional interpretations, including the effects of past discrimination on the current state medical access for minority communities, the impact of disparate educational opportunities on grade point averages and graduate test scores, and the practical social needs of remedial race-conscious policies.

Remedial Societal Needs. Many briefs, like many affirmative action policies at the time, argued that affirmative action programs resolve a race-specific critical need in the minority community – medical attention. Arguments were couched in legal doctrine ranging from the constitutionally permissible “compelling state interest,” to anti-discrimination arguments, to citations of the Geneva Convention rules against the unresolved deaths of particular racial subgroups. Doctors Price M. Cobbs and Ephraim Kahn petitioned the court on behalf of “members of various minority groups” attesting to the need for more minority doctors. The NAACP Legal Defense and Educational Fund argued in support for the UC-Davis program for a variety of reasons – the legislative history of the Fourteenth Amendment allows it, the program stigmatizes neither whites nor minorities, a history of discrimination in medical education compels affirmative action – including the compelling goal of serving minority health needs. The Association of American Law Schools claimed

not only that special admissions programs had laudable goals, including the need for more minority lawyers and the upward social mobility that graduate schools offer, but that they were proven to produce successful minority lawyers. Dr. Jerome Lackner, the Director of California's Department of Health, and Marion J. Woods, the Director of California's Department of Benefits Payments, gave numerical evidence detailing the desperate need for medical help in California's minority communities, paired with evidence that minority graduates of medical schools practice in minority areas "in far great proportion than their peers."¹⁶⁷ The UCLA Black Law Students Association et al. took a novel approach, arguing that the Genocide Convention of the United Nations "provides restrictions of international law" when "race discrimination results in the deaths of a significant portion of a racial subgroup," which they assert is what is happening in medically underserved minority communities.¹⁶⁸ The Fraternal Order of Police was one of the few briefs to combat this remedial argument, mirroring the majority's argument in the California Supreme Court that the minority medical need does not justify more minority doctors, in part because it assumes that doctors will return to minority communities to set up practice, an assumption the FOP argued was unproven and stigmatizing.

Other briefs linked the UC-Davis program to the continuing mission of integration, set against a historical context of discrimination. The brief of the Law School Admission Council, for instance, argued that admissions policies should make allowances for the effects of prior segregation, which had been judicially recognized as hampering educational achievement; they also argued that diversified representation in the profession is crucial to a fair and complete understanding of the

nuances of that field.¹⁶⁹ The American Medical Student Association and the Council on Legal Education Opportunity also evoked “integration” as their interest in the case. The Regents most clearly linked the special admissions program to the integration goals of *Brown v. Board of Education*:

Among the applicants for admission to professional and graduate education in the 1970’s are minority students who attended elementary school in the immediate post-*Brown* environment. These are the children for whom *Brown* was a beacon of hope, a call for open education as an avenue of ending the effects of centuries of prejudice and suppression. Yet these are also the children for whom the commitment expressed in *Brown* has been as much a hope as a reality—for whom, in many instances, the efforts to implement *Brown* were late, of even too late, in coming...¹⁷⁰

Others argued a structural approach: the societal effects of racial discrimination made race-neutral entrance virtually impossible, especially when combined with entrance requirements that favored historically privileged groups, including whites, children of alumni and children of contributors. The *amicus* brief from the Justice Department argued a combination of integrationist and structural discrimination justifications, asserting that although “this court has witnessed a history of discrimination against minority groups that does not require repetition here,” and that “discrimination has affected the medical profession no less than other professions,” in this case the “only question is whether a state university admissions program may take race into account to remedy the effects of societal discrimination. We submit that it may.”¹⁷¹

Whether or not the race-conscious goals were temporal in nature – only in place until racial disparities cease to exist – or whether goals were more universally multicultural – a diverse student body is a valid educational goal in a pluralistic society – was a dividing line in the briefs. For the former, race was primarily imbued with historical meaning; when discrimination was no more, then racial classifications would lose their importance as a remedial category. For the latter, race was a cultural commonplace, bringing more than historical tales; with race comes traditions, habits, philosophical perspectives, different notions of identity, and different spheres of knowledge.

Several affirmative action proponents base their arguments of race consciousness on the goal of a fully integrated, colorblind society.¹⁷² The Regents were among those who envisioned an end to the need for race-conscious policies: race, they argued, is “a personal characteristic relevant to the implementation of such [integrative] measures...and race will become irrelevant if the measures are permitted to succeed.”¹⁷³ While it should be “...obvious by now [that] ‘our society cannot be completely color-blind in the short term if we are to have a color-blind society in the long term,’” argued the Regents, at some point “race-conscious admissions programs will no longer be required or justified.”¹⁷⁴ The *amicus* briefs for the Bar Association of San Francisco and the Los Angeles County Bar Association, as well as the brief for the National Fund for Minority Engineering Students, supported affirmative action programs, but anticipated their end when “necessity ceases” or “minorities achieve equal access to professional schools and to the professions.”¹⁷⁵

The second – and not mutually exclusive – argument on behalf of a race conscious admissions policy was the benefit of a diverse student body.

Diversity as a Social and Educational Good. The appreciation of pluralism has been as central to American democracy as has the sense of individualism evidenced in liberal political theory. Contemporary political theorists assert that the combination of free association and multiple group associations form the “central elements of liberal and democratic aspects of [American] politics” by setting faction against faction in the free market of ideas that assured no single group total power.¹⁷⁶ The argument for diversity embodies the most robust conception of race; one that considers racial categories as culturally-driven, wherein race is an embodiment of “broadly shared beliefs and social practices;” a concept referring to a community in both the physical and spiritual senses.¹⁷⁷ For proponents of race-consciousness in the nationalist tradition, race means not only shared experiences, but also bringing particular talents, values, and specialized knowledge to a situation, all of which is part of an individual’s identity and character. These talents, values, experiences, and specialized knowledge enrich the classroom and the skills of the profession, argued many proponents of race-conscious entrance programs. This conceptualization of race is also the one evoked in the spirit of cultural diversity, which went beyond remedial functions of race conscious policies to “assert a positive and liberating role of race consciousness.”¹⁷⁸

The Cleveland State University Chapter of the Black American Law Student Association summarized the positive associative benefits of diversity within professional schools: “Our...student body should be more representative of the

outside world. There is educational value in exposing students to the viewpoints of their peers from differing economic, social and cultural backgrounds.”¹⁷⁹ The brief from Columbia, Harvard, Stanford, and University of Pennsylvania agreed:

by not enrolling minority students in significant numbers, the *amici* were continuing to deny intellectual house room to a broad spectrum of diverse cultural insights, thereby perpetuating a sort of white myopia among students and faculty in many academic disciplines—most particularly the professions...A primary value of a liberal education should be exposure to new and provocative points of view, at a time in the student’s life when he or she...is eager for new intellectual experiences. Minority students add such points of view, both in the classroom and in the larger university community.¹⁸⁰

Often, the two goals of social justice for minority groups and multicultural benefits of a diverse student body were listed together. Peller argues that, by the 1970s, such a merger was becoming more common in discourses about race:

successes in struggles for political influence in or control of many cities, combined with the national commitment to ‘cultural diversity,’ began to echo features of the nationalist program as American mainstream institutions seemed to accommodate a diffused and limited version of black race consciousness.¹⁸¹

The Regents’ brief listed both goals as legitimate educational objectives, although their articulation of a time limit made the latter seem to be an incidental benefit rather than an independent goal.¹⁸² The brief of the Law School Admission Council, for

instance, argued that admissions policies should make allowances for the effects of prior segregation, which had been judicially recognized as hampering educational achievement; they also argued that diversified representation in the profession is crucial to a fair and complete understanding of the nuances of that field.¹⁸³

The Supreme Court had previously formed a similarly multicultural conclusion, if much narrower in scope, about higher education in *Sweatt v. Painter* (1950):

...although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. *Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.* The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.¹⁸⁴

Conclusion

The Regents' plea that the Court not blind itself to what the world already knows was a more difficult request than it seemed: indeed, the evocation of blindness was a powerful tool of the opposing side. Although the Supreme Court had never upheld the "colorblind" doctrine evoked in the dissent in *Plessy v. Ferguson*, it was consistent with a primary function of the Court as interpreter of the Constitution: enacting social solidarity across the United States citizenry. Given the increased value of multiculturalism discussed in Chapter Two, a twentieth century value-recognition of a plurality of races, ethnicities, religions, and cultures that predated the nation, Robert Post argues that individualism may be a unifying American commonality: that is, Americans are similar in their appreciation for their individuality, and for the rights that support and protect it. However, argues Post, if groups "argue that cultural diversity should be protected because group culture is essential to the identity of persons," then "they do not share the common status of individuals, because they possess the (by hypothesis) distinct identities created by their groups."¹⁸⁵ If this is true, continues Post, then it would "account for the [Supreme Court's] concern...that interpreting equal protection as authorizing special rights would effectively undermine 'the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement,' ...a dream the Court manifestly views as essential to constitutional unity."¹⁸⁶

The final quote by Regents highlights more than differences in principles of scarcity: it highlights the different conceptions of race and its importance in public life. The increasing "visibility" of whiteness as a contestable racial category, the role

of race in individual identity, the extent to which race equals culture, and the value of racial and cultural diversity contributed to these negotiations.

The backlash against coordinated group efforts highlights the tension between the values of individualism and collectivity that is underlying fault line in the *Bakke* case, as well as a consistent struggle in constitutional interpretation. Argues Post, “implicit in such decisions will always be a portrait of group relationships viewed from the perspective of national culture.”¹⁸⁷ This is true, continues Post, because “democratic legitimacy ultimately rests upon the reconciliation of individual and collective autonomy, so that a democratic state must always maintain a relationship with its citizens, viewed as individuals. Individualism is the modern ideology, *par excellence*, because the only thing we have in common is our status as individuals. Individualism is thus the only ideology capable of sustaining the legitimacy of the contemporary, heterogeneous state.”¹⁸⁸

No single brief, including the petition from UC-Davis, separated the justification of diversity from the broader remedial goal of affirmative action programs. Just as the *Brown* justification of integration was multi-tiered, including both the unconstitutional disparate treatment and the benefits of remedying that treatment, most *amici* supporting the program included diversity more as a consequence of affirmative action programs, the justification of which was to increase access to minority groups whom they felt were underserved. Justice Powell’s goal, then, would be “to establish a fragile balance between, on the one hand, allowing academic affirmative action plans to continue as a means of redressing deep social

dislocations and, on the other, ideologically destabilizing such plans so as to prevent their slide into a regime of racial and ethnic rights and entitlements.”¹⁸⁹

Notes

¹ James F. Scott, “*Brown* and *Bakke*: The Relation between Judicial Decisions and Socioeconomic Conditions,” *Phylon* 14 (1980): 235.

² Samuel Krislov, “The *Amicus Curiae* Brief: From Friendship to Advocacy,” *Yale Law Journal* 72 (1963): 704.

³ Rule 42, “Order Adopting Revised Rules of the Supreme Court,” 346 US 947 (1954).

⁴ Krislov, “The *Amicus Curiae* Brief,” 704.

⁵ Krislov, “The *Amicus Curiae* Brief,” 704.

⁶ Allan P. Sindler, *Bakke, DeFunis, and Minority Admissions: The Quest for Equal Opportunity* (New York: Longman, 1978), 24.

⁷ *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam, 1968). This report, often referred to as the Kerner Commission report, was commissioned in the wake of widespread civil unrest, some of which turned into violence after the assassination of Martin Luther King Jr. The results of the report pointed to the African American frustrations with overt discrimination, but also disproportionate poverty, unemployment, poor education and housing, and systematic police bias. The recommendations of the Kerner commission included fostering programs that carried an immediate impact “in order to close the gap between promise and performance” for all minority groups, although the focus on the report was on African Americans living in urban ghettos.

⁸ John Louis Lucaites, “Between Rhetoric and ‘The Law’: Power, Legitimacy, and Social Change,” *Quarterly Journal of Speech* 76 (1990): 445.

⁹ Marouf Hasian Jr. “Myth and Ideology in Legal Discourse: Moving from Critical Legal Studies Toward Rhetorical Consciousness,” *Legal Studies Forum* 17 (1994): 349.

¹⁰ Ideology is a collection of interrelated convictions, produced in political language and preserved in historical documents that control and influence the beliefs and behaviors of the public, including the rulemakers, rule-enforcers, and the rules-subjects. See Edwin Black, “The Second Persona,” *Quarterly Journal of Speech* 56 (1970): 109-119, and Michael Calvin McGee, “The ‘Ideograph’: A Link between Rhetoric and Ideology,” *Quarterly Journal of Speech* 66 (1980): 1-16.

¹¹ Alan Hunt, “Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law,” *Law & Society Review* 19 (1985): 16.

¹² Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 3.

¹³ John E. Morrison, “Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action,” *Iowa Law Review* 79 (1994): 314-315, explains that the common rhetorical analysis of law examines pairs of terms and their relationships – white innocence with black victimization, for instance – thus dichotomizing relationships that are more complicated. Morrison argues that interrogating trilogies of terms provides a more robust rhetorical analysis; although he acknowledges that any ideological or semiotic criticism of as complex a topic as affirmative action is necessarily reductionist.

¹⁴ Krislov, “The *Amicus Curiae* Brief,” 697.

¹⁵ Krislov, “The *Amicus Curiae* Brief,” 697.

¹⁶ *Amicus Curiae* Brief of the Deans of the University of California Law Schools, including Sanford H. Kadish, Dean UC Berkeley Law; Pierre R. Loiseaux, Dean UC Davis Law; William D. Warren, Dean UCLA Law; Marvin J. Anderson, Dean Hastings College of Law, UC, *Regents v. Bakke* No. 76-811 (October Term 1976) 3; emphasis added.

¹⁷ Krislov, “The *Amicus Curiae* Brief,” 703.

¹⁸ Krislov, “The *Amicus Curiae* Brief,” 703.

¹⁹ Lucius J. Barker, “Third Parties in Litigation: A Systemic View of the Judicial Function,” *The Journal of Politics* 29 (1967): 54.

²⁰ Michael Selmi, “The Life of *Bakke*: An Affirmative Action Retrospective,” *Georgetown Law Journal* 87 (1999): 989.

²¹ *Amicus Curiae* Brief of the Queens Jewish Community Council and the Jewish Rights Council, *Regents v. Bakke* No. 76-811, October Term 1976, 5.

²² Queens Jewish Community Council and the Jewish Rights Council, 7; quoting Edmond Cahn, “Jurisprudence,” *Annual Survey of American Law* (1954): 826. The *amicus* brief of the Pacific Legal Foundation agreed with the problem of sociological evidence used in decisions.

²³ Robert Post, “Democratic Constitutionalism and Cultural Heterogeneity,” *Boalt Working Papers in Public Law* (2000): 9. Emphasis added.

²⁴ Scott, “*Brown and Bakke*,” 243.

²⁵ Larry M. Lavinsky, “A Moment of Truth on Racially Based Admissions,” *Hastings Constitutional Law Quarterly* 3 (1976): 880.

²⁶ James C. Foster and Mary C. Segers, ed. *Elusive Equality: Liberalism, Affirmative Action, and Social Change in America* (Port Washington, NY: Associated Faculty, 1983). Foster, Segers, and others in this book assert that the major problem with American liberalism is its close correlation with what they call “proprietary equality,” of the individual opportunity to accumulate property of different sorts (4). Thus, affirmative action is particularly devastating to this tradition because its justifications – at least, until *Bakke*, when rectifying past discrimination was rejected by Justice Powell – reflect a failure of this mission.

²⁷ See Carl Cohen, “Racial Preference is Against the Law,” in *Affirmative Action and Racial Preference: A Debate* (New York: Oxford University Press, 2003).

²⁸ Scott, “*Brown and Bakke*,” 240-241.

²⁹ James C. Foster, “The Fundamental Continuity of Proprietary Equality in America,” in *Elusive Equality: Liberalism, Affirmative Action, and Social Change in America*, ed. James C. Foster and Mary C. Segers (Port Washington, NY: Associated Faculty Press, 1983), 23.

³⁰ *Amicus Curiae* Brief of the Polish American Congress, the National Advocates Society, and the National Medical and Dental Association, *Regents v. Bakke* No. 76-811, October Term 1976, 5-6.

³¹ Polish American Congress et al., 10-11.

³² Opinion of Judge Stanley Mosk, *Allan Bakke v. Regents of the University of California*, California Supreme Court No. 31287, 16.

³³ Mosk, *Bakke*, 17.

³⁴ *Amicus Curiae* Brief of the American Federation of Teachers, *Regents v. Bakke* No. 76-811, October Term 1976, 13.

³⁵ *Amicus Curiae* Brief of Ralph J. Galliano, *Regents v. Bakke* No. 76-811, October Term 1976, 6.

³⁶ Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

³⁷ Martha Augoustinos, Keith Tuffin, and Danielle Every, "New Racism, Meritocracy and Individualism: Constraining Affirmative Action in Education," *Discourse & Society* 16 (2005): 315-340.

³⁸ Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind'," *Stanford Law Review* 44 (1991): 4.

³⁹ Gotanda, "A Critique," 4.

⁴⁰ American Federation of Teachers, 12.

⁴¹ *Amicus Curiae* Brief of the Committee on Academic Non-Discrimination and Integrity, a group that lists itself of "diverse" professionals, young and tenured academics and graduate students. *Regents v. Bakke* No. 76-811, October Term 1976. The "intent doesn't matter" argument was also offered by: The Order of the Sons of Italy of America, Congressperson Henry A. Waxman, the Queens Jewish Community Council, and Bakke.

⁴² Gary Peller, "Frontier of Legal Thought III: Race Consciousness," *Duke Law Journal* 4 (1990): 768.

⁴³ Brief for Respondent, *Regents v. Bakke* No. 76-811, October Term 1976, 33-34. This argument was also used by the American Federation of Teachers argued

that, in addition to racial classifications being “ideologically and philosophically wrong,” it was “undefinable as a matter of practicality.” “Our society is a pluralistic one, made up a great cultural and ethnic mix,” argued the *amici*. “Once one begins setting quotas, where do we stop? How do we determine what groups of ‘minorities’ are entitled to special treatment? They system of the University of California does not provide any preference for American Indians, or Orientals. Why are not they, and other groups entitled to special considerations as well as those chosen for such consideration?” (7) See also *Amicus Curiae* Briefs of the Polish American Congress, the National Advocates Society, and the National Medical and Dental Association.

⁴⁴ Timothy J. Hoy, 10-17.

⁴⁵ Codified in Supreme Court doctrine through a footnote in *US v. Carolene Products Co.* 304 US 144 (1938) at 152, Justice Stone described the Court’s general stance of deference to Congress on economic regulation, but gave a now-famous caveat in footnote 4, wherein he explained that the Supreme Court may use “more searching judicial scrutiny” in cases involving potential prejudice against “discrete and insular minorities.” This finding has since been used to establish guidelines of levels of scrutiny, depending on merit of the goals of the policies under question, and the extent to which the use of race is narrowly tailored and unachievable by any other means.

⁴⁶ American Federation of Teachers, 7.

⁴⁷ Gotanda, “A Critique,” 4.

⁴⁸ The majority opinion of the California Supreme Court was the first to forward the argument that it was the Regents’ responsibility to prove past

discrimination, which they failed to do. The *amici* that offered this argument include: the Queens Jewish Community Council and the Jewish Rights Council brief; The Order of the Sons of Italy in America; and the Chamber of Commerce of the United States of America.

⁴⁹ Gotanda, “A Critique,” 4. Emphasis in the original. Gotanda established four categories of race: status-race, formal-race, historical-race, and culture-race. However, when enacted in legal discourse, I find the distinction between status-race and historical-race to be more fluid than does Gotanda. If the use of race confers any kind of status, then it is considered suspect because of the history of using racial categories to subordinate particular racial groups.

⁵⁰ The NAACP Legal Defense and Educational Fund argued that the program was not invidious because there was no attempt to stigmatize whites or to make them inferior; the Fair Employment Practice Commission of California argued that the program was constitutional because it was a benignly conceived program; The National Association of Affirmative Action Officers asserted that, because the program was not discriminatory in intent and did not invidiously discriminate against Bakke, it was acceptable. The American Bar Association argued similarly: that race consciousness is constitutionally permissible when the goal is benign.

⁵¹ *Amicus Curiae* Brief of the Board of Governors at Rutgers, State University of New Jersey, Rutgers Law School Alumni Association and the Student Bar Association of Rutgers School of Law at Newark, *Regents v. Bakke* No. 76-811, October Term 1976. Howard University also argued that the Thirteenth Amendment holds primacy, and warrants preferential treatment of blacks.

⁵² Thomas Nakayama and Robert L. Krizek, "Whiteness: A Strategic Rhetoric," *Quarterly Journal of Speech* 81 (1995): 291-309.

⁵³ T. Alexander Alienikoff, "A Case for Race-Consciousness," *Columbia Law Review* 91 (1991), 1066.

⁵⁴ Marouf A. Hasian, Jr. and Thomas K. Nakayama, "The Fictions of Racialized Identities" in *Judgment Calls: Rhetoric, Politics, and Indeterminacy*, Ed. John M. Sloop and James P. McDaniel (Boulder, CO: Westview, 1998), 185.

⁵⁵ Richard L. Plaut, "Prospects for the Entrance and Scholastic Advancement of Negroes in Higher Educational Institutions," *Journal of Negro Education* 36 (1967): 230.

⁵⁶ Quoted in Robert M. O'Neil, *Discriminating Against Discrimination: Preferential Admissions and the DeFunis Case* (Bloomington, IN: Indiana University Press, 1975), 4. See reports of the speeches in New York Times Feb 13, 1970 at 1, column 2; and Chronicle of Higher Ed, April 20, 1970 at 1. The Chronicle of Higher Education criticized his speeches in their April 27, 1970 issue.

⁵⁷ Lavinsky, "A Moment of Truth," 879-890; John Hart Ely, "The Constitutionality of Reverse Racial Discrimination," *University of Chicago Law Review* 41 (1974): 723-741; Richard A. Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," *Supreme Court Review* 1 (1974): 1-32.

⁵⁸ Lavinsky, "A Moment of Truth," 879.

⁵⁹ Ely, "Constitutionality of Reverse Racial Discrimination," 723-741.

⁶⁰ Posner, "The DeFunis Case," 7-12.

⁶¹ Robert A. Hillman, “The Rhetoric of Legal Backfire,” *Boston College Law Review* 43 (2002): 820, 822. Hillman cites a variety of legal backfire arguments, a strategy which he deems ultimately unpersuasive, including: hate crimes legislation (increasing hatred toward protected groups); fights for gay rights (sets back their cause); EPA regulations of coal-burning power plants (making the environment worse); Highway Beautification Act (thwarts beautification); and flexible spending accounts (encourage medical spending instead of holding down medical costs).

⁶² *Amicus Curiae* Brief for the Order Sons of Italy in America, *Regents v. Bakke* No. 76-811, October Term 1976, 20.

⁶³ Queens Jewish Community Council and the Jewish Rights Council, 12.

⁶⁴ *Amicus Curiae* Brief for Henry A. Waxman, *Regents v. Bakke* No. 76-811, October Term 1976, 7, 18.

⁶⁵ Brief for Respondent, 26.

⁶⁶ Brief for Respondent, 30.

⁶⁷ Timothy J. Hoy, 6.

⁶⁸ Queens Jewish Community Council and the Jewish Rights Council, 9.

⁶⁹ Queens Jewish Community Council and the Jewish Rights Council, 4-5.

⁷⁰ *Amici* also arguing that the UC-Davis was an unconstitutional quota included the American Federation of Teachers, Timothy Hoy, the Order of the Sons of Italy of America (arguing that it constituted “social engineering”), the Anti-Defamation League of B’Nai Brith et al. (arguing that public opinion did not support quotas), Congressman Harry Waxman (arguing that quotas do not work because most of the beneficiaries turn out to be middle-class and not disadvantaged), and the

Chamber of Commerce of the United States of America (arguing that no court has ever upheld the use of quotas).

⁷¹ Oliver B. Pollak, “Antisemitism, the Harvard Plan, and the Roots of Reverse Discrimination,” *Jewish Social Studies* 45 (1983): 114-118.

⁷² Pollak, “Antisemitism,” 115 and A. Lawrence Lowell, “The Flavor of Harvard,” *New Republic* 31 (10 August 1922), 708.

⁷³ Mack, quoted in Pollak, “Antisemitism,” 115.

⁷⁴ Scott, “*Brown and Bakke*,” 243.

⁷⁵ Scott, “*Brown and Bakke*,” 243.

⁷⁶ Scott, “*Brown and Bakke*,” 243; Ely, “Constitutionality of Reverse Racial Discrimination,” 723-741. Scott finds the trends of Supreme Court arguments to be closely aligned with public opinion. Furthermore, he correlates public opinion with economic trends: great affluence produces more receptive public sentiments, whereas scarcity demands more rigid rules in allocation of resources. Scott also places the Civil Rights Act of 1964, commonly held as a largely progressive move, as one reflecting the more rigid, competition-based reasoning seen in times of economic scarcity – hence the forbiddance of race as a consideration. See Scott, “*Brown and Bakke*,” 244-245.

⁷⁷ Paul R. Spikard, “Why I Believe in Affirmative Action,” in *Racial Preference and Racial Justice: The New Affirmative Action Controversy* (Washington DC: Ethics and Public Policy Center, 1991), 109.

⁷⁸ Brief for Respondent, 31.

⁷⁹ Brief for Respondent, 27. Emphasis added.

⁸⁰ Alfred A. Slocum, ed. "Introduction" in *Bakke versus Regents of the University of California* Volume I (Dobbs Ferry, NY: Oceana Publications, 1978), xii.

⁸¹ James Arnt Aune, *Selling the Free Market: The Rhetoric of Economic Correctness* (New York: Guilford Press, 2001), 15.

⁸² Edward M. Panetta and Marouf Hasian, Jr. "Anti-Rhetoric as Rhetoric: The Law and Economics Movement," *Communication Quarterly* 42 (1994): 57-58. Panetta and Hasian draw an explicit link between the anti-rhetorics of Law and Economics and the denial of the role of rhetoric in law described in detail by Gerald B. Wetlaufer. Law, Wetlaufer notes, "is the very profession of rhetoric," although it builds its reputation on denying its central feature. See Gerald B. Wetlaufer, "Rhetoric and its Denial in Legal Discourse," *Virginia Law Review* 76 (1990): 1445, 1555.

⁸³ Panetta and Hasian, "Anti-Rhetoric as Rhetoric," 71. Emphasis added.

⁸⁴ O'Neil, *Discriminating Against Discrimination*, 5.

⁸⁵ Robert M. O'Neil, "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," *The Yale Law Journal* 80 (1971), 700.

⁸⁶ *Amicus Curiae* Brief for Committee for Academic Non-Discrimination and Integrity, *Regents v. Bakke* No. 76-811, October Term 1976, 6.

⁸⁷ *Amicus Curiae* Brief for the Fraternal Order of Police, Conference of Pennsylvania State Police Lodges of the Fraternal Order of Police, The International Conference of Policy Associations and the International Association of Chiefs of Police, *Regents v. Bakke* No. 76-811, October Term 1976.

⁸⁸ George Lipsitz, “Civil Rights Rhetoric and White Identity Politics” in *The Rhetoric of Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1996), 123.

⁸⁹ Cheryl I. Harris, “Whiteness as Property,” *Harvard Law Review* 106.8 (1993): 1754.

⁹⁰ Lipsitz, “Civil Rights Rhetoric,” 124.

⁹¹ Chaim Perelman, *The Idea of Justice and the Problem of Argument*, trans. John Petrie (London: Routledge & Kegan Paul, 1963), 62.

⁹² American Federation of Teachers, 12.

⁹³ Timothy J. Hoy, 4. Emphasis in original. Hoy’s argument was unique in that he found acceptable the use of “disadvantage” as a factor in admissions decisions. He took umbrage with the correlation between race and disadvantage that he felt special programs took, in justifying race-conscious policies by arguing that particular minority groups are disadvantaged. The difference, to him, was one between individual and group classifications: Hoy had a problem with the consideration of group disadvantaged, because every member of that group might not have had the same experience. Hoy claimed to have been disadvantaged by a poor upbringing which provided him with the same struggles that the programs in question asserted brought “character” to the special admittees.

⁹⁴ Selmi, “The Life of *Bakke*,” 987.

⁹⁵ Selmi, “The Life of *Bakke*,” 987.

⁹⁶ Sandler, *Bakke, DeFunis, and Minority Admissions*, 28.

⁹⁷ Sandler, *Bakke, DeFunis, and Minority Admissions*, 28.

⁹⁸ Sindler, *Bakke, DeFunis, and Minority Admissions*, 32.

