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This paper is part of the requirements for honors in rhetoric and communication studies. The signatures below, by the advisor, a departmental reader, and a representative of the departmental honors committee, demonstrate that Cathy Reno has met all the requirements needed to receive honors in rhetoric and communication studies.

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Telling Arguments: A Weaverian Analysis of Supreme Court Cases Regarding Civil Rights and Affirmative Action

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Honors Thesis
Department of Rhetoric and Communication Studies
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Introduction

In his book, *The Ethics of Rhetoric*, influential rhetoric and culture scholar Richard M. Weaver articulates a framework called Grammatical Categories. These classifications are used to identify both the motivation and implications of arguments. There are four discrete categories.

The first, and least difficult to formulate is the argument from circumstance. Here an individual bases his reasoning on the conditions surrounding the case. Weaver labels this, "the nearest of all to purest expediency" (Weaver, 1985). To illustrate this point, Weaver depicts an individual employing this method: "'The city must be surrendered because the besiegers are so numerous'" (Weaver, 1985). The individual in this case examines only the situation exactly in front of him rather than taking into account the plethora of other issues affecting it. The persuader gives so much credence to the 'here and now' that he avoids considering the consequences or future implications of his decision (Weaver, 1985).

The second Grammatical Category is cause and effect, which links an action to a consequence. This is not extraordinarily difficult to construct, which generally leads to a lukewarm outcome. For instance, one may attempt to sway his constituents into persisting in a questionable war by warning them if the task is not completed now, it will have to be addressed in the future. Thus, the predicted result is intended to persuade. Weaver asserts that such a process is generally utilized by individuals who "go all out for action; they are radicals" (Weaver 1985). It is tempting to evaluate situations using this

rubric since it is one we have been trained to recognize since childhood, however it is not as effective as the third and fourth categories.

The third category is called the argument from similitude in which, as the name implies, the rhetor looks for inherent connections between certain objects or ideas. Weaver describes these as: "essential (though not exhaustive) correspondences" (Weaver, 1985). An individual will try to discover an intrinsic relationship between his example and another, and transfer the qualities of one to the other in order to formulate his argument. That is, because a certain tactic worked in one instance, it is well-qualified to be used in another. This is generally conducted by those with a transcendental view of the world, most often writers and artists. It is the second most esteemed argument.

Finally, the argument from definition (or principle) is the most powerful and long-lasting. Not surprisingly, it is the most arduous to construct. One must dig to the very essence of the issue for which he is attempting to argue in order to achieve long-term persuasion using this method. He must locate the stasis, frame the principle to which it applies and then prove his case according to that category. The superiority of definition can be traced all the way back to Plato's writings. This method ensures that the argument is based on principle, rather than contemporary circumstance or lazily constructed analogies. Principle bridges chasms which the other categories do not, such as age, culture and time because it gets to what makes us unique as humans, and if nothing else we all have these principles in common. More importantly, these principles never change, "the realm of essence is the realm above the flux of phenomena" (Weaver, 1985). This allows for consistency, which further strengthens an argument. Weaver uses Abraham Lincoln's speeches to illustrate this concept. In particular, Weaver praises

Lincoln's handling of the slavery issue, with his ability to rise above the seemingly crushing circumstance, "Yet while all other political leaders were looking to the law, to American history, and to this or that political contingency, Lincoln looked – as it was his habit already to do – to the center; that is to the definition of man" (Weaver, 1985). Hence, Lincoln argued that by nature, blacks were men and could not be treated as property because of this definition. This was undoubtedly a toilsome argument to make during this time period. However, Lincoln refused to compromise and yield to circumstance. Despite this difficulty, his tenacity using this approach eventually led to the abolition of slavery.

Weaver's framework seemed particularly applicable to my analysis because of his dealings in ethics and the ramifications of language. These ideas have added relevance when dealing with "the law of the land" – especially in the realm of race relations. An examination of the argumentation behind a policy can provide a window into the minds of those who supported it: that is, if the argument hinges on a principle of equality, the arguer would be inclined to define the principle. If principle stands in the way, an argument from definition would hardly take precedence. Instead the arguer would almost surely spend time trying to persuade that comparative cases, causes or effects, or even circumstance bear more heavily on this case in this instance. But therein lies the difficulty, for the argument endures only for the length and strength of the particular case.

The binary between circumstance and definition established in these cases further lends itself to an examination based on the Grammatical Categories. A trend in the majority opinions of circumstance overcoming definition was usurped by the reverse in the *Brown v. Board of Education* case in which definition came to the forefront, and then

was overcome by circumstance once again in the *Bakke* and *Grutter* cases. Weaver's universal outlook, as reflected in the Categories, piqued my interest as a way to examine these cases for this reason. I wonder if there is a growing penchant for the circumstantial and if so, whether it may be a sign of intolerance for consistency. Definitional arguments are by their nature not attention-getting and in the current culture their nature is their drawback.

Objective

In this paper I plan to analyze the Supreme Court majority and dissenting opinions from five landmark cases representing this issue of civil rights and affirmative action using Richard Weaver's Grammatical Categories. I chose these cases by examining the abundance of jurisprudence in this area and selecting the five cases which legal scholars and historians alike have agreed upon to be the most influential. Each case had a unique and significant impact on the institution of race relations in the United States of America. These five are: *Scott v. Sanford* (1856), *Plessy v. Ferguson* (1896), *Brown v. Board of Education* (1954), *Regents of the University of California v. Bakke* (1978) and *Grutter vs. Bollinger* (2003). I will evaluate both the quality of the arguments, and based on that, the longevity they will likely enjoy. According to Weaver, the more highly ranked category of argument used, the more likely the case is to withstand future examination. I will trace the evolution of this issue, as well as types of arguments employed by justices on each side of the case. In so doing, Weaver's assertion is put to the test.

When I was preparing to address this topic, a review of the literature on this issue was a step I planned on pursuing. When I met with Dean Rodney Smolla of the University of Richmond Law School, however, he advised me to concentrate solely on the primary sources rather than attempt to tackle the overwhelming number of secondary sources in existence on this subject. I have therefore heeded the Dean's advice and examined only Weaver's book and the aforementioned cases.

Analysis

In the majority opinion for the *Scott v. Sanford* case, Chief Justice Taney argues that blacks were not considered citizens by the Constitution and the body of laws passed soon thereafter. He therefore crafts his case around the idea of citizenship, and attempts to locate the definition of the term laid out by the founding fathers. Although the arguments from definition may sound appealing, it is important to examine the deeper principle for which Taney is arguing: blacks are property, not people. That skin tone identifies humanity is simply not aligned with the true essence of man, which means that Taney's arguments from definition are based on fallacy and are inaccurate and unconvincing. Taney employs three flawed arguments from definition, three from similitude, one from consequence and two from circumstance. Although there appears to be a preponderance of strong arguments (definition and similitude), a careful reading will show that for this particular subject, these cases are not strong or convincing of inherent inequality.

The main argument from definition that Taney utilizes declares that the founding fathers did not consider blacks to be a part of the citizenry of the United States, using the Constitution as his guide for determining this principle. He claims, "The words 'people of the United States' and 'citizens' as synonymous terms, and mean the same thing... The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which the instrument provides for and secures to citizens of the United States" (*Scott v. Sanford*, 1856). This is the basis of his case, and his other arguments from principle serve to support this one.

Taney then lays out his method, interpreting the intentions of those who composed the Constitution, "The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of this court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted" (*Scott v. Sanford,* 1856). This framework seems derived from principle, but scrutiny will reveal its true nature: an argument from circumstance. Taney seeks to demonstrate that the circumstance at the time the Constitution was written would not allow for blacks to be included as citizens of the United States. If he can demonstrate that the founding fathers did not deem blacks human members of society, then he will be able to argue that by principle, their status has not changed. It would then follow that blacks are not equal to whites and do not have the

same rights and privileges. However, his definition is based on an assumption about the implicit intentions of those who drafted the Constitution, which is a much more speculative case to make than when a party's objectives are overt. Therefore, he cannot actually prove that the founders intended the Constitution to mean one thing or another, which makes for a weak foundation of an argument.

A second time Taney attempts to tie his conclusion to that of the founding fathers. This time, he maintains that by examining the conditions of the time surrounding the drafting of the Constitution, he can determine the definition of an American citizen, "In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendents, whether they become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument" (*Scott v. Sanford,* 1856). Here Taney examines the language used in the Declaration of Independence, contemporary legislation, and conditions surrounding them to determine that the framers of the Constitution did not view blacks as a part of the American citizenry. Although this appears to serve as an argument from definition, it is not. A true argument from definition is based on the essence of the principle. That is, simply because a body of law says something is true does not mean for certain that it is so. This is exemplified in Weaver's analysis of Abraham Lincoln, who recognized that despite the conditions and body of law of his time – that it was acceptable to hold blacks in the bondage of slavery – such a condition was not the true essence of man. Hence, blacks were men and by principle other men should not hold them as property as they would an animal or piece of luggage. Lincoln

overcame the circumstance to uncover the *true* definition of man, " 'If the Negro is a man, why then my ancient faith teaches me that 'all men are created equal,' and that there can be no moral right in connection with one man's making a slave of another.'" (*As cited* in Weaver, 1985). Therefore, if Chief Justice Taney desired to argue from a true definition, he would have to look past the circumstance and contemporary condition to find the true essence of man.

