This article contributes to the small but growing legal literature on social movements and constitutional culture. I use the widespread public mobilization that occurred around *Grutter* and *Gratz v. Bollinger* as a point of departure for my analysis. These cases are apt for such a discussion because they generated scores of *amicus curiae* briefs, spawned numerous public opinion polls—and most importantly for this analysis—featured a group of intervenors styling itself a “mass movement” for social justice. Taking an interdisciplinary approach, I consider the *Grutter* intervenors’ experience in light of nineteenth and twentieth century history and the social science and legal literature on mass movements. In contrast to the reigning assumption in the legal literature, I conclude that social movements and the law are fundamentally in tension. The legal literature not only assumes that the two are compatible, but also that rights talk is especially inspirational to and efficacious for social movements. In advancing this view, constitutional scholars overlook an important distinction—namely, the difference between the definitional and inspirational roles that law-in-the-courts can occupy in protest movements. Social movements may profitably use rights talk to inspire political mobilization, although with less success than legal mobilization theorists assume. But social movements that make rights talks definitional risk undermining their insurgent role in the political process and thus losing their agenda-setting ability. Viewed within this framework, the *Grutter* “mass movement” fell short of being a social movement capable of having a significant impact on the constitutional order. Instead, the intervenors engaged in a single-issue political and legal reform campaign. This campaign achieved only a moderate degree of success, providing additional evidence for scholarly skepticism of litigation’s ability to directly and fundamentally transform society.
Introduction

Supreme Court opinions are forms of public discourse that both shape and reflect national debates about controversial subjects, including race matters. For this reason, identifying the voices that are heard in legal discourses about race, listening to their stories, and connecting them to themes in the Court’s equal protection jurisprudence can be illuminating. This exercise can tell us much about both our political and constitutional cultures.

*Grutter*1 and *Gratz v. Bollinger*, 2 the University of Michigan affirmative action cases, underscore the point. Robert Post’s characterization of the dynamic between the legal and political cultures in the Michigan decisions defines the dynamic well. “Constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.”3 Post notes, for example, that the “beliefs and values of non-judicial actors” heavily influenced the Court’s result in *Grutter*.4 Surely, Post’s insights are correct.

This Article expands on the observation that constitutional law and culture are mutually reinforcing by exploring questions concerning the nature and consequences of this dialectic. Which non-judicial actors’ beliefs and values affected the Court? How are their values reflected in the Court’s opinions? What does the dialectical process by which cultural norms affect constitutional norms suggest about the relationship between law and democracy? These are big

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1 *Grutter* endorsed the consideration of an applicant’s race in university admissions in order to admit the “critical mass” of minority students necessary to achieve the educational benefits that flow from a diverse student body--provided that each applicant is subject to an individualized assessment of qualifications. *Grutter v. Bollinger*, 539 U.S. 306, 326-326-342 (2003). *Grutter* (and *Gratz*) reaffirmed *University of California v. Bakke*, 438 U.S. 265, 311-15 (1978) (holding that race may be used to further the compelling state interest of diversity in higher education, provided universities do not rely on racial quotas).
2 In *Gratz*, the Court found unconstitutional an admissions policy in which minority applicants automatically were awarded bonus points because of their race. *Gratz v. Bollinger*, 539 U.S. 244, 274-275 (2003).
3 Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003); see generally PAUL KAHN, THE CULTURAL STUDY OF LAW (1999)(arguing that law is a “political experience” and “socially constructed world” whose constitutive elements should be analyzed for what they reveal about citizens’ understanding of time, space, community, and authority and how they illuminate the values that are realized in that order).
4 Post, *supra* note 3, at 8.
questions, and this Article does not pretend to address all of them completely. Here, I begin a conversation about the recent affirmative action cases that uses such questions as points of departure for analyzing *Grutter* and *Gratz* from socio-political and cultural perspectives, and considering, in particular, what the cases suggest about how law and social movements interact.  

*Grutter* and *Gratz* are excellent texts to consider from this broad perspective because the cases so clearly bear society’s imprint. The Michigan cases inspired a public mobilization of tremendous scope. The mobilization involved thousands of individuals, groups, and institutions from every important sector of public and private life. The cases generated scores of *amicus curiae* briefs, spawned numerous opinion polls measuring Americans’ perspectives on race conscious university admissions, and featured a group of intervenors in *Grutter* who styled themselves a “mass movement” for social justice.

The presence and tactics of the *Grutter* intervenors, juxtaposed with those of more established elite interest groups involved in the litigation, drive my analysis of the relationship among social movements, elites, and the law. The intervenors invoked the rhetoric and employed some of the strategies of the 1960s civil rights movement in defending affirmative action. They embraced litigation as a tool for achieving change, but also championed “mass organizing and struggle, mass education and action, and democratic decision making.”

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6 See infra Part I.


8 See id.

9 Id. The students’ perspective was complemented by *amicus* briefs submitted by civic and civil rights organizations that advanced similar arguments. See notes ___ infra and accompanying text.
intervenors entered the law school case to offer a perspective they believed to be missing in the diversity-based defense of affirmative action offered by the University and buttressed by amici curiae representing the military, business, academia, and leading professional organizations. These amici made utilitarian arguments in support of the law school’s affirmative action policies. By contrast, the Grutter intervenors focused on discrimination and distributive justice.

Judging from the opinions’ structure and rhetoric, this public discourse greatly influenced the Court’s analysis. Values, arguments, and narratives evident in the public’s discourse about the Michigan cases found expression in the Court’s description of the benefit of diverse educational environments. Socio-political and cultural norms also influenced how the Court analyzed the harm of overwhelmingly white colleges and universities and of admissions systems that give preferential treatment to minorities.

At the same time, these decisions suggest that the more moderate (and elite) elements of the mobilization were the greatest influence on the majority’s decision upholding affirmative action in law school admissions. As Justice Thomas forcefully argued, the Grutter majority justified the constitutionality of affirmative action in terms favored by the “cognoscenti”—the military, business, academic, and professional elites who championed the University of Michigan’s

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10 See infra Part I.
11 See notes _ to __ infra and accompanying text.
12 See infra Part II.
13 As used here, elites are defined as those with superior status based on social standing, wealth, intellect, or identification with high status institutions, including governmental or political, educational, or commercial institutions. See CHRISTOPHER LASCH, THE REVOLT OF THE ELITES 25-26 (1995) (defining the elite as those who control the international flow of money and information, preside over philanthropic foundations and institutions of higher learning and manage the instruments of cultural production); C. WRIGHT MILLS, THE POWER ELITE 3-20 (1956) (describing the general characteristics of the elite class); FROM MAX WEBER 180-84 (Gerth & Mills, eds. 1964).
14 Of the 69 amicus briefs submitted in Grutter, the majority mentioned 6, three of which were business and military briefs, two of which were university briefs. In addition, the majority cited the brief of the United States. The Grutter majority cited the briefs Judith Areen et al., Amherst College et al., 3M et al., General Motors Corp. et al., Julius W. Becton, Jr. et al., the Association of American Law Schools, the United States, and the American Educational Research Association. See Appendix I for a list of the full complement of amicus briefs submitted in both cases. I should note that I was a member of a team of lawyers from Paul, Weiss, Rifkind, Wharton & Garrison who wrote the BLSAs’ amicus brief in Grutter v. Bollinger. The brief was submitted in support of the University of Michigan School of Law and cited by Justice Thomas’ in his dissent. See Brief of Amici Curiae Harvard Black Law Students Ass’n., et al., Grutter v. Bollinger, 539 U.S. 306 (2003), available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html. The team was led by Ted Wells and included David Brown and Melanca Clark.
race-conscious admissions policies. Thomas is right. The Grutter majority opinion undoubtedly embraces these groups’ arguments.

Yet, the Court’s engagement of the centrist arguments of these powerful constituencies is not surprising. Indeed, given the influence that elite interest groups generally wield in political and legal cultures, it is expected. The Court’s allusion to these elites’ perspectives was a sensible rhetorical strategy. Justice O’Connor may have concluded, the imprimatur of these powerful groups—especially military officers during a time of war fought by a disproportionately African-American and Hispanic infantry—might make the Court’s endorsement of affirmative action more palatable to those ambivalent about it.

The Grutter majority’s attention was not limited to the cognoscenti. Others voices were heard, as well. The Center for Individual Rights (the “CIR”), the public interest litigator that represented the plaintiffs, prevailed in Gratz; but its view on a crucial issue also found expression in Grutter. The Grutter majority tacitly accepted the premise of the CIR’s case (shared or undisputed by the University) that, by virtue of better average performance on the relevant admissions criteria, the plaintiffs were more qualified for, and hence more deserving of admission to, the law school than affirmative action admits. Hoping to draw attention to the issue of discrimination, the intervenors made the flip side of the CIR’s argument. They claimed that affirmative action was justified as a remedy for the university’s reliance on discriminatory admissions criteria. The intervenors were unsuccessful on this point. The credentials bias argument was met with silence, even in concurrences by Justices Ginsburg, Souter, Stevens, and Breyer, although the majority tacitly acknowledged the intervenors’ perspective in other ways.

16 See infra Part II.
17 See infra Part II.
18 See Evan Caminker, A Glimpse Behind and Beyond Bakke, 48 St. Louis U. L.J. 889, 893-94 (2004) (Grutter litigator (and law school dean) arguing that military brief aided Michigan law school’s case immensely though it was not directly relevant to law school’s admissions process); Joel Goldstein, Beyond Bakke: Grutter-Gratz and the Promise of Brown, 48 St. Louis L.J. 899, 948-49 (2004); but see William Nelson, Brown v. Board of Education and the Jurisprudence of Legal Realism, 48 St. Louis L.J. 795, 834 (2004) (arguing that reliance on military and business amicus briefs was cynical).
19 See notes ... infra and accompanying text.
The fate of the Grutter intervenors and their “mass movement” for social justice is my point of entry into the scholarly conversation about the relationship between social movements and the law. The reigning view in the legal literature, advanced principally in the work of Bill Eskridge, is that law is and should be a critical player in the creation and evolution of social movements. Legal mobilization theorists agree that law can be an especially useful point of reference for social movements. In contrast, this article argues that social movements and the law are fundamentally in tension. I turn to nineteenth and twentieth century social movement history and the social science literature to demonstrate this point. I then argue that in privileging law in analyses of social movements, constitutional theorists and legal mobilization scholars are overlooking an important distinction—namely, the difference between the definitional and inspirational roles that constitutional law-in-the-courts can play in protest movements. Social movements may profitably use rights talk to inspire political mobilization, although with less success than legal mobilization theorists assume. But social movements that make law definitional risk undermining their insurgent role in the political process and thus losing their agenda-setting ability.

Viewed within this framework, the Grutter “mass movement” fell short of being a social movement capable of having a significant impact on the constitutional order. Instead, the intervenors engaged in a single-issue political and legal reform campaign, with limited success, in the process providing

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22 See Eskridge, Channeling, supra note 21, at 420-425 (advancing view that judges should moderate over social movements to achieve “peaceable pluralism”); but cf. Siegel, supra note 21, at 322 (rejecting juri-centric interpretations of constitutional law but emphasizing constitutional text as a site for community contestation of constitutional meanings).

23 See e.g. Michael W. McCann, Rights at Work (1994) (arguing that equal pay litigation had important symbolic effect on comparable worth movement and made pay scales more equitable to women); McMahon & Paris, The Politics of Rights Revisited in Leveraging the Law 63-82 (1998) (arguing that Rosenberg undervalues direct and indirect positive effects of Brown on Montgomery bus boycott and accounts of contemporary participants).
additional evidence for skeptics of law’s ability to fundamentally transform society.\textsuperscript{24}

Like these skeptics, I aim to de-center constitutional law as the beginning point for scholarly discussions of how change occurs, as social movement theory contemplates. But the \textit{Grutter/Gratz} paradigm constitutes a more discrete inquiry about the efficacy of law than other scholars have undertaken. The most significant works on the connection between law and social change have painted on a large canvas; this scholarship makes broad claims about how law impacts society based on examinations of lines of cases traversing many subject areas and status groups, from abortion to the death penalty to school desegregation and equal pay litigation.\textsuperscript{25} The \textit{Grutter/Gratz} litigation constitutes a smaller canvas—it is a single campaign focused on one issue that involved many legal and political actors, but a small number when judged by the standards of broader studies. Yet, \textit{Grutter} and \textit{Gratz} constitute a fitting microcosm in which to study the relationship between law and movements seeking social change because of their importance in recent constitutional history\textsuperscript{26} and the widespread public discourse that they generated. The small but rich environment of \textit{Grutter/Gratz} provides a fitting context for answering the call from Reva Siegel, a constitutional theorist of social movements, for a “thicker description of the understandings and practices

\textsuperscript{24}See \textsc{Gerald Rosenberg}, \textsc{The Hollow Hope: Can Courts Bring About Social Change?} (1991); \textsc{Stuart Scheingold}, \textsc{The Politics of Rights Lawyers, Public Policy, and Political Change} (1974) (arguing that reformists’ litigation campaigns undermine effective challenges to stratification by fostering a “myth of rights”); \textsc{Michael J. Klarman}, \textsc{From Jim Crow to Civil Rights} 468 (2004) (concluding that Supreme Court decisions from Plessy to Brown did not alone fundamentally alter race relations because of political and social constraints on justices and force of extralegal events); Klarman, \textit{How Brown Changed Race Relations: The Backlash Thesis}, 81 J. of Am. Hist. 81-118 (June 1994) (arguing that Brown indirectly influenced the course of the civil rights movement by inciting violent white southern repression of black activists, which in turn engendered support for civil rights legislation among northern whites, and ultimately, led to the Civil Rights Act of 1964 and Voting Rights Act of 1965) [hereinafter, Klarman, \textit{Backlash}].

\textsuperscript{25}See sources cited supra, note 24.

through which mobilized groups of Americans regularly endeavor to shape the Constitution’s meaning.”

My discussion of how law mediates democracy in the University of Michigan affirmative action decisions proceeds in three parts. Part I provides background information. It illuminates the constitutional culture in which Grutter and Gratz were decided by identifying major categories of citizen mobilization around the Michigan decisions and describing each group’s narratives about equality. This part concludes by observing that the identities of the most prominent voices in the public mobilization around Grutter/Gratz—and the prominence of the affirmative action debate itself in public discourse about social justice—lend support to the elitist model of institutionalized politics.

Part II analyzes the relationship between the mobilization identified in Part I and the outcomes in Grutter and Gratz. This part’s analysis demonstrates the Grutter majority’s attempt to respond to each of the groups described in Part I. Yet, the majority’s rhetoric mostly reflects deference to the arguments of the University and the more moderate and elite elements among its supporters. By contrast, the Justices who backed affirmative action were unresponsive to the most radical dimension of the Grutter intervenors’ defense of affirmative action—that the University’s race conscious policies remedied it reliance on racially discriminatory admissions criteria. This paradoxical result of this outcome was that the intervenors won their case, but in a way that confirmed their relative lack of influence in the political and legal processes.

Part III is the central part of the article. Here, I situate my discussion of the Grutter intervention within the legal, social science, and historical literature on social movements. My discussion rests on the insight that elite interest group litigation and social movements aimed at accomplishing fundamental change are distinct and largely incompatible phenomena. I argue that law should play a secondary role in social movements seeking fundamental change. Mass movements must lay the groundwork for constitutional litigation. Thus, those seeking change should first mobilize outside of the law before attempting to change society through constitutional litigation.

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27 See Siegel, supra note 21, at 304; see also McMahon & Paris, supra note 17 at 63-134 (calling for “thick conflict and policy narratives” aimed at exploring how lawyers and communities seek to mobilize law to affect change).

28 See e.g. E.E. SCHATTSCneider, THE SEMI-SOVEREIGN PEOPLE 35 (1960)(“The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably about 90 percent of the people cannot get into the pressure system.”); see also notes ___ to ___ infra and accompanying text.
I. Voices

The University of Michigan affirmative action cases featured sustained efforts by many different sectors of society to influence the outcome of the litigation. The public mobilization was tremendous in scope. It involved thousands of individuals, groups, and institutions, featured a flood of *amicus curiae* briefs, and intervenors claiming to be a social movement for racial justice. This part identifies the major citizen groupings involved in the mobilization around *Grutter* and *Gratz* and describes the arguments that each made in defending the university’s affirmative action policies. I develop this taxonomy of voices with a view toward identifying the rhetoric and values about race, equal protection, and education that animated these cases. These elements formed the constitutional culture in which the Supreme Court reached its decisions in the affirmative action cases.

A. The Opponents of Affirmative Action

1. The Catalyst

The central agenda-setter in the *Grutter/Gratz* litigation was the Center for Individual Rights (“CIR”), the public interest group litigator. The CIR is one of the most successful conservative public interest group litigators in recent years. Its purpose is to advance the value of absolute colorblindness under the law. Its

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29 See notes _____ infra and accompanying text.
30 In this respect, *Grutter/Gratz* recalled the public’s interest in Roe v. Wade, which also generated scores of amicus briefs. See Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 ST. LOUIS U. L.J., 773, n. 9 (2003) (arguing that even if Justices O’Connor and Kennedy were not worried about the reaction in Congress if they joined a majority opinion overruling Roe, it is possible that they also both viewed Congress as a “barometer of public and elite opinion – so that a decision overturning Roe would isolate them from communities that they did care about.”); see also Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 370 (2003) (noting that the absence of a especially powerful voices against the University’s policy in Grutter was in stark contrast to other highly charged political controversies to reach the court, such as abortion and religion in schools).
32 CIR makes clear its view on race jurisprudence in its mission statement:

CIR’s civil rights litigation is based on the principle of strict state neutrality: the state must not advantage some or disadvantage others because of their race. Race, like religion, must be placed beyond the reach of the state. Our objections to racial preferences are legal, moral, and pragmatic. Preferences are almost always unconstitutional when used to achieve an arbitrary racial diversity; they are only legal when narrowly tailored to remedy past discrimination against identifiable individuals. As a moral matter, preferences are dehumanizing and reduce individuals to the color of their skin. And
conception of equal protection recognizes no distinctions between whites, as individuals or as a group, and the racial minorities that benefit from affirmative action policies. This well-funded and highly publicized group is the leading contemporary advocate of the “reverse racism” cases that were first filed in large numbers during the 1970s. The CIR has developed a multi-pronged strategy for achieving its agenda of outlawing all race-conscious programs designed to benefit racial minorities. Its program includes using the media to convince the public that race-sensitive policies are anti-democratic quota schemes that systematically disadvantage white men, lobbying legislative bodies to enact anti-affirmative action legislation, locating sympathetic plaintiffs, and, ultimately, filing and prosecuting lawsuits challenging race-conscious policies. The CIR has pursued its agenda with great success in recent years, leading anti-affirmative action

pragmatically, racial preferences almost always add to division and discord in society.


33 See LEE EPSTEIN, CONSERVATIVES IN COURT 80-146 (1985) (describing litigation campaigns against obscenity, abortion, social welfare programs for the poor by conservative interest groups). Examples of earlier so-called “reverse racism” cases, include, of course, Bakke v. Univ. of California, __ U.S. __ (197__)(suit by white male challenging medical school’s admissions policy as discriminatory); see also Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (challenge by white employees to policy favoring blacks in lay-off determinations rather than exclusively considering seniority).


35 See, e.g., Terrence J. Pell, Texas Must Choose Between a Court Order and a Clinton Edict, WALL STREET J., April 2, 1997 at A15 (arguing that the Office of Civil Rights under the Clinton administration was encouraged to go against federal law by implementing policies that encouraged continuing to use race as a factor in university admissions); Terrence J. Pell, Is Judge Right on U-M Affirmative Action Policy? No: Don’t let University Illegally Engineer Racial Mix, DETROIT NEWS, Dec. 17, 2000, available at, http://www.cir-usa.org/articles/pell_detnews_duggan_decision.html (arguing that the value of ethnic diversity in the University admissions context is “slight”); and Michael S. Greve, A River Runs Dry, POLICY REV., April & May, 1999, available at http://www.cir-usa.org/articles/greve_river.htm (critiquing William Bowen and Derek Bok’s book The Shape of the River, claiming among other things that the book is out of touch with the views of the American public, the judiciary and legislators).


37 The CIR has followed the blueprint created by the liberal interest group litigators that came before it, in particular, the NAACP Legal Defense Fund (“LDF”), whose lawyers litigated Brown
efforts in California, Washington and Texas. These efforts laid the groundwork for the CIR’s activism in Michigan.

The plaintiffs that the CIR chose for the Grutter/Gratz litigation powerfully embodied the white victimization narrative that the organization advances in its campaigns against affirmative action. Selected from among some two hundred interested students, the three plaintiffs, all hailing from suburbs of Detroit and working- or lower middle-class backgrounds, personified the idea that meritorious white students from “middle America” are victimized by racial quotas that advantage minorities in university admissions. The named plaintiffs included Jennifer Gratz, daughter of a suburban Detroit police sergeant and hospital lab worker. Gratz “came from a distinctly working-class neighborhood,” and “planned to be the first member of her family to graduate from college.” The second plaintiff was Patrick Hamacher, a hospice volunteer, varsity football and baseball player, and member of the school choir; he worked several part-time jobs to support himself. Barbara Grutter, a forty-three old single mother who ran a health-care consulting business from her home in a working-class suburb of Detroit, was the plaintiff in the law school case. These students, all from humble backgrounds, were well-suited to be the public face of CIR’s claims that affirmative action hurts the average white student.

v. Board of Education. See Epstein, CONSERVATIVES, supra note 44 at 94, 113, 120 (describing conservative interest group litigators borrowing LDF’s strategies and tactics); MARK TUSHNET, THE NAACP’S LEGAL STRATEGY TO END SEGREGATION IN EDUCATION 1-33, 105-137 (1987)(describing LDF’s litigation campaign). Like LDF, the CIR relies on test cases in specific localities to vindicate its agenda of ending—categorically—affirmative action policies benefiting racial minorities. See e.g. Evan Camiker, A Glimpse Behind and Beyond Grutter, 48 St. Louis L.J. 889, 891 (2004) (discussing CIR’s strategy in affirmative action litigation). Like LDF, the CIR makes deliberate choices about who will serve as plaintiffs in the test cases that it chooses to bring. Stohr, supra note 28, at 47-49. These similarities are intriguing and raise the question of precisely what the CIR’s relationship is to the public and whether it would be appropriate or useful to study this group from a social movement perspective. An extended analysis of this sort is, however, beyond the scope of this paper.

38 See, e.g., Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir.) cert. denied, 522 U.S. 963 (1997) (upholding the constitutionality of the California Civil Rights Initiative, “Prop. 209,” which prohibited discrimination on the basis of race and sex); Smith v. Univ. of Washington Law Sch., 233 F.3d 1188 (9th Cir. 2000) (dismissing for mootness the claims of two law students alleging the school impermissibly used race as an admissions criteria in violation of Title VI and the Equal Protection Clause). See also notes 45-46 infra and accompanying text. CHK CROSS REF. Some scholars have criticized interest group’s use of the initiative and referendum process as having the paradoxical effect of undermining the popular will. Stohr, supra note 28, at 47-49.

39 Stohr, supra note 28, at 47-49.
40 id. at 1-2, 47-49.
41 STORH, supra note 28, at 1-2.
42 STORH, supra note 28, at 49.
43 See STORH, SUPRA NOTE 28, AT 47-48; Michael Betzold, University of Michigan Defends Race-based Admissions, CHICAGO TRIB., Dec. 1, 1997, at 1; Carol Morello, A New Battleground for Affirmative Action, USA TODAY, Nov. 28, 1997, at 10A; STORH, supra note 28 at 47-49.
In constructing this narrative, the CIR invoked the argument of LDF attorney Robert Carter’s before the Supreme Court in Brown. The CIR litigators argued that the outcome in the law school affirmative action would demonstrate whether “the Dred Scott case or the Fourteenth Amendment embodies our national principles, whether Plessy vs. Ferguson or Brown vs. Board of Education, is the law of the land.” The CIR’s summoning of Carter’s opening statement and references to Dred Scott and Plessy poignantly dramatized its contention that affirmative action is immoral and constitutes an enormous injustice to whites—just as pernicious as Jim Crow was to blacks.

2. The United States

The Bush administration opposed Michigan’s race-conscious admissions policies in both the law school and undergraduate case. In an amicus curiae brief, the solicitor general argued that the equal protection clause requires colorblindness and that public institutions may only resort to race-based policies “when necessary.” Race-based policies such as those used by the University of Michigan were “unfair” and imposed “unnecessary burdens on innocent third parties.” These inequities were avoidable, the government argued, because diversity can be achieved in higher education through race-neutral means. The solicitor general touted facially neutral “percentage plans,” which guarantee admission to high school students who graduate in the top quartiles of their classes, as an alternative to openly race-sensitive policies. Percentage plans have been used successfully in Texas, Florida, and California, states where race-conscious polices were outlawed; according to official state reports, universities in those states have replicated or surpassed the diversity levels achieved through race-conscious policies. In light of this track record, there was no reason to believe that selective institutions such as the University of Michigan could not admit a diverse student body without relying on “disguised quotas.”