⁹⁹ P.B. Price, the primary author of the article publishing the results of the study, noted about the lack of correlation between grade point average, MCAT scores, and physician performance: “This was a somewhat shocking finding for a medical educator like myself...has led me to question the adequacy of some of our traditional admission policies, as well as the reliability of conventional grades as a measure of progress of the student during his medical course, or as the sole criterion for promotion, or as a dependable predictor of future success in practice.” P.B. Price, C.W. Taylor, J.M. Richards, and T.L. Jacobson, “Measurement of Physician Performance,” *Journal of Medical Education* 39 (1964): 39: 203, 209. Judge Torbiner cited this study, among others, in his dissent from the California Supreme Court decision declaring the UC-Davis program unconstitutional: “Indeed, the medical school’s decision to deemphasize MCAT scores and grade point averages for minorities is especially reasonable and invulnerable to constitutional challenge in light of numerous studies which reveal that, among qualified applicants, such academic credentials bear no significant correlation to an individual’s eventual achievement in the medical profession.” (100-101)

¹⁰⁰ Sindler, *Bakke, DeFunis, and Minority Admissions*, 45.

¹⁰¹ Committee on Academic Non-Discrimination and Integrity and the Mid-American Legal Foundation, 31-36; *Amicus Curiae* Brief of the Young Americans For Freedom, *Regents v. Bakke* No. 76-811, October Term 1976, 6-7.

¹⁰² Queens Jewish Community Council and the Jewish Rights Council, 9.

¹⁰³ Christopher Newfield, *Unmaking the Public University: The Forty Year Assault on the Middle Class* (Cambridge: Harvard University Press, 2008), 3.

¹⁰⁴ Irving Kristol, “Why Big Business is Good for America” (1978), published in *Conservatism in America since 1930*, ed. Gregory L. Schneider (New York: New York University Press, 2003), 318-335.

¹⁰⁵ Newfield, *Unmaking the Public University*, 55.

¹⁰⁶ Newfield, *Unmaking the Public University*, 52.

¹⁰⁷ A memorandum from Powell’s law clerk, Bob Comfort, reveals a certain amount of weariness for DeFunis: on a list of briefs of interest that Comfort created for Powell, he lists the brief from Young Americans for Freedom, and in the note explaining why it deserves attention, he wrote “purely of historical interest: Marco DeFunis is on the brief (laugh).” Bob Comfort, “Memorandum for Mr. Justice Powell: Re: Reading for the Bakke case,” 2 September, 1977.

¹⁰⁸ Lewis F. Powell Jr., “Confidential Memorandum: Attack on American Free Enterprise System,” memorandum to Eugene B. Sydnor Jr., Chairman, Education Committee, U.S. Chamber of Commerce, August 23, 1971: 2.

¹⁰⁹ Powell, “Attack on Free Enterprise,” 2. Powell went on to outline a program for creating “research and media institutions that is credited with inspiring the development of the Heritage Foundation, the Cato Institute, and other organizations that from the 1970s onward entirely renewed the intellectual foundations of conservative thought for the benefit of political and business leaders.” Newfield, *Unmaking the Public University*, 53.

¹¹⁰ Robert K. Fullinwider and Judith Lichtenberg, *Leveling the Playing Field: Justice, Politics, and College Admissions* (Boulder, CO: Rowman & Littlefield, 2004), 49.

¹¹¹ Fullinwider and Lichtenberg, *Leveling the Playing Field*, 49-51.

¹¹² Fullinwider and Lichtenberg, *Leveling the Playing Field*, 53, 50-51.

¹¹³ Newfield, *Unmaking the Public University*, 3.

¹¹⁴ Newfield, *Unmaking the Public University*, 3.

¹¹⁵ *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954) at 493.

¹¹⁶ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), at 16. Emphasis added.

¹¹⁷ Petitioner's Brief, 20, citing *San Antonio School District v. Rodriguez* 411 US 1 (1973) at 42.

¹¹⁸ Sindler, *Bakke, DeFunis, and Minority Admissions*, 50.

¹¹⁹ Petitioner's Brief, 14.

¹²⁰ Petitioner's Brief, 14, 18.

¹²¹ Reply Brief for Petitioner, *Regents v. Bakke* No. 76-811, October Term 1977, 18-19.

¹²² Justice Lewis F. Powell Jr., *Bates v. State Bar of Arizona* 97 S.Ct. 2691 (1977) at 2718-19. Cited in Reply Brief for Petitioner at 20; hence the citation from the *Supreme Court Reporter*, which publishes the opinions more quickly than the *United States Supreme Court Reports* (the current citation is *Bates v. State Bar of Arizona* 433 U.S. 350). Because *Bates* was decided in the same year that Bakke filed the reply brief, the *United States Supreme Court Reports* had likely not yet come out.

¹²³ Reply Brief for Petitioner, 20, citing *San Antonio School District v. Rodriguez* 411 U.S. 1 (1973) at 42.

¹²⁴ *Amicus Curiae* Brief of the National Association of Minority Contractors and the Minority Contractors Association of Northern California, *Regents v. Bakke* No. 76-811, October Term 1976, 2.

¹²⁵ *Amicus Curiae* Brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, *Regents v. Bakke* No. 76-811, October Term 1976, 1-2.

¹²⁶ *Amicus Curiae* Brief of the United States of America, *Regents v. Bakke* No. 76-811, October Term 1976, 60.

¹²⁷ *Amicus Curiae* Brief of the Board of Governors at Rutgers, State University of New Jersey, Rutgers Law School Alumni Association and the Student Bar Association of the Rutgers School of Law-Newark, *Regents v. Bakke* No. 76-811, October Term 1976, 46.

¹²⁸ Scott, “*Brown and Bakke*,” 242.

¹²⁹ Sindler, *Bakke, DeFunis, and Minority Admissions*, 45.

¹³⁰ Sindler, *Bakke, DeFunis, and Minority Admissions*, 46.

¹³¹ Scott, “*Brown and Bakke*,” 243.

¹³² Plaut, “Prospects for the Entrance,” 230.

¹³³ Newfield, *Unmaking the Public University*, 4.

¹³⁴ Brainerd Alden Thresher, *College Admissions and the Public Interest* (New York: College Entrance Examination Board, 1966), 24.

¹³⁵ See Sindler, *Bakke, DeFunis, and Minority Admissions*, 32; Mary C. Thornberry, “Problems of Implementing Affirmative Action I: *Bakke* and Equal Educational Opportunity,” in *Elusive Equality: Liberalism, Affirmative Action, and Social Change in America*, ed. James C. Foster and Mary C. Segers (Port Washington, NY: Associated Faculty Press, 1983), 55.

¹³⁶ Howard Ball, *The Bakke Case: Race, Education, and Affirmative Action* (Lawrence: University Press of Kansas, 2000), 4.

¹³⁷ Ely, “Constitutionality of Reverse Racial Discrimination,” 723. This essay was cited by supporters of both sides of the *Bakke* case, as it outlines the [necessary] downside of such policies in the subsequent sentence: “But that must mean denying opportunities to some people solely because they were born White.” (723)

¹³⁸ Thresher, *College Admissions and the Public Interest*, 110.

¹³⁹ Robert A. Altman and Patricia O. Snyder, ed. *The Minority Student on the Campus: Expectations and Possibilities* (Boulder, CO: Western Interstate Commission on Higher Education, 1970).

¹⁴⁰ “Medical School Admission Requirements, U.S.A. and Canada 1974-1975,” 24th Edition (Washington, DC: Association of American Medical Colleges, 1974).

¹⁴¹ *Graduate and Professional School Opportunities for Minority Students*, 5th ed. (Princeton, NJ: Educational Testing Service, 1973).

¹⁴² Sindler, *Bakke, DeFunis, and Minority Admissions*, 43-47.

¹⁴³ Sindler, *Bakke, DeFunis, and Minority Admissions*, 44.

¹⁴⁴ Sindler, *Bakke, DeFunis, and Minority Admissions*, 48.

¹⁴⁵ Peller, “Frontier of Legal Thought III,” 776.

¹⁴⁶ *Amicus Curiae* Brief of the Association of American Medical Colleges, *Regents v. Bakke* No. 76-811, October Term 1976, 4, 7.

¹⁴⁷ *Amicus Curiae* Brief of the Black Law Students Association at the University of California, Berkeley School of Law, *Regents v. Bakke* No. 76-811, October Term 1976, 7-16.

¹⁴⁸ *Amicus Curiae* Brief of the National Employment Law Project, *Regents v. Bakke* No. 76-811, October Term 1976, 202. The Brief of *Amicus Curiae* of the American Medical Student Association also argued that grade point averages and MCAT scores were “inappropriate instruments” for determining who would be a good physician.

¹⁴⁹ *Amicus Curiae* Brief of the Antioch School of Law, *Regents v. Bakke* No. 76-811, October Term 1976.

¹⁵⁰ Reply Brief for Petitioner, 3.

¹⁵¹ Reply Brief for Petitioner, 3. Emphasis added.

¹⁵² The Petitioner’s Brief from the Regents argued that minority students would be essentially excluded if universities were disallowed from keeping special admissions programs, as did the Briefs of *Amicus Curiae* for the Society of American Law Teachers, the Association of American Law Schools, the Legal Services Corporation, The Board of Governors at Rutgers et al., and Howard University. *Regents v. Bakke*, No. 76-811, October Term 1976.

¹⁵³ Scott, “*Brown and Bakke*,” 243.

¹⁵⁴ National Employment Law Project, 4-8 and 18-21.

¹⁵⁵ Petition to Grant *Certiorari* for the Regents of the University of California, *Regents v. Bakke* No. 76-811, October Term 1976, 4.

¹⁵⁶ *Amicus Curiae* Brief for the Deans of the University of California Law Schools, including Sanford H. Kadish, Dean UC Berkeley Law; Pierre R. Loiseaux, Dean UC Davis Law; William D. Warren, Dean UCLA Law; Marvin J. Anderson, Dean Hastings College of Law, UC, *Regents v. Bakke* No. 76-811, October Term 1976, 5.

¹⁵⁷ *Amicus Curiae* Brief of the United States of America, 60.

¹⁵⁸ Reply Brief for Petitioner, 8.

¹⁵⁹ Reply Brief for Petitioner, 10. Emphasis added.

¹⁶⁰ Reply Brief for Petitioner, 10. Emphasis added.

¹⁶¹ Deans of the University of California Law Schools, 2. The *amicus* brief for the National Fund for Minority Engineering Students also disputed the validity of a race-neutral approach to affirmative action programs.

¹⁶² Deans of the University of California Law Schools, 25.

¹⁶³ National Employment Law Project, 24.

¹⁶⁴ Petitioner's Brief to Grant *Certiorari*, 17.

¹⁶⁵ Newfield, *Unmaking the Public University*, 110.

¹⁶⁶ Newfield, *Unmaking the Public University*, 109.

¹⁶⁷ *Amicus Curiae* Brief of Jerome A. Lackner, MD, JD, Director of the Department of Health for California, and Marion J. Woods, Director of Department of Benefits Payments for California, *Regents v. Bakke* No. 76-811, October Term 1976, 394.

¹⁶⁸ *Amicus Curiae* Brief of the UCLA Black Law Students Association, the UCLA Black Law Alumni Association, and the Union Women’s Alliance to Gain Equality, *Regents v. Bakke* No. 76-811, October Term 1976, 14.

¹⁶⁹ *Amicus Curiae* Brief of the Law School Admission Council, *Regents v. Bakke* No. 76-811, October Term 1976, 9-24 and 52-55.

¹⁷⁰ Petitioner’s Brief to Grant *Certiorari*, 3.

¹⁷¹ Brief of the United States of America, 26, 23.

¹⁷² For examples of these arguments, see James P. Sterba, “Defending Affirmative Action, Defending Preferences,” in *Affirmative Action and Racial Preference: A Debate*, ed. Carl Cohen and James P. Sterba (Oxford: Oxford University Press, 2003), 200-203; and Ronald Dworkin, “Are Quotas Unfair?” *Racial Preference and Racial Justice: The New Affirmative Action Controversy* (Washington DC: Ethics and Public Policy Center, 1991), 175.

¹⁷³ Reply Brief for Petitioner, 10.

¹⁷⁴ Reply Brief for Petitioner, 10.

¹⁷⁵ *Amicus Curiae* Brief of the Bar Association of San Francisco and the Los Angeles County Bar Association, *Regents v. Bakke* No. 76-811, October Term 1976, 42; *Amicus Curiae* Brief of the Fund for Minority Engineering Students, *Regents v. Bakke* No. 76-811, October Term 1976, 35.

¹⁷⁶ Vanessa B. Beasley, “Making Diversity Safe for Democracy: American Pluralism and the Presidential Local Address, 1885-1992,” *Quarterly Journal of Speech* 87 (2001): 26. Beasley summarizes the arguments of Avigail Eisenberg,

Reconstructing Political Pluralism (Albany: State University of New York, 1995) in

this passage.

¹⁷⁷ Gotanda, “A Critique,” 4.

¹⁷⁸ Peller, “Frontier of Legal Thought III,” 761.

¹⁷⁹ *Amicus Curiae* Brief of the Cleveland State University Chapter of the Black American Law Student Association, *Regents v. Bakke* No. 76-811, October Term 1976, 14.

¹⁸⁰ Columbia University et al., 3, 13.

¹⁸¹ Peller, “Frontier of Legal Thought III,” 835.

¹⁸² In their “Reply Brief for Petitioner,” the Regents argued that their “program adopted to counter effects of past societal discrimination *and* secure the educational, professional and social benefits of racial diversity.” (18, emphasis added).

¹⁸³ *Amicus Curiae* Brief of the Law School Admission Council, *Regents v. Bakke* No. 76-811, October Term 1976, 9-24 and 52-55.

¹⁸⁴ *Sweatt v. Painter*, 339 U.S. 629 (1950), at 634. Emphasis added.

¹⁸⁵ Post, “Democratic Constitutionalism,” 11.

¹⁸⁶ Post, “Democratic Constitutionalism,” 13.

¹⁸⁷ Post, “Democratic Constitutionalism,” 9.

¹⁸⁸ Post, “Democratic Constitutionalism,” 11.

¹⁸⁹ Post, “Introduction: After *Bakke*” in “Race and Representation: Affirmative Action,” special issue, *Representations* 55 (1996): 3-4.

Chapter Four:

Mapping the Middle Ground in *Bakke*;

Lewis Powell's Inventional Process and the Ideological Articulation of "Diversity"

In 1977, only three years after declining to decide on a similar case, the U.S. Supreme Court faced another case questioning the fairness of affirmative action in higher education: *Regents of the University of California v. Bakke*. The justices, as a whole, were having trouble determining the grounds for their decision. None of the justices thought that the case between white applicant Allan Bakke and the Regents of the University of California was ideal. Justice Thurgood Marshall, who would later advocate overturning the lower court's ruling and upholding the UC-Davis affirmative action program in the final opinion, said during deliberations that, "despite the lousy record, the poorly reasoned lower court opinion, and the absence of parties of those who will be most affected by the decision (the Negro applicants), we are stuck with this case."¹ Four of the justices thought the UC-Davis admissions program was discriminatory (John Paul Stevens, Potter Stewart, William Rehnquist, and Chief Justice Warren Burger), but nevertheless wanted to avoid making a constitutional declaration about the program, and hoped to resolve the case statutorily, under Title VI of the Civil Rights Act of 1964. This way, they reasoned, the Court could once again avoid deciding the constitutionality of affirmative action as a policy, which had burgeoned over the past decade in public institutions, in

government contract decision-making, and in the language of presidential executive orders. Four other justices (William Brennan, Thurgood Marshall, Harry Blackmun, and Byron White) found a far different interpretation of the Civil Rights Act of 1964, as well as the Fourteenth Amendment. They argued that the history of these acts, paired with ongoing racial inequities, motivated an interpretation that made the UC-Davis task force program constitutional (the “task force program” being the moniker that UC-Davis had given to its affirmative action program), and they believed that the Court should speak directly to its constitutionality.

Justice Lewis F. Powell Jr. found both solutions to be onerous for jurisprudential and pragmatic reasons, however. He argued that Title VI could not be interpreted as having a substantively different meaning than the Fourteenth Amendment; so deciding on Title VI would, essentially, be deciding on the constitutional issue, anyway. Moreover, Powell warned his colleagues that failing to reach the constitutional question would both be perceived as – and would, indeed, actually be – an act of avoidance that left an important public question unanswered. Yet he proclaimed to have serious trouble with UC-Davis’s solution to the lack of minority students in its medical school, which was to develop a task force program which held aside 16 of the 100 available medical school seats for minority students. This arrangement meant that white applicants could only compete for 84 of the 100 seats, while minority applicants could compete for all of them. His ambivalence put Powell in a unique position in relation to his colleagues, who wanted either to affirm the lower court’s decision striking down the UC-Davis program, or to overturn the decision, thus legitimizing the two-track system. His ambivalence also put him in the

best, albeit difficult, position to author the opinion of the Court. As chief justice, Burger assigned this duty, and Brennan suggested to him that Powell write the opinion for *Bakke*.² On May 2, 1978, Burger circulated a memo to the conference agreeing to this: “Given the posture of this case, Bill Brennan and I conferred with a view to considering what may fairly be called a ‘joint’ assignment. There being four definitive decisions tending one way, four another, Lewis’ position can be joined in part by some or all of each ‘four group.’ Accordingly, the case is assigned to Lewis...”³

The Court’s ambivalence about how to deal with affirmative action reflected wider public uncertainty about the policy, an occurrence which itself embodies the symbiotic relationship between the public and the courts. The Supreme Court is never insulated from the community of which it is part, to whom it speaks, and which it serves a role in rhetorically constituting through its judgments. It necessarily draws its justificatory resources from the larger rhetorical environment, in this case including discourses about colorblindness and race consciousness, the value and meaning of race, and higher education’s role in the United States. Analysis of Powell’s inventional process in the *Bakke* case reveals a Court self-reflective about its constitutive role, and balancing the material features of this specific case against jurisprudential norms as well as their own constructed narratives about the role of race in a democratic society.

The nature of those jurisprudential norms is complicated. While the basic charge of the Supreme Court is agreed upon – to pass appellate judgment on lower court decisions in light of their adherence to constitutional and other legal principles –

the scope of the Court's authority in the broader governmental structure, its appropriate concern with policy implications, the justices' role as institutional stewards, and the appropriate use of legal doctrines are but a few ways that individual justices might disagree.⁴ These differences are negotiated during deliberations as well as through the circulation of memoranda and opinion drafts, and final opinions often bear the imprint of those negotiations through compromises in justifications, altered narratives of the case, and omissions of particular points.

This is not to say that justices merely behave strategically toward self-interested policy goals.⁵ Howard Gillman and Cornell Clayton argue that "justices' behavior might be motivated not only by a calculation about prevailing opportunities and risks but also by a sense of duty or obligation about their responsibilities to the law and the Constitution and by a commitment to act as judges rather than as legislators or executives."⁶ Ideological structures control both the ruler and the ruled, and justices are bound by the rules that they help constitute because "individuals who are associated with particular institutions often come to believe that their position imposes upon them an obligation to act in accordance with particular expectations and responsibilities."⁷ For Powell, the Court's responsibilities included the duty to speak clearly about how affirmative action policies might properly be administered.

This chapter examines Justice Powell's inventional process as he used the rhetorical resources at his disposal – pulled from the larger rhetorical environment surrounding *Bakke* and transformed into the language of the law – to craft the Court's deciding opinion, in which he concluded that the goal of a diverse student body was a compelling enough state interest to justify the consideration of race as one factor in

the university admissions process. Powell and his law clerks began their work by using legal *topoi* to interrogate the validity of the *amicus* briefs, party briefs, various legal doctrines, and other justices' arguments in light of institutional traditions of decision-making. Then, pulling on strains of public discourse about the role of race in the United States and mindful of the public audiences who would bear the force of the result, Powell and his clerks justified the holding by pairing the pro-Bakke ideological principles of individualism and competition with the pro-Davis principles of race-conscious diversity and academic freedom.

Finally, a justice's decision-making habits will limit the types of wider arguments that will be accepted. As opinion writer, Powell held a position that "enjoys an agenda-setting advantage, given his or her ability to propose a policy position from the range of available policy alternatives."⁸ Powell's pragmatic jurisprudential style and personal experience on educational boards would influence the choices he made. Yet, "because outcomes on the Supreme Court depend on forging a majority coalition that for most cases must consist of at least five justices, there is good reason to expect that final Court opinions will be the product of a collaborative process."⁹ Supreme Court opinions are acts of collective authorship – even in rare cases like *Bakke* in which a single justice writes the narrow holding of the Court – and Powell would need to coordinate with his fellow justices to cull together both a holding and a series of justifications that supported it.

Powell's primary law clerk for the *Bakke* case, Robert Comfort, proved to be a key dialectical resource for Powell as he negotiated these factors. A central function of Comfort's memos was to open up possibilities for arguments, as well as revealing

weaknesses. His lengthy bench memo served as a deliberative map throughout Powell's opinion-crafting process – just as the briefs had functioned as a reservoir of arguments for Comfort and the other law clerks and, before that, strains of public discourses had been pulled from the larger rhetorical environment into the *Bakke* briefs. These discourses were filtered through institutional rhetorical traditions which, bearing their own ideological leanings, entrench some principles and discount others, allowing certain experiences to be heard and others to be silenced. In turn, the *topoi* laid out by Comfort for Powell were judged against the multiple audiences for which Powell would write: primarily, the other justices and ultimately the wider public.

Taking Inventory of Legal Topoi

Early questions in the *Bakke* case began as all Supreme Court cases do: that is, in ancient terms, to determine the *stasis* of the issue, or to figure out which of these issues was at the center of the dispute. George L. Pullman argues that the notion of *stasis* is as relevant today as it was during Aristotle's time, especially in judicial and deliberative proceedings. Pullman defines *stasis* as “the discursive pause created when a difference of opinion arises. Heuristically, *stasis* is a series of hierarchically arranged questions that can be used to locate specific differences of opinion within a broader disagreement.”¹⁰ Generally, the Supreme Court's search for *stasis* involves determining whether it fits the Supreme Court's guidelines for granting *certiorari*, reviewing the party briefs, *amicus* briefs, and lower court decisions, and deciding what they would consider to be the relevant issues.

Law clerks were integral to this inventory process, especially in outlining the discrete facts or controversies surrounding the case, the precedents that might relate, and the possibilities for interpretive strategies. This inventional help comes in two waves: by a clerk who briefs each of the cases' request of *certiorari* for the benefit of all of the justices, and a more detailed "bench memo" from a law clerk within each justice's chambers. Bench memos are detailed summaries of the facts, arguments, precedents, and suggested conclusions offered by the parties, non-party groups and individuals, lower courts, and any other sources that law clerks find to be relevant.¹¹ The specific duties of law clerks may vary within each justice's chambers, but they always "consist of legal research and writing. Clerks conduct research, prepare memoranda, and draft orders an opinions."¹²

An additional function of Powell's law clerks was to engage him in a process that the sophists called *antilogic*: a dialectic exercise in which an arguer explored the possible consequences and weaknesses of the other's argument until discrepancy or unacceptable solution was found.¹³ Aristotle posited that the process of arguing both sides is beneficial to rhetorical needs: "one should be able to argue persuasively on either side of the question...not that we may actually do both (for one should not persuade what is debased) but in order that it may not escape our notice what the real state of the case is and that we ourselves may be able to refute if another person uses speech unjustly."¹⁴

Justice Powell found in his relationship with his law clerks a useful dialectic. He proclaimed to have chosen clerks from various political leanings so that he would have counter-arguments at the ready: "[Powell] prided himself on hiring liberal

clerks. He would tell his clerks that the conservative side of the issues came to him naturally. Their job was to present the other side, to challenge him. He would rather encounter a compelling argument for another position in the privacy of his own chambers, than to meet it unexpectedly at conference or in a dissent.”¹⁵

Thus, inventionally, law clerks performed “an indispensable role” to Powell, who said:

in providing stimulation, challenge and testing of ideas and positions....I want someone of an independent mind who will test, as well as stimulate, my own thinking...It is most helpful, therefore, to have a clerk—in a bench memo or in verbal discussion—present the best view that can be taken to each side of a case. In the end, of course, I have to cast a vote and often support it in a written opinion...But until I have ‘come to rest’ my office, and my attentive ear, is open.¹⁶

After choosing his law clerks, Powell actively encouraged them to familiarize themselves with his opinions so that they would understand his judicial philosophy by the time they arrived.¹⁷ As a result, Artemus Ward and David L. Weiden argue, “Powell’s clerks knew that he was often searching for a moderate position in tough cases.”¹⁸

In the cover letter of his bench memo for *Bakke*, law clerk Robert Comfort reflected knowledge of his justice’s pragmatic habits when he described his attempts as “an effort to separate the issues which must be addressed from those that need not be, to present those issues in a logical sequence, and *to map out the middle ground which avoids the dire consequences each side predicts if it should lose.*”¹⁹ The bench

memo – which Powell declared on the cover letter to be an “Excellent memo” – laid out in meticulous detail the available legal *topoi*, the judicial starting places of argument.²⁰ In turn, Powell wrote his thoughts in the margins, including areas of agreement and disagreement with Comfort’s assessment, as well as underlining salient points. In this manner, Powell engaged in a dialectic on the issues, encountering the arguments from the parties and *amici* – those starting places of “facts,” precedents, and public culture – through the lens of the pre-existing standards of legal interpretation. Comfort subsumed the context-specific arguments within the topical frames of legal doctrine: the diverse arguments supplied by the briefs became sublimated, used as rhetorical artifacts to either support or undermine particular possibilities for acceptable legal interpretations. These “starting points” cannot easily be separated from the reasoning that bears out a fully formed argument: both Comfort and Powell would use this document throughout the opinion-writing process, the first draft of which was written by Comfort on October 6, 1977, just over a month after the bench memo was completed and six days before oral arguments were held. This inventory was rhetorically fruitful enough to determine the *stasis* of the case, to frame discussions with other justices, and to serve as the basis for Powell’s final opinion.

Pre-Bench Memo: A Search for Authority

After the Court decides to hear a case, law clerks brief their justices on the case in anticipation of oral arguments. The most substantive of the memos is, of course, the bench memo. However, clerks also point out the particular *amicus* briefs,

academic and law review articles, and newspaper articles that they find pertinent in a pre-Bench memorandum.

In June 1977, three months before the bench memo was written, Powell received an annotated bibliography “on the *DeFunis/Bakke* question,” which included ten academic sources about the questions of discrimination, affirmative action, and higher education. The sources included mostly law review articles, as well as an article from *Philosophy and Public Affairs* and a book. Of these, the author (signed only as “Willy” in the memo) recommended that Powell read for himself the book, entitled *Discriminating Against Discrimination* (1975) by former Brennan law clerk Robert M. O’Neil, which “strongly favors preferential minority admissions programs;” an article by Michigan law professor Terrance Sandalow entitled “Racial Preferences in Higher Education: Political Responsibility and the Judicial Role,” (1975) which accompanied a comment by the clerk that the article “strikes me as does much of the other literature on the topic – a cataloguing of the societal values to be served, and a rather perfunctory legal analysis;” University of Chicago law professor Richard A. Posner’s article about *DeFunis* and the constitutional impropriety of preferential treatment based on race, no matter what the justificatory grounds; and two published symposiums, one of which Willy found useful because, (s)he argued, the non-prestigious status of the law school rendered the writings more approachable and effects-driven.²¹

From the fifty-eight briefs filed, Comfort wrote to Powell that only twelve “of the briefs and articles concerned with this case... merit your attention. Some of the briefs are included not for quality,” Comfort explained, “but because they present a

unique argument.”²² These briefs included: The American Jewish Committee, for its “strong pro-Bakke arguments;” the Association of American Law Schools, because Comfort thought it was “one of the best expressions of the professional schools’ admissions concerns”; The Anti-Defamation League of the B’nai B’rith, both because of the author – “Professor Kurland” – and because of its brevity; the Chamber of Commerce, of which Powell been a member, because of the “good discussions of *United Jewish Orgs* and other special benefits cases;” Howard University, due to its “concern about the demise of affirmative action;” the Lawyers’ Committee for Civil Rights Under Law, the “only [brief to offer] discussion of independent state ground;” the NAACP, because it offered a Title VI argument that Powell’s colleagues found important; the NAACP Legal Defense Fund, which Comfort recommended that Powell “skim” because it offered “historical argument[s] from Freedmen’s Bureau Act, etc;” The National Association of Minority Contractors, both because it was “short” and the “closest thing to a structured way of viewing the case;” Board of Governors of Rutgers due to a “unique Thirteenth Amendment argument;” the Order of the Sons of Italy, which Comfort declared a “marginal choice” that “contains some interesting arguments dealing with the threat of a system of proportional representation,” meriting a “skim;” and finally, the brief from the Young Americans for Freedom, for “purely...historical interest; Marco DeFunis is on the brief,” next to which Comfort wrote, “laugh.”²³

The law clerks also searched through the leading law review journals, and Comfort reported on these, as well, in the same memo. “Most of the articles,” wrote Comfort, “simply are not very good. Sandalow’s does the best job of pulling together

the various considerations in a coherent form,” and “it might be worth reading Ely, *The Constitutionality of Reverse Racial Discrimination*...since that is the fountainhead of the political argument favoring Petitioner’s view of the Equal Protection Clause.”²⁴ His assessment was based on the paucity of precedent related to the current case: “Because there simply is not that much detailed legal analysis to be done in this area – there are virtually no cases on point – law review pieces do not add that much to the arguments made in the better briefs. Beyond the ones listed here, none of them repay close study.”²⁵ Powell agreed: on the cover of this memo, Powell wrote, “Good memo. Articles are not helpful.”²⁶ The clerks and Powell would find it necessary, then, to craft their own pathway to a decision.