Again, Taney looks to the Declaration of Independence, and afterwards he opines, "But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration... Yet the men who framed this declaration were great men in high literary acquirements...they perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race...They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them...The state of public opinion had undergone no change when the Constitution was adopted..." (*Scott v. Sanford,* 1856). This is a similar attempt at creating a definition which does not dig deep enough to the root of the principle. Again, he allows circumstance to impinge on his location of principle. This is similar to tactics often employed by Edmund Burke, who Weaver castigates throughout *The Ethics of Rhetoric* for his reliance on circumstance over principle. Weaver cites Burke in contrast to Lincoln, "whereas for Burke circumstance was often a deciding factor, for Lincoln it was never more than a retarding factor" (Weaver, 1985). Taney falls into the same trap as Burke, which leads to privileging circumstance over true definition.

Chief Justice Taney employs two pure arguments from circumstance, in which he attempts to show that contemporary conditions lead to a permeating belief that blacks are not citizens and should thus not be given rights of citizens. "And in no nation was this opinion more firmly fixed...than by the English government and the English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them... The opinion thus entertained and acted upon in England was naturally impressed on the colonies..." (*Scott v. Sanford,* 1856). Taney portrays blacks as property rather than men, which he contends had been the view of the British, who then passed it on to the colonies. Following this logic, the conditions of the time (or the circumstance) then would dictate that people view blacks as things to be owned, not peers. However, this is skirting the real issue: just because one group defined another group as one thing does not mean that they were in fact that thing. It is necessary to transcend the circumstance and unearth the true principle behind this. He makes a second strikingly similar statement, "None of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise...It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union... Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them" (*Scott v. Sanford,* 1856). Here Taney says essentially the same thing, that it is unlikely that the conditions around the time of the Constitution's adoption would have dictated Americans to view blacks as peers rather than property. Taney

seems to fit into Weaver's category of circumstance, which he claims "seems to be preferred by those who are easily impressed by existing tangibles" (Weaver, 1985).

Taney utilizes one argument from consequence. He constructs a cause-and-effect relationship between awarding blacks the rights of citizens and civil disruption, "It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport...and it would give them full liberty of speech in public and in private upon all subjects...and to keep and carry arms wherever they went. And of all this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them and endangering the peace and safety of the State" (*Scott v. Sanford,* 1856). This argument is drawn from cause and effect. That is, if blacks were to be given rights, it would result in an upheaval of civilized society: if they are given rights, they may realize that they are more than just property and rebel against the situation. Although it is true that any enslaved creature, once freed, may react against his captures, this possible short-term outcome should not trump a principle which is being violated. It seems counterproductive to continue an unjust policy, enslaving a fellow man, only in order to avoid a potential interim problem. In such an argument, Justice Taney attempts to discreetly ignore the rhinoceros in the living room, managing to dodge defining blacks as either property or human beings.

Taney draws on a series of laws passed after the Constitution to further cement his argument that blacks were not considered to be citizens of the United States via three arguments from similitude. He cites three specific laws, which he fashions into arguments from similitude to prove that blacks were not considered equal to whites.

First Taney likens the plight of blacks to that of American Indians, explaining that the former would not expect to be treated equally to whites and they would be more likely to be considered so because of their 'foreigner' status (his meaning by this is unclear, as American Indians certainly were not foreign in the Americas), "Congress might, as we before said, have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their untutored and savage state, no one would have thought of admitting them as citizens in a civilized community... No one supposed then that any Indian would ask for, or was capable of enjoying the privilege of an American citizen, and the word white was not used with any particular reference to them. Neither was it used with any reference to the African race imported into or born in this country; because Congress has no power to naturalize them, and therefore there was not necessity for using particular words to exclude them" (*Scott v. Sanford,* 1856). Much like American Indians were not considered to be a group equal to whites, neither would blacks fit into this category. However, he does not draw adequate comparisons between the two groups to be compelling enough to consider this parallel to be meaningful. For example, the blacks were purchased and brought over to work as slaves for European Americans living in North America, whereas the American Indians inhabited North America well before the Europeans discovered its existence. The policy toward American Indians varied over time, from trading partners to enemies, but never slaves. Secondly, he employs this type of argument because he cannot make the case that particular words were used to exclude blacks in this instance.

A similar argument is noted in the Militia Law of 1792. It states: "The language of this law is equally plain and significant with the one just mentioned. It directs that

every 'free able-bodied white male citizen' shall be enrolled in the militia. The word is evidently used to exclude the African race" (*Scott v. Sanford,* 1856). The issues with this argument are similar to the faulty argument from definition utilized earlier in the case: it is necessary to surpass the precedent and contemporary conditions to reach the true essence of the problem at hand. It is generally true that past cases will support the dominant circumstance – especially in regard to an issue such as slavery – however, looking past these limitations in order to find the principle is paramount.

In the third argument from similitude, Taney strives to show that differentiations were made in past legislation between citizens and blacks. He uses this example as reason why there should still exist such a distinction. Here he quotes an 1813 piece of legislation, "'That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any persons or persons except citizens of the United States, or persons of color, natives of the United States'… Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons" (*Scott v. Sanford,* 1856). The same counterargument applies: in order to overturn oppressive precedent, someone must locate the true essence of man and lean on this definition rather than legislation tinted by circumstance. Weaver laments basing arguments on precedent because of the sluggish pace of reform in law, "This political organism is a 'mysterious incorporation', never wholly young or middle-aged, or old… It is therefore modified only through the slow forces that produce evolution" (Weaver, 1985). Hence, if one does nothing but wait for the body of laws to right themselves,

change will not soon come; if inequality exists in even one precedent, it can be carried on to affect an endless number of cases unless it is overturned. This is especially important in the Supreme Court, which has the power to create the "law of the land". If the Court always relies on past cases, change will be extraordinarily unlikely to come about.

Chief Justice Taney bases his majority opinion primarily on a combination of circumstance and similitude. The arguments are so similar, that it becomes difficult to differentiate between the two. The essence of both remains that because blacks have been historically discriminated against, they should continue to experience the same treatment. There is no effort to break away from these constraints and to attempt to grapple with the actual issue at hand – whether blacks were people or property. This argument is comparable to one put forth by Edmund Burke in his critique of the French Revolution. He contended that the French people's desire for freedom was fundamentally distinct from the struggle England had once engaged in to gain freedom, and he condemned this struggle as unwarranted without demonstating any actual difference between the two. Weaver comments, "Burke tried with all his eloquence to show that the 'manly' freedom of the English was something inherited from ancestors, like a valuable piece of property, increased or otherwise modified slightly to meet the needs of the present generation, and then reverently passed on. He did not want to know the precise origin of the title to it, nor did he want philosophical definition of it" (Weaver, 1985). It was acceptable for England's people to be free, but by refusing to specify how they became so, Burke discredited the French movement to do just the same. Behind the veneers of Burke's argument was a contradiction – which can also be seen in Taney's

case. Although Taney represents a majority on the Court of his day, it is not surprising that this decision is soon overturned.

In the dissent for the Dred Scott case, Justice Curtis employs two arguments from definition and one argument from similitude. Although this is a brief opinion, it is powerful in that it utilizes the two most influential forms of argument. Curtis productively raises issues that were not examined in the majority opinion, such as prior examples of other enslaved races and the lack of many political rights held by American citizens other than blacks.

The first argument put forth by Curtis is one from definition, where he examines the cause of discrimination against blacks. He locates this cause in their unfortunate state of slavery. He utilizes this definition to point out that many races – including whites – have been enslaved at different points in history, "But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles, white men were made slaves. All slavery has its origin in power, and is against right…" (*Scott v. Sanford,* 1856). Curtis broadens the narrow view of slavery established by those penning the majority opinion: slavery has not historically been confined to blacks, in fact whites were once held as slaves as well. This perspective is integral to refuting the majority opinion because it brings to light that any race of people can fall victim to the curse of slavery and suddenly become powerless. This argument exemplifies Curtis's ability to look past circumstance and current law and into principle, just as Lincoln did, "Yet while other political leaders were looking to the law, to American history, and to this or that political contingency, Lincoln looked – as it was his habit already to do – to the center; that is, to the definition of man" (Weaver, 1985).

Justice Curtis's ability to locate the true essence of man through the tangled web of contemporary law and circumstance makes his argument powerful.

Curtis then adds to this principle by demonstrating ways in which blacks were considered citizens at the time of the Constitution. He cites the Constitution's opening phrase as evidence that this is true, as well as the fact that blacks were recognized as citizens of certain states during this time, "And that it [the Constitution] was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established" (*Scott v. Sanford,* 1856). Therefore, Curtis shows that in many ways, blacks were in fact considered to be part of the citizenry, and that the condition of slavery (which is imposed and arbitrary) – not skin tone – separates the black man from his natural rights as man. Treating part of the citizenry of the United States as property, then, would be a direct violation of the Constitution as well as the principle of equality.

Curtis makes a strong case through similitude. He asserts that there are many American citizens who cannot exercise the same rights as others in society, but they are still considered to be part of the citizenry. Therefore, the capability of practicing political or social rights should not be used as criteria for judging citizenship – or for that matter, equality, "A naturalized citizen cannot be President of the United States, nor a Senator till after the lapse of nine years…Yet, as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia…eligible to the office of

Senator or Representative in Congress, though they may be citizens of the United States. So in all states, numerous persons, though citizens, cannot vote or cannot hold office, either on account of their age, sex, or the want of the necessary legal qualifications. The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt to define it must lead to error" (*Scott v. Sanford,* 1856). Curtis is thus comparing those agreed upon by all to be citizens to blacks, and through this analogy determines that blacks should be considered equal even if they cannot partake in all political or social rights because others are not excluded because of this factor. This is a compelling argument and raises an issue not addressed by the majority opinion of the court.

