Marginalized Significance:

Race and Scientific Evidence in the United States Supreme Court

by

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ABSTRACT

Law and science are fundamental to the operation of racism in the United States. Law provides structure to maintain and enforce social hierarchies, while science ensures that these hierarchies are given the guise of truth. Biologists and geneticists have used race in physical sciences to justify social differences, while criminologists, sociologists, and other social scientists use race, and Blackness in particular, as an explain-all for criminality, poverty, or other conditions affecting racialized peoples. Social and physical sciences profoundly impact conceptualizations and constructions of race in society, while juridical bodies give racial science the force of law—placing legal benefits and criminal punishments into play. Yet, no formal rules govern the use of empirical data in opinions of the Supreme Court. My dissertation therefore studies the Court's use of social scientific evidence in two key cases involving race and discrimination to identify what, if any, social scientific standards the Court has developed for its own analysis of scientific evidence. In so doing, I draw on Critical Race Theory (CRT) and Institutional Ethnography (IE) to develop a methodological framework for the study and use of social sciences in the law. Critical Race scholars generally argue that race is a social and legal construct and racism is endemic, and permanent, while Institutional Ethnography provides a social scientific method for rigorous study of the law by mapping and illuminating relationships of power manifested in social institutions that construct consciousness and place for marginalized groups in society. Combining methods of IE with epistemologies of CRT, I propose Critical Race Methodologies in the study of *Fisher v. University of Texas at Austin and Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* These two cases from

recent terms of the Supreme Court involve heavy use of social sciences in briefing and at oral argument, and both cases set standards for racial inclusiveness in Texas. Throughout this dissertation, I look at how law and social sciences co-construct racial meanings and racial power, and how law and social science understand and misunderstand one another in attempting to scientifically understand the role of race in the United States.

To K, Z, X, Dad and Mom.

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TABLE OF CONTENTS

Page

LIST OF TABLES ix

LIST OF FIGURES x

CHAPTER

1 INTRODUCTION 1

1.1 From the Root: Critical Race Theory 7

1.2 Mapping the Ruling Relations 13

1.2.1 Defining Institutional Ethnography 17

1.2.2 Institutional Ethnography and the Supreme Court 23

1.3 Vexed Bonds: From Brown to Fisher II. 30

2 THE I'S OF THE COURT 38

2.1 The Blueprint – Constitutional Powers of the Supreme Court 43

2.2 Pillar I: Racial Ideologies 51

2.2.1 State Apparatus and Interest Convergence 54

2.2.2 Colorblind Constitutionalism 57

2.2.3 Evolution to Post-Racialism 61

2.2.4 Dissents to the People 64

2.2.5 Courting Ideology 65

2.3 Pillars II and III: Social Institutions and Individual Rights 67

2.3.1 Impacts of Institutional Discrimination 67

2.3.2 Procedures and Court Doctrines 71

CHAPTER Page

2.3.3 Remedies, Rights, and Responsibilities 75

2.3.4 Constitutional Personhood 79

2.3.5 Twin Pillars of Social Institutions and Individual Rights 83

2.4 Windows and Vents in the Master's House 84

3 MODERN AUTHORITIES: FACTS & EVIDENCE 87

3.1 Shifting the Status Quo 90

3.2 Twenty-First Century Empirical Evidence 99

3.3 Classifying Facts in the Supreme Court 105

3.4 Legal or Social Philosophies of Science 113

3.5 Towards a Critical Race Methodology 121

INTERMISSION: PROCESSING METHODS 123

Data Collection 126

How to Code 128

NVivo Nodes and Cases 129

Thematic Categories 131

Coding Process 133

Foreshadowing and Missteps 134

4 UNFAIR HOUSING: DISPARATE-IMPACT & THE FAIR HOUSING ACT 137

4.1 Identifying Housing Discrimination 143

4.2 Disparate Impact under the Fair Housing Act 150

CHAPTER Page

4.2.1 Interpreting Statutes and Regulations 153

4.2.1.1 "Otherwise Make Unavailable" 154

4.2.1.2 The 1988 Amendments 156

4.2.2 What's Race Got to do with it? 160

4.2.3 Significant Statistics and Statistical Significance 169

4.2.3.1 Sporting Percentages 176

4.2.3.2 Avoiding Pretext 179

4.3 Rebuilding Fair Housing 181

5 MEASUREMENT MISMATCH: AFFIRMATIVE ACTION & FISHER II 185

5.1 The Texas Plan: Residential Segregation and the path to Fisher II 189

5.2 Scrutinizing Fisher I 194

5.3 Stranger Things: Educational Authorities in Fisher II 197

5.3.1 Narrow Tailoring: Justice Kennedy's Majority 200

5.3.2 Surprised Strawmen: Justice Alito's Dissent 204

5.3.2.1 Asian American Representation 208

5.3.2.2 Self-Identification and Multiraciality 209

5.3.2.3 Intraracial Diversity 211

5.3.2.4 Standardized Testing 213

5.3.2.5 Have a Little Fire Scarecrow 213

5.4 Critical Masses: Social Scientists and Race Neutral Alternatives 217

CHAPTER Page

5.4.1 Colorblindness as Neutrality 221

5.4.2 Replacing Race with Class 225

5.4.3 Centralizing Race to Achieve Diversity 228

5.5 Conclusion: Conceptualizing Race and Policy 232

6 CONCLUSION 236

6.1 Scientific evidence in Fisher II and Inclusive Communities 239

6.2 Eyes on the Prize: Towards a Critical Race Methodology 247

6.2.1 The Centrality of Race 250

6.2.2 Triangulating the I's of the Court 251

6.2.3 Systematic, Subjective Legal Analysis 253

6.2.3.1 Race Matters 255

BIBLIOGRAPHY 258

APPENDIX

A LIST OF NODES FROM NVIVO CODING FOR CHAPTER 4 258

B LIST OF NODES FROM NVIVO CODING FOR CHAPTER 5 273

C INSTITUTIONAL ETHNOGRAPHIC MAPS 279

LIST OF TABLES

Table Page

1: Authorities referenced in Fisher II Opinions 199

2: Authorities Referenced in Fisher II Amicus Briefs 220

LIST OF FIGURES

Figure Page

1: Path from Trial Court to the Supreme Court 25

2: Davis, Monahan and Walker taxonomies of fact..... 106

3: Faigman's taxonomy of facts 108

4: Map of "Sources" node in NVivo for Chapter 4..... 130

5: Example of Argument Map 134

6: Word tree of "race-conscious" in briefs supporting the petitioner 164

7: Word tree of "race-conscious" in briefs supporting the respondent 165

8: Justice Kennedy "race-neutral" word tree..... 166

9: Hierarchy Chart of authorities in Inclusive Communities opinions. 171

10: Hierarchy Chart of Sources of Authority used by Justice Kennedy 172

11: Hierarchy Chart of Sources of Authority used by Justice Thomas..... 173

12: Heirarchy Chart of Sources of Authority used by Justice Alito 175

13: Hierarchy Chart of Authorities used in the Majority Opinion..... 201

14: Hierarchy Chart of Justice Alito's Dissent in Fisher II 207

15: Institutional ethnographic map of Inclusive Communities..... 280

16: Photograph of Institutional Ethnographic Map of Fisher v. Texas..... 281

1 Introduction

Quis custodiet ipsos custodes?
(Who watches the watchmen?)
-Juvenal, Satire VI, 347-8

Law and science are fundamental to the construction of race and racism in the United States. Law provides structure to maintain and enforce social hierarchies, like Jim Crow segregation or mass incarceration, while science ensures that these hierarchies are given the guise of truth. Biologists and geneticists use race in physical sciences to justify social differences,[1] while criminologists, sociologists, and other social scientists use race, and Blackness in particular, as an explain-all for criminality, poverty, or other conditions effecting racialized peoples.[2] Social and physical sciences influence the way that race is conceptualized and constructed in society; enabling, enacting, and perpetuating white supremacy by giving racism an air of science or objectivity. Courts and legislation also give racial science the force of law—adding legal benefits or criminal punishments.

Scientific evidence can also undermine legal regimes of racial power. In *Brown v. Board of Education*, Chief Justice Earl Warren cited to psychological and sociological

1 See Troy Duster, BACKDOOR TO EUGENICS (2nd ed. 2003) (describing the ways genetic sciences have revived eugenics movements by biologizing social constructs, like race); Dorothy Roberts, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY (2011) (discussing how racial categorization is reinscribed in new technologies and laws, like supposed DNA tests for ancestry which use statistical correlations between genetic markers to guess about ancestries and geographies as a substitute for racial categorization), and Kim TallBear, NATIVE AMERICAN DNA: TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE (2013) (examining how genetics companies are selling unproven, and inaccurate DNA testing to Tribal Nations as a means of determining citizenship).

2 *See* Tukufu Zuberi, THICKER THAN BLOOD: HOW RACIAL STATISTICS LIE (2001) (describing how statistics have used race as a proxy or decontextualized identity to legitimize stratification and disparities in healthcare, sentencing, income, etc.); Khalil Gibran Muhammad, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010) (describing how social science was used to both vindicate and undermine associations of Blackness with criminality based on studies of crime).

studies as evidence of segregation's negative impacts on Black youth.[3] These "modern authorities" indicating the ongoing harms of segregation provided sufficient weight to overturn long established legal precedent.[4] Particularly in understanding or explaining the effects of social constructs like race or gender, scientific evidence often takes center stage in legislation and legal proceedings.

For example, at oral argument for *Fisher v. University of Texas at Austin*—the U.S. Supreme Court's most recent decision on affirmative action—the late Justice Antonin Scalia sought scientific standards for the University of Texas' use of race in its admissions policies. First, Justice Scalia questioned whether there were "scientific studies" for critical mass, defining precisely what would be sufficient enrollment of non-white, non-male applicants to achieve diversity.[5] Later in oral argument, Justice Scalia stated that "most of the black scientists in this country don't come from schools like the University of Texas. . . They come from lesser schools where they do not feel that they're being pushed ahead in – in classes that are too – too fast for them,"[6] paraphrasing research from on the so-called "mismatch theory" to imply that Black scientists are less

[3] 387 U.S. 483, 494 Fn.11 (1954).

[4] *Id.*

[5] Transcript of Oral Argument at 12-13, *Fisher v. University of Texas at Austin*, 579 U.S. ___, 136 S. Ct. 2198 (2016) (No. 14-981). In the Supreme Court, the term harkens back to the Court's decision in *Grutter v. Bollinger*, where the Court found critical mass to be necessary to further Michigan Law School's "compelling interest in securing the educational benefits of a diverse student body." 539 U.S. 306, 333 (2003). In searching for an exact, scientific number, Justice Scalia is likely trying to analogize the critical mass standard to a quota or racial balancing, which is unconstitutional. *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (finding affirmative action constitutional insofar as it does not depend on a quota system).

[6] Transcript of Oral Argument at 67-68, *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981).

capable of performing at elite institutions, and this apparently inherent inferiority would be best accommodated by removing affirmative action policies.

Justice Scalia's use of social science at oral argument is ironic, considering his staunch originalism—believing the Constitution should be interpreted by deciphering the original, intended meaning[7]—would usually shun extrinsic evidence, particularly modern social science data. For Justice Scalia to search beyond the text itself for a legal test of significance seems like a departure from his thirty years of decisions as a Supreme Court Justice. But, Justice Scalia was not searching for a constitutional standard. The Court had long before decided that to be constitutional under the equal protection clause, an affirmative action program must be necessary to further a compelling state interest and be narrowly tailored to meet that interest.[8] The scientific evidence Justice Scalia mentions is legally dubious and scientifically flawed; it overstates the findings of the research[9] and

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[7] *See* Antonin Scalia. A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (1998) (describing Justice Scalia's originalist philosophy as a means of avoiding creating novel constitutional rights, that he would not read into the Constitution based on his understanding of history).

[8] In *Regents of the University of California v. Bakke*, the Court outright states that diversity, or a diverse student body, "furthers a compelling state interest [but] encompasses a broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." See *Bakke*, 438 U.S. at 315. The *Bakke* Court found that racial quotas were not narrowly tailored to meet the compelling interest of diversity, instead advocating for the racial "plus" plan proposed by Harvard and other elite institutions which consider race but do not reserve seats based on race. *Id.* 438 U.S. at 317.

[9] Yanan Wang, Where Justice Scalia got the idea that African Americans might be better off at 'slower-track' universities, WASH. POST (Dec. 10, 2015). The mismatch theory comes from a Law Professor's analysis of admissions standards and law student performance, *see* Richard Sander, "A Systematic Analysis of Affirmative Action in American Law Schools," 57 STAN. L. REV. 367 (2004) (calling for reconsideration of affirmative action policies, modifying to prevent mismatch of students with low scores to institutions with high academic standards). This theory was thoroughly refuted by another article the same issue of the Stanford Law review, and submitted as an opposing brief submitted in *Fisher*, *see* Ian Ayers and Richard R.W. Brooks, "Does Affirmative Action Reduce the Number of Black Lawyers?," 57 STAN. L. REV. 1807 (2004) (arguing that removing affirmative action policies would significantly decrease the number of diverse, and particularly Black, attorneys in the United States). *See also infra* Chapter 5 (discussing both Sander's mismatch theory and the opposing briefs).

revives arguments against affirmative action with pseudo-rigorous science that imply racial inferiority. Justice Scalia's search for scientific evidence in *Fisher* is part of a long history of the Court searching for external validation for the meaning of race in society—using science to evaluate, reaffirm, or decry social applications of constitutional schemes, but with little deference to social scientific standards that create and regulate that evidence.[10]

For social scientists and others generating research to combat the social and legal oppressions of racial, class, gender, or other intersecting inequities, misuse or ignorance of scientific evidence is incredibly frustrating. Social scientists hold themselves to methodological standards for rigor in their given field, why can't the Court do the same when evidence comes before it? Similarly, Social scientific evidence may seem dubious to those unfamiliar with methodological standards or procedures, or even worse, studies and findings may reach courts without meeting levels of rigor, validity, or reliability that are commonly accepted in the social sciences.

For lower courts, the Supreme Court has offered opinions, guidance, and handbooks on how to think about social scientific evidence presented before it. In a series of opinions stemming from *Daubert v. Merrell Dow Pharmaceuticals*,[11] the

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[10] *See* Chapter 3 *infra*. *Compare Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) (finding that because the Civil Rights Act of 1964 protected against racially discriminatory effects of employment practices, a showing of disparate impact was sufficient to show a statutory violation) *with McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that statistically significant racial disparities in death penalty sentencing were not enough to find an unconstitutional discriminatory purpose or cruel and unusual punishment).

[11] *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (finding Federal Rule of Evidence 702 superseded the *Frye v. United States* test, which asked only whether a scientific technique is generally accepted as reliable in the relevant scientific community, 54 App., D.C. 46, 47, 293 F. 1013, 1014 (1923)); *General Electric co. v. Joiner*, 522 U.S. 579 (1997) (finding that a judge's decisions to admit or exclude evidence under *Daubert* is reviewed for abuse of discretion); *and Kumho Tire Co. v. Carmichael*, 526 U.S.

Supreme Court established judges as gatekeepers with guiding principles for the introduction of scientific evidence through experts at trial.[12] Under Federal Rule of Evidence 702, judges have a "gatekeeping responsibility" to take "a preliminary assessment of whether the reasoning or methodology underlying testimony is scientifically valid and of whether that reasoning or methodology can be properly applied to the facts in issue."[13] Judges are the initial filter to determine the validity, relevance, and admissibility of scientific evidence, in order to ensure expert testimony and evidence "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[14] *Daubert* triggered a new way of thinking about the introduction of extrinsic, empirical data through expert testimony, due to a "heightened need for judicial awareness of scientific methods and reasoning," spawning a series of federal reference manuals on scientific evidence from the Federal Judicial Center,[15] hundreds of treatises, thousands of law review articles, and countless textbooks and course offerings at law schools across the United States.[16]

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137 (1999)(extending *Daubert*'s line of analysis to apply to all expert testimony, not just scientific testimony).

[12] Justice Breyer summarized the general factors of *Daubert* in *Kumho Tire*: "testing, peer review, error rates, and "acceptability" in the relevant scientific community, some or all of which might prove helpful in determining the particular scientific 'theory or technique.'" *Kumho*, 526 U.S. at 141, (quoting *Daubert*, 509 U.S. at 593-594.

[13] *Daubert*, 509 U.S. at 589 n.7, 592-93.

[14] *Kumho Tire,* 526 U.S. at 152.

[15] *See* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (Federal Judicial Center, 2nd ed. 2000); REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211 (Federal Judicial Center, 3d ed. 2011).