The Bench Memo: A Search for *Stasis*

Chapter One identified the main inventional *topoi*, or starting places of argument, for contemporary judicial argument. They include the “facts” of the case, the various constitutional and statutory interpretations under question, the precedents that may be applicable to the case, other justices’ arguments about the case, and the public culture surrounding the case. From these interrelated starting places, justices construct the rhetorical resources necessary to form an acceptable legal judgment: these include the building and maintenance of the Court’s authority; specific constructions of history which support and even naturalize the outcomes that the opinion argues for; and maintaining and building upon certain features of legal culture which confer institutional legitimacy and legal decision-making. Comfort’s bench memo dealt with each of these *topoi*, along with the construction of resulting rhetorical artifacts. As he did so, Comfort – and Powell, in his handwritten notes on

the memo – rejected those arguments that were unsupportable under their interpretations of the legal *topoi* or which would not offer the necessary rhetorical resources for crafting a final opinion.

In his table of contents, Comfort divided the bench memo into two sections, the first addressing the “obstacles to review on the merits” – problems with offering a judicial opinion based on the questions asked – and “judicial review of the task force program,” in which he detailed the possible standards of judgment that the Court could consider. Comfort folded the party and *amici* arguments under these broader categories. Of the four subcategories detailing potential standards for judicial review, the section addressing the applicability of strict scrutiny was disproportionately larger, at 43 pages of a 70-page memo. This was true in part because of the large number of party and *amicus* briefs that addressed it, and in part because it is the clerk’s job to consider how the arguments could be answered under existing jurisprudential standards and the level of scrutiny is often foundational to discrimination cases.

Comfort’s memo was outlined chronologically, in the order that the Court would have to consider the case (whether to decide the case on its merits, then on what specific grounds to decide it). For each of these categories, he offered a summary and a preliminary personal comment, followed by the benefits and drawbacks of each major argument. For the concept of strict scrutiny, Comfort summarized arguments from the parties and *amici* against and for its use, including whether or not the majoritarian process protects whites such as Bakke; whether the program creates a stigma against whites, and if that matters; whether the tradition and

history of the Equal Protection Clause support such an application; whether the judiciary is qualified to determine which races and ethnicities have been sufficiently disadvantaged so as to deserve special treatment; and whether this case is a question of expanding access to all, or one of dividing limited access among more people. Next, Comfort engaged in a preliminary judgment of the legal *topoi*, addressing “consideration of competing arguments of the application of strict scrutiny,” under which he critiqued the relative persuasiveness and judicial feasibility of the claims he outlined.²⁷ He separately considered the legal standard of “substantial state interests served by the program,” which he divided into similar sub-categories: a brief summary of the question at hand, a summary of Bakke’s and UC-Davis’s claims, and his evaluation of those claims. Finally, he addressed a legal standard not significantly addressed by the briefs, but important to a decision about strict scrutiny: whether the task force program was necessary to promote the state interests addressed in the previous section.²⁸

Comfort summarized the main “fact” necessary to review the case: “Assuming that all obstacles to review on the merits are passed,” wrote Comfort, “no one seems to deny that race-related decisions of university faculties and administrations are reviewable under the Equal Protection Clause.”²⁹ Thus, Comfort moved on to the second category, entitled “Judicial Review of the Task Force Program.” In this section, Comfort outlined the Court’s authority to review the program. This is an important starting place of judicial argument, because its authority to speak on any case is not a given: it is constructed by the Supreme Court. Even the capacity for judicial review was a carefully constructed argument made by the Court in *Marbury*

v. Madison (1803), and because it lacks any enforcement body, the Supreme Court depends on the assent of its audiences for its legitimacy.³⁰

In most of this section, Comfort addressed a major argument put forth by supporters of UC-Davis: that of academic freedom. “When Petitioner and its allied *amici* call for this Court to recognize their discretion to make decisions related to the educational process, *they are not claiming academic freedom* from judicial scrutiny of racial classifications, *nor could they*.”³¹ Comfort continued by asserting that the argument for “judicial restraint” – meaning that the Court declines to review the racial classifications altogether – was not an option for the Supreme Court in this situation, for both precedential reasons and for appearance of consistency. To this latter point, Comfort pointed out that “this Court obviously would not allow a classification that operated against minority groups to go unreviewed.”³²

Nevertheless, Comfort did not find this point to be fatal to the possibility of using “academic freedom” as a justification for a certain amount of judicial restraint, because there is precedent for such an argument. Because precedents cue a primary source of justification in Supreme Court legal arguments, they are crucial to the inventional process. After examining the holding of *San Antonio Independent School District v. Rodriguez* (1973), Comfort concluded that they could rely on it for precedential support, because its “admonition [against judicial interference in academic freedom] appears to stand for the proposition that *once strict scrutiny has been by-passed, it is not for judges to second-guess educators in matters of educational policy*.”³³

Comfort noted that there were some – though few – who argued that *all* racial classifications are *per se* invalid. These included an *amicus* brief from the American Federation of Teachers and, importantly, the California Supreme Court, whose opinion was now being reviewed. Finally, Comfort noted a significant party who did *not* argue that racial classifications are always invalid – Allan Bakke.³⁴ Thus, Comfort concluded, “the applicability *vel non* of strict scrutiny, and the related inquiries into the state’s interest and its means, present the major points of contention in the case.”³⁵ To this point, he devoted most of the remaining space.

The first step was to define the “nature of the task force program.” In the briefs, this question evoked narrative histories of racial inequalities justifying the program, of university goals created to meet multiple needs of its student bodies, of the medical community’s call for such programs, and charges of discrimination lodged against it. For legal decision-making purposes, however, Comfort declared the only relevant question to be the crucial charge from Bakke’s brief: whether or not the task force program excluded whites from competing for all available seats. Powell shared this belief, writing underneath the header, “Is it a racial quota?” and in the margins, “Courts below found it was a quota system – I’m inclined to agree. Always will be 16 seats for which whites may not compete. Others may compete for 100.”³⁶ Comfort cared less about the definitional argument between a quota and a goal, summarizing that “*both the ‘quota’ label and the academic freedom argument seem to be smokescreens at this level of the analysis. They will become relevant when the nature of the state’s interest and the concomitant means are examined.* Calling

this a goal rather than a quota does not change the fact that in practical terms a minimum number of seats is allotted to non-whites.”³⁷

For Comfort, “much of the rhetoric and confusion generated by the various briefs stems from not breaking the problem down into its component analytical steps and recognizing [strict scrutiny] as the first.”³⁸ Comfort argued that the *stasis* of this argument was the appropriate legal doctrine, and further that the appropriate legal doctrine was the application of strict scrutiny to the race-conscious admissions program. He began by summarizing UC-Davis’s argument – that their form of racial classification is benign, because “it favors minorities traditionally protected by the Equal Protection Clause,” thus “insulat[ing] it from the strict scrutiny applied to classifications disfavoring those minorities.”³⁹ From there, Comfort subdivided the arguments into other legal, political, and social arguments against the application of strict scrutiny. Next to most of these categories, Powell wrote either counter-arguments or dismissive statements.

The first argument dealt with political power – namely, that the Equal Protection Clause protects minorities against the “ravages of the majoritarian process,” next to which Powell wrote “But see *Castemada*.”⁴⁰ To the argument that the classification is allowable because it does not stigmatize whites nor brand them as inferior, Powell countered, “But the selection process is segregated.”⁴¹ He did not comment on the tradition and history of the 14th Amendment (the Equal Protection Clause was intended to aid disadvantaged groups, not to forbid classifications that would help them), nor on Comfort’s summary of the precedent of *Washington v. Davis* (1976) offered by several *amici*, which they argue finds that segregative intent

must be shown. Powell wrote “Nothing to this” next the argument provided by Rutgers that the absence of African Americans from medical schools constitutes a badge of slavery, evoking the protections of the Thirteenth Amendment.⁴² Finally, Powell he wrote ironic quotation marks around the word “Benefits” in Comfort’s title “Judicial Approval of Race-Related Benefits,” as well as the comment next to Comfort’s list of precedents that “Strict scrutiny has not been applied to ‘*benefits*’. But these cases did not *deprive* whites of anything.”⁴³

By dismissing the arguments against strict scrutiny, Powell was doing more than measuring them against jurisprudential norms: he was making decisions about the role that race does and should play within the nation’s political system. Because the legal category of “strict scrutiny” is used to measure the extent to which race is considered suspicious, it preserves within it assumptions about “good” and “bad” uses of race. Thus, the category of strict scrutiny performs an ideological function – it assumes that racial categories are inherently suspect, because they violate the principle of individualism.⁴⁴ This, in turn, belies a conception of race consciousness that is “associated with status-based social coercion,” depriving the individual of his or her choice of group membership.⁴⁵ Powell would reiterate the principle of individualism throughout his deliberations and in his final opinion.

After doing away with arguments against strict scrutiny, Comfort then addressed arguments that supported its application. “Respondent and his allies insist that strict scrutiny ought to be applied to the Task Force program,” summarized Comfort. “Indeed, they take the position that strict scrutiny ought to attend every instance of racial classification.”⁴⁶ As with the counter-arguments, Comfort listed

sub-categories of argument, based on party and *amicus* briefs. The first in support of strict scrutiny was “‘Equality’ Means Equality”: “Looking at the *language* of the Fourteenth Amendment, even in the light of its historical origins as a shield for black rights, one may ask the following question: *to whom are non-whites to be ‘equal’ if not to whites?*”⁴⁷

For these briefs, equality is construed as both colorblind and individual. Comfort marshaled the credibility of Professor Philip B. Kurland in the B’nai B’rith brief to support that argument for color-blindness; in this case that the Equal Protection Clause “must mean that all races are entitled to the same protection.”⁴⁸ An even more supportable argument, according to Comfort, was one that framed Fourteenth Amendment rights as individual in nature: “The conclusion that all individuals, regardless of color, are entitled to the same protection under the 14th Amendment *finds support in several famous dicta* cited by Respondent and his allies,” including *Shelley v. Kraemer* (1948), which concluded that “‘The rights created by the first section of the 14th Amendment are, by its terms, guaranteed to the individual. They are *personal rights*.’”⁴⁹

Comfort next summarized the a-historical construction of race forwarded by Bakke’s brief: namely, that there is no principled way to determine which minority groups have been “historically/politically disadvantaged,” that “politics consists of coalitions of various minority interest groups, each one putting pressure on the legislators.”⁵⁰ Moreover, Comfort argued, “the frame of reference for the majority/minority test is never made clear: city, county, state, nation.”⁵¹ Offering a hypothetical, Comfort asked, “Would discrimination against blacks not trigger strict

scrutiny in Newark, NJ, Detroit, or the District of Columbia, simply because blacks are the majority race in those localities and control political institutions?”⁵² The same reasoning was used to negate the argument that no stigma was attached to racial distinctions, and Comfort offered valuable precedents to support this reading. Protections against discrimination “applied equally to whites and non-whites, eliminating any clear ‘stigma’ to one race or the other, including *Shelley*, *Loving*, *McLaughlin*, and *Buchanan*.”⁵³

Comfort next voiced a distrust of university faculty similar to that Powell had articulated in his pre-nomination memorandum to the Chair of the Chamber of Commerce Education Committee, entitled “Attack on the Free Enterprise System.”⁵⁴ The university campus, Powell argued in that memo, “is the single most dynamic source” of the attack on free enterprise, from the “Marxist faculty member at the University of California at San Diego,” to the “convinced socialists” and the “liberal critic.”⁵⁵ Likewise, Comfort posited in his memo that another problem with the political safeguard argument forwarded by UC-Davis was that “*the group discriminating against [Bakke] was not the democratically elected legislature...but a medical school faculty. There is no particular reason to believe that this group is susceptible to the majoritarian political safeguards* Ely and Petitioner laud.”⁵⁶ The particular ideological leaning of the professors make it less likely for Bakke to be treated sympathetically, argued Comfort: “Nor is there any reason to believe that a liberal, highly educated professor will be more likely to be impressed with the problems of a lower class, marginal white applicant, than with those of a non-white.”⁵⁷

Under a subsection entitled “Problems of Judicial Competence,” Comfort forwarded Bakke’s argument that deciding whether something is “benign” or not is beyond capacity of judiciary.⁵⁸ If the Supreme Court attempts to answer this question, then they face worse consequences than charges of legal realism: Bakke argued that, because “most of the ethnic groups comprised by American society have faced...prejudice and hostility,” then “*courts will be faced with myriad competing claims to ‘target’ minority status.*” Because “*principled bases for such racial distinctions...are hard to imagine...strict scrutiny ought to be applied to all classifications dealing with race.*”⁵⁹ This fear of balkanization, prevalent in wider public arguments about the dangers of race conscious laws and policies, appealed to Powell, who used language similar to Bakke’s “competing groups” argument in his final opinion.

In the bench memo, Comfort devoted space in both sides of the argument to the different articulations of the history of the Fourteenth Amendment: an important search, because the rhetorical construction of history is another staple of the judicial opinion. In order to motivate acceptance of a particular interpretation in light of the particularities of a given case, a legal author must offer a history of the principle and of the case that makes her conclusion seem logical, natural, or inevitable.⁶⁰ Thus, the various constructions of history offered by the briefs and justices are foundational to the inventional process. Additionally, these constructions of history reflect long-standing assumptions about the nature of race, and the capability of positive law to mediate social relations.

In arguments supporting strict scrutiny, Comfort relied on Bakke's brief, which argued that while the Fourteenth Amendment was passed "exclusively as a shield for blacks, see, e.g., *The Slaughterhouse Cases* . . . , it is too late in the day to restrict that Amendment to some narrow class of historical 'wards.'"⁶¹ At this point, "some form of heightened scrutiny" has been given to "Asians, aliens, women, and illegitimates," Comfort summarized in language that Powell would later modify to less polarizing descriptions. Powell circled each of these categories and wrote in the margins, "E/P Clause not limited to blacks."⁶² Powell and Comfort would expand on this notion of an increasingly heterogeneous nation in drafts of Powell's opinion, forwarding an articulation of history that Vincent N. Parrillo labels the "fallacies of cultural homogeneity."⁶³ This version of American racial history imagines an early colonial population consisting almost entirely of British immigrants of similar cultural beliefs and habits, juxtaposed against a contemporary America wherein cultural diversity is "not only a new construction but somehow also a threat to the cohesiveness of American society."⁶⁴

The scarcity of resources had been a strain of discourse far-reaching into the history of the *Bakke* case, and its reliance on the principles of economic reasoning fit with Powell's values, strains of which were seen in the anxious memo to the Chamber of Commerce. Shades of the scarcity argument had been seen in public discourse about race for centuries: for example, amid fears about freed slaves taking jobs held by whites and in arguments about immigrant access to the country and its benefits. In *Bakke*, the principle of scarcity motivated the creation of programs like the one under question, as more and more students applied for a limited number of graduate school

seats, making students of color less of the total percentage applying. It also motivated the economic counter-argument of competition, which Bakke used to argue against the fairness of the program. In his bench memo, Comfort borrowed the characterization of the subtitle “Expanding and Dividing Pies” from legal journal articles to summarize this principle of scarcity as it relates to past and current cases. The cases UC-Davis cited to support their program “involved what Professor Redish would call ‘*expanding pies*,’” Comfort explained to Powell:⁶⁵

In *Lau* and *United Jewish Orgs.*, society’s assets do not look like a single pie, which can be divided up only by taking away from some in order to give to others. Instead, the pie is being expanded, so that some may get a larger share without taking anything away from anyone else. *Admission to medical school, however, is not an expanding pie*, and there is no question, said Respondent, that the Task Force attempt to give more of it to minority group members takes some away from persons like Bakke. *This fact of imposing affirmative burden distinguishes Bakke’s case from the special benefit cases.*⁶⁶

In addition to testing the limits of particular arguments, the inventional *topoi* distinctions are also used to open up creative space for argument. Comfort and Powell were looking for ways to allow some consideration of race, despite Powell’s distaste for the particular program under question. The lower court had declared any consideration of race to be unconstitutional, and not a single member of the Court was willing to uphold this ruling as it stood, because the consequences would be to end affirmative action programs altogether. Thus, this category of expanding and dividing pies sparked an important aside from Comfort: “[It also serves to narrow an

affirmance in this case down from a death sentence to all affirmative action. Affirmative action which does not exclude anyone from full consideration on account of his race – recruitment, remedial programs, etc – would not be implicated necessarily by an affirmance in this case. Those are expanding pie situations, while this case involves a dividing pie.]”⁶⁷

Having outlined the dominant arguments surrounding the question of strict scrutiny, Comfort offered his analysis of what the above-mentioned categories meant for the case. After working the specifics of the case against the generalized legal *topoi*, Comfort concluded several things: that reliance on precedent alone was an untenable solution; that neither the Court nor the universities had the authority to declare which races were disadvantaged, and that the Court’s attempts to do so would deprive the Equal Protection Clause of its useful ambiguity; that, because of this, strict scrutiny of all racial classifications is the only acceptable standard; and that room could be made under the standards of strict scrutiny to allow some consideration of race.

First, Comfort declared Bakke the winner on matters of legal precedent and established doctrines for interpretation – components that Comfort characterized as “authority” – in large part because the question is new to the Court, and to the history of race relations in the United States. “The major reason for the lack of authority supporting Respondent,” asserted Comfort, “may be the simple historical fact that discrimination in favor of a ‘target’ minority has occurred to a significant degree only recently. Thus, in the century of Fourteenth Amendment exegesis, there was *never any need to consider any racial classifications that did not involve the hallmarks*

Petitioner describes.”⁶⁸ Because of the lack of precedent, Comfort concluded that the tradition of *stare decisis* was unhelpful in deciding the *Bakke* case: “legal (i.e. case-by-case) analysis is of...little avail on this issue. The question requires a decision on the contours of the Equal Protection Clause in light of social and historical changes, changes which this Court to a large extent helped bring about.”⁶⁹ In cases where there is no clear precedent, the choice of starting places is opened wider for justices. Warren Wright argues that:

In the absence of clear precedent, ...the judge makes what amounts to legislative choices; his official opinion then is the rhetorical medium for defending his choices...If the judge extends the principle ‘logically,’ his *inventio* is the logic of that extension; if he elects to extend it historically, he refers to the origins and the evolution of the principle; if he extends it traditionally, his material is drawn from the customs of the community; if he extends the principle sociologically, his reasoning is rooted in the attitudes, the aspirations, and the social needs of the community...The choice in all instances is guided by the circumstances of the case and by the judge’s experience. But there is a choice.⁷⁰

The choice that Comfort recommended was temporal in nature. Traditional judicial frameworks extend their temporal valence toward the past – an orientation he declared unhelpful because there was no precedent to aid in “defining the contours of the Clause.”⁷¹ Instead, Comfort encouraged “*prudential judgments about [the Equal Protection Clause’s] consistent operation in the future.*”⁷² Eileen Scallen explains that “interpretation [can be] a combined deliberative and judicial question, sometimes

emphasizing a reading of a text that would provide the most useful effects in the future, and sometimes emphasizing a particular reading as the ‘historically’ accurate one, in the sense of the drafter's original intent or purpose.”⁷³ Having discovered that a historical reading of the Equal Protection Clause would not be useful, Comfort outlined the benefits of casting a forward-looking orientation on the interpretation of the clause:

If the Clause is seen as a narrowly limited license, permitting the Court to interfere with legislative decision-making only when there is reason to distrust some broadly defined majoritarian process, then Petitioner’s arguments are more appealing. If the Clause itself is broadly defined to mean that all persons, regardless of color, ought to be free from legislative burdens based on that color, except when necessary to further a substantial state interest, the Respondent’s arguments seem more reasonable.⁷⁴

Layered on top of ideological valuations about race under question in *Bakke* – race consciousness, colorblindness, group identity and individuality – were judicial concerns about the maintenance and fitness of constitutional principles which might be altered in the particular application. In his bench memo, Comfort characterized the question about whether particular groups need additional protections not as a question of idealized fairness or matter of right, but of the potential effects on future interpretation and political neutrality of the Equal Protection Clause. If they were to decide that the Task Force Program did not merit strict scrutiny because it benefits particular groups, then “this would...enshrine in the *Constitution* the *political system’s* judgments that membership in particular racial or ethnic groups renders

some individuals more deserving than others.”⁷⁵ This is problematic, argued Comfort, because the clause “should not change in meaning with the political judgment of each generation.”⁷⁶

The solution to this dilemma, albeit motivated by institutional concerns, was ideologically bound to Bakke’s construction of race. The way to safeguard the broad utility of the Equal Protection Clause, argued Comfort, was to maintain the ambiguity of the text: “*it would seem better to keep the constitutional text of racial classifications the same to each individual.*”⁷⁷ Thus, the Court could avoid doing damage to the useful generality of constitutional language by offering an interpretation of the Equal Protection Clause that held the rights offered therein as individual rights. To maintain focus on the rights of an individual would keep the courts from “delving into the intractables...or deciding whose ox has been gored more often and for how long.”⁷⁸

Having concluded that strict scrutiny was the appropriate doctrine to apply to this case, Comfort went about exploring the subcategories that need to be met in order to justify a race-conscious program under strict scrutiny. For Comfort, the strict scrutiny standard did more than curb a racial classification program that rendered problematic the interpretation of the Equal Protection Clause: it opened up an opportunity to validate some forms of racial consideration while condemning the UC-Davis Task Force Program in particular. A previous Supreme Court case (*re Griffiths*, 1973) had laid out the elements for judgment via strict scrutiny, and Comfort cited them: “in order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and

substantial and that its use of the classification is ‘necessary [to] the accomplishment’ of its purpose of the safeguarding of its interest.’”⁷⁹ Under the section labeled “Substantial state interests served by the program,” Comfort outlined the state interests argued by UC-Davis and refuted by Bakke, concluding that the goal of a diverse student body to be the only justifiable solution.

Comfort methodically laid out the major arguments, and then weighed them against each of the elements of strict scrutiny. UC-Davis and their *amici* offered three main arguments promoting the substantial state interests provided by the Task Force Program: it remedied past exclusion of minorities from medical school; it would increase minority access to health care; and it would promote educational diversity. Bakke and his supporters counter-argued that the first two goals were unsubstantiated by evidence, said Comfort. They did not directly challenge the school’s right to seek a diverse student body, although Comfort felt that they over-relied on the concept of “merit” to discount any consideration of race. “[T]he vast amount of argumentation over selection based on ‘merit’ is beside the point,” argued Comfort. “It does not address directly the question whether race is a valid admissions criterion. Instead, the ‘merit’ advocates assume that it is not, because it is not part of ‘merit.’”⁸⁰ This is fallacious, continued Comfort; “The issue is not whether admissions decision must be based exclusively on ‘merit,’ for they are not; instead, *the issue is whether race is one of the non-‘merit’ factors that can be taken into account.*”⁸¹

Comfort reiterated his concerns with remediation as a state goal, because he felt that there was no acceptable institutional means to justify it: “there is *no*

principled way to contain the notion that quotas can be used to 'remedy' the past exclusion of a particular group, when the existence of that exclusion has not been linked to any specific constitutional or statutory violation."⁸² Furthermore, there was no case on which to argue precedent, although Comfort admitted that "once again that lack may be owing to historical circumstance: this is one of the first cases to present the question."⁸³ Finally, Comfort found this position untenable because the university made no attempt to prove a history of discrimination, and because he felt it dangerous for either the Supreme Court or the university to make a judgment about larger societal discrimination. However, Comfort posited, if the Court were to accept this goal as legitimate, "then the Task Force program is probably a perfect fit."⁸⁴ The opposite problem existed for the goal of increasing minority health care: whereas "everyone appears to agree" that this "is both substantial and legitimate" as a state goal, Comfort posited that the UC-Davis task force program was a circuitous means of securing that end, thus failing under the strict scrutiny standard of the ends being necessary to promote the goal.⁸⁵

"The *nettlesome question* of voluntary remedies for traditional *exclusions perhaps can be avoided* in this case by relying on the somewhat narrow holding that *obtaining a diverse student body in a state-related institution of higher education is a legitimate and substantial state interest,*" offered Comfort in the longest subsection of the memo, and the one reflected most directly in the final opinion.⁸⁶ Powell's margin notes were less than enthusiastic: "diverse student body is leg. state interest – I agree – but it does not follow that quotas are valid."⁸⁷ The diversity justification carried with it useful legal artifacts, and shed burdensome arguments, according to Comfort.

Albeit slim, “there is language in some opinions supporting this view,” including *Sweatt v. Painter* (1950) and *Sweezy v. New Hampshire* (1957), and “*there are First Amendment policies supporting the university’s right to determine who is to be taught and how*. Other things being equal, *academic freedom* of expression, thought, and certification ought to prevail.”⁸⁸ Support for academic freedom was not a new concept to Powell: years before, in his “Free Enterprise” memo, he had written that although universities were showing more leftist tendencies than he thought prudent, “few things are more sanctified in American life than academic freedom. It would be fatal to attack this as a principle.”⁸⁹ Better, then, to “[restore] the qualities of ‘openness,’ ‘fairness,’ and ‘balance’...to the academic communities...The ultimate responsibility for intellectual integrity on the campus must remain on the administrations and faculties of our colleges and universities.”⁹⁰

This option has the benefit of being able to justify leaving the universities room to consider race as one element of educational diversity, asserted Comfort, while allowing the Court to proclaim judicial restraint on the issue. “Under this approach,” he said, “the proper judicial role is to circumscribe the exercise of academic discretion only to the extent that it impinges upon constitutional rights.”⁹¹ The main question would be whether it is constitutional to consider race as one factor. As an answer, Comfort offered an example which Powell (who received an LL.M. – or Master of Laws degree – from Harvard in 1932) would repeat throughout memos, drafts, and the final opinion: “It seems undeniable that an individual’s race and the experiences he has by virtue of it are the same kinds of qualities that prompt Harvard College to prefer the scarcer Idaho farmboy over the Boston Brahmin.”⁹² Other non-

quantitative factors such as geography, athletic skills, and work experiences were already considered in the admissions process, offered Comfort; “unless the Court is to say that it is impermissible for the state to consider race in any way...it would follow that *universities could consider race* as one element in their admissions systems.”⁹³

Comfort used the Idaho “farmboy” example from Harvard et al.’s *amicus* brief to interrogate the means-end fit component of strict scrutiny as it relates to educational diversity. He concluded that a set-aside system was not necessary to meet the needs of diversity: Harvard did not hold aside a number of seats for Idaho farmers, insulating them from comparison with the rest of the applicants. “Instead,” Comfort asserted, “[the Harvard plan] takes the fact of geographical origin as one factor weighing in the *farmboy’s favor* when he is compared against all other applicants competing for a marginal seat.”⁹⁴ At UC-Davis, however, “The Task Force *program tells whites that they can compete only for 84 of the 100 seats in the class, while blacks can compete for all 100*” – a sentence which Powell wrote was a “Key point.”⁹⁵ This would be a perfect solution for remedying past exclusion, argued Comfort – but the university had not offered evidence of past exclusion, and he found the assertion of broad societal discrimination to be unreliable, considering its non-democratically elected source.