Justice Curtis's use of definition and a strong argument from similitude in his dissent suggests that his argument is the more valid opinion. Unlike the majority which relied heavily on precedent and shaky definitions, this opinion highlights areas which were not even addressed in the majority case and questions the validity of the stance that blacks should not be considered citizens. This is an incredibly powerful argument, especially when one considers the overwhelming circumstance Curtis had to overcome in order to make such a bold claim from principle. In this sense, his courage and argument craftsmanship is similar to that of Abraham Lincoln, who Weaver holds in the highest regard. In a strikingly similar argument, Lincoln exemplifies the disconnect between how many Americans view the term liberty, "'The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare liberty; but in using the same word we do not all mean the same thing... Plainly, the sheep and the wolf are not agreed upon a definition of the word liberty; and precisely

the same difference prevails today among us human creatures, even in the North, and all professing to love liberty'" (*as cited in* Weaver, 1985). This seems useful in comparing how the two men were able to transcend the circumstance of prevailing notions to find the true meaning of equality.

A similarly frustrating case in civil rights jurisprudence in the way of principle is *Plessy v. Ferguson*, regarding the issue of separating the races in equal facilities. The tangible issue is the creation and enforcement of discrete train cars for whites and blacks. Justice Brown presents the majority opinion of the Court, which rules that the idea of "separate but equal" facilities is constitutional. In doing so, Brown utilizes two arguments from definition, four arguments from similitude, and one argument from circumstance. This is not a convincing argument, as it is based largely on precedent that is questionably linked to the aforementioned issue.

Justice Brown commences his case with two attempts to create arguments from definition. He examines the Thirteenth and Fourteenth Amendments to determine their applicability to the issue at hand. His attempts to argue from principle, however, are ineffective, because he does not successfully locate the essence of the principle he is struggling to define.

Brown claims that the Thirteenth Amendment does not apply to this case because it simply abolishes slavery. Therefore, he contends, the "separate but equal" doctrine is Constitutional with regard to that particular amendment, "A statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality

of the two races, or reestablish a state of involuntary servitude" (*Plessy v. Ferguson*, 1896). However, this argument is based on a fallacy. Although Brown attempted to form an argument from definition, he failed to dig deep enough to discover the lack of principle in creating a legal distinction between two allegedly equal groups. His argument contains an intrinsic contradiction: that is, if two groups are inherently equal, how can there be laws which force them to be treated differently or separately? In actuality, by *definition* such regulations necessitate the groups being treated differently. Therefore, although Brown attempts to utilize an argument from definition, it fails because he does not unearth the true core of what equality means.

The aims of the Fourteenth Amendment are also a major issue for Brown. He attempts to formulate an argument from definition based on a principle he apparently sees present in the amendment, "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power..." (*Plessy v. Ferguson*, 1896). Brown states that the intention of the creators of the Fourteenth Amendment were to impose equality before the law, however in the same breath he also contends that the amendment was not possibly created to eradicate distinctions based on race. It is impossible to consider two people to be completely equal, yet harbor concrete

beliefs on how they inherently differ. Because this "definition" is based on an innate contradiction, it is invalid and therefore unsuccessful in the long term.

The majority opinion in Plessy rests heavily, if not completely, on precedent, which is argument from similitude. This allows the rhetor to base his argument on what has previously been done in a meaningfully similar situation in the past. If he can show that the precedent is closely related to his own topic, it is possible that he show his own to be sound. However, demonstrating relevant salience is essential to effectively executing this type of argument. Equally important to this is proving that the precedent itself is valid, and that it was based on a sound argument. Weaver finds issue with this type of argumentation, "What line do precedents mark out for us? How may we know that this particular act is in conformity with the body of precedents unless we can abstract the essence of the precedents? And if one abstracts the essence of a body of precedents, does not one have a 'speculative idea'? However one turns, one cannot evade the truth that there is no practice without theory, and no government without some science of government" (Weaver, 1985). That is, we need to be able to locate the principle embedded within these precedents in order to employ them successfully. For the most part, Brown does not succeed in this endeavor.

In his first use of precedent, Brown alludes to Roberts v. City of Boston 5 Cush. 198, where the Court upheld the legality of establishing separate schools for different children, "It was held that the powers of the committee extended to the establishment of separate schools for children of different ages, sexes, and colors and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and have not yet acquired the rudiments of learning, to enable

them to enter the ordinary schools" (*Plessy v. Ferguson*, 1896). Here, Brown employs an argument from similitude. Because separating by gender, ages and race under certain circumstances has been established in Boston, separating by race in general should be considered acceptable. The problem here is, the children he cites are incapable (they are mentally "different" from normal children) of completing the same work as their peers. If the fourteenth amendment dictates that the races are equal, then these two examples are not analogous because the former situation demonstrates unequal children being separated.

In a second argument from similitude, Brown attempts to show that laws positively enforcing the Fourteenth Amendment are unconstitutional, "Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the States to give to all persons traveling within that State, upon vessels employed in that business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel, who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be so far as it applied to interstate commerce, unconstitutional and void. Hall v. De Cuir, 95 U.S. 485" (*Plessy v. Ferguson*, 1896). This, however, seems to rebel against the spirit of the law itself, or one could say, the principle underlying it. That is, the amendment was introduced to strengthen the Thirteenth Amendment and ensure that blacks were treated equally to other American citizens. Why then, would such a principle oppose a law demanding that equal citizens share public facilities? Although this argument may be valid on a literal

level when compared to other cases of its time, this outlook conflicts with the spirit of the law.

Brown then tackles the question of whether the Fourteenth Amendment prohibits positive laws, "In the Civil Rights case, 109 U.S. 3, it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the Fourteenth Amendment was prohibitory upon the States only" (*Plessy v. Ferguson*, 1896). Brown cites an earlier case which stated that the Fourteenth Amendment only guaranteed that the rights outlined in it would not be violated by the States. That is, States could not positively enforce it by creating laws requiring equal access to facilities by people of all races, but instead the Federal Government would simply make certain that States did not pass laws which violated the amendment. Therefore, the case that Brown cites rules that laws demanding equal access to public areas are unconstitutional. Brown uses this case to articulate that a state, namely Louisiana, cannot constitutionally create laws which secure equality. Although this technically corresponds to the cited case, it is important to examine the prior decision's merits. First of all, it contradicts itself, claiming that the Fourteenth Amendment declared equality for all, yet prohibited laws which would make this idea a reality. Thus, the case acknowledges only part of the Amendment, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law" (Fourteenth Amendment). The amendment says nothing about the prohibition of statewide laws allowing equal access to public areas. Therefore, it seems that the precedent Brown relies on for his argument from similitude, was based on an extrapolation from the Amendment. Not to mention, the Fourteenth Amendment's purpose was to further ensure that blacks were considered equal and not discriminated against because the previous amendment was deemed inadequate. It is within the spirit of the amendment that blacks should be treated the same as whites, because of the essence of equality. If two groups are equal, they should be treated as such. This interpretation of the Fourteenth Amendment ignores the *definition* of equality for which the authors were reaching. Additionally, because the original argument was based on faulty evidence, even if this case is similar enough to warrant an argument from similitude, it is invalid.

The largest gap in Justice Brown's opinion rests in the argument's penultimate paragraph. Here Brown employs an argument from circumstance. He asserts that the plaintiff is wrong in assuming that separation of the races means that blacks are inferior to whites. This misconception, according to Brown, is the result of the mindset of the black race, which is not based in reality. He cements his argument from circumstance with something that does not seem to be based in reality, a vague and unlikely hypothetical situation in which whites are the minority under black rule, "The argument necessarily assumes that if… the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption." (*Plessy v. Ferguson*, 1896). This argument is

riddled with flaws. It would be weak as an argument from circumstance, however it is completely invalid because it is not based in actual (or even likely) circumstance! To prove his point, Brown simply invents a scenario and predicts how an entire race would react to it. This argument is not sound and does not belong in a Supreme Court majority opinion.

Justice Brown utilized four arguments from similitude, two faulty arguments from definition, and an argument from circumstance in his majority opinion. Although on the surface this seems like a powerful case, many of the arguments were flawed and not true representations of Weaver's categories. The arguments from similitude are either not analogous to the case at hand, or the precedent itself was based upon circumstances at the time. Even the argument from circumstance, which Weaver considers the easiest to construct, was not done so correctly. All in all, this reflects an indolent argument built on past flaws and faulty definitions.

Unlike the majority opinion, the dissent is overflowing with arguments based on definition. Of the seven cases made by Justice Harlan, five are based purely on principle, and two are hybrid arguments: one of circumstance to definition and the other from consequence to definition. It is a solid case, based concretely on the foundations of principle.