[16] The ABA does not require evidence courses under its rules of accreditation, *see* American Bar Association, Standard 303. Curriculum, *ABA Standards, and Rules of Procedure for Approval of Law Schools* (2016-2017) (available at http://www.americanbar.org/content/dam/aba/publications

Yet for all the rules and guidance to come out of *Daubert*, none of the factors or standards apply to the Supreme Court directly since the Supreme Court does not hear expert witnesses, except in the rarest of circumstances. Evidence comes before the Court primarily through written briefs with pages of footnotes citing to evidence that the Court is not required to interrogate or screen before it is considered. At trial, there are procedures to follow for making decisions on evidence, both of which are reviewable by courts of appeals or the Supreme Court. But there are no appeals from the Supreme Court. The Court reviews and considers rules of procedure and evidence, but since the Supreme Court does not hold a trial with witnesses, they are not applicable. The Supreme Court has its own set of rules which take Federal Rules of Procedure and Evidence only "as guides" in very limited circumstances.[17]

With no rules for the use of empirical data in opinions of the Supreme Court, this dissertation examines the Court's use of social scientific evidence in recent cases involving race and discrimination. To identify what standards, if any, the Court develops through its opinions, I ask the following guiding questions: How does the Supreme Court use, misuse, and/or analyze, empirical data in cases dealing with race? What research has the Court deemed significant? For that matter, how does the Court operationalize and conceptualize race? How can social science researchers present empirical data to better

/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf); but based on a very non-scientific google search of the curricula of most major law schools, some form of evidence course is offered, with some presenting scientific evidence, or advanced evidence seminars are typically optional. At Arizona State University, for example, evidence and scientific evidence are both offered, though neither is required for J.D. graduation, they are required for practice in one of the clinical legal programs. *See* Ariz. R. of the Sup. Ct. 38 (d) (requiring students practicing in law school clinics to have taken or be currently enrolled in civil procedure, criminal law, evidence, and professional responsibility).

[17] Sup. Ct. R. 17.2. Even this rule for the Supreme Court applies in the very limited sets of cases that invoke the Court's original jurisdiction.

persuade the Court, if at all? Does the Court have implicit or unspoken methodological or theoretical standards, or is scientific evidence taken at face value? How does empirical data come before the Court—briefing, amici, or from the Court's independent research? And ultimately, how does this effect the social construction of race in the law and thereby the lived experiences of racialized peoples in the United States?

To begin answering these questions, I draw on Critical Race Theory (CRT) and Institutional Ethnography in order to develop a methodological framework for the study and use of social sciences in the law. Critical Race Theory provides a theoretical and activist base from which engaged legal scholarship on race occurs, providing a wealth of knowledge predominantly generated by legal scholars of Color, questioning race and racism as ideology, institutional/systemic power, and the tension between group and individual rights. Institutional Ethnography provides a social scientific perspective for rigorous study of the law, drawing from the epistemologies of Critical Race Theory to form a methodology.

1.1 From the Root: Critical Race Theory

Analyzing race and science at the Supreme Court necessarily begins with Critical Race Theory—a movement of critical legal scholars and others who "not merely [work] to understand the vexed bond between law and racial power, but to *change* it."[18] Critical Race Theory's engaged scholarship is rooted in the tradition of W.E.B. Du Bois,[19] and

[18] Kimberlé Crenshaw, *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas eds., 1995).

[19] *See* Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (foundational piece of Critical Race scholarship which draws on Du Bois' scholarship to strategize tactics for lawyers working for school desegregation).

social scientists like Oliver Cox, Joyce Ladner, Robert Guthrie, and contemporaries like Tukufu Zuberi and Eduardo Bonilla-Silva, who recognize the hegemonic and systematic effects of race in society.[20] While there is no "canonical set of doctrines" to Critical Race Theory,[21] over time CRT has developed some points of consensus.[22] Critical Race scholars generally argue that race is a social and legal construct, not an inherent biological trait, but comes with real life significance. Although race is in many ways made up, the categorization and valuation of people based on skin color, tone, and/or national origin has consequences, and produces racial hierarchies like white supremacy. Put simply, race is a social construct, but is also very real because of its impact on the lived experiences of people through racism and white supremacy.

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[20] *See*, Crenshaw, Kimberlé, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L.REV 1253, 1257 (2011).

[21] Crenshaw, *supra* note 18, at xiii.

[22] Devon Carbado and Daria Roithmayr summarize

> ten empirical arguments that represent CRT commitments . . . on which there is general consensus among practitioners in the United States.
> 1. Racial inequality is hardwired into the fabric of our social and economic landscape.
> 2. Because racism exists at both the subconscious and conscious levels, the elimination of intentional racism would not eliminate racial inequality.
> 3. Racism intersects with other forms of inequality, such as classism, sexism, and homophobia.
> 4. Our racial past exerts contemporary effects.
> 5. Racial change occurs when the interests of white elites converge with the interests of the racially disempowered.
> 6. Race is a social construction whose meanings and effects are contingent and change over time.
> 7. The concept of color blindness in law and social policy and the argument ostensibly race-neutral practices often serve to undermine the interest of people of color.
> 8. Immigration laws that restrict Asian and Mexican entry into the United States regulate the racial makeup of the nation and perpetuate the view that people of Asian and Latino descent are foreigners.
> 9. Racial stereotypes are ubiquitous in society and limit the opportunities of people of color.
> 10. The success of various policy initiatives often depends on whether the perceived beneficiaries are people of color.

Devon Carbado and Daria Roithmayr. *Critical race theory meets social science*. 10 ANN. REV L. & SOCIAL SCIENCE 149, 151 (2014).

Furthermore, racism is endemic, and permanent,[23] which necessitates analyzing "the ongoing dynamics of racialized power, and its embeddedness in practices and values which have been shorn of any explicit, formal manifestation of racism."[24] Analyzing the dimensions of the Supreme Court's definitions of race and racism highlights the structural power of the Court as well as the social and ideological effects of race on society. The United States built by enslaving Africans, taking the lands (by treaty or force) from hundreds of Indigenous Nations, and creating social strata obfuscated by a myth of meritocracy—all legal under the Constitution and laws of the United States. Critical Race Theory highlights how racialization and white supremacy are central to relations of power the United States, past and present. Despite textual commitments to justice, due process, and equal protection, the Court's application and understanding of these principles perpetuate relationships and systems of power that insulate white supremacy and racism.

Critical Race Theory focuses on law and courts, both because of its roots in the the work of law students and professors, and because law is an area where "the relationship between losing a legal battle and suffering a particular material loss [is] readily visible."[25] As Crenshaw notes, critiques of law and racial power are "perhaps more explosive because of law's putatively apolitical status and the corresponding claims

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[23] Derrick Bell, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 92 (1992) (arguing that recognizing racism as a permanent, integral part of United States society that "cannot be vanquished by enactment and vigorous enforcement of strong civil rights laws," but in recognizing permanence "enable[s] us to recognize the potential for effecting reform in even what appear to be setbacks.")

[24] Crenshaw, *supra* note 18, at xxix.

[25] Crenshaw, *supra* note 20, at 1307.

that reason more generally could distinguish truth from ideology."[26] Critical Race Theory recognizes the power of law to create and destroy entire populations, by defining the legal standards for categorization—what it means to be white, Black, brown, Latina/o, under the law is defined by the entitlements and interests that go along with it.[27]

Foundational works of Critical Race Theory illuminate how even laws that speak to equality in the text, function to reinforce imbalances in power. For example, Derrick Bell's principle of interest convergence identifies how landmark decisions like *Brown v. Board of Education* are diluted by ideological powers underlying existing practices. Although *Brown* declares educational segregation unconstitutional and incompatible with the Fourteenth Amendment's guarantee of equal protection,[28] making segregation illegal does not upend the underlying system of white supremacy that fostered the unconstitutional inequality in the first place. Moreover, white supremacist ideologies and structures extend like a web throughout United States law and society, cutting one thread does not automatically eliminate the network of interlocking systems. Bell's principle of interest convergence reminds us that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[29] In other words, racial justice does not happen because of some inherent, normative belief in racial

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[26] *Id.* at 1309.

[27] *See* Cheryl I. Harris, *Whiteness as property*, 106 HARV. L. REV 1707 (1992)(summarizing how systems of property and race were legally sanctioned to create differential status privileges); Ian Haney López, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE, (1997) (historicizing legal status of whiteness in the context of immigrants and others who were racialized through naturalization legislation).

[28] *Brown*, 347 U.S. at 495.

[29] Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARVARD LAW REVIEW 518, 523 (1980).

equality, but because the dominant class benefits more than it loses.[30] Although *Brown* eliminates educational segregation, the Court does not interrogate the underlying ideologies of white supremacy in society, leaving racism to continue to fester and grow.

Critical Race Theory provide core concepts like interest convergence, whiteness as property, intersectionality, and critiques of colorblindness that are crucial to understanding the relationship between race and the law, particularly in decisions of the Supreme Court. In Chapter 2, I spend more time closely reading these concepts against the legal and historical background of the Supreme Court. While CRT's focus on law provides a crucial lens of analysis, the activist scholarship of CRT has grown beyond legal academia and spread into other fields like education, cultural studies, political science, philosophy, psychology, and sociology that CRT draws so heavily from.[31]

Recent CRT scholarship argues for adding empirical analysis to legal curriculum and CRT itself. Gregory S. Parks and others call to merge the "New Legal Realism Project" into CRT, in order to "facilitate some translation between law and social science—bridge the gap between epistemologies, methods, operating assumptions and

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[30] In *Brown*, particularly, Bell argues that Brown emerges in a historical moment when the United States needed to maintain governmental legitimacy in three main ways:

> First the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. . . . Second, Brown offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. . . . [Third,] segregation was viewed as a barrier to further industrialization in the South.

Id. at 525.

[31] *See generally* Crenshaw, *supra* note 20, at 1256-1257 (extensively describing and citing to other fields where CRT has taken root, while also paying deference to influential sociologists).

overall goals."[32] These Critical Race Realists are optimistic that integrating empirical social sciences—primarily quantitative research and psychology—into the law should "expose racism where it may be found, identify its effects on individuals and institutions and put forth a concerted attack against it, in part, via public policy" in the tradition of Charles Hamilton Houston's use of social sciences in defeating educational segregation in *Brown*.[33]

Other Critical Race Theorists are more cautious, arguing that social sciences, particularly quantitative analyses, are potentially "antithetical to the core commitments that characterize CRT," like the critique of neutrality and the structural dimension of race.[34] The primary concern here comes from social scientists who want to individualize structural oppressions, or social sciences that uncritically engage race without acknowledging the role of sciences, particularly social sciences, in perpetuating racial stratification and hierarchy.[35] Tukufu Zuberi's insightful work on race and statistics theorizes anti-racist social sciences, that also apply to integrating CRT and science:

> theorize more precisely the structural nature of inequality [by drawing on the] descriptive method—a mode of knowledge production—that helps to theorize the connection among racial inequality, individual agency, and collective action, to uncover the way in which processes that appear to be race neutral in fact reproduce racial subordination.[36]

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[32] Gregory S. Parks, Toward a Critical Race Realism, in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 3 (Gregory S. Parks, Shayne Jones, and W. Jonathan Cardi eds., 2008).

[33] *Id.* at 7.

[34] Carbado and Roithmayr, *supra* note 22, at 150.

[35] For a brilliant and detailed discussion of the role of social sciences and sociology in perpetuating racial stratification, *see* Zuberi, *supra* note 2.

[36] *Id.* at 163.

While CRT has been taken up in a variety of disciplines, founders like Kimberlé Crenshaw call for CRT to develop a broadened, intersectional interdisciplinary approach "to remap the racial contours of the way that people see the world that we live in."[37] CRT thus not only serves as a theoretical lens for analyzing race, courts, and the law, but the precursor to one of the primary goals of this dissertation: identifying and creating methodological approaches to studying the law.

1.2 Mapping the Ruling Relations

Social science evidence and Supreme Court opinions are discourses of power emanating from social institutions. Though researchers and Supreme Court justices occupy different social positions, both effect the everyday lives of marginalized peoples by establishing, reifying, or even countering, social constructions of race. The Supreme Court, through its decisions interpreting the Constitution, function as a social institution which reflects and reinforces narratives of personhood, rights, and governmental responsibility—deeming whose lives and privileges are protected, or even need protecting, under the United States legal system. In a society built on white supremacy, this means that even those systems and institutions which proclaim justice and equality are still built upon constructs of race and embedded with racism; providing for the insulation, reification, and furthering of white supremacy, even as forms of racism like segregation are dismantled.[38] Racial identity is "merged with stratified social and legal

[37] Crenshaw, *supra* note 20, at 1352.

[38] *See* Bell, *supra* note 23, (racism is both endemic to society and perpetuated through legal decisions, even those that may appear to grant rights like in *Brown v. Board*); Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law.* 101 HARV. L. REV. 1331 (1988) (the boom of antidiscrimination law floundered in the midst of white supremacist retrenchment tactics that curtailed remedial legislation); Harris, *supra* note 27 (summarizing how systems of property and

status" in the United States; from pre-Constitutional definitions of white as free, Black as property, and Red as assailable/exterminable to modern stratified definitions that continue to limit the rights and social status of non-whites.[39]

Similarly, social sciences have legitimized oppression and marginalization under the guise of scientific fact—normalizing white supremacy by making social constructions of race to appear natural, justifiable, and immutable.[40] Statistical analyses have been particularly harmful, as racial disparities in incarceration, education, or even demographics have been used as legitimating tools for white supremacy.[41] As Khalil Gibran Muhammad brilliantly summarizes:

> `For good or bad, the numbers do not speak for themselves. They never have. They have always been interpreted, and made meaningful, in a broader political, economic, and social context in which race mattered…. The invisible layers of racial ideology packed into the statistics, sociological theories, and the everyday stories we continue to tell about crime in modern urban America are a legacy of the past. The choice about which narratives we attach to the data in the future, however, is ours to make.[42]

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race were legally sanctioned to create differential status privileges); Charles Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*,109 STAN. L. REV. 317 (1987)(identifying how racism permeates decisionmaking in the United States legal system, so much so that overt racism is no longer necessary to reinforcing white supremacy); Haney López, *supra* note 27 (historicizing legal status of whiteness in the context of immigrants and others who were racialized through naturalization legislation).

[39] Harris, *supra* note 27, at 1718.

[40] Duster, *supra* note 1 (describing the modern genetics movement and how it builds on racist pseudoscience of the past); Tukufu Zuberi and Eduardo Bonilla Silva, WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY (2008) (collecting essays examining the ways in which social sciences reify and influence social constructions of race); Zuberi, *supra* note 2.

[41] Muhammad, *supra* note 2; Zuberi, *supra* note 2 (describing the ways in which statistical analyses are used to reinforce racial domination).

[42] Muhammad, *supra* note 2, at 277.

In the Supreme Court or in social sciences, the narratives created from, around, or with data are a means of affirming or negating the existing hierarchies of power, but the weight of the evidence is constantly in flux, depending on how and where they are used.

Social sciences at the Supreme Court become part of legal storytelling, which Gerald Torres and Kathryn Milun describe as "more like gathering of material for an index than the telling of a classic narrative. Facts are assembled to tell a story whose conclusions are determined by others."[43] The way the story is told depends on the way facts are incorporated and how those facts are made relevant. In social sciences there are large debates over how facts are gathered and what methods are used in the academic production and gathering of knowledges. For the most part, when race is involved, methodologies and research reproduce knowledge only for the benefit of white people and to reinforce social hierarchy.[44] Sciences have used "white methods. . . to manufacture empirical data and analysis to support the racial stratification in society."[45] Critical sociologists have turned the gaze inward to create race-conscious methodologies that are critical of established methods, reflective, and focused on the histories, growth, and changes in social relations and realities involving race.[46]

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[43] Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*. DUKE L.J. 625, 627 (1990).

[44] Tukufu Zuberi & Bonilla-Silva, Eduardo, *Telling the Real Tale of the Hunt: Toward a Race Conscious Sociology of Racial Stratification*, in WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY 332 (Tukufu Zuberi & Eduardo Bonilla-Silva eds., 2008).

[45] Eduardo Bonilla-Silva & Tukufu Zuberi. *Toward a Definition of White Logic and White Methods*, in WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY 18 (Tukufu Zuberi & Eduardo Bonilla-Silva eds., 2008).

[46] Zuberi & Bonilla-Silva, *supra* note 44, at 336-338.

Translating critical methodologies into the law, however, is difficult since there is no legal methodology to begin with. Law certainly has procedural safeguards and guidelines to manage the flow of evidence, but there is no standard for the evaluation of research—particularly before appellate courts which review briefs and hear oral arguments rather than hold a full trial. Legal academia has drawn on the style and production of empirical research in history, statistics, and other fields, but reviews of legal literature reveals "little awareness of, much less compliance with, the rules of inference that guide empirical research in the social and natural sciences," leading to exaggerated conclusions and less rigorous scholarship.[47] Lee Epstein and Gary King conclude the key problem "is the unmet need for a subfield of the law devoted to empirical methods, and the concomitant total absence of articles devoted exclusively to solving methodological problems unique to legal scholarship."[48] Empirical legal scholars do exist and do produce quality research, however conversations on methodologies specific to the law are notably absent, especially when looking at the Supreme Court.[49]

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[47] Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 6 (2002).