If, however, “*diversity is the only goal recognized as legitimate and substantial, the only means necessary to promote it is the giving of extra credit toward admission for being non-white*, because otherwise non-whites would be scarce.”⁹⁶ Comfort addressed a potential counter-argument here, which he found non-fatal to the diversity argument:

...it can be objected that this view elevates form over substance, that it permits the university to do *sub silentio* what it now does above board... That may be true, but it is not clear why it is relevant... each white gets the chance to compete for each seat at the margin. He will be weighed against each minority applicant to see if his *qualifications in total overshadow the minority candidate's when race is added into the equation.*⁹⁷

Ultimately, Comfort concluded, the “symbolic value of opening the whole class to [individualized] competition by members of all races may be important,” as well as the emphasis on race in “only a positive way”; “once a substantial number of non-whites (or Idahoans) are admitted, the fact of race (or geography) no longer weighs in their favor, but it does not count *against* them.”⁹⁸ Moreover, the diversity approach obviates one of the strongest arguments by UC-Davis and its supporters: “that abandonment of the special admissions program means a return to lily-white professional schools.”⁹⁹

Collaborative Invention

By the end of the bench memo, Comfort had identified the *stasis* of the case for Powell’s chambers – the application of strict scrutiny. Additionally, Comfort laid out a preliminary set of *topoi* from which they could build their argument, should Powell agree with his assessment. This did not mean that these common assumptions were held by all of the justices, however. Because Supreme Court opinions involve a combination of independent, interdependent, and institutional considerations, the next stage of Powell’s judicial invention process would be to negotiate agreement on enough *topoi* to craft a coherent public opinion.¹⁰⁰

This task was well suited to Powell: his reputation at the Court was one of a moderate who often sought the middle ground. Known as a political moderate, Powell's pre-Supreme Court biography balanced trial lawyers associations with legal aid work, and a position at a prestigious private practice law firm with membership on President Lyndon Johnson's National Crime Commission. In the years before his nomination to the Supreme Court, Powell also held positions as President of the American Bar Association (1964-65); President of the American College of Trial Lawyers (1968-70); Vice President of the National Legal Aid and Defender Association; and membership on several educational boards, including the Virginia State Library Board, the Virginia Foundation of Independent Colleges, and the governing boards of Hollins College, Union Theological Seminary, and Washington and Lee University.¹⁰¹ His role as chairperson of the Richmond School Board from 1953 to 1961, followed by membership (and later presidency) of the Virginia State Board of Education, during massive state resistance to the *Brown v. Board of Education* (1954) call to desegregate schools "revealed his tendency towards moderation and consensus."¹⁰² He was both criticized and praised for his leadership strategy during Virginia school desegregation: by the time he resigned the Richmond School Board to take a role at the Virginia Board of Education in 1961, only two black students had enrolled in Richmond public schools. To some, this was an indication that he was the type of Southern white moderate that Martin Luther King Jr. had warned about in his "Letter from a Birmingham Jail," using a "strategic constitutionalism" that, while working to end racial violence, "discreetly shifted the burden of constitutional change onto black shoulders" and "held them responsible for

their plight.”¹⁰³ To others, “Powell probably did the most he could have accomplished...given Virginia's political climate in the Fifties and Sixties.”¹⁰⁴

Powell was questioned about his role – or lack thereof – in desegregating schools during his confirmation hearings, but because he had been packaged with the more controversial William H. Rehnquist for approval, he was not seriously impeded by it.¹⁰⁵

On the Court, “Powell had positioned himself in the center, along with Stewart and White. And since Stewart and White went in opposite directions on so many key issues, Powell was becoming the true swing vote.”¹⁰⁶ This came as a welcome relief to Brennan, who feared when Powell was appointed that he would be easily led by the Chief Justice, according to Bob Woodward and Scott Armstrong. There was some cause to be worried; Woodward and Armstrong reported the following about his early Supreme Court days:

When Powell first arrived on the Court the previous year and voted with Burger in a particular case, Stewart asked why. ‘I thought I would follow the leadership of the Court,’ Powell had replied. Stewart was dumbfounded. He decided he had better explain to his new colleague something about the realities of life at the Court. The leadership was not Burger. He was Chief Justice in name only. The leadership belonged to the Justices at the center, the swing votes, those who were neither doctrinaire liberals nor conservatives. It belonged to Stewart and White and Lewis Powell if he chose.¹⁰⁷

Brennan’s concerns were somewhat allayed after *U.S. v. U.S. District Court* (1972), when Powell wrote the opinion of the Court that invalidated the Nixon-

sponsored unwarranted domestic wiretaps that Powell had spoken publicly in favor of several years previously.¹⁰⁸ Rather than following the Chief Justice or the political leanings of the president who appointed him, “Powell had begun cautiously and to Brennan he seemed precise and fair-minded, somewhat like Harlan. Harlan and Powell had both concluded, from years of private law practice, that narrow solutions to legal problems were better than sweeping ones.”¹⁰⁹ Jeffrey A. Segal and Harold J. Spaeth report that, far from being led by the Chief Justice, Powell’s voting pattern was uninfluenced by *any* particular justice, making him the most influential conservative on the Burger Court.¹¹⁰ Powell’s particular jurisprudential approach was one of “representative balancing,” argues Paul Kahn, who defines this characterization as a jurisprudence which believes the justice’s role is to adjudicate “the existing distribution of values and authority among the competing factions that constitute the community,” based on the assumption that “all substantive values must derive from the free competition of interests within the community.”¹¹¹ Craig Evan Klafter argues that Powell’s influence came from this pragmatism, which he asserts gave Powell “a distinct advantage over the more ideologically consistent members of the Court.”¹¹²

Powell’s tendency toward representative balancing highlights the notion of co-authorship, which Karen Burke LeFevre asserts is central to any inventional process:

Invention becomes explicitly social when writers involve other people as collaborators, or as reviewers whose comments aid invention, or as ‘resonators’ who nourish the development of ideas. To create discourses such

as contracts, treaties, and business proposals, two or more writers *must* invent together...[I]nvention is powerfully influenced by social collectives, such as institutions, bureaucracies, and governments, which transmit expectations and prohibitions, encouraging certain ideas and discouraging others.¹¹³

The collaborative invention process is explicit on the Supreme Court, where "...opinion authors preemptively and responsively accommodate colleagues in predictable patterns. These patterns depend, to varying degrees, on ideological agreement among the justices, the amount of support authors have from their colleagues, the signals sent by those colleagues, and the nature of the cooperative relationship with their brethren."¹¹⁴ This "art of deliberation...of thinking well about what ought to be done when reasonable people disagree" is one of the central features of the rhetoricity of the law, argues James Boyd White.¹¹⁵ Whereas by the final opinion the decision is written in the language of certainty, examining the deliberative give-and-take between the justices reveals a process whereby "knowledge [is] characterized by reasonableness and by the taking into consideration diverse aspirations and multiple interests, defined by Aristotle as *phronesis* or prudence, and which is so brilliantly manifested in law."¹¹⁶

Powell had a less optimistic view of the inter-chambers deliberative process, although his papers reveal that he engaged in it frequently. He told the American Bar Association in 1976 that the Supreme Court "is perhaps one of the last citadels of jealously preserved individualism. To be sure, we sit together for the arguments and during the long Friday conferences when votes are taken. But for the most part, perhaps as much as 90 percent of our total time, we function as nine small,

independent law firms.”¹¹⁷ This experience would be consistent with the *Bakke* case, wherein the ease of the Comfort-Powell dialectic was complicated by other justices who found the “diversity” conclusion unpersuasive. Yet, even by Powell’s modest estimation, that ten percent of the time when they function collaboratively is significant to the final opinions.

Comfort received early warning through his network of other law clerks that a decision on the case would be more complicated than expected:

I had a long conversation this morning with Keith Ellison, one of Justice Blackmun’s clerks...I gathered from Keith that Justice Blackmun is troubled about an aspect of the case not stressed in the bench memo. P.S. My conversation with Keith also confirms the suspicion, voiced in the original memo, that the various briefs have only confused the Court by not breaking the problem down into its component steps. *The thinking in Justice Blackmun’s chambers is still hampered by the inability to separate the decision on the proper level of scrutiny from the weighing of the various justifications* for the Task Force program. It seems as though conflation of the various questions in the case is going to plague the Court in its attempt to produce a reasoned result in this case.¹¹⁸

Thus, when it came time for conference, Powell outlined those points he felt were the most central to his judicial perspective on *Bakke*, and took notes on his fellow justices’ respective thoughts.

Powell attended the conference with personal notes listing the legal *topoi* that he considered to be “settled propositions.”¹¹⁹ The first few of them reflected an

interpretation of the Equal Protection Clause of the Fourteenth Amendment informed by an ideological commitment to individual agency: “We all compete throughout life on an individual basis. A...system...that ascends non-competitive preferred status is contrary to basic traditions of this country.”¹²⁰ Powell framed the principle of individualism as a Fourteenth Amendment guarantee, supported by precedents: “14th Amend. guarantees rights to ‘persons’ individually; not to any group, racial or ethnic. *Yick Wo v. Hopkins*, *Shelley v. Kraemer*, also *Missouri ex rel Gaines v. Canada* (1938)”.¹²¹ Additionally, Powell wrote that these individual rights were unvaried in their force between racial or ethnic groups. Rights cannot be limited to members of “any one or more racial or ethnic groups,” wrote Powell, “[n]or is there any principled basis for inclusion or exclusion of groups on the basis of race or ethnic origins. Pet[itioner] identified Blacks, Chicanos, Orientals + Am. Indians. Why not Italians, Irish, Greeks, etc. Also who are identifiable as *Chicanos*?”¹²² The third “settled proposition” Powell posited was that “There is a *racial classification* – frankly conceded.”¹²³ Based on this “fact,” Powell offered the legal doctrine he believed was appropriate: “In my view, *any* racial ‘classification’ is ‘suspect,’” thus needed a compelling state interest that cannot otherwise be attained.¹²⁴ Powell could not agree that the “two-track admission plan based on race” was the least intrusive means to satisfy any legitimate interest promoted in the consideration of race.

“Yet,” wrote Powell in his notes, “race is *not* irrelevant in all circumstances – and this for me is especially true at the admission stage in a University.”¹²⁵ Here, Powell parted company with the California Supreme Court’s holding – and with typical pathway of colorblind individualism. “[A]s I read its opinion, the Calif Ct

held that no consideration of race *as such* is valid. The opinion seems to lay down a *per se* rule... In my view race + ethnic origin properly *may* be considered.”¹²⁶ So long as the principle of individual competition was upheld, then racial and ethnic identities could be considered “on an individual basis + as one element or factor to be weighed – together with a variety of other factors.”¹²⁷ Moreover, Powell rearticulated the notions of academic freedom, non-quantitative merit, and race-conscious diversity forwarded by Comfort’s bench memo as his settled propositions. He reminded himself to read portions of the Harvard admissions plan (described in an *amicus* brief) to the conference as a good example of how to enact “the primary educational interest is *diversity of student body* in our uniquely pluralistic society,” and of the reasons why “a University should have *wide latitude* to determine the composition of its student body.”¹²⁸ Thus, Powell concluded:

Affirm, but on the basis above stated. The opinion should make clear its narrow focus. It would not foreclose sustaining affirmative action programs ...An opinion along these lines would not be a set back to the course of full equality in this Country. Our Const. guarantees are framed to protect individuals – not groups whether racial or otherwise.¹²⁹

Powell’s “settled propositions” carried within them three interrelated points of divergence with the other justices, which he would need to accommodate in order for the Court to have any kind of a holding. The first was an issue of interpretation: Powell felt that they must speak broadly to constitutional principles, and he felt that the most compelling interpretation was one that supported individual rights, rather than group rights. Secondly, Powell felt that the Supreme Court lacked the authority

to declare societal discrimination an appropriate justification, a presumption that reflected a judicially conservative institutional perspective. Finally, and most importantly to Powell, the Court must give the public a clear answer on how to deal with affirmative action programs.

The only “settled proposition” between all of the justices was the hesitancy to offer a decision that would result in an end to affirmative action programs altogether. Howard Ball argues that, “Much like the parties and the *amici*, the justices of the Court clashed in the...effort to find meaning in the ‘spirit’ and the ‘letter’ of Title VI and the Fourteenth Amendment’s Equal Protection Clause.”¹³⁰ Yet to invalidate affirmative action policies on the whole could be perceived as an overreach of the separation of federal powers, and an increasingly conservative Supreme Court led by the cautious guidance of Chief Justice Burger had a tendency to adopt a rhetoric of judicial efficiency best explained by its link to economics: “the primary criterion for those who see economics as the foundation of law is efficiency, and to them, efficiency is best promoted by the free operation of the market.”¹³¹ Said Burger of the task facing the Court in *Bakke*, “I am confronted with the tactical consideration of how best to structure and shape a result so as to confine its impact and yet make it clear that the Court intends to leave states free to serve as ‘laboratories’ for experimenting with less rigidly exclusionary methods of pursuing desirable social goals.”¹³² Another problem with the constitutional issue, argued Stevens in conference, was “that [the university] programs may not be permanent.”¹³³ Stevens approved of what he called “quota systems” as a temporary measure, but was unsure about them as permanent measures, because “Negroes may not need protection for

many more years” – a comment that met with a response by Justice Marshall that “it will be 100 years” before they no longer need protection.¹³⁴ Yet Stevens insisted that he, too, would like to allow these programs to continue, and would therefore “like to ‘duck’ the Const[itutional] issue and let this problem work itself out.”¹³⁵

Brennan and Marshall found laughable the prospect that some of their fellow justices could conclude that a Civil Rights Act and a constitutional amendment, both written to alleviate racial discrimination, somehow disallowed universities from voluntarily attempting the same goals. Said Marshall: “Ultimately I believe, after reviewing the entire debates, that the Congress that enacted Title VI would be surprised to be told that they had intentionally precluded race conscious programs benefiting Negroes if such programs are otherwise lawful.”¹³⁶ This program is lawful, argued Marshall, because “This is a ‘quota to get someone in’ – ‘not a quota to get someone out.’”¹³⁷ The Equal Protection Clause of the Fourteenth Amendment was written precisely to account for discrimination, and could not be used to stop a program aimed at alleviating discrimination: thus, for Marshall the program is constitutionally sound.

Powell’s Pragmatic Conservatism

Philip C. Kissam argues that the “value of everyman” embedded in pragmatic jurisprudence motivates a “sensitive interpretation of complicated factual situations” which “can engage judicial sympathy for the interests and rights of individual persons who bring or are affected by constitutional challenges to government policies.”¹³⁸

Kissam cites Powell’s “balanced consideration of affirmative action admissions policies and their possible social effects...in *Bakke*” as an example of this value in

action.¹³⁹ Powell's pragmatic approach to law, fostered by a combination of his legal formalist education at Washington and Lee School of Law, paired with an awakening "from his dogmatic slumbers" by a graduate degree at Harvard Law School that centered on realism and fostering a keen critical eye, resulted in "a personal jurisprudence that emphasized the doctrine of *stare decisis*, except when Powell was persuaded that justice demanded a different conclusion."¹⁴⁰

Pragmatic jurisprudence was not just a calling card of Powell's, although his moderate ideological leanings made it more pronounced; the entire Burger Court has been characterized by Kissam as pragmatic to a fault.

In the end, the Burger Court may have provided a glimpse of the emptiness to which unguided pragmatism, legal realism, and empiricism are likely to lead... When issues of principle came before the Burger Court – issues like the propriety of affirmative action, the legitimacy of the death penalty, the justice of using unlawfully obtained evidence, and the appropriateness of public aid for the nonreligious activities of church-related schools – the Court's first impulse was usually to seek a middle ground. The Supreme Court resolved few great issues decisively... the Court's pragmatism was inherently incapable of offering the leadership, inspiration, and guidance that the American judiciary at its best has provided.¹⁴¹

Despite this criticism, "legal principles continue to evolve," says Don R. LeDuc, "in large part because 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."¹⁴² In cases of public

interest, the need to offer a reasonable explanation extends beyond the lawyers, judges, and parties involved with the case; the Court must also write for non-legal audiences. Additionally, although justices are not likely to make decisions solely based on public opinion, the indeterminate nature of constitutional law guarantees that “constitutional interpretation almost inevitably reflects the broader social and political context of the times.”¹⁴³ At a time when the civil rights gains and the celebration of multiculturalism of earlier decades were met by ideological backlash and economic scarcity, when the invisibility of whiteness had been rendered opaque by the critique of white privilege, and when the open university system had given way to a competitive market model, the fractured Burger Court was indeed a reflection of the broader social and political context, and Powell’s incremental, modest pragmatism was a further reflection of the body politic.

Powell professed discomfort with legitimating generalized claims of societal discrimination in the authoritative voice of the Supreme Court opinion; yet he nonetheless acknowledged its existence, and the role that *Bakke* would play in the ability to mediate it. Powell urged his colleagues to consider the audiences to whom they were writing – particularly the universities. The consequence of affirming the lower court’s decision, argued Powell to his fellow justices, would not be singular: Bakke’s acceptance into medical school would be but the first step in a larger sequence. “We are not reviewing the judgment below in a vacuum,” Powell reminded the conference. “It draws meaning from the opinion supporting it, and that meaning is that race may never be considered to any extent in admitting students to a university.”¹⁴⁴ Such a decision would effectively end affirmative action programs

within universities, Powell asserted, and contrary to Stevens' belief that the problems evidenced in *Bakke* would be temporary, "there is no reason to believe that in so short a span of time the socio-economic position of racial and ethnic minorities will have changed so drastically as to end the demand for some types of preferential admission programs. Even the petition estimates that 'minority conscious programs' will be necessary for some 25 to 50 years."¹⁴⁵

The need for a decisive answer has increased since the Court avoided the constitutional issue in *DeFunis*, continued Powell: "We were criticized then for leaving the hundreds of state colleges, universities and graduate schools without guidance. The need for resolution of the issue certainly has not lessened."¹⁴⁶ Powell reasoned that:

If the Court now were to affirm this case on Title VI without reaching the Fourteenth Amendment, again we will have resolved finally exactly nothing. Every state institution of higher learning in our country would then have to terminate forthwith all Davis-type programs. Institutions with Harvard-type programs, or some variation thereof, would have no idea whether they were in compliance with the law. Nor, indeed, would HEW, which provides funds to virtually all of these institutions. Inevitably, after some presently indeterminate time – perhaps another two to three years – the constitutional issue will again be before us.¹⁴⁷

Powell's concern reflects the symbiotic relationship between the Supreme Court and its audiences described by Makau thusly: "The composite audience expects the Court to balance the need for doctrinal consistency against these compelling social

demands. In turn, the Court uses argumentation to persuade the composite audience that the Court's selected stability and change are appropriate responses to the relevant rhetorical situations."¹⁴⁸ And, adds Wright, "if the implications of the decision are broader—if they apply to a pervasive political question—clarity and persuasiveness become simultaneously more important and more difficult. The opinion still must serve its purpose for litigant and counsel, but it must make the argument clear and persuasive to the nation at large."¹⁴⁹ Thus, Powell argued:

I have a conviction that the Court should speak out clearly and unambiguously. If we merely affirm the California decision...no university in the country will feel free to give any consideration to race. I simply could not join that result. Nor do I think the consequences would differ in any material respect even if the opinion hinted broadly...that despite the affirmance of the California judgment, universities would be free to do essentially as they please. I would think this would exacerbate the turmoil that now prevails so widely in the academic community...I recognize, of course, that just as the public has widely varying perceptions on the issue, so do we here on the Court. I therefore fully respect your views and those of our other Brothers. My own thinking may be shaped by my long experience in education, including experience with this problem...I think the country deserves and expects an unequivocal answer from its highest court.¹⁵⁰

Interpretive Choices

Drucilla Cornell argues that "all interpretations entail an inevitable moment of fictionality...Once we recognize that the process of recollection of legal principle is

never mere exposition but involves the imagination and positing of the very ideals to be read into a legal text, we can no longer choose between competing interpretations on the basis of an appeal to what is just ‘there.’”¹⁵¹ Moreover, L. H. LaRue argues that interpretive fictions serve as more than a heuristic tool for effective reasoning. Interpretations, and the narratives that justices write to support them, are also “stories of growth” and “stories of limits” which are foundational to the Court’s maintenance of judicial authority: the justices expand or constrict constitutional limits within their justificatory framework as interpreters.¹⁵² Interpretations constructing a story of limits would assert that the Constitution is not subject to legislative whim, and is above transient political needs.¹⁵³ Stories of growth, on the other hand, see the Constitution as dynamic, meeting contemporary needs as they arise.¹⁵⁴

Powell’s belief that the Court must help guide universities, combined with his need to uphold individual agency against the threat of what he saw as balkanization, motivated a narrow, forward-casting temporal interpretation of the Fourteenth Amendment. It also made a difficult “story” to tell, for to accomplish this goal Powell would need to argue that the Constitution was both race-conscious enough to allow for some consideration of race within college admissions, and colorblind enough to disallow the particular program at UC-Davis. Justices Stevens, Potter Stewart, and William Rehnquist shared Powell’s goal of finding the narrowest grounds on which they could satisfy their distaste for what they perceived as “quotas” and still avoid halting affirmative action programs altogether. For them, however, the most elegant solution was to decide the case under Title VI of the Civil Rights Act of 1964 and declaring it a “private action” – thus, the decision would apply only to

Bakke. Chief Justice Burger was sympathetic to the Title VI argument, as well. After the first conference, a furious round of memos circulated, centering on two interpretations of the history of Title VI and its goals.

The memo from Stevens' chambers conceded that the section of Title VI in question was "to prevent federal funding of segregated facilities."¹⁵⁵ However, it proceeded to offer direct quotations from the House and Senate discussions about Title VI of the Civil Rights Act which Stevens' law clerk, Frank Blake, argued spoke to a belief that the section was intended to confer a colorblind, individual right. Blake cited two "key supporters" of the legislation – Representatives Emanuel Celler and Hubert Humphrey – who argued that "it cannot apply one standard of conduct to one person and a different standard of conduct to another," and that "we could get over all these problems...if we started to treat Americans as Americans, not as fat ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that, we would not need to worry about discrimination."¹⁵⁶ Thus, the memo concluded, the "drafters of Title VI intended to cover discrimination against all races."¹⁵⁷

Marshall also shared his chamber's research, and his cover letter revealed the contested nature of discerning legislative intent. "Attached is the first draft of some research on Title VI of the Civil Rights Act of 1964 prepared by my law clerk, Ellen Silberman," wrote Marshall. "It appears that we have two sides of the legislative history."¹⁵⁸ Silberman offered a historical context against which to read the quotes from Stevens' memo, a step she argued was crucial in the interpretation of the act. "The key to understanding the legislative history of Title VI, in my view, is

understanding the evil that was being addressed,” wrote Silberman. “That evil is simply stated: federal tax dollars collected from persons of all colors were being spent on programs that excluded Negroes or that provided separate facilities for Negroes.”¹⁵⁹ Silberman offered quotes from the legislative debates which provided that contextualization, including a passage from Senator John Pastore:

Mr. President, why is Title VI necessary to the civil rights bill...? Let me explain. In the community of Greensboro, N.C., there are two excellent hospitals. They are numbered among the most modern in the area. This is due, in part, to Federal financial assistance... Their modern medical care was denied to those whose skin was colored... the Negro in need of care could not get it at these hospitals simply because he was a Negro... That is why we need Title VI of the Civil Rights Act... to insure once and for all that the financial resources of the Federal Government – the commonwealth of Negro and white alike – will no longer subsidize racial discrimination.¹⁶⁰

The reason that the objects of discrimination were not more clearly defined in the language of the law, concluded Silberman, was “because the evil Congress was addressing in Title VI was so clear, there was no occasion for Congress to define precisely what was permissible under law.”¹⁶¹ The administration of Title VI was left to the states, and “the debates are replete with statements suggesting that while the bill did not require such programs [as the one under consideration in *Bakke*] it did not forbid them either.”¹⁶²

Comfort’s review of the circulated memoranda favored Marshall’s interpretation of legislative history. Comfort took Stevens’ legislative history to task

for “lift[ing]” quotes “out of context,” before concluding, “I think Congress would be quite surprised to discover that in enacting Title VI it had prohibited programs such as Davis Medical School’s Task Force program.”¹⁶³ Taken at face value, argued Comfort, each quote “appears to be addressed to a concept of ‘color-blindness’ that might include proscription of the Task Force program. Without exception, however, each of these color-blindness statements was directed, in context, to the elimination of the segregation then thought to be prevalent in the operation of many federally funded programs.”¹⁶⁴ This a-contextual, literal interpretation gets the Court nowhere, Comfort concluded: the Stevens chambers memo revealed only that “there is no more warrant in the legislative history for reading Title VI literally than for reading the Fourteenth Amendment literally. Both addressed the problem of discrimination against particular, obviously disadvantaged groups; discrimination in favor of those groups seems not to have been addressed in any specific sense.”¹⁶⁵

In the circulated memo addressing Title VI, Powell offered four reasons why they should neither ask the parties for supplemental briefs on the issue nor limit their decision to a statutory declaration. First, Powell argued against Stevens’ appeal to a precedent entitled *Ashwander v. TVA* (1936), in which Justice Louis D. Brandeis posited that it is institutionally prudent to resolve cases under statutory questions instead of via constitutional interpretation.¹⁶⁶ To this point, Powell argued that *Ashwander* was “not a rigid restriction on the power of the Court to make decisions it thinks proper,” and that “viewing the matter in a prudential light, the arguments on both sides of the Fourteenth Amendment issue are as fully developed as they will ever be.”¹⁶⁷ Additional briefings would be futile, argued Powell, because “the Howard

University *amicus* brief about covers the field,” and because neither party to the case had mentioned the Title VI issue. Relying on Title VI would bring forth the necessity to address other complicated issues, including “an implied private right of action under Title VI, whether such a right would entail private remedies, and whether it would require exhaustion of administrative remedies.”¹⁶⁸ More importantly to legal traditions, argued Powell:

This avoidance technique risks not only indefensible statutory interpretation but also irresponsible constitutional adjudication. There may be temptation to strain for a meaning in the statute beyond that fairly possible in order to avoid constitutional interpretation. Yet constitutional interpretation may not be wholly avoided: tentative interpretations may be ventured in the very process of stating what constitutional issues are being avoided; there may be temptations to launch constitutional trial balloons and indulge in free floating constitutional law dispositive of the case.¹⁶⁹

In addition to matters of judicial prudence, Powell reminded his fellow justices of a crucial audience to whom they were writing – the public – and the enormous stakes – the Court’s credibility. Given the prevalence of affirmative action programs, the scarcity of student seats, the media interest, and the fact that they were facing this question again, so soon after having avoided it, would likely mean that “any action by us that may be perceived as ducking this issue for the second time in three years could be would be viewed by many as a ‘self-inflicted wound’ on the Court.”¹⁷⁰ Furthermore, he argued “a decision that Title VI forbids the program, made merely to avoid a decision that the Fourteenth Amendment may permit it, would be

futile. Futile, because the next case will present the Fourteenth Amendment issue anyway.”¹⁷¹ Finally, Powell argued that the interpretation that “Congress in enacting Title VI was contemplating a departure from the Fourteenth Amendment would be quite a judicial *tour de force*.”¹⁷²

Despite Powell’s attempts to drag his colleagues into addressing the constitutional issue directly, the conference of December 9, 1977, saw little movement. The movement he did see was in favor of deciding on Title VI, as by that time the Court had requested and reviewed supplemental briefs on the issue. Powell’s notes during conference reflected the movement. Burger, as Chief Justice, announced his views first, and he said that he could “affirm [the lower court’s decision] on either or both grounds,” was “now satisfied that a private citizen has standing to raise [a] Title VI claim,” and thus “could decide [the] case on VI [because] violation of VI is absolutely clear.”¹⁷³ Rehnquist would affirm, too, but could affirm under either Title VI or the Fourteenth Amendment: race should never be a consideration, according to Rehnquist, finding a narrower interpretation of racial considerations than even Bakke himself. Stevens, the leader of the push to decide under Title VI, had different reasons for supporting it. The problem with the constitutional issue, argued Stevens in conference, is “that their [universities’] programs may not be permanent.” Stevens approved of quota systems as temporary measures, but was unsure about the need for them as permanent measures. Marshall rejected such a narrow approach to the question before them, asserting that the “legality of affirmative action simply could not be resolved without consideration of the historical, legal, and sociological context of past racial policies and practices.”¹⁷⁴

Convinced that he could not motivate consensus, or even further movement, between the two camps, Justice Powell's solution was to use both a story of growth, and one of limits: thus, he both expanded and constricted the scope and utility of the Equal Protection Clause as he worked toward his final opinion. Early in his description of the clause, Powell characterized the language as highly malleable: "the concept of 'discrimination,' like the phrase 'equal protection of the laws,' is susceptible to *varying interpretations*," a fact that allowed it to "*flourish as a cornerstone* in the Court's defense of property and liberty of contract."¹⁷⁵ Yet, Powell limited such open interpretation by stressing the dangers of interpreting statutes in light of social issues: "By hitching the meaning of the Equal Protection Clause to these *transitory considerations*, we would be holding, as a constitutional principle, that judicial scrutiny ... may vary with the ebb and flow of political forces."¹⁷⁶

Constructing and Limiting Authority

The institutional role of the Court was undergoing an internal shift, and the nature of the "racial problem" was highly disputed subject among the justices as it was in the nation. The Warren Court had taken a leadership role in proclaiming the primacy of the Constitution in the governmental ability to protect individual and group civil liberties, wherein "justices spoke of constitutionally derived mandates to maintain a sometimes precarious balance between the three branches of government."¹⁷⁷ However, the Burger Court adopted "an increased tendency to adopt the language of deference in cases involving civil liberties," characterized by a rhetoric of efficiency reflecting a view of democracy as "a political process in which

‘decision by an elected legislature and elected executive officials is the only legitimate means for making fundamental moral choices.’”¹⁷⁸

This shift heightened its members’ sensitivity to the perceived limits of “judicial competence,” an argument made in Bakke’s brief and a concern shared by Burger, who in his charge to the Court insisted that “we have far more competence to say what cannot be done than what ought to be done.”¹⁷⁹ The fluidity of race would ultimately make it difficult for an inherently conservative institution like the Supreme Court, made more judicially conservative in the post-Warren Court years, to define with what they saw as timeless constitutional principles. However, this limited view of judicial competence also allowed Powell to argue that the Court lacked the authority to determine the educational needs of a student body – such as diversity.