Harlan opens with a hybrid argument: at first it appears to be crafted from circumstance, but this tactic is soon reshaped into an argument from definition, "A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant, personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been

employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty." (*Plessy v. Ferguson*, 1896). This is an argument from circumstance. Harlan asserts that this law potentially inhibits blacks from properly fulfilling the responsibilities of their occupations. Although it may be a valid point, it is inherently a weak counter to the majority opinion. This tactic is employed, however, to set up a larger argument regarding the constitutionality of separating by race in railroad cars, which is an argument from definition. Harlan cites the inconsistency, "I deny that any legislative body or judicial tribunal may have regard to the race of citizen when the civil rights of those citizens are involved. Indeed, such legislation, as that here is question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States" (*Plessy v. Ferguson*, 1896). Therefore, Harlan asserts that because blacks are citizens, they should be treated exactly the same as other citizens – period. This is a clear argument from definition. Harlan identifies what it means to be a citizen of the United States of America, a large part of which is freedom and equality, and applies this case to that principle. He cements this moments later with a statement regarding the true spirit of the two amendments, "These two amendments, if enforced to their true intent and meaning will protect all the civil rights that pertain to freedom and citizenship" (*Plessy v. Ferguson*, 1896). Because Harlan is able to define what it means to be an American citizen, his argument is effective. Only for the purpose of intentionally violating the intent of the two amendments does the majority have a case.

Harlan moves away from the hybrid argument to one strictly from definition. He uses the Supreme Court's own words to demonstrate the principle he is after, "this court has further said, 'that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color'" (*Plessy v. Ferguson*, 1896). Harlan cites the Supreme Court's own decision in his explanation of reasoning: the Court itself framed its commentary around the amendments to make clear that blacks and whites are to have the same laws because they are equal citizens. Thus, according to the definition, creating any laws that differentiates between the races is wrong.

Harlan then asserts an argument similar to the preceding argument from definition, again citing the Supreme Court, "We also said: 'The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race -- the right to exemption from unfriendly legislation against them distinctively as colored -- exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.'" (*Plessy v. Ferguson*, 1896). This argument is a solid counter to Brown's last argument from similitude, which used precedent to argue that laws distinguishing between the two races were justifiable. Harlan's argument from definition trumps Brown's citations of previous cases because rather than likening this case to another in which someone else made a decision (likely also based on a previous

decision), Harlan excavates the true principle at hand: according to the Thirteenth and Fourteenth Amendments, blacks and whites are equal before the law.

In a third argument from definition, Harlan outlines his primary frustration with the situations of this case, "The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.'" (*Plessy v. Ferguson*, 1896). He employs an argument from definition which shows that ruling in favor of "separate but equal" goes against the doctrine of personal liberty. That means that such a law would deny an American citizen something to which he is necessarily entitled because of the simple fact that he is a citizen.

Another strong case from definition delivered by Harlan regards the superiority whites mistakenly claim they have over blacks, "The white race deems itself to be the dominant race in this country...But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of

race" (*Plessy v. Ferguson,* 1896). This is perhaps his most compelling argument from definition. Harlan uses the Constitution to prove the principle that all men are equal before the law and cannot be treated otherwise. This is reminiscent of Abraham Lincoln's persistency in his quest prove that blacks were men and not property, "Yet while other political leaders were looking to the law, to American history, and to this or that political contingency, Lincoln looked – as it was already his habit to do – to the center; that is, to the definition of man" (Weaver, 1985). Harlan shares Lincoln's ability to look past present circumstance to the true essence of equality. If two races are inherently equal, as stated in the Thirteenth and Fourteenth Amendments, how could one possibly conceive of treating them differently?

A fifth argument from definition works with the idea of civil freedom, "The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds…We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done." Harlan is utilizing another argument from definition. He again cites the Constitution as well as the hypocrisy of the United States of America to prove his point. America claims that her citizens are equal, but no onlooker is fooled by this façade. Instead, people will see her

duplicity for what it is, which is intrinsic in her actions. The "separate but equal" clause violates the principle of equality, which makes it invalid and hypocritical.

Harlan moves from pure definition back to a hybrid argument: this time, a use of consequence to illustrate a principle, "If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other?... Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?" (*Plessy v. Ferguson*, 1896). This is an argument from consequence. If the government legitimizes one form of discrimination, it will lead to the questioning of all sorts of other related issues, such as separate facilities for different religions. This case could then be used to create an argument from similitude which could condone other inequities. This is by no means a flawless argument: it assumes that one decision will lead to similar discriminations happening in cases of religion or nationality. However, Harlan again is employing an apparently weak argument to further another: in this case, a rebuttal to the majority opinion. In the majority opinion, Brown claims that such distinctions will not follow from this case because of their unreasonableness, "every exercise of police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not the annoyance or oppression of a particular class" (*Plessy v. Ferguson*, 1896). Harlan responds by pointing out their violation of principle, "Is it meant that the determination of questions of legislative power depends upon the

inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment" (*Plessy v. Ferguson*, 1896). That is, how can discrimination against one group of citizens at one point be condoned simply because of circumstance? It is inherently wrong to discriminate against certain groups within an equal citizenry, no matter what the conditions. The first part of the argument was designed to demonstrate that if any type of discrimination is allowed, and the principle of equality is violated, a plethora of negative consequences would likely arise.

As previously mentioned, Weaver holds Abraham Lincoln in the highest esteem for his method of argumentation. Lincoln consistently crafted his arguments from definition – despite arguments strongly opposed to his point of view. Weaver praised Lincoln for never straying from this stance, "In sum, we see that Lincoln could never be dislodged from his position that there is one genus of human beings...he learned that it is better to base an argument upon one incontrovertible point than to try to make an impressive case through a whole array of points...for Burke circumstance was often a deciding factor, for Lincoln it was never more than a retarding factor" (Weaver, 1985). Justice Harlan seems to follow in Lincoln's footsteps. Rather than creating a web of reasons for opposing the "separate but equal" case, he simply steadfastly claims that all men are equal as citizens and that race is not a valid reason for separating them. One principle carries far more weight than a slew of circumstances and precedent. His eloquent presentation of principle completely debunks Brown's majority opinion, which is largely based on precedent (drawn from circumstance) and questionable definitions. It

is no surprise that the discriminatory nature of Brown's opinion is unanimously overturned in *Brown v. Board of Education.*

As one would come to expect of a unanimous decision, *Brown v. Board of Education* has a well-reasoned and concise majority opinion. Despite its brevity, Chief Justice Warren employs five discrete arguments: one from consequence, one from similitude, and three from definition. It is not entirely surprising that a case which undoes educational segregation is dominated by arguments from definition. The principle of equality and the spirit of the Fourteenth Amendment play important roles in Warren's case.

In his sole argument from similitude, Warren cites the case *Strauder v. West Virginia,* which ruled that distinctions implying inferiority of a race were unconstitutional, "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, --the right to exemption from unfriendly legislation against them distinctively as colored, -- exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.'" (*Brown v. Board of Education,* 1954). Warren uses a precedent to argue his point. However, it is stronger than a simple argument from similitude because the original opinion is based on definition. The principle upon which this argument is based is that of equality: the Fourteenth Amendment was intended to promote equality, not only to disallow discrimination. Therefore, interpreting it to mean that positively enforcing equality is wrong would be against the general spirit – or principle of the amendment.

Therefore, even though this is technically an argument from similitude, it is based on a clearly defined principle, which makes it a strong case.

Warren follows his strong similitude with three solid arguments from definition. In the first, he determines that concrete factors cannot determine the success or failure of the "separate but equal" system dictated in *Plessy*, "In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education" (*Brown v. Board of Education*, 1954). Warren dismisses previous arguments based upon circumstance. Even though the situations of white and black schools may appear to be similar if one examines what Warren refers to as "tangible factors", there is an intrinsic inequality below the surface. Because any sort of disparity between the two races breaks with the spirit of the Fourteenth Amendment, Warren dispenses with the prior reasoning that separate is equal, and argues here through definition that it simply is not. Weaver would likely praise Warren for his ability to take into account many layers of this definition, and take perspective, "Definition must see the thing in relation to other things, as that relation is expressible through substance, magnitude, kind, cause, effect, and other particularities" (Weaver, 1985). Hence, it is an argument from principle grounded in perspective.

In a second argument from definition, Warren outlines the principle of all people's right to a solid educational foundation, which is encompassed in the definition

of citizenship. He opines, "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." (*Brown v. Board of Education*, 1954). In order for a citizen to be able to participate fully in society, according to Warren, he needs to have a solid educational base. It follows that it is not possible for him to contribute and be considered an equal if he does not have access to the same educational resources as do his peers. Therefore, Warren contends, unequal accommodations are a violation of the right of blacks to exist on a level playing field with their fellow citizens. This is an argument from definition, because without this equal opportunity for citizenship, equality in American society is unlikely to be possible. It is effective in demonstrating how the "separate but equal" doctrine negatively affects blacks, which is literally what the Fourteenth Amendment prohibits, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law" (Fourteenth Amendment). Thus, the argument is effectively set in the definition laid out by the Fourteenth Amendment.

Warren's third argument from definition can be located in his conclusion, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the

plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment" (*Brown v. Board of Education*, 1954). This is perhaps the most clear-cut example of an argument from definition in the case. Warren summarizes the entire case in two sentences condemning *Plessy*'s ruling of "separate but equal" by demonstrating that it is impossible for the educational system to be segregated and equal at the same time.