[48] *Id.* at 6 fn. 19.

[49] For the most part, these studies focus on quantitative models of the Supreme Court, looking at political ideologies of the judges (*see e.g.* Jeffrey A. Segal & Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Jeffrey A. Segal, Harold J. Spaeth, & Sara C. Benesh, THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM (2005); Harold J. Spaeth & Michael F. Altfield, *Influence Relationships within the Supreme Court: A Comparison of the Warren and Burger Courts*, 38 WESTERN POL. Q. 70 (1985)), predictive forecasting of voting patterns of individual justices (*see e.g.* Theodore Ruger, Pauline T. Kim, Andrew D. Martin, & Kevin M. Quinn. *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision making*, 104 COLUM. L. REV. 1150 (2004); Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L. J. 909 (2013)) and amicus modeling to try and measure the quantitative influence of briefs (*see e.g.* Paul M. Collins, Jr., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING (2008); Joseph D. Kearney & Thomas W. Merrill. *The Influence of Amicus Briefs on the Supreme Court*, 148 U. PENN L. REV. 743 (2000).

Discourse[50] and institutional power are therefore central to the operation of the Court and social sciences separately, making it vital to interrogate when they intersect. Institutional ethnography provides a key analytical tool for understanding the overt and covert meanings created when the Court uses, misuses, or fails to use social science evidence in cases dealing with race. Institutional ethnography provides a unique means of understanding how institutions construct meaning and how these meanings factor in to what Dorothy Smith terms "ruling relations [which are] forms of consciousness and organization that are objectified in the sense that they are constituted externally to particular people and places."[51] Though terms like *stare decisis* have specific institutional meaning in the Court—beyond being a fancy way of saying that prior decisions must be applied in future cases—institutional ethnography provides a rigorous, and emancipatory, method of unlocking the implications of legal meanings by examining the Court's ontological or epistemological understandings of social science.

1.2.1 Defining Institutional Ethnography

Institutional ethnography (IE) is more than a methodology for understanding the power relationships of institutions; it is, as founder Dorothy Smith proposes, an "alternative sociology" to understand the subjectivities of marginalized peoples in midst

[50] Here I use discourse to evoke law's ethical, social, and political formations used in perpetuating power. Discourse in this sense refers not only to the ways in which law controls speakers and forms of knowledges determined to be valid, *see e.g.* Michel Foucault, THE ARCHAEOLOGY OF KNOWLEDGE (1972; 2012), and the relationship between society, ethics and law, *see .e.g.* Jürgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

[51] Dorothy Smith, INSTITUTIONAL ETHNOGRAPHY: A SOCIOLOGY FOR PEOPLE 13 (2005).

of the complexities of multilayered social relations.[52] Smith developed IE from her own experience as a feminist sociologist, understanding that "women's experience has special authority" to claim alternative subject position to coordinate struggle against oppression from the margins.[53] While standpoint theory originates primarily in white feminisms, it has been expanded to understand the intersecting layers of identity and refers more to the creation of "a subject position for IE as a method of inquiry, a site for the knower that is open to anyone."[54] The aim is therefore to acknowledge and integrate the positionality of the researcher, the research subject (an individual being interviewed or text used in the process), and the institution as the object. Smith explains that "it is the aspects of the institutions relevant to the people's experience, not the people themselves, that constitute the object of inquiry."[55] This positioning of researcher, subject, and object creates a multilayered perspective in understanding the function of institutions through the experiences of both the observer and the observed.

Analysis of social life through institutional ethnography begins with the "ethnographic problematic." Rooted in the works of Marx and Althusser, IE uses the problematic to identify "the discursive organization of a field that is larger than a specific

[52] *Id.* at 1.

[53] *Id.* at 8-9. Importantly, Smith notes that standpoint theory, and indeed the dynamics of the women's movement in the United States were largely centralized on experiences of white middle-class heterosexual women. These centers shifted with activism of working-class women, lesbians, women of color and others, making "issues of older feminists either alien or irrelevant." *Id.*

[54] *Id.* at 10.

[55] *Id.* at 38.

question or problem."[56] Identifying a problematic is not the same as speaking on problems people experience in everyday life. Instead a problematic identifies the social relations that construct, coordinate, or otherwise correlate to everyday problems. Institutional ethnography may begin with the specifics of lived experience, but the ultimate focus is on "how peoples' activities and practices are coordinated."[57] As Marjorie L. DeVault and Lisa McCoy summarize, "the aim of the institutional ethnographer is to explore particular corners or strands within a specific institutional complex, in ways that make visible their points of connection with other sites and courses of action."[58] Moving between localized problems and larger systemic issues therefore reveals the connections between oppressions that people face and the structural forces that contribute to oppression.

Links and relationships are critical to social inquiry under institutional ethnography—identifying the ways in which people relate to institutions and how structural forces are linked to form ruling relations. The researcher approaches the problematic, with a "general orientation," but then engages how social life is coordinated through two overall aims:

> One is to produce for people what might be called "maps" of the ruling relations and specifically the institutional complexes in which they participate in whatever fashion. . . . The second aim is to build knowledge and methods of discovering the institutions, and more generally, the ruling relations of contemporary Western society.[59]

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[56] *Id.*

[57] *Id.* at 59.

[58] Marjorie L. DeVault & Liza McCoy, *Institutional Ethnography: Using Interviews to Investigate Ruling Relations, in* INSTITUTIONAL ETHNOGRAPHY AS PRACTICE 17 (Dorothy Smith, ed., 2006).

[59] Smith, *supra* note 51, at 51.

Mapping and discovering ruling relations thus identifies the complexities embedded in institutional discourse and provide a way for researches, activists, and participants to conscientiously navigate social life. Conceptual mapping of institutions creates a way of identifying where social processes operate and how, creating "an account of an aspect of an institutional regime that a reader can refer to with her or his own work knowledge of the same regime or can incorporate into one's work knowledge."[60] This simultaneously indicates how people are positioned in structures of institutional power, while identifying obstacles, barriers, and paths for the researcher and others to navigate.

Map making, practically and theoretically, begins with products of institutional discourse: language and texts. Texts are more than words on a page, particularly in an institutional setting. Texts coordinate sequences of institutional action, which then generate more institutional texts. In the Supreme Court, for example, cases are heard based on a petition for a writ of certiorari—a text asking the Court to review the case. If the Court accepts certiorari, then parties and amicus curiae submit written briefs to the Court suggesting arguments on an interpretation of the law, the Court holds oral argument and issues an opinion, which is published as text. The relationship between text and action is crucial, as texts are part of social processes; texts are "activated" by the circumstances in which they are produced and interpreted.[61] Susan Marie Turner emphasizes that with institutional ethnography "the analytic goal is to situate the text

[60] *Id.* at 161.

[61] Smith, *supra* note 51, at 169.

back into the action in which it is produced, circulated, and read, and where it has consequences in time and space."[62] Institutional discourse is manifested through text which "installs its own temporality" and creates categories which "locate the subjects of institutional courses of action, not as to particular individuals, but as a class of persons."[63] Institutional ethnographic analyses of "text-based work sequences" broaden the view of particular cases or sites to understand and "map the institution's work practices."[64] Mapping institutional texts therefore reveals the mechanisms by which institutions operate, how people and actions are conceptualized and operationalized through the institutional process, and how people, institutional actors, function within the system.

In some ways, institutional mapping resembles the process-tracing methods in case study methodology. Alexander George and Andrew Bennet explain that process-tracing identifies "mechanisms or micro foundations behind observed phenomena" by analyzing empirical connections between variables in social processes, to hypothesize and theorize explanations for events.[65] Process-tracing looks to historical pathways to generalize instances based on theoretical interpretations of events, crafting categories that can be used to model historical outcomes. These models are used to identify "causal processes embedded in the phenomenon being investigated" through detailed narratives,

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[62] Susan Marie Turner, *Mapping Institutions as Work and Texts* in INSTITUTIONAL ETHNOGRAPHY AS PRACTICE 140 (Dorothy Smith ed., 2006).

[63] Smith, *supra* note 51, at 116-117.

[64] Turner, *supra* note 62, at 149.

[65] Alexander L. George and Andrew Bennett, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES 147 (2005).

hypothesis testing, and analytic theorizing.[66] Case studies, process-tracing, and institutional ethnography share methodological orientations in connecting events in historical or social contexts in which they arise. However, process-tracing's interest in causal mechanisms is motivated by prediction, while institutional ethnography emphasizes the descriptive. Rather than test a specific theoretical model, institutional ethnography emphasizes the dialogic nature of texts and institutional processes in coordinating social actions. Prediction is replaced with "anticipation" and the development of "intervention strategies"[67] that may resist oppressive institutional forces in peoples' lived experiences, rather than a grand historical or political narrative.

Texts in institutional ethnography are meant to illuminate social processes that may be obscured through institutional discourse. This means attempting to understand how texts coordinate social processes, particularly in how texts and language create institutional hierarchies. The social coordination of institutions through texts creates "a distinctive vulnerability" through discourse which is "highly effective and largely invisible" in the regulation of everyday life.[68] Mapping institutional discourse therefore reveals how institutional processes are coordinated and affect peoples' lives in and outside institutions. Understanding the procedural and practical implications of institutional action reveals how institutions coordinate social life, but also begins considerations of why and to what end.

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[66] *Id.* at 210-212.

[67] Turner, *supra* note 62, at 159.

[68] Smith, *supra* note 51, at 219.

The same question can be turned back on institutional ethnography; what purpose does revealing the coordination of social activities serve? Smith emphasizes that institutional ethnography must be "accessible," not just restricted to academic publishing—though Smith argues this is important in challenging how other sociologists and students internalize work processes and research.[69] Institutional ethnography attempts to turn criticism of "the incompetence of individuals to the work process and its intertextuality," highlighting the systems of power in everyday life that radically effect individuals, but no one person may be responsible. In this process, institutional ethnographers are concerned with the standpoints and perspectives of marginalized people, and with the underlying question of justice for those who may be adversely affected by institutional action. Mapping the social not only identifies how the power structures effect marginalized people, but also potential avenues for change and resistance—and maybe even the ultimate brokenness of a system that cannot be reformed, repaired, or rescued.

1.2.2 Institutional Ethnography and the Supreme Court

Legal inquiries in the United States are like research in the social sciences. Courts are qualitative, taking in testimonies, expert opinions, and prior analyses of similar instances to decide the outcome of a given case based on general principles. In the law there are strict rules for data collection, particularly in trial courts, as rules of evidence, procedure, and professional conduct govern the introduction and discussion of evidence. Information in trial courts comes through expert testimony and exhibits, over

[69] *Id.* at 220.

an extended trial with many decisions on the application of legal standards and an eventual conclusion on a factual matter (guilty or not guilty, whether someone is at fault, etc). This is all incorporated into the official record, which is sent on to appellate courts with oral arguments, which is again put into the official court record, which eventually can become incorporated to a writ of certiorari for the Supreme Court. Figure 1.1 (below) offers a brief sketch of the different paths a case may take to reach the Supreme Court. All paths lead to a writ of certiorari—a brief submitted to the Court arguing there are pressing constitutional or statutory legal issues that need to be resolved by the Supreme Court (usually involving disagreement on standards or outcomes between different state supreme courts or federal appellate courts). The Court does not review the minutiae of the case, but focuses on questions of law central to the case; ostensibly grounding its opinion in constitutional analysis of the key questions. Parties will submit briefs and argue the case before the Court. Third parties may submit briefs as amici curiae, arguing for some interpretation of the case with additional information that is not part of the official record. However, the Court is not required to accept the interpretation of any party (petitioner, respondent, or amici). Rather, the Court is tasked with interpreting and affirming the underlying constitutional principles that it deems necessary to the case. Theoretical interpretations of the Court are always traced back to constitutional interpretation, giving some formal meaning to the provisions of the constitution at issue by exercising the "judicial power of the United States."[70]

[70] U.S. Const., Art. III.

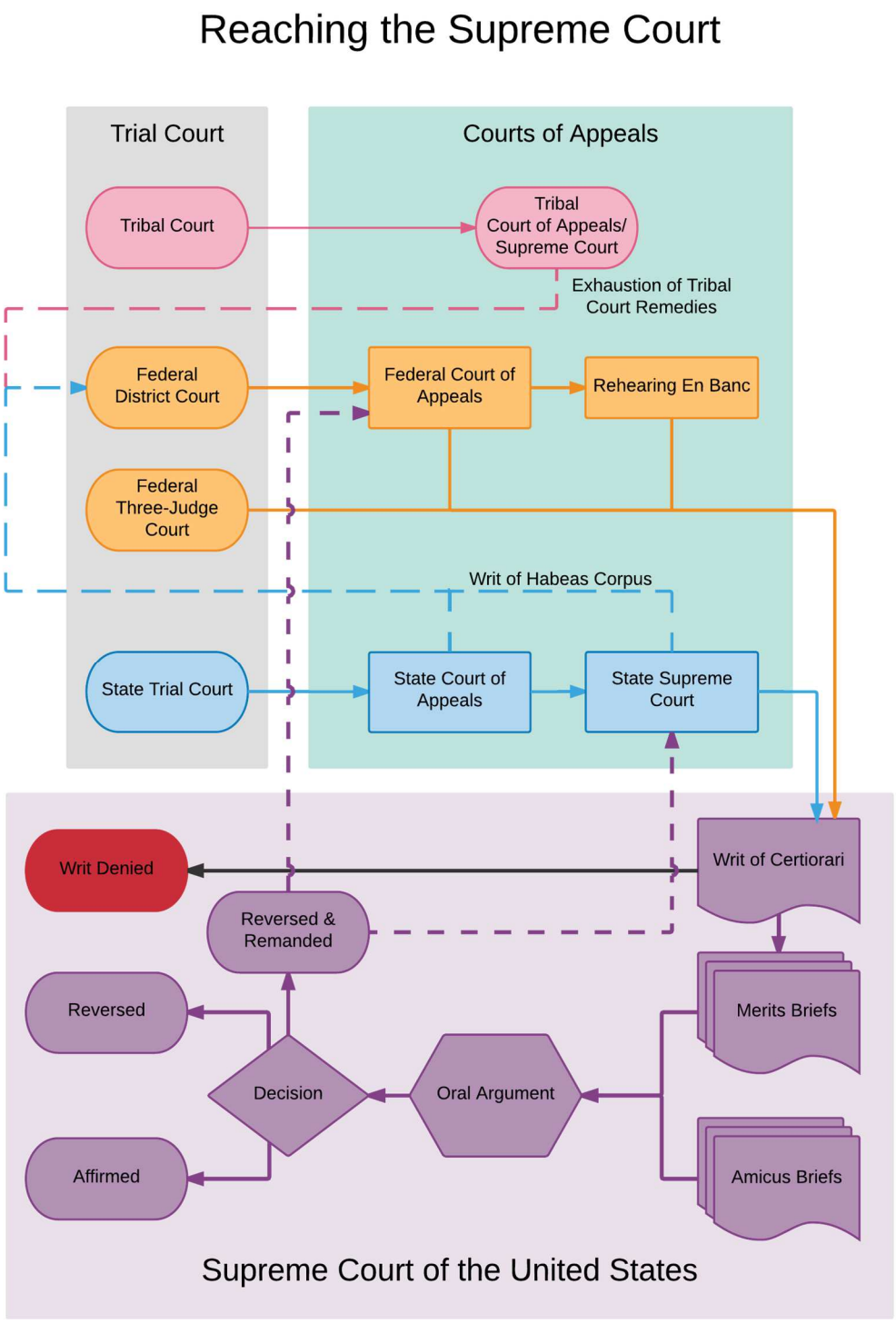

Figure 1: Path from Trial Court to the Supreme Court

Mapping institutional discourse of the Supreme Court is centered on the text-act-text relationship that is thoroughly embedded in the law. Any case seeking a hearing before the Supreme Court begins with a petition for writ of certiorari. The justices review the petition and four must decide to grant cert for "compelling reasons"—usually based on opinions by a state supreme court or a United States Courts of Appeals which decide an "important federal question" that conflicts with either Supreme Court precedent or opinions of other state supreme courts or courts of appeals.[71] A grant of certiorari leads to more briefs, from all parties involved in the case and amicus curiae, leading to oral argument at the Supreme Court, typically involving an advocate from the petitioner, the respondent, and occasionally an intervention by the solicitor general of the United States. The Court then issues its written opinion, and reads an abbreviated version of the majority opinion from the bench—though at times a justice may decide to orally dissent in addition to a written dissent in the opinion. The decision of the Court may affirm the decision of a lower court, reverse the decision of a lower court, and/or remand the case for proceedings not inconsistent with the opinion of the Court. The Supreme Court may also dismiss the case outright.