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44 See e.g. Brief for Petitioner at 18, Grutter v. Bollinger (No. 01-241)(S.Ct. April, 2001)(“We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no state has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its students”).
45 See e.g. Transcript of Proceedings at 31, Grutter v. Bollinger (Feb. 16, 2001).
47 Id. at 10. See also Gratz v. Bollinger, 539 U.S. at 261-263.
49 Gratz, 539 U.S. at 304 (Ginsburg, J., dissenting) (citing to the Brief for United States as Amicus Curiae).
50 Brief of Amici United States at 14-18.
51 Id. at 14-18, 22-25.
the government embraced an egalitarian vision of higher education, the university either did not or was not willing to use a system that, on the face of it, was fairer than its race conscious alternative. However, the government’s brief did not respond to critics’ claim that percentage plans are not genuinely race-neutral, but instead are premised on the reality that most secondary schools are racially segregated. The government ignored the criticism that its understanding of proscribed race consciousness was limited to facial or explicit discrimination. As a consequence, the administration simultaneously championed the norm of colorblindness, promote the idea that current structure of higher education is consistent with egalitarianism, and affirmed its support for the concept of diversity in higher education.

B. Public Opinion: The Ambivalent Center

Public opinion, as measured in numerous opinion polls, also was a prominent element of the political environment in which the Michigan cases were decided. Both conservative and liberal interest groups, together with numerous media outlets, commissioned polls, the results of which were publicized at pivotal points leading up to the Grutter and Gratz arguments in the Supreme Court. The polls, conducted by Gallup, the Harvard Graduate School of Education, CNN and CBS/New York Times, demonstrated the American public’s qualified support for

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52 Critics point out that percentage plans are predicated on de facto segregation in high schools, and their intent is the same as avowedly race-sensitive programs like Michigan’s, critics argue see, e.g., Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1 (1997); see also Catherine L. Horn & Stella M. Flores, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES (2003) (examining percentage plans and concluding that they are ineffective proxies for racial inclusiveness at elite law schools); Danielle Holley & Delia Spencer, The Texas Ten Percent Plan, 34 Harv. C.R.-C.L. L. Rev. 245, 277 (2000) (noting the limited number of schools from which the universities have admitted students under the state’s percentage plan).

53 Notably, Condoleezza Rice, then-National Security Advisor, and Colin Powell, Secretary of State, publicly disagreed with the administration’s position. The press reported that Ms. Rice was influential in the President’s decision making about the position that the government should take in the cases --she apparently encouraged a more moderate statement of disagreement with Michigan’s policies than the president was otherwise inclined to take. See David Firestone, From 2 Bush Aides, 2 Positions On Affirmative Action Case, N.Y. TIMES, Jan. 20, 2003, at A17 (noting Powell’s strong support of race conscious admissions); see also Neil A. Lewis, Bush Adviser Backs Use of Race in College Admissions, N.Y. TIMES, Jan. 18, 2003, at A14 (noting that Rice issued a statement agreeing with the president’s position on Michigan’s programs but at the same time declaring that “it is appropriate to use race as one factor among others in achieving a diverse student body.”)

54 Poll data is not necessarily a reliable indicator of actual preferences, especially as it relates to race. Deborah W. Denno, The Perils of Public Opinion, 28 Hofstra L. Rev. 741, 762 (2000) (contending that validity of current opinion polling doubtful because of extremely high refusal rates and because “[i]ncreasingly, public opinion polls fail to reflect the kinds of diverse demographics that should constitute the ‘community consensus’”).

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Given these ambiguities in the poll results, both proponents and opponents of affirmative action deployed the data to support their respective positions. The overarching significance of the polls, however, was their indication that a majority of Americans apparently can reconcile at least some forms of affirmative action with their values.\footnote{See Michael Klarman, \textit{Are Landmark Court Decisions All That Important? CHRON. OF HIGHER EDU.} at 10 (Aug. 8, 2003) (noting that \textit{Grutter} majority seems to be in sync with public opinion).} But these polls also suggest that the populace’s support for affirmative action is soft. The polls indicate that a majority of Americans simultaneously embrace the norm of colorblindness, the concept of equal opportunity, and the view that merit explains individuals’ position in the socio-economic hierarchy.\footnote{See polls cited in note 50-51 supra.} As a result, the public is ambivalent about the constitutionality of status-conscious affirmative action policies. For affirmative action policies test the public’s perhaps paradoxical allegiance to colorblindness, equal opportunity, and merit since race-conscious policies are predicated on the assumption that these three values are irreconcilable at present.\footnote{For a recent discussion of how notions of merit figure into resistance to race-conscious policies, see Pauline Kim, \textit{The Colorblind Lottery}, 72 Fordham L. Rev. 9, 17-22 (2003).} According to affirmative action supporters, absolute colorblindness is at odds with the imperative of equal opportunity in light of the fact that many minorities fare less well than whites on the criteria used to measure merit in education and employment.\footnote{On the racial implications of prevailing measures of merit, see Guinier, supra note 5 at 133-35; Guinier & Strum, 84 California L. Rev. 953 (1996); Bryan K. Fair, \textit{Taking Educational Caste Seriously: Why Grutter Will Help Very Little}, 78 Tul. L. Rev. 1843 (2004).}
C. Affirmative Action Proponents

1. The University of Michigan

The defendant’s arguments in support of its affirmative action policies steered clear of the value-laden arguments that animate the public’s ambivalence over affirmative action. Instead, the university’s defense of both the undergraduate and law school policies focused on narrow, doctrinal questions. Its counsel argued that the principle of *stare decisis* commanded that the Court reaffirm *Regents of the University of California v. Bakke*,[60] where a plurality of the Court upheld the constitutionality of admissions policies designed to achieve diverse learning environments.[61] The university and law school then argued that the policies that they used to achieve diversity were narrowly tailored.[62] That is, Michigan’s policies were of the competitive, race-plus variety that Justice Powell endorsed in *Bakke*,[63] rather than non-competitive racial quotas,[64] which unquestionably are unconstitutional.

The university disavowed any remedial justification for its affirmative action programs,[65] although in a few instances it alluded to present discrimination

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60 See 438 U.S. 265, 320 (1978) (“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”); and id. at 306 (the interest of diversity is compelling in the context of a university’s admissions program”).

61 See Brief for Respondents at 14-17, Grutter v. Bollinger, No. 02-241 (2003); Brief for Respondents at 13-21, Gratz v. Bollinger, No. 02-516.


63 438 U.S. at 318 (finding Harvard’s program of using race as one factor among many considered in making admissions decisions lawful).

64 438 U.S. at 272-75 (finding program that set-aside 16 of 100 seats in each year’s entering class for minorities and that funneled minorities through a separate admissions process unlawful).

65 Bollinger reportedly believed that *Brown* needed to be the starting point for the public debate and questioned whether *Bakke’s diversity rationale was a “powerful enough” argument*. Stohr, supra note 28, at 73. But the University did not in fact emphasize this rationale in its presentations, notwithstanding the occasional reference (like Bollinger’s on the stand). Practically speaking, emphasizing remedial considerations probably was considered adverse to the university’s interests. Theoretically, however, nothing prevented the university from offering a combined diversity and remedial justification for its race-sensitive admissions policies. Together, the two rationales might have offered a more compelling justification for affirmative action than either standing alone. After all, many commentators view past and present discrimination as the true explanation for universities’ commitment to racially diverse student bodies. See Lawrence, supra note 5, at 928; Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427 (1997). *Bakke* would not have precluded a two-pronged argument since it contains language that endorses the discrimination-focused corrective rationale for affirmative action; in any event, *Bakke* does not proscribe a remedial justification for race-sensitive admissions. See Goldstein, supra note 14, at 948-49. On the relative merits of remedial versus diversity rationales for affirmative action, see Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 Colum. L. Rev. 60,
as a rationale for race-conscious admissions. In light of continuing race-based discrimination, counsel for the University Michigan Law School wrote, “law schools need the autonomy and discretion to decide that teaching about … race … [is a] critically important aspect[ ] of their educational missions.” As framed by the University, the main justification for affirmative action is utilitarian. The development of interpersonal intelligence about race is crucial for law students because law schools train “future leaders” who must “learn how to bridge racial divides, work sensitively and effectively with people of different races, and … overcome the initial discomfort of interacting with people visibly different from themselves that is a hallmark of human nature.” Lee Bollinger, then dean of the law school, expressed these same sentiments at trial. The university did not discuss the riposte, made by some, including prominent minorities such as Justice Clarence Thomas, that affirmative action stigmatizes its “beneficiaries,” and therefore, is not a benign form of discrimination, whatever its pedagogical benefits.

Nor did the defendants address the contention of some affirmative action proponents that race consciousness in admissions is necessary to remedy the college and law school’s use of racially discriminatory admissions criteria. Instead of confronting that issue directly, Michigan argued, elliptically, that it should not have to abandon “selectivity” as a “core part” of its mission in its quest to achieve racially diverse learning environments. The university’s claim that diversity and selectivity are mutually exclusive rested on its assertion that the pool of black and Hispanics applicants who meet Michigan’s selective admissions criteria is small. Since white applicants far outnumber minority applicants and tend on average to have higher scores, many more whites will be admitted to the institution than minorities in the normal (race neutral) scheme of things.

61-65 (2004); Kathleen Sullivan, Sins of Discrimination: Last term’s Affirmative Action Cases, 100 Harv. L. Rev. 78, 94 (1986).


69 See Transcript of Proceedings at 58, Grutter v. Bollinger (Jan. 18, 2001)(“Given the history of this country, given the history of race relations in the United States and indeed in the world, [race] is simply a part of life. … [R]acial and ethnic diversity are as critical to that process as any other way in which we try to compose a class.”)


71 See notes 122-23, 238, 283-288 infra and accompanying text. CHK cross refs.

72 See Brief for Respondents at 19-20, Grutter v. Bollinger, No. 02-241 (2003)( “Overruling Bakke would force this Nation’s elite and selective institutions of higher education, public and private, to an immediate choice between dramatic resegregation and abandoning academic selectivity.”); id at 35-36.

the university argued, it can only admit a “critical mass” of minority students by taking account of applicants’ race.\(^\text{74}\)

From critics, Michigan’s contention about the limited pool of minority applicants raises as many questions as it answers. In an unlikely convergence of viewpoints, both Justice Thomas and the intervenors identified credentials bias as the true source of Michigan’s pool “problem.”\(^\text{75}\) However, from the university’s standpoint, this conundrum likely seemed beside the point. Diversity in law schools promotes tolerance and professionalism; thus, the law school is obligated to assemble diverse student bodies. It does so by relying on a measure of ability that is almost universally used in its “market,” and which enables admissions office to efficiently screen large volumes of applications. The relevant question, constitutionally, was whether it could exercise its prerogative to assemble its class in a way that achieved its goal of a diverse learning environment without resorting to quotas. This was a narrow question; it did not require discussion of whether the university should retool its admissions criteria. For Michigan, that some minorities find its race conscious criteria stigmatizing and that some whites not admitted to the law school feel mistreated is unfortunate, but superfluous to the law.

2. The Coalition of Amicus Curiae

The coalition that assembled in support of the University of Michigan used justificatory rhetoric common to both the diversity and remedial rationales for affirmative action polices.\(^\text{76}\) For this reason, these proponents are best understood as consisting of two distinct strands: a distributive justice strand and a utilitarian strand. The distributive justice strand of the coalition itself consisted of two elements. The first was composed of student intervenors. The second element of the distributive justice strand consisted of prominent civil rights and civic organizations. These groups filed amicus briefs that reiterated, in large part, the student-intervenors claims.\(^\text{77}\) The utilitarian strand of the mobilization included elite educational institutions, businesses, professional organizations, and a cadre of highly influential individuals, most significantly, a group of retired military officers.\(^\text{78}\) This group of “establishment” elites also filed amicus briefs in support of Michigan.

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\(^{74}\) See Brief for Respondents at 36, Grutter v. Bollinger, No. 02-241 (2003);

\(^{75}\) See notes 122-23, 238, 283-288 infra and accompanying text. CHK CROSS REF

\(^{76}\) This article focuses on the contributions of particular friends of the court; it does not discuss in detail the arguments of every group that submitted an amicus brief in Grutter or Gratz.

\(^{77}\) See infra notes 163-172 and accompanying text. CROSS REF CHK

\(^{78}\) See infra notes 173-90 and accompanying text. On Interest groups and interest group litigators see Epstein, supra note 44. CROSS REF CHK
The two strands of the mobilization made distinct arguments in support of affirmative action. Nevertheless, together they created a formidable coalition supporting the University’s admissions policies. The coalition’s pro-affirmative action offensive went unmatched by those opposed to race conscious admissions, despite the efforts of the CIR to marshal the public’s support for the plaintiffs’ arguments.

a. The Distributive Justice Strand of the Coalition

The distributive justice strand of the coalition advanced moral claims premised on the philosophy of distributive justice. Discrimination has produced a socio-economic hierarchy and political environment in which minorities, African-Americans in particular, do not receive their just deserts. Affirmative action ameliorates this imbalance by redistributing to the disadvantaged educational and employment opportunities, and the status and political power attendant to those with greater income and wealth. Such redistribution is consistent with social justice, the theory holds.

A backward-looking component was embedded in these groups’ distributive arguments. Many made remedial arguments premised on the

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79 See infra notes 103-108, 176-179, 185-190 and accompanying text. CROSS REF CHK
80 See Will Potter, Thousands Rally for Affirmative Action Outside Supreme Court, CHRON. OF HIGHER ED., Apr. 11, 2003, at 32 (noting only two counter protestors at rally of thousands in support of affirmative action on day of arguments in Michigan cases); see also Edward Lempinen, Prop. 209 Takes a National Stage: Uncertain Receptions Await Anti-Affirmative Action Drives, S.F. CHRON., Dec. 16, 1996, at A1 (noting that the California initiative attacking racial preferences had galvanized affirmative action supporters); see also Devins, Explaining Grutter, supra note 32 at 370.
81 On distributive justice, see JOHN RAWLS, A THEORY OF JUSTICE 60-63 (1971) (describing justice as fairness and opportunity for all); Groups and the Equal Protection Clause, 5 PHILOSOPHY & PUB. AFFAIRS 107, 147-70 (1976) (describing “group-disadvantaging” theory of equal protection which sanctions race conscious measures as remedy for past discrimination and its present effects).
82 See e.g., Brief of Ebony Patterson et al. at 33-38, Grutter, 539 U.S. 306 (2003) (No. 02-241); Brief of Amici Curiae Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists at 3-7, Grutter, 539 U.S. 306 (2003) (No. 02-241); Brief of the American Federation of Labor and the Congress of Industrial Organizations at 1-17, Grutter, 539 U.S. 306 (No. 02-241); Brief of Coalition for Economic Equity et al at 22-29, Grutter, 539 U.S. 306 (No. 02-241).
83 The backward looking component might be labeled corrective justice. See Jules Coleman, The Mixed Conception of Corrective Justice, 77 Iowa L. Rev. 427 (1992)(defining corrective justice as animating principle of tort law); Peter Benson, The Basis of Corrective Justice and its Relation to Distributive Justice, 77 Iowa L. Rev. 515, 529-532 (1992)(defining Aristotelian corrective justice). But corrective justice may be considered an unsatisfying explanation for remedies for past racial harms because persons who did not participate in the harms bear the brunt of the remedy rather than the original individuals who actually perpetrated the racial harms. See Coleman, supra, at 429-433 (describing immediate relationship between wrongdoer and person to be compensated). Despite the inexact fit, constitutional scholars have discussed remedies such as
historical discrimination experienced by the families and communities from which many affirmative action beneficiaries hail. From this perspective, the harms perpetrated against African-Americans (the paradigmatic victim group) by historic discrimination continues to be visited upon them, and the debt owed as a result of these identifiable harms must be repaid by society as a whole. The unfairness occasioned to individuals not responsible for the “original sin” against African-Americans is unfortunate but justifiable under this view. Given the breadth and depth of the original injury, the scope of the legal injury under the equal protection clause must likewise be broad.

i. The Grutter Intervenors

The vanguard of the distributive justice strand of the coalition supporting the University of Michigan consisted of several student groups. To appreciate why these students have been labeled the vanguard of the mobilization, we must go back to a point in time well before the Supreme Court considered Grutter and Gratz. After the cases were filed and as they wound their way through the federal court system, many commentators assumed that the cases presaged the death knell of affirmative action. It was during this period that an interracial, but predominantly minority, group of high school, college, and professional students, many of whom identified themselves as beneficiaries or future beneficiaries of affirmative action, decided to fight the rollback of affirmative action anticipated by the experts. The question of minority access to higher education was personally significant to these students, and this sense of personal crisis proved a


84 See Paul Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 COLUM. L. REV. 728, 731-32 (1986) (stating that corrective justice “requires significant measures to eliminate the ongoing effects of discrimination; it requires remedial intervention that goes beyond the corrective efforts to eliminate the effects of past discrimination.”).

85 See Gewirtz, supra note 79, at 731-32.


87 Interview with Miranda Massie, Oct. 8, 2004.
source of inspiration for these students. These students intervened in Grutter, the law school case, on March 26, 1998.

The Grutter intervenors consisted of a coalition of four groups. These groups were Students Supporting Affirmative Action (SSAA), United for Equality and Affirmative Action (“UEAA”), Law Students for Affirmative Action (“LSAA”), and the Coalition to Defend Affirmative Action & Integration and Fight for Equality by Any Means Necessary (“BAMN”). BAMN, a political organization created in July of 1995, was the leader of the Grutter coalition. The organization originally was formed to defeat California’s Proposition 209. The proposition was approved by Californians in 1996, however, and ended affirmative action in California’s colleges and universities. Despite its defeat in California, BAMN set about a program to prevent the rollback of affirmative action at other colleges and universities, including the Universities of Michigan, Washington, and Texas, and more broadly, to preserve a multi-racial, integrated society.

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89 See Students File Motion to Intervene in University of Michigan Law School Lawsuit, (March 27, 1998) available at http://www.bamn.com/news/archive-launch.asp; see also LIBERATOR: JOURNAL FOR THE EMERGING NEW CIVIL RIGHTS MOVEMENT, Vol. 2, No. 1 (3) (Nov. 1998) available at http://www.bamn.com/liberator/liberator-1.pdf. A second student group, represented by the NAACP Legal Defense Fund and the ACLU, intervened in Gratz, the undergraduate case. The Gratz intervenors limited their defense of the University’s affirmative action policies to the courtroom, an unsurprising development, given LDF’s historic opposition to direct action. See ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 15-16 (1984); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 309-10 (1994). The Gratz intervenors made remedial arguments in support of affirmative action premised on past and present discrimination. Brief of Ebony Patterson et al, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), at 6-13. For example, they pointed to the University of Michigan’s own history of discrimination in its brief defending the university’s admissions policies. They noted that the university had operated segregated student dormitories, condoned exclusion of minorities from campus activities and social life, and shown “deliberate indifference” to racial hostility on campus; the university’s race-sensitive policies had initially been instituted after a series of “strikes” by black students, who complained about racial hostility on campus. Id. at 9-11, 22-29. The Gratz intervenors also argued that affirmative action in higher education was necessary to effectuate the purpose of Brown v. Board of Education and to remedy societal discrimination. Id. at 22-29. Since this paper focuses on law reform campaigns that do utilize protest tactics, the Grutter intervenors, rather than the Gratz intervenors, are the subjects of my analysis.
BAMN’s involvement in the Michigan affirmative action cases was but one component of its leadership in what it calls “the new civil rights movement.” BAMN expressly connects its “mass movement” to the concept of participatory democracy. BAMN’s purpose is “to defend affirmative action, integration and all the gains of the previous Civil Rights Movement” through a mass, democratic movement “rooted” in the courts and legislatures.

BAMN’s tactics include direct action. From its inception the group embraced “rallies, marches, building occupations and strikes,” as well as educational efforts and lawsuits, as tactics for achieving its goals. Prior to its involvement in Grutter and Gratz, BAMN organized protests against Proposition 209 by high school and college students. While cases challenging the initiative’s lawfulness were being litigated, BAMN staged pro-affirmative action demonstrations and occupied buildings at the University of California at Berkeley, held press conferences, published a newsletter, the Liberator, and created a website to publicize its positions. BAMN’s involvement in the University of Michigan cases represented the latest phase of a sustained, four-year movement to preserve minority access to higher education.


In leading the movement to defend affirmative action at Michigan, BAMN continued its practice of engaging in both direct and legal action. BAMN staged demonstrations in support of the *Grutter* intervention on several occasions. Prior to and throughout the trial and appeal in the Michigan cases, BAMN and its co-sponsors used direct action tactics to raise public awareness of the stakes involved in the cases, and to win converts to its “movement.” Beginning on October 16, 2000, BAMN held a ten-day symposium in Ann Arbor to build support for its effort to defeat the threat to affirmative action posed by *Grutter* and *Gratz*. The symposium featured rallies at the law school, speeches by veteran civil rights leaders, and presentations by the student-intervenors’ expert witnesses. 100 On the weekend of June 1-3, 2001, BAMN, together with UEAA and Jesse Jackson’s Rainbow/Push organization, sponsored a pro-affirmative action conference at the University of Michigan that brought together students activists from twenty states and numerous educational institutions. 101

The intervenors’ legal defense of the Michigan policies was different from the University’s. The intervenors explored a topic that the law school generally avoided—discrimination. 102 They defended the university’s policies on the theory that law school’s admissions criteria were discriminatory, and that its affirmative policies were, then, a remedy for its discrimination. As the intervenors saw it, the regime of standardized tests of ability on which the law school relied 103 was the linchpin of a racial caste system that kept blacks and Hispanics in inferior schools and jobs. 104 The students’ briefs also emphasized that the use of racially biased criteria in admissions perpetuates *de facto* segregation in K-12 education, college, and law school, and discrimination in the workforce. 105 Thus the very premise of the plaintiffs’ case—that whites better qualified for admissions than admitted

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102 *See id.*

103 *See Brief for Respondent Kimberly James et al at 2-45, Grutter v. Bollinger (No. 02-241, 2003).*


105 *See Brief for Respondent Kimberly James et al at 2-45, Grutter v. Bollinger (No. 02-241, 2003); Transcript of Argument by Miranda Massie at 76, Grutter v. Bollinger (Feb. 16, 2003)(“There’s a segregation and inequality in K through 12 schooling… There’s a set of ways in which race and racism structure the educational experiences and performance of even the most economically privileged minority student”).*
minorities faced discrimination by virtue of affirmative action programs—was false.  