Comfort had proposed in the bench memo that, if discrimination was assumed by the Court to have occurred, then voluminous precedents and associated legal doctrines could be used to support the conclusion that the task force program was constitutionally sound in its remedial goals. Yet the university had not offered evidence that it discriminated against the racial and ethnic groups it was soliciting, and Powell was concerned with the “anti-democratic” nature of the admissions deciding body. Had the legislature declared societal discrimination a reality, then the Court could claim to be following the legislative branch’s findings in its ruling. Such evidence was not forthcoming, and Powell could not agree with the four justices who found this justification to be appropriate because, he argued it “could be justified only by a basic judgment about the nature of the racial problem in this country and the institutional role of this Court.”¹⁸⁰

Manifest and latent characterizations of the value of racial identity were pulled through many of the briefs as each side framed the question of race to support their arguments about the fairness of the UC-Davis affirmative action plan, and the ability of the Supreme Court to speak to it. For Bakke and his supporters, individual agency trumped any consideration of race – especially in a competitive admissions system at a time graduate school seats were scarce. For UC-Davis and supporters of affirmative action programs, race consciousness was a necessary and laudable component of higher education: they argued that racial classifications must be allowed in order to remediate societal discrimination and to promote the academic benefit of a diverse student population.

As these arguments reached the Supreme Court, they encountered another layer of rhetorical history: prior Supreme Court cases and interpretive traditions with the laws and constitutional language under question. Yet filtering the arguments through the legal *topoi* does not mean that they lose their ideological force, nor separation from the justices' ideological leanings and lived experiences. For instance, a primary justification for the affirmative action program at UC-Davis was the legacy of societal discrimination, which was rectified through the special admissions program. As Comfort noted in the bench memo, this justification would be perfect – if a majority of the justices agreed that discrimination indeed existed. There were plenty of Supreme Court cases to rely on as precedent for this type of justification. Yet this question would evoke conceptions of race which varied widely among the justices, as well as different articulations of American racial histories and self-imposed legal standards of proof that limited the ability of the Court to authoritatively

account for those histories or to speak to their contemporary manifestations. In fact, a majority of the justices found that it was Bakke who was discriminated against, belying notions of race sympathetic to the arguments of “reverse discrimination” and drawing an embittered response from Marshall.

Comfort’s assessment about the problems with granting “societal discrimination” as appropriate justification was mirrored in memos and conference discussions by four other justices. Although Burger was open to suggestions about how to avoid declaring all considerations of race unconstitutional, he found the particulars of the case to be a barrier:

The basic facts are not subject to dispute. (1) Bakke was not allowed to compete for any of the 16 seats reserved for the Regents’ Program solely because of his race. (2) Bakke...would have been admitted if all 100 seats had been open and free from any arbitrary exclusion based on race. (3) The university evaluated minority applicants as a separate group and did not compare their individual qualities with those of other applicants.¹⁸¹

Thurgood Marshall found the basic “facts” asserted by Burger to be very much in dispute. “The decision in this case,” Marshall posited, “depends on whether you consider the action of the Regents as *admitting* certain students or as *excluding* certain other students.

If you view the program as admitting qualified students who, because of this Nation’s sorry history of racial discrimination, have academic records that prevent them from effectively competing for medical school, then this is affirmative action to remove the vestiges of slavery and state imposed

segregation by ‘root and branch.’ If you view the program as excluding students, it is a program of ‘quotas’ which violates the principle that the ‘Constitution is color-blind.’...If only the principle of color-blindness had been accepted by the majority in *Plessy* in 1896, we would not be faced with this problem in 1978....This case is here now because of that sordid history... We are not yet equals, in large part because of the refusal of the *Plessy* Court to adopt the principle of color-blindness. It would be the cruelest irony for this Court to adopt the dissent in *Plessy* now and hold that the University must use color-blind admissions.¹⁸²

Stewart, on the other hand, concluded that *any* use of race was discriminatory, asserting during conference that, “If the Equal Protection clause does nothing else, it forbids discrimination based along on a person’s race. That’s precisely what the Davis program does...No state agency can take race into account.”¹⁸³ Rehnquist agreed with Stewart’s conclusion, but not his means of getting there. He found both the arguments for diversity and past discrimination to have promise as general propositions. “It may be both important and desirable to have more members of racial minorities in the student body because such people, simply by the fact of their minority status, have a different, valuable perspective,” Rehnquist contemplated, and “past societal discrimination...is not an unappealing rationale.”¹⁸⁴ However, Rehnquist concluded, the “factual elements” of “the University’s admissions policy...make its ‘affirmative action’ program as difficult to sustain constitutionally as one conceivably could be.”¹⁸⁵ Against the diversity argument, Rehnquist employed a Posnerian colorblind view of racial classifications, which considers race

“unrelated to ability, disadvantage, or moral culpability” or social attributes such as “culture, education, wealth, or language,” and which finds it racist to assume such an association.¹⁸⁶ As valuable as diversity might hypothetically be, argued Rehnquist, “I would think that the Fourteenth Amendment holds that for governmental purposes nobody ‘has’ anything simply by virtue of their race. Members of minority groups are not less valuable human beings simply because of their minority status and, it would seem to me, are not more valuable either.”¹⁸⁷ Rehnquist’s reservation about the societal discrimination argument, like Powell’s, stemmed from the source it came from: university faculty and administration. “[I]t should not be enough here...to say that the applicants admitted under the minority program were victims of generalized past discrimination,” argued Rehnquist.¹⁸⁸ Additionally, one could not assume that the diversity rationale “is not bottomed simply on a rationale of administrative convenience.”¹⁸⁹

Negotiating the Written Opinion

Without consensus on interpretive doctrine, legislative history, sources for authority, or precedents to rely upon, Powell was assigned the task of writing the final opinion on May 2, 1978. He was not waiting for these issues to work themselves out, however; his chambers had begun drafting an opinion in October 1977. Powell said during 1990 interview that:

Some people have said I waited to see how the other Justices would vote, but that’s not so. The year before *Bakke* was argued, we had a case named *Defunis* that came up from the University of Washington. It presented basically the same issue, that is, the validity of a university’s setting aside a specific

category, be it blacks or Chicanos or Eskimos. The *Defunis* case had been argued, but the case became moot...the case didn't have to be decided.

That summer, knowing we had granted *Bakke certiorari* in order to address the issue, I spent a fair amount of time... thinking how I should vote in *Bakke* and, if I wrote the opinion, what I should say. The fact that I had been interested in education, I think, helped me...I was very conscious of the fact that in our society diversity was critically important, so I had generally decided how I would write *Bakke* before the case was argued. Nevertheless, it was a difficult opinion to write.¹⁹⁰

Before sending it to the conference, Powell edited Comfort's attempts at drafting the opinion, removing ambiguous phrases and passive voice, questioning characterizations, and suggesting additions. Powell changed most of Comfort's references about "the question" before the Court – a characterization implying choices and options – into the language of duty and obligation. In the first sentence of the second internal draft, Powell changed "This case presents the Court, for the second time, with *a question* of great constitutional moment" to "...with *an issue* of great constitutional moment."¹⁹¹ Similarly, he crossed out the first part of Comfort's second sentence – "*Before us is the question* whether the guarantees to the Constitution of the United States extend to each individual regardless of color or national origin,..." – and changed it into "*We must decide* whether the guarantees..."¹⁹²

Powell also made suggestions for additions that would reflect public arguments about the case:

2. I'd like to cite in a note somewhere the leading law review articles – to indicate they were not overlooked.
3. Any ideas from media commentary?
4. Have we made appropriate use of Carnegie study?¹⁹³

Powell coached Comfort on the art of crafting a Supreme Court opinion – ordering and characterizing the facts and questions so as to naturalize the answers that they would give. In a note entitled “Comments on Bakke draft,” Powell offered the following tips:

1. State the Q[uestion] in 1st paragraph. Then move to Part I in which the facts + decisions below should be stated...
2. The 2nd paragraph under Part II...moves directly to the Q of the level of scrutiny....I think it would be better to commence the Court analysis by stating that it is conceded that we have a *racial classification* placing several categories of minorities in one class and all whites in a separate class. The classes are structured on a group – racial group – basis.

Move then to Q whether, as Resp contends + Calif S/Ct held, the 14th Amend guarantees personal or individual rights. The cases clearly establish this. Thus we have a racial classification + also one structured on a group basis. At this point talk about standard or level of E/P analysis – along lines of the discourse in Part III.¹⁹⁴

Powell also forewarned Comfort about the trouble that “strict scrutiny” might cause in gaining support from Brennan, suggesting more ambiguous language to accommodate their differences:

Part II addresses primarily the level of scrutiny issue. Without Brennan it is sometimes difficult to obtain majority consensus on standards (perhaps terminology) of E/P analysis. Altho [*sic*] I think *all* racial clarifications must be subjected to same level of scrutiny, I would like to minimize the repetitive use of phrases such as ‘strict scrutiny.’ Racial classifications are ‘suspect’; therefore they may be sustained only when the...state interest is substantial enough to be deemed compelling in the public interest.¹⁹⁵

Powell’s assessment of Brennan’s distaste for the blanket “strict scrutiny” application was accurate. A good deal for time was spent forging an agreement with Brennan, who like Powell was willing to collaborate, but who had to mediate the rather disparate concerns that Marshall, Blackmun, and White had with Powell’s opinion. As in earlier stages of the inventional process, the law clerks’ role was important; they offered analyses and suggestions for strategy as memos circulated, as well as serving as intermediaries between chambers via the other justices’ law clerks.¹⁹⁶

As mentioned previously, the Brennan bloc argued that societal discrimination was a valid justification for the consideration of race, and were comfortable with upholding the two-tiered program at UC-Davis. Powell – and the Stevens bloc – found the use of race always to trigger the most exacting standard of scrutiny, and further argued that the UC-Davis program would fail because it denied Bakke the right to compete for all slots based on his race. However, Powell felt that the use of race was not fatal to a program, and from early in the drafts had referenced the Harvard admissions program that considered race as one factor among many that

might contribute to a diverse student body as evidence of how properly to consider race. In a December 14, 1977, memo to Powell, Comfort indicated that Brennan was interested in this argument, which might benefit them:

Justice Brennan seems to have expressed his willingness to reverse in part along the ‘Harvard’ lines of our memorandum. If Justices Marshall and White were to take the same tack, it would be an important step, for it would establish what we take to be the central issue of the case: all racial classifications are subject to strict scrutiny...I suppose that they could reach the same reversal in part by applying a form of middle tier scrutiny, but Justice Brennan does not raise that possibility in this memo. Thus, there is movement.¹⁹⁷

Comfort doubted, however, that they would join entirely with Powell’s opinion. “From their point of view,” argued Comfort, “even if they join our ‘Harvard’ position, it is politically very desirable to reverse the judgment below, if only in part.”¹⁹⁸ However, this movement was still good news for the Court, according to Comfort, because, “assuming that they would be willing to recognize the basis of the ‘Harvard’ discussion (that strict scrutiny applies), and a Court could be obtained on that point [strict scrutiny] *and* on the permissible uses of race, an important victory would have been won without regard to the form of the judgment.”¹⁹⁹

Looking for additional ways to obtain a judgment of the Court while accommodating the differences of opinion, Powell proposed to the conference the

possibility of deciding separately the different parts of the lower court's decision.

Powell wrote:

I had not [previously] considered the scope of the trial court's injunction. If it can be read as enjoining Davis from ever including race or ethnic origin as *one* element, to be weighed *competitively* with all other relevant elements in making admissions decisions (i.e., from adopting what I shall refer to herein as the "Harvard"-type admissions policy), then – as I stated – I would certainly favor a modification of that injunction... Thus, in the unlikely but welcome event that a consensus develops for allowing the competitive consideration of race as an element, I think we should affirm as to the Davis program, but reverse in part as to the scope of the injunction.²⁰⁰

Comfort's subsequent memorandum to Powell, entitled "Possible Common Ground with Justice Brennan on *Bakke*" on February 8, 1978, reveals inter-chambers negotiation between clerks as Comfort sought to test his earlier judgment:

I explored this issue informally with Dave Carpenter today. After our conversation, I was pessimistic about the possibility that Justice Brennan would join substantial portions of an opinion you authored. I should make it clear, however, that David has not sounded Justice Brennan out on this issue for some time. Also, I get the impression that Dave may be less flexible in his approach to making up a Court opinion than Justice Brennan himself might be. If anything breaks in their Chambers, Dave will let us know.²⁰¹

Comfort's conversation with Brennan's law clerk also indicated that Brennan supported Powell writing the final opinion:

Dave says that it is Justice Brennan's belief that you will be assigned the opinion announcing the judgment of the Court, assuming that Justice Blackmun ends up somewhere on your side of the fence. This belief is based on the fact that yours would be the narrowest ground for reversal, and it would be reversal only in part. Because of that fact, Justice Brennan concludes that it would be your opinion to which courts and schools would look for guidance, since you would state the actual judgment and *ratio*. For that reason, says Dave, Justice Brennan is eager to join as much of your opinion as he can. Yet Dave gave little indication that his boss could join anything of significance in your memo as it now stands.²⁰²

On April 12, 1978, Powell dispatched a personal memo to Burger, in which he outlined his thoughts for the final opinion in *Bakke*. Reflected in it were the reflections about race, his fellow justices, the institutional role of the Court, the concerns for their audience, and, in the end, the best solution he could come up with for balancing all of these factors.

"Dear Chief," Powell began: "Following your visit on Monday and our discussion of the current deadlock on this troublesome case, I have reviewed the situation to see whether I could identify a way to break the present deadlock ... My review has not been fruitful."²⁰³ Currently, Powell continued, there were four votes to hold that UC-Davis's consideration of race was improper: Stevens, Stewart, Rehnquist, and Burger. There were also four who would vote that race might be considered: Brennan, White, Marshall, and himself. Blackmun, who had been ailing for most of the deliberations, still had not cast a vote. Despite the seeming deadlock,

Powell reported, “we do stand five to three on affirmance of the portion of the California Supreme Court order that Bakke be admitted to medical school.”²⁰⁴ “It seems like we agree on a vote,” offered Powell, but “have parted company...on how the opinion should be written.”²⁰⁵

Powell then outlined the possibilities for a decision. “There are four possible answers to the question before us,” said Powell: “(i) no consideration of race is permissible...; (ii) race may be given unlimited and controlling weight...; (iii) *maybe* race can be considered, but give not guidance other than to say that a quota system is out; and (iv) to go my route, which would be clear and unambiguous, affording both guidance and counseling restraint.”²⁰⁶

I could never agree with either answer (i) or (ii), although they do have the virtue of being unambiguous. Nor can I, in good conscience, merely hint that race may be considered in some circumstances and at the same time leave Part (ii) of the California court’s judgment standing. If you think some consideration of race is permissible (as I understand you do), I continue to hope you will join me in an opinion that resolves the issue with guidance for the universities and colleges.²⁰⁷

“It was in light of the foregoing that I [have] concluded to cast...a split vote,” offered Powell. Such a vote would “affirm so much of the California’s court order that would reinstate Bakke, but reverse the portion thereof that enjoins the medical school from considering ‘the race of any other applicant in passing upon his application for admission.’ Thus, at the end of my opinion the bottom line would be: ‘Affirm in part and reverse in part.’”²⁰⁸ This would affirm Powell’s commitment to the principle of

individual competition, while upholding some sense of academic freedom, or in Powell's words: "Bakke would win his case, but the medical school would be free to consider race as one element in its admissions determinations, with all places open to competition."²⁰⁹

Not deciding is not an option, concluded Powell; this would incur the rightful wrath of the public, and would do no good. "We will never be better informed on the issue" than we are presently, Powell reminded the chief justice: "With perhaps a total of 75 or more briefs filed in *DeFunis* and *Bakke*, and with distinguished counsel having argued, carrying the case over would be viewed as an irresponsible failure to do our duty...however [t]his vote may go, the country will then have its answer."²¹⁰

The lack on answer came largely from two factors: first, Blackmun had been away from the Court recovering from surgery, and had been completely silent on which way he would vote. Second, the four justices who agreed that using race as a factor was not *per se* unconstitutional (Brennan, Marshall, Powell, and White) were divided on "what standard should be used to determine the validity of various affirmative action programs."²¹¹ Finally, on May 1, 1978, Blackmun circulated a memorandum stating his opinion: he would join with Brennan, Marshall, and White. He acknowledged the influence that Marshall's narrative had on his decision: "There is much to be said for Marshall's 'cruellest irony' approach as set forth in his memorandum of April 13."²¹² Blackman also acknowledged the merits of Rehnquist's appeal to colorblindness, but characterized it as idealistic, and thus insufficient:

Title VI, as with the Fourteenth Amendment, was concerned with the unconstitutional use of race criteria, not with the use of race as an appropriate remedial feature...The original aims [of the Fourteenth Amendment] persist. And that, in a distinct sense, is what affirmative action, in light of the proper facts, is all about. To be sure, it conflicts with idealistic equality in the sense that Bill Rehnquist proposes, but if there is tension here it is original Fourteenth Amendment tension and a part of the Amendment's very nature until equality is achieved...It is the *unconstitutional* use of race that is prohibited, not the constitutional use.²¹³

Now that he has a sense of where everyone stood, Powell circulated to the conference the first draft of his final opinion on May 9, 1978. He explained this stage of the process to his law clerks in an office manual: "You then wait anxiously to see what reaction this initial draft will prompt from other Justices. Subsequent drafts may be sent around to reflect stylistic revisions, cite checking changes, or accommodations made in the hope of obtaining the support of other Justices."²¹⁴ The disappointing news came via memo the next day: Brennan was not convinced by Powell's opinion. "Dear Lewis," Brennan wrote: "I have read your opinion very carefully and have regretfully come to the conclusion that I should write out my own views. I think those views as reflected in my memorandum of November 23 differ so substantially from your own that no common ground seems possible."²¹⁵ In actuality, there was a bit of common ground to be had – Powell's notes on the memo summarized that "Bill plans to join Judgment + the first 14 pages."²¹⁶ Brennan

reiterated this limited agreement, and hinted at more, in another memo sent six days later:

Dear Lewis: Supplementing my note of May 10, I can join pages 1 through the top of page 14 and also subdivision (B) at 14 through 17 except that I may join Byron's treatment of Title VI if he writes a more expanded treatment. I have also considered whether I might agree with your subdivision (E) at page 46 [the section about diversity] and think that I should reserve decision on that until my own writing is concluded. The reason is that there may be other reasons besides educational diversity that will support competitive consideration of race and ethnic origin.²¹⁷

Brennan circulated his own opinion, which Marshall, Blackmun, and White planned to join, forging the bloc who would overturn the lower court's ruling on the unconstitutionality of race-conscious admissions. As drafts arrived in Powell's chambers, Comfort analyzed them to see if anything merited changes in Powell's opinion. He paid particular attention to the final draft, to which he concluded, "I don't think any of the changes [from Brennan's earlier stance] require action on our part."²¹⁸ Brennan had decided to join with the "strict scrutiny" standard, although his definition was a bit looser than Powell's, reported Comfort. "He still has silly footnote 13, which takes us to task for our 'rival group' analysis," Comfort noted, but "I don't think we need to respond to this rather silly attack, because our point is clear to anyone following the progression of our argument."²¹⁹

Brennan also held to the remediation justification, and he did not share the concern with a university making the judgment about social discrimination. In fact,

Comfort summarized, “WJB argues that States are free to distribute power as they wish, and that if the State legitimately could do this, so can the medical school. We suggest, however, that *even the State could not have done this without findings and criteria.*”²²⁰ Again, Comfort found no benefit to changing Powell’s opinion, because “our section on this point was the one that we changed in anticipation of this footnote...I think that we are probably okay here with the changes we finally agreed upon.”²²¹ The same assessment was given for Brennan’s “*flight of fancy* concerning Davis’ ‘real’ reasons for enacting the preference and the discrimination faced by minorities in medicine, detached from any reference to the record. It’s the same *social essay* contained in the previous drafts...we need say nothing about it.”²²²

With the votes in, the opinions circulated, and no more movement to be made, there was a final decision left: to articulate what the binding judgment of the Court actually was. Brennan agreed with Powell’s conviction that the Court be clear about what was and was not allowed under its ruling, although they disagreed about what that was. Powell was voting to affirm in part and reverse in part, an act that bridged the judgments of the Brennan and Stevens blocs of votes, so his was the “official” holding of the Court. Yet the personal memo that Powell wrote to Brennan, just five days before the opinion was announced to the public, evidences the negotiation of who gets to declare the judgment:

Since your telephone call I have given further thought...to your question whether the following sentence on the first page of your opinion is accurate as to my opinion as well as yours: ‘Government may take race into account

when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.’

Your opinion states that the foregoing reflects the ‘central meaning of this Court’s judgment.’ If your statement is read literally, I doubt that it does reflect accurately the judgment of the Court. *In terms of ‘judgment’, my opinion is limited to the holding that a state university validly may consider race to achieve diversity.*

But my opinion recognized broadly...that consideration of race is appropriate to eliminate the effects of past discrimination when appropriate findings have been made by judicial, legislative or administrative bodies authorized to act.²²³

Stevens was right, Powell argued, when he declared the *judgment itself* not to go beyond the diversity rationale. But Powell expressed discomfort with negating different characterizations of his own opinion:

Despite the foregoing I have not objected to your characterization of what the Court holds as I have thought you could put whatever ‘gloss’ on the several opinions you think proper. In sum, while I might prefer that you describe the judgment differently, I have no thought of making any response on this point beyond what I have already circulated.²²⁴

Conclusion

Powell’s measured decision-making in *Bakke* reflects Neil MacCormick’s argument about the rhetoricity of legal reasoning:

it is all too often a matter of choosing between two strongly arguable and strongly argued cases, in a dialectical situation in which each argument made

by either party is firmly countered by a good argument proposed by the other. Perhaps...it is only by reference to considerations of ideology extraneous to law that one can come to a justified decision at all. Then the ultimately justifying ground is a particular ideology, not law as an ideologically neutral ultimate ground of appeal.²²⁵

As frequently as Powell used the language of prudence and pragmatism to justify his reasoning, then, to bridge different interpretations is ultimately to choose an ideological path. The result of Powell's inventional process was to uphold "an ideological principle" of diversity – but a version of diversity dissociated from the robust race-consciousness of the pro-Davis briefs, and replaced with an individualized racialism. This outcome defined race as an individual characteristic, separating race consciousness from its group identity and coalition-forming potential, and toward a characterological feature. This balance "shows all the tensions created by the desire to conciliate stability with change, the need for continuity with adaptation, and security with equity and the common good" evident in legal reasoning, argues Chaïm Perelman.²²⁶

Yet by separating the consideration of race from any group history associated with it, Powell individualized and privatized the notion of race, thus making race "decontextualized so that it becomes an institutional value rather than a complex social construct."²²⁷ Perelman and Lucie Olbrechts-Tyteca describe this argumentative technique of dissociation as an act which "take[s] the form of showing that a link considered to have been accepted...does not exist, because there are no grounds for stating or maintaining that [the]...phenomena under consideration

exercise an influence on those which are under discussion and that it is consequently irrelevant to take the former into account.”²²⁸ On a practical level, they argue, “the dissociation of notions amounts to a compromise, but, on the theoretical level, it leads to a solution that will also be valid for the future, because, by remodeling our conception of reality, it prevents the reappearance of the same incompatibility.”²²⁹

Justice Powell’s decision was seen as a partial victory and partial defeat for most interested parties. An Associated Press story, released on the morning the decision was announced, explained: “The 5-4 decision was a clear victory for Bakke but without clear guideposts for the future use of quotas or goals in programs designed to aid minorities. And while the court ruling was on college admissions, its decision could affect minority hiring practices by hundreds of businesses and government agencies under affirmative action programs developed over the past 15 years.”²³⁰ The *Washington Post* declared *Bakke* “A Ruling with Something for Every Group,” and the *New York Times* announced that “No One Lost.”²³¹ The NAACP called the *Bakke* decision “a major disappointment,” whereas the Congressional Black Caucus thought *Bakke* promising because it upheld the use of race in admissions.²³² University of California President David Saxon called the decision an “overall victory” for the university, because “despite the flaws of the U.C. Medical School at Davis, ‘the overwhelming bulk of our admission program appears to be entirely lawful.’”²³³ The *Chicago Sun-Times* headlined “White Student Wins Reverse Bias Case,” followed by a small font-type qualifier: “Justices OK some racial preferences.”²³⁴ *Time* Magazine reported, “Quotas, No; Race, Yes.”²³⁵ *Newsweek* writer Peter Goldman found broader significance in the decision’s careful ruling: “A

fragile 5-to-4 majority of the Court did leave ample room for the survival of most of the affirmative-action programs now pervasive on campus and in the marketplace as well. But the Court substantially narrowed the ground for preferred treatment of blacks, and so mirrored a spreading national Spirit of '78 – a will to be left alone.”²³⁶

Future Supreme Court nominee Robert Bork read the decision as “at bottom a statement that the 14th Amendment allows some, but not too much, reverse discrimination,” at the same time that Allan Bakke spoke through his lawyer to declare that he was pleased with the results.²³⁷ Law professor and lawyer Alan Dershowitz said that *Bakke* would:

go down in history not for what it did but for what it didn't do. It neither legitimized racial quotas nor put down affirmative action programs. The decision will make the job of admissions officers a lot harder. It will make them look at people as persons, not as members of a group and not as computerized ciphers.²³⁸

Mark Tushnet shares this tepid interpretation of Powell's decision in *Bakke*, an approach that he finds reflective of Powell's overall jurisprudence of centrism. “If a judge adheres to a jurisprudence of balancing, as Powell did, it would be desirable for that judge to have a capacious social vision. Judges who lack such a vision may not do a good job in balancing competing interests because they do not fully appreciate the range of interests at stake.”²³⁹ Without a strong social vision to motivate this balancing, the public ends up only the timid decision, not the sense of struggle and balance that comes from Powell's inventional process. As Tushnet

asserts: “Powell's desire to achieve balance meant that the law he articulated reflected the balance he struck, not a balance accessible to any fair reader of the cases.”²⁴⁰

Notes

¹ Justice Thurgood Marshall, Memo to the Conference, “Re: No 76-811, *Regents of the University of the California v. Bakke*,” 13 April 1978, Supreme Court File 2, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 3.

² Howard Ball, *The Bakke Case: Race, Education, & Affirmative Action* (Lawrence, KS: University Press of Kansas, 2000), 123.

³ Quoted in Ball, *The Bakke Case*, 123.

⁴ See Cornell W. Clayton and Howard Gillman, ed. *Supreme Court Decision-Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999); Lee Epstein and Lack Knight, *The Choices Justices Make* (Washington, DC: Congressional Quarterly Press, 1998); Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge: Cambridge University Press, 2000); and Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).

⁵ In the introduction to the book they edited, Howard Gillman and Cornell Clayton advocate the move away from the long-time political science approach to Supreme Court decision-making that treats the institution almost exclusively as “a collection of individuals who were pursuing their personal policy preferences.” (1) Such studies treat justices as if they were legislators, voting based on partisan political affiliations and ideological beliefs only, an approach that Gillman and Clayton argue is partial at best. They assert that more attention to historical and

institutional contexts, as well as relationships with other institutions and between the justices, better account for judicial decision-making, and their book's subtitle – "New Institutional Approaches" – reflects this belief. Howard Gillman and Cornell Clayton, "Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making," in *Supreme Court Decision-Making: New Institutional Approaches*, ed. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999).

⁶ Gillman and Clayton, "Beyond Judicial Attitudes," 5.

⁷ Gillman and Clayton, "Beyond Judicial Attitudes," 4. The characterization of ideology comes from Michael Calvin McGee, "The 'Ideograph': A Link between Rhetoric and Ideology," *Quarterly Journal of Speech* 66 (1980): 1-16;

⁸ Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge: Cambridge University Press, 2000), 7.

⁹ Maltzman, Spriggs II, and Wahlbeck, *Crafting Law*, 8.

¹⁰ George L. Pullman, "Deliberative Rhetoric and Forensic Stasis: Reconsidering the Scope and Function of an Ancient Rhetorical Heuristic in the Aftermath of the Thomas/Hill Controversy," *Rhetoric Society Quarterly* 25 (1995): 224.

¹¹ Artemus Ward and David L. Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York: New York University Press, 2006), 155; Ball, *The Bakke Case*, 90-91.

¹² Ward and Weiden, *Sorcerers' Apprentices*, 3.

¹³ George A. Kennedy, *Classical Rhetoric & Its Christian and Secular Tradition from Ancient to Modern Times*, 2nd ed. (Chapel Hill: University of North Carolina Press, 1999).

¹⁴ Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. George A. Kennedy (New York: Oxford University Press, 1991), 34.

¹⁵ Bob Woodward and Scott Armstrong, *The Brethren* (New York: Simon & Schuster, 1978), 354-355.

¹⁶ Ward and Weiden, *Sorcerers' Apprentices*, 50.