The legal system in the United States produces and creates a multitude of texts. The legal system and the Supreme Court are defined by the text of the Constitution. The Supreme Court's constitutional role is the interpretation and application of cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall

[71] Supreme Court Rule 10

be made under their Authority."[72] Text is the impetus for legal action at the Supreme Court, first defining the metes and bounds of judicial authority, and secondarily in particular actions as each case comes before the court on a writ of certiorari, which leads to extended written briefs—from parties and amicus curiae. Acts of the Court, the decisions made by the justices, are then reproduced in text as written opinions.

This process is a prime example of the type of text-act-text relationship that institutional ethnography seeks to map: the petition for certiorari is the initial text, leading to the Court's action or inaction, which creates more text through briefing, an act of oral argument, followed by more text in a written opinion, and acts by other courts. The multitude of texts produced in this process can be mapped to reveal potential influence on Supreme Court decisions, as the arguments, theories, and most importantly facts, that emerge from briefing—both by the parties and by amicus curiae—appear in the final decision of the court.

Final decisions do not have a strict procedure or methodology for arriving at an ultimate conclusion of law; controlled only the longstanding tradition of applying of judicial precedent in analogizing or distinguishing prior decisions of the court. Precedent is not simply an outcome but is formed "when deciding individual cases, judges create general rules, or perhaps governing standards, to be applied when similar factual circumstances arise in future actions."[73] Precedent is not intended to be applied mechanically or create a rigid uniformity, but aims to ensure the "stability, certainty, and

[72] U.S. Const., Art. III, §2.

[73] Frank B. Cross, DECISION MAKING IN THE U.S. COURTS OF APPEALS 204 (2007).

predictability of the law" by presuming the court has correctly decided an issue previously.[74] Under this ideology, previous decisions are not easily questioned and are theoretically followed "unless flatly absurd[,] unjust" or inapplicable.[75] But, as Robert A. Williams, Jr. notes, "a judge who feels bound to enforce prior precedents because of this doctrine of *stare decisis* can perpetuate, in the most subtle of fashions, a system of racial inequality."[76] Precedent alone does not decide cases, as no two cases before the Supreme Court are identical and Justices often distinguish previous cases based on factual differences. The key connection is in the constitutional text, and how the principles of the court are received.

Like institutional ethnographers, the Court takes texts and maps their relationship to the institutional structure in deciding how precedent applies; beginning with the lived experience that initiated a legal dispute, mediated through textual commitments of the Constitution, to institutional principles that function beyond the particularities of a given case through general principles of law. Unlike institutional ethnography, there is no necessary reflexivity. The justices of the Court rarely involve their personal standpoints in the text of their opinions, outside collegial qualifiers ("In my view…," "in my colleagues' view," etc.). The institutional power of the Court imbues the opinions of the Justices with institutional power, making binding constitutional doctrine from one

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[74] Brian Z. Tamanaha, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDING 38 (2010).

[75] *Id.* at 39 (quoting William Blackstone).

[76] Robert Williams, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA 23 (2005).

person's perspective.[77] There are theories of constitutional application and principle, but the methodology in reaching this point is largely obscured, explained only through the discussion of a written opinion. Which facts became relevant are only those which appear in the opinion—why those facts in the opinion were considered above others is left to guesswork by observers, scholars, and others. While the Court may be concerned with social life in the United States, it is bound to some meaning derived from the constitution to define it.

The Court reinforces systems of power, actively defining how governmental powers operate under constitutional standards. Social science, on the other hand, perceives the world as it is, or predicts how it could be. The fundamental conflict then arises in which perception and description is deemed valid by the Court, scientists and social perception; and whether the three overlap. The constitution validates specific regimes and organizations of power, as enumerated by the constitution. Procedure in the

[77] Of course, this one perspective is put to a vote, usually requiring a majority of the Justices. The Court usually speaks with one voice—between 2009 and 2015 nearly half of the cases before the Supreme Court were decided 9-0. There are some 8-1 and 7-2 opinions, but the Court becomes more closely split in the 6-3 and 5-4 cases, which are usually the more politically and socially controversial opinions. Currently, as of March 2017, there are only eight justices on the Supreme Court, which means there are potential for 4-4 splits, in which case the opinion of the lower court would remain undisturbed, though justices will still write opinions. Kedar Bhatia, *Final October Term 2015 Stat Pack*, SCOTUSBLOG (Jun. 29, 2016, 11:25 PM), *http://www.scotusblog.com/2016/06/final-october-term-2015-stat-pack/*. However even when the Court has all nine justices, there are rare cases where the Court is split 4-4, and one justice votes with the result of the majority, but does not agree with the opinion, or sections of the opinion, of the plurality of the justices and so writes separately. *See e.g Parents Involved in Community Schools*, 551 U.S. 701 (2007) (Justice Kennedy joined only with Parts I, II, III-A, and III-C of Chief Justice Roberts' opinion, which Justices Scalia, Thomas, and Alito joined in full). There are still other circumstances with a glut of opinions, that it can become confusing which opinion represents the Constitutional doctrine or opinion of the Court. *See e.g. Youngstown Sheet & Tube Co.*, 343 U.S. 579 (1952)(during the Korean War President Truman attempted to seize control of the nation's steel mills, 6 of the Justices found that action unconstitutional, Justice Black wrote the majority opinion, but Justices Frankfurter, Douglas, Jackson, Burton and Clark all wrote separate concurrences to explain their own view and reasoning as to why, with Chief Justice Vinson writing for all three dissenting justices; Justice Jackson's concurrence is the most often cited of the seven opinions issued in the case).

Court defines the methods of inquiry as facts are obtained from sources—including the factual record created by the lower courts, briefs submitted to the court and external sources that a justice may insert on their own[78]—and cited in the opinions of the Justices. While the means of obtaining information is fairly clear, mapping through institutional ethnography helps to reveal the methodological, ontological, axiological, and epistemological assumptions of the justices. Using institutional ethnography to map the way information is presented to the Court, and how it emerges in the analyses of the majority, concurring, and dissenting opinions creates a clearer picture of how and why the justices use facts—and permits inferences as to why. Better understanding how and why the Court interprets facts presented before it would help social scientists to shape the presentation of data and extend the practical influence of the social sciences in legal structures. Similarly, institutional maps of the justice's reasoning can aid attorneys in looking for what type of evidence and arguments to make before the court. Above all, institutional ethnography can map how the Court uses, misuses, and fails to use social science in understanding the cases that appear before it.

1.3 Vexed Bonds: From Brown to Fisher II.

The "vexed bond" between law and racial power is not a dichotomy,[79] but includes influence from a multitude of disciplines. Race, law, and social science are at the center of the problematic that begins my institutional ethnographic research design. Regimes of power manifest in law to coordinate the activities and lived experiences of

[78] Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

[79] Crenshaw, *supra* note 18, at xiii.

people; defining personhood and identity through race, which is interpreted by social science. This ethnographic problematic highlights the fluidity of race, law and social science; there are any number of variations in the relationship, but none are entirely linear. Taken together, race, law and social science construct and coordinate everyday experiences, and the Supreme Court is at the center. The Supreme Court's understanding of the Constitution ultimately decides questions of rights and privileges—attacking or reaffirming the legitimacy of social attitudes embodied by the law.

Social sciences may expose racism, but they are also used to legitimate and perpetuate racial ideologies under the same veils of neutrality that CRT critiques. Using an institutional ethnography to map the uses and misuses of social sciences in Supreme Court opinions will reveal and inform a legal methodology guided by CRT, uniting critiques of neutrality with standards of inquiry to contemplate how courts understand social scientific evidence. The remainder of this dissertation will therefore focus on the relationship between social sciences, race, and the law to outline the metes and bounds of what I call Critical Race Methodology (CRM), a way of producing interdisciplinary legal knowledge that is legally accurate, methodologically rigorous, reflexive, and transparent. This dissertation is not a discussion of the relationship between race and science, focusing on the flawed conceptualization and operationalization of race throughout the scientific method. This has been done quite brilliantly by established sociologists, psychologists, historians, and others who inspire me to rethink my own methodological approaches to science and many of whom are cited in this dissertation.[80] This also isn't

[80] *See* Muhammad, *supra* note 2*;* Zuberi & Bonilla-Silva, *supra* note 40; Zuberi, *supra* note 2; Duster, *supra* note 1; Tallbear, *supra* note 1.

strictly a discussion of race and the Supreme Court—another essential element of my dissertation which has been thoroughly discussed by scholars more brilliant than I could hope to be.[81] What I want to focus on is the intersection of these two eminent fields of scholarship from an interdisciplinary, methodological perspective—drawing out central arguments from both social sciences and legal studies and looking at how they overlap and interact. Focusing on the methodological question is rarely done in legal studies, but adds a necessary, and largely missing, element of legal discussions on race.

My goal is to use CRM to bridge gaps and translation errors that I have seen over the course of my study as a J.D./Ph.D. student. The mismatch I saw was not the white supremacist mismatch theory that would eliminate affirmative action, identified by Justice Scalia at oral argument in *Fisher II*,[82] but rather a mismatch between law and the sciences that used to bolster legislation or opinions of the courts. Lawyers and social scientists often have common concerns, particularly those concerned with peoples placed at the margins of society by racialization, white supremacy, poverty, patriarchy, homophobia, ableism, and other oppressive social hierarchies. What is missing is a common vocabulary, a means of ensuring that legal significance and scientific significance overlap. This dissertation therefore tires to bridge that gap, by identifying the function of the Supreme Court, the types of evidence and facts presented before it, and two case-studies to examine how race, science, and law intersect in practice.

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[81] *See* Lani Guinier, *Demosprudence through Dissent*, 122 HARV. L. REV. 4 (2008); Crenshaw, *supra* note 18; Bell, *supra* note 29; Derrick Bell, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2005); Harris, *supra* note 27; and so many other Critical Race Scholars.

[82] Transcript of Oral Argument at 12-13, *Fisher v. University of Texas at Austin*, No. 14-981 (2015).

Chapter two begins this effort by identifying the functions of the Supreme Court. Constitutionally, the Court is committed to hearing cases and controversies based on federal law, with many distinctions and legally relevant minutiae defining what types of issues make it before the Supreme Court. However, opinions of the Court have broader impact than the Constitution describes. Supreme Court interpretations of the Constitution, case law, and facts influence ideologies, social institutions, and individual rights at all levels in the United States. Chapter 2 identifies these as "the I's of the Court," examining the influence of the Supreme Court and what social pressures may influence decisions of the Court. I argue the Supreme Court acts as a pressure valve for social issues, a way of diffusing the force of social movements or oppressive social forces that would give rise to revolutionary attitudes that could disturb the Constitutional structure. For the most part, the Supreme Court has been incredibly effective at moderating social change by utilizing, obscuring, or reworking the I's of the Court.

Social science often plays a role in the Court's opinions on social issues, and chapter three examines the extent of the influence of social science by looking to the literature and case law behind presenting social science evidence to the Supreme Court in cases dealing with race. Beginning with the Brandies brief and moving through *Brown* into modern uses of social science and conflicting philosophies of law and science, this genealogy of law and social science begins to develop patterns of analysis of social facts—received through social science or hegemonic commonsense—in the Supreme Court. This foundational process of the institutional ethnography draws on different taxonomies of fact established by legal scholars to begin mapping the functional aspects of Supreme Court interpretations of data. Meanings of the law are just as open to

interpretation by the justices as are the facts in a given case; there is not necessarily a correct decision of the court, but only one that matches the ideology of a justice or the precedent of the court (which is really just the ideology of previous justices). Rather than simply create a system of classification, an institutional ethnography attempts to create a guide for navigating institutional processes. Ultimately my hope is to provide insight into how justices consider arguments and ideas before the Court by analyzing how these are incorporated into the opinions, tracing how laws, doctrine, and facts are transformed through the process of a single case.

Law students are taught to write and construct arguments that follow general patterns of discussion and analysis, taught in law schools as some variation of Conclusion, Rule, Explanation, Analysis, Conclusion, or CREAC—but research designs and analyses are not typically pushed towards questioning methods or methodologies of the law itself. I argue that institutional ethnography and CRT provide an alternative to traditional studies of law by presenting a scientifically grounded, legal research and analysis methodology, explored fully in the final three chapters of this dissertation. Chapters four and five look at two recent cases coming out of Texas: *Fisher v. University of Texas at Austin*[83] and *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*[84] Both cases arise from controversies in Texas involving racial discrimination—*Fisher* is contesting remedies like affirmative action, while *Inclusive Communities* looks at the applicability of the federal Fair Housing Act in

[83] *Fisher v. University of Texas at Austin (Fisher II)*, 579 U.S. ___, 136 S. Ct. 2198 (2016).

[84] 576 U.S. ___, 135 S. Ct. 2504 (2015).

cases involving housing discrimination. Both cases were decided within the past 5 years by close margins, 5-4 and 4-3 respectively, with Justice Anthony Kennedy writing both opinions. Justice Kennedy's authorship is significant since he has been opposed to most racial remedies during his tenure on the Court; writing conservative majorities in cases like *Schuette v. Coalition to Defend Affirmative Action*, where the Court affirmed a state's power to ban affirmative action and other racial remedies under the guise of colorblindness.[85] These two cases will highlight how the Court uses social scientific, and other, evidence in two major cases involving race decided very recently and explores the connections between the science and reasoning involved in the two.

Analyzing a case is not just a good way to play on the typical social science process of the "case study," but also serves as the site for mapping institutional power. Though many institutional ethnographic accounts focus on interviews to map relations of ruling, I focus exclusively on texts and audio recordings of oral arguments. In part this is an issue of access—interviewing Supreme Court justices on a pending or past case is usually work reserved for biographers, ghostwriters of memoirs, or the occasional well-connected journalist. Rather, focusing on a case presents a manageable way for tracking what elements are given relevance and are supplied to the Court. The litany of amicus curiae that add on to the original briefing helps to show how arguments are developed and come before the Court, while arguments and facts that appear in the final opinion that do not come from any of the briefs show the ideas a justice develops on its own. Looking at a particular case also highlights how the power of the Court is applied; using a

[85] *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 572 U.S. ___, 134 S.Ct. 1623 (2014)

particular set of factual circumstances to stand in for larger principles of law. If the Court is to set standards for all lower courts to follow under the Constitution, the interpretation of broad principles in any given case are incredibly meaningful.

Analyzing *Fisher II* and *Texas Department of Housing*, I will map and analyze how scientific evidence is considered in each case, what standards (if any) are given for social science—either in the particulars of the case or as a general standard—and where the data or scientific evidence comes from. I plan on reading and coding the information in reverse-chronological order, beginning with the actual opinion of the Court and any concurrences or dissents, working backwards through oral argument, amicus briefs, and merits briefs in each case. Starting from the beginning of the case makes narrative sense, but in my case, in order to map how the Court uses information, it is best to begin with what the Court deems relevant, since there is considerably more information presented before the Court than it actually uses. In this way I can map where citations and assertions of the Court recur within the texts presented before the court, visualizing how information is received by the Court and where it comes from within the case record. Although I will be focusing on the presentation and use of social scientific data, I intend to also map the use of case law and the factual record of the case, to compare how different types of information recur in case law. From this I can analyze the outcome of the case, looking at how the Court's conclusions are supported by evidence, the record, and data, and what conclusions of law, fact, or a mixture of the two, emerge.

Ultimately, my dissertation argues for the importance of exchange and translation between legal and social scientific studies of the Supreme Court, and the law generally. Social sciences can alter or legitimize understandings of power, hierarchy, or even

everyday life in the United States through stories, surveys, and analysis. These analyses are important and influential, but I hope to understand how influential they can be when put before a Court, and more importantly, what Courts need to properly analyze the data presented and weigh competing studies. Law has the power to define lived realities, while social sciences describe and help understand those lived realities, putting the two in conversation has tremendous potential for change—either to aid those at the margins or to legitimize established state structures.

2 The I's of the Court

I seen people abuse power, use power, misuse and then lose power
Power to the people at last, it's a new hour
-Kanye West, "Power"

No one corrects the Supreme Court, and we rarely correct ourselves.
- Justice Sonya Sotomayor

First Lady Michelle Obama's powerful statement "I wake up every morning in a house that was built by slaves" at the 2016 Democratic National Convention highlights the continuing salience of race and slavery in the United States.[1] As the wife of the President whose election flooded media with talk of a mythical "postracial" America, Michelle Obama's statement recentralizes race by emphasizing how structures of power are built on Black labor and Black lives. Black and brown labor was, and still is, used to build the physical representations of social power on land taken from indigenous peoples. Michelle Obama invokes the imagery and history of slave labor to argue for the greatness of the United States—a Black family now lives in the White House as the first family of the same nation that used enslaved Black people to build the White House. Slave labor built the White House and Congress, but they did not build the power structure that racialized, enslaved, and continues to oppress people of color in the United States. These oppressive forces are not contrary to the founding principles of the United States, but instead are deeply rooted in the Constitution and laws of the United States—texts brought

[1] Importantly, this sentiment was couched in language bolstering the importance of the United States and support of Hillary Clinton:That is the story of this country, the story that has brought me to this stage tonight, the story of generations of people who felt the lash of bondage, the shame of servitude, the sting of segregation, but who kept on striving and hoping and doing what needed to be done so that today I wake up every morning in a house that was built by slaves. Democratic National Convention, *First Lady Michelle Obama at DNC 2016*, YouTube (July 26, 2016), *https://youtu.be/cBxTwFiF9QI*.

to life by state actors like the Presidency or maintained and protected by the Supreme Court. Just as the White House was built by slaves, the Supreme Court and the laws of the United States construct race.