Rather, for BAMN, these policies instead should be viewed as a necessary to offset the discrimination that universities engaged in by knowingly relying on biased admissions criteria. 107 The intervenors’ lead counsel, Miranda Massie, pegged the Court’s ability to uphold race-conscious measures in view of discriminatory admissions criteria on a footnote in Justice Powell’s opinion in Bakke where he noted, “To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no ‘preference’ at all.” 108 The intervenors invoked the specter of Jim Crow in arguing that race conscious admissions should be viewed as a remedy for credentials bias. They argued that if race-conscious remedies offsetting such bias were eliminated, the integrative ideal established in Brown v. Board of Education and affirmed in Bakke would be eviscerated. 109

106 See id. at 18-20.
109 See Transcript of Argument by Miranda Massie at 67-70, Grutter v. Bollinger (Feb. 16, 2001)(defining basic question in case as whether black students who suffered in integrating schools in wake of Brown would have suffered “in vain”); see also id. at 88 (discussing violence surrounding desegregation of the University of Mississippi); Brief for Respondent Kimberly James et al at 2, Grutter v. Bollinger (No. 02-241, 2003)([G]ains toward integration will be reversed and replaced by a massive return to segregation starting in the most selective universities and spreading throughout higher education and into society as a whole. This prediction was disputed by the plaintiffs as well as by Justice Ginsburg. See Gratz v. Bollinger, 509 U.S. 244, 304 (2003)(Ginsburg, J., dissenting) (“One can reasonably anticipate … that colleges and universities will seek to maintain their minority enrollment … whether or not they can do so in full candor through the adoption of affirmative action plans of the kind at issue here.”); see also Michael Klarman, Are Landmark Court Decisions All That Important?, 49 CHRON. OF HIGHER EDUC. 48 at 10 (2003) (noting that affirmative action proponents who have “insisted that terminating race-based preference would dramatically decrease racial diversity on college campuses” had great incentive to exaggerate impact of decision finding it unlawful). In fact, the record on effect on minority enrollment even with a defeat for the plaintiffs has been mixed. Black and Hispanic enrollment at some selective institutions has dropped precipitously since Grutter/Gratz, in part because some of these institutions have responded cautiously to the split decisions, as if affirmative action has been banned. Their caution is due in part to continuing legal efforts to narrow the scope of affirmative action programs. See Keffrey Selingo, Michigan: Who Really Won?, CHRON. OF HIGHER ED., Jan. 14, 205 at A21.
ii. Discrimination-Oriented *Amicus Curiae*

Prominent civil rights and civic organizations filed *amicus* briefs that reiterated and reinforced the *Grutter* intervenors’ arguments. The civil rights and civic elite’s arguments were predicated on a keen sense of history and a broad conception of the defendant’s—and society’s—responsibility to remedy these historical harms. Such themes sounded, for example, in briefs by the United Negro College Fund,\(^\text{110}\) the Coalition for Economic Equity,\(^\text{111}\) and American Federation of Labor and Congress of Industrial Organizations.\(^\text{112}\) The brief of Harvard University’s Civil Rights Project buttressed the students’ arguments by addressing “second generation” *Brown v. Board of Education* issues. The Civil Rights Project’s brief made a connection between *Brown*, de facto segregated and unequal elementary and secondary education, racial performance gaps in high stakes testing, and the need for race-conscious programs in higher education.\(^\text{113}\) The disparate racial impact of the LSAT and SAT also were emphasized by the National Center for Fair and Open Testing\(^\text{114}\) and the Society of American Law Teachers.\(^\text{115}\) Members of Congress submitted an amicus brief that forcefully articulated the link between access to higher education and fairness in democracy.\(^\text{116}\) The most poignant brief making moral arguments in support of Michigan’s policies was submitted by two hundred “Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists.”\(^\text{117}\) This brief discussed the contributions of those whose lives were taken in the struggle for civil rights and equal education opportunity.\(^\text{118}\) It then argued that affirmative action was crucial to maintaining the gains won through the ultimate sacrifice.\(^\text{119}\)

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\(^{112}\) Brief of the American Federation of Labor and the Congress of Industrial Organizations, *Grutter*, 539 U.S. 306 (No. 02-241), at 2-24; see also of the Society of American Law Teachers, *Grutter*, 539 U.S. 306 (No. 02-241), at 3-16.


\(^{114}\) See Brief of the National Center for Fair and Open Testing, *Grutter*, 539 U.S. 306 (No. 02-241), at 7-25.


\(^{118}\) On the role of violence in creating a political environment favorable to the passage and implementation of civil rights laws, see Klarman, supra note 17, at 110-118; see also Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 141-49 (1994).

b. The Utilitarian Strand of the Coalition

The other strand of the *Grutter/Gratz* mobilization consisted of Fortune 500 companies, former military officers, educational institutions, and professional associations, and prominent individuals. This group’s support for affirmative action garnered considerable media interest; that these sectors of our society, including risk-averse businesses, backed a controversial policy was remarkable to some. The University of Michigan’s then-president, Lee Bollinger, solicited the participation of these *amicici* in the fight to preserve the university’s admissions policies. Bollinger first persuaded Harry Pearce of General Motors to support affirmative action publicly by filing an amicus brief on behalf of the university’s policies. This initial success led sixty-five other Fortune 500 companies, including Microsoft, Coca-Cola, and General Electric, to join General Motors’ amicus brief supporting Michigan. Even more remarkably, twenty-nine retired military officers, including Generals Norman Schwarzkopf, Wesley Clark, and John M. Shalikashvili, filed an amicus brief in support of race-conscious admissions at Bollinger’s suggestion. In addition, 3,900 colleges and universities, including most of America’s top educational institutions, submitted amicus briefs in support of the University of Michigan’s policies, as did a multi-racial group of 13,992 law students.

The arguments advanced by the establishment elites differed sharply from that of the student-intervenors and the civil rights and civic *amicici*. Their briefs were forward-looking and, they claimed, utilitarian. They were silent on the subject of discrimination. Instead, this strand focused on achieving the greatest good for American society at large.

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120 For example, the length of the New York Times article on the student demonstrators was 701 words, while its article on the amicus briefs filed by corporation and the military was 1142 words. Compare Winter, supra note 109, at A14, with Schemo, supra note 100 at A18.
121 See Bollinger, supra note 299, at 1594; Schemo, supra, note 100 at A18 (stating that Bollinger looked for help from the “factories and boardrooms and military” and secured the support of over 300 organizations that signed briefs supporting the university); see also Brief of Amicus Curiae General Motors et al., Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).
124 See Stuart M. Brown, *Duty and the Production of Good*, THE PHILOSOPHICAL REV., vol. 61, no. 3 (Jul. 1952), 299-311. (discussing Utilitarian goals of maximizing the greatest social good and the question of morality that arises pertaining to individual acts performed in furtherance of these goals).
i. The Business and Military Amicus Curiae

The brief filed by General Motors revealed that its participation in the case was motivated largely by economic considerations. Most other Fortune 500 companies which participated in the coalition joined GM’s brief. GM explained that its prosperity, that of American business in general, and, it implied, the entire American economy, depended on its ability to recruit a diverse and well-educated work force. GM argued that it was necessary for it to have a diverse work force because its customer base in the United States is diverse; minorities’ purchasing power in the U.S. alone was estimated at $600 billion per annum in 1998. Its argument was also predicated on GM’s need, as a part of the global company, to compete in a marketplace consisting of customers, business partners, and competitors of diverse racial and ethnic backgrounds. In other words, the GM brief argued that ending race-conscious admissions would place it at a competitive disadvantage, which, in turn, would be adverse to the American economy given the company’s prominent place therein. The other businesses that filed amicus briefs largely echoed GM’s arguments.

Similarly, the military brief claimed that its interests dovetailed with the national interest. The military officers claimed that affirmative action was necessary to maintain diversity among the military’s officer corps. Such diversity is vital to national security, they argued, because it diffuses racial and ethnic hostilities between officers and enlisted men and women that undercut morale and impede military preparedness and effectiveness. The military officers relied on observations about the Vietnam War to support their contention that the government has a compelling national security interest in diversity within the military’s officer corps. That is, during the Vietnam era the military’s ability to prosecute the war was nearly undermined by strife engendered by the fact that the officer corps was overwhelmingly white, while the enlisted men who fought on the front lines disproportionately were African-American and Hispanic. Such strife poses an intolerable threat to national security, the officers claimed.

126 See Brief of General Motors Corp. at 1-5, 11-26, Grutter, 539 U.S. 306 (2003) (No. 02-241).
130 Brief of Amici Curiae Julius W. Becton, Jr. et. al. at 6 (noting that “[I]n Vietnam, racial tensions reached a point where there was an inability to fight”).
131 Id.
ii. The Professional and Academic Amicus Curiae

Following the lead of the University of Michigan, the selective college and university amicus curiae claimed that race-conscious admissions policies were necessary to fulfill each institution’s particular mission. In addition, diversity served their collective public mission of educating students to be productive members of a pluralist society and multiracial global economy. The American Council on Education and a consortium of fifty-three educational associations, including the Association of American Law Schools, made a similar argument. This group, along with the National School Boards Association and the National Education Association, argued that the diverse educational environment prepared students for citizenship. None of these amici addressed the student-intervenors’ argument that universities’ reliance on biased admissions criteria necessitates race-sensitive affirmative action policies.

D. Conclusion

This part has sought to shed light on the constitutional culture in which the Supreme Court decided Grutter and Gratz by identifying the parties involved in the cases and describing their narratives about equality. Though they offered different rationales for affirmative action, the utilitarian and distributive justice strands of affirmative action proponents formed a powerful coalition in support of the University’s policies. Together with the CIR and its supporters, these groups constituted a public mobilization around the issue of affirmative action of an impressive scope.

On one reading, the fact and extent of the mobilization affirms the view that America is a democracy characterized by vigorous public debate among citizens about important policy and legal issues. The outpouring lends support, as well, to the idea that American democracy is pluralist in character. Groups

132 See notes __-__73-89 supra and accompanying text.
136 See Brief of Amici Curiae Harvard Univ. et al. at 14, Grutter, 539 U.S. 306 (2003) (No. 02-241). The Harvard brief advances the view that students subject to “historical and continuing prejudices” are particularly well-suited to yield the educational benefits of a diverse student body. Id. at 5. See also Brief for Respondent, Grutter, 539 U.S. 306 (2003) (No. 02-241).
137 See MATTHEW A. CRENSON & BENJAMIN GINSBURG DOWNSIZING DEMOCRACY 1-6 (2004).
representing racial minorities, women, and labor were among the thousands who participated in the public discourse around Grutter/Gratz. These groups had access to decision makers and the ability to participate in the public debate about affirmative action on the same footing as others. In this way, the Grutter/Gratz paradigm supports the notion that citizens can gain access to decision makers on issues of great importance simply by being engaged on the issues of the day. My examination of the Grutter/Gratz litigation does not directly challenge this description of the American political system.

But it does substantiate the elite conception of the American political process. As political scientists have long noted, elites wield a significant degree of influence in the legal spaces that are constitutive elements of the American political environment, often through interest groups representing public and private interests on a wide range of issues. Critics charge that these groups, which are largely unaccountable to the public even if they claim to represent the

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139 See Appendix I.
140 For discussions of political apathy among Americans and its effect on the body politic, see, e.g. CRENSON & GINSBURG supra note 34, at 1-19, 151.
141 On defects in pluralism in practice, see ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY 32-37 (1982)(discussing elite domination); WILLIAM GAMSON, STRATEGY OF SOCIAL PROTEST 9-10 (2d ed. 1990)(reviewing literature criticizing elite influence on politics); E.E. SCHATTSCHEIDER, THE SEMI-SOVEREIGN PEOPLE 35 (1960)(“The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably about 90 percent of the people cannot get into the pressure system.”); C. WRIGHT MILLS, THE POWER ELITE (1956)(describing the origins of the elite class in politics, economics, and the military and its influence on society).
142 The influential early literature includes ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); DAHL, WHO GOVERNS (1956); EARL LATHAM, THE GROUP BASIS OF POLITICS (1952).
143 See ELISABETH S. CLEMENS, THE PEOPLE’S LOBBY: ORGANIZATIONAL INNOVATION AND THE RISE OF INTEREST GROUP POLITICS IN THE UNITED STATES (1997); DAVID TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951); KAY LEHMAN SCHLOZOMAN & JOHN T. TIERNEY, ORGANIZED INTEREST AND AMERICAN DEMOCRACY 32-33 (1986)(noting that middle and upper-middle classes” are the “backbone” of public interest movement and that there is a “pervasive upper-middle class skew[ ] within organized interest groups); id. at 60-61 (noting that “upper-status individuals — those with high levels of education, prestigious jobs, and high incomes — are much more likely to be members of organizations than lower-status individuals”); CRENSON & GINSBURG supra note 34, at xvi-xviii, 2-19 ( ); THEEDA SKOCPOL, DIMINISHED DEMOCRACY 211-13, 257-58 (2003)( ); Theda Skocpol, Advocates without Members: The Recent Transformation on American Civic Life, in CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY (1999); see also E.E. SCHATTSCHEIDER, supra note __, at 35; GUGNI, MCDAM, AND TILLY, HOW SOCIAL MOVEMENTS MATTER (1999) (discussing well-funded, -organized, and –institutionalized activities of interest groups); ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY 37 (1982)(noting elites’ exercise of influence through pressure groups); SCHATTSCHEIDER, supra note 168, at 30-37 (discussing exclusivity). On the distinction between public and private interest groups, see id at 26-35 & nn. 17-22. On the fuzzy distinction between groups representing economic and non-economic interests, see id at 23-26.
“public interest,” exert a profound and unhealthy influence on democracy. They strangle democracy by usurping public authority, eroding boundaries between the public and private spheres, and further marginalizing those who are disempowered in the political process. Elite interest groups attempt to inscribe their policy preferences into law by influencing the structure and outcomes of the political and legal systems. They influence electoral results, shape public opinion, champion their goals through participation, both formal and informal, in legislative and administrative proceedings, lobby for particular judicial and political appointees, and maintain a recurring presence in the legal process through impact and class action litigation, either as parties or as *amicus curiae*. The courts are “yet another point of access” for elites, and that the Supreme Court is more responsive to elite perspectives than others—if only because elites are repeat players in the legal process. Using the courts and these other strategies, interest groups are able to outperform non-groups on various measures of success in achieving their political and legal agendas. But even if they are not

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144 On the accountability of “public” interest groups, see SCHLOZMAN & TIERNEY, supra note 170, at 28-34; CRENSON & GINSBURG, supra note 34, at 16-17, 176-178.

145 See LEHMAN & TIERNEY, supra note 170, at x-xi, 33; WRIGHT, INTEREST GROUPS AND CONGRESS 176-178, 181-186 (noting an “upper-class bias in the American interest group system” and discussing under-representation of unorganized interests, who are more likely to have lower levels of education, income, and status); see also sources cited supra note 170.


victorious in every battle, their status as repeat players in the political and legal processes makes them agenda setters.\textsuperscript{150}

When viewed in terms of elite interest group politics and litigation, the Grutter/Gratz mobilization, which at first blush seems to reflect the openness of our democracy, begins to look differently. All of the major voices actively participating in the affirmative action litigation were of the elite, decision-making class, repeat players and agenda setters in the legal process. This characterization includes the CIR, the relatively young but highly successful firm at the forefront of recent anti-affirmative action efforts,\textsuperscript{151} and its ally, the office of the Solicitor General of the United States, one of the most successful and influential advocates before the Court.\textsuperscript{152} The proponents of affirmative action fall into this category as well, including the University and its \textit{amici curiae}. To cite the most obvious examples of powerful interest groups among these \textit{amici}, the corporate backers of Michigan employ armies of lobbyists and trade associations to ensure that their interests are articulated and represented before the government.\textsuperscript{153} Even the civil rights and civic groups that were coalition members are repeat players in the political and legal processes,\textsuperscript{154} if peripheral and fledging ones in comparison to

\textsuperscript{150} See Cortner, \textit{supra} note 203, at 287-306; Orren, \textit{supra} note 203, at 723-27.

\textsuperscript{151} See notes 36 to 45 \textit{supra} and accompanying text.


\textsuperscript{154} Though the scale of their operations is small in comparison to that of the corporate lobbies, groups such as National School Boards Association, the National Education Association, and public interest litigators such as the LDF, and the ACLU engage in lobbying, publicity campaigns, and litigation to advance their policy preferences. See e.g., Kobylnka, \textit{supra} note 203, at 1065, 1067-69; Cortner, \textit{supra} note 203, at 306. The NAACP LDF and ACLU have long been at the forefront of public interest litigation and in fact have served as a practice model for others. See e.g. Epstein, \textit{supra} note __, at 209. The AFL-CIO is a potent political force with a powerful lobby in Washington. \textit{See also} Crenson & Ginsburg, \textit{supra} note 34, at 60-62, 131-36.

As we have seen, the political and legal environment in which Grutter and Gratz were litigated privileged an ahistorical narrative about equality, one that de-emphasized discrimination as a rationale for race conscious admissions in favor of utilitarian diversity rhetoric. This context placed the intervenors at a profound disadvantage in their effort to speak in a different voice about equality and the lawfulness of affirmative action. It destabilized BAMN’s effort to be a voice championing a genuinely distributive, “caste” theory of justice. This is because within this elite context, the intervenors faced the difficult task of playing dual roles and representing competing interests—insiders and outsiders, elites and non-elites—in effect, “serving two masters,” as Derrick Bell has termed the conflict of interest.\footnote{See Derrick Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976)(describing conflict between LDF’s clients and constituents).} BAMN assumed the role of insider elites (Supreme Court litigators), but adopted a legal theory (“caste” or subordination), blunt rhetoric,\footnote{See e.g. Why and How We Must Defend Affirmative Action, Nov. 1997, Liberator, Vol. 1, available at http://www.liberator.org/issue9711.html (“Liberator rejects the apologetic, tepid tone and language, and the half-stepping, unpersuasive, tokenist argumentation of the reluctant, moderate ‘defenders’ of affirmative action”).} and demonstration tactics (direct action) typically associated with outsiders. The tension between BAMN’s roles exposed the “two masters” problem that has long beset identity-based organizations, but which seldom is discussed.\footnote{This tension is seldom discussed despite Bell’s seminal work in this area and the fact that in-group diversity is becoming increasingly evident as time passes. See Brown-Nagin, Race as Identity Caricature, 151 U.Pa.L. Rev. 1913, 1919-1922 (2003)(describing absence of analysis).}
As an example of how this unspoken problem surfaced in the affirmative action litigation, consider the intervenors’ conflict with the University and other proponents—“servile beneficiaries of the status quo,” in BAMN’s words—who embraced a utilitarian rather than a discrimination-oriented defense of affirmative action. The intervenors faulted the University for using discriminatory criteria and failing to defend minority students in the face of attacks on their ability predicated (in part) on their underperformance on these same criteria. The university’s noblesse oblige—allowing minorities to enter its gates, but only on terms with profound dignity costs—was much less than would be expected from a true advocate of diversity and equality, the intervenors complained. BAMN’s criticism of the University and its utilitarian-oriented amici ignored the crucial fact that the intervenors were subject to much the same criticism that it had used against the university.

By virtue of their status as collegians and ascendant professionals, the intervenors were a privileged class relative to most Americans, most relevantly, the average minority student. But judging from BAMN’s rhetoric linking affirmative action at selective institutions to the well-being of minority communities as a whole, one would conclude that these policies provided a way out of ghettos for significant numbers of minorities trapped in the nation’s central cities. In truth, however, reams of social scientific data demonstrate that the vast majority of children of color who grow up in conditions of entrenched poverty remain there. Rarely do the “truly disadvantaged,” to use William Julius Wilson’s phrase, make it into the pool of applicants from which selective universities choose their student bodies. The minorities who suffer most and in the greatest number from socio-economic ills typically are not well-positioned to graduate from high school, much less compete for admission to universities like

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160 Yet, these students should be understood as “ascendant elites” to acknowledge their fledgling status, relative to that of the establishment and civil rights and civic elites. This caveat is especially important in light of the fact that most of the students were racial minorities. Race shapes status in ways that set even middle -and upper-income minorities at a disadvantage, relative to whites of the same (or even lower) social class. See Michael Dawson, Behind the Mule: Race and African-American Politics 72-75 (1994); Kevin Gaines, Uplifting the Race 11, 19-21, 162-63 (1996); Ellis Cose, The Rage of a Privileged Class (1994); see also note 200 infra and accompanying text. Yet, their status as elites is clear by comparison to the overwhelming majority of people of color, who have proportionately less political or legal influence than both whites and higher-income minorities. On the exclusion of working class and poor interests from institutionalized politics and the average person’s disaffection with electoral politics, see Crenson & Ginsburg, supra note 34, at 49, 98, 138-39.

161 See e.g. Brief of Kimberly James et al at 5-25, Grutter, No. 02-241 (2003).


163 Wilson, supra note 219, at 57-60.
Michigan. When experts talk about the so-called “achievement gap,” it is these students whom they most have in mind.

There are, of course, exceptions to the rule that minority students from working-class and poor, even abjectly poor, backgrounds do not attend selective colleges. (But tellingly, that these students are atypical is confirmed by the occasional news story or book telling their stories of triumph over adversity). And I do not mean to suggest that middle-class minority beneficiaries of affirmative action are indistinguishable from middle-class whites. As Dalton Conley and other social scientists have recently demonstrated, African-Americans, for example, are worse off than middle-class whites on numerous measures of well-being.

Nor am I denigrating the goal of increasing the representation of minorities in bastions of educational (and thus, legal, political, and social) privilege. It is a worthy goal. Given the present and past structure of society, the burdens of achieving meaningful levels of integration (and impliedly, social justice) can only lie, predominantly, on the shoulders of the middle-class minorities; they are the only ones in the aggregate with a reasonable chance of competing with advantaged whites.

These caveats notwithstanding, it remains true that the issue debated in Grutter/Gratz—admission to selective public universities—is mainly of interest to minority and white students from middle-class and upper-income households.

166 See, e.g., GREG MATHIS, INNER CITY MIRACLE (2002) (discussing rise of an “underprivileged” black male from Detroit from a life of crime to law school and a judgeship); BEN CARSON, GIFTED HANDS (1996)(describing rise of black male from poverty in Detroit to medical school and renown as a pediatric neurosurgeon); DAVIS SAMPSON ET. AL., THE PACT : THREE YOUNG MEN MAKE A PROMISE AND FULFILL A DREAM (2003)(describing rise of three black men from poverty in Newark to medical school and successful medical practices).
167 For instance, on average even higher-income blacks have much less wealth than whites of the same or even lower income due to the intergenerational effects of discrimination. See DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA (1999); OLIVER & SHAPIRO, BLACK WEALTH, WHITE WEALTH (1997). For an excellent discussion of these issues within the context of the affirmative action debate, see Deborah C. Malmud, Affirmative Action, Diversity, and the Black Middle Class, 68 U. Colo. L. Rev. 939 (1997)(demonstrating that the black middle class is systematically worse off than the white middle class on numerous economic dimensions).
168 DONALD MASSEY ET AL., THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMAN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES ___(2003)(showing that 80 percent of Asians, 66 percent of Latino, and 60 percent of African Americans freshman at competitive
Taking the perspective of less well-off minorities, it is not an ideally redistributive policy. Rather than fighting for policies that have the broadest impact on the greatest proportion of minorities, the intervenors (and civil rights and civic amici) were pursuing a different, and as I have suggested above, important goal—a more inclusive elite, exemplified by greater numbers of black lawyers.\textsuperscript{169} The intervenors were not pursuing an egalitarian admissions system, whatever their rhetoric. Nor is such a system in the interests of middle-class minorities, to the extent that it would reduce the value in the marketplace of degrees from selective universities. In the short-term, the intervenors, like the University, desired to preserve the status quo. This was so even though the current system is, by their own admission, discriminatory (because of the credentials gap) and exclusionary (because middle- and–upper income minorities benefit disproportionately from affirmative action).\textsuperscript{170}

True, the intervenors argued or implied that minority representation in elite law school enhances the well being of all minorities, regardless of whether individual minorities are direct beneficiaries of these policies. The theory of representation that the intervenors advance is ubiquitous and rests on a seldom interrogated assumption that shared racial identity necessarily implies group cohesion and interest convergence.\textsuperscript{171} Fortunately, this assumption often bears out. Judging, for example, from recent studies showing that minority lawyers disproportionately engage in pro bono efforts to aid poor, minority clients, we can conclude that the goal of increasing minority lawyers has a positive, indirect impact on the truly disadvantaged.\textsuperscript{172} But the indirect benefits to poor minorities of affirmative action programs are limited in scope and different in kind from pursuits that directly benefit the neediest. The interests of minority student applicants to selective colleges and truly disadvantaged minority students are distinguishable.

Affirmative action in selective institutions of higher education is at the

\textsuperscript{169} Brief of Harvard BLSA et al at 4-19, Grutter, No 02-241 (2003); Brief of American Bar Assn. at 6-18, Grutter, No 02-241 (2003).

\textsuperscript{170} See sources cited supra note 201.

\textsuperscript{171} But see Bell, supra note 188, at __ (discussing interest divergence among African-Americans over implementation of Brown); Brown-Nagin, supra note 190 at 1924-1966 (same).

forefront of the civil rights agenda due to the interest group dynamics that I discussed above. It is not the issue on which an organization pursuing distributive justice, with a choice regarding how to expend their time and resources, and intent on being an agenda setter, would make a priority. Other pursuits, most obviously better elementary and secondary schools, would be more urgent. Nevertheless, the privileging of elite political and legal agendas, as exemplified in the affirmative action debate, cannot be viewed as an aberration; it reflects an historical continuity. As recent historical scholarship has shown, elites’ priorities often have been privileged over theories and strategies of social justice that focused on the plight of working-class and poor.  