¹⁷ Ward and Weiden, *Sorcerers' Apprentices*, 52. Ward and Weiden cite a letter from Powell to law clerk James D. Alt on 9/15/1976, in which Powell wrote: "You are perhaps generally familiar with many of my decisions. You should be thoroughly familiar at least with the major ones by the time you 'join up.'"

¹⁸ Ward and Weiden, *Sorcerers' Apprentices*, 52.

¹⁹ Bob Comfort, Memorandum for Justice Powell, "Re: Bench memo in *Bakke*," 29 August, 1977, Green Folder, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, cover. Emphasis added.

²⁰ Comfort, Bench memo in *Bakke*," cover. Powell's handwritten note.

²¹ Willy, "Annotated Bibliography on Defunis/Bakke Question," 27 June, 1977, Supreme Court files, File Docket #76-811, Justice L. Powell Archives, Washington and Lee University, Lexington, VA. The author of this memo is unclear. The memo is signed "Willy" at the bottom, although the published list of law clerks for Justice Powell does not correlate with a Willy or William. At the top of the cover page, the name "Sam" is written, which correlates with one of Powell's law clerks for

the 1977-78 term named Samuel Estreicher. Posner's article was in *Supreme Court Review* 1 (1974); Sandalow's in *Univeristy of Chicago Law Review* 42 (1975); the symposiums were in *Columbia Law Review* 75 (1975) and *Toledo Law Review* (1970).

²² Bob Comfort, Memorandum for Mr. Justice Powell, "Re: Reading for the *Bakke* case" 2 September, 1977, Green Folder, Justice L. Powell Archives, Washington and Lee University, Lexington, VA. Cover.

²³ Comfort, "Reading for *Bakke* case," cover. Marco DeFunis was the petitioner in the previous case arguing "reverse discrimination," which had been declared moot by the Supreme Court several years previously.

²⁴ Comfort, "Reading for *Bakke* case," 2.

²⁵ Comfort, "Reading for *Bakke* case," 2.

²⁶ Comfort, "Reading for *Bakke* case," 1. Powell's handwritten note.

²⁷ Comfort, "Re: Bench memo in *Bakke*," 30.

²⁸ Comfort, "Re: Bench memo in *Bakke*," 56.

²⁹ Comfort, "Re: Bench memo in *Bakke*," 12.

³⁰ In *Marbury v. Madison* 5 US 137 (1803), Chief Justice John Marshall's opinion established both the primacy of the Constitution over legislative acts as "one of the fundamental principles of our society," and that, in a conflict of laws, "the courts *must* decide on the operation of each...so if a law be in opposition to the Constitution...the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty." (177-178) Robert McCloskey argues that, while the Constitution left the particular roles and responsibilities of the

Supreme Court vague, it left open the possibility for judicial review, and historical circumstances fostered the growth of the aspect of the Court's authority, which it articulated formally in *Marbury v. Madison*. Robert G. McCloskey, *The American Supreme Court*, ed. Daniel Boorstin (Chicago: University of Chicago Press, 1960).

³¹ Comfort, "Bench memo in *Bakke*," 12. Emphasis reflects Powell's markings.

³² Comfort, "Bench memo in *Bakke*," 12. Next to this sentence, Powell wrote "True."

³³ Comfort, "Bench memo in *Bakke*," 12. Emphasis reflects Powell's markings.

³⁴ Comfort, "Bench memo in *Bakke*," 12-13.

³⁵ Comfort, "Bench memo in *Bakke*," 14.

³⁶ Comfort, "Bench memo in *Bakke*," Powell's handwritten note at 14. Emphasis reflects Powell's markings.

³⁷ Comfort, "Bench memo in *Bakke*," 15. Emphasis reflects Powell's markings.

³⁸ Comfort, "Bench memo in *Bakke*," 16. Powell wrote "Yes" next to this line.

³⁹ Comfort, "Bench memo in *Bakke*," 16.

⁴⁰ Comfort, "Bench memo in *Bakke*," Powell's handwritten note on 18.

⁴¹ Comfort, "Bench memo in *Bakke*," Powell's handwritten note at 18.

⁴² Comfort, "Bench memo in *Bakke*," Powell's handwritten note at 20.

⁴³ Comfort, "*Bench memo in Bakke*," 20.

⁴⁴ Ideology is defined here as a collection of interrelated convictions, produced in political language and preserved in historical documents, that control and influence the beliefs and behaviors of the public, including both the ruler(s) and the ruled. It points the audience(s) toward certain values and away from alternative world-views. Ideology, defined in this way, is more of a social process than a deterministic force. Alan Hunt argues that ideology “draws its power from its ability to connect and combine diverse mental elements (concepts, ideas, etc.) into combinations that influence and structure the perception and cognition of social agents.” See Alan Hunt, “Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law” in *Law & Society Review* 1985: 16.

Thus, an ideological focus recognizes the naturalized political assumptions that work in and through texts, subject to change through confrontation with social exigencies and conflicting ideological beliefs. This definition reflects conceptions of ideology discussed in: Edwin Black, “The Second Persona,” *Quarterly Journal of Speech* 56 (1970): 109-119; McGee, “Ideograph;” Philip Wander, “The Ideological Turn in Modern Criticism,” *Central States Speech Journal* 34 (1983): 1-18 and “The Third Persona: An Ideological Turn in Rhetorical Theory,” *Central States Speech Journal* 35 (1984): 197-216.

⁴⁵ Gary Peller, “Frontier of Legal Thought III: Race Consciousness,” 1990 *Duke Law Journal* (1990): 774.

⁴⁶ Comfort, “Bench memo in *Bakke*,” 21.

⁴⁷ Comfort, “Bench memo in *Bakke*,” 21. Emphasis reflects Powell’s markings.

⁴⁸ Comfort, “Bench memo in *Bakke*,” 22. Powell underlined Professor Kurland’s name in the memo and wrote “*Kurland*” in the margins.

⁴⁹ Comfort, “Bench memo in *Bakke*,” 22. Emphasis reflects Powell’s markings. Powell noted, “14th Amend. rights are *personal*” in the margins, circled the reference to *Shelley v. Kraemer*, and wrote in another Supreme Court case – *Sweatt v. Painter* – at the end of the paragraph.

⁵⁰ Comfort, “Bench memo in *Bakke*,” 22-23.

⁵¹ Comfort, “Bench memo in *Bakke*,” 23.

⁵² Comfort, “Bench memo in *Bakke*,” 23.

⁵³ Comfort, “Bench memo in *Bakke*,” 27.

⁵⁴ Lewis F. Powell to Eugene B. Sydnor, Jr., “Confidential Memorandum: Attack on American Free Enterprise System,” U.S. Chamber of Commerce, 23 August, 1971.

⁵⁵ Powell, “Attack on Free Enterprise,” 8.

⁵⁶ Comfort, “Bench memo in *Bakke*,” 23. Emphasis reflects Powell’s underlines.

⁵⁷ Comfort, “Bench memo in *Bakke*,” 23.

⁵⁸ Comfort, “Bench memo in *Bakke*,” 25.

⁵⁹ Comfort, “Bench memo in *Bakke*,” 26. Emphasis reflects Powell’s underlines.

⁶⁰ Charles A. Miller argues that, “when the Court’s work is scrutinized in public, that is, when the Court’s authority is being confirmed or criticized, the use of history is also a matter of concern...The Constitution itself is a product of the nation’s past, and the Supreme Court, as the accepted interpreter of the Constitution, has become the public interpreter of American political history.” (6) This role of interpreter means that “the nature of law, particularly constitutional law, and the function of the Supreme Court in American society both contain a large element of viewing the present in terms of the past.” (20) Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge: Harvard University Press, 1969).

⁶¹ Comfort, “Bench memo in *Bakke*,” 27. Emphasis reflects Powell’s underlines.

⁶² Comfort, “Bench memo in *Bakke*,” 27.

⁶³ Vincent N. Parrillo, “Diversity in America: A Sociohistorical Analysis,” *Sociological Forum* (1994): 524.

⁶⁴ Parrillo, “Diversity in America,” 524.

⁶⁵ Comfort, “Bench memo in *Bakke*,” 29.

⁶⁶ Comfort, “Bench memo in *Bakke*,” 29. Emphasis reflects Powell’s underlines. Powell also wrote “Yes” beside the final sentence, and etched a heavier underline beneath it.

⁶⁷ Comfort, “Bench memo in *Bakke*,” 29-30. Powell summarized this section in the margins: “This is a ‘dividing pie’ case, taking some of a limited pie and giving to one group. It is different from ‘enlarged pie’ cases like *Lau*. Thus affirmance here would not foreclose affirmative action programs based on qualifications.” (30)

⁶⁸ Comfort, “Bench memo in *Bakke*,” 30. Emphasis reflects Powell’s underlines.

⁶⁹ Comfort, “Bench memo in *Bakke*,” 30.

⁷⁰ Warren E. Wright, “Judicial Rhetoric: A Field of Research” *Speech Monographs* 31 (1964): 65.

⁷¹ Comfort, “Bench memo in *Bakke*,” 30.

⁷² Comfort, “Bench memo in *Bakke*,” 30. Emphasis reflects Powell’s underlines. Additionally, Powell wrote “Yes” beside this sentence.

⁷³ Eileen A. Scallen, “Classical Rhetoric, Practical Reasoning, and the Law of Evidence,” *American University Law Review* 44 (1995): 1726-1727.

⁷⁴ Comfort, “Bench memo in *Bakke*,” 31.

⁷⁵ Comfort, “Bench memo in *Bakke*,” 31. Emphasis reflects Comfort’s typed underline.

⁷⁶ Comfort, “Bench memo in *Bakke*,” 33.

⁷⁷ Comfort, “Bench memo in *Bakke*,” 34. Emphasis reflects Powell’s underline.

⁷⁸ Comfort, “Bench memo in *Bakke*,” 31.

⁷⁹ Comfort, “Bench memo in *Bakke*,” 39. Powell noted this with a reminder in the margins: “State must show *means* is necessary” (39). The case Comfort referred to is *In Re Griffiths* 413 U.S. 717 (1973) at 721-722.

⁸⁰ Comfort, “Bench memo in *Bakke*,” 43.

⁸¹ Comfort, “Bench memo in *Bakke*,” 43. Emphasis reflects Powell’s underline.

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- ⁸² Comfort, "Bench memo in *Bakke*," 47. Emphasis reflects Powell's underline.
- ⁸³ Comfort, "Bench memo in *Bakke*," 48.
- ⁸⁴ Comfort, "Bench memo in *Bakke*," 57.
- ⁸⁵ Comfort, "Bench memo in *Bakke*," 47.
- ⁸⁶ Comfort, "Bench memo in *Bakke*," 52. Emphasis reflects Powell's underline.
- ⁸⁷ Comfort, "Bench memo in *Bakke*," Powell's handwritten note at 52.
- ⁸⁸ Comfort, "Bench memo in *Bakke*," 52. Emphasis reflects Powell's underlines. He also wrote "Yes" next to the sentence trumpeting academic freedom.
- ⁸⁹ Powell, "Attack on Free Enterprise," 9.
- ⁹⁰ Powell, "Attack on Free Enterprise," 9-10.
- ⁹¹ Comfort, "Bench memo in *Bakke*," 52.
- ⁹² Comfort, "Bench memo in *Bakke*," 53. Powell wrote "Yes" next to this example.
- ⁹³ Comfort, "Bench memo in *Bakke*," 53-54. Emphasis reflects Powell's underline.
- ⁹⁴ Comfort, "Bench memo in *Bakke*," 59.
- ⁹⁵ Comfort, "Bench memo in *Bakke*," 59. Emphasis reflects Powell's underline.
- ⁹⁶ Comfort, "Bench memo in *Bakke*," 59-60. Emphasis reflects Powell's underline.

⁹⁷ Comfort, “Bench memo in *Bakke*,” 60. Emphasis reflects Powell’s underline.

⁹⁸ Comfort, “Bench memo in *Bakke*,” 60-61. Emphasis reflects Comfort’s typed underline.

⁹⁹ Comfort, “Bench memo in *Bakke*,” 61. Powell wrote “Yes” next to this sentence.

¹⁰⁰ Epstein and Knight, *The Choices Justices Make*, 2-14.

¹⁰¹ Victoria J. Dodd, “The Education Justice: The Honorable Lewis Franklin Powell, Jr.” in “Education Law and Policy,” special issue, *Fordham Urban Law Journal* 29 (2001): 686-687; John C. Jeffries, *Justice Lewis F. Powell, Jr.* (New York: Charles Scriber’s Sons, 1994); Craig Evan Klafter, “Justice Lewis F. Powell, Jr.: A Pragmatic Relativist,” *Boston University Public Interest Law Journal* 8 (1998): 1-13; Woodward and Armstrong, *The Brethren*, 161;

¹⁰² Klafter, “Pragmatic Relativist,” 5. See also Jeffries, *Justice Lewis F. Powell, Jr.*; Woodward and Armstrong, *The Brethren*.

¹⁰³ Anders Walker, *The Ghosts of Jim Crow: How Southern Moderates Used Brown v. Board of Education to Stall Civil Rights* (New York: Oxford University Press, 2009), 5.

¹⁰⁴ Klafter, “Pragmatic Relativist,” 5.

¹⁰⁵ Klafter, “Pragmatic Relativist”; Woodward and Armstrong, *The Brethren*.

¹⁰⁶ Woodward and Armstrong, *The Brethren*, 224.

¹⁰⁷ Woodward and Armstrong, *The Brethren*, 256.

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- ¹⁰⁸ Woodward and Armstrong, *The Brethren*, 223. See also *U.S. vs U.S. District Court* 407 U.S. 297 (1972).
- ¹⁰⁹ Woodward and Armstrong, *The Brethren*, 222.
- ¹¹⁰ Segal and Spaeth, *Supreme Court and Attitudinal Model Revisited*, 402-403.
- ¹¹¹ Paul W. Kahn, “The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell,” *Yale Law Journal* 97 (1987): 4.
- ¹¹² Klafter, “Pragmatic Relativist,” 8.
- ¹¹³ Karen Burke LeFevre, *Invention as a Social Act* (Carbondale: Southern Illinois University Press, 1987), 2.
- ¹¹⁴ Maltzman, Spriggs II, and Wahlbeck, *Crafting Law*, 123.
- ¹¹⁵ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), xiv.
- ¹¹⁶ Chaïm Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, trans. John Petrie (Dordrecht, Holland: D. Reidel, 1980), 119.
- ¹¹⁷ Justice Lewis F. Powell, Jr., *Report to the Labor Law Section of the American Bar Association*, 11 August, 1976, Atlanta, GA.
- ¹¹⁸ Bob Comfort, Memorandum for Mr. Justice Powell, “Re: BAKKE” 6 September, 1977, Green Folder, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1-2. Ward and Weiden spend a good deal of time in their book exploring the coalition-forming function of law clerks. They argue that, in addition to serving an inventional function for finding and selecting appropriate arguments, “...clerks and justices use the clerk network to aid in decision making,

with clerks from different chambers routinely discussing cases with one another.”

Ward and Weiden, *Sorcerers' Apprentices*, 151.

¹¹⁹ Justice Lewis F. Powell, Jr. “Bakke – Pre-Conference Notes (10/13),” 13 October, 1977, Bakke Files I. Correspondence, Drawer 26, Folder 1, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

¹²⁰ Powell, “Pre-Conference Notes (10/13),” 5.

¹²¹ Powell, “Pre-Conference Notes (10/13),” 1.

¹²² Powell, “Pre-Conference Notes (10/13),” 1. Emphasis reflects Powell’s underlines.

¹²³ Powell, “Pre-Conference Notes (10/13),” 2. Emphasis reflects Powell’s underlines.

¹²⁴ Powell, “Pre-Conference Notes (10/13),” 2. Emphasis reflects Powell’s underlines.

¹²⁵ Powell, “Pre-Conference Notes (10/13),” 5. Emphasis reflects Powell’s underlines.

¹²⁶ Powell, “Pre-Conference Notes (10/13),” 3.

¹²⁷ Powell, “Pre-Conference Notes (10/13),” 3.

¹²⁸ Powell, “Pre-Conference Notes (10/13),” 4.

¹²⁹ Powell, “Pre-Conference Notes (10/13),” 5.

¹³⁰ Ball, *The Bakke Case*, 87.

¹³¹ Bernard Schwartz, *The New Right and the Constitution: Turning Back the Legal Clock* (Boston, MA: Northeastern University Press, 1990), 164.

¹³² Chief Justice Warren Burger, Confidential Memorandum to the Conference, “Re: No 76-811 *Regents of the University of California v Allan Bakke*”, 21 October, 1977, Bakke files, II. Intra-Chambers Memos, “Chief-Basic Position” Tab, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 2.

¹³³ Justice Lewis F. Powell, Jr., personal notes on conference, “*Bakke* Conference of 12/9/77,” Powell papers, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 7.

¹³⁴ Powell, Notes on Conference 12/9/77, 7.

¹³⁵ Powell, Notes on Conference 12/9/77, 7.

¹³⁶ Justice Thurgood Marshall, Memorandum to the Conference, “Re: No. 76-811, *Regents of the University of California. v. Allan Bakke*,” 28 October, 1977, Bakke files, II. Intra-Chambers Memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 11.

¹³⁷ Powell, Notes on Conference 12/9/77, 5.

¹³⁸ Philip C. Kissam, “Triangulating Constitutional Theory: Power, Time, and Everyman,” *Buffalo Law Review* 53 (2005): 295.

¹³⁹ Kissam, “Triangulating Constitutional Theory,” 295.

¹⁴⁰ Klafter, “Pragmatic Relativist,” 2.

¹⁴¹ Albert W. Alschuler, “Failed Pragmatism: Reflections on the Burger Court,” *Harvard Law Review* 100 (1987): 1455.

¹⁴² Don R. LeDuc, “‘Free Speech’ Decisions and the Legal Process: The Judicial Opinion in Context,” *Quarterly Journal of Speech* 62 (1976): 279.

¹⁴³ Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 5.

¹⁴⁴ Justice Lewis Powell, Memorandum to the Conference, “No. 76-811 *Regents v. Bakke*”, 5 January, 1978, Bakke files, II. Intra-Chambers Memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 7.

¹⁴⁵ Powell, Memo to Conference 1/5/78, 7.

¹⁴⁶ Powell, Memo to Conference 1/5/78, 6.

¹⁴⁷ Powell, Memo to Conference 1/5/78, 6.

¹⁴⁸ Josina M. Makau, “The Supreme Court and Reasonableness,” *Quarterly Journal of Speech* 70 (1984): 382.

¹⁴⁹ Wright, “Judicial Rhetoric,” 67.

¹⁵⁰ Justice Lewis Powell, personal memo to Chief Justice Burger, “Personal: *Bakke*”, 12 April, 1978, Bakke files, II. Intra-Chambers Memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 3.

¹⁵¹ Drucilla L. Cornell, “Institutionalization of Meaning, Recollective Imagination, and the Potential for Transformative Legal Interpretation,” *University of Pennsylvania Law Review* 136 (1988): 1229.

¹⁵² L. H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park: Pennsylvania State University Press, 1995). LaRue devotes one chapter each – entitled respectively “The Story of Limits” (42-69) and “The Story of Growth” (70-92) – to this judicial habit in his book.

¹⁵³ LaRue, “The Story of Limits” in *Constitutional Law as Fiction*, 42-69.

¹⁵⁴ LaRue, “The Story of Growth” in *Constitutional Law as Fiction*, 70-92.

¹⁵⁵ Frank Blake on behalf of Justice John Paul Stevens, Memorandum to the conference, “76-811 – University of California v. Bakke: Supplemental Memo re Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d,” 19 October, 1977, Drawer 26, Folder 1: OT77, Justice L Powell Archives, Washington and Lee University, Lexington, VA, 1. Frank Blake was the law clerk who prepared the supplemental memo, as Stevens’ cover letter to the conference indicated: “During our discussion at Conference it was suggested that we share some of our research. Accordingly, I enclose copies of the memorandum prepared for me by my law clerk Frank Blake on Title VI...”

¹⁵⁶ Blake, “Supplemental Memo re Title VI,” 3-4, quoting Celler and then Humphrey.

¹⁵⁷ Blake, “Supplemental Memo re Title VI,” 4.

¹⁵⁸ Justice Thurgood Marshall’s chambers, Memorandum to the Conference, “Re: No. 76-811, *Regents of the University of California. v. Allan Bakke*,” 28 October, 1977, Drawer 26, Folder 1, Justice L Powell Archives, Washington and Lee University, Lexington, VA, 1.

¹⁵⁹ Ellen Silberman, Memorandum for Justice Marshall, “Re: The Legislative History of Title VI of the Civil Rights Act of 1964,” attachment to Justice Marshall’s Memorandum to the Conference, “Re: No. 76-811, *Regents of the University of California. v. Allan Bakke*,” 28 October, 1977, Drawer 26, Folder 1, Justice L Powell Archives, Washington and Lee University, Lexington, VA, 1.

¹⁶⁰ Silberman, “Re: Legislative History of Title VI,” 3, quoting Pastore.

¹⁶¹ Silberman, “Re: Legislative History of Title VI,” 5.

¹⁶² Silberman, “Re: Legislative History of Title VI,” 9.

¹⁶³ Bob Comfort, Memorandum for Justice Powell, “Comments on Justice Stevens’s Title VI Memo,” 19 October, 1977, Bakke memo file, Drawer 26, Folder 1 Justice L Powell Archives, Washington and Lee University, Lexington, VA, 1.

¹⁶⁴ Comfort, “Justice Stevens’s Title VI,” 1.

¹⁶⁵ Comfort, “Justice Stevens’s Title VI,” 3.

¹⁶⁶ *Ashwander v. Tennessee Valley Authority (TVA)* 297 U.S. 288 (1936).

¹⁶⁷ Justice Lewis F. Powell, Jr. Memorandum to the Conference, “No. 76-811 Regents v. Bakke,” 14 October, 1977, Drawer 26, Folder 1: OT77, Justice L Powell Archives, Washington and Lee University, Lexington, VA, 1.

¹⁶⁸ Justice Lewis F. Powell, Jr, Memorandum to the Conference, “76-811 Regents v. Bakke” 22 November, 1977, Bakke files, II. Intra-Chambers Memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

¹⁶⁹ Powell, Memo to Conference 10/14/77, 4.

¹⁷⁰ Powell, Memo to Conference 10/14/77, 1-2.

¹⁷¹ Powell, Memo to Conference 10/14/77, 2-3.

¹⁷² Justice Lewis Powell, Memorandum to the Conference, “*No. 76-811 Regents v. Bakke*”, 5 January, 1978, Bakke files, II. Intra-Chambers Memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 4.

¹⁷³ Powell, Notes on Conference of 12/9/77, 1.

¹⁷⁴ Justice Thurgood Marshall, Memorandum to the Conference, October Term 1977, Box 195, Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington, DC.

¹⁷⁵ Justice Lewis Powell, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) at 284, 291, emphasis added.

¹⁷⁶ Powell, *Regents v. Bakke* at 298, emphasis added.

¹⁷⁷ Josina M. Makau and David Lawrence, “Administrative Judicial Rhetoric: The Supreme Court’s New Thesis of Political Morality,” *Argumentation & Advocacy* 4 (1994): 191-205. *Online*.

¹⁷⁸ Makau and Lawrence, “Administrative Judicial Rhetoric,” *online*.

¹⁷⁹ Chief Justice Warren Burger, Confidential Memorandum to the Conference, “Re: No. 76-811 *Regents of the University of California v. Allan Bakke*,” 21 October, 1977, Bakke files, II. Intra-Chambers Memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

¹⁸⁰ Powell, Memorandum to the Conference 1/5/78, 3-4.

¹⁸¹ Burger, Confidential Memo to Conference, 10/21/77, 2.

¹⁸² Justice Thurgood Marshall, Memo to the Conference, “Re: No 76-811, *Regents of the University of the California v. Bakke*,” 13 April, 1978, Supreme Court Files #2, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1-3.

¹⁸³ Quoted in Ball, *The Bakke Case*, 100. Ball consulted Justice Brennan’s conference notes to provide these quotes.

¹⁸⁴ Justice William H. Rehnquist, Memorandum to the Conference, “Re: No. 76-811, *Regents of the University of California. v. Allan Bakke*,” 10 November, 1977, Bakke files, II. Intra-Chambers Memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 13, 14.

¹⁸⁵ Rehnquist, Memo to Conference 11/10/77, 1.

¹⁸⁶ Neil Gotanda, “A Critique of ‘Our Constitution is Color-Blind’,” *Stanford Law Review* 44 (1991): 4. The quote is from Gotanda; the characterization of such a view as Posnerian is mine.

¹⁸⁷ Rehnquist, Memo to Conference 11/10/77, 13. Emphasis reflects Powell’s underline.

¹⁸⁸ Rehnquist, Memo to Conference 11/10/77, 14.

¹⁸⁹ Rehnquist, Memo to Conference 11/10/77, 13.

¹⁹⁰ Justice Lewis F. Powell, Jr., quoted in Dodd, “The Education Justice,” 699.

¹⁹¹ Comfort “No. 76-811 Regents of the University of California v. Bakke” Draft 1, 6 October, 1977, Powell review 10-10-77. Bakke files, IV. Drafts – Memos to Conference, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1. Emphasis added.

¹⁹² Comfort, Draft 1, Powell review 10-10-77: 1. Emphasis added.

¹⁹³ Justice Lewis F. Powell, Jr., notes on revisions, entitled “Bob,” undated, Bakke files, IV: Drafts – Memos to conference, Justice L. Powell Archives, Washington and Lee University, Lexington, VA.

¹⁹⁴ Powell, “Bob,” 1-2.

¹⁹⁵ Powell, “Bob,” 2.

¹⁹⁶ Ward and Weiden, *Sorcerer’s Apprentices*, 43, describe law clerks as “informal ambassadors in negotiations across chambers,” and cite memoranda from Justice Powell’s law clerk, Bob Comfort as evidence.

¹⁹⁷ Bob Comfort, Memorandum for Mr. Justice Powell, “Re: Justice Brennan’s Dec. 13 Memo on *Bakke*,” 14 December, 1977. Bakke files, I. Conference, Drawer 26, Folder 1, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

¹⁹⁸ Comfort, “Brennan’s Dec. 13 Memo,” 6.

¹⁹⁹ Comfort, “Brennan’s Dec. 13 Memo,” 6. Emphasis in original.

²⁰⁰ Justice Lewis F. Powell, Jr., Memo to the Conference, “No. 76-811 *Regents v. Bakke*” 19 December, 1977, Bakke files, I. Conference, Drawer 26, Folder 1, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1-2. Emphasis in original.

²⁰¹ Bob Comfort, Memorandum to Mr. Justice Powell, “Re: Possible Common Ground With Justice Brennan in *Bakke*,” 8 February, 1978, Supreme Court Files, Folder 2, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

²⁰² Bob Comfort, “Possible Common Ground,” 3.

²⁰³ Powell, Personal Memo to Burger 4/12/78, 1.

²⁰⁴ Powell, Personal Memo to Burger 4/12/78, 1.

²⁰⁵ Powell, Personal Memo to Burger 4/12/78, 3.

²⁰⁶ Powell, Personal Memo to Burger 4/12/78, 3. Emphasis in original.

²⁰⁷ Powell, Personal Memo to Burger 4/12/78, 4.

²⁰⁸ Powell, Personal Memo to Burger 4/12/78, 2-3.

²⁰⁹ Powell, Personal Memo to Burger 4/12/78, 3.

²¹⁰ Powell, Personal Memo to Burger 4/12/78, 4.

²¹¹ Ball, *The Bakke Case*, 120.

²¹² Quoted in Ball, *The Bakke Case*, 121.

²¹³ Quoted in Ball, *The Bakke Case*, 120-121. Emphasis added.

²¹⁴ Justice Lewis F. Powell, Jr. "Office Manual," 1975, cited in Maltzman, Sprigg II, and Wahlbeck, *Crafting Law*, 9.

²¹⁵ Justice William Brennan, Memorandum to Justice Powell, copied to the conference, "RE: *No. 76-811 Board of Regents v. Bakke*," 10 May, 1978, Supreme Court, File 2, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

²¹⁶ Brennan, Memo to Powell 5/10/78, Powell's handwritten notes in margins.

²¹⁷ Brennan, Memorandum to Justice Powell, copied to the conference, "RE: *No. 76-811 Board of Regents v. Bakke*," 16 May, 1978, Supreme Court File 2, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

²¹⁸ Bob Comfort, Memorandum for Mr. Justice Powell, "Re: WJB's Revised Draft (6/16) in *Bakke*", 17 June, 1978, Bakke files, "Memos 77-78," Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

²¹⁹ Comfort, "Re: WJB's Revised Draft" 1-2.

²²⁰ Comfort, "Re: WJB's Revised Draft," 3. Emphasis reflects Powell's markings.

²²¹ Comfort, "Re: WJB's Revised Draft," 3.

²²² Comfort, "Re: WJB's Revised Draft," 4. Emphasis reflects Powell's markings.