The Supreme Court sits at the crux of this relationship of race, law, and power in the United States. If the Constitution is a blueprint for law and order, the Supreme Court ensures that those plans are followed and maintained so the structure stands in perpetuity. The Court maintains the legitimacy of the state by defining the terms of justice under the Constitution.[2] The Constitution does not mention race directly, but relies on implication. The Census Clause, for example, defined state representatives based on "adding the whole number of free Persons. . . and excluding Indians not taxed, three fifths of all other Persons"—counting only white landowning men had the power to vote, reducing enslaved Blacks to a fraction, and excluding Indigenous peoples of the United States.[3] The Census Clause thus constitutionalized the racial hierarchy that would dominate the early United States, conceptualizing Whites as whole persons under the law, Natives as assimilable outsiders, and Blacks as fractional property of the region they were held to. Even the language of "free Persons" is misleading as voting rights applied only White men, according to the Supreme Court, until the passage of the Nineteenth Amendment.[4]

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[2] Article III of the Constitution vests "the judicial Power of the United States" in one Supreme Court, giving the court final say on all cases "arising under" the Constitution. U.S. Const. Art. III. Judicial review originates with the text, but mostly comes from common law precedent—the Court's understanding of its own role. *See Marbury v. Madison*, 5 U.S. 137 (1803) (defining the terms of the Court's original and appellate jurisdiction, rejecting the case for lack of jurisdiction since the Judiciary Act of 1801 would contradict the Constitution).

[3] U.S. Const. art. I, § 2, cl. 3 (known as the "Three-Fifths Clause" or the "Census Clause").

[4] Prior to the 19th Amendment, the Supreme Court decided in *Minor v. Happersett*, that women are not entitled to a right to vote under the Fourteenth Amendment because the right to vote is not guaranteed to

The Supreme Court interprets, maintains and perpetuates the Constitution above all—typically reinforcing white supremacist patriarchal hierarchies.

If and when the Constitution implies or explicates guidelines for racial power, how does the Court give the text relevant social meaning? What contexts, injuries, or advantages are taken into account? What remedies, if any, are available for the social injuries created by racial oppression? Is the Supreme Court an active or passive participant in the legitimation of white supremacy? Put simply, what is the role of the Supreme Court in the construction of race and racism in the United States? This essay attempts to see how competing ideologies of race are balanced in the institutional scheme created by the Constitution, and what implications this has for people in society.

Race does not originate in the Supreme Court, but the Court's constitutional and social authority shapes the function of race in society. The Supreme Court operationalizes race—managing and enacting racial meaning in the law. Andrea Smith theorizes three pillars of White Supremacy to highlight the "separate and distinct, but still interrelated, logics" of Slavery/Capitalism, Genocide/Capitalism, and Orientalism/War.[5] In this view White Supremacy relies on Black Labor, Native Land, and the vacillating

citizens under the Constitution. 88 U.S. 162 (1873) (holding "if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared."). Even the Fifteenth Amendment contains no explicit guarantee of the right to vote, only a prohibition on states from restricting the right to vote on account of race, color, or previous condition of servitude. U.S. Const. amend. XV.

[5] Andrea Smith, *Heteropatriarchy and the Three Pillars of White Supremacy*, *in* COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY, ed. INCITE! Women of Color Against Violence 67 (2016).

in/exclusion of those deemed outsiders, predominantly Asian and Latina/o peoples.[6] Each of these are distinct and important issues, but in looking at the three pillars we see the greater structural relationship between them and how they bolster white supremacy.

Similarly, I would argue that at the Supreme Court, there are three pillars of racial power, what I call the "I's of the Court:" Ideology, institutional power, and individual rights. Ideology is the manifestation of implicit social rules and hierarchies—these are both created and reinforced by the Supreme Court. Institutional power refers to the coordination of social institutions at all levels under the Constitutional power of the court. Disputes involving schools, prisons, and everything between often come before the Supreme Court for a determination on constitutional authority of power. Can school district policy compel students to attend specific high schools to achieve racial diversity?[7] Can a prison prevent an inmate from growing a beard?[8] The Supreme Court determines the meaning of institutional power under the Constitution, especially in lower federal and state courts, since opinions of the Supreme Court must be followed, and thus reinterpreted, by lower courts. The third I, Individual rights, refers to the rights of people under the law and how the Court conceptualizes the rights of individuals under the Constitution—as distinct from groups which the Court is loath to recognize outside a formal class action.

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[6] *Id.* at 67-69. Each of the three pillars of white supremacy as constructed by smith is connected, but distinct, reliant upon a common theme of white supremacy but with distinct strategies and tactics.

[7] No, at least according to Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007).

[8] No, according to a unanimous court in *Holt v. Hobbs*, 574 135 S. Ct. 853 (2015).

In the following sections I identify the role and power of the Court in four primary areas, first the textual power of the Court as defined by the constitution and court opinion that has flowed from it. Next I begin tackling the I's of the court with the ideological power of the law and the Supreme Court. It is the Court's ideological role that does the most balancing by attempting to insulate the Constitution, and thus white supremacy, from all challenges—even challenges for racial justice. Finally, I address the Institutional and Individual I's of the court in the final section, since the two are usually placed in opposition before the Supreme Court—individual rights placed in opposition to an institution's authority. Institution in this sense is not about a group or collective, but the doctrinal power of a social body. Similarly, individual rights also include corporations or collections of individuals, but not social identities or group rights because rights under the Constitution are vested in individuals, not groups.[9]

The Court's power to define race shapes legal realities for the United States and the lived experiences of people within it, even if that legal reality does not always resemble the lived realties of people of color. The supposed neutrality of law and its relationship to truth and justice mask the Court's role in shaping mindset, as the legal realties provide a justification for changing, denying, or ignoring lived realities of people of color. Because the Supreme Court has the final say on law, it is crucial to look at

[9] *See infra* §III; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1761 (1993). The Court has strict rules about what groups it will and will not recognize, *see* Fed. R. Civ. Pro. Rule 23 which designates class certification, proscribing formal rules and standards for recognizing the group. However even class certification is only about coordinating individual lawsuits against common parties to better allow for spreading the burden of litigation and legal fees among parties. The benefits and rights involved still are individually derived for each member of the class certified by a court.

whose voices are amplified or even heard, how it effects social conditions, and if it is even possible for the Court to work as an agent of social change to benefit people of color when the Constitution was not designed to grant people of color, the "other persons,"[10] rights or privileges. Erwin Chemerinsky argues that the Supreme Court has failed in its most important role: "to enforce the Constitution against the will of the majority," thereby protecting rights of socially marginalized people.[11] However, particularly when it comes to race, the Court's role is not to protect the rights of the marginalized, but to protect the Constitution above all—regardless of whether the will of the majority or rights of the marginalized are aligned with the Court's interpretation.

2.1 The Blueprint – Constitutional Powers of the Supreme Court

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.

- Chief Justice John Marshall, *Marbury v. Madison* (1803)

Decisions of the Supreme Court establish constitutional bases for social, civil, and political rights in the United States. Even though a decision may not radically alter social perceptions, status, or standing, the Court's opinion provides legal authority to social power. Before analyzing the social power of the Court's decisions, it is important to understand what powers the Court has according to the Constitution. Article III vests "the judicial Power of the United States . . . in one supreme Court, and in such inferior

[10] U.S. Const. art. I, § 2, cl. 3.

[11] Erwin Chemerinsky, THE CASE AGAINST THE SUPREME COURT 200 (2014).

Courts as the Congress may from time to time ordain and establish."[12] However the Supreme Court does not hear trials, and is hardly ever the first court to rule on an issue. Instead, the Supreme Court primarily hears oral arguments based on appeals from lower Federal courts or State supreme courts.[13] Any issue goes through years of litigation before reaching the Supreme Court, and even then the questions before the Court are matters of federal law—determinations of administrative or legal authority, or broader notions of Constitutionality. Since the Constitution is the Supreme Law of the land under Article VI[14] the Supreme Court's judicial powers extend to all cases and controversies "arising under" federal law—so long as the interpretation of federal law is essential to the claim.[15] Even when the Court hears a case it does not usually determine the outcome, but instead rules on the pertinent legal issue appealed to the Court. A criminal conviction for kidnapping and rape would not reach the Supreme Court—unless it involved constitutional or federal issues like in the infamous *Miranda v. Arizona* where the

[12] U.S. Const. Art. III, §1.

[13] Article III §2 limits the Court's original jurisdiction (or power to hear cases without any other court's prior ruling) is limited to "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." U.S. Const. Art. III, §2. Appellate jurisdiction is more expansive, and defined through various acts of Congress. *See e.g.* 28 U.S.C. §§ 1331 & 1332 (defining subject matter and personal jurisdiction, respectively).

[14] U.S. Const. Art. VI.

[15] U.S. Const, Art. III, §2; *Cohens v. Virginia*, 19 U.S. 264 (1821) (interpreting arising under jurisdiction to include cases where it is necessary to interpret the Constitution, laws, and treaties of the United States), *but see Christianson v. Colt Industries Operating Corp*, 486 U.S. 800 (1988) (finding that a theory under federal law is not sufficient to invoke arising under jurisdiction under 28 U.S.C. § 1331), *and Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) (finding that arising under jurisdiction requires a substantial federal issue, necessary to the claim, which is actually disputed, and will not disturb congressionally approved balance of state and federal interests).

conviction resulted from a coerced confession, meaning the defendant was under duress and did not understand his constitutional protection against self-incrimination.[16]

No matter the scale or perception of injustice, the Court is not required to hear a case. Wrongful convictions or inaccurate court decisions happen and are never reviewed by the Supreme Court. Instead, the Supreme Court accepts nearly all of its cases through a writ of certiorari, giving the Court almost complete discretion on what cases to review.[17] How, where, and when the Supreme Court intervenes in social issues is further restricted by doctrines of justiciability—implied limits on judicial authority outlined by the Supreme Court. Determining whether a case is justiciable may be grounded in the Constitution, but requires no explicit restriction or allowance to hear a case. Instead the Court limits its own authority to hear cases based on the Court's understanding of the Constitution, statutes, and theories of its own power. Even when a case presents an issue that is socially relevant, the Court may dismiss it as non-justiciable if a party lacks

[16] 384 U.S. 436 (1966).

[17] There is an extremely limited set of cases for mandatory review, the Court's jurisdiction is codified at 28 U.S.C. §§1251-1259, illustrating the requirements for original jurisdiction, direct appeals, and appeals from state courts. The language of the statute primarily uses the language that decisions "may" be repealed or the Supreme Court "may" review appeals from federal or state courts. The remaining cases in which the court "shall" have jurisdiction are only those cases described for the Court's original jurisdiction under Article III.

standing,[18] if the issue is not ripe for review[19] or has become moot,[20] if it is an advisory opinion,[21] or if it involves a "political question."[22] Each of these doctrines set judicially-

[18] Standing is a question of whether or not the party bringing the case is the actual party injured by the actions of the defendant/other party, and whether or not the court can remedy that injury. Thus the three elements the court evaluates are: whether there is an injury in fact, if the action can be traced to defendant's conduct, and finally if the Court can redress the injury. *Compare Allen v. Wright*, 468 U.S. 737 (1984) (determining that the nationwide class of Black parents lacked standing to sue the IRS to enforce regulations and revoke tax exempt status of segregated private schools because the parents alleged an "abstract stigmatic injury" caused by segregated private schools and shifting tax funding to public schools) *with Massachusetts v. EPA*,549 U.S. 497 (2007) (determining Massachusetts had standing to sue the EPA over emissions regulations since the decreasing shoreline was a sufficient injury in fact traceable to emissions standards, which are overseen by the EPA).

[19] If a case is not yet ripe, the Court has determined that the injury has yet to manifest in a way that the Court feels comfortable deciding. *See Poe v. Ullman*, 367 U.S. 497 (1961) (deciding that a suit over a criminal statute banning contraceptives was not ripe since the doctor and married persons bringing suit had not been prosecuted and, in the Court's opinion, were not likely to be prosecuted, meaning no injury was ripe for review) *and Susan B. Anthony List v. Driehaus*, 573 U.S. ___, 134 S. Ct. 2334 (2014) (discussing the relationship between ripeness and the "injury in fact" requirement of standing).

[20] Cases are dismissed as moot if the injury is no longer present; the dispute died before a final judgement could be issued. Like ripeness, this is a determination that the standing requirement is not present, but usually happens over the course of litigation. In some cases there may be a voluntary cessation or settlement mid-case that renders another issue being litigated moot, *see Already LLC v. Nike LLC*, 133 S. Ct. 721 (2013) (finding that a sweeping covenant not to sue by Nike was sufficient to remove the injury or potential injury for Already that the counterclaim to remove Nike's trademark was also dismissed). However, a large exception exists in cases where the challenged conduct is "capable of repetition yet evading review," *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167 (2000) (finding that case is not moot because even though the defendant corporation ceased producing waste in excess of EPA permits, the company retained its permit and could pollute again in the future, ceasing only to moot litigation).

[21] The Court will not issue advisory opinions based on its interpretation of Article III's "case or controversy" requirement; requiring issues come to the Court as cases, rather than simply offering advice on matters of state to a coordinate branch. Part of this evolves from the Neutrality Controversy of 1793, where President George Washington requested advice from Chief Justice John Jay on a statement of neutrality that would likely violate treaty obligations. Chief Justice Jay declined to offer an opinion, noting "the power given by the constitution of the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments." John Jay, John Jay to George Washington: Correspondence 3:488-89, The Founders' Constitution, Document 34 (1987) (emphasis in original). The Court followed Chief Justice Jay's lead and still declines to issue advisory opinions. For further discussion, *see e.g.* Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1923) *and* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 644-645 (1992) (examples of the standards for what constitutes an advisory opinion).

[22] Issues which show "a textually demonstrable constitutional commitment of the issue to a coordinate political department, or a lack of judicially discoverable and manageable standards for resolving it" will be dismissed as political questions. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (deciding that issues of redistricting are justiciable because a loss of voting rights makes other avenues for remedy inaccessible). Other elements of the doctrine include: the impossibility of deciding without an initial policy determination

imposed boundaries for intervention in social issues. Erwin Chemerinsky points out that "the entire area of justiciability is a morass that confuses more than it clarifies;"[23] it provides ample fodder for law school exams and a vague body of judicial doctrine which enables the Supreme Court to dismiss cases on procedural reasons, rather than address the substantive issues.

In *Allen v. Wright*, for example, the Supreme Court avoided addressing discriminatory impacts of white flight on public schools through the doctrine of standing. Black parents with children in public schools filed a class action suit against the IRS, alleging that the IRS' failure to enforce nondiscrimination policies in granting tax exempt status to private schools.[24] None of the parents had attempted to enroll their children in the private schools, but instead sought declaratory judgement and an injunction against the IRS, pointing to the nationwide discriminatory impact that is caused by the rise in private, tax exempt schools following school desegregation orders.[25] In other words, the tax exempt status of private schools combined with white flight caused public school funding to decrease, and Black parents asked the Court to require the IRS to enforce the law as written. But, the Supreme Court avoided the substantive issues of white flight, tax exempt status and school desegregation entirely by finding the parents lacked standing to

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of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question). *Id.*

[23] Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677 (1990).

[24] 468 U.S. 737 (1984).

[25] *Id.* at 746.

bring the suit. Standing requires an injury in fact, causation, and redressability. Supreme Court decisions since *Brown v. Board*[26] clearly established that segregated schooling is an injury and courts had the power to redress it. In *Allen*, the Court recognized the injury, but found the IRS' grants of tax exempt status "attenuated at best," and dismissed the case for lack of standing based on the Court's understanding of the causal chain in the claim.[27] The Court did not address the role of the IRS and taxation in funding public education for Black students, but instead decided that the connection was not worth exploring in a court of law. The Court's power to decide substantive issues coexists with the power to avoid substantive decisions on procedural grounds like justiciability.

Certiorari and justiciability doctrine highlight the Court's power to decide cases and concurrent power to decide *which* cases it decides. Certiorari operates by an uncodified "Rule of Four" that requires the votes of four Justices to accept a petition of certiorari and review the case. A judgment of the Court requires a plurality of votes, though not all Justices may agree in the same opinion. In written opinions, one Justice will write the judgment of the Court while Justices may concur, dissent, or both in a separate written opinion.