To state the obvious, organizations pursuing social justice typically have made strategic calculations about their agendas from a defensive posture, and that is no less true today. The CIR has made affirmative action a priority by making less than genuine claims about how its litigation advances the interests of the average white citizen. The organization repeatedly situated its lawsuit against the University as a matter of utmost concern to the “average American.” To be sure, every American has (or should have) an interest in how the Court interprets the Constitution. It is also true that working-class whites bear the brunt of affirmative action policies. But as I have noted in the discussion of BAMN’s two masters’ problem, in point of fact, the number of students affected by affirmative action policies per capita is relatively small because these policies are only used at selective colleges and universities. Such colleges and universities are overwhelming and disproportionately attended by wealthy whites. Hence, the named plaintiffs in Grutter and Gratz were not typical representatives of the class of students applying or admitted to the University, but largely for reasons well beyond affirmative action. Barbara Grutter, for example, hailed from a working-class suburb of Detroit, from the type of neighborhood that sends few students to the University of Michigan. The vast majority of students who attend the University are wealthy, non-resident whites, since wealthy whites routinely score higher and post better credentials for admission to Michigan (and similar schools) than in-state whites from working- and lower middle-class backgrounds.  

173 See Risa Goluboff, “We Live’s in a Free House Such as it is,”: Class and the creation of modern civil rights, 151 U. Pa. L. Rev. 1977, 2010-2018 (2003)(discussing race- and class-based rights claims by African-Americans during the 1940s that NAACP LDF declined to follow); Brown-Nagin, supra note 190 at 1949-1966 (discussing challenge by poor women to desegregation plan negotiated by a group of biracial elites); MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY (2003)(discussing Communist Party’s organizing efforts and collaboration with members of the NAACP, Urban League, and other organizations in New York city).

174 See Guinier, supra note 5, at ____.

175 See STOHRR, supra note 28, at 45-47.

176 See Grutter, 539 U.S. at 360 (Thomas, J., concurring in part and dissenting in part)

177 See Strum & Guinier, supra note 55, at 990-992.
The debate over affirmative action thus obfuscates the most obvious inequality in American higher education. Parental income, education, and occupational status are the main positive indicators of whether a student is likely to attend quality elementary and secondary schools, and thus, a selective university, or any institution of higher education, for that matter.\textsuperscript{178} According to a Century Foundation report published in 2003, 74 percent of students admitted to America’s 146 competitive colleges came from the “top quarter of the nation’s social and economic strata.”\textsuperscript{179} Less than 10 percent came from the bottom two socio-economic strata, and only 3 percent from the very bottom strata.\textsuperscript{180} In other words, as Peter Sacks recently explained in the \textit{Chronicle of Higher Education}, “Class, not race, is the grand organizing principle of our educational system.”\textsuperscript{181} Clara Lovett, President of the American Association of Higher Education, agrees. Notwithstanding egalitarian rhetoric, educational institutions that are pathways to economic security and leadership increasingly serve only to “ratify social advantage” rather than enable “social mobility.”\textsuperscript{182} Hence, any organization interested in advancing the goals of the average American student could find much better targets of opportunity than affirmative action.

As I shall next discuss, the discursive framework created by the CIR and the utilitarian strand of affirmative action proponents found expression in \textit{Grutter} and \textit{Gratz}. In light of the socio-political dynamics that I have discussed here, it

\textsuperscript{178} See Guinier, supra note 5, at 149 (noting that 74% of the students at the 147 most selective colleges and universities come from the upper 25% of socioeconomic status indicators, that only 3% come from the bottom 25% and roughly 10% come from the bottom half); Peter Sacks, \textit{Class Rules: The Fiction of Egalitarian Higher Education}, CHRON. OF HIGHER EDUC., Jul. 25, 2003, at 7 (“Admission to by America’s elite are largely determined long before an application even reaches the admissions office” because they are a “function of an elaborate, self-perpetuating system of social and economic class that systematically grants advantages to those of privilege.”).

\textsuperscript{179} Sacks, supra note 10, at 7; see also Anthony P. Carnevale and Stephen J. Rose, \textit{Socioeconomic Status, Race/Ethnicity, and Selective College Admissions} 8 (2003), available at http://www.tcf.org/Publications/White_Papers/carnevale_rose.pdf; see also A Century Foundation, \textit{Left Behind; Unequal Opportunity in Education} (noting that students from families in the highest income quartile participate attend college at a 90% rate, compared with a less than 60% rate for students from bottom quartile and that those in the bottom quartile are significantly less likely to graduate from college).

\textsuperscript{180} Carnevale and Stephen J. Rose, supra note 211, at __.

\textsuperscript{181} Sacks, supra note 210, at 7.

\textsuperscript{182} Clara M. Lovett, \textit{The Perils of Pursing Prestige}, Chron. of High. Ed., Jan 21, 2005, at B20 (“Instead of investing in learning environments that help students of varied backgrounds and preparation succeed, too many institutions now spend their resources aggressively recruiting students with high SAT or ACT scores and other conventional markers of achievement that correlate strongly with socioeconomic status.”); David Leonhardt, \textit{As Wealthy Fill Top Colleges, Concerns Grow Over Fairness}, N.Y. Times, Apr. 22, 2004, at A1 (describing predominance of students from wealthy households in college); Sacks, supra note 210, at 7 (same).
comes as no surprise that the intervenors’ effort to fashion an alternative vision of equality by making an “issue” of credentials bias would see limited success.

II. Imprints

Many commentators have described Grutter and Gratz as definitively resolving an important doctrinal question.183 Grutter is a clear victory for proponents of affirmative action and a certain defeat for conservatives, some argue.184 This view is a partial truth. It is plainly the case that Grutter forecloses the argument that diversity is an inadequate justification for race-conscious state action.185 But the meaning of Justice O’Connor’s rhetoric enshrining diversity with constitutional significance is far from clear, however. As others have explained, the Grutter majority fails to cogently explain under what circumstances race conscious policies should be considered sufficiently narrowly tailored to avoid offending the Constitution. Grutter’s ambiguity matters a great deal, both practically186 and conceptually,187 for future debates about affirmative action.

183 See Lani Guinier, The Constitution is Both Colorblind and Color-Conscious, THE CHRON. REV., Jul. 4, 2003, at B11 (“The Supreme Court’s decision was a slam-dunk for affirmative action.”); Lynette Clemetson, NAACP Legal Defense Fund Chief Retires, N.Y. TIMES, Jan. 16, 2004, at A10 (describing Michigan cases as “end[ing] in a slam-dunk victory affirming the principles we have been fighting for.”); Lee C. Bollinger, A Comment on Grutter and Gratz v. Bollinger, 103 Colum. L. Rev. 1589 (2003)(describing Grutter as “having definitely resolved (at least for a generation” the issue of the constitutionality of affirmative action in higher education’’); Jack Greenberg, Diversity, the University, and the World Outside, 103 Colum. L. Rev. 1610, 1611-12, 1615-20 (2003) (characterizing affirmative action policies as necessary to alleviate uniquely oppressed condition of African-Americans and Justice O’Connor’s decision in Grutter as “path-breaking” in recognizing blacks’ unique status, but noting that diversity is a limited rationale for racial inclusion). See also Tony Mauro, Court Signals No End to Racial Preferences, THE RECORDER, June 24, 2003 ([The] “U.S. Supreme Court gave a surprising and historic embrace to the concept of affirmative action in university admissions Monday, dashing the hopes of the Bush administration and conservatives that racial preferences would come to an end.”); John Aloysius Farrell, Court Backs Diversity in College Admissions: Landmark Ruling Keeps Affirmative Action Alive, THE DENVER POST, June 24, 2003, at A1 (classifying the Grutter decision as landmark for being the first case in 25 years to squarely tackle the question of racial preferences in higher education by certifying diversity as a vital national interest); David G. Savage, Court Affirms Use of Race in University Admissions, L. A. TIMES, June 24, 2003 at 1 (noting that the decision to uphold affirmative action at colleges “marks a surprising defeat for conservative activists”).

184 See sources cited supra note 222. CHK CROSS REF


186 Justice O’Connor’s opinion leaves numerous details about the proper application of the narrow tailoring prong of its test for whether diversity-based race conscious policies open to question. See e.g. David Levine, Public School Assignment Methods After Grutter and Gratz: The View from San Francisco, 30 Hastings Const. L. Q. 511, 513 (2003)) (arguing that cases “draw a blurry line between permissible and impermissible admission plans in higher education context”). The confusion about what kinds of race-conscious programs are permissible is heightened by the fact
Nevertheless, my goal in this part is not to recapitulate the observations made in the many articles that explore Grutter from a doctrinal standpoint or to offer a normative argument about equality discourses. As I initially explained, this article is written from a cultural and socio-political standpoint. My goal in this part is narrow: to read Grutter as it relates to the project of understanding the relationship among constitutional litigation, interest groups, and social movements. With a view toward that end, this part observes that the Grutter majority opinion reflects Justice O’Connor’s appeasement of all of the interests discussed in Part I, in an effort to find consensus amidst cultural conflict. Even as it appeases all, the opinion appeals most to the sensibilities of the mobilization’s moderate, utilitarian strand. In fact, the Court’s justificatory rhetoric unabashedly invoked the views of the moderate elite interest groups. The CIR’s perspective prevails, as well, although it was the nominal loser in Grutter. The Grutter majority rejected the CIR’s claim that the equal protection clause requires absolute colorblindness. But Justice O’Connor nevertheless bowed to its worldview, since it overlapped in an important respect with that of the moderates. In the process of finding diversity a compelling governmental interest and affirming the lawfulness of holistic forms of affirmative action, the Grutter majority credited the CIR’s view (shared by the University and most amici curiae) that the underlying admissions criteria were sound, or, in any event, not subject to debate. By contrast, the intervenors’ discrimination argument met an

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that the undergraduate policy at issue in Gratz was struck down for giving inadequate consideration to individual applicant’s qualifications. 539 U.S. at 271-75. Yet the kind of policies at issue in Gratz more efficiently generate racially diverse student bodies. Hence, the regime that Grutter enshrines there is impractical. In the face of the CIR’s on-going plan to attack affirmative action programs by challenging whether policies are narrowly tailored, the easiest way to comply with the dictates of the Grutter/Gratz decisions is to avoid using race as a factor in admissions. See Guinier, supra note 5 at 195 (“To assess the qualitative merit of their applicants in a manner consistent with Grutter and Gratz, public institutions such as Pennsylvania State University, which has 87,000 applicants a year, may feel pressured to hire extra admissions officers to read files.”); Levine, supra, at 513 (“[U]ncertainty may well lead public elementary and secondary school districts to … use clearly race-neutral assignment plans rather than face the risk of having to defend a race-conscious plan through financially expensive and politically divisive litigation”).

187 See e.g. Barbara Flagg, Diversity Discourses, 78 Tulane L.Rev. 827 (2004) (arguing that Grutter’s rhetoric might encourage white resistance to race-conscious policies); Bryan K. Fair, Taking Caste Seriously: Why Grutter Will Help Very Little, 78 Tul. L. Rev. 1843,1857-60 (2003) (arguing that Grutter encourages white hegemony); Lawrence, supra note 5, at 950-59 (arguing that liberal defense of affirmative action overlooks historic and structural discrimination against minorities and fails to challenge subordinating practices); but see Post, supra note 3, at 58-60 (arguing that Grutter’s diversity principle is broader than Bakke’s and has far-reaching implications for all of society’s institutions); Cynthia Estlund, Taking Grutter To Work, 7 Green Bag 2d 215 (2004) (arguing that Grutter may be grounds for defending race conscious employment decisions).

188 See notes 233-240 infra and accompanying text. CHK CROSS REF
altogether different fate—silence. Not one Justice who endorsed race-conscious admissions engaged the intervenors’ credential bias argument.\textsuperscript{189}

The extent to which moderate, elite understandings about equality find expression in the majority opinion is remarkable, but not unexpected, in light of the influential roles that elite interest groups generally play in setting political and legal agendas. Nevertheless, the Court’s receptivity to these elements—the degree to which their vision of society dominates the Court’s rhetoric—is striking. Yet, the establishment elites’ predominance within the constitutional conversation about equality in \textit{Grutter} and \textit{Gratz} has been celebrated more than scrutinized.\textsuperscript{190} This part’s analysis of their influence and the intervenors’ corresponding lack of influence lays the groundwork for the article’s final part, which questions scholars’ claims that law is and should be constitutive in social movements seeking fundamental change.

A. Deference to the Utilitarians

\textit{Grutter} steers clear of expressions of support for minorities’ interests that are untethered to considerations of the interests of society as a whole, as articulated by leaders of its most influential institutions. The decision principally justifies diversity-based affirmative action in higher education as an engine for advancing the public welfare. That is, the \textit{Grutter} majority fully embraced the utilitarian arguments made by the University of Michigan and the establishment elite \textit{amici}.

\textsuperscript{189} The only Justice who focused on the discriminatory effect of Michigan’s admissions standards was Justice Thomas, who believes affirmative action is unconstitutional. See \textit{Grutter}, 539 U.S. 306, 361-72 (Thomas, J., concurring in part and dissenting in part).

\textsuperscript{190} See Caminker, \textit{supra} note 14, at 893-94 (noting persuasiveness of military brief); Jonathan Alger and Marvin Krislov, \textit{You’ve Got to Have Friends: Lessons Learned From the Role of Amici in the University of Michigan Cases}, 30 J.C. & U.L. 503, 524 (2004)(“[A]micus brief[s] from significant leaders of our nation’s most trusted institution, particularly during a time of anxiety about national security, validated the claims being made by respondents both about the value of diversity and the necessity of employing race-conscious measures to achieve that goal.”); Guinier, \textit{supra} note 5, at 175 (“By citing the amicus briefs of the military and others, Justice O’Connor’s opinion for the Court affirmed that the conversation about racial diversity extends beyond the classroom to include the fundamental role of public education in a democracy); Devins, supra note __, at 369-70 (“The amicus curiae filings in \textit{Grutter} and \textit{Gratz} are a testament to the breadth and intensity of support for affirmative action. By detailing the perceived benefits of affirmative action, they provided the Court with information it could use to explain why racial diversity is a compelling government issue.”); Mike France and William Sydmonds, \textit{Diversity is About to Get More Elusive, Not Less}, Bus. Week., July 7, 2003, at 30 (“Smart companies have seen the future -- and it isn’t lily-white. … [In the future] the majority of corporate America’s new customers and workers are going to be minorities. That’s why the business community vigorously defended the University of Michigan’s affirmative-action programs in 2003”); \textit{but see} Nelson, supra note 14, at 834 (referring to Court’s reliance on military and business’ arguments as “cynical”); Guinier, supra note 5, at 176 (noting the limitations of the notions of upward mobility advanced by the Court and universities).
The Grutter Court endorsed race-consciousness in admissions because of the “laudable educational benefits” of diversity claimed by the University of Michigan and other educational institutions, including “cross-racial understanding” and the “breaking down of stereotypes.”

But to what end is this diversity, for what purpose? In resounding terms, the Court answered that diversity is a social good because it is consistent with the interests articulated by the utilitarian strand of the business, military, and professional elite amici, along with the universities.

Justice O’Connor’s justificatory rhetoric invoked the arguments spelled out in the briefs submitted by the elite amici. Those interests include stimulating the global economy, populating the domestic and global workforce with socially intelligent workers, and providing legitimacy for the legal profession and the political economy, as a whole. The Court relied on business and academia’s argument that diversity was needed in order to successfully educate and populate the American workforce with socially intelligent individuals. The persuasive force of these arguments was aided by demographic trends cited in their briefs, which the Court did not explicitly mention, but which are common points of reference in the current socio-political environment. Several of the amicus curie who supported the University of Michigan, including the business concerns and military officers, cited the economic and political leverage of racial minorities as a rationale for their support of race-conscious admissions.

Finally, the majority cited national security as a rationale for upholding affirmative action programs. The Court relied on the former military officers’

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191 See Grutter v. Bollinger, 539 U.S. at 330-332 (deferring to Michigan and amici curiae’s conclusion that diversity “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals”).
193 Id. at 330-333 (discussing view that diverse learning environments better prepare students for workforce than non-diverse schools would).
194 Id. at 330-333 (discussing how having minorities in professions confers legitimacy on societal institutions).
195 Id. (“[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and view points.”) (quoting Brief of General Motors, supra note 184, at 3-4).
196 See Brief of Julius Becton et al as Amicus Curiae, Grutter v. Bollinger, No. 02-241 (2003); Brief of 3M et al as Amicus Curiae, Grutter v. Bollinger, No. 02-241 (2003). During the period when the cases were pending, “Hispanics” became the largest minority group in the nation, and there has been increased public discussion of the importance of minorities in the marketplace and at the ballot box. See Gregory Rodriguez, Where Minorities Rule, The Nation, Feb. 10, 2002, at 6; see also U.S. Census 2004, U.S. Census Bureau, available at http://factfinder.census.gov/servlet/SAFFFacts? sse=on.
argument that race-conscious programs are needed to preserve racial diversity in the officers corps, and therefore, national security. 197 The majority’s references to the arguments in the military brief fit seamlessly with contemporary socio-political dynamics, since the nation and the world were captivated by the United States’ declaration of war against Iraq in the months before Grutter/Gratz were decided. 198

Based on the tight fit between the Court’s reasoning and current socio-political and economic dynamics, the utilitarian and pragmatic themes in the majority opinion are clear.

B. Appeal to Skeptics and Opponents

Justice O’Connor’s opinion also struck a tone that addressed the concerns of the fragile majority of the public that offers conditional support for limited forms of affirmative action in education and employment. As noted in the prior part, whites consistently articulate to pollsters skepticism about affirmative action. This skepticism is predicated in part on the flip side of the intervenors’ credential bias claim—the claim that the cold numbers demonstrate whites’ superior qualifications for admission to law school. 199 The Grutter majority’s rhetoric, especially when coupled with the rhetoric of Gratz, appeased skeptics who worry that minorities are admitted to educational institutions despite being less qualified than white applicants.

The two opinions assuage this concern in at least two respects. In Gratz, the Court rejected the undergraduate policy because of its view that the bonus point system made race the predominant factor in determining whether a candidate was admitted to the university. 200 As the Grutter majority explained, the point system had the “ill” effect of ensuring that every “minimally qualified” minority applicant was admitted to the university. 201 The Grutter majority limited

197 Id. at 331 (noting that high-ranking retired officers and civilian leaders of the United States military assert that “based on [their] decades of experience [a] highly qualified, racially diverse officer corps … is essential to the military’s ability to fulfill its principle mission to provide national security.”) (quoting Brief of Julius Becton et al., supra note 119, at 27).

198 See Presidential Address to the Nation, Mar. 19, 2003, available at http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html (announcing that U.S. “had begun military operations “to disarm Iraq, to free its people and to defend the world from grave danger”). Judging from past episodes, the war footing is significant; war engenders a patriotic ethos that can sometimes have a positive effect on race relations or on the pursuit of racial justice (WWII, for example) See e.g. Richard Dalfume, The Forgotten Years of the Negro Revolution, J.of Am.Hst. 55:1 (June 1968): 90-106; JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 454-66 (7th ed. 1994).

199 See note 68 supra and accompanying text. CHK CROSS REF


201 Id. at 265-272.
its endorsement of affirmative action policies to those in which race is but one of many factors considered in a holistic admissions process.\textsuperscript{202} The stark line that the Court drew between the policies at issue in \textit{Grutter} and \textit{Gratz} addressed the polled public’s general perception that affirmative action and individual merit are incompatible concepts.\textsuperscript{203} The Court accomplished this objective by finding unlawful the system that seems most like a quota. The \textit{Gratz} Court rejected race-based point systems that some experts view as the most efficient means to achieve racial diversity,\textsuperscript{204} but which the average person, even moderates who view affirmative action as a social good, tends to perceive as group-based numerical set-asides which leave no room for the consideration of an individual applicant’s qualifications.\textsuperscript{205} By striking down an undergraduate policy that limited admissions officers’ discretion in assessing minority applicant’s admissions files, the Court allayed concerns that affirmative action programs operate as nothing more than race-based quota system.\textsuperscript{206}

\textit{Grutter}’s rhetoric also contained an element that both skeptics and outright opponents of affirmative action would be expected to appreciate. Justice O’Connor opinion included a sunset provision for affirmative action policies in higher education. The majority closed its opinion by noting that race-conscious policies must end at a definite future point. Going further, the Court predicted that the endpoint likely will occur in twenty-five years, when affirmative action presumably will become unconstitutional.\textsuperscript{207} In her concurring opinion, Justice Ginsburg, joined by Justice Breyer, also endorsed the concept of sunset

\textsuperscript{202} Grutter, 539 U.S. at 335-340.

\textsuperscript{203} See infra Part I C.


\textsuperscript{205} See poll data cited in notes 50-51 supra and accompanying text.

\textsuperscript{206} The Court’s use of the term “minimally qualified” is revealing. Students who are “minimally qualified” are, presumably, nevertheless “qualified”. These sharp distinctions drawn between the Grutter and Gratz policies had the additional effect of turning the Court away from the reality that the more subjective policies are those most likely to reward the most advantaged and well-equipped minorities, consigning the truly disadvantaged—those most likely to be “minimally qualified”—to non-selective institutions. On the two-tiered system of higher education, encapsulated in the notions of “selective” versus “non-selective” institutions, and its inherent elitism and discriminatory impact, see Peter Sacks, \textit{Class Rules: The Fiction of Egalitarian Higher Education}, CHRON. OF HIGHER EDUC., Jul. 25, 2003, at 7. Justice Ginsburg’s dissent took note of the short shrift given to the minimally qualified in the majority opinion and the relevance of socioeconomic circumstances. See Gratz, 539 U.S. at 298-305 (Ginsburg, J., dissenting).

\textsuperscript{207} See Grutter, 539 U.S. at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”) Justice Thomas characterized this aspect of the majority opinion as a “holding,” see id. at 351, a characterization that one scholar calls either “wishful thinking, sloppy reading, or deliberate distortion.” Goldstein, supra note 14, at 931.
C. Mixed Signals about Distributive Justice

The Court’s mixed reception to the intervenors’ claims was foreshadowed well before its decisions in the affirmative action cases were announced. The intervenors were “shut out” of the oral argument. Prior to the Supreme Court argument, the University had agreed to divide its time for argument with the intervenors. Later, it reversed its decision—a “betrayal,” according to the intervenors. The intervenors then petitioned the Court to enlarge the time for argument in Grutter (by ten minutes) so that the students could add their distinctive perspective to the oral argument. Namely, the students wanted to present “uncontested evidence” that the admissions criteria used by the law school perpetrated “racial bias and discrimination” that affirmative action remedied. The Court denied the request.

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208 See 539 U.S. at 344, 346 (Ginsburg, J., concurring) (noting that Court’s sunset provision “accords with international understanding,” but adding that “[f]rom today’s vantage point, one may hope, but not firmly forecast, that … progress toward nondiscrimination … will make it safe to sunset affirmative action”).

209 See Jodi S. Cohen, Ruling Bars Minorities in U-M Case, Mar. 11, 2003, DETROIT (MICH.) NEWS, at 1D (quoting one of the students’ lawyers as saying “U-M lied to us” by reneging on an earlier promise to cede some of their time to the intervenors during the Supreme Court argument).

210 This proposition is uncontested by the University’s attorneys. See STOH, supra note __, at __.

211 Id.; Maryanne George, Student’s Can’t Address Supreme Court in U-M Case, Mar. 11, 2003, DETROIT FREE PRESS, available at 2003 WL 2544127 (quoting lawyer as noting that student-intervenors would be forced to watch the proceedings rather than participate in them, thus relegating “the black man … [to] the damn gallery again.”). Although no one other than the parties can contest the validity of the betrayal argument, it is clear that the litigators for the University of Michigan did not want the students and LDF/ACLU’s argument made before the Supreme Court. See Grutter Litigators Explain Strategy Used to Win Affirmative Action Case, Apr. 1, 2004, available at http://www.law.virginia.edu/home2002/html/news/2004_spr/grutter.htm (noting that the University’s lawyers rejected LDF’s proposed strategy of arguing that diversity argument in Regents of the University of California v. Bakke was not the best justification for affirmative action). Yet, one of the university’s attorneys now claims that they did want to offer an argument broader than Bakke’s diversity rationale. See Evan Caminker, A Glimpse Behind and Beyond Grutter, 48 St. Louis L.J. 889, 894 (2004) (“From our perspective as litigators, we knew that we wanted to push beyond Bakke…”).

212 See Motion for Enlargement of Argument Time and For Divided Time, Grutter v. Bollinger, No. 02-241 (2003)). The university did support the students petition to expand the amount of time for argument, however, See Univ. of Michigan Student Intervenors Denied Time to Give Oral Arguments, U-WIRE, Mar. 10, 2003, available at 2003 WL 14059945. Massie says no—double check in the record Had the University joined the motion for divided time, it would almost certainly have been granted. See, e.g., Crawford v. Martinez, 124 S.Ct. 2851 (2004) (denying additional time but granting parties’ joint request for divided argument); Comm. Of Internal Revenue v. Banks, 125 S.Ct. 28 (2004) (same).

213 Motion for Enlargement of Argument Time and For Divided Time, Grutter v. Bollinger, No. 02-241 (2003); Stohr, supra note 28 at 257.