Finally, Warren employs one argument from consequence. Although these are generally rather weak cases, this one exemplifies a true problem in the "separate but equal" doctrine, "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (*Brown v. Board of Education*, 1954). This is a cause and effect argument. Here the action, separating blacks and whites, leads to a negative consequence, creating a feeling of inferiority within the black race. This is a negative byproduct of the "separate but equal" clause, which brings it into direct violation of the Fourteenth Amendment, which literally opposes negative distinctions between races. Although this is not Warren's strongest argument according to Weaver, it does convey the unconstitutionality of the "separate but equal" clause through a persuasive appeal to pathos. Additionally, it is a direct response to an argument by Justice Brown in the majority opinion of *Plessy*, where he argues that such a stigma is created in the minds of blacks and is not part of reality. Therefore it seems necessary for *Brown* to address this issue, since it was a major part of the argument in the case it overturns.

Chief Justice Warren's prevailing use of argument from definition to overturn the legalized segregation set forth by *Plessy* lends itself to be extended upon and used as precedent for other cases involving segregation in other realms of life. A case of such importance to be well-reasoned for this purpose is essential.

After *Brown*, a new wave of cases arise over an attempt by universities to make up for past discrimination through programs which give minority candidates an advantage in admission based on their skin color. While many view this as an effective method of "righting" past wrongs, others perceive it as reverse discrimination. The examination of arguments employed by the justices in this area becomes increasingly important as American society grows increasingly polarized on this policy. Two landmark cases in Affirmative Action jurisprudence are *Regents of the University of California v. Bakke* and *Grutter v. Bollinger*.

This decision of *Regents of the University of California v. Bakke* is based on circumstance. For most of the majority opinion, Justice Powell articulates why discriminating by race is outlawed in the Fourteenth Amendment. Despite this, he maintains that achieving a diverse learning environment is within the goals allowed by a university. This means that admissions offices can give privilege to certain factors, but may not use a quota system which preferences any race over another. The argumentation style employed in the majority opinion seems counterintuitive: Powell begins with a hybrid argument shifting from definition to circumstance, followed by three arguments from definition which serve to undermine his final conclusion, and then three arguments from circumstance which summarize his ultimate decision. His use of principle as

opposing evidence to his conclusion based on circumstance, however, seems to backfire and rather than strengthen his final conclusion, challenges it.

Justice Powell begins with a straightforward argument from definition, "The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: 'No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual'... The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal" (*Regents of the University of California v. Bakke*, 1978). Powell states that the Constitution dictates that all individuals are to be treated equally, all the time. However, Powell soon shifts to an argument from circumstance. He moves from this clear case to cite examples of the Court making "exceptions" to this rule, and ultimately states that while such distinctions are "inherently suspect" (*Regents of the University of California v. Bakke*, 1978), they can be considered Constitutional if they survive "the most exacting judicial examination" (*Regents of the University of California v. Bakke*, 1978). Therefore, he allows circumstance to trump the principle of equality that he has already outlined. Weaver cites a strikingly similar position taken by Edmund Burke, "What a number of faults have led to this multitude of misfortunes, and almost all from this one source – that of considering certain general maxims, without attending to circumstances, to times, to places, to conjectures, and to actors! If we do not attend scrupulously to all of these, the medicine of today becomes the poison of tomorrow!" (*as cited in* Weaver, 1985). Burke argues that despite the existence of definitions and

principles, one should make decisions based upon circumstance. Weaver condemns this argument as, "the least philosophical of all the sources of argument, since it theoretically stops at the level of perception of fact" (Weaver, 1985). Privileging current conditions over timeless principles is problematic in that it only considers short-term solutions. A resolution that may be effective "here and now" is unlikely to remain effective in the long-term because it only addresses the present situation. According to Weaver, to claim that a circumstance should be considered before a definition is reprehensible and weak.

The next three arguments utilized by Justice Powell are principle-based: they all demonstrate the unconstitutionality of discrimination based on ethnic origin. However, it seems that Powell is using them as a sort of inoculation to his final conclusion, which rebels against the definition he exhumes here. For the sake of his ultimate conclusion, however, the following four arguments are far stronger and more solidly constructed.

Powell employs an argument from definition to demonstrate that the Fourteenth Amendment was intended to ensure that all persons were treated equally under the law: "Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority,' Slaughter-House Cases, supra, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude... And that legislation was specifically broadened in 1870 to ensure that 'all persons,' not merely 'citizens,' would enjoy equal rights under the law. See Runyon v. McCrary, 427 U.S. 160, 192-202 (1976) (WHITE, J., dissenting)." (*Regents of the University of California v. Bakke*, 1978). The case is well-assembled and convincing. Despite the eloquence of this argument, it does nothing to further Powell's final conclusion, that some forms of

discrimination are Constitutional as long as they are examined under strict scrutiny. He is making the case that all discrimination is unconstitutional because the Fourteenth Amendment abolishes it.

A similarly strong argument is used to illustrate the inherent inequality in the idea of preference regarding ethnicities in the eyes of the Constitution, "Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest... Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups...By hitching the meaning of the Equal Protection Clause to these transitory considerations, 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" (*Regents of the University of California v. Bakke*, 1978). Powell uses an argument from definition to show that awarding preference to an individual based solely on his ethnic group is a violation of the Equal Protection Clause. He poses important moral questions, such as accounting for the "debt" owed to those groups who have historically experienced discrimination. He denies the validity of these claims by demonstrating that the Constitution does not succumb to circumstance. This is well-executed, yet ironically diametrically opposed to his conclusion which advocates the elevation of one race over another.

Powell employs a third argument from principle in which he demonstrates that differentiating based on race is by definition discrimination, "Preferring members of any one group for no reason other than race or ethnic origin is *discrimination for its own sake.* This the Constitution forbids. E. g., Loving v. Virginia, supra, at 11; McLaughlin v. Florida, supra, at 196; Brown v. Board of Education, 347 U.S. 483 (1954)...We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations... Thus, the *government has no compelling justification for inflicting such harm*" (*Regents of the University of California v. Bakke*, 1978, emphasis added). This is a third argument from definition wherein Powell seems to be advocating against his final decision: he states that the practice is discriminatory and that the government has no justification for implementing such a program. Regardless of these objections, he sets this controversial policy as "the law of the land" in this majority opinion.

Powell fashions a final argument from definition that runs counter to his ultimate point, "Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions... That is a step we have never approved" (*Regents of the University of California v. Bakke*, 1978). He asserts that the Supreme Court does not condone the punishment of certain individuals for disadvantages experienced by another racial group. Powell is alleging that programs which privilege certain ethnic groups are *not* constitutional because they

force one group to be castigated so another can prosper. Again, this argument from definition is not congruent with Powell's final decision because in the end, he supports a policy opposed to the principles he lays out.

In the final three arguments, Justice Powell employs circumstance to reach his ultimate conclusion: that privileging certain factors in admission to universities promotes a sense of academic diversity, which is in the best interest of the State.

Powell first constructs a hybrid argument which begins with definition, but degenerates into circumstance, "Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission" (*Regents of the University of California v. Bakke*, 1978). Here, Powell attempts to reconcile an apparent clash between the rights represented in the First Amendment, academic freedom, and the Fourteenth, equal protection. In fact, there is no mention of academia in the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (First Amendment, 1791). On the contrary, the Fourteenth Amendment specifically prohibits discrimination against any citizen of the United States of America, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

equal protection of the laws" (Fourteenth Amendment, 1868). Therefore, the dichotomy Powell attempts to establish is invalid: one Amendment specifically disallows discrimination against any individual while the other simply states that freedom of religion, states, right to assemble, and freedom of the press are to remain intact. One must substantially stretch this to include the right of public academic institutions to create diverse learning environments. Powell recognizes the power of arguments from definition and strains to structure his case in such a way as to appear to be following principle.

The next argument is the one which best highlights Powell's supreme dependence on circumstance, "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats... In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, *although not necessarily according them the same weight.* Indeed, the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class" (*Regents of the University of California v. Bakke*, 1978, emphasis added). This is a classic argument from circumstance. Powell contends that certain qualities, race being one of a plethora, may be considered as a kind of "bonus" to one's application. Additionally, the admissions officers may choose to give more weight to some "bonuses" over others. He then concludes that the weight given to particular qualities is also subject to vary based on year and the pool of applicants. This argument is constructed on a

foundation of circumstance, with another floor of circumstance resting on it, and a third balancing atop the latter, which makes for an uneasy structure. Needless to say, this argument is flawed and ineffective, especially when compared to the strength of the preceding cases based upon principle that Powell cites earlier.

Powell concludes with a final argument from circumstance. He goes so far as to deny that Fourteenth Amendment rights are invalid in some cases due to certain State interests, "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S., at 22. Such rights are not absolute... In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed" (*Regents of the University of California v. Bakke*, 1978). Powell affirms the Equal Protection Clause in one breath and abandons it in favor of a potential reward for academia in the next. Perhaps appropriately, this reward is itself based on circumstance: it is certainly possible that the proposed system would not yield the type of diversity the Court hopes it to. That is, among all of the candidates considered for the sixteen seats set aside for "disadvantaged" students (*Regents of the University of California v. Bakke*, 1978) at the Davis Medical School, none of the "large number" of whites who applied for these seats was chosen. This is true despite the fact that the program was ostensibly established to give preference to those who had been "'economically or educationally disadvantaged'" (*Regents of the*

University of California v. Bakke, 1978). Although Powell condemns this system as unconstitutional, he formulates a strikingly similar solution of his own. It seems that the "fatal flaw" in Justice Powell's argument, then, is his reliance on circumstance.