²²³ Justice Lewis F. Powell, Jr., Personal Memorandum to Justice William Brennan, “Personal: *Bakke*,” 23 June, 1978, Bakke files, II. Intra-Chambers Memos, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1. Emphasis added.

²²⁴ Powell, “Personal” to Brennan, 2.

²²⁵ Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005), 20.

²²⁶ Perelman, *Justice, Law, and Argument*, 135.

²²⁷ Cedric Merlin Powell, “Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory,” *Cleveland State Law Review* 56 (2008): 832.

²²⁸ Chaïm Perelman and Lucy Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Purcell Weaver (Notre Dame, IN: University of Notre Dame Press, 1969), 411.

²²⁹ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 413.

²³⁰ Richard Carelli, Associated Press, June 28, 1978, AM Cycle.

²³¹ *Washington Post*, June 29, 1978, A1; News in Review, *New York Times*, July 2, 1978, A4.

²³² Susan Welch and John Gruhl, *Affirmative Action and Minority Enrollments in Medical and Law Schools* (Ann Arbor: University of Michigan Press, 1998), 30.

²³³ Quoted in an article by Cynthia Gorney, “University President Calls the Decision an Overall Victory,” *Washington Post*, June 29, 1978, A28.

²³⁴ *Chicago Sun-Times*, June 29, 1978, A1.

²³⁵ *Time*, July 10, 1978, cover.

²³⁶ Peter Goldman, “The Age of Less,” *Newsweek*, July 10, 1978, 18.

²³⁷ Bakke is quoted in Ball, *The Bakke Case*, 141, and in Allan P. Sindler, *Bakke, Defunis, and Minority Admissions: The Quest for Equal Opportunity* (New York: Longman, 1978), 317.

²³⁸ Quoted in John Herbers, “A Plateau for Minorities,” *New York Times*, June 29, 1978, A22.

²³⁹ Mark Tushnet, “Lives in the Law: Justice Lewis F. Powell and the Jurisprudence of Centrism,” *Michigan Law Review* 93 (1995): 1884.

²⁴⁰ Tushnet, “Lives in the Law,” 1874.

Conclusion:

The Rhetorical Supreme Court and the Legacy of “Diversity”

The classical notion of *kairos* – a focus on the right moment or the opportune, taking creative advantage of the particularities of the situation – is the missing link in contemporary inventional processes, according to Eric Charles White.¹ Driven by impulses toward formalism, positivism, and realism, legal invention is particularly susceptible to an arhetorical ignorance of *kairos*. At the same time, despite the best efforts of judicial rhetors, the judicial decision-making process cannot avoid in practice the contextual and ideological situatedness in which it is immersed.

Justice Lewis F. Powell Jr.’s decision to rely on racial diversity as a compelling justification for the continuance of some affirmative action programs was the result of such a *kairotic* moment, found in the exploration of *topoi* with his law clerk, Bob Comfort, and through the convergence of social and political forces, the tensions between the justices’ blocs of votes, and the particulars of the *Regents of the University of California v. Bakke* case. The ongoing push and pull of the rhetorics of integration and cultural pluralism, the widespread use of affirmative action programs in university life and in other federally funded programs, Powell’s history on educational boards, the Regents’ decision to concede Bakke’s argument about admission, the Burger Court’s fragmented membership and the conservative pragmatism of its leaders, the numerous *amicus* briefs – all constrained options for decision-making in general, but also brought to the foreground the possibilities inherent in a limited concept of diversity as both a value and a policy.

Contemporary legal education rejects the rhetorical basis of legal knowledge in favor of legal doctrine, reliance on precedent, legislative histories, and other starting places of arguments aiming to rid judicial decisions of their subjectivities. I have argued in this study that, in practice, opinion writers use these resources in rhetorical ways (wrestling with contingencies and arguing in probabilities), and toward rhetorical ends (using the linguistic resources of the public sphere to address specific audiences about public issues). The starting places of legal arguments are themselves ideological containers of meaning, filled with the specifics of each case and chosen to meet the goals of the justices and the institutional needs of the Court.

In *Bakke*, legal doctrines such as the application of “strict scrutiny” and the discernment between benign and invidious forms of discrimination carried within them assumptions about the harms and values of race consciousness. Thus, when Justice Powell insisted on using strict scrutiny, he also was insisting on the treatment of race as something potentially dangerous to the American community. Likewise, when Powell cited precedential support for academic freedom, he was also reaffirming the limited role of the Supreme Court in decisions about public policy and social justice.

I have also argued that, in addition to legal doctrines and precedents, justices and their clerks involved in the *Bakke* decision considered the practical needs of their audiences, the beliefs of their colleagues, and the opinions of the public at large both when deciding how to decide and how to justify those decisions. Powell and Comfort searched through the available arguments in the *Bakke* case for ways to avoid negating affirmative action policies altogether while avoiding the balkanization that

several *amici* and public actors had warned of, and about which Powell was concerned. They insisted on giving a clear answer to the question of how to offer a constitutional affirmative action policy: a question not formally presented to the Court by the parties, but which was rampant in the *amicus* briefs and in public discourse. They chose among the possible justifications those lines of argument that would mediate the most concerns of the parties, the public, and the other justices, resulting in a split vote which struck down “quotas” like the UC-Davis task force program, but which also created space for the consideration of race in university admissions. That Powell constructed the final opinion in the Court’s rhetoric of inevitability does not detract from the many choices that he made in getting there, nor does it mean that the ideas, values, or language were his alone.

The practice of authorship is an epistemologically social activity, and this study asserts that the “final texts” of the opinions in *Bakke* are better seen as fragments of the wider rhetorical environment from which they emerged. Chapter Three posited the overlapping ideologies manifest in arguments for and against affirmative action policies in *Bakke*: on one side, race-consciousness, cultural pluralism, and remedial social justice; on the other, individualism, meritocracy, and colorblindness. The Court’s fragmented decision – with six separately written opinions – reflects the ambivalence and discord that the American public felt about the need for and value of affirmative action policies. The ideology of individual agency as a source of power, embedded in the cultural narrative of the American dream, was being challenged by the limits of that narrative, wherein, as Christopher Newfield reminds us, “democracy depended on the recognition of the political and

economic realities created by...group life—by systemic racial inequalities, by ongoing racial disparities, by racism past and present.”² Powell’s pragmatic judicial style motivated a narrative that combined the primacy of the individual with the value of multiculturalism, making race an individual asset within the university community.

Because legal appeals for equal access to education had long been the field on which battles over racial inequities had been fought, I have also read the *Bakke* case as the scene for a larger struggle. In past Supreme Court cases, the most successful arguments for increasing minority student access to education had been integrationist arguments reliant on an individualist ideology of self-help and growth of agency. Whereas in the nineteenth and early-twentieth centuries rhetorics of assimilation were responses to overt exclusionary practices, by the mid- to late-twentieth century, this rhetorical strategy was markedly conservative when juxtaposed with the re-emergence of cultural pluralism as a positive American value. Similarly, whereas in the early twentieth century rhetorical strategies deemphasized race in order to gain entrance into “white” institutions, the focus in the post-Civil Rights Acts decades centered on solutions to racial disparities that existed in fact, although no longer in law. This meant highlighting the differences in the lived experiences of people of color who had been marginalized.

The value of cultural pluralism, enacted in *Bakke* through the arguments for a diverse student body, offered to fill a rhetorical void. Examining the *topoi* in *Bakke* as they worked up from the larger rhetorical environment, were pulled through the party and *amicus* briefs, and were sorted through the starting places of judicial argument, allows for an understanding of the shifting ideological alliances at work in

the decision. Through this lens, new legal principles, like the value of racial diversity as a facet of academic freedom, are evident within the act of inventional playfulness and judicial co-authorship, often combining strains of existing ideologies into subtly different manifestations. As evidenced in the statements of the Court below as well as the circulation and recirculation of these arguments, these moves are seldom uncontested.

The Final Opinions in Bakke

Justice Lewis Powell announced the judgment of the Court for *Regents of the University of California v. Allan Bakke* on June 28, 1978. He prepared two drafts of the announcement, which he scripted for reading aloud. The tone of his announcement reflected weariness: “I am authorized to announce only the judgment of the Court,” said Powell before a packed courtroom. “There is no opinion joined in its entirety by five members of the Court.”³ Four of his fellow justices – Stevens, Brennan, Blackmun, and Marshall – also announced their views, a process that took over an hour. Powell explained to the audience:

This case was argued some eight months ago, and as we speak today with a *notable lack of unanimity*, it may be fair to say that we needed *all* of this advice. In any event, it will be evident from our several opinions that the case – intrinsically difficult – has received our most thoughtful attention over many months.

So much for an introduction. As there are six separate opinions, I will state first the Court’s judgment. Insofar as the California Supreme Court held that Bakke must be admitted to the Davis Medical School, we affirm. Insofar as

the California Court prohibited Davis from considering race as a factor in admissions, we reverse. I will now try to explain how we divided on these issues. This may not be self-evident from a hurried examination of our various opinions.⁴

Powell separated the “questions before the Court” into two issues as he continued with the announcement. There was not even consensus on the questions. The first, which Powell called the “Bakke admissions question,” addressed whether or not the UC-Davis task force program had unlawfully discriminated against Bakke. Justice John Paul Stevens argued in his separate announcement to the Court that, apart from Bakke’s lawsuit against the UC-Davis medical school, “no other issue remains in the case...It is well settled that this court reviews judgments, not statements in opinion...notwithstanding the pressure that tempts us to speak about other issues, well-settled principles dictate a course of judicial restraint.”⁵ Thus, this was the only question considered by the group comprised of opinion author Stevens and joined by Rehnquist, Burger, and Stewart, and they argued that Bakke had indeed been discriminated against, based on a private cause of action conferred under Title VI of the Civil Rights Act of 1964. Powell agreed with their judgment – that the school had discriminated against Bakke – but disagreed with grounds on which they decided it. Still, this meant that there were five votes invalidating the task force program.

The second question was broader, asking whether or not race could *ever* be considered during the admissions process. Brennan wrote the plurality opinion that included Marshall, Blackmun, and White, although each of the later three wrote

separate opinions as well. The Brennan plurality argued that the Constitution allowed for the consideration of race in college admissions, although strict scrutiny was necessary to determine if its use was appropriate. Powell agreed with this judgment, as well. But as with the other question, he disagreed with the reasons that they offered, as well as the scope of their judgment. Whereas the Brennan group found that the university's goal of alleviating the effects of societal discrimination was constitutionally permissible, Powell announced that "the only state interest that fairly may be viewed as compelling on this record is the interest of a university in a *diverse* student body."⁶

After Powell finished his explanation, Stevens read portions of his opinion. In it, he reiterated the legislative history narrative circulated and debated between the justices. The opinion of the Stevens plurality was a story of limits, written in a rhetoric of deference to the legislature, to the lower court's decision, to the "plain language" of the statute they decided under, and to legal doctrine that disallowed them to reach the constitutional issue. "The University, through its special admissions policy, excluded Bakke from participation in its program...because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires affirmance of the judgment below. A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute...The legislative history reinforces this reading."⁷ Even though "[b]oth petitioner and respondent have asked us to determine the legality of the University's special admissions program by reference to the Constitution," argued Stevens, "[o]ur settled practice...is to avoid the

decision of a constitutional issue if a case can be fairly decided on a statutory ground.”⁸ Thus, Stevens concluded, UC-Davis violated Title VI of the Civil Right Act of 1964, and “[i]t is therefore our duty to affirm the judgment ordering Bakke admitted to the University. Accordingly, I concur with the Court’s judgment insofar as it affirms the judgment of [the lower court]. To the extent that it purports to do anything else, I respectfully dissent.”⁹

Brennan gave his bench speech next. He and Powell had a less than amicable end to the opinion writing process, and Powell wrote a note for his permanent file explaining:

In the fifth draft of my opinion, I added footnote 34, the second paragraph of which alludes to discrimination against Jews early in this century because of their perceived capability of dominating the universities. My reason for including this reference, and the citation to *Steinberg*, is that it seems to me that the rationale of the Brennan plurality opinion would require approval of the quotas imposed upon the admission of Jews.

Bill Brennan called me, following circulation of my fifth draft and was quite upset by this portion of footnote 34. He characterized it as ‘personally offensive,’ saying that his respect and admiration for our Jewish citizens was widely known. He thought that my reference to the former mistreatment of the Jews would be quoted against him – and against his opinion in this case – to his embarrassment.

I stated that I would omit anything from any opinion where a Justice of the Court requested me to do so on the ground that what I had written was

‘personally offensive.’ This portion of the note was removed in the sixth and final draft.

Pulling partly from his opinion, and partly from his own words, Brennan now offered his explanation for what the Court’s decisions meant: “...in consequence, only five members of the Court address the constitutional question of unique paramount importance that this case presents: What race conscious programs are permissible under the Equal Protection Clause?...It is no secret that the Court took this case as the vehicle for confronting that issue, after avoiding it in lieu of these grounds in the defendant’s case.”¹⁰ Nevertheless, Brennan argued in the opinion, the lack of unanimity “should not and must not mask the central meaning of today’s opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.”¹¹

Brennan characterized arguments about constitutional colorblindness as naïve and historically inaccurate. In addition to detailing a legislative history of Title VI similar to that circulated by Marshall’s chambers in response to Stevens’ memo, Brennan extended the narrative timeline of the constitutional debate to its origins. It is true, said Brennan, that “our Nation was founded on the principle that ‘all Men are created equal.’

Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery...[I]t is well to recount how recent the time

has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color. The Fourteenth Amendment..., has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund. Against this background, claims that law must be “colorblind” or that the datum of race is no longer relevant to public policy must be seen as aspiration, rather than as description of reality... This is not to denigrate aspiration... Yet we cannot... let color blindness become myopia which masks the reality that many “created equal” have been treated within our lifetimes as inferior by both the law and by their fellow citizens.¹²

Furthermore, although the Brennan plurality joined the part of Powell’s decision which found the consideration of race to be constitutional, they could not find a meaningful difference between the UC-Davis program that the Court struck down, and the Harvard plan that Powell attached to his opinion as an appendix as an example of a proper affirmative action program. “We think that for purposes of constitutional adjudication there is simply no difference between the two approaches,” argued Brennan.

It is inescapable that in any admissions program which extends a preference to disadvantaged racial minorities a decision must be made as to how much of the preference is to be given and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis... there is no basis for preferring a

particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.¹³

Justice Harry Blackmun offered a contextualist reading of the questions before, and the holding of, the Court. “Mr. Justice Powell has stated that this case is intrinsically difficult; perhaps so, perhaps not,” Blackmun began in his statement to the Court.

I suspect that for those four members of the Court who find the Title VI issue controlling, the case really is not very difficult. But for the five of us who feel that Title VI does not provide the answer, the case has much deeper and more profound ramifications... This case, like the death penalty issues that have been before the Court in years past, like the abortion cases, like the school desegregation cases, has caught the popular interest and the people’s deep concern. Like each of those it finds the people, as well as Justices, divided in their innate reactions. Strands of heritage and strands of emotion and strands of presumption, all are plucked.¹⁴

Next, Blackmun offered a backdrop against which the opinions should be judged:

...until a few years ago...less than 2% of all the physicians and all of the attorneys and all the students in medical and law schools in this country were members of what we refer to as minority groups...if ways are not found to remedy that kind of situation the country will never achieve its professed goal of a society that is not race-conscious...I am optimistic that remedy will be

forthcoming, and...when it comes, the affirmative action, so-called, or 'reverse discrimination' will be a thing of the past.¹⁵

Blackmun also critiqued the reliance on meritocracy evoked in the case, which ignored other preference-based admissions criteria already in place at most universities. "It is somewhat ironic to [be] so deeply disturbed by this case," said Blackmun, "which concerns a program where race is an element of consciousness, and yet for all of us to be aware of the fact...that our institutions of higher learning have long given...conceded preference...to accomplished or promising athletes, to children of alumni, to the affluent and to those who have connections with celebrities and the famous and the powerful."¹⁶

Blackmun agreed with Powell's proclamation that the Fourteenth Amendment has "expanded beyond its original 1868 concept" to embrace a broader principle than protections of African Americans only, but rejected the conclusions that Powell had drawn from that expansion. "This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes," argued Blackmun in his opinion. "Those original aims persist. And that, in a distinct sense, is what 'affirmative action,' in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area."¹⁷

Marshall was the last of the justices to speak about the *Bakke* decision. As with Brennan, he and Powell had ended the writing process with some personal

animosity. In the second-to-last draft of his dissent, Marshall had offered a harsh critique of Powell's claim that "[i]t is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitle to a degree of protection greater than that accorded others."¹⁸ Marshall had noted in his circulated opinion that "His words bear a discomfoting relationship to those of the Court in the *Civil Rights Cases, supra*; the Court there wrote that the Negro emerging from slavery must cease 'to be the special favorite of the laws.'¹⁹ In the margins next to this line, Powell's law clerk Bob Comfort had written, "This is a not-so-subtle suggestion that you are a racist, but I'm not sure we should dignify it by replying," and, in different ink, "I called Ellen S. [Marshall's law clerk] and she said they will take this out. B."²⁰ On the first page of the memo, Powell wrote "Bob – on his own called TM's clerk. I would not have responded. LFP."²¹ In his final opinion, Marshall removed Powell's name, but kept the point:

In the Civil Rights Cases, this Court wrote that the Negro emerging from slavery must cease 'to be the special favorite of the laws.' We cannot, in light of the history of the last century, yield to that view. Had this Court been willing in 1896 in *Plessy v. Ferguson* to hold that the Equal Protection Clause forbids difference in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the Constitution is colorblind appeared only in the dissenting opinion.²²

Although Marshall had agreed to take out the direct reference to Powell, the remainder of his dissent went unchanged, and he read portions of it to the Court. He offered a history similar to Brennan's, then offered an ironic reading of the current

holding of the Court in light of that history and the current state of affairs stemming from them:

It must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe this same Constitution stands as a barrier...

The position of the Negro today...is a tragic but inevitable consequence of centuries of unequal treatment. Measured against any benchmark of comfort of achievement, meaningful equality remains a distant dream of the Negro. The Negro child today has a life expectancy which is shorter by more than five years than that of the white child. That's today...For Negro adults, the unemployment rate is twice that of whites, at least twice. And the unemployment rate for Negro teenagers is three to four times that of white teenagers. I'm talking about today. The relationship between these figures and the history of unequal treatment offered to the Negro cannot be denied. And I haven't heard it denied.²³

Appeals to Isreal Zangwill's melting pot society are not enough, concluded Marshall: "In light of this sorry history of discrimination and the devastating impact on the lives of our Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order...the dream of America as a great melting pot has not been realized for the Negro. Because of his skin color, he never even made it into the pot." Thus, Marshall concluded, "It is a little ironic that, after several hundred

years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible.”²⁴

Bakke’s Legacies

Attorney General Griffin B. Bell held a press briefing on the *Bakke* case several hours after the decision was announced by the Supreme Court. Powell and his law clerk, Bob Comfort, had found little of use in government’s brief during the inventional process: “On the whole,” Comfort had written, “I think the Brief is disappointing. It assumes, with little analysis, that a middle tier scrutiny ought to be applied...once that conclusion is reached, the ball game is over.”²⁵ Bell, however, declared the *Bakke* opinion “very helpful,” especially once the public realizes that “the law of discrimination is complex” and that the Supreme Court had never addressed the issue of college admissions to professional schools.²⁶

Under our system of common law where the law evolves on a case-by-case basis, you can’t have just one decision that solves everything for all time...[This opinion] is a very good start. Justice Powell did what I thought was a very good thing. He not only wrote an opinion, but then he gave as an example a plan which he said was constitutional, legal. He used a Harvard admissions plan...So he has told everyone what the law is and then he said, ‘Here is a plan that is legal.’ So I think that is settled, yes.²⁷

Asked what President Jimmy Carter thought about the decision, Bell replied, “He was pleased that the affirmative action position that we took was upheld. This was his main interest in the case...This case came out a little different from our position on

Mr. Bakke, but we wish him well. But the main thing we are looking at is what was going to happen to all our affirmative action programs.”²⁸

Catherine L. Horn and Patricia Marin concluded that Powell’s opinion in *Bakke* was indeed helpful to colleges and universities: “*Bakke* has provided educational institutions with the language to clearly articulate some of their most central goals and practices and has contributed to the discussion about the purpose and benefits of higher education and access to education at all levels.”²⁹ Powell was not the first public actor to do so, but his opinion was an authoritative one, continue Horn and Marin: “*Bakke* was not a watershed moment but, instead, initially a codification of practice across a range of policies.”³⁰ Universities that already used affirmative action programs either modified them to consider race as one factor of admissions criteria or kept their programs as they were, and private industry and government appeared to do the same.³¹ In the short-term, African-American and Hispanic enrollments in medical schools stayed at the same level, with neither substantially increasing nor decreasing enrollments.³²

The Association of American Law Schools described the *Bakke* case as a “cause celebre in the higher education world.”³³ Yet it was law schools in particular, which had and continue to have vastly larger concentrations of Latino and African American graduates than do any other professional school programs, that reaped the greatest benefit of *Bakke*. Henry Ramsey’s 1979 survey of 100 law schools found that 72% of American law schools reported having affirmative action programs.³⁴ Susan Welch and John Gruhl argue that *Bakke* established the legitimacy of pre-existing affirmative action programs at universities who already had them, rather than

motivating the creation of new programs.³⁵ Law schools programs, who had filed the majority of the *amicus* briefs in *Bakke* and who were arguably the most directly impacted by its decision, would continue to be the grounds for challenging Powell's judgment, as well.

In the longer term, more students attend post-secondary schools in general, but the gap between the attendance of white students and African American and Latino students has remained. According to the National Center of Education Statistics: "In 1975, 44.3% of Whites age 25 to 29 had some postsecondary schooling, compared with 27.5% of Blacks and 21.95 of Hispanics in the same age group. In 2000, 64.7% of Whites age 25 to 29 had some postsecondary schooling, compared with only 51.9% and 32.3% of Blacks and Hispanics, respectively."³⁶ As significant to Michael Kurlaender and Erika Felts is the economic impact on postsecondary school attendance: "Among the high school class of 1992, 94% of students in the top socioeconomic quintile attended some postsecondary institution, but only 54% of those students in the bottom quintile went on to postsecondary schooling."³⁷

The correlation between socioeconomic status and race, a legacy of *de jure* and *de facto* discrimination, had been one of the primary concerns of the Regents of the University of California, as well as the *amici* supporting them in the *Bakke* case. No single brief supporting affirmative action programs in *Bakke* had separated support for affirmative action from the remediation argument – yet Powell did in his opinion. His judgment in *Bakke* negated remedial considerations, except when either the university or the state legislature provided evidence of the history of discrimination. Although *Bakke* did not disallow the quest for social justice, it

provided an alternative process – and a corresponding vocabulary – that made it easier for educational institutions not to pursue such a goal. In particular, “Justice Powell’s opinion reshaped the discussion of race/ethnicity in college admissions from one of remedies for the present effects of past institutional discrimination to one of educational benefits of diversity, establishing a philosophy that continues to drive admission practices today,” argue Horn and Marin.³⁸

In this sense, Powell’s decision in *Bakke* had broader ramifications than its ability to offer a practical example for how to enact a lawful affirmative action admissions program. By legitimizing the Harvard admissions plan and its educational goal of a diverse student body, Powell’s opinion performed an ideological function: it privileged the commitment to diversity, broadly defined, over the commitment to social justice. The longer-term consequences of the diversity rationale included a wider lacuna between the consideration of racial identity and the struggle for social equality. In their book examining the legacy of the *Bakke* decision, Marin and Horn remind legal scholars and higher education attorneys that remedying past institutional discrimination remains a valid justification for affirmative action.³⁹ Powell’s rejection of this defense was based on the lack of evidence provided by either the university or a legislative body to “prove” the effects of past discrimination. Neither he nor any other justice discounted this goal entirely, and Justice Sandra Day O’Connor reaffirmed this option in her majority opinion in *Grutter v. Bollinger* (2003).

What the justices in *Bakke* did affirm, however, makes it less likely that the remediation argument would be acceptable. Powell’s articulation of diversity was not

limited to race, and more importantly, it was tied to the principle of individualism.

Argues Martin D. Carcieri:

To acknowledge the legitimacy of educational diversity...and the possibility that it remains a compelling state interest is to acknowledge only part of Justice Powell's opinion....There is another quintessential liberal principle that Justice Powell elaborated in *Bakke* and at much greater length than he did the diversity rationale. It is that rights under the equal protection clause are held by the individual human being and not by groups of human beings. Moreover, while the rest of the *Bakke* Court was silent on diversity, it unanimously acknowledged the force of this individualist principle. This is not surprising as the Court had clearly acknowledged the individual locus of equal protection for decades before *Bakke* and has reaffirmed it for decades since.⁴⁰

Although discourses about the benefits of race conscious policies like affirmative action had long preceded the *Bakke* case, Powell's jurisprudential tendency of pragmatic conservatism – supporting that which is necessary to fix problematic situations, but avoiding using the Court to shift social norms or otherwise cause upheaval – motivated a novel combination of the rhetoric of multiculturalism with the agent-centered justification of individual rights.⁴¹ Robert K. Fullinwider and Judith Lichtenberg said of the case: “the main moral and legal positions on affirmative action mirror the various opinions...delivered by the justices of the Court in *Bakke*. Thus, in closely rehearsing the arguments in *Bakke* for and against the medical school's policy, we see the main lines of contention and the broad principles

to which the protagonists and antagonists of affirmative action, past and present, have pinned their arguments.”⁴² Yet Powell’s articulation of the diversity rationale bridged several of these broad principles, as “he was determined both to achieve a pragmatic accommodation of the social necessity of affirmative action and to extract a patent symbolic commitment to the values of individualism.”⁴³

This project evaluated the rhetorical invention process that led Powell to his decision to rely upon diversity as the linguistic umbrella under which he could solve the problem that he saw college and universities undergoing, while blocking the two-tiered admissions systems that he found onerous to individual rights. That two-tiered system had been justified by its advocates with an argument about societal discrimination, but a pragmatic conservative such as Powell had trouble articulating such a broad history from his seat at the Supreme Court. What he did, instead, was rhetorically fragment the concept of a “white majority,” problematizing the distinction between white and minority groups. The resulting complexity allowed Powell to declare distinctions based on previous social wrongs functionally impossible. It was thus necessary to focus on individual freedoms instead of group protections, privileging the ideal of liberal individualism above contextual exigencies. To articulate this distinction, Justice Powell constructed a narrative of the nation that pulled upon a collective memory of a United States that, since the Equal Protection Clause, has become a multiplicity of equally-advantaged minority groups.

Collective memory moves beyond history because it provides an interpretive lens through which the community reflects on the past.⁴⁴ It need not be “true” in order to be persuasive: the rhetorically constructed nature of histories assures us that

any view of history will be partial. The force of collective memory, especially when evoked by public figures such as Powell, is its ability to “fabricate, arrange, or omit details from the past as we thought we knew it.”⁴⁵ Powell’s narrative pulled upon a long-lasting fallacy of homogeneity, casting United States’ racial history as one of occasional spurts of immigration, followed by rapid assimilation. Powell used this partial racial history to portray the contemporary United States as mostly minority, making it illogical to consider minority status as still in need of protection. He wove this image of a rapidly turned multiculturalist society into the history of the Equal Protection Clause, thus embedding the fallacy in legal history:

During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities.... As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese); *Truax v. Raich*, 239 U.S. 33, 41 (1915) (Austrian resident aliens); *Korematsu*, supra (Japanese); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-Americans).⁴⁶

Because “the white ‘majority’ itself is composed of various minority groups,”⁴⁷ Powell argued that one cannot “benignly” distinguish which group should receive preferences over another. Employing metaphors of movement and stability, Powell rejected the remedial attempts at social equality in favor of a constitutional interpretation of individualism. As Stern argues about metaphors, the contexts in which they are used provide particular interpretations of certain words, giving them

positive or negative connotations.⁴⁸ Within Powell's opinion, his construction of the "shifting" nature of race makes it a weak constitutional – and thus judicial – "target," whereas the stability of the individual is "rooted" in the First Amendment.