“preference for leaving [the University’s] own prejudices undisturbed.” She continued, “How can you [the Court] reach an intelligent conclusion on whether affirmative action is fair and legal without taking account of the unearned advantage for white people in the admissions system?”

The Grutter opinion itself rejected the two varieties of discrimination-based arguments proffered by the distributive justice of the coalition defending Michigan’s policies. The credentials bias argument was its central claims. But the intervenors also pointed to a second, interrelated, form of bias. This was the claim that the existing mal-distribution of education, employment, and other goods resulted from past and present discrimination. Both forms of discrimination justified affirmative action, according to the intervenors.

One aspect of the Grutter majority opinion seemed responsive to the distributional claim, however. A single, but powerfully rendered, paragraph in Grutter responded to the claim that the overwhelmingly white elite law schools that would follow the end of affirmative action admissions would undermine the credibility of the legal system and legitimacy of America’s multi-racial democracy. Noting that most of Congress and federal judges are lawyers and that many are graduates of elite law schools, the Court conceded that professions such as law are conduits to leadership. The majority then charged that the “path to leadership” must be “visibly open to talented and qualified individuals of every race and ethnicity” if leaders are to have “legitimacy in the eyes of the citizenry.” This black-out comment provided the closest thing in the majority opinion to a moral argument for race-conscious admissions.

But this passage was filled with utilitarian rhetoric as well. Justice O’Connor discussed the impact of an all-white aesthetic in the legal profession on society as a whole. She avoided directly discussing the putative beneficiaries of affirmative action themselves, or their right to equal access to selective}

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216 Maryanne George, Student’s Can’t Address Supreme Court in U-M Case, DETROIT FREE PRESS, Mar. 11, 2003, available at 2003 WL 2544127.
217 See notes 104-105, 109, 117, 120-22 supra and accompanying text. CHK CROSS REF
218 The amicus brief of Harvard, Stanford, and Yale BLSAs make this argument, as does the ABA’s amicus brief, though neither was cited by the Court. See Brief of Amici Curiae Harvard Black Law Students Ass’n, Stanford Black Law Students Ass’n and Yale Black Law Students Ass’n, Grutter, 539 U.S. 306 (2003) (No. 02-241) at 6-28; Brief of Amici Curiae Am. Bar Ass’n, Grutter, 539 U.S. 306 (2003) (No. 02-241).
219 Grutter, 539 U.S. at 332.
institutions of higher education. The predominant line of reasoning running through the Michigan opinion remained that affirmative action furthers the interests of whites as a group, even if such programs sometimes deny individual whites access to certain selective institutions of higher education. In other words, the interests of the majority converged with the interests of the minority; it is this convergence that justified programs that otherwise would be deemed unlawful.  

Justice Ginsburg stood alone in emphasizing historicist rationales for affirmative action. The Grutter and Gratz majorities averted their gaze from historical wrongs. The question of whether Jim Crow justified race-sensitive admissions was deemphasized in the Court’s embrace of the diversity rationale. Although some have noted that the diversity rationale is more convincing when conjoined with an historicist argument, in the Grutter majority’s rendering, diversity looks forward rather than backward. That said, two references in the opinion arguably acknowledged the country’s racial past. Justice O’Connor remarked that “race unfortunately still matters” and suggested that pedagogical benefits may flow from affirmative action beneficiaries because “our Nation’s struggle with racial inequality” will color their experiences. The first reference was too fleeting to be of consequence. The second spoke to utilitarian benefits that flow from affirmative action, rather than to historical discrimination in the sense that the intervenors’ pressed upon the Court. The intervenors (and the civil rights and civic amici) wanted an admission that America’s tortured racial history had diminished African-Americans’ and other minorities’ opportunities for accumulating intellectual and social capital. Therefore, past discrimination had inexorably tilted the playing field in favor of whites. This was an admission that O’Connor did not make.

\[220\] See Derrick Bell, Brown and the Interest Convergence Dilemma, 93 Harv. L. Rev. 518 (1980)(propounding “interest convergence thesis, which holds that whites confer benefits on blacks only when it is in their interests to do so). In his recent commentary on Grutter/Gratz, Bell has described the split decisions as a “definitive example” of the interest convergence theory. See Bell, supra note ___ at 1624. For other scholarly analyses of American race relations that draw on Bell’s theory, see Lani Guinier, From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma, 92 JOUR. OF AMERICAN HISTORY (June 2004); Mary Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61 (1988) (explaining that Jim Crow’s demise corresponded with American interest of belying Soviet propaganda pointing to segregation as proof that U.S. propaganda touting the superiority of its socio-political system was untrue in a fundamental dimension).

\[221\] See 539 U.S. at 344-345 (Ginsburg, J., concurring), 539 U.S. 298-305 (Ginsburg, J., dissenting).

\[222\] Grutter, 539 U.S. at 333.

\[223\] Grutter, 539 U.S. at 338.

\[224\] Universities located in states with such histories would have offered a more logical context in which to consider what quantum of evidence justifies race-conscious admissions on a corrective rationale. Tellingly, the CIR has chosen to steer clear of such institutions. See Caminker, A Glimpse Behind and Beyond Grutter, 48 St. Louis L.J. 889, 891 (2004) (noting the CIR’s strategic calculations in bringing litigation against affirmative action and noting that the organization
C. Silence on the Credentials Bias Claim

The *Grutter* majority met the intervenors’ credentials bias claim with silence. As discussed above, the intervenors argued that the University’s reliance on racially discriminatory admissions criteria was the root cause of its “need” for race-conscious admissions policies. Given the built-in advantages that they possessed in the admissions process, the plaintiffs were more victors than victims. Neither the plaintiffs nor the University challenged the credentials bias claim.

Two dissenters, Justices Rehnquist and Kennedy, discussed the magnitude of the credentials gap between the University’s affirmative action admits and rejected white applicants. They pointed to the gap as evidence for the CIR’s claim that minority beneficiaries of affirmative action were less deserving of admission than whites. The justices’ perspective tracked that of the dissent in the Sixth Circuit’s opinion finding the University’s race conscious policies lawful.

None of the justices who supported race-conscious admissions engaged the intervenors’ argument. Justice O’Connor seemed to discount the notion that race-sensitive admissions should be viewed as a remedy for discriminatory avoided filing an action against the University of Virginia because it “wanted to avoid a school that could plausibly offer a remedial justification for affirmative action). This is not to say that the pasts of the University of Michigan or Michigan State are free of racial discrimination. Quite the contrary is true. See THOMAS J. SUGRUE, ORIGINS OF THE URBAN CRISIS 266 (explaining the racial politics surrounding the Milliken decision as creating a backlash against growing black power in Detroit, resulting in white resistance, which included support for white conservative candidates for public office.). A prior Court in fact has acknowledged Michigan’s history of racial discrimination. See Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Milliken I) (“All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.”).

See *Grutter*, 539 U.S. at 380-85 (Rehnquist, J., dissenting); 539 U.S. at 389-92 (Kennedy, J., dissenting).

See 288 F.3d 732, 796-800 (6th Cir. 2002)(discussing magnitude of preference for under-represented minorities).

The parties’ status as intervenors would not have limited the Court’s ability to address their argument. In fact, in two recent cases the Court not only granted intervenors’ time to make specific arguments, but also discussed their arguments extensively in its opinion. See Utah v. Evans, 535 U.S. 903 (2002)(allowing intervenor, state of North Carolina, additional time for oral argument and addressing its perspective extensively in a case challenging the “hot-deck imputation” method of taking census); Zelman v. Simmons-Harris, 536 U.S. 639 (2002)(allowing intervenors, nonpublic schools participating in voucher program, additional time for oral argument and addressing their arguments). These cases arguably are distinguishable because the University opposed [double check] the BAMN intervenors’ motion for additional time and because the intervenors’ argument arguably was averse to the University. Even crediting these arguments, though, nothing prevented the concurring justices from mentioning the intervenors’ claim. The silence could of course be a function of the kinds of behind-the-scenes maneuvering in which Justices engage when attempting to reach consensus on a contentious issue.
admission’s criteria, however. In response to the District Court’s suggestion that “decreasing the emphasis for all applicants on undergraduate GPA and LSAT” would diminish the need for race-conscious measures, 228 Justice O’Connor deferred to the university’s judgment about how best to assemble student bodies with a critical mass of minority students. The District Court’s suggestion would be a “drastic remedy that would require the Law School to become a much different institution.”229 “Academic selectivity” is a “cornerstone of [the University of Michigan’s] educational mission” that it should not have to sacrifice for the sake of diversity, O’Connor wrote. 230

Justice Thomas countered Justice O’Connor’s statement with the claim that the universities’ use of race-conscious measures should be viewed as the more drastic remedy. 231 Given the noxiousness of race-consciousness to the equal protection clause under conventional accounts, it would seem preferable for universities to cease relying so heavily on criteria that they acknowledge systematically disfavors blacks and Hispanics.

D. Conclusion

Grutter offers no coherent theory of justice because it gives every major constituency involved in the affirmative action debate a bit of what it wanted to hear. Yet, the dominant rhetorical tone of the opinion is moderate, elitist, and utilitarian. Although the value of this rhetorical strategy is an open question, 232 it

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228 Grutter, 539 U.S. at 340.
229 Id.
230 Id.
231 Id. at 361 (Thomas, J., dissenting).
232 Grutter and Gratz’s thinly-veiled appeal to public opinion may serve as a clarion call to opponents of affirmative action who were outdistanced in their effort to rally public opinion around affirmative action by moderate and liberal supporters of these programs. Indeed, this is the lesson of the abortion rights movement, which impressed the Court with a barrage of amicus filings in Roe v. Wade and won a legal victory, but at the same precipitated an onslaught of activism by pro-life forces. The anti-affirmative action groups can be expected to attempt to organize the public in opposition to affirmative action policies that seem vulnerable under the Grutter/Gratz formulation, especially given the Grutter majority’s reference to the presumptive unconstitutionality of race conscious programs in the future. Justice Scalia’s dissent is largely a roadmap for legal challenges to admissions policies under the Grutter/Gratz standard. See Grutter, 539 U.S. at 347-349 (Scalia, J. dissenting). The CIR continues its efforts effectively to end affirmative action by ensuring that universities’ policies are narrowly tailoring to the (uncertain) degree contemplated in Grutter. See Michael Rosman, Uncertain Direction: The Legacy of Gratz and Grutter, JURIST, (Sept. 5, 2003) (Rosman is Counsel for Center for Ind. Rights) at http://jurist.law.pitt.edu/forum/symposium-aa/rosman.php. See also Peter Schmidt, At U. of Washington, a First Test of the Michigan Ruling, CHRON. OF HIGHER EDUC. at 20 (Mar. 19, 2004); Terence J. Pell, Court Gives New Life to Quota Camouflage, NEWSDAY, July 1, 2003, at A25 (remarking that “holistic review” approach to admissions is not feasible because “[I]f … universities follow suit, and they are true to their word, America will soon have more admissions officers than Iraq has allied soldiers”).
has obvious appeal. By issuing a split decision and relying on the support of powerful business, academic, professional, and military interests, the Court appeased those who offer lukewarm support for minority racial preferences and avoided alienating those who oppose the policies altogether.233

But this strategy arguably came at a high cost. To the extent that the Court’s emphasis on utilitarian concerns is viewed as a repudiation of the arguments urged by the mostly minority distributive justice strand of the coalition, \textit{Grutter} sends paradoxical signals. It celebrated pluralism while demonstrating the extent to which whites—elite organized interests, in particular—set the terms of the legal and political debate about the meaning of the Equal Protection Clause.234 Viewed in these terms, the diversity rationale for affirmative action, at least as advanced by the University and articulated by Justice O’Connor, reinforced the political status quo and denied the possibility of meaningful pluralism.235

On the other hand, the intervenors prevailed in their bid to maintain affirmative action at the University of Michigan law school. The CIR did not achieve its immediate goal—ending race-based affirmative action in higher education across the board. \textit{Grutter} affirmed the constitutionality of the law school’s admissions practices;236 in fact, the majority held up the law school’s carefully calibrated race-sensitive policy as a model for other institutions, including the undergraduate college, to follow.237 The intervenors were a core part of the coalition of litigators whose advocacy preserved race-conscious affirmative action at selective universities. They helped to prevent the “re-segregation” of higher education—the fate that the University’s supporters predicted would have

\textsuperscript{233} In approaching the affirmative action decisions with its ears toward the political winds, the Court seemed to recapitulate a strategy used in 1990s cases challenging abortion rights, \textit{Planned Parenthood v. Casey}, in particular, which established the “undue burden” test for whether a restriction was lawful. See Thomas W. Merrill, \textit{The Making of the Second Rehnquist Court: A Preliminary Analysis}, 47 \textit{St. Louis Univ. L. J.} 569, 629 (2003) (discussing the plausibility of a public opinion influence on the Supreme Court in high profile cases, such as abortion, as a way or explaining O’Connor’s apparent shift in attitudes on this issue.); \textit{see also} Neal Devins, \textit{Explaining \textit{Grutter}}, 152 \textit{Penn. L. Rev.} 347 (2003-04); cf. Penry v. Lynaugh, 492 U.S. 302, 334-35 (1989) (O’Connor writing for the majority responded regarding the numerous opinion polls cited by the Plaintiff, “The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.”).

\textsuperscript{234} \textit{Accord} Bell, \textit{supra} note 218, at 518 (proposing that whites only act in favor of minorities when it is in their interests to do so, rather than because of the independent value to minorities of remedial action.).

\textsuperscript{235} \textit{Accord} Cass Sunstein, \textit{Foreward: Leaving Things Undecided}, 110 \textit{Harv. L. Rev.} 4, 36-37 (1996)(arguing that the American constitutional system is or should be a deliberate democracy and that deliberate democracy works best as a pluralist system); see also SUNSTEIN, CASS R, \textit{WHY SOCIETIES NEED DISSENT} (2003). [RA check for Sunstein’s latest book, for statement on AA].

\textsuperscript{236} 539 U.S. 306, 327-43 (2003).

\textsuperscript{237} \textit{See Gratz v. Bollinger}, 539 U.S. 244, 268-75 (2003)(contrasting undergraduate point system with law school’s holistic system); \textit{see also} id. at 276-80 (O’Connor, J., concurring)(same).
ensued had it lost both of its cases. Nevertheless, the next part suggests why, from a social movement perspective, the intervenors’ victory actually looks like a defeat, or, at very least, a much narrower success.

III. Implications

The legal literature on social movements speaks in a different voice about popular efforts to effect change than the literature on this subject developed in recent decades by sociologists, political scientists, and social historians. Constitutional and legal mobilization theorists typically write about social movements from a perspective internal to law. These scholars’ discussions pivot around the legal system, and more particularly, around judges and the texts that they interpret in the adjudication process. They assume that the interpretation or creation of favorable constitutional law is a fundamental component of a social movement’s agenda. Consequently, these scholars make positive and normative claims about how the rule of law, constitutional text, and rights litigation (or the threat of such litigation) shape social movements, as well as how social movements, in turn, shape the law. This literature is a welcome addition to constitutional scholarship that traditionally disregarded the ability of ordinary people to influence the path of the law.

Nevertheless, this part suggests that the scholarship on law and social movements is in need of further nuance. For law is still over-determined in this scholarship. Given the hegemony of law in our society, legal scholars’ positive claim that law is definitive in social relations and judges pivotal as arbiters of these relations is undeniable. It is the normative implication of the positive claim—the assumption that (judge made) law should define social movements—that is troubling. It is contrary to our understanding of how social movements have interacted with law over time and how they are best positioned to achieve their goals. Nineteenth- and twentieth-century social movement history, as well as the social science literature, counsel that law and social movements are fundamentally in tension. They teach that social movements attain leverage in the political and legal processes by engaging in disruptive, protests action taken

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238 See note 119-123 supra and accompanying text.
239 See Rubin, supra note 21, at 2, 45-48 (noting that legal scholars “seem largely oblivious to the extensive social science literature on social movements”).
240 See notes _- to __ infra and accompanying text.
241 See notes _- to __ infra and accompanying text.
242 See notes _- to __ infra and accompanying text.
243 See notes _- to __ infra and accompanying text.
244 See notes _- to __ infra and accompanying text.
245 The generalization encompasses, for example, most of the constitutional scholarship about post-New Deal changes in racial, gender, and other status laws, which celebrates the Court (i.e. the Warren Court), while giving insufficient attention to non-judicial actors and action.
246 See notes _- to __ infra and accompanying text.
outside of institutionalized political structures; that legal and political change are
codependent, but that influence runs from politics to law; and that law can both
harm and help social movements in unintended ways.246

Legal scholars’ commitment to the primacy of law in their analyses of
social movements obscures the important distinction between inspirational and
definitional roles that law may play in social movements. Consequently, these
scholars overstate law’s capacity to trigger social movements and undervalue non-
legal, non-institutional forms of political activism. Additionally, these scholars’
overestimate the positive influence that legal rhetoric and norms have on social
movements as they evolve. In the process, legal scholars perpetuate juri-centrism
and encourage the tendency among lawyers representing social movements to
privilege constitutional litigation. But constitutional law has been a limited and
unreliable agent of distributive justice historically.247 The limited, if not altogether
ineffectual, nature of law is particularly evident in the Supreme Courts’
jurisprudence on education.248 The experience of the Grutter intervenors, when
read against relevant history and literature, illustrates these points, as I
demonstrate below. Ultimately, these sources suggest answers to the question of
whether or under what circumstances a law reform campaign can simultaneously
constitute a social movement, and on what terms such a hybrid entity should
frame its agendas as constitutional issues.

A. Constitutional Theory on Social Movements

In a recent symposium article on the legal literature on social movements,
Edward Rubin noted that legal scholars seem “oblivious” to the social science
literature on social movements.249 He assumed that this lacuna results from law’s
juri-centrism.250 Bill Eskridge’s interdisciplinary, theoretically sophisticated and
wide-ranging work on social movements suggests that Rubin is only half right.
Eskridge, the leading legal theorist of social movements, is well versed in the
literature, but finds it wanting.251 He makes correcting the fact that “law and even
legal actors” are “bit players” in social movement theory (written by social
scientists) the major objective of his scholarship.252 Eskridge freely acknowledges
that social movements have “generated many important statutes that we now take
for granted”253 and contributed more to the “modern meaning of the Equal

246 See notes _ to __ infra and accompanying text.
247 See ROSENBERG, supra note 22, at __; KLARMAN, supra note 22, at 443-468; see also notes _
to __ infra and accompanying text.
248 See notes _ to __ infra and accompanying text.
249 See Rubin, supra note 21, at 2.
250 Id. at 55.
251 See Eskridge, Channeling, supra note 21, at 420-421.
252 Id. at 421.
253 Id. at 419 (discussing civil rights and environmental laws); see also Eskridge, Identity, supra
note 21, at 2353-2355.
Protection Clause” than “the Fourteenth Amendment’s framers.” But his aim is to demonstrate that “law and legal actors are critical to the instigation and dynamics, as well as the goals, of the identity-based social movement.”

Eskridge notes that identity-based social movements have been “rights oriented” all over the world and presented their goals in “constitutional terms.” “Social movements are surrounded by and seek to influence law.” Law is a “pervasive positive and normative context in which the social movement operates,” and therefore, he says, a “movement’s struggle will inevitably involve law.” From there, Eskridge reasons that the “[p]rimary normative question for constitutional law professors” is: “what ought to be the role of judges in the evolution of social movements?”

Eskridge moves seamlessly from the observation that social movements must engage the law to a theory of judicial review of movements’ claims. He assumes that social movements should be afforded the “protections of the rule of law.” The rule of law is a double-edged sword for social movements in Eskridge’s normative vision, however. He writes,

If the goal of our constitutional polity is preservation and adaptation of a peaceable pluralism, the judiciary is a necessary safety valve. Therefore, I argue that the judiciary needs to accommodate emerging social movements—as well as counter-movements. Under the premises of pluralist theory, this accommodation is in the interests of the country but may not be in the interests of some elements of the social movements, for a clever judicial strategy empowers the movement, moderates over the radicals, and channels the movement’s discourse in assimilative directions.

When he considers modern constitutional history, Eskridge concludes that “the Supreme Court’s constitutional jurisprudence has usually served the pluralist polity pretty well.” Social movements have generated claims to which the Supreme Court and legislatures responded favorably, in modern times, through

254 Eskridge, Channeling, supra note 21, at 419.
255 Id. at 421.
256 Id. at 423.
257 Id. at 420.
258 Id at 420.
259 Id at 420.
260 Id at 423.
261 Id at 423; see also id at 521 (“Once a minority starts to mobilize as a social movement, the Court ought to protect the minority group’s expression and association from state interference and ought to strike down the most serious state penalties against the group.”)
262 Id. at 423
263 Id. at 423
“expansive interpretations of the equal protection clause” and the creation of “super-statutes” (pervasive, preference-transforming laws). 264 Eskridge is unapologetically juri-centric. His interest in social movements is premised on their functionality in the legal system, of which they necessarily are a part, given law’s role in regulating status and defining identities. 265 Law and social movements are partners in creating social stability and controlling disorder, even violence. 266 Like any apparatus of the state, social movements are methods of social control.

As profound and refreshing as Eskridge’s scholarship in this area is, one must ask whether the conceptual foundation on which his arguments rests is persuasive. As an initial matter, his rhetoric of “identity” suggests a major question about his normative vision of social movements. As I have argued above and elsewhere, 267 the one-dimensional identity that the law of equal protection and interest group politics imposes on “suspect” racial classes is deeply problematic for claims of distributive justice. It limits the goals of political struggle and legal agenda to those objectives preferred by and most useful to elites. 268

Second, Eskridge’s failure to discuss the formation, organization, evolution, strategies and tactics of social movements simplifies and flattens these movements into static repositories or mirrors of legal epistemologies, norms and processes. Eskridge overlooks the interactive and temporal dimensions of a social movement’s engagement with law; law envelopes and defines the movements in his telling. Most troubling, Eskridge’s vision of “peaceable pluralism” strikes me as an impoverished and, in many respects, undesirable, portrait of society and social movement’s role in the polity—a reaction that even he anticipates. 269 In his view, human agency is excessively subservient to the dictates of law and order. This portrait bears little relation to the social history of the marginalized groups that Eskridge concedes have been so influential in shaping constitutional history. Nevertheless, Eskridge’s vision probably does accurately describe how the Supreme Court has mediated democracy and social movements in recent history; thus, it helps to explain the fate of the Grutter intervenors’ “mass movement.”

265 Id. at 422-25 (discussing how law served as forum for IBSM to “contesting their status denigration” and “stigmatization” and thus claiming “personhood”).
266 Id. at 423.
267 See Part I.D supra and accompanying text.
268 Id.
269 See Eskridge, supra note 21, at 424 (noting that the Court’s jurisprudence is “less defensible if one rejects the relevance of [his] pluralist premises for constitutional theory”).
In contrast to Eskridge, Reva Siegel’s work on social movements challenges the “juricentric understanding of our constitutional tradition.”270 “[C]onstitutional theory rarely recognizes the role that social movements play in the construction of constitutional meaning,”271 Siegel says. Taking this as her starting point, she argues that social movements should be studied to enhance understanding of how the “Constitution outside of the courts shapes constitutional understandings inside the courts.”272 In particular, Siegel is interested in demonstrating how “mobilized groups of citizens, acting inside and outside of the formal procedures of the legal system,”273 have used the text of the Constitution to claim full citizenship.274 Siegel thus contributes to current constitutional scholarship touting “popular constitutionalism” in the face of what advocates view as the Rehnquist’s Court’s improper incursions into congressional prerogatives275 and, more generally, “judicial triumphalism.”276

Siegel views the text of the Constitution as a site for contesting the meaning of citizenship. She uses the successful nineteenth-century struggle for ratification of the Nineteenth Amendment, conferring women suffrage, and the unsuccessful bid during the 1960s and 1970s for ratification of the Equal Rights Amendment to demonstrate the point.277 Siegel does not give primacy to either the courts or the legislature, but notes that the women in these struggles sometimes worked “with the help of a responsive judiciary” and sometimes “by overcoming deeply entrenched resistance in the representative branches of government.”278 Siegel argues that the peoples’ interpretations of the Constitution are not to be ignored in deference to “the official pronouncements of judges”279 and lawmaking within the meaning of Article V’s prescriptions for formal amendment of the Constitution.280 She explains,

Because our constitutional culture addresses ordinary Citizens as authors and imbues them with the expectation

270 See Siegel, supra note 21, at 299.
271 Id. at 300.
272 Id. at 303.
273 Id. at 299.
274 Id. at 299.
275 Siegel’s other scholarship on this theme includes, Siegel & Robert Post, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 Ind. L. J. 1 (2003); Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimmel, 110 Yale L.J. 441 (2002).
276 See Larry Kramer, Popular Constitutionalism, circa 2004, 92 Cal L. Rev. 959, 1010 (2004); id. at 982 (discussing Siegel’s work); see also MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 33-54, 154-194 (1999)(expounding theory of constitutionalism outside of the courts).
277 Siegel, supra note 21, at 328-342.
278 Id. at 344.
279 Id. at 299.
280 Id. at 300-302, 313-315; see also sources cited in note 302 supra.
that official declarations of the law are semantically permeable, contestable, and revisable, official pronouncements about the meaning of the Constitution elicit special forms of engagement from citizens and so become a formal point of normative contestation. 281

In Siegel’s conception, the relationship between social movements and the law is dynamic. Siegel builds a bridge between constitutional and social theory; she pushes the legal literature toward the understanding of social movements contained in the social science literature.