Essentially, Powell claims that even though discrimination based on race is unconstitutional, in certain cases (based on the circumstances) it is not. This closely parallels Weaver's indictment of Edmund Burke, who appeared to stand for certain principles, but instead allowed specific conditions of his time keep him from doing so. Weaver laments the downfall in Burke's argument regarding the thirteen British colonies, "The question then is not what is right or wrong, or what accords with our idea of justice or our scheme of duty; it is, how can we meet the circumstance?... The circumstance becomes the cue of the policy" (Weaver, 1985). That is, instead of concentrating on what is and will always be the true principle at hand, Burke let the current climate dictate his decision. The same applies to Justice Powell in the *Bakke* case: he spends the better part of his decision condemning discrimination, only to embrace it in the end because of the circumstance he identifies as diversity's impact on academia. One may get the sense that a majority opinion the High Court relying heavily on the inoculation of principle, wherein the rhetor explicitly contradicts his own conclusion several times, is a shaky foundation on which to construct a controversial policy. This is especially true in a decision which leads to the legalization of a violation of the principle of equality.

Justice Marshall's dissent in *Regents of the University of California v. Bakke* is a similar, but more radical take on the majority opinion: he agrees that a university should be allowed to consider race in its admissions program, but contrary to the majority opinion does not agree that the University of California's specific admissions program

violates the Constitution. His argument for both cases is planted firmly in circumstance, despite his puzzling belief that they are from definition. The structure of Marshall's dissent is unique in that he spends the majority of it recounting and describing the oppression faced by blacks in America since their arrival, or as Weaver would likely categorize it, the circumstance on which Marshall's dissent is built. Four-fifths of the way through his dissent, Marshall shifts to an argument from similitude, which he uses to contradict his original premise. Finally, he concludes with a return to circumstance.

Justice Marshall provides a meticulous testimony of the oppressive circumstances faced by blacks dating from to their arrival to North America until the present. His case for race-conscious admissions is based almost completely on his depiction of the abhorrent circumstances of blacks in this country throughout history. Marshall begins by graphically describing the arrival of blacks as slaves, "Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights" (*Regents of the University of California v. Bakke*, 1978). After spending ample time discussing this, he moves to the post-emancipation period, "But the long-awaited emancipation...did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of 'laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value'" (*Regents of the University of California v. Bakke*, 1978). Marshall then illustrates the hardships brought about by Jim Crow laws and other discrimination lasting long after the end of the Civil War. Finally, after dedicating half of the dissent to description, he delivers an argument:

"The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro" *(Regents of the University of California v. Bakke*, 1978). Because of the vividly detailed circumstance, blacks do not have equality to whites, and should thus be the beneficiaries of programs designed to elevate them as a race, such as university admissions policies awarding them special advantages earned by their skin color. It appears as though Marshall believes that he is arguing from the principle of equality, because one race has not been treated equally in the past, they should be given the opportunity to be treated equally in the present. This argument may sound compelling, but an examination of who suffers at its hand is important: the particular method of "equality" advocated by Marshall gives blacks an advantage over whites when applying to universities. Is one group being given an advantage over another based solely on skin color rooted in the principle of equality? This does not seem like an argument based on the principle of equality, as Marshall seems to believe. Instead, it appears similar to Weaver categorization of Edmund Burke's case for the North American colonies. He states that Burke's case was "not an argument about rights of definitions... an argument about policy as dictated by circumstances" (Weaver, 1985).

This structure is strikingly similar to that employed by Edmund Burke in proposing a policy for England's relationship with its North American colonies in light of their rebellions: to leave the thirteen in limbo between a sovereign nation and British colonies. He elects this ideology because the alternatives on either side do not seem to have tangible methods of implementations (he concedes that it would be nearly

impossible to indict "a whole people") (Weaver, 1985) and letting the territory go would be a mistake because of the immense benefits it brings to its mother country. Weaver finds fault in this strategy, "The entire first part of his discourse may be described as a depiction of the circumstance which is to be his source of argument" (Weaver, 1985). Burke then illustrates in detail the wonders and benefits of the Colonies and concludes that Britain should "'pardon something to the spirit of liberty'" (Weaver, 1985). This methodology is in line with Marshall's approach in his *Bakke* dissent: a compelling depiction of circumstance masks the lack of principle imbued in the argument (although both men seem to believe that they are arguing from principle). Not surprisingly, Weaver condemns Burke's approach: "The outcome of this disjunctive argument is then a measure to accommodate a circumstance" (Weaver, 1985). This characterization is also true of Marshall's dissent: giving special consideration to race in university admissions programs is meant to make up for the oppression experienced by blacks at the hands of whites in American history. Marshall's end hope is that giving blacks an advantage in university admissions will close the gap he depicted between the two races: "It is because of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America...we must be willing to take steps to open these doors" (*Regents of the University of California v. Bakke*, 1978). Although this statement may on the surface appear to be advocating the principle equality, it is anchored sturdily in the circumstance of oppression, and in reality supports *in*equality by elevating one race at the expense of another.

Near the end of the dissent, Marshall dedicates two pages to arguments from similitude in the form of precedent. He examines two previous cases dealing with legally privileging one group over another, and uses them to strengthen his argument that race-conscious university admissions policies are not unconstitutional. In evaluating a precedent, Weaver emphasizes the necessity to "isolate the precept" contained in the argument (Weaver, 1985). Articulating the basis of the argument being used as precedent is necessary both to determine its own strength and to show its applicability to the contemporary argument. In one of the cases Marshall cites, the end product is that one racial group is compensated for historical discrimination at the cost of another group, the other case, conversely, equalizes two groups.

In the first case, taking place only one year before the *Bakke* case, the Supreme Court gave blacks and Puerto Ricans additional electoral power at the expense of Hasidic Jews, "In United Jewish Organizations v. Carey, 430 U.S. 144 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in UJO to sanction the remedial use of a racial classification even though it disadvantaged otherwise 'innocent' individuals" (*Regents of the University of California v. Bakke*, 1978). Marshall establishes that this case is relevant precedent by drawing the parallel between Hasidic Jews in this case and Caucasians in the *Bakke* case. He also grants that those who suffered a loss of strength (Hasidic Jews) were innocent victims. The problem with using this precedent to argue for Marshall's side in the *Bakke* case is that the original case is not a strong argument. *UJO v. Carey* was not based on arguments from principle,

unless that principle was of inequality: two racial groups were empowered while a third lost power and influence. Therefore, because the original argument (*UJO v. Carey*) was a weak argument, it fails to strengthen Marshall's case.

Justice Marshall acknowledges another recent case as precedent to his arguments in *Bakke*. He cites, "In *Califano v. Webster*, 430 U.S. 313 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was 'the permissible one of redressing our society's longstanding disparate treatment of women.' Id., at 317, quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 (1977) (plurality opinion). We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications" (*Regents of the University of California v. Bakke*, 1978). This case is not sufficiently applicable to the *Bakke* case because no group is gaining something at the expense of another: working women were granted equal rights to those of working men, at no expense to the working men. The circumstance of past discrimination was a factor in the decision, but the decision was based on the principle of equality. The strength of the argument, however, is irrelevant because it is not sufficiently comparable to the *Bakke* case.

Finally, Marshall attempts to use the two aforementioned cases to argue that race-conscious admissions policies should exist regardless of the experience (or lack thereof) of those individuals receiving the privileges with discrimination, "the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims

of that discrimination" (*Regents of the University of California v. Bakke*, 1978). Not only, he states, is a race-conscious university admission policy constitutional, but it also does not matter if the individuals involved *actually experienced* any sort of discrimination. This last argument is based partly on the aforementioned precedent (similitude) and partly on a skewed principle of equality: Marshall contradicts his entire argument from circumstance by establishing that even if one does not experience any sort of discrimination during his whole life he should still be entitled to an advantage over someone else solely because of his race. The conclusion is even more contradictory from the opposite perspective: someone who has had the same comfortable, discrimination-free life as someone else who is white or Asian will be given an advantage over the latter because of his skin color. Marshall uses inadequate precedent to support his circumstantial argument (based on the premise of discrimination) which he later contradicts. The *Bakke* dissent is initially weak and then self-contradictory, rendering it feeble by Weaver's standards.

In both the majority and dissent of *Bakke*, the justices rely heavily on circumstance. This is likely because in this complex case, both sides agree on a large part of the decision: that the consideration of race in university admissions is constitutional. The authors of both opinions build their cases using predominantly circumstance, and later contradict themselves. Powell spends too long constructing a strong inoculating argument built sturdily on principle, which makes his own circumstantial argument appear even weaker in comparison. Marshall spends fourth-fifths of his dissent illustrating the conditions he feels justify giving blacks advantages over other racial groups, and then claims that actual discrimination experience should not have any

bearing on one's access to the advantages allegedly derived from past discrimination. Neither side of this case seems entirely convinced of his own argument, which is evident in the lack of persuasiveness of both opinions.

The majority opinion in Grutter vs. Bollinger, crafted by Justice O'Connor, is made up of a combination of arguments from circumstance (three) and similitude (used only once). As previously mentioned, such arguments are not among Weaver's most highly respected. He describes the argument from circumstance as one that, "merely reads the circumstances—the 'facts standing around' – and accepts them as coercive, or allows them to dictate the decision" (Weaver, 1985). Needless to say, this is not generally found to be a sturdy argument. The case based on similitude is certainly a more powerful argument than the latter; however O'Connor only employs it once in her lengthy decision. Justice O'Connor's majority decision is exhaustive, almost five times longer than the dissenting opinion. Of her many arguments, from I have extracted the salient four. Three out of these four arguments are based on circumstance, while one is from similitude. Therefore, circumstance is her preferred methodology in this opinion.