Justices still add their own style to the written opinion, making authoritative statements of law, called "dicta." Dicta is meant to be a binding statement of the law, but forms the background reasoning and rhetoric of the court. Dissenting opinions make

[26] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[27] *Allen,* 468 U.S. at 757.

statements of law, but lack the binding force of law. As Lani Guinier notes, "the Court gains authority when it speaks with an institutional rather than an individual voice."[28] Whether with the institutional force of the majority or in separate concurrences, "Justices teach by their opinions."[29] Opinions of the court speak not only to other justices and those trained in the law, but speak to society—at times attempting to mobilize non-legal sources of authority to change the law that motivated the majority opinion. Guinier and Gerald Torres thus argue that some opinions function as "demosprudence," which is less concerned with the "legal principles that animate and justify a judicial opinion . . . instead focus[ing] on enhancing the democratic potential of the work of lawyers, judges, and other legal elites."[30] As the judiciary speaks to society, especially through dissents, law may be changed through legislative action or social movements that gain support from the authority of a Justice's opinion—even if that authority is not through law.

The Court's authority, derived from the Constitution and dispersed through legal and social perception, is a powerful tool in shaping or reflecting society. Vested with the judicial authority of the nation—the power to determine the law and the meanings of rights under the Constitution—the Supreme Court is a definitive source of legal meaning which extends into society. The law has very real effects for those detained in criminal trials or those who are arguing for rights or responsibilities through constitutional claims. Opinions of the Court, whether dicta or a binding ruling, have the power to "transform

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[28] Lani Guinier, *Demosprudence through Dissent*, 122 HARV. L. REV. 4, 15 (2008).

[29] *Id.* at 14.

[30] *Id.* at 16.

racial ideas into a lived reality of material inequality, [and] the ensuing reality becomes a further justification for the ideas of race."[31]

The meaning of the law also includes the meanings of race under the law—both in openly racialized legislation like the three-fifths clause which has since been removed from the Constitution, to modern interpretations of the 14th Amendment that favor avoiding discussion of race altogether. Recently, in *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court held that a state's ban on affirmative action—rebranded as a "prohibition on race- and sex-based discrimination and preferential treatment"—did not violate the Equal Protection Clause of the Fourteenth Amendment.[32] *Schuette* effectively empowers states to bar the consideration of racial inequality in public services by eliminating and banning any "race conscious" policy in education or employment. This not only shapes discourse in employment and education, but practical outcomes too because, as Justice Sotomayor so eloquently states in her dissent, "race matters" as a historical, political, legal, and economic inequality:

> In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It

[31] Ian Haney López, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 13 (1997).

[32] *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. ___, 134 S.Ct. 1623 (2014).

> is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.[33]

Decisions of the Supreme Court set the tone for what race means in society, by proscribing or circumscribing meaning through ideology, institutional power, and what individual rights mean for different bodies under the law. Justice Sotomayor's emphasis on the everyday impacts of race, when dealing with legislation that sought to eliminate discourse on race and inequality, highlights the influential role that the law and the Supreme Court has over the multilayered experiences of racialized people in society. As Justice Sotomayor highlights, the letter of the law in racial discrimination is just as important as the Court's intervention or lack thereof. The Constitutional structure empowers the Court to operationalize race through ideologies of race and status, social institutions, or individual rights. Therefore, the next section turns to the ideological relationship between race and the Court, particularly the ways in which the Court shapes ideas of race, racialization, and discrimination.

2.2 Pillar I: Racial Ideologies

At the center of the pillars of power of the Supreme Court is the ideological function of the Supreme Court. Justice Sotomayor called out the Court's attempts to "wish away, rather than confront, the racial inequality that exists in our society" in *Schuette*,[34] but just as the Court's uses its silence to dismiss cases on procedural rather than substantive grounds, the Supreme Court ruling or declining to rule on issues of race

[33] *Id.* at 1676 (Sotomayor, J. dissenting). The entire dissent highlights the multifaceted and layered nature of race in society in was that the Supreme Court rarely speaks, outside some previous demosprudential dissents like those highlighted by Lani Guinier.

[34] *Id.*

perpetuates and facilitates racial ideologies in society and in the law. Law appeals to commonsense understandings of society, including social definitions of race, by "embody[ing] and reinforce[ing] ideological assumptions about human relations that people accept as natural or even immutable."[35] Law engages in an ideological "racist 'call-and-response' with society" by reaffirming hierarchies of white supremacy through neutral-sounding concepts like "equal protection."[36] Ian Haney López argues the Supreme Court constructs race through ideology through legitimation and transcendence. First, the law legitimates existing racial hierarchies and definitions, "affirming the categories and images of popular racial beliefs and making it nearly impossible to imagine non-racialized ways of thinking about identity, belonging, and difference."[37] Second, "the law helps racial categories to transcend the sociohistorical contexts in which they develop."[38] The Supreme Court builds on the common law precedent created by previous decisions, thus a decision made in 1823 may control and determine the outcome in a 2016 opinion—as in United States v. Jones, where Justice Antonin Scalia's majority opinion used case law going back to 1886 to determine the scope of the Fourth Amendment protection against unreasonable searches and seizures for GPS tracking

[35] Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law.* 101 HARV. L. REV. 1331, 1352 (1988).

[36] Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1608 (2009): 1608.

[37] Haney López, *supra* note 31, at 87.

[38] *Id.* at 88.

devices.[39] If the authors of the Constitution, or any of the Justices alive at the time of the case law could see a GPS tracking device they might be more perplexed by the car it is attached to than the device itself. Similarly, the technologies and science behind constructing racial categories has long changed, yet, particularly in the law, remains mired in past opinions and decisions of what is factual.[40]

Courts serve a hegemonic function in legitimizing ideologies of racial definition by clothing them with the "illusion of necessity because it embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable."[41] Lawlessness and anarchy are used as political talking points to scare voters every election cycle, or even just to characterize Black protests as "riots"—however the underlying assumption of the law as a necessary force is precisely what gives it legitimating power. Law has such legitimating power that it can give authority to scientific practices of dubious scientific value, like masking white supremacist eugenics as a legitimate public health issue in miscegenation and forced sterilization laws.[42]

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[39] *United States v. Jones*, 565 U.S. ____, 132 S. Ct. 945 (2012) (quoting Lord Camden and relying on common-law definitions of trespass to determine that governmental placement of a GPS tracking device on a car, without a warrant, violated the Fourth amendment).

[40] *See* Dorothy Roberts, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY (2011) (discussing how racial categorization is reinscribed in new technologies and laws, like supposed DNA tests for ancestry which use statistical correlations between genetic markers to guess about ancestries and geographies as a substitute for racial categorization).

[41] Crenshaw, *supra* note 35, at 1352.

[42] Troy Duster extensively explores the pseudoscience of forced sterilization and the Court's tendency towards white supremacy in the case of *Buck v. Bell*, 274 U.S. 200 (1927) *see* Troy Duster, BACKDOOR TO EUGENICS 11 (2nd ed. 2003). Furthermore, anti-miscegenation laws were created to ensure white racial purity as a similar eugenics effort labeled as public health law, particularly for Blacks and Asians, *see* Leti Volpp, *American Mestizo: Filipinos and Anti-Miscegenation Laws in California*, in MIXED RACE AMERICA AND THE LAW: A READER 86 (Kevin R. Johnson ed., 2003).

Maintenance of racial power therefore serves the more important purpose of maintaining the power of the state in society by making it appear legitimate, timeless, and necessary.

2.2.1 State Apparatus and Interest Convergence

Marxist philosopher Louis Althusser argues that the Court, and the law generally, represent a state apparatus that enforces state power both as a "Repressive State Apparatus (RSA)" and an "Ideological State Apparatus (ISA)."[43] As a RSA, the Court and law "functions by violence" (physical or non-physical) to assert the power of the state over a person[44]—for example when the Supreme Court rejects a death penalty appeal, the administrative power of review merges with the physical power of state violence in taking life. Conversely an ISA functions through "the ruling ideology," which turns imaginary relations into material reality.[45] Ideology operates by constructing sites of meaning and rituals of participation. For race and the law this could mean everything from segregation of public and private facilities to the use of Supreme Court cases to end those practices. Althusser envisions this in terms of class, noting that the ruling class sets state ideology,[46] but for race this means that white supremacy serves to structure the relationship between race and the law. The Court maintains racial power in that gains for racial justice ultimately come through Constitutional processes—legislation like Civil Rights laws, Constitutional amendments, or even Supreme Court decisions like

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[43] Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in MEDIA AND CULTURAL STUDIES: KEYWORKS 79 (Rev. ed., Meenakshi Gigi Durham and Douglas M. Kellner, eds. 2009).

[44] *Id.*

[45] *Id.* at 82.

[46] *Id.* at 81.

Brown v. Board of Education. The structure becomes stronger as challenges to its authority become integrated into the rhetoric and ideology of the state.

Brown v. Board of Education serves as a prime example of the way the Court insulates existing structures of power against challenges, as the Court decides briefly and unanimously that segregation in public education is unconstitutional.[47] *Brown* is properly considered a landmark victory for Civil Rights at the Supreme Court, and is more shocking as a, brief, shift in tone for the Court—confronting race and discrimination more directly rather than following its history of avoiding jurisdiction to ensure slavery in *Dredd Scott*,[48] striking down the 1875 Civil Rights Act's attempts to ban racial discrimination in *The Civil Rights Cases*,[49] and gutting the critical "privileges or immunities" section of the 14th Amendment just years after it was ratified in the *Slaughter-House Cases*.[50] Most of the Supreme Court's history was adverse to rights of Black people, so what made the Court unanimously change course? First, as the *Brown* opinion notes, legal precedents had been seeded in previous opinions of the Supreme

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[47] *Brown*, 347 U.S. 483 (1954).

[48] *Dredd Scott v. Sandford*, 60 U.S. 393 (1857) (finding that the Court lacked jurisdiction because Mr. Dredd Scott was determined to be as slave, and therefore not a citizen of any state and unable to avail himself of the Court's 28 U.S.C. §1331 diversity jurisdiction).

[49] *The Civil Rights Cases* 109 U.S. 3 (1883) (finding the Civil Rights Act of 1875 an unconstitutional use of congressional power under the 14th amendment since the 1875 act would ban all racial discrimination, not just racial discrimination by state entities. The Civil Rights Act would not be amended or any similar legislation passed until the 1964 Civil Rights Act).

[50] *The Slaughter House Cases*, 83 U.S. 36 (1873) (in the first opinion on the Fourteenth Amendment, the Court held that the privileges or immunities clause did not ensure full privileges or immunities, but a limited set recognized by federal law and bounded by state police powers. The Fourteenth Amendment, read as the dissenting four Justices and most scholars of history would understand, should guarantee full citizenship rights and all incidental rights to being a citizen, including travel and accommodations, and could have ended segregation under the strict letter of the constitution).

Court and lower federal courts, creating a network of opinions on specific issues like graduate education that were used to undermine racial segregation generally.[51] However social forces also arguably played a role as mounting social pressure was pushing the United States to either incorporate non-whites more fully into the polity or face serious Constitutional crisis and international scandal.

Returning to Derrick Bell's principle of interest convergence demonstrates how this potential for change is still mediated by the interest of the Court and state apparatuses in maintaining the underlying ideological power behind existing practices. Bell's interest convergence holds that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[52] Even dramatic shifts in racial policy, like *Brown*'s repudiation of segregation in education, do not come from recognition in the oppressive power of white supremacy. Rather, Bell argues that *Brown* emerges in a historical moment when the United States needed to maintain governmental legitimacy in three main ways:

> First the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. . . . Second, Brown offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. . . . [Third,] segregation was viewed as a barrier to further industrialization in the South.[53]

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[51] The Court in Brown cites specifically *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938); *Sipuel v. Oklahoma*, 332 U. S. 631 (1948); *Sweatt v. Painter*, 339 U. S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

[52] Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[53] *Id.* at 525.

Although *Brown* dismantles a significant social institution which maintains white supremacy, the decision fails to undermine underlying ideologies or conditions of white supremacy. Ideologies remain stable while the implementation and reasoning shifts.

2.2.2 Colorblind Constitutionalism

After *Brown*, colorblindness replaced segregation under the guise of justice. White supremacy became increasingly covert, wrapped in rhetoric of equality and opportunity. As Eduardo Bonilla-Silva explains, race is loosely constructed through ideology to allow for "accommodation of contradictions, exceptions, and new information."[54] Racial ideologies are effective "not by establishing ideological uniformity, but by providing the frames to organize difference."[55] Racial frames allow ideologies to shift and adapt, effectively organizing social differences, but allowing for accommodation and exclusion. The "abstract liberalism" frame, for example, utilizes legal and political ideas associated with liberalism to explain racial matters with terms like "equal opportunity" or "individual choice" while ignoring "the multiple institutional and state sponsored practices" that reinforce white supremacy.[56] Framing race in this way is permissive towards broad state language of inclusion, while remaining silent on exclusionary effects.

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[54] Eduardo Bonilla-Silva, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND RACIAL INEQUALITY IN CONTEMPORARY AMERICA 10 (3rd ed., 2010).

[55] *Id.* at 171.

[56] *Id.* at 28.

State language is crucial in maintaining racial ideologies, particularly through the Supreme Court, since the Court is so centered on text—it writes opinions interpreting the Constitution based on briefs and other documents submitted to it. Terms like "equality" can be interpreted and applied broadly or narrowly based on the Court's interpretation of scope or applicability. Myths of colorblindness and postracialism gain significant legal traction because the language may not blatantly address race in overt ways—like the three-fifths clause or segregation—allowing the Court to overlook the effects of discrimination because the language itself is supposedly colorblind. Justice Harlan's infamous dissent in *Plessy v. Ferguson* decries the majority's affirmation of segregation, instead arguing that "our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[57] Textual equality was sufficient for Justice Harlan. If the constitution makes no explicit mention of race or color, it must therefore be color blind in giving rights. Historically and presently we know this to be untrue simply from experience, but Justice Harlan's argument that the text itself is colorblind continues to hold sway in the Supreme Court.[58]

Neil Gotanda demonstrates that the Court's use of color-blind and related ontologies "legitimate[] racial inequality and domination" in its framing of race and discrimination issues.[59] In essence, the Court neglects the multidimensionality of lived

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[57] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[58] In the last fifteen years, Chief Justice Roberts and Justice Thomas have quoted Justice Harlan's dissent in their opinions. *See Schuette*, 134 S.Ct. at 1648 (Roberts, C.J. concurring); *Parents Involved*, 127 S.Ct. at 2758 Fn. 14; *Grutter v. Bollinger*, 539 U.S. 306 at 378 (2003) (Thomas, J. dissenting).

[59] Niel Gotanda, *A Critique of 'Our Constitution is Color-Blind,'* 44 STAN. L. REV. 1, 3 (1991).

racial experience by reducing race to exclusively to social status, formal categorization, past/ongoing racial discrimination, or cultural consciousness/experience.[60] Narrowly framing race in these ways produces colorblind constitutionalism, which Gotanda identifies based on five distinct themes.

First is a "public-private distinction" which creates a protected private sphere where "the due process right to contractual freedom protects economic activity from governmental regulation."[61] This creates what amounts to a private right to discriminate, since the Court interprets the Fourteenth and Fifteenth Amendments as applying only to federal or state actors, not private individuals or companies unless it is a criminal law or the private entity receives federal funding. Second, the Court "notices but does not consider" race—ignoring, discounting, repressing, or outright denying racial subordination.[62] Paradoxically acknowledging the importance of race and proceeding to focus "exclusively on the nonconsideration by denying the existence of the consideration component" and claims moral superiority for doing so.[63] This is exactly what Justice Sotomayor scolded the majority of doing in *Schuette*, as the Court attempts to wish away racism by ignoring the persistence of race.[64]

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[60] Gotanda labels these as four distinct ideas: status-race, formal-race, historical-race, and culture-race." *Id.*

[61] *Id.* at 8.

[62] *Id.* at 22.

[63] *Id.* at 23.

[64] *Schuette*, 134 S. Ct. at 1676.

Thirdly, the Court treats racial categorization as value neutral scientific observation, as biological or immutable.[65] This approach ignores social constructions of race in favor of essentialism and places science, particularly biology and anthropology, on a pedestal of objectivity and uncritical acceptance. Similarly, Gotanda's fourth frame "Formal-Race and Unconnectedness" identifies when the Court relies only on blanket racial categories like Black or white and disconnects race from racialization and the historical processes that create present-day inequalities.[66] This is especially relevant in the context of judicial review of affirmative action policies. While affirmative action is designed to remedy the historical exclusion from higher education or employment, the Court takes racial categories at face value, treating them as interchangeable and ignoring racial subordination. Opponents to affirmative action at the Court make race only a category: a box to be checked at admission that unlocks some secret pathway to benefits that others are being denied—disconnecting admissions policies from the histories of exclusion and disenfranchisement that made affirmative action policies necessary and enabling whites claiming discrimination in admissions simply because race is involved in some way.[67]

Gotanda's fifth and final frame of color-blind constitutionalism identifies how the Court idealizes color-blindness "as a means and as an end for American society" that re-

[65] Gotanda, *supra* note 59, at 36.