Nevertheless, the privileged position assigned to Constitutional text in Siegel’s theory raises questions of context and degree. It is not that I disagree with the observation that text is meaningful. The claim that the contestation of constitutional meanings has been integral to social movements is undoubtedly accurate in Siegel’s history of the two American women’s movements. But, as a generally applicable principle spanning time and place, the emphasis on text is problematical. Consider too, as an example, a comparison between the nineteenth and twentieth century feminist mobilizations in the United States and the abolitionists movement, which spanned numerous geographical locales (tracking the course of the Atlantic slave trade) and running from the eighteenth to the nineteenth centuries (and arguably, the twentieth century as well by virtue of only nominally free labor systems). 282 Constitutional text was much less relevant to the abolitionist struggle over time than to the American women’s movements.

Since slaves were considered chattel and had no legal personhood, 283 the movement by the enslaved for citizenship rights, most famously in Dred Scott v. Sanford, 284 was but one piece of the American abolitionist movement. The violence of slave insurrections, or threat of violent disorder—“the crushing arm of power,” as the black abolitionist David Walker called it 285 —was a much more potent form of resistance for slaves. 286 One need only think of the Nat Turner

281 Id. at 322.
285 See BENJAMIN QUARLES, BLACK ABOLITIONISTS 16-17 (1969)(discussing Walker’s Appeal and how it led to passage of laws in Georgia and North Carolina against “incendiary publications”).
286 See HERBERT APTEKER, AMERICAN NEGRO SLAVE REVOLTS 18-52, 79-208 (1943)(discussing whites’ fears of slave rebellions and slaves’ resistance of slavery through insurrection or threat of them).
insurrection in Virginia in 1831 \(^{287}\) or the Denmark Vesey uprising in South Carolina \(^{288}\) to demonstrate the point.

It is also vitally important to bear in mind that religious belief and teachings in the oral tradition, as well as religious texts, were the predicate for abolitionist rhetoric and slave resistance—a far more plausible source of inspiration than the American Constitution. \(^{289}\) As the historian Paul Escott has explained, “Armed with their religion, the slaves established a set of ethics and a view of the universe that gave this spiritual independence from white oppression. … Obviously, God’s law would not sanction the injustice that took place on man’s earth.”\(^{290}\) Consider the religious commitment of the black abolitionist Frederick Douglass\(^{291}\) and the religious fervor evident in slave testimonials\(^{292}\) as examples of the ethical understandings that animated abolitionism. Consider also the religious inspiration of slave insurrections, most famously, Nat Turner’s.\(^{293}\) Or, consider the transcendentalism that motivated William Lloyd Garrison, who denied the legitimacy of a government comprised of slaveholders, \(^{294}\) or Ralph Waldo Emerson, \(^{295}\) or Henry David Thoreau.\(^{296}\) The claim that religious text and belief were a greater source of inspiration for the black freedom struggle than the Constitution can also be made for the African-American struggle after the enactment of the Reconstruction Amendments and through the twentieth century. If one situates the civil rights struggle around the leadership and liberation theology of Rev. Martin Luther King, Jr., the primacy of religious text, beliefs, and authority is inescapable.\(^{297}\)

Constitutional text obtains a privileged position

\(^{287}\) QUARLES, supra note 311, at 17-18; WILMORE, BLACK RELIGION AND BLACK RADICALISM 87-98 (1998)(discussing Turner).

\(^{288}\) WILMORE at 47, 81-87, 111 (1998)(discussing Vesey).

\(^{289}\) See PAUL ESCOTT, SLAVERY REMEMBERED 110-111 (1979); Pulpit and Press, in QUARLES, supra note __, at 68-89; WILMORE, SUPRA NOTE 312, AT 57-59, 110-124 (discussing connection between black churches and abolitionism).

\(^{290}\) ESCOTT, supra note 315, AT 111-112.

\(^{291}\) See e.g. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 104-108 (1855, 1987)(describing religious awakening that preceded his abolitionist activism).

\(^{292}\) See ESCOTT, supra note 315, AT 110-117; see generally HENRY LOUIS GATES, ED. SLAVE NARRATIVES (2000)(demonstrating salience of religious belief); Cheryl J. Sanders, Liberation Ethics in the Ex-Slave Interviews, in HOPKINS & CUMMINGS, CUT LOOSE YOUR STAMMERING TONGUE: BLACK THEOLOGY IN THE SLAVE NARRATIVE 73-96 (discussing ethical perspectives of ex-slaves as their related to Christianity, including liberation ethos).

\(^{293}\) See QUARLES, supra note __, AT 17-18 (discussing Prosser’s religious faith); WILMORE, BLACK RELIGION AND BLACK RADICALISM 69-74 (1998)(discussing religion as a factor in slave insurrections).

\(^{294}\) See AILEEN S. KRADITOR, MEANS AND ENDS IN AMERICAN ABOLITIONISM 78-140 (1989).

\(^{295}\) Id. at 13-14.

\(^{296}\) Id. at 24.

only if one superimposes the NAACP’s liberal legalist worldview onto all of the African-American freedom struggle, as if it were a trans-historical phenomenon, which, of course, it was not.

Overall, the centrality of constitutional text in Siegel’s conception of social movements’ claims for justice legitimizes and attributes too much influence to the Constitution, a document whose inspirational capacity in the everyday lives of slaves was limited, in comparison to other sources. Siegel’s theory contributes to an overly legalistic, if not juri-centric, conception of the goals of social protest. To that extent, law is over-determined and insufficiently contextualized in Siegel’s otherwise appealing theory of social movements.

B. Legal Mobilization Literature

Mobilization theory must be understood in relation to scholarship that is skeptical of the capacity of courts to produce fundamental change. Gerald Rosenberg’s scholarship is a paradigm for this approach. In The Hollow Hope, Rosenberg concluded that “U.S. courts can almost never be effective producers of significant social reform.”\(^{298}\) Rosenberg’s determination rested on three observations. He argued that the negative conception of rights that characterizes equal protection jurisprudence limits courts’ ability to articulate rules mandating fundamental, affirmative change.\(^{299}\) And, in any event, the Court is unable to ensure that politicos and administrators implement constitutional norms that might reorder society.\(^{300}\) Rosenberg acknowledged that litigation might indirectly aid struggles for change by, for example, changing public opinion or mobilizing the marginalized, but dismissed the idea that it produces significant extra-judicial effects.\(^{301}\)

Legal historians writing in the critical tradition have significantly strengthened the view. Two works are particularly valuable additions to this literature. Michael Klarman’s scholarship on race relations from Plessy v. Ferguson to Brown v. Board of Education has substantiated the claim that law is unlikely, alone, to directly produce significant change.\(^{302}\) But Klarman has moved beyond the singular focus on the courts that characterized Rosenberg’s

\(^{298}\) See Rosenberg, supra note 17, at 338.
\(^{299}\) See id. at 10-21, 336-343.
\(^{300}\) See id.
\(^{301}\) See id. at 338 (calling claim of important extra-judicial effects “dubious” due to lack of empirical evidence supporting it).
\(^{302}\) See Klarman, supra note 22, at 8-344; See Klarman, Backlash, supra note 17, at 81-118; Klarman, supra note 174, [check crossref] at 13-141.
study. He has demonstrated that a broad array of political, social, and economic factors and a complex relationship between the black protest movement and white resistance to Brown explain the Court’s shift from endorsing de jure segregation to sanctioning formal equality. Mary Dudziak has also strengthened the critical view of civil rights litigation’s causal relationship to change by discussing the role of international politics in race relations history. She has demonstrated that the Cold War significantly influenced the Executive Branch’s shift from neglect to responsiveness on the civil rights issue, and the Supreme Court’s endorsement of formal equality in Brown.

The critical view has met with resistance in the scholarly community, however, including among legal mobilization theorists. These scholars are skeptical of the critics’ claims that law is unlikely to produce fundamental change. Critics advancing a “legal mobilization” theory urge scholars to focus more closely on precisely what counsel and client-communities hope to achieve through litigation and on how they deploy legal discourses to their advantage—despite its limitations. Mobilization scholars emphasize law’s politically

303 See Klarman supra note 21, at 443-468; Klarman, supra note 174, at 13-141.
304 See Dudziak, supra note 22, at 18-46, 79-114, 203-248. Dudziak has not explicitly aligned herself with the critical scholarship; that she is an important part of it is my interpretation.
306 Some of the works comprising the critical view were written after mobilization theory got its start; as an ongoing area of scholarly analysis, mobilization theory continues to be responsive to such works in the critical canon.
307 See MICHAEL McCANN, supra note 22, at 1-12 (using pay equity cases to propose a “bottom-up” jurisprudence and legal mobilization model of how legal discourses, symbols, and procedures can aid social movements); McCann, Reform Litigation on Trial, 17 Law & Soc. Inq. 715-743 (1992) (arguing that Rosenberg inadequately explored the nature and meanings of law’s “indirect effects” on social movements and thereby undervalued inspirational and tactical usefulness of legal forms to client communities); McCann & Silverstein, Rethinking Law’s Allurements, in CAUSE LAWYERING 261-92 (Sarat & Scheingold, eds., 1998) (arguing that pessimistic assessments of law’s potential to affect social change and generalizations about cause lawyers are overly broad and inadequately substantiated); Jonathan Simon, The Long Walk Home to Politics, 24 Law & Soc’y Rev. 923 (1992) (arguing that Rosenberg insufficiently explored structures, ideologies, and agendas that influence judicial interpretation); see also MARC GALANTER, THE RADIATING
“mobilizing” effect. In their view, Rosenberg’s negative assessment of law’s ability to produce change is excessively pessimistic. According to mobilization scholars, Rosenberg’s unjustified pessimism can be traced to flawed methodology. Rosenberg was hamstrung by a narrow, institutional focus. He measured success in terms of direct consequences of legal campaigns—whether lawyers win their cases and whether court victories translate into policy changes with nationwide impact.

Top-down scholarship like Rosenberg’s considers vitally important questions, but misses the politically sophisticated stratagems that lawyers bring to their legal campaigns, legal mobilization theorists argue. Of course litigators want to win their cases. But they do not view litigation as a zero-sum game. These lawyers define success more broadly, in terms that cannot be captured easily, if at all, by statistical data gleaned from conventional sources such as media reports and surveys of public opinion. They seek to generate and leverage the beneficial, indirect or “radiating” effects that they presume to flow from change-oriented litigation campaigns. Thus, litigation can be indirectly efficacious even if claims never reach the trial stage, or if lawyers do not prevail at trial or on appeal.

Law is deployed as a tactic for altering perceptions and raising expectations about the prospects for change within client-communities. It creates “opportunity structures” and “discursive frameworks” that can be

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308 See McCann, supra note 22, at 715-43.
309 See ROSENBERG, supra note 22, at 4.
310 On cause lawyering, see Carrie Menkel-Meadow, The Causes of Cause Lawyering, in CAUSE LAWYERING, supra note 25, at 31-68 (Sarat & Scheingold, eds., 1998).
311 See e.g. McCann, supra note 22, at 727-33; Galanter, supra note 17, at 125-27.
312 See McCann, supra note 22, at 732, 736, 741-42.
313 See McCann, supra note 22, at 732-43.
314 See Galanter, supra note 22, at 118-19 (describing the “flow of influence outward from the courts to the wider world of disputing and regulating” and the “incommensurability of law in action with law on the books”).
315 As an example, according to Doug McAdam the increasing responsiveness of the Supreme Court and federal policymakers to African-Americans during the 1930s through the 1950s resulted in a “cognitive revolution” among blacks. See MCA DAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970 108 (1982).
316 See McCann, supra note 25, at 738-39.
317 Galanter, supra note 309, at 125-26 (describing law’s “mobilizational or demobilizational effects” achieved through the “transmission and reception of information”).
318 See McCann, supra note 25, at 733; MARTHA MINOW, MAKING ALL THE DIFFERENCE 304 (1990)(discussing how legal rights become “possessions of the dispossessed.”)
exploited by the socially marginalized. Lawyers can mobilize communities by “enhancing” a “sense of efficacy;” providing “organizing skills and resources” and “symbols for rallying a group;” “broadcasting awareness of grievance;” “dramatizing challenge to the status quo;” helping lay people “take themselves seriously” and “believe in its “capabilities;” “lend[ing] an air of importance and legitimacy to what is often a meager group of citizens with very little political experience;” putting at the community’s disposal “litigation and its credible promise of tangible and proximate results in the form of courtroom victories;” and “counsel[ing] organizational leaders on how to behave so as to maximize” the chances of a legal victory. In short, legal mobilization is conceived as a “social movement tactic” in and of itself, or as crucial in “movement building” by helping lay citizens make “tactical judgments.” Lawyers facilitate rather than dominate or fragment movement activity because they have developed “flexible lawyering” techniques that make them capable of engaging in political action and working with non-lawyers.

The legal mobilization literature is not juri-centric in the manner of Eskridge. And its standpoint on constitutional text is more skeptical than Siegel’s. But legal mobilization theory shares the central defect that I have identified in the constitutional literature on social movements—law is over-determined and insufficiently contextualized. As a result, these theorists overstate the usefulness of litigation, or its threat, in mobilizing communities. Certainly, litigation can have a positive impact on the political consciousness of some client-communities, as the critical literature concedes. The mobilization theorists’


320 Scheingold at 139, 141; Galanter, supra note 17, at 125-26.

321 See Paul Burstein, Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity, 96 Am.J.of Soc.5 (March 1991): 1201-1225 (noting that litigation in federal courts is seldom formally analyzed as a social movement tactic” and offering such an analysis).

322 McCann, supra note 25, at 735.

323 McCann, supra note 25, at 732.

324 McCann & Silverstein, supra note 25 at 269-76. The vast majority of scholars who write about public interest litigation have adopted an analytical framework that writes out the tension between law and movement activity. As I discuss infra notes 513 to 515, this framework best applies where lawyers adopt a radically client-centered approach or do not work as practitioners.

325 McCann & Silverstein, supra note 25 at 276.

326 See Rosenberg, supra note __, at ___. In an important innovation, Klarman accepts the view that litigation can have important, indirect effects on society. But he rejects the assumption that such effects necessarily are positive or substantial enough to ascribe tremendous utility to litigation as a tool for achieving change. Klarman, supra note 21, at 363-76; Id. at 377-85
general proposition is overdrawn, however. Their insistence that law can be “leveraged” to achieve substantial, indirectly positive results for marginalized groups is unpersuasive as meta-theory of law’s utility in social change efforts.

C. Distinguishing Law from Social Movements

Legal theorists’ confidence in the compatibility of law and political struggles for change, including identity-based ones, flows, I propose, from their tendency to characterize social movements in ways that deny their distinctive features. Those who champion the centrality of law to social movements or advance the concept of legal mobilization wrongly conflate politicized legal campaigns with “social movements.” Notably, the tendency for the legal literature to draw little distinction between law reform campaigns seeking to mobilize communities and the concept of a “social movement” is deeply rooted in the literature. Joel Handler, one of the first legal scholars to examine the public interest litigation of the 1960s, declared years ago that the “use of litigation as an instrument of social reform [has] become so widespread that it can be called a movement.”

Contemporary constitutional and legal mobilization theories perpetuate the idea that law is compatible with and immensely efficacious for a social change movement.

In ascribing such vast capacities to lawyers or constitutional text as mobilizing agents, or assigning judges the role of “necessary safety valve” “channeling” movements in “assimilative directions,” legal scholarship overlooks the characteristics of social movements that make them worth studying. These scholars minimize the differences between the form and substance of legal processes and concepts, and the form and purposes of participatory democratic action. In fact, there are profound differences between most forms and tactics of lawyering and social movement activity. Each of the theories discussed in the preceding section diminishes the basic tension between law and social movements, but Eskridge’s approach is the most problematic. His mischaracterization of protest movements is premised on his normative position that social movements and the legal order should work, more or less, in sync.

In this section I discuss why Eskridge’s assumption and other scholarship that privileges law in this manner inverts and distorts social movement theory, as understood in the social sciences and suggested by history. Ultimately, I posit a normative vision in which social movements preserve their own social and

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(assuming that Brown likely undercut blacks use of direct action tactics); id at 385-442 (assuming that Brown radicalized white southern politics and precipitated violent massive resistance).

327 HANDLER, supra note 16, at 4; see also AUERBACH, supra note 16, at 3.

328 See Scheingold, supra note 17, at 139.

329 Some mobilization scholars note the historical tension between cause lawyers and social movements, although this fact does not figure much in their analyses. See Scheingold, supra note 17, at 141-42; McCann, supra note 25, at 736; McCann & Silverstein, supra note 25 at 272.
political identities and spaces; movements approach law and lawyers deliberately and strategically if the two forms of political action are to co-exist or collaborate. By design and character, I argue, social movements are more likely to achieve their goals when they are free from the constraints imposed by law and lawyers—even politically astute ones like the counsel for the Grutter intervenors.

Attaching concrete meaning to the term “social movement” illuminates the distinction that I am positing between social movements as agent of “peaceable pluralism,” and social movements that seek political agency outside of the law. In using the term “social movement,” I mean to suggest a specific set of characteristics and activities associated with and flowing from participatory democratic action. Participants in social movements engage in a sustained, interactive campaign that makes sustained, collective claims for relief or redistribution in response to social marginalization, dislocation, change, or crisis. The hallmark of such participatory democratic action is citizens’ efforts to directly influence public policy by appealing directly to the public and a target audience of decision-makers, such as governmental representatives. Participatory democracy is, then, the converse of indirect or representative democracy, where citizens’ preferences are subsumed within the organizational structures and strategic apparatus of political parties and interest groups. Instead, citizens seek influence through political activism that occurs outside of

330 As explained in a seminal text,

Participatory democracy assumes that in a good society people participate fully, and that a society cannot be good unless that happens. Participation and control must be one. Furthermore, the democratic process of participation and control must be used in the movement for social change from the start; thus the means employed for change must be democratic. … [A] politics of creative disorder is indicated, at once oriented to unveiling the inequities of the present, and to building a counter-system that is participatory from the ground up. New, participatory institutions must be built in all social spheres and, as they develop, will claim legitimacy and recognition as being genuinely democratic and accountable to their constituencies.

See THE CASE FOR PARTICIPATORY DEMOCRACY 6 (Benello and Roussopoulos, eds., 1971).
331 See CHARLES TILLY, SOCIAL MOVEMENTS 3-4, 12-14 (2004)(describing characteristics of social movement); FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE’S MOVEMENTS 6-14 (1977)(describing conditions that give rise to social movements); John D. McCarthy & Mayer N. Zald, Social Movement Organizations in GOODWIN, supra note __, at 169-186; Burnstein, Social Movements and Public Policy, in GIUNGI, supra note __, at 8-9; Freeman, On the Origins of Protest, in WAVES OF PROTEST 8, 18-19, 21-22 (Jo Freeman ed. 1999).
332 TILLY, supra note 362 at 3-4; Tilly, From Interactions to Outcomes in Social Movements, in GIUNGI, supra note 361, at 260-268.
333 See Burnstein, in GIUNGI, supra note 38 at 7-9 (distinguishing “unstructured performances” of social movement by those on margins of society from well-funded, -organized, and – institutionalized activities of interest groups); POX & PIVEN, supra note 361, at 5 (distinguishing social movement from social movement organization and discussing how formal structures undermine protest).
such strictures, and they practice a “contentious politics,” as Charles Tilly, a leading theoretician of social movements has explained.334 Social movements make arguments in support of their policy preferences, such as moral arguments, that typically would not be made in institutionalized settings.335 These movements are in pursuit of their conception of justice, against the backdrop of an unresponsive polity.336

Organization, cohesion, and agenda setting distinguish social movement activity from other types of responses to social crisis.337 A social movement typically meets in a friendly social space, such as a community center, church, or dwelling, where members gather to caucus and collaborate.338 The members of the collective develop a plan of action, or strategies and tactics, for achieving their goal of ameliorating whatever ails them.339 They commonly use direct action, such as demonstrations, marches, or sit-ins; community organizing, which typically includes community education or “consciousness-raising” sessions; and petitioning and pamphleteering to achieve the movement’s goals.340 There is an express role for emotion in social movements because breaking mental chains of oppression, creating new forms of cultural expression, and awakening participants

334 See TILLY, supra note 362 at 3-4; see also Goodwin, supra note __, at 3-4 (“Social movements are conscious, concerted, and sustained efforts by ordinary people to change some aspect of their society by using non-institutional means. … They are protesting against something…”).  
335 See John C. Green, The Spirit Willing: Collective Identity and the Development of the Christian Right in WAVES OF PROTEST 153-164 (Jo Freeman ed. 1999); PIVEN & CLOWARD, supra note 424, at 12 (describing perception among protestors that social arrangements are “wrong” and “unjust.”).  
336 See Goodwin, supra note __, at 3-4; Tilly, supra note __, at 3-4.  
337 See Freeman, Introduction, in WAVES OF PROTEST 1-3 (Jo Freeman ed. 1999); PIVEN & CLOWARD, supra note 4-5 (describing dominant view that organization is critical to definition of social movement, but rejecting this view).  
338 Freeman, supra note __, at 9-12, 20-21 (discussing black church and colleges, pre-existing women’s group co-opted by women’s movement); William H. Chafe, Sex and Race: The Analogy of Social Change, in WOMEN AND EQUALITY: CHANGING PATTERNS IN AMERICAN CULTURE 81-113 (1977) (discussing creation of change through use of social spaces).  
340 See Birmingham: A Planned Exercise in Mass Disruption, in MORRIS, supra note 60 at 275-90 (discussing elements of civil rights movement, including “freedom rides,” citizenship schools, Birmingham campaign, media strategy, non-violent tactics); JERVIS ANDERSON, BAYARD RUSTIN: TROUBLES I’VE SEEN 239-63 (1998) (discussing planning and implementation of 1963 March on Washington); DOUG MCADAM, FREEDOM SUMMER 35-160 (1988) (discussing 1963 voting rights campaign in Mississippi by student volunteers, mostly white); ALICE ECHOLS, DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 10, 83-90, 140, 382-84 (1989) (discussing consciousness raising in the women’s movement); Tilly, From Interactions to Outcomes in Social Movements, in GIUGNI, supra note 361, at 260-262, 267.
from quiescence are fundamental to the initiation, growth, and development of a movement. Public performance of the cognitively liberated self and displays of unity are integral to sustaining movement cohesion and gaining the public’s attention. The key factor uniting these tactics is that they are protest-oriented and disruptive of the normal course of politics. In fact, although the paradigm social movement in this country, the civil rights movement, was non-violent, some social movement theorists argue that violence is highly correlated with movement success. On the other end of the spectrum, social movements also engage in activities that look more like interest group behavior— lobbying external sources of support and strategically using the media, for example. Despite planning, social movements retain fluidity and an improvisational quality because of their informal nature. They must retain the ability to change course and tactics quickly because they must respond to the changing political environment if they are to sustain themselves and achieve and implement their goals. As historian Jo Freeman has maintained, “It is the tension between spontaneity and structure that gives a social movement its peculiar flavor.”

Members of a social movement typically participate in the decision making process on equal footing, although they may choose leaders or spokespersons to act on behalf of the group. “[M]ost movements are not subject to hierarchical control,” Freeman explains, because hierarchy and the structure that it implies can undermine the egalitarian ethos that animates social movements. For instance, during second wave feminism, some women believed that “everyone should participate in the decisions that affected her life,

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341 See James M. Jasper, The Emotions of Protest, in GOODWIN, supra note __, at 153-162 (discussing role of frustration, anger, alienation, and anomie in collective behavior); FOX & PIVEN, supra note 361, at 10-11 (discussing role of frustration and anger in igniting social movement); Freeman, supra note __, at 21-22 (discussing discontent).