Justice O'Connor's major premise is that the use of race in determining admissions is constitutional. She writes, "student body diversity is a compelling state interest that can justify the use of race in university admissions" (*Grutter v. Bollinger*, 2003). This is based on an earlier precedent which stated that the, "government may treat people differently because of their race only for the most compelling reasons" (*Adarand Constructors, Inc. v. Pena*, 1995). O'Connor is making the case that this particular use of different treatment based on ethnicity is compelling enough to disregard the Constitution. This opinion seems to hinge on circumstance based solely on her premise. She concedes

that this contradicts many aspects of the United States' existing body of law. For example, she cites the Equal Protection Clause (which states that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws" (Equal Protection Clause, 1868). The basis for the decision relies on circumstance. In contrast, an argument from definition would likely declare that constitutionally, any form of discrimination is against the law, period. O'Connor prefers more recent interpretations of the text Equal Protection Clause, "'a core purpose of the fourteenth amendment was to do away with all governmentally imposed discrimination based on race'. Accordingly, race-conscious admissions polices must be limited in time... racial classifications, however compelling their goals, are *potentially so dangerous* that they may be employed no more broadly than the interest demands. *Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle*" (*Grutter v. Bollinger*, 2003, emphasis added). An argument from definition would disallow such a statement suggesting that something might be "right" for a limited time. O'Connor privileges circumstance in expressing her opinion that the current plight of certain minority groups supersedes the Constitution. A third time, O'Connor acknowledges that this situation technically breaks with the Constitution. If the Law School's goal was to admit a certain percentage of minorities, O'Conner claims that it would be "patently unconstitutional" (*Grutter v. Bollinger*, 2003). She maintains that because the Law School insists that such actions result in a 'better learning environment' (as subjective as it is speculative) that they are somehow constitutional. It appears that O'Connor is enabling circumstance to outweigh the principle.

Weaver inveighs against such arguments. He cautions, "whoever says he is going to give equal consideration to circumstance and to ideals (or principles) almost inevitably finds himself following circumstances while preserving a mere decorous respect for ideals" (Weaver, 1985). It seems that O'Connor has fallen into such a trap. Later in her decision, O'Connor again confesses that this case is an exception to the Constitution. She notes, "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context" (*Grutter v. Bollinger*, 2003). Apparently, sometimes using race as a deciding factor is constitutional, and other times it is not, suggesting abandonment of principle to a degree. This is similar to a tactic utilized by Edmund Burke. In order to disguise the fact that he is strongly relying on the situation, Burke spends the majority of the document illustrating the current goings-on. Weaver comments, "The entire first part of his discourse may be described as a depiction of the circumstance which is to be the source of his argument… the unavoidable effect of this passage is to impress on his hearers the size and resources of this portion of the Empire" (Weaver, 1985). Burke was attempting to cloak his circumstantial argument as an all-encompassing principle. He then attempted to argue that circumstance should outweigh principle. Weaver condemns this notion: "The question then is not what is right or wrong, or what accords with our idea of justice or our scheme of duty; it is, how can we meet this circumstance?" (*As cited in* Weaver, 1985). Burke's argument's weakness is exposed by its dependence on the situation; it would not likely have lasted long if accepted because the conditions would inevitably have shifted. It is strikingly similar to Justice O'Connor's approach in this

case. She does not grapple with the fact that the constitution itself outlaws discrimination in any form, but instead focuses on the situation and its temporary problems.

O'Connor's next argument regards the appropriateness of the current system used by the Law School to ensure diversity, which involves attempting to gain a "critical mass" of students from certain minority groups. The object, the institution claims, is to have a diverse enough class so that each minority does not feel isolated or that they must speak on behalf of their race. The Law School also hopes to expel racial stereotypes in this manner. Their current method of obtaining such a class is to closely follow applicant's racial category and admit enough of each minority so as to reach the aforementioned "critical mass" (*Grutter v. Bollinger*, 2003). O'Connor describes this strategy, "The Law School's admission policy is 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, *although not necessarily according to the same weight*'" (*Grutter v. Bollinger*, 2003). The institution is admitting that it gives preference to some elements of diversity over others. Both O'Connor and the Law School also avoid a quantitative definition of this "critical mass", "the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce" (*Grutter v. Bollinger*, 2003). This seems to be problematic in both diagnosing any discrepancies as well as attempting to remedy any if found. The Law School also references their "daily reports" which they examine to "keep track of the racial and ethnic composition of the class" (*Grutter v. Bollinger*, 2003). This leads one to believe that the Law School gives preference to individuals belonging to minority groups. Other groups allege that there are other, more fair ways of obtaining a diverse class,

including lotteries or percentage plans. O'Connor maintains that the Law School's practice is acceptable, despite evidence that it is discriminatory. Weaver would likely describe this as, "not an argument about rights or definitions... it is an argument about policy as dictated by circumstances" (Weaver, 1985). O'Connor has disregarded the definition of discrimination spelled out in the Constitution in favor of certain situational issues and has proceeded to overlook more principled solutions (one that is fair to all citizens) to the problem.

A third major argument set forward by Justice O'Connor is what at first appears to be an argument from definition, but later deteriorates into an argument from circumstance. She reiterates a precedent decision that "all racial classifications imposed by government "'must be analyzed by a reviewing court under strict scrutiny'" (*Grutter v. Bollinger*, 2003). Despite her claims of desire to adhere to this condition set forth by the Court in the past, she instead falls victim to circumstance. Rather than examining and keeping track of such a process, O'Connor puts this paramount decision in the hands of the Law School, "Keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits" (*Grutter v. Bollinger*, 2003). There is at least the hint of "fox in charge of the henhouse" here. O'Connor has betrayed her own premise, which is already based on circumstance. Weaver depicts the consequences of such an attitude, "Whereas the argument from consequence attempts a forecast of results, the argument from circumstance attempts only an estimate of current conditions of pressures. By making present circumstance the overbearing consideration, it keeps from sight even the nexus of cause and effect" (Weaver, 1985). It seems that O'Connor is avoiding an examination of what has caused

this inequality as well as what will end it, which, if studied would possibly uncover a more substantial and meaningful solution to the problem. Instead, she brushes aside these factors by acknowledging that they exist and that someday they will hopefully dissipate, and hopes for the best by clinging to selected precedent.

Justice O'Connor's final main argument is one from similitude. Justice O'Connor likens the system currently in place in the Law School to that used by the United States military. She cites statement by a retired member of the armed forces, " 'the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academics and the ROTC used limited race-conscious recruiting and admissions policies'" (*Grutter v. Bollinger*, 2003). Thus, she is attempting to justify a circumstance with similitude. By comparing her desired outcome in this situation, that is racial discrimination in universities, to racial quotas in the military, she is striving to demonstrate that other institutions use similar systems (even if they are not endorsed by the Constitution), and thus that another group's doing it makes it supported by principle.

The case for the majority opinion, written by Justice O'Connor, is characterized primarily by arguments from circumstance. This method is not highly regarded by Weaver's framework. He describes the rhetor as one who, "merely reads the circumstances—the 'facts standing around' – and accepts them as coercive, or allows them to dictate the decision" (Weaver, 1985). Because of this lack of perspective, most of these types of arguments are doomed to eventual failure. It is unlikely that O'Connor's opinion, with its lack of principle, as well as tangible landmarks for success or quantitive considerations, will be an exception to this.

The dissenting opinion in *Grutter* is one crafted from definition. Justice Rehnquist defines discrimination in detail and demonstrates the ways in which both the Law School's argument and that of the majority opinion are flawed in a concise dissent. He makes two simple arguments, the second of which is based on the definition set out in the first: such a process is unconstitutional in itself, which leads to the second premise, that any standard that would potentially exist needs to be applied exactly evenly to everyone. Since Rehnquist bases his case on the principle that inequality is unconstitutional, he is arguing in accord with Weaver's counsel.

Rehnquist approaches the issue of Affirmative Action much like Abraham Lincoln approached the definition of a nation in his Second Message to Congress in 1862. Weaver describes how Lincoln first tackled the defining of the concept of a nation, upon which his speech was based. Rehnquist did much the same in determining if Affirmative Action was constitutional, writing: "We have said that when it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that; it is not merely a question of 'fit' between ends and means. Here the means actually used are forbidden by the Equal Protection Clause of the Constitution" (*Grutter v. Bollinger*, 2003). Believing that discriminating on the basis of race violates constitutional law, he grounds his dissent on the fundamental premise that all men are created equal. If all men are created equal, regardless of race, then all should have equal opportunities, especially in regards to higher education. Because the Constitution directly states this premise and by amendments fortifies it, the conclusion must take this into account. In the process currently in use by the Law School, however, not everyone has an equal opportunity to be admitted because those

who are members of certain minority groups are given an advantage. Rehnquist writes, "Respondents themselves emphasize that the number of underrepresented minority students admitted to the Law School would be significantly smaller if the race of each applicant were not considered" (*Grutter v. Bollinger*, 2003). Therefore, not every person has an equal chance of being selected as a student in the Law School because racial issues lead to an unleveled playing field. That is, if two people apply, one an African-American and one a Caucasian, with the same qualifying LSAT scores and GPAs, the African-American will more likely than not be chosen over the Caucasian because of her race. In the name of reestablishing balance due to past imbalance (a kind of two wrongs achieving right) a protected minority with a lower GPA and/or LSAT score applying; he too is more likely to be accepted than a Caucasian with a higher score. Rejecting the idea that this is just, Rehnquist defines the practice as inherently unconstitutional.