[66] *Id.*

[67] *Id.* at 51.

centers whiteness and devalues historical/cultural Blackness.[68] Colorblindness seeks to eliminate formal racial categorization only, not the underlying inequalities created by white supremacy, patriarchy, capitalism or other social hierarchies. In all, these five frames of color-blind constitutionalism span the Court's post-*Brown* decisions, reinforcing racial ideologies of white supremacy in distinct ways. Gotanda argues that if color-blind constitutionalism is successful "the Supreme Court risk[s] perpetuating racism and undermining its own legitimacy."[69] However, the very existence of these five frames which Gotanda identifies, with the nested sub-issues within, represents the Court's ability to maintain legitimacy while reinforcing white supremacist racial ideologies by adapting the ideology to different cases through racial frames. The legitimacy of the Court is also kept in check by interest-convergence, since the Court, as in *Brown*, can make symbolic decisions for self-preservation.

2.2.3 Evolution to Post-Racialism

Colorblindness was a key feature of the post-Civil Rights movement retrenchment on race as Supreme Court cases started to focus less on racial discrimination and more on the effects of anti-discrimination legislation on society, namely whites. The first major affirmative action case, *Regents of the University of California v. Bakke,*[70] questioned the benefit of policies that benefitted disenfranchised people of color and white women based on the claims of exclusion from a white man—a group very significantly represented in

[68] *Id.* at 54.

[69] *Id.* at 68.

[70] 438 U.S. 265 (1978) (holding racial quota systems unconstitutional, but affirmative action constitutional in principle).

higher education to this day. Affirmative action would survive because the Court saw the necessity of such policies in remedying past discrimination, but aspired to a day when it would be unnecessary. This aspiration is the key feature in the evolution of colorblindness into post-racialism, defined by Sumi Cho as "a retreat from race"[71] under the mistaken belief that "significant racial progress has been made" and thus state-imposed mechanisms and remedies for evaluating racism should be abandoned.[72] While color-blindness represents "a largely normative claim," post-racialism authorizes a material, sociocultural, and political retreat from race—including the destruction of what few institutional mechanisms exist for combating racism in society.

Cho therefore identifies four interdependent but non-exclusive key features of post-racialism: the trope of racial progress, race neutral universalism, moral equivalence, and a distancing move.[73] In essence, post-racialism advocates the elimination of race as a discourse in society, based on the existence of markers and mechanisms for identifying racial inequality in society. Like Gotanda's analysis of non-recognition under color-blind constitutionalism,[74] post-racialism is a self-congratulatory, self-contradictory analysis of history. Postracialism would claim that because *Brown v. Board* desegregated schools

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[71] Cho, *supra* note 36, at 1594 (quoting Dana Y. Takagi, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS (1993)). The term "retreat from race" was also used in Stephen Steinberg's denouncement of liberal ineffectiveness in issues of racial justice at the end of the 20th century, identifying a similar phenomenon to post-racialism (without naming it as such) while calling out liberal academia in reifying a "willful color-blindness in the liberal camp [to] acquiesce[] to the racial status quo." Stephen Steinberg, *The Liberal Retreat from Race*, 5.1 NEW POLITICS 146 (1994).

[72] Cho, *supra* note 36, at 1594.

[73] *Id.* at 1600.

[74] Gotanda, *supra* note 59, at 22.

when segregation was a significant manifestation of racism in society, which is a big move for racial progress, therefore racism no longer exists fifty years later. Particularly for the Court, with principles of stare decisis (Court precedent)[75] and strict scrutiny,[76] moral equivalence weighs heavily in the Court's modern decision-making process. If segregation was a bad state practice, moral equivalence places blame on the existence of race as a category—rather than racism and white supremacy. Thus, any categorical use of race merits strict scrutiny—equivocating the consideration of race as a sociohistorical remedy with the consideration of race for segregation. In this view, policies like affirmative action are equivocated with the structural racism it is meant to remedy—because affirmative action relies on racial identities and groups, the mere mention of race invokes the specter of segregation and oppression as equivalents, rather than opposites.

Similarly, tropes of racial progress, glorifying decisions like *Brown*, are used to reinforce race-neutral universalism as a principle of law—equal protection created landmark decisions and legislation, and therefore is neutral in providing benefits to all. This becomes particularly problematic for ensuring the legacy of remedies created by

[75] Latin for "to stand by things decided," this doctrine drives the Court's decision-making towards consistency by giving previous decisions of the Court extraordinary weight in decisions. This does not mean that a decision will stand for all time, but it forces the Court to give great deference to previous decisions in the name of "uniformity and continuity." *See* William O. Douglas, *Stare Decisis*, 49 COL. L.REV. 735 (1949).

[76] Strict scrutiny is a standard of review at the Supreme Court, which requires that a law or legislation is narrowly tailored to meet a compelling government interest. The term and standard dates back to 1938 in Justice Harlan Fiske Stone's footnote four in *United States v. Carolene Products* 304 U.S. 144, 152 n.4 (1938) (holding Congress has the power to pass a law banning interstate shipment of "filled" milk), but developed as a standard test in litigation over segregation and has become a go to standard in cases involving racial discrimination. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (describing the history of strict scrutiny and its evolution in the Supreme Court).

these landmark decisions, as the Court in cases like *Parents Involved* or *Shelby County v. Holder*[77] rhetorically invokes racial progress to eliminate programs to remedy oppressive racial ideologies. As Justice Ruth Bader Ginsburg argues in her scathing dissent in *Shelby County*, eliminating remedies that have, arguably, worked to combat discrimination "is like throwing away your umbrella in a rainstorm because you are not getting wet."[78] The umbrella of remedies available under the law constitute the final mechanism of the Court as an institution, which, under post-racialism, have been cast as "partial and divisive, and benefitting those with 'special interests' versus all Americans."[79]

2.2.4 Dissents to the People

The post-racialist tendencies of the current Roberts Supreme Court do not bode well for governmental programs, but the opinions of dissenting Justices, like Justice Ginsburg in *Shelby County* or Justice Sotomayor in *Schuette* are not only speaking against legal standards and ideologies put forward by the majority. Instead, these opinions are heavily based on facts involved in the case, highlighting issues and examples not discussed by the majority opinion, and writing instead toward a broader audience than the collection of attorneys, legal scholars, overeager law students that read full Supreme Court opinions. As Lani Guinier argues, these dissenting opinions are writing to the

[77] *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (finding the preclearance formula of the Voting Rights Act of 1965 unconstitutional).

[78] *Id.* at 2650.

[79] Cho, *supra* note 36, at 1602.

public. Through "demosprudence," Justices shift their argument from the Supreme Court to the court of public opinion. Lani Guinier explains that

> A demosprudential dissent uses multiple stylistic or narrative tools . . . to facilitate an ongoing public conversation . . . about the issue at the heart of the conflict . . . in ways that inform (but do not necessarily prescribe) the relationship between law and democracy.[80]

The dissenting Justice[s] thereby use their institutional authority as a part of the ideological state apparatus to question the professed institutional ideology of the Court on an issue. Even majority opinions like *Brown v. Board of Education* are written with the public in mind, focusing less on the legal standard than the moral, social argument to the public.[81] Frames of Judicial reasoning, like color-blind constitutionalism, can therefore be altered or countered by the opinions and reframing by opposing Justices from the bench. Guinier argues that because a dissent "is a story told without the coercive power of the state,"[82] demosprudential opinions can serve a counter-hegemonic purpose as pedagogy. Demosprudential dissents thus enabling social movements to tap into ideological meta-narratives of law by lending the legitimacy of a Supreme Court Justice to the ideological struggle in society.

2.2.5 Courting Ideology

At core, the Court serves to create and legitimate racial ideologies, and thereby maintain existing structures of racial power. As Derrick Bell points out, the Court does

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[80] Guinier, *supra* note 28, at 49.

[81] *Id.* at 53.

[82] *Id.* at 49.

not interrogate the underlying ideologies of white supremacy in society, but by "rewiring the rhetoric of equality" it constructs manifestations of white supremacy like segregation as "an eminently fixable aberration."[83] The ideology underlying the practice thus remains untouched, and is even reinforced with a new packaging of color-blindness, states' rights, and equality. Kimberlé Crenshaw argues that Courts take on a restrictive view of equality, narrowly focused on preventing and isolating "future wrongdoing rather than [redressing] present manifestations of past injustice."[84] Ideologies of white supremacy are rationalized in society through science in the development of IQ tests, forced sterilization,[85] or even in the associations of Blackness and criminality,[86] and then given a legal legitimation through the decisions of the Supreme Court.

As these rationalizations and respondent practices fail, the Court legitimizes new practices to replace the old. Colorblindness and postracialism replace segregation,[87] genetics replace hypodescent,[88] the periphery spins while the ideological core remains the same. Each rotation develops new practices for maintaining ideologies of white supremacy, redefining race and racism to fit social rhetoric that maintains the legitimacy of existing structures. Ideology is the central pillar of the Court's racial power, forming a

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[83] Derrick Bell, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2005).

[84] Crenshaw, *supra* note 35, at 1342.

[85] Duster, *supra* note 42, at 11.

[86] Khalil Gibran Muhammad, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2011).

[87] Gotanda, *supra* note 59, at 68; Cho, *supra* note 36, at 1594.

[88] Duster, *supra* note 42, at 105.

superstructure to rationalize and legitimate the definition of race within institutional practice and its application to people. The Ideological pillar bears the lode that enables the Court's rulings on social institutions and individual rights.

2.3 Pillars II and III: Social Institutions and Individual Rights

Racial ideologies are animated and manifested in the Court's interpretations of institutional power and individual rights. In these two areas, the Court defines legal relationships between people, government, and organizations in society through its opinions—setting the floor for what rights people have and ceilings on exercises of governmental power over institutions. The Court substantiates textual and ideological commitments of the law through legal procedure and principles[89]—deciding what claims are cognizable under the constitution, what standards apply to claims of racial injustice, and what rights or remedies are available to individuals and communities. Institutions and individual rights are distinct pillars of analysis in the power structure of race at the Supreme Court, but are deeply interrelated as racial institutions and institutional racisms effect individual rights.

2.3.1 Impacts of Institutional Discrimination

Racial conflicts between individual rights and institutional power are easily visible in the criminal justice system. The Sixth Amendment proscribes a series of individual rights of the accused in criminal trials— "a speedy and public trial, by an impartial jury. . . to be informed of the nature and cause of the accusation. . . to have the

[89] Charles Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*,109 STAN. L. REV. 381 (1987).

Assistance of Counsel for his defense."[90] Criminal defendants are guaranteed an "impartial jury" but it is left up to the Supreme Court to determine the ultimate meaning of the phrase. The administration of jury trials is a part of the institution of the courts, involving administrators, bailiffs, judges, and jurors. Race may play a factor in the decision-making process at any of the different institutional levels, but result in racialized disparities in the jury process. The Supreme Court will recognize racial bias if it involves individuals, such the recent case of a prosecutor abusing power by using discretionary challenges during jury selection to remove all qualified Black jurors.[91] The Supreme Court in such cases recognizes that an individual's right to a jury trial was violated by racial discrimination, but the racialized disparities in sentencing for black defendants with white juries, particularly in death penalty cases, fails to meet the level of institutional concern for the Court.[92]

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[90] U.S. Const. Art. VI.

[91] *Foster v. Chatman, Warden*, 136 S.Ct. 1737 (2016) (Prosecutor in this case targeted prospective Black jurors explicitly as discovered by the defendant under an open records request, which included:(1) copies of the jury venire list on which the names of each black prospective juror were highlighted in bright green, with a legend indicating that the highlighting "represents Blacks"; (2) a draft affidavit from an investigator comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) notes identifying black prospective jurors as "B#1," "B#2," and "B#3"; (4) notes with "N" (for "no") appearing next to the names of all black prospective jurors; (5) a list titled "[D]efinite NO's" containing six names, including the names of all of the qualified black prospective jurors; (6) a document with notes on the Church of Christ that was annotated "NO. No Black Church"; and (7) the questionnaires filled out by five prospective black jurors, on which each juror's response indicating his or her race had been circled).

[92] *See McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that statistical disparities in death penalty sentencing, indicating that the race of the defendant and race of victim correlated with increased likelihood of death penalty convictions for Black defendants in Georgia, were not significant enough to warrant an unconstitutional discriminatory purpose or cruel and unusual punishment).

Instead, the Court largely declines to consider systemic processes of racism that harm people of color without a showing of intentional racial discrimination. Institutional power and processes are therefore prioritized over individual rights since, without a showing that someone intended for a person to be harmed, the system having racist consequences for people of color is simply an unfortunate consequence. While there are certain areas where the Court does recognize discriminatory impact—voting,[93] employment,[94] and recently housing[95]—the Court is incredibly permissive of institutional racism. Ian Haney López defines institutional racism as "unconsidered actions. . . the background scripts and paths that mark social and organizational life."[96] Institutional racism is a procedural manifestation of ideologies of white supremacy in society. The "unconsidered" action does not necessarily remove intentionality, but suggests that racism is so deeply engrained in social and organizational life, that processes within institutions mirrors socially life while remaining "theoretically distinct."[97] Haney López thus argues that within courts, institutional racism particularly manifests through "status-

[93] *See Shaw v. Reno*, 509 U.S. 630 (1993) (finding that North Carolina's lack of Black representatives for 100 years despite a 20% black population, in addition to oddly shaped redistricting plans, were due to racial bias in political districting to suppress Black votes).

[94] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (prohibiting the use of employment tests that show discriminatory impact, even if there is no discriminatory intent, if the test is not a reasonable measure of job performance).

[95] *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 576 U.S. ___, 135 S. Ct. 46 (holding that disparate impact discrimination claims are cognizable under the Fair Housing Act).

[96] Ian Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717,1728 (200).

[97] *Id.* at 1808

enforcement," defining a racial group's social position, through "path racism" and "script racism."[98] Script racism simply follows established procedures for (racist) institutional action, while path racism "occurs when persons enforce racial hierarchy after carefully considering, and rejecting, the idea that race informs their actions."[99]

Institutional racism illuminates what happens when the Court ignores existing or potential systematic exclusion that has no single, explicit actor. Consider *Ricci v. DeStefano*, where the Court ruled that a city's attempt to avoid disparate impact liability violated the Equal Protection Clause.[100] The City used a test to select firefighters for promotion to lieutenant and captain, and in each round of testing the pass rate disproportionately favored white candidates. The city discarded the test results, fearing disparate impact liability under federal employment law, and was subsequently sued by white firefighters claiming that discarding the test results was racially discriminatory. The Court found that the city discarding the test results was "race-based action. . . impermissible under Title VII" and did not meet the "strong basis in evidence" standard established by disparate-impact case law.[101] In other words, because the City had failed to follow procedures for reconsideration under Supreme Court case law, its attempt to avoid liability for a test that had discriminatory results was, in the eyes of the Supreme Court, discriminatory against the white firefighters who had passed the (racially biased)

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[98] *Id.* at 1811.

[99] *Id.* at 1822.

[100] 557 U.S. 557 (2009).

[101] *Id.* at 559.

test. This procedural loop turned the Court's disparate-impact case law on its head by essentially preserving the interests of whites who benefit from discriminatory institutional practices if the institution does not follow proper procedures in considering whether it was discriminatory in the first place. Individual white entitlements are given procedural priority for reconsideration above potential racial discrimination.

2.3.2 Procedures and Court Doctrines

Examining the institutional procedures of the Supreme Court therefore reveals how Court doctrines bolster the Supreme Court's power to define race by creating internal mechanisms and standards that the Court can use to measure racial impact. Creating a standard does not mean it is clear or applied evenly, but only creates a way of validating and legitimizing the way the institution itself functions—particularly for those enacting the processes that have become normalized. Institutional actors, like the Justices on the Supreme Court down to prosecutors at trial courts may perpetuate racist impacts and systemic effect without expressed racial animus. Charles Lawrence's germinal critique of "unconscious racism," identifies how race is so deeply embedded in the United States so that the "actor himself will be unaware that his actions, or the racially neutral feelings and ideas that accompany them, have racist origins."[102] Systematic effects of racism are felt by people of color and largely ignored by whites, consciously or unconsciously, in part because white people have not historically, socially, or personally experienced racial discrimination from governmental entities, social institutions like schools or churches, and especially other racist individuals. Seeing, reporting, and

[102] Lawrence, *supra* note 89, at 344.

studying may create knowledge, but experience generates meaning and understanding. Lawrence suggests a "cultural meaning test" for evaluating racism in the Court to circumvent unconscious racism: "this test would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. . . . As a result, it would apply heightened scrutiny."[103] Lawrence argues this would shift the focus from causal to interpretive judgements, by providing social context. Problems of judicial bias in interpretation remain, since the Court has the power to remake the meaning of contextual clues, but Lawrence contends that this makes the cultural meaning test more beneficial, since "it forces [judges] to take responsibility for their own biases and preconceptions."[104] However it also leaves out the privileges of judges and justices, both the social status privilege they hold by virtue of their office, but also the privilege to ignore important contextual clues at their discretion.