342 See TILLY, supra note 362 at 4 (describing social movement repertoire including displays of numbers, worthiness, unity, and commitment);

343 See William Gamson, Strategy of Social Protest (1979); FOX & PIVEN, supra note __, at 14-23; GIUGNI, supra note 361, at xvi-viii (discussing militant action); Saul D. Alinsky, Protest Tactics in Goodwin, supra note __, at 225-228.

344 See Birmingham: A Planned Exercise in Mass Disruption, in MORRIS, supra note 60 at 275-90 (discussing elements of civil rights movement, including “freedom rides,” citizenship schools, Birmingham campaign, media strategy, non-violent tactics); JERVIS ANDERSON, BAYARD RUSTIN: TROUBLES I’VE SEEN 239-63 (1998) (discussing planning and implementation of 1963 March on Washington); DOUG MCADAM, FREEDOM SUMMER 35-160 (1988) (discussing 1963 voting rights campaign in Mississippi by student volunteers, mostly white).


346 See Tilly, supra note __, at 11-14; Aldon Morris, Tactical Innovation in the Civil Rights Movement in GOODWIN, supra note __, at 229-233.

347 Freeman, supra note __, at 1-2

348 See Freeman, supra note 361, at 1-2, 221.

349 Id. at 221.
and that everyone’s contribution was equally valid” because “participatory
democracy, equality, liberty, and community” dictated these values. Moreover,
a hierarchical structure can undermine movement goals such as mobilizing and
organizing communities to challenge authority. This is true in part because the
constituency typically involves “ordinary people as opposed to army officers,
politicians, or economic elites.” These are people on society’s margins—for
instance, poor people with little formal education—for whom the domination and
status differentiation associated with hierarchy would be counterproductive. Or,
the constituency might simply lack the social and intellectual capital, and thus the
confidence, of people in dominant positions in society, such as many women at
the beginning of the second wave feminist movement. Either case suggests
why elite and/or professional involvement in social movements is fraught with
difficulty; professionals are accustomed to hierarchy, expect to occupy leadership
roles, and to utilize their expertise; their perspectives can clash with those of
lower-status participants in a social movement. Consider, for example, the
conflict that beset the civil rights movement in Mississippi in 1965. Chana Kai
Lee, biographer of Fannie Lou Hamer, the local activist from a sharecropping
family who was a leader in the struggle for voting rights, explains,

On the one side were … poor, local Mississippi activists … and
on the other were national NAACP officials who were financially

350 Id at 228.
351 See CHARLES PAYNE, I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE
MISSISSIPPI FREEDOM STRUGGLE 180-206 (1995)(discussing “redefinition  of leadership” from
experts to everyday people in civil rights struggle).
352 GOODWIN & JASPER, supra note __, at 3.
353 On the marginality of movement participants and movement action, see FOX & PIVEN, supra
note 361, at 1-40 (discussing welfare recipients, southern black civil rights activists, and laborers);
TILLY, supra note 361, at 1-15 (discussing social movements among poor and politically marginal
or out-groups throughout the world); J. Craig Jenkins, The Transformation of a Constituency into
a Social Movement Revisited, in Freeman, supra note 361 at 277-299(discussing farm laborers);
Payne, supra not 378, at 180-206.
354 See Jo Freeman, supra note __, at 229-230 (discussing women’s movement).
355 See Suzanne Staggenborg, The Consequences if Professionalization and Formalization in the
Pro-Choice Movement, in FREEMAN, supra note __, at 99-114 (discussing conflicts between
movement entrepreneurs and those who bring skill to social movement organization in expectation
that it will be utilized); Morris, The Decline of the Civil Rights Movement in Freeman, supra note
__, at 325-26 (describing oligarchization theory that ties decline of social movements to “the
emergence of an elite that comes to exercise disproportionate control over the movement
organization,”’ displaces “original goals with more conservative ones” and leads to a “diminution in radicalism”); id at 326 (describing institutionalization theory that ties decline of social
movements to “the development of a hierarchical organization, an explicit division of labor, and
established administrative procedures” that “dampen member enthusiasm and creativity in favor of
predictability and organizational stability”); PAYNE, supra note 378, at 341-42 (noting a “different
breed” of “urban, educated, and affluent” blacks whose agenda differed from that of earlier group
and who had “little contact with the black masses, for whom they professed to speak”)).
and educationally middle class and had a reputation for being condescending toward the black poor. Local … activists wanted to identify their own problems and determine their own solutions without input from the middle-class people…. On the other hand, NAACP activists in the state branch and national office had serious questions about the effectiveness of the “localist” strategy. Doubt centered around capability and experience, and sometimes it surfaced in insulting public statements made by national officials.\textsuperscript{356}

Bridging this cultural divide and ensuring that the expertise and prerogatives of higher-status leaders do not overwhelm the movement’s beneficiary constituency is fundamental to a movement’s health and success. As the social historian Charles Payne remarked in his study of the Mississippi movement, “SNCC will always be remembered for its militancy, but an even more important key to its legacy is the respect it had for people regardless of their status and the ways in which that respect empowered those people to make contributions they had in them.”\textsuperscript{357} SNCC’s success in this regard was rooted in its rejection of the hierarchical model of leadership associated with the NAACP.\textsuperscript{358}

In sum, then, social movements are instances of \textit{insurgent} political activity, usually initiated by or on behalf of low-status and/or socially marginal citizens that are \textit{unmediated} by the state or conventional political structures.\textsuperscript{359} Citizens speak in their own voices and in ways that may not be recognized as appropriate forms of communication in traditional political institutions. That is, by design, social movements are outside of the “mainstream.” Indeed, the consensus among social movement scholars is that “marginality is what distinguishes them from other political organizations.”\textsuperscript{360} Their “abnormality” poses a threat to institutionalized politics, and it is this threat of disorder that gives them influence. As Douglas McAdam surmised in his study of the 1960s civil rights movement, “What marks social movements as inherently threatening is

\textsuperscript{356} See CHANA KAI LEE, FOR FREEDOM’S SAKE: THE LIFE OF FANNIE LOU HAMER 114-115 (2000)(describing woman from abjectly poor sharecropping family who was an unlikely but highly effective leader of Mississippi Delta voting rights movement); \textit{id}. at 116 (noting memo from National NAACP official stating that “local people in Miss. needed someone to think for them”); \textit{id}. (noting tension between “preachers and teachers” in “suits” and the “little people”).
\textsuperscript{357} PAYNE, supra note 378, at 185 (distinguishing SNCC from other groups infected with “class snobbery” such as the NAACP); BARBARA RANSBY, ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION 209-298 (2003)(describing mentor for activists associated with SNCC who cultivated poor, southern blacks in localities across the south).
\textsuperscript{358} On SNCC’s ethos, see PAYNE, supra note 378, at __.
\textsuperscript{359} See e.g. PIVEN & COWARD, supra note 324, at 14-23.
\textsuperscript{360} See Burnstein, in GIUGNI, supra note 38, at 7 (describing the dominant scholarly conception of social movements); see also \textit{id}. at 1203 (“For most sociologists, and for many political scientists studying social movements, the distinction between political action ‘inside the system’ and ‘outside of the system’ is crucial.”)
their implicit challenge to the established structure of polity membership and their willingness to bypass institutionalized political channels.\footnote{See MCADAM, supra note 261, at 26.} The same could be said of other social movements, ranging from abolitionism to the contemporary anti-abortion movement.\footnote{On anti-abortion politics, see, for example, Victoria Johnson, The Strategic Determinants of a Countermovement: The Emergence and Impact of Operation Rescue Blockades, in WAVES OF PROTEST 241-266 (Jo Freeman ed. 1999).}

The differences between legal norms and the collective behavior involved in social movements are substantial, even if they exist on a political continuum.\footnote{See Burnstein, in GIUGNI, supra note 38, at 8 (arguing that scholarly tendency to view social movements as radically different from interest groups undervalues the similarities between the two); \textit{but see} Charles Tilly, Social Movements and National Politics, in STATEMAKING AND SOCIAL MOVEMENTS297-317 (1984)(delineating distinction).} As I have explained, social movements are premised on direct appeals to public opinion and widespread community involvement, and the tactics that they typically use are predicated on the value of democratic experimentalism.\footnote{For descriptions of direct action tactics and goals, see MORRIS, supra note 29 at 275-90; RUSTIN, supra note 30 at 83-87, 114-24, 241-42, 246-47.} Lawyers, by contrast, must translate claims about social problems into the language and form of law, framing them as constitutional issues, for instance. They do so for purposes of appealing in a formal forum (the courtroom) to a fact finder unaccountable to the public, rather than to the public generally, or to those with direct power over public policy.\footnote{The NAACP’s voting rights and school desegregation victories are paradigmatic of the incremental and sometimes inconsequential effect of legal action, even when civil rights lawyers prevailed. Consider the voting rights example. The NAACP’s first legal victory in the voting rights context occurred in Guinn v. United States, 238 U.S. 347 (1915), the case that invalidated the grandfather clause. This victory was followed by other landmark voting rights cases, including Nixon v. Herndon, 286 U.S. 536 (1927), which found Texas’ white primary unconstitutional, and Smith v. Allwright, 321 U.S. 649 (1944), the case in which the Court found unconstitutional mechanisms that southern states had designed to preserve the white primary, Guinn notwithstanding. Despite this string of NAACP victories, the vast majority of African-Americans remained unable to vote in the South into the 1960s; this situation remained until Congress, reacting to direct action protests initiated by Dr. King’s Southern Christian Leadership Conference and the Student Non-violent Coordinating Committee, passed the Voting Rights Act of 1965. See ADAM FAIRCLOUGH, TO REDEEM THE SOUL OF AMERICA 249-53 (1987). On the direct action movement’s frustration with the slow pace of the courts, see GREENBERG, supra note 32, at 267-68; ROY WILKINS, STANDING FAST 269-70 (1994).} Law is the essence of a state-mediated process, one that privileges expertise and arcane language over the frames of reference familiar to laypeople.\footnote{See, e.g., CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER THE LAW 131-32, 149 (1998); MARK TUSHNET, MAKING CONSTITUTIONAL LAW 233-34 (1997); WILKINS, supra note 34, at 269-70.}
substantive justice. Courts are likely to adopt a centrist alternative to a progressive social movement’s goals. Remedies that aspire to distributive justice, take, for instance, the structural injunction used in school desegregation cases, are considered extraordinary exercises of judicial power. Thus, they generally have not fared well during the implementation process; the school desegregation decree is a prime example of system failure, as I will discuss more below. Finally, the manner in which the law may benefit social movements is unpredictable. Michael Klarman’s scholarship on *Brown v. Board of Education*, propounding a backlash thesis to explain the perverse relationship among black protest, white violence, and civil rights legislation, demonstrates this point. Given the limited nature of legal remedies, the unpredictable ways in which legal strategies can aid social movements, and the ancillary role that law often plays to politics, law-in-the courts is an implausible tool of choice for protest groups seeking distributive justice.

The description of social movements that I have rendered demonstrates the extent to which Eskridge’s conception of social movements fundamentally contradicts the nature and functions of these forms of political action. Social movements aspire to remedy the ways in which institutionalized politics—the electoral process, representative government, and the legal system—place those who are not repeat players (or who do not otherwise command influence) in these arenas at a great disadvantage. The influence of these activists is constrained by characteristics (such as gender or race/ethnicity) that limit their success in “normal” (i.e. institutionalized) political channels. Hence, they organize outside of and against forums of exclusion, and they attempt to gain leverage by disrupting or threatening to disrupt, and thereby undermining, normal decision-making channels. They are conflict- rather than consensus-based forms of political action. Participants do not naturally or necessarily view constitutional law as constitutive of their identities. Nor does law necessarily determine the movement’s agenda and shape its path to the extent that Eskridge suggests. Though consideration of how social movements relate to law and the legal process is important, observing and preserving the analytical distinction between the two enhances our ability to avoid a juri-centric, legalist worldview that excludes or diminishes the uniqueness of these non-institutionalized forms of political action.

D. The Definitional/Inspirational Role Distinction

The relationship between social movements and law is essentially antagonistic, but activists do and must utilize legal processes when necessary to

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368 See notes ___ to ___ infra and accompanying text.
369 See Klarman, Backlash, supra note 17, at ___; Klarman, supra note 17, at ___.
370 See Burnstein, supra note 38 at 1204.
advance their goals. Given the tension between the two, however, the objectives of such movements typically will be best served by circumspection about legal epistemologies and processes. Calculated, strategic uses of law that do not threaten the movement’s ability to exercise influence by introducing conflict may be advantageous. Litigation or the threat of litigation might be a tactic among a broader arsenal of tools to which the movement turns at an opportune moment. But if law wholly defines a social movement in the way that recent constitutional scholarship suggests that it does or should, the movement likely would lose its capacity to shape, or stand outside of, the decision-making processes of political and legal elites.

The decision making calculus that I suggest can be captured by drawing a distinction between two different ways in which law and social movements can relate. Law-in-the courts can play an inspirational or definitional role in social movements. Social movements may profitably use rights talk to inspire political mobilization, although legal mobilization theorists overstate law’s effectiveness in this regard. But social movements that make rights talks or litigation definitional to their agendas threaten their insurgent role in the political process. Without an insurgent element, social movements lose their agenda-setting ability.

1. Law as Definitional

The experience of the BAMN intervenors suggests the utility of recognizing a distinction between the definitional and inspirational roles that law-in-the-courts can occupy in social movements. By choosing to intervene in Grutter rather than, say, confine its action to community organizing, BAMN narrowed its broad goal of leading a “new civil rights movement” to a single, narrow objective—preserving affirmative action. Law-in-the-courts became definitional to BAMN’s putative mass movement by virtue of the intervention. A few examples from the Grutter intervention demonstrate the point that when law-in-the-courts plays a definitional role in a social movement, law constrains the movement’s agenda-setting ability. The dictates of law, rather than the movement, determine agendas.

First, consider that, in contrast to the affirmative agenda for change that social movements pursue, the intervenors’ role in the litigation was reactive and defensive at nearly every turn. Grutter was not affirmative litigation brought by the plaintiffs to challenge “racial caste” in education. Instead, the intervenors’ trial strategies and written and oral arguments were shaped by the actions of the array of other actors involved in the litigation, most clearly, the CIR. 371 The CIR defined the terms of engagement for BAMN and the other participants in the court

371 See note 41 supra and accompanying text.
debate over race-conscious admissions. The intervenors filed motions that responded to the plaintiffs’ allegations of reverse discrimination. BAMN defended affirmative action by inverting the CIR’s claims. The CIR claimed that its plaintiffs were entitled to admission to the University because of their superior credentials; the intervenors made the flip side of that argument, claiming that the credentials were themselves discriminatory. The plaintiffs framed the debate in such a way that even the intervenors’ moral claims, based on historical discrimination, were co-opted.

BAMN’s arguments and actions were also constrained by the choices of the defendant, the University of Michigan. Had the university chosen not to mount a defense based on the propositions that diversity and selectivity are mutually exclusive, and that its admissions criteria adequately captures merit, then the intervenors’ credentials bias argument would have stood on a much different footing. Moreover, whether the intervenors could have a voice in the Supreme Court largely was determined by the university, especially when it indicated its unwillingness to share time or support the intervenors’ request for additional time.

The intervenors’ claim that the University’s admissions criteria were discriminatory represented an attempt at leadership despite the law-as-definitional context. In making this claim, the intervenors were able to air their concern that the University’s use of affirmative action was a “self-inflicted wound.” Had they prevailed in their argument, the student-intervenors likely would have precipitated a restructuring of the admissions systems used in higher education (presumably in a way favorable to black and Hispanic students).

The collateral

372 See notes 51-56 supra and accompanying text.
373 See notes 48 to 58 supra and accompanying text.
374 See notes 114-115, 135-140 supra and accompanying text.
375 See notes 145-149 supra and accompanying text.
376 See Grutter, 539 U.S. 306, 350 (2003)(Thomas, J., dissenting and concurring)(“Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.”).
377 One unintended consequence of decreasing reliance on numbers-only criteria would likely be an increase in administrators’ discretion in the educational process, which might have profoundly negative consequences. Certainly, administrative discretion has not worked well for African-Americans seeking educational equality in the past. See Klarman, supra note 17, at 255-59, 330, 358-59 (discussing how school board’s manipulation of pupil placement criteria during Brown era); JOE R. FEAGIN ET AL., THE AGENCY OF EDUCATION 115-34 (1996)(discussing how administrative discretion in areas such as academic advising to counseling creates barriers to success at predominantly white colleges and universities). Indeed, the movement toward more objective, routine procedures typically is a hallmark of a more equitable socio-economic structure. See e.g. Furman v. Georgia, 408 U.S. 238, 293 (Brennan, J.) (stating that unbridled discretion vested in judges and juries capital punishment statutes generated a pattern of death sentencing that smacks of little more than a lottery system.”); Practicing Law Institute, Class Action Litigation: Prosecution & Defense Strategies, Litigation PLI Order Number 3438, July 29 - 30, 2004 (noting
effects of such a victory likely would be widespread. It would call into question the validity of the range of quantitative data used to decide how societal goods are distributed.\footnote{378}{See Guinier, \textit{supra} note 5 at 131-135.} But, of course, the students did not prevail on this argument, in part because of the environment in which they initiated their protest.\footnote{379}{See notes 283-287 \textit{supra} and accompanying text. Nevertheless, it is notable that Justice Thomas, an ardent opponent of affirmative action and \textit{Grutter} dissenter, indicated some agreement with the intervenors’ claim that the law school’s admission criteria are systematically discriminatory. \textit{See} \textit{Grutter}, 509 U.S. 306, 361, 367, 370 (2003)(questioning fairness and usefulness of law school school’s admission’s criteria in determining which students attend law school). Judge Bernard Friedman, who tried \textit{Grutter} v. Bollinger, 137 F. Supp. 821, 855-65, 866-72 (E.D. Mich. 2001)(discussing BAMN’s evidence on causes of weaker quantitative merit measures among blacks and Hispanics, finding inferior K-12 educational opportunity a significant influence on weaker scores and grades, but holding that neither past discrimination, nor present, societal discrimination is a constitutionally compelling justification for race-conscious law school admissions), \textit{rev'd} 288 F.3d 732, 744-52 (6th Cir. 2002)(en banc).}

Nothing better demonstrates the law-as-definitional context in which the intervenors operated than the fact that even the rhythms and scope of their protest tactics were shaped by the drama unfolding in the courtroom. Generally speaking, BAMN’s demonstrations were designed to achieve a narrow purpose: persuading the federal courts to accept the legal positions that the defendants favored.\footnote{380}{See notes 137-144 \textit{supra} and accompanying text.} Hence, the intervenors’ demonstrations generally occurred at crucial points in the litigation\footnote{381}{See notes 135-40 \textit{supra} and accompanying text.} and thus they were at the behest of others and responsive to the timetable mandated by the litigation process. In response to the CIR’s filing suit against the University of Michigan’s affirmative action policies, BAMN staged periodic protest demonstrations, including the day after the filing.\footnote{382}{See BAMN Protests The New Michigan Anti-Affirmative Action Lawsuit (Oct. 15, 1997), available at \url{http://www.bamn.com/news/index.asp?go=go&cat=&yr=1997&mo=10&first=375&last=366}.} Subsequent to the students’ intervention in \textit{Grutter} as defendants on March 26, 1998, BAMN staged protests at pivotal points in the legal cases, including after the District Court issued opinions for the plaintiffs, and during arguments on appeal to the Sixth Circuit.\footnote{383}{See notes 113-115 \textit{supra} and accompanying text.} This cycle of protests to influence the course of the legal actions culminated in BAMN’s April 1, 2003 protest at the U.S. Supreme Court during oral arguments in \textit{Grutter} and \textit{Gratz}.\footnote{384}{See notes 139-143 \textit{supra} and accompanying text.}
protest of the bitterly disappointed intervenors was made in defiance of their counsel’s exclusion from oral argument.\(^{385}\)

Even when the intervenors were able to make appearances in court, however, their strategy of creating narratives to support their claim for social justice met with resistance from presiding judges. The trial court ensured that the students’ counsel refrained from straying from legally relevant testimony and “politicizing” the trial. For instance, both the plaintiffs and the judge questioned whether Massie should be allowed to call Gary Orfield, the expert on school desegregation in lower education, to testify.\(^{386}\) Orfield was important to Massie’s case because her theory that affirmative action rightly is seen as a remedy for discrimination turned on showing that a race-based educational caste system exists in America. Orfield, who would testify that the public educational system is overwhelmingly segregated and that minorities attend inferior schools,\(^ {387}\) could provide evidence supporting the intervenors’ caste claim.\(^ {388}\) One exchange between the judge and intervenors’ counsel on the issue of whether witnesses such as Orfield were relevant, was explosive. Massie’s co-counsel, attorney George Washington, charged,

In our view, Judge, the Court, just like the overwhelming majority of white people in this country[,] does not … have an adequate understanding of race and racism in the United States and we are presenting witnesses who we think are vital for this Court to hear on this case which is of critical importance for race and race relations. … [W]e believe you must hear what our witnesses have to say.

During oral argument at the Sixth Circuit Court of Appeals, Massie tried to go on the offensive, but was rebuked. She attempted to present the Court with a petition containing 50,000 signatures of Americans who reaffirmed “our national commitment to \( Brown v. Board of Education \)” and thus, Massie argued, to affirmative action.\(^ {389}\) In rejecting the petitions, the court admonished her that public opinion does not decide lawsuits.\(^ {390}\)

We decide the case on the law and the facts and

\(^{385}\) See notes 144-152 supra and accompanying text.
\(^{386}\) See e.g. Transcript of Trial Proceedings, Grutter v. Bollinger, Jan. 23, 2001, at 5-6.
\(^{387}\) See GARY ORFIELD & SUSAN EATON, DIsmantling Segregation: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996)(discussing the growth of segregation in recent decades).
We want it very clear that we are not policymakers. We are not a legislative body. We are not the executive branch. We are the judiciary. ... So the petitions are not of any benefit in our decision making. [W]e prefer to hear from you the law of why what the University of Michigan Law School is doing is appropriate and authorized under the Constitution.391

The court’s comment perfectly captures how law checks the overtly activist impulses of the cause lawyer. The intervenors’ arguments and tactics breached the norms of the legal process and conventions of the courtroom.392 It is, then, no surprise that their perspective was largely disregarded—their counsel’s political sophistication notwithstanding.

2. Law as Inspirational

Despite their setbacks in the litigation, the experience of the Grutter intervenors’ supports legal mobilization theorists’ view that indirectly beneficial effects may flow from litigation campaigns—that law-in-the-courts may be inspirational. The intervenors likely raised the political consciousness of client-communities affected by the suit in three ways, according to counsel, and all of these inspirational effects seem plausible.393 As a result of the intervention, students were “excited” by the prospect of political activism (regarding educational inequality, in particular), developed a “desire to be leaders,” and became participants in the litigation, including the demonstrations.394 BAMN pricked the conscience of students and parents by reaching out to them in schools and through canvassing door-to-door, mainly in Detroit.395 Many of the students involved in the intervention agree that BAMN’s outreach galvanized their

391 Id.
392 Petitions and other such messages traditionally are thought to affront the independence of the legal system. An interesting historical example comes from the trial of Julius and Ethel Rosenberg, when the National Committee to Secure Justice attempted to present a petition with 50,000 signatures to the Supreme Court. See Vose, supra note 203, at 29.
393 Interview with Miranda Massie, Oct. 8 and 12th, 2004.
395 Id.; Transcript of Proceedings, Grutter v. Bollinger, No. 97-CV-75928, Jan. 23, 2001, at 38 (intervenor Erica Dowdell testifying that BAMN presentation during her senior year in high school inspired her to engage in activism to preserve integration and to apply to the University of Michigan).
communities. Some have continued activism for quality education instigated as a result of BAMN’s outreach.

But there is little evidence suggesting that the intervenors’ litigation-rooted approach mobilized a broad segment of their target constituency, the community, and their target audience, the public, around the injustice of the “racial caste-perpetuating” features of higher and secondary school education. This is the case, I suspect, because law’s definitional role in the campaign undercut its inspirational impact.

According to social movement theorists, the community and public opinion must be both the initial and primary targets of a social movement’s attention if it is to have a chance of influencing policy and law. The intervenors’ ability to leverage their participation in the litigation to achieve a significant inspirational impact was impeded by the fact that the lawsuit diverted its attention from the appropriate target audience. By necessity the presiding courts and other parties in the litigation were the intervenors’ primary audiences, as I have explained immediately above. Thus, BAMN’s participation in the litigation assured that it could not focus its energies where they were most needed and could not broadly communicate the injustices that it perceived salient to potential converts to the movement.