Powell described the troubled nature of "benign" racial classifications, due to the fact that they ask individuals to carry the burden of forwarding the general group interests (even if that "group" is their own) and that it is judicially problematic to ask "innocent" individuals to bear the burden of "redressing grievances not of their making."⁴⁹ Powell analogizes what he considers to be such unreasonable grounding that "hitching the meaning of the Equal Protection Clause to these transitory considerations" has the effect of imbalance: "we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background *may vary with the ebb and flow* of political forces."⁵⁰

Only after Powell constructed a fractured racial and ethnic U.S. citizenry, relocated that citizenry within individual freedoms, and banished social goals that punish innocent individuals for the sake of "amorphous" injuries, could he conclude that *all* individuals could benefit from the diversity offered by individuals from different backgrounds. In so doing, Powell shifted the constitutional safeguards against racial discrimination and guaranteeing equality articulated in the Fourteenth Amendment to the individual freedoms asserted by the First Amendment, and the academic freedom implicit in it, to find that "diversity" is a compelling enough interest to consider race as a factor. He found "academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."⁵¹ By relocating race within the individual, Powell

found a justification for the consideration of race that was commensurate with a “national commitment” to freedom. Out of the “nation of minorities,” Powell found a freedom “which is of transcendent value to *all* of us.”⁵² Individualism, seen this way, is more than a constitutional principle: “Rather, individualism is an effect of the invisibility of (white) collectivism, and merit is an effect of the invisibility of (white) preference.”⁵³

By not considering societal injury, but instead focusing on race as one “plus” factor in the admissions process, race can, presumably, be “factored” in or out of consideration. This construction of race denies its historic foundation and social construction of meaning, equating it instead with “playing the piano” or “leadership skills.”⁵⁴ By framing race or ethnic background as a positive factor to consider as a contribution to all racial categories, Powell called for a celebration of the benefits that an introduction to different cultural backgrounds yields. Yet that celebration is not as liberating as some other forms of cultural pluralism. Celeste Condit and John Lucaites have asserted that such movement away from “oppositional heterogeneity” toward a “democratic heterogeneity” that rejects group rights in favor of individual opportunity alleviates potential backlash against “special privileges” that reifies perceived racial inequalities.⁵⁵ The celebration of differences without the acknowledgement of the exigency for some of those differences denies a painful but real aspect of race that is only told in the dissents of *Bakke*. Accommodating the backlash against “special privileges” in such a way that lets the majority share in the benefits, at the expense of acknowledging a concession of lingering social inequalities, one relinquishes the power to the whim of the majority to determine if

they are still receiving the benefit of academic freedom and cultural diversity that Powell articulated.

Powell's separation of diversity from ideals of social justice need not be purposeful in order to be meaningful. In fact, Powell claimed to have been willing to grant "societal discrimination" had the university or the state legislatures made any attempts to support this argument with evidence. Prior strains of discourse influenced the pathway he would take in *Bakke*, just as his judgment in *Bakke* would provide a starting place for subsequent arguments widening that divide. Powell did not invent the "diversity" rationale whole cloth – this ideological commitment was circulating in public discourse, and in different articulations had been an American value since its inception.

Powell's choices were motivated and constrained by the expectations of judicial reasoning, by the co-authors of the opinion, and by his own conceptions of law and its role within the American political system, college admissions process, and the struggles to define and alleviate social inequities. Many of these factors were articulated during the inventional process, but always not written into the final opinion. This is because the judicial opinion-writing genre is written in the language of inevitability, subsuming doubt in the monologic voice of the opinion.⁵⁶ As Robert A. Ferguson describes about the judicial opinion genre: "The goal of judgment is to subsume difference in an act of explanation and a moment of decision."⁵⁷

While written in the technical language of law, Powell's opinion in *Bakke* reflected public assumptions about, and ideological embodiments of, race. His insistence on the application of strict scrutiny reflected a larger resistance to the

benefits of race consciousness. The vastly different legislative histories told by Justices Stevens and Brennan reflected both colorblind ideologies and race conscious pragmatism. Whereas legal scholars “often decry the notion of ‘legal storytelling,’” David Breshears suggests that “the primary distinction between the majority and dissenting opinions in *Bakke*... can be reduced to the respective stories each tells about the history of race in America.”⁵⁸ Likewise, Powell’s handwritten notes to his law clerk reflected President Woodrow Wilson’s distaste for the “hyphenated American” that revealed his strong sympathies toward proponents of colorblindness, even as he argued for race to be a consideration in college admissions.

These strains of public discourse came together in Powell’s opinion in a manner that trivializes more robust articulations of race. Public discourses celebrating multiculturalism as moral and necessary for contemporary American life were used in the *Bakke* decision to become one more feature in a competitive free market, mediated by an individualist ideology that made group power impossible and white privilege invisible. This, too, reflects the context in which multiculturalism was articulated: it matters that an economic downturn spurred an increase in graduate school applications, and that it motivated arguments about affirmative action using the rhetoric of scarcity. That Powell, whose free-market leanings motivated him to write a letter to the Chamber of Commerce, warning them of the dangers of liberal thinking within the academy, was taken with the diversity rationale reveals the conservative possibilities in a traditionally liberal ideology.

As discussed in Chapters Two and Three, discourses about race have been linked in complex ways to economic conditions. Although Attorney General Bell

stated during the 1978 press conference that he was pleased with the *Bakke* decision, he would comment at a 1997 conference that “Powell had ‘obfuscated’ the problem.”⁵⁹ Bell believed that “affirmative action programs should favor only the economic ‘underclass’ in order to encourage their ascent into the middle class, stating that ‘the quicker we move to an economic test, the better off the nation will be.’”⁶⁰ Martin Luther King Jr., who had invoked a metaphor linking racial injustice with economic fraud in his *I Have a Dream* speech and who advocated for boycotts of stores as a part of nonviolent protest, was assassinated when he visited Memphis sanitary workers during what he called the Poor People’s Campaign, an effort to resolve economic injustices in the country. In his book *Where Do We Go From Here: Chaos or Community?*, King advocated a nationwide guaranteed income, asserting that poverty crosses racial boundaries: “In the treatment of poverty nationally, one fact stands out: there are twice as many white poor as Negro poor in the United States...I hope that both Negro and white will act in coalition to effect this change, because their combined strength will be necessary to overcome the fierce opposition we must realistically anticipate.”⁶¹ Piecemeal solutions to poverty, like tackling lack of education, poor housing conditions, and family counseling, are inefficient, argued King, because “each seeks to solve poverty by first solving something else.”⁶²

Yet social scientist Nathan Glazer declared in 1997 that “We’re all multiculturalists now,” calling attention to the ways “in which all Americans—regardless of race, religion, political affiliation, lifestyle, or moral orientation—have come to speak the language of tolerance and respect for cultural diversity in the contemporary, post-civil rights era.”⁶³ The tradeoff for such tolerance, say Douglas

Hartmann and Joseph Gerteis, is that “the discourse of multiculturalism has diverted attention away from more fundamental structural problems of racism and social inequality that have landed disproportionately and unjustly on African Americans.”⁶⁴

Walter Penn Michaels asserts that the problem with appreciating racial diversity is that, “that we love race—we love identity—because we don’t love class.”⁶⁵ This bifurcation is unnecessary, argues Michaels: “we don’t need to purchase our progress in civil rights at the expense of a commitment to economic justice.”⁶⁶

Indeed, because ideological commitments are amorphous in nature, changing in meaning between communities, in context, and across time, Powell’s articulation of diversity is not codified: rather, it is an artifact of the Supreme Court’s continuous negotiation between the nation’s democratic ideals and its racial histories.⁶⁷ “The fact that symbols predate [particular group interests], or may have inconsistent aspects, is irrelevant to their utility,” asserts Robert Downey, “as the ambiguities existing in any ideological construct are sufficient to allow substantial semantic shifts without abandoning the construct itself.”⁶⁸ In fact, argues Downey: “an analysis of [an ideological construct] should begin by taking seriously its ambiguity—its multivalence—as essential to its symbolic role.”⁶⁹ More recent challenges to the *Bakke* decision, and to Powell’s “diversity” rationale, reflect those semantic shifts.

In 1995, the Board of Regents of the University of California who had fought Alan Bakke’s lawsuit voted, against the views of faculty, students, administration, chancellors, and public demonstrators, to end affirmative action in its public institutions.⁷⁰ The resolution declared that it did so in response to an Executive Order from California Governor Pete Wilson, entitled “End Preferential Treatment and to

Promote Individual Opportunity Based on Merit.”⁷¹ In 1996, the state of California passed Proposition 209, an amendment which reflected the reasoning seen in Powell’s opinion, and against which Brennan had argued: that stigma need not attach to racial classifications in order for them to be suspect. Proposition 209 “prohibits the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities *from discriminating against or giving preferential treatment to* any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.”⁷² By 1998, the California Board of Regents had stopped all its state universities from considering race and ethnicities in their college admissions decisions. “At a stroke,” argues Robert Post, “the landscape of higher education had changed. Assumptions about race and ethnicity that had for decades guided policy were suddenly stripped of the armor of institutional inevitability.”⁷³

The results were seen immediately: at UC Berkeley and UCLA, where in previous years enrollments of African American students had ranged between 6 and 7 percent, in 1998 dropped to 3.3 percent and 3.6 percent, respectively.⁷⁴ Enrollments among African American California residents dropped on the whole.⁷⁵ Additionally, the “colorblind” policy had what Fullinwider and Lichtenberg call a “cascading” effect, meaning that “the black students who lost out at Berkeley and UCLA after 1998 didn’t necessarily leave the University of California system; they just dropped down to less selective campuses like Riverside or Irvine.”⁷⁶ In turn, the students who would have gotten into Riverside and Irvine attended one of the California State

University campuses, and the students who would have otherwise gone to those campuses went to the state community colleges.

In 1996, the case of *Hopwood v. State of Texas* reached the Fifth Circuit Court of Appeals. Cheryl Hopwood had filed a lawsuit after being rejected from the University of Texas Law School.⁷⁷ The law school's admissions policy was established based on the Texas Office of Civil Rights' goal of ten percent Mexican American students and five percent African American students, a goal based on the state's existing college graduate numbers and justified based on the state's sorry history of resisting desegregation.⁷⁸ The Fifth Circuit Court reversed the district court's decision that the history of racial discrimination in Texas merited the affirmative action program that the University of Texas used, claiming that "the beneficiaries of this system are blacks and Mexican Americans, to the detriment of whites and non-preferred minorities."⁷⁹ As a result of this case, the state of Texas adopted a "race neutral" admission policy for its colleges and universities, which would admit the top four percent of its high school classes. The U.S. Supreme Court declined to hear the case because the University of Texas changed its admissions policy; thus the case did not represent a "live controversy," a mandatory standard for judicial review.

On April 1, 2003, the U.S. Supreme Court heard two cases that considered whether diversity *is* a compelling interest sufficient to pass the strict scrutiny standard.⁸⁰ Both of these cases invited the Court to reexamine *Bakke* in search for the definitive answer on affirmative action in higher education. The first case, *Gratz and Hamacher v. Bollinger*, challenged the admissions policy of the University of

Michigan's College of Literature, Science, and the Arts. This undergraduate admissions policy awarded a set number of extra points to each minority applicant's admissions score. *Grutter v. Bollinger* questioned the admissions policy of the University of Michigan's Law School, which considered race and ethnicity during the admission process in accordance with its "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, who without this commitment might not be represented in the student body in meaningful numbers."⁸¹ The petitioner in the case had a similar story to Alan Bakke's: Barbara Grutter was a white 43-year-old female who applied for admission into the fall 1997 class of the University of Michigan Law School with a 3.8 undergraduate grade point average and an LSAT score of 161, falling in the 86th percentile nationally. The Law School first placed Grutter on the "wait-list," and then denied her admission. Grutter sued, charging that the Law School's admission policy violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964. The Law School admitted during oral arguments for the Sixth Circuit Court that Grutter probably would have been admitted had she been a member of one of the racial minority groups to which the law school gives a preference.

The Sixth Circuit Court relied on the precedent and subsequent doctrine established by *Marks v. United States* (1977), to interpret *Bakke* while deciding the *Grutter* case. *Marks* – an opinion written by Powell, as well – held that if there is no clear single rationale for a majority opinion, then the Court could be viewed as having concurred with the judgment on its "narrowest grounds."⁸² Because Powell argued

for “strict scrutiny,” the Sixth Circuit decided that Powell’s decision met the narrowest grounds, and that his approval of diversity as a compelling interest in university admissions would be taken as the opinion of the Court. Grutter appealed.

In her petition requesting that *certiorari* be granted by the Supreme Court, Grutter asked: “If universities may select the racial groups to which they give preferences based on ‘underrepresentation’ of these groups in the student body, how is diversity different in principle from objectives of simple racial balancing or remedying the lingering effects of societal discrimination?”⁸³ The petition argued that the law school plan is faulty because the preferences are of unlimited duration, because the assumption that a diversity of viewpoints and perspectives will be achieved by selecting students based on their race amounts to impermissible stereotyping, and because race-neutral alternatives to the preferences have not been meaningfully considered. Diversity was especially problematic for Grutter, because “[i]t is a rationale that gives essentially un-checked authority to admissions officers to define what ‘diversity’ ... mean[s]; which racial and ethnic groups, among many, are to be considered ‘underrepresented’ or are to receive preferences...and their duration.”⁸⁴ Indeed, Neil Gotanda also pointed out the lack of clarity embedded within the diversity argument: “A goal of public sphere diversity has its social price. Diversity in its narrow sense does not truly challenge existing racial practice, but rather seeks to accommodate present racial divisions by casting them in a positive light.”⁸⁵ Moreover, Grutter argued that the generalized goals of diversity mean that affirmative action policies can continue indefinitely, unlike remediation policies. To this end, Grutter cited a 1998 DC Circuit Court decision in her brief, noting “‘how

much burden the term ‘diversity’ has been asked to bear in the latter part of the 20th Century’ and that ‘[it] appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life (‘affirmative action’ has only a temporary remedial connotation) and as a synonym for proportional representation itself.’⁸⁶

Yet on June 23, 2003, the Court followed *Bakke* closely as it handed down its decisions. *Gratz and Hamacher v. Bollinger*, the undergraduate case, was found unconstitutional because it did not narrowly tailor its consideration of race to fit its needs and that it had essentially established a quota system. *Grutter v. Bollinger*, the law school case, was narrowly upheld on the same grounds that Powell found Harvard appealing – it used race as one of many factors to consider for admissions, thus considering diversity as a compelling enough interest to maintain it. The longevity of Powell’s opinion motivated Michael Selmi to offer the following:

... the Court can provide political resolution, and when done properly, as I believe it was in *Bakke*, the Court can be a model forum for deliberative resolution – one where issues are raised and discussed in a context free from the dictates of political polls, even if the ultimate resolution mirrors those polls. In the twenty years since *Bakke*, no political body has improved on either the Court's deliberation or its compromise. In fact...very few have even tried to undertake such a task...while pleasing none of the participants and sparking great controversy, [the decision] has remained intact.⁸⁷

In 2008, *Washington Post* columnist Kenneth S. Baer took umbrage with the glorification of the 40-year anniversary of 1968, reflecting instead on the many ways that 1978 had changed modern America. Baer said that:

Our year [1978]...set the contours of today's civil rights battles. In *Regents of the University of California v. Bakke*, the Supreme Court ruled that rigid race quotas for university admissions were unconstitutional but that affirmative action policies designed to ensure a diverse student body were not. Americans have battled over the implications of this decision ever since, but we have come to accept diversity as a virtue in universities, corporations and throughout American life. That began with *Bakke* in 1978.⁸⁸

The meaning of diversity, like the meaning of equality, was – and continues to be – negotiated through what Condit and Lucaites call an “active sociorhetorical process...drawn from the common rhetorical culture of the social and political collectivity” and enacted through public argumentation.⁸⁹ Just as the premise of equality offers an ideological commitment to those who do not experience it, so too does the value of pluralism. And, just as the rhetorical force of equality is altered by its linkages to other premises, the ambiguity of pluralism allows for its meanings and enactments to change. Powell’s decision, while written in the legal jargon of jurisprudential certainty, nevertheless reflected, and contributed to, the ongoing public discourse about the value of cultural pluralism. As Fullinwider and Lichtenberg assert: “consciousness of color was...always central to American society insofar as that society was a committedly racist one. The relevant change here—marked rather than produced by *Bakke*—involved (in the wake of both the successes

and failures of the civil rights movement) the emergence of color consciousness as an antiracist position.”⁹⁰

Notes

¹ Eric Charles White, *Kaironomia: On the Will-to-Invent* (Ithaca, NY: Cornell University Press, 1987).

² Christopher Newfield, *Unmaking the Public University: The Forty Year Assault on the Middle Class* (Cambridge: Harvard University Press, 2008), 109.

³ Justice Lewis F. Powell, Jr. “Proposed Statement from Bench,” 2nd draft, 28 June, 1978, Supreme Court Files, Docket #76-811, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1. Powell wrote in the upper-left corner of the manuscript, “This is statement I read from the Bench.” (1). This manuscript corresponds with the audio recording, found at http://www.oyez.org/cases/1970-1979/1977/1977_76_811/opinion.

⁴ Powell, “Statement from Bench,” 1-2. Emphasis reflects Powell’s underlines in his script.

⁵ Justice John Paul Stevens, statement to the Court, 28 June, 1978, *University of California Regents v. Bakke* 438 US 265 (1978). Found at http://www.oyez.org/cases/1970-1979/1977/1977_76_811/opinion.

⁶ Powell, “Statement from Bench,” 7.

⁷ Justice John Paul Stevens, *Regents of the University of California v. Bakke*, 428 US 265, 412-413.

⁸ Stevens, *Bakke*, 411.

⁹ Stevens, *Bakke*, 421.

¹⁰ Justice William J. Brennan, Jr., statement to the Court, 28 June, 1978, *University of California Regents v. Bakke* 438 US 265 (1978). Found at http://www.oyez.org/cases/1970-1979/1977/1977_76_811/opinion.

¹¹ Justice William J. Brennan, Jr., *University of California Regents v. Bakke* 438 US 265 (1978), 325.

¹² Brennan, *Bakke*, 326-327.

¹³ Brennan, *Bakke*, 378.

¹⁴ Justice Harry A. Blackmun, statement to the Court, 28 June, 1978, *University of California Regents v. Bakke* 438 US 265 (1978). Found at http://www.oyez.org/cases/1970-1979/1977/1977_76_811/opinion.

¹⁵ Blackmun, Statement to the Court.

¹⁶ Blackmun, Statement to the Court.

¹⁷ Justice Harry A. Blackmun, *Regents of the University of California v. Bakke*, 438 US 265 (1978), 405.

¹⁸ Justice Lewis F. Powell, Jr., *Regents of the University of California v. Bakke*, 438 US 265, 295.

¹⁹ Justice Thurgood Marshall, draft opinion, “No. 76-811, *Regents of the University of California v. Bakke*,” 23 June, 1978, Bakke files, VI. Opinions – Other Justices, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 23.

²⁰ Marshall, draft opinion 6-23-78, 23. Comfort’s handwritten notes in margin.

²¹ Marshall, draft opinion 6-23-78, 1. Powell’s handwritten notes in margin.

²² Justice Thurgood Marshall, statement to the Court, 28 June, 1978, *Regents of the University of California v Bakke* 438 US 265. Found at http://www.oyez.org/cases/1970-1979/1977/1977_76_811/opinion.

²³ Marshall, Statement to the Court.

²⁴ Marshall, *Bakke*, 648.

²⁵ Bob Comfort, memorandum to Mr. Justice Powell, 19 September, 1977, Bakke files, Docket #76-811, "Miscellaneous," Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

²⁶ Attorney General Griffin B. Bell, Press Summary Supplement, "Press Briefing," released 29 June, 1978, Bakke Files: Correspondence, Folder #2, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 1.

²⁷ Attorney General Griffin B. Bell, Press Summary Supplement, "Question and Answer Session with Attorney General Griffin B. Bell," released 29 June, 1978, Bakke Files: Correspondence, Folder #2, Justice L. Powell Archives, Washington and Lee University, Lexington, VA, 2.

²⁸ Bell, "Question and Answer Session," 5-6.

²⁹ Catherine L. Horn and Patricia Marin, "Realizing the Legacy of *Bakke*," in *Realizing the Legacy of Bakke: Affirmative Action, Equal Opportunity, and Access in Higher Education*, eds. Patricia Marin and Catherine L. Horn (Sterling, VA: Stylus Publishing, 2008), 7.

³⁰ Horn and Marin, "Realizing the Legacy of *Bakke*," 6-7.

³¹ Charles R. Lawrence III and Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (Boston: Houghton Mifflin, 1997), 52.

³² John Gruhl and Susan Welch, "The Impact of the *Bakke* Decision on Black and Hispanic Enrollment in Medical and Law Schools," *Social Science Quarterly* 71 (1990): 459-473.

³³ Quoted in Henry Ramsey, Jr., "Affirmative Action at American Bar Association Approved Law Schools: 1979-1980," *Journal of Legal Education* 30 (1980): 378.

³⁴ Henry Ramsey, Jr., "Affirmative Action at American Bar Association Approved Law Schools: 1979-1980," *Journal of Legal Education* 30 (1980): 377-416.

³⁵ Susan Welch and John Gruhl, *Affirmative Action and Minority Enrollments in Medical and Law Schools* (Ann Arbor: University of Michigan Press, 1998), 132-165.

³⁶ Michael Kurlaender and Erika Felts, "Bakke Beyond College Access: Investigating Racial/Ethnic Differences in College Completion," in *Realizing the Legacy of Bakke: Affirmative Action, Equal Opportunity, and Access in Higher Education*, eds. Patricia Marin and Catherine L. Horn (Sterling, VA: Stylus Publishing, 2008), 110.

³⁷ Kurlaender and Felts, "Bakke Beyond College Access," 110-111.

³⁸ Horn and Marin, "Realizing the Legacy of *Bakke*," 6.

³⁹ Patricia Marin and Catherine L. Horn, "The Future of *Bakke*," in *Realizing the Legacy of Bakke: Affirmative Action, Equal Opportunity, and Access in Higher Education*, eds. Patricia Marin and Catherine L. Horn (Sterling, VA: Stylus Publishing, 2008), 243.

⁴⁰ Martin D. Carcieri, "The Wages of Taking *Bakke* Seriously: The Untenable Denial of the Primacy of the Individual," *Tennessee Law Review* 67 (2000): 952.

⁴¹ John C. Jeffries, Jr. *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner's Sons, 1994), 470.

⁴² Robert K. Fullinwider and Judith Lichtenberg, *Leveling the Playing Field: Justice, Politics, and College Admissions* (Lanham, MD: Rowman & Littlefield, 2004), 150.

⁴³ Robert Post, "Introduction," in *Race and Representation: Affirmative Action*, eds. Robert Post and Michael Rogin (New York: Zone Books, 1998), 17.

⁴⁴ See Stephen H. Browne, "Reading, Rhetoric, and the Texture of Public Memory," *Quarterly Journal of Speech* 81 (1995); Stephen H. Browne, "Remembering Crispus Attucks: Race, Rhetoric, and the Politics of Commemoration," *Quarterly Journal of Speech* 85 (1999): 169-197; Natalie Zemon Davis and Randolph Starn, Introduction, "Memory and Counter-memory," Special Issue of *Representations* 26 (1980); Shawn J. Parry-Giles and Trevor Parry-Giles, "Collective Memory, Political Nostalgia, and the Rhetorical Presidency: Bill Clinton's Commemoration of the March on Washington, August 28, 1998," *Quarterly Journal of Speech* 86 (2000): 417-437; and Barbie Zelizer, "Achieving Journalistic Authority Through Narrative," *Critical Studies in Mass Communication* 7 (1990) 366-376.

⁴⁵ Zelizer, "Achieving Journalistic Authority Through Narrative," 217.

⁴⁶ Powell, *Bakke*, 14.

⁴⁷ Powell, *Bakke*, 16.

⁴⁸ Josef Stern, *Metaphor in Context* (Cambridge, MA: Oxford University Press, 2000).

⁴⁹ Powell, *Bakke*, 16.

⁵⁰ Powell, *Bakke*, 16. Emphasis added.

⁵¹ Powell, *Bakke*, 22.

⁵² Powell, *Bakke*, 14, 22.

⁵³ 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*," *The Journal of Law in Society* 3 (2002): 78.

⁵⁴ Powell, *Bakke*, Appendix A. Powell attached a description of the Harvard admissions plan, to his opinion.

⁵⁵ Celeste Michelle Condit and John L. Lucaites, *Crafting Equality: America's Anglo-African Word*, (Chicago, IL: University of Chicago Press, 1993), 220-221.

⁵⁶ Robert A. Ferguson, "The Judicial Opinion as Literary Genre." *Yale Journal of Law & the Humanities* 2 (1990): 201-19. Ferguson identifies four features of judicial opinion writing as a genre: monologic voice, interrogative mode, a rhetoric of inevitability, and a declarative tone. For more on the law's rhetoric of inevitability, see also Joseph W. Dellapenna and Kathleen Farrell, "Law and the Language of Community: On the Contributions of James Boyd White," *Rhetoric Society Quarterly* 21 (1991): 38-58.

⁵⁷ Ferguson, "Judicial Opinion as Literary Genre," 205.

⁵⁸ Breshears, "One Step Forward," 79.

⁵⁹ Quoted in Marcia G. Synnott, "The Evolving Diversity Rationale in University Admissions: From *Regents v. Bakke* to the University of Michigan Cases," *Cornell Law Review* 90 (2005): 468.

⁶⁰ Synnott, "The Evolving Diversity Rationale," 468.

⁶¹ Martin Luther King, Jr., *Where Do We Go From Here: Chaos or Community?* (Boston, MA: Beacon Press, 1968), 170, 173-174.

⁶² King, *Where Do We Go?*, 171.

⁶³ Douglas Hartmann and Joseph Gerteis, "Dealing with Diversity: Mapping Multiculturalism in Sociological Terms," *Sociological Theory* 23 (2005): 218.

⁶⁴ Hartmann and Gerteis, "Dealing with Diversity," 218-219; citing Glazer, *We are All Multiculturalists Now* (Cambridge, MA: Harvard University Press, 1997): 147.

⁶⁵ Walter Benn Michaels, *The Trouble with Diversity: How We Learned to Love Identity and Ignore Inequality* (New York: Metropolitan Books, 2006), 6.

⁶⁶ Michaels, *Trouble with Diversity*, 16.

⁶⁷ Reva B. Siegel, "The Racial Rhetorics of Colorblind Constitutionalism: The Case of *Hopwood v. Texas*," in *Race and Representation: Affirmative Action*, eds. Robert Post and Michel Rogin (New York: Zone Books, 1998), 29.

⁶⁸ Dennis J. Downey, "From Americanization to Multiculturalism: Political Symbols and Struggles for Cultural Diversity in Twentieth-Century American Race Relations," *Sociological Perspectives* 42 (1999): 253.

⁶⁹ Downey, "From Americanization to Multiculturalism," 251.

⁷⁰ Robert Post, “Introduction,” in *Race and Representation: Affirmative Action*, eds. Robert Post and Michael Rogin (New York: Zone Books, 1998), 13.

⁷¹ “Resolution of the University of California Board of Regents Adopting a Policy ‘Ensuring Equal Treatment’ of Admissions,” 20 July, 1995. The resolution was reproduced in Appendix A of *Race and Representation: Affirmative Action*, eds. Robert Post and Michael Rogin (New York: Zone Books, 1998).

⁷² “Proposition 209,” California Constitution, Article I, Section 31 as amended 1996. Emphasis added.

⁷³ Post, “Introduction,” *Race and Representation*, 13.

⁷⁴ Fullinwider and Lichtenberg, *Leveling the Playing Field*, 147.

⁷⁵ Fullinwider and Lichtenberg, *Leveling the Playing Field*, 148. The authors say that the only increase in enrollments amongst African Americans occurred at UC Irvine, which had 2.2 percent enrollment in 1995, and 2.9 in 2001. (148)

⁷⁶ Fullinwider and Lichtenberg, *Leveling the Playing Field*, 148.

⁷⁷ *Hopwood v. State of Texas*, 78 F.3d 932 5th Cir (1996).

⁷⁸ Siegel, “Racial Rhetorics,” 35.

⁷⁹ *Hopwood v. State of Texas*, 78 F.3d 932 5th Cir (1996) at 934.

⁸⁰ *Gratz and Hamacher v. Bollinger, Duderstadt, and the Board of Regents of the University of Michigan*, No. 02-516 2002 US Briefs 516; *Grutter v. Bollinger and the Board of Regents of the University of Michigan*. No. 02-241 2002 US Briefs 516.

⁸¹ Policy language cited in Barbara Grutter, petitioner, “Petition for Writ of Certiorari,” *Grutter v. Bollinger, Lehman, Sheilds, and the Board of Regents of the University of Michigan*, 539 US 306 (2003), 5.

⁸² *Marks v. United States* 430 US 188 (1977).

⁸³ Grutter, “Petitioner’s Brief,” 17.

⁸⁴ Grutter, “Petitioner’s Brief,” 34.

⁸⁵ Neil Gotanda, “A Critique of ‘Our Constitution is Color-Blind’,” *Stanford Law Review* 44 (1991): 26.

⁸⁶ Grutter, “Petitioner’s Brief, 34, citing *Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344 (1998) at 356.

⁸⁷ Michael Selmi, “The Life of *Bakke*: An Affirmative Action Retrospective,” *Georgetown Law Journal* 87 (1999): 1021-1022.

⁸⁸ Kenneth S. Baer, “The Spirit of ’78, Stayin’ Alive,” *Washington Post*, 13 July, 2008: B01.

⁸⁹ Condit and Lucaites, *Crafting Equality*, xv.

⁹⁰ Fullinwider and Judith, *Leveling the Playing Field*, 150.

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