As a next step, Lincoln delves deeper into his argument and explains the difference between his principle and other endeavors at countering it. Similarly, Rehnquist examines how the Law School rationalizes its attempts to obtain a "critical mass" of each minority group. To do this, he reexamines the case from the institution's standpoint to evaluate the definition of "critical mass" it sets out for itself by inspecting the actual numbers of minority admission. He discovers that the standard to which the Law School holds itself, to admit enough of each minority group so that members do not feel isolated and stereotypes are destroyed, is not the same for every minority group. He cites exhaustive statistics which demonstrate this disparity. It is not an equal standard, even according to the definition provided by the Law School. Rehnquist expostulates, "In order for this pattern of admission to be consistent with the Law School's explanation

of 'critical mass', one would have to believe that the objectives of 'critical mass' offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities" (*Grutter v. Bollinger*, 2003). Like Lincoln, Rehnquist examines the counterarguments and disproves them according to principle. Therefore, Rehnquist demonstrates through an argument of definition that the Law School's practice is flawed. This perspective is consistent with a characteristic Weaver sees as inherent in arguments from definition: "Definition must see the thing in relation to other things" (Weaver, 1985). This method helps Rehnquist cast a shadow of doubt over the Law School's own definition of their practice.

Along with his disapproval of the current practice at the Law School, Rehnquist is distrustful of the Court's proposed solution, in part because of a perceived half-hearted desire to find permanent or temporary solutions to the issue of Affirmative Action. Justice O'Connor lays out a vague end date for the Affirmative Action program. Rehnquist claims that this carelessness further weakens her decisions, "I believe that the Law School's program fails strict scrutiny because it is devoid of any reasonable precise time limit on the Law School's use of race in admissions" (*Grutter v. Bollinger*, 2003). Thus, Rehnquist condemns not only the solution, but also the perceived permanence of it. Rehnquist is as forward-looking as he is set in principle: his recognition that a weak, circumstantial solution cannot possibly withstand the test of time is markedly similar to another example Weaver cites of Lincoln. In his "House Divided" speech, Lincoln also pointed out an inevitable consequence for weak compromises to fall through, saying, "'A house divided against itself cannot stand. I believe this government cannot endure

permanently half slave and half free. I do not expect the Union to be dissolved – I do not expect the house to fall – but I do expect it will cease to be divided. It will become all one thing or all the other'" (*As cited in* Weaver, 1985). Lincoln proved correct in his prediction that the country will be uniform, one way or the other. Rehnquist demonstrates the same forward-looking ability and perspective, which will likely lead to his decision gaining acceptance in the future. Like Lincoln, Rehnquist framed the *genus*, differentiated the aspects of the arguments, and made a solid case based on definition. His ability to look to the future from a principled perspective will likely lead his opinion to influence future decisions, or at the very least make his dissent harder to oppose.

Justice O'Connor's opinion is built on circumstance. She allows for the continuation of a practice that she herself admits contradicts the existing body of law (including the Fourteenth Amendment and the Equal Protection Clause) and is "dangerous". Additionally, her allowance of the universities to police themselves on this issue demonstrates a causal attitude toward the issue, despite her cited precedent stating that any such program must be controlled by the "strict scrutiny" of a review court (*Grutter v. Bollinger*, 2003). Finally, her lack of quantitive guidelines – both for concrete landmarks of "success" as well as equality among "critical masses" seem to suggest a departure from the arguments of even cause-and-effect and precedent!

In stark contrast is Justice Rehnquist's opinion, which is deeply rooted in principle. Weaver would likely cite Rehnquist's choice of such a succinct, yet powerful argument as a step in the right direction. Weaver posits: "it is better to base an argument upon one incontrovertible point than to try to make an impressive case through a whole array of points" (Weaver, 1985). He refutes O'Connor's vague yet lengthy list of

circumstantial assertions with depth of perspective and the principle of equality. Additionally, he counters O'Connor's glossing over of detail with concrete evidence of the discriminatory nature of the Law School's "critical mass" policy. Although the circumstantial argument trumped the one from principle in this particular case, it does not seem that this will be long-term representation of the future. The majority decision is flawed and riddled with contradictions and oversights.

Conclusion

In assessing the meaning of the argumentation and effects of these five cases, it is important to determine each case's contribution to the next phase in decision making. For example, the *Dred Scott* decision was overturned shortly thereafter due to the Civil War. According to Weaver's categorization, the majority opinion was argued weakly, based strongly on precedent without a grounding in principle. Even though the circumstance at the time played a large role in the majority decision, the circumstance was on the cusp of change – as it often is. The dissenting opinion by Justice Curtis was solidly based in principle, a principle which would soon be realized through the Civil War.

The majority in *Plessy v. Ferguson* was similarly flawed, as it rested heavily on unrelated precedent. Justice Harlan utilized five arguments from definition, an especially daring feat during the era in which he lived. This is reminiscent of Weaver's admiration for Lincoln, "It was as if he projected a view in which history was the duration, the world the stage, and himself a transitory actor upon it" (Weaver, 1985). Although his case was

only the dissent in this instance, it would later become the majority view of our country. The shaky majority opinion in this case was later overturned unanimously. This transition, however, did not happen overnight: it would be another fifty-eight years before the Court would reposition itself in line with Harlan. Perhaps this trend is what leads many to see those like Harlan and Lincoln as thinkers ahead of their times.

Brown v. Board of Education was an important case as it was responding to the overreach of *Plessy*, that is, trying to apply the "separate but equal" doctrine from a case regarding railroad cars to education. Chief Justice Warren articulated this misunderstanding in relating it to other factors, such as the inevitable psychological damage wreaked on the black children and their lower quality of education. This sense of perspective is paramount to solid arguments. Weaver claims, "To define is to assume perspective; that is the method of definition" (Weaver, 1985). Therefore, the argumentation used in *Brown* was successful in its transcendence of circumstance and yet ability to take into account point of view. It is not surprising, then, that such a powerful argument was something upon which the entire Court could agree.

Regents of the University of California v. Bakke and *Grutter v. Bollinger* represent a regrettable trope in argumentation style; whereas *Brown* seemed to signify a turn toward arguments based from principle, these two cases brought a backlash of circumstance. That discrimination can be outlawed in our Constitution but somehow approved in certain scenarios almost assures the cropping up of more scenarios that will reduce the decision to farce. One who enacts arguments as such often does so, it seems, with a desire to earn popular support for both their arguments and themselves. Ironically, in the long-term, the circumstantial arguer may find this choice draws substantial ridicule.

How long will it take for the proposed solution to come into effect, and how will we know when it has? O'Connor never gives an explicit deadline in *Grutter*, only a rough estimate of 25 years time. Will Affirmative Actions programs immediately cease or will there have to be another lengthy adjustment period? The inconsistencies appear endless. Inevitably, a similar case will resurface in the near future in hope of a solution which can provide longevity and uniformity. This of course, could only result from an argument from the very essence of the idea of equality itself.

Another illuminating conclusion in Weaver's book is that the argument most employed by an individual is the best judge of the arguer's character. He states: "the rhetorical content of the major premise which the speaker habitually uses is the key to his primary view of existence" (Weaver, 1985). If this is true, we can gain a breadth of knowledge about a person by examining their arguments. Those who argue primarily from circumstance, such as Justice Powell, Justice Marshall, and Justice O'Connor, are concerned primarily with the 'here and now' of life rather than philosophical principles. Weaver describes this position (and those who hold it) as: "defined by other positions because it will not conceive ultimate goals, and it will not display on occasion a sovereign contempt for circumstances... trusting more to safety and to present success than to imagination and dramatic boldness of principle" (Weaver, 1985). The problem with a person of such character upholding constitutional law, is that law is not intended for circumstances that may or may not be convenient, but rather consistent principles.

In contrast stand Justice Curtis, Justice Harlan, Justice Warren and Justice Rehnquist, who represent the arguer from definition. Weaver describes this person as, "one who sees the universe as a paradigm of essences, of which the phenomenology of

the world is a sort of continuing approximation...he sees it [the world] as a set of definitions which are struggling to get themselves defined in the real world" (Weaver, 1985). One with an ability to connect abstract definitions to tangible situations is the type of person needed to make paramount decisions for the United States of America. Law in the hands of one with an ability to view essences and to connect the abstract to the tangible in defining the categories will make a constitution robust and reliably resistant to fashionable approaches that like affirmative action ostensibly intended to redress inequality. They have the appearance of fairness but in practice they evade fairness and contradict stated law.

Alas, it seems that we are back to square one, attempting to combat arguments from circumstance. Hopefully steadfast, great thinkers such as Curtis, Harlan, Warren, and Rehnquist will come to the forefront and rescue us from the influence of these unfortunately pervasive weak arguments. Lincoln was able to overcome the immense power granted to circumstance in his day, which should give us hope that principle will be able to reclaim its high status in today's society. Weaver praises him: "Lincoln knew the type of argument he had to oppose, and he correctly gauged its force. It was the argument from circumstance, which he treated as such argument requires to be treated. 'Let us turn slavery away from its claims of 'moral right' back upon its existing legal rights and its argument of 'necessity'. He did not deny the 'necessity'; he regarded it as something that could be taken care of in course of time" (Weaver, 1985).

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