The dominant role of litigation in BAMN’s movement gave rise to another impediment to their ability to generate a significant inspirational impact. As I explained in Part I, the high-status interest groups comprising the utilitarian strand of the coalition were the focal points of media interest in the cases throughout the course of the litigation. The fact that military leaders, Fortune 500 companies, and the academic establishment filed a record number of amicus briefs in support

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396 Many of these students were associated with BAMN prior to its intervention; therefore, they presumably would be inclined to view the organization’s work favorably. Interview with Miranda Massie, Oct. 12, 2004.
397 BAMN is now embroiled in a political battle over school governance in Detroit that revolves around the question of how much power city residents will and should have over the public schools. Interview with Miranda Massie, Oct. 12, 2004; see also Chastity Pratt & Peggy Walsh-Samecki, Proposal E: Control at Stake, Oct. 8, 2004, Detroit Free Press, available at http://www.freep.com/news/locway/dpsvote8e_20041008.htm; Zurich Dawson, Letter to Editor, Detroit Free Press, Oct. 13, 2004 (praising BAMN and explaining why readers should reject the ballot measure), available at http://www.freep.com/voices/columnists/enob13_20041013.htm
398 See Burstein, Social Movements and Public Policy, in QUIGNA, supra note __, at 25 (arguing that SMs may affect policy by changing legislators’ perceptions of the public preferences or their intensity, by changing the preferences themselves, or by changing the importance of the issue to the public).
399 Id.
400 See notes __ to __ supra and accompanying text.
of the University was the story about which the media reported. As a result, the utilitarian rationales that these elites offered for backing affirmative action—that diversity is good for business, national security, and the legitimacy of our democracy—defined the issue and the story. Under these circumstances, BAMN’s caste-based perspective on the debate was lost or minimized. To the extent that the media mentioned the salience of the credentials gap in the affirmative action debate, it repeated the CIR’s narrative—unchallenged by the University and the utilitarian elites—that minorities are less well qualified than whites for admission to college and law school. Under these circumstances, BAMN was no able to reframe the credentials issue as one about discrimination against minorities rather than against whites—a necessary predicate to unleash a broad inspirational message on its target constituency and audience.

The negative impact of law’s definitional role on the intervenors’ ability to reframe the issue extends beyond the dynamics of Grutter itself, however. The larger context of the Court’s jurisprudence on race and education is highly relevant to the question of how large of a mobilizing impact law-in-the-courts could have been expected to generate about racial caste in education. The context of race and education is a uniquely inapt predicate for theorists’ confidence that litigation’s beneficial, indirect effects disprove the critical commentary on law and change. There is little reason to believe that rights talk—even when accompanied by victories on liability—is an especially useful way of mobilizing communities around the anti-caste goal. Even a cursory examination of litigation about the equal protection rights of minority students points to a sobering conclusion. When the “discursive frameworks,” “opportunity structures,” and symbolic significance that flow from litigation are considered in the context of education, the conclusion that many, and probably most, of its radiating effects have been profoundly negative for students of color is hard to miss. In fact, it is difficult to point to a context in which critics’ pessimistic view of law’s ability to produce fundamental change is more fitting.

A large and growing body of scholarship, written by commentators across the political spectrum, attests that many of the cues created over the long course of educational civil rights litigation have been deleterious. Generally speaking,

401 See notes __ to __ supra and accompanying text.
402 See Business Week article, supra.
403 RA—review articles cited above or in Chronicle.
404 See McCann, supra note 25, at 733; MARTHA MINOW, MAKING ALL THE DIFFERENCE 304 (1990)(discussing how legal rights become “possessions of the dispossessed.”)
405 See DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 8-10, 14-28, 130-37 (2004) (arguing that Brown was a “mirage” that did not bring about equality and that a ruling demanding equality in separate-but-equal paradigm would have been preferable); JACK BALKIN, WHAT BROWN V. BOARD OF
many of both the direct and indirect effects of race and education litigation over the past several decades, whether involving lower school\textsuperscript{407} or higher education,\textsuperscript{408} whether in state\textsuperscript{409} or federal court,\textsuperscript{410} have been demobilizing. Here is why: educational litigation has tended to reinforce rather than disrupt longstanding and continuing racial stratification in the socio-economic order.

Educational litigation has not defined educational equality in terms consistent with an anti-caste principle for students of color, but rather, as social integration or in terms of the adequacy of educational inputs (resources).\textsuperscript{411} When lawyers have defined equality as racially integrated education, the litigation has had limited success.\textsuperscript{412} The Court’s doctrine in \textit{Milliken v. Bradley}, for example, effectively foreclosed the possibility of integrated schooling in the central cities.\textsuperscript{413} More damning, even when the Court has issued favorable rulings, the litigation has produced unfavorable results. As an example, consider \textit{Swann v. Charlotte-Mecklenburg Board of Education}, the 1971 case in which the Court upheld the constitutionality of busing and gerrymandered school district to achieve the maximum degree of pupil integration.\textsuperscript{414} \textit{Swann}, specifically, and school desegregation litigation, generally, precipitated a wide-ranging backlash. The resistance was evinced by white flight from the cities, into the suburbs, where fewer minorities live,\textsuperscript{415} and minority resistance to the goal of integrated


\textsuperscript{410} Brown-Nagin, \textit{ supra} note 20, at 778-99; see also cases cited in note 461 \textit{ supra}.

\textsuperscript{411} See \textit{Fair, supra} note 462, at 1844-46, 1851-62.

\textsuperscript{412} See \textit{e.g., Wolters, \textit{The Burden of Brown} 3-8, 273-289 (1984); Formisano, \textit{Boston Against Busing} 1-44, 88-203 (1991); \textit{Jacobs, Getting Around Brown} 179-204 (1998).}

\textsuperscript{413} \textit{Milliken}, 418 U.S. at 733-44; see also cases cited \textit{ supra} note 432.

\textsuperscript{414} 402 U.S. 1 (1971).

\textsuperscript{415} See Orfield, supra note 61-63, 302-03, 308, 314-18; Brown-Nagin, \textit{ supra} note 190, at 1928-34.
As a consequence of these dynamics, Black and Hispanic students attend overwhelmingly segregated schools.\(^{417}\)

Similarly, litigation over educational inputs has a spotty record of success.\(^{418}\) Celebrated wins on liability in state-level litigation, such as *Abbott v. Burke*,\(^{419}\) the New Jersey litigation, were followed by years of wrangling between courts and legislatures over the precise nature of the remedy.\(^{420}\) State legislators who answer to white majorities were less than enthusiastic about complying with court orders mandating increased expenditures in majority-minority school districts.\(^{421}\) The message sent to black and Hispanic communities by such litigation campaigns was that they are not important actors in the political community or in the marketplace.

Part of the difficulty in this area derived from the paradigm on which educational litigation was based—*Brown v. Board of Education*. The Supreme Court justified its outcome in *Brown* in terms that reinforced in the public imagination the social aspects of racial inequality rather than its material or political aspects.\(^{422}\) The justices spoke of eliminating the stigma of racially separate learning environments.\(^{423}\) As a consequence of this reasoning, says scholars such as Lani Guinier, students of color seeking legal redress have been viewed as deficient supplicants seeking to invade white social spaces.\(^{424}\) This negative message saturates the culture,\(^{425}\) and it is highly likely that minority communities’ disenchantment with integration, where it exists, is, at least partially, a response to the signal.

Finally, law’s substantive and discursive frameworks also were at odds with the intervenors on the precise issue that they wished to foreground in the litigation—credentials bias. In contrast to Title VII law on testing in employment,

\(^{416}\) See e.g. Michel Marriott, *Louisville Debates Plan to End Forced Grade School Busing*, N.Y. TIMES, December 11, 1919, at B13; Bell, supra note __, at 471-493 __; Brown-Nagin, supra note 190, at 1928-40.

\(^{417}\) See ORFIELD & EATON, supra note 449, at 53-71.

\(^{418}\) See Ryan, supra note 222, at 299-304; McUsic, supra note 443, at 455.


\(^{420}\) See Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey’s Experience Implementing Abbott V Mandate*, 22 Yale L. & Pol’y Rev. 615 (2004) (discussing the lineage of New Jersey funding case, including ten New Jersey Supreme Court opinions and three major legislative overhauls seeking to comply with decree but noting that court-ordered remedy “shows little sign of becoming a reality”).

\(^{421}\) Id.

\(^{422}\) See Guinier, supra note 249, at 94-96.


\(^{424}\) Guiner, supra note 249, at 96 n.9 (citing literature that addresses how Brown I had the effect of polarizing blue-collar whites and re-stigmatizing blacks).
pursuant to which plaintiffs can challenge testing policies under intentional and disparate impact theories of discrimination, the law pertaining to educational testing in higher education is unfavorable and underdeveloped. Claims of intentional discrimination premised on equal protection are likely to fail due to long-standing precedent that requires plaintiffs to prove intent on a standard “akin to malice” in the criminal law. And in a recent decision, Alexander v. Sandavol, a divided Court held that private plaintiffs may not challenge school policies under Title VI of the Civil Rights Act, and in any event, that Title VI does not reach disparate impact discrimination. Sandavol, which was viewed as a grave loss by civil rights litigators, would seem to preclude what had been the most viable legal theory for challenging test bias. The clear message flowing from this law is that credentials bias in higher education is not a legally cognizable issue. Hence, there is little reason to think that this case law, coupled with the disappointing track record for educational litigation, would have any inspirational effects.


427 See Washington v. Davis, 426 U.S. 229 (1976) (holding that plaintiffs challenging facially neutral state action have to demonstrate that the state acted with discriminatory purpose in order to make out an equal protection claim).

428 Reva Siegel, Why Equal Protection No Longer Protects, 49 Stan. L. Rev. 1111,1133 (1997) (arguing equal protection standards require proof that legislators adopted a policy that could foreseeably injure women and minorities acted with a legislative state of mind akin to malice).


E. Mobilizing Outside of the Law

As a consequence of its juris- or law-centric view of social movements, the legal literature glosses over important distinctions between these movements and the law. This part has delineated some of these distinctions by discussing historical examples of mass movements for change, the social science literature, and the *Grutter* intervention. I have observed the dissonance between constitutional law-making in the courts and the objectives and tactics commonly associated with protest movements. In the process, I have argued that the legal literature wrongly assumes that law and rights are especially relevant to social movements. Yet, I have not argued that constitutional law is irrelevant to social movements. Here, I offer further thoughts on the overarching normative question raised here: given the tension between social movements and the law, what should be their relationship?

Generally speaking, lawyers are not well-positioned to mobilize communities because of their commitment to legal processes. Consequently, the ability of communities to leverage the law for social change should not be understood as a power resting with attorneys. Lawyers, litigators, in particular, must be willing to cede leadership of movements for change to non-lawyers, or, at the very least, vest initial leadership in non-practicing or radically client-centered lawyers. Those seeking to have an impact on the political and legal

431 Julie Su’s article detailing the achievements of inexperienced lawyers who abdicated legal stratagems for protest strategies in working with and on behalf of garment industry workers suggests the hopeful possibilities presented by this approach. See Julie A. Su, *Making the Invisible Visible: The Garment Industry’s Dirty Laundry*, 1 J. Gender, Race & Just. 405, 405-17 (1998)(discussing advocacy on behalf of enslaved garment workers and describing conflict between “social activism” and “traditional legal avenues”). Su concludes:

I am convinced that we succeeded in getting the workers released in just over a week in part because we did not know the rules, because we would not accept procedures that made no sense either in our hearts or to our minds. It was an important lesson that our formal education might, at times, actually make us less effective advocates for the causes we believe in and for the people we care about.

431 See id. at 410.

432 On client-centered lawyering, see e.g. Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes*, 38 Buff. L. Rev. 1 (1990); GERALD LOPEZ, *REBELLIOUS LAWYERING* (1992). For commentary suggesting how and why lawyers’ professional norms limit lawyers’ willingness to cede decision making power to clients and other lay people, see e.g. Nancy Polikoff, *Am I my Client: The Role Confusion of a Lawyer Activist*, 31 Harv. Civ.Lib.-C.R. L.R. 443 (1996); Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976); Su, *supra* note 512, at 417 (describing friendly attorneys saying “If you want to do the political and educational stuff, organize meetings with the workers and visit them in their homes at night. … But leave the ‘real lawyering’—the hard core strategizing, brief writing, and arguing—to the real lawyers.”).
orders should not “root” a mass movement in the courts; instead, litigation about constitutional rights should be anchored upon and preceded by a mass movement. Efforts to achieve fundamental change should begin with the target constituency and be waged initially outside of the confines of institutionalized politics. Law should be understood as a tactic in an on-going political struggle, where the struggle is the main event and favorable legal outcomes are its byproducts. There is a crucially important temporal component to this view. Legal claims can be tactically useful in a political strategy for achieving change, but only after social movements lay the groundwork for legal change. Social movements must first create political pressure that frames issues in a favorable manner, creates cultural norm shifts, and affects public opinion; these norm shifts then increase the likelihood that courts will reach outcomes favored by lawyers.433

Again, my claims are predicated on a particular narrative about the history of the mid-twentieth century civil rights movement. This narrative posits an intimate relationship between socio-political dynamics within black client-communities and the success (or failure) of civil rights lawyers’ litigation campaigns for rights. The post-war civil rights movement confirms that the moral suasion of participatory democratic groups of non-lawyers, typically non-elites, was integral to law’s movement from a Jim Crow regime to a constitutional order in which formal equality was the norm. During the past three decades historians who have analyzed how social change occurs have discovered that small groups of inexpert individuals can be the leading edge of a social movement, especially when they work in coalition with those who traditionally wield influence in society.434 Through their commitment to a social cause, ordinary people with no insider knowledge of the technical aspects of the issue on which they are mobilizing can create circumstances in which those with actual power (political, economic, and ultimately legal power) are persuaded to act in their favor.435

The Montgomery, Alabama bus boycott is a paradigmatic example. Designed to protest unfair treatment under Montgomery’s bus segregation laws, the boycott was initiated and led by the city’s African-American residents, rather than instigated by lawyers. Rosa Parks, the church-going NAACP secretary of


435 See, e.g., WILLIAM H. CHAFE, Sex and Race: The Analogy of Social Change in WOMEN & EQUAL. 81-113 (1977) (arguing that African-Americans created social change during the 1960s in “social spaces” that served as places for planning strategies for communicating needs to government officials and leaders in business and industry); WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS, GREENSBORO, NORTH CAROLINA AND THE BLACK FREEDOM STRUGGLE (1980).
“unblemished character” who stood up to white bus driver J.F. Blake, provided a morally stark picture of Jim Crow’s injustice. 436 Rev. Martin Luther King Jr. became the public face of the boycott by virtue of his election as president of the Montgomery Improvement Association (“MIA”), the organization that managed the protest. 437 However, the MIA’s and King’s constituents, workaday people such as seamstresses, household servants, and low-wage laborers who were dependent on the buses for travel to their jobs were the backbone of the movement. 438 Civil rights lawyers only became involved in the boycott later; they ultimately garnered an order from the Supreme Court in Gayle v. Browder invalidating segregation on buses. 439 The lawyers entered the scene only after local citizens had organized and sustained the boycott for many months. 440 Certainly, the civil rights lawyers were integral to the formal victory that came in Gayle v. Browder. 441 Lawyers provided crucial information to movement organizers about the legal implications of their goals and tactics and ultimately used their skills in advocacy to implement the changes in law that desegregated the buses. 442 But the most crucial activity—galvanizing public support for the boycott—began and ended with the grassroots. Thus, citizens on society’s margins engaged in collective action were the foundational change agents in the

436 See FAIRCLough, supra note 214 at 16; Morris, infra note 60 at 52 (noting that Mrs. Parks’ action “triggered the mass movement” in part because “she was a quiet, dignified woman of high morals”). 437 See FAIRCLough, supra note 214 at 16; Morris, supra note 60 at 51, 54-55, 62. 438 Minister E.D. Nixon, a boycott organizer, explained how the workaday lives of average blacks figured into the protest. 440 [After Mrs. Parks’ act] I went home that night and took out a slide rule and a sheet of paper and I put Montgomery in the center of that sheet and I discovered that there wasn’t a single spot in Montgomery a man couldn’t walk to work if he really wanted to. I said it ain’t no reason in the world why we should lose the boycott because people couldn’t get to work. See MORRIS, supra note 60 at 52; see also id at 62 (noting King’s ability to attract “large segments of oppressed blacks from the poolrooms, city streets, and backwoods long enough for trained organizers to acquaint them with the …demands, and strategies of the movement.”); FAIRCLough, supra note 214 at 16. 439 See JACK GREENBERG, CRUSADERS IN THE COURTS 212-13 (1994) (describing the boycott as a “community mobilization” effort). The Court found bus segregation in Montgomery unconstitutional in Gayle v. Browder, 352 U.S. 903 (1956). 440 See GREENBERG, supra note 426 at 212-13. 441 See Jerome Glennon, “The Role of Law in the Civil Rights Movement,” 9 Law & Hist. Rev. 59-100 (1991). Glennon thus extrapolates that lawyers and law were primarily responsible for the boycott, rather than the boycotters themselves. It seems clear to me, however, that but for the activism of the locals, the lawyers would never have been positioned to achieve their legal victory. Notably, Jack Greenberg, who litigated the case, agrees with me on this point. See GREENBERG, supra note 426, at 212-13. 442 See Glennon, supra note 428, at 59-100.
boycott, which in turn served as the “watershed of the modern civil rights movement.”

This dynamic of local people preparing the way for legal change was repeated numerous times during the course of the civil rights movement. The black struggle for political power in Alabama provides another example. Protests in Selma and Montgomery, coupled with the violent white resistance that they spawned, played a decisive role in the passage of the Voting Rights Act of 1965. The Birmingham protests, a year earlier, were an impetus for passage of the Civil Rights Act of 1964, and involved similar “backlash” dynamics. The moral authority generated by the image of viscous white southerners attacking peaceful blacks was immense.

Hence, the most successful episodes of the civil rights movement featured a two-pronged strategy for achieving change in which participatory democratic actors making moral claims for racial justice relied on lawyers and legislators to translate these claims into the language of law after, or while the movement was affecting the hearts and minds of the public. “[T]he two approaches—legal action and mass protest—entered into a turbulent but workable marriage,” Aldon Morris has explained. Legal processes were an integral part of the overall process of achieving fundamental social change, but not the initial spark that set in motion the chain of events that created this change. Rather, the “mass dramatization of injustice,” to quote King, lit the fire. The decisive political actors instigated legal change from outside of the law, rather than the reverse, suggesting that courts are reactive institutions that respond to socio-political currents.

Consequently, rather than hewing to the traditional, lawyer-dominated impact litigation model, activists intent on ameliorating the caste-like inequality in education should mobilize outside the law if they hope one day to achieve leverage within the law. Suppose, for example, activists wished to tackle the credentials bias issue from a social movement perspective. Here is how the interactive, temporally sensitive model of the relationship between social movements and law would unfold, when applied to this issue.

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443 See Morris, supra note 60 at 51.
444 On the role of white violence in the evolution of the civil rights movement, see Klarman, supra note 17, at 421-42.
445 See id; see also Fairclough, supra note 214 at 225-51, 253-55, 265-66.
446 See Klarman, Backlash, supra note 17, at 385-442; see also Fairclough, supra note 214 at 112-29.
447 See Klarman, Backlash, supra note 17 at 385-422.
448 See Morris, supra note 60 at 39. The boycott “had created the pressure that that contributed to the favorable court ruling.” Id. at 63.
450 See Klarman, supra note 17, at 449-50.
Initially, activists would mobilize outside of the law to raise the political consciousness of client-communities about the problem. The nature and extent of the problem that the movement would confront is clear. The majority of Americans, including a majority of Hispanics and a near majority of blacks, think of quantitative measures and an applicant’s merit as interchangeable. These criteria are generally accepted in the culture (by educators, administrators, commentators, and students, among others) as intelligence tests, objective and reliable measures of aptitude. This is the case even though the manufacturers acknowledge that the measures are merely predictive and warn against their overuse because, for example, they capture and measure social status, as well as ability. This perception cripples many minority students, according to experts. The psychologist, Shelby Steele, has studied a phenomenon that he terms “stereotype threat,” which he describes as the threat to the psyche of “being viewed through the lens of a stereotype or the fear of doing something that inadvertently would confirm the stereotype.” This lingering threat negatively influences minority students’ performance on standardized tests, and in the classroom. A substantial literature confirms that minority students’ perceptions that those in their learning environments have low expectations of them or are biased against them has a harmful impact on their experiences of education at every level. The interplay of stereotype threat and the general cultural tendency to accept performance on quantitative measures of ability as reliable proxies for

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451 Polls consistently show that Americans, including a near majority of blacks and a majority of Hispanics, believe it is unfair to give preferential treatment to minorities if doing so requires lowering “standards” such as test scores. See Steve Crabtree, The Gallup Brain: Bakke and Affirmative Action, Jan. 28, 2003, available at http://www.gallup.com/poll/content/?ci=7660. Among the findings in these polls are the following: In 2001, 66% of Americans favor quotas in employment and education, provided they meet the “same standards” as others. But only 18% favor such quotas “even if it means lowering standards to make up for past discrimination” against racial minorities. Similarly, in 1977, 81% of Americans said that “ability, as determined by test scores” should be the decisive factor in employment and education decisions, when asked whether they supported preferential treatment to compensate for past discrimination. Interestingly, the 1977 poll also showed that 53% of Americans would favor governmentally funded programs, free of charge, to help minorities perform better on standardized tests of ability. The public’s opinions have not changed post-Grutter. See Public: Only Merit Should Count in College Admissions: Little Perception of Racial Bias in Admissions Process, June 24, 2003, available at http://www.gallup.com/poll/content/?ci=8689 (noting that 75% of white Americans and 69% of all Americans support merit-only admissions even if it results in few minority admissions; and that 44% of blacks and 59% of Hispanics agree).

452 See e.g. MURRAY, supra NOTE 471.

453 See notes 283-292 supra and accompanying text.

454 See Guinier & Strum supra note 55, at 953.


456 Id.

457 See e.g. FEAIGIN, supra note 264, at 1-21, 83-134.
intelligence was apparent in *Grutter* and *Gratz*. The presiding judges, the university, and the plaintiffs apparently all accepted the validity of the criteria that the intervenors challenged as discriminatory. Consequently, it is crystal clear that the first step in any campaign to end racial caste in education must be consciousness raising and cognitive liberation about the validity of the test themselves. They would use pressure tactics, first to persuade those with direct authority to address their grievances—local and state educational officials and legislators, for example—rather than to persuade courts who jealous guard their independence in the face of overt political pressure.

Activists would next need to generate attention for their cause with a view toward creating political pressure on policy makers to embrace the movement’s perspective on the issue. Parents might undertake sustained protests over the use or over-reliance on “ability grouping” or “high-stakes” tests, for example. Pressure on decision makers for change would follow if public attitudes about quantitative measures of ability changed substantially and noticeably, so much so that the media recognize and confirm the shift in opinion. It is only after such attitudinal changes have occurred or are underway that lawyers might successfully seek changes in law, whether judicially or legislatively (or both), that will preserve the attitudinal shifts created by extra-legal activism. Ideally, litigation could be avoided altogether if activists conceive, evaluate, and then lobby for alternatives to the existing regime. The feasibility of admissions systems that rely less on test data, accept test scores on a voluntary basis, or accept alternative predictors of future success, might be considered, for example. By employing such a strategy, activists would increase the chance that courts might take steps toward a less regressive distributive of educational opportunities.

458 See notes 283-292 *supra* and accompanying text.
460 See note 342 *supra* and accompanying text.
461 See notes 396-400 *supra* (discussing public attitudes about merit measures).
462 See Klarman, *supra* note 70, at 10.
463 There is a caveat to all of these claims. Law and social movements are only incompatible if the movement’s aim is to achieve social transformation, rather than to maintain social stasis or reform. The intervenors’ goal of exposing racial caste perpetuating nature of college and university admissions criteria falls in the former category, and their goal of preserving affirmative action falls in the latter. Reform implies an affirmative agenda of improvement or change. See note 350 *supra*. 
CONCLUSION

The *Grutter* intervenors’ limited success—from a social movement perspective—despite their legal victory, illuminates why the legal literature should distinguish between politicized lawyering and social movements. The *Grutter* example confirms the disproportionate influence of moderate and elite thought on legal narratives about equality and the substance of law making in-the-courts. By implication, they also support the view that there is little space in law for agenda setting by those seeking to undermine the preferences of a majority. Hence, if lawyers hope to leverage the law to achieve the goals of socially and economically marginalized groups, the lawyer’s work must be preceded by a social movements that is not defined by law. Law should be the final arena of struggle over systemic social problems, rather than the first.