Reliance on the Court's strict scrutiny standard however falls back into the procedural mechanisms the Court has developed from precedent that establish vague levels of scrutiny that are supposed to be tools for analysis that often become outcome-determinative standards. The doctrine consumes the principles it stands for, since setting the appropriate level of scrutiny becomes the central contested issue that will decide the entire case. Decision-making doctrines like scrutiny supposedly introduce "limiting

[103] *Id.* at 356. Lawrence further explains: "If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers."

[104] *Id.* at 380.

principles" that attempt to curb wide sweeping decisions "in response to the genie of equality that had been let out of the bottle."[105] Limiting principles become necessary to maintain the status quo in the face of announced radical change—compare the sweeping opinion of *Brown I* which declares segregation in education unconstitutional with the toothless remedy of *Brown II* which defers to school boards. Ideologies of law are implemented in a practical context, as particular cases are decided under guiding principles of constitutional scrutiny. For the Supreme Court, issues of equal protection and race trigger "strict scrutiny," requiring narrowly tailored plan to meet compelling state interests. The standard was applied in *Korematsu v. United States*, declaring

> all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say all restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[106]

The *Korematsu* Court proceeded to find a public necessity for Japanese exclusion and internment based on fraudulent documentation of spying, but the suspect classification and language of "rigid scrutiny" created precedent for decisions like *Brown v. Board of Education*. However, strict scrutiny has come to be applied in *any* case involving race.

Particularly in affirmative action jurisprudence, the Court has turned this standard for identifying racial animus to attack programs that would undermine historical inequalities experienced by people of color. The Court, in the name of colorblindness, evaluates affirmative action programs under strict scrutiny for curtailing the presumptive

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[105] Cho, *supra* note 36, at 1613.

[106] *Korematsu v. United States,* 323 U.S. 214, 216 (1944).

entitlement of whites to all higher education, arguing that programs designed to rectify historical disadvantages to people of color prevent whites from present and future success.[107] Cheryl Harris notes that the problem comes not from extending constitutionally guaranteed equal protection jurisprudence to all persons, but

> lies in extending the protection of the law in the form of strict scrutiny review to whites as whites. . . . After all, race oppression has meaning in this country not because of what has been done to whites because of their racial identity, but what has been done to those who are not white in the name of protecting whiteness.[108]

Thus, the textual standards of the law, like equal protection, form the basis for mechanisms of decision-making that then insulate ideological white supremacy by holding to strict definitions of race merely as a category without context.

Recent developments in the Court even advance beyond the mechanisms of color-blind constitutionalism, turning strict scrutiny into a catch-22 for restorative social projects like affirmative action. In *Parents Involved v. Seattle School District no. 1*, a group of predominantly White parents sued school districts in Seattle, Washington and Jefferson County, Kentucky which attempted to orchestrate district wide diversification by ensuring a balance of white and non-white students within schools that mirrored community demographics.[109] The attempt at diversification through balancing was found

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[107] Gotanda, *supra* note 59, at 51.

[108] Harris, *supra* note 9, at 1775.

[109] *Parents Involved*, 551 U.S. at 701.

unconstitutional by the Supreme Court under strict scrutiny because, as Sumi Cho explains, that the Court paradoxically narrows the narrowly tailored requirement:

> The Court's decision, based on narrow tailoring's remedial inefficiency, represents a strict-scrutiny catch-22 where a narrowly tailored remedy is invalidated because compliance thereto will almost always fail to be the most effective remedy, while a failure to narrowly tailor is always invalidated.[110]

The Court's extremely narrow standard thus negates the compelling interest requirement, since making race such a minor factor in the School's consideration of student placement makes race ultimately irrelevant and eliminates any need to consider it in the first place. The proposed remedy in *Parents Involved* eliminates the basis for the original claim, following Chief Justice Robert's paradoxical logic that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[111] Racial discrimination, in this view, cannot happen if we simply stop talking about it—remedying ongoing oppressions by silencing attempts to remedy those same ongoing oppressions.

2.3.3 Remedies, Rights, and Responsibilities

Chief Justice Robert's logic on discrimination in *Parents Involved* does little for remedying centuries of racial discrimination, but does wonders for highlighting the Supreme Court's power to determine what remedies are available to parties coming before the court. If the Supreme Court rules that a process is unconstitutional, this does not necessarily end the case. The Supreme Court decides primarily whether to reverse or affirm the opinion of the previous Court—it may proscribe social hierarchies and ideas in

[110] Cho, *supra* note 36 at 1619.

[111] *Parents Involved*, 551 U.S. at 748

the rhetoric and conceptualization of an issue, but the orders given are to other institutions. Lower courts are ordered to enforce a decree, stop governmental action, compel parties to act, create judicial oversight—particularly in elections and school districts—or even incarcerate/free an accused person.

As Bell notes, even in landmark cases like *Brown* where the Court decries segregation as socially incompatible, the remedy gives deference to the very same processes which created the inequality in the first place. After delaying the question of remedies for a year following *Brown*, the Court deferred to the school districts recommending "all deliberate speed" in integrating schools; "an unknown and never really defined legal standard that those committed to segregation interpreted as never."[112] The institutional, remedial power of the Court was therefore diffused throughout the legal system. If *Brown* was a demosprudential decision appealing to the best of democratic society, *Brown II* was a resignation to let the worst continue. Remedies therefore form one of the most critical tasks of the Court—exposing how ideology is maintained through the proposed institutional solutions.

A large part of determining remedies in United States law is defining what vested rights or interests were infringed upon—identifying an expectation of property, capital, or privileges that were unconstitutionally denied. Cheryl Harris' formative work "Whiteness as Property" identifies how law and the Courts conceptualize race as a vested property interest, particularly the interest in whiteness and the accompanying rights and privileges in a society rooted in white supremacy. In United States law property

[112] Bell, *supra* note 83, at 18.

represents a legal entitlement which, Harris argues, includes entitlement to privileges based on race.[113] Citing enlightenment philosopher Jeremy Bentham, Harris notes that property in the United States is "nothing but the basis of an expectation" and thus whiteness becomes "an 'object' over which continued control was—and is—expected."[114] Law thus legitimizes not only "the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination."[115]

Even *Plessey v. Ferguson*, part of Plessy's claim involved a deprivation of property through damage to his "reputation [of being white] which has an actual pecuniary value'—without due process of law guaranteed by [the Fourteenth Amendment]."[116] Importantly, Harris identifies the property value of whiteness in the fact that compensation would be owed for the loss of whiteness: "if Plessy where white any injury to his reputation would be adequately compensated by an action for damages against the company."[117] Conversely in *Brown*, the Court defers to the school districts to avoid "too deeply involv[ing] the judiciary in the operation of public schools," ignoring the material inequalities that generated the decision in the first place.[118] The deferential

[113] Harris, *supra* note 9, at 1725.

[114] *Id.* at 1729-1730.

[115] *Id.* at 1731.

[116] *Id.* at 1747.

[117] *Id.* at 1749.

[118] *Id.* at 1754.

remedy of *Brown* and *Brown II*, fails to address the property of material privileges created by whiteness. Instead *Brown* "invited defiance and delay . . . [as] the level of white resistance dictated the parameters of the remedy."[119] White privilege thus survives as a vested form of property, in some ways triggering the long line of affirmative action litigation from *Bakke*[120] through *Fisher*,[121] involving white plaintiffs claiming their rights were violated by the presence of narrowly tailored affirmative action programs. Again, the individualizing effect of the law takes precedence in attempting to remedy individual claims for white privilege, while failing to implement the remedial powers of the Court for entire groups and generations of people of color.[122]

Part of this disconnect stems from the Court's ideological conceptualization of race as formal, individual categorization. Whites generally benefit from whiteness and Blackness has been legally constructed as a denial of rights, yet the Court and constitution have insisted that "constitutional protections inhere in individuals not in groups"—denying the existence of group identities like race while acknowledging the presence of racism at a reductionist level of acts of meanness against individuals.[123] This view also fails to recognize the overlapping and intersectional nature of identity. As Kimberlé Crenshaw's brilliant work on intersectionality reveals, the Court is unable to

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[119] *Id.* at 1756.

[120] 438 U.S. 265 (1978).

[121] *Fisher I*, 570 U.S. ___, 133 S.Ct. 2411 (2013) and *Fisher II,* 570 U.S. ___, 136 S. Ct. 2198 (2016).

[122] Harris, *supra* note 9, at 1762.

[123] *Id.* at 1761 (citing Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381 (1991)).

apply remedies to groups unless they are made discrete and remove parts of social context. Crenshaw's theory of intersectionality in fact spawns from anti-discrimination law's view of identity on a "single categorical axis . . . eras[ing] Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experience of otherwise-privileged members of the group."[124] Looking to opinions of federal courts analyzing remedies for employment discrimination, Crenshaw demonstrates that the Court's single axis of remedy pervades efforts to end subordination along any axis. In *DeGraffenreid v. General Motors*, for example, the district court reasons that analyzing the discrimination against Black women as both Black and women under anti-discrimination law would "combine statutory remedies to create a new 'super-remedy' which would give relief beyond what the drafters of what the relevant statutes intended."[125] The Court's narrow definition of race is revealed through the lower court's inability to conceptualize race to include gendered, social, class, or other socially constructed implications. Branding intersectionality a "super-remedy" further entrenches a rigid institutional framing of race, as the categories of social construction are kept separate and unequal.

2.3.4 Constitutional Personhood

Ultimately, what rights are vested or what remedies are allowable to those at the margins depends on the legal conceptualization of personhood—the apex of how the institutional power of the Court shapes individual rights. The Reconstruction

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[124] Kimberlé Crenshaw, *Demarginalizing the Interesection of Race and Sex: A Black Feminist Critiue of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 140 (1989).

[125] *Id.* at 141 (quoting *DeGraffenreid v. General Motors*, 413 F. Supp. 142, 143 (E.D. Mo., 1976)).

Amendments (13th, 14th, and 15th Amendments to the Constitution) grappled with questions of personhood after abandoning slavery as a formal institution, providing broad grants of rights to "persons" and "citizens" of the United States with little qualification.[126] Though it would be decades before these rights of personhood would be—at least nominally—available to all, the constitutional text defines the limits for personhood under the law and therefore at the Supreme Court.

In the words of Hannah Arendt, legal personhood defines who has "the right to have rights" under the law.[127] As Cheryl Harris illustrated, personhood is not simply a metaphysical question of the law, but a question of how the rights are vested racialized bodies.[128] The legal definition of person is thus entwined with definitions of race. Colin Dayan notes that "the rules of law and the leeway within them enact and enable a philosophy of personhood and create a legal subject."[129] Focusing on the constructions of personhood through slavery and mass incarceration, Dayan notes that the Court's deference to other institutions on matters of human dignity, and procedure—ignoring underlying moral conceptions of humanity:

> These legal opinions construct a legal person who thus stands in a negative relation to law, with a status so degraded that psychic violence and sensory deprivation continue to pass constitutional muster. The judicial logic relies on the 'subjective' expertise of prison administrators and 'deference' to their special knowledge.[130]

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[126] W.E.B. Du Bois, BLACK RECONSTRUCTION IN AMERICA: 1860-1880 690 (1935, 1998).

[127] Qtd. in Colin Dayan, THE LAW IS A WHITE DOG 72 (2011): 72.

[128] Harris, *supra* note 9, at 1725.

[129] Dayan, *supra* note 127, at 73.

[130] *Id.* at 78-79.

Deference thus not only undermines the remedial power of the law, but it materially impacts the lives of those subjected to violence from other institutions. The Court's deference to experts in the field—scientific or administrative—enables inhumane practices under legal principles of fair treatment and justice.

Restricting rights based on racialized personhood also extends to the Court's construction of the "citizen" and "alien" under immigration law. As Kevin Johnson explains, the citizen/alien binary under the law drastically affects the Constitutional and legal protections available: "Citizens can vote and enjoy other political rights. . . . Aliens, no matter what their ties to the community . . . cannot vote and risk deportation if they engage in certain political activities that, if they were citizens, would be constitutionally protected."[131] The legal "alien" represents the denial of important legal rights and protections, encouraging animosity from those deemed citizens. Johnson notes that the alien was historically constructed as a racialized group; immigration legislation overtly and subtly targeted people of color and "alienage classifications all-too-frequently are employed as a proxy for race."[132] At the core of alien rhetoric is the dehumanization and, unsurprisingly, alienation of people of color by rationalizing differential treatment under concepts of citizenship rights.

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[131] Kevin Johnson, *'Aliens' and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, Immigr. & Nat'lity L. Rev. 3, 264 (1997).

[132] *Id.* at 266-67.

Rhetorical usage of "alien" by the Supreme Court can "obfuscate the real impacts" on persons affected.[133] Johnson contrasts the language use in *Reno v. Flores* to highlight the rhetorical power of the Court:

> On the one hand, Justice Scalia, who reads their constitutional rights restrictively, calls them 'alien juveniles' something akin to juvenile delinquents. On the other hand, Justice Stevens, who would find in their favor, calls them 'children. Although the regulation directly affected children, its disparate impact on undocumented children from Mexico and Central America generally went ignored.[134]

Language of citizenship is used to obfuscate highly racialized conceptions of rights, marking the "alien" other as undeserving under federal law. Very real consequences arise from the rhetorical moves, embedding the racialization of incarceration through immigrant detention centers and allowing the expulsion of peoples through deportation.

Just as alien is racialized to a non-white other, Ian Haney López highlights how citizen is conversely constructed through whiteness as immigrant groups vie for rights given to citizens under the law. Though the Fourteenth Amendment textually guarantees birthright citizenship, the Court declined to extend citizenship to all racial minorities born under the jurisdiction of the United States until the Nationality Act of 1940—seventy-four years later.[135]

Even then, naturalization laws for the United States were highly racialized and gendered. Immigration law in the early 20th Century at times made naturalization

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[133] *Id.* at 278.

[134] *Id.* at 280.

[135] Haney López, *supra* note 31, at 29-30.

available only to white women who married citizens, even mandating expatriation for citizen women who married men "racially barred form citizenship."[136] Between 1878 and 1952, naturalization was contingent on whiteness, making race a prerequisite for citizenship rights for anyone not born in the United States.[137] The Court originally based the rationale for whiteness on scientific evidence, denying citizenship in *Ozawa v. United States* because "numerous scientific authorities, which we do not deem it necessary to review" indicated whiteness was "synonymous with the words 'a person of the Caucasian race.'"[138] Three months later the Court dropped the scientific ruse it "failed to prove what was to the courts eminently obvious,"[139] adopting " 'the understanding of the common man' as the exclusive interpretive principle for creating legal taxonomies of race" in *United States v. Thind*.[140] The Court used standards of race, both pseudo-scientific and commonsense, to define citizenship in spite of broad textual commitments to all persons. Ideologies of race and institutional commitments to deference and citizenship create a glass ceiling in the Court's adherence to principles of individual rights. Racial personhood therefore creates a non-white legal subject that is simultaneously citizen and alien, included yet otherized.

2.3.5 Twin Pillars of Social Institutions and Individual Rights

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[136] *Id.* at 34.

[137] *Id.* at 35.

[138] *Id.* at 60 (quoting *Ozawa v. United States*, 260 U.S. 178 (1922)).

[139] *Id.* at 70.

[140] *Id.* at 64 (quoting *United States v. Thind*, 261 U.S. 204 (1923)).

The Court's institutional processes thereby reinforce ideologies of racism like white supremacy by retaining propertied interests in whiteness while rejecting claims involving group identities for people of color. Opinions of the Court are enacted by social institutions, lower courts, which in turn proscribe actions for other social institutions like schools, businesses, churches etc. What the courts tell institutions to do, and what powers they give or remove from these institutions are impacted by and effect individual rights. I mean this not only in terms of conceptualizing a legal individual, as in the definitions of personhood, but also in determining what entitlements, rights, and remedies a legal person is deemed to deserve under the law. Social institutions and individual rights therefore exist in tandem, co-constructing what effect the opinions of the Court may have on society by simultaneously determining what parties must act and what rights are allotted to persons under the law.

2.4 Windows and Vents in the Master's House

President Barack and Michelle Obama's ascendance to the White House was so often held to be a transcendent racial moment, it became trite before Obama first officially took office and the first family moved in to the White House—the house that slaves, their ancestors, built. And although First Lady Michelle Obama now wakes up every day in a house built by slaves, long before President Obama's term began and long after his second term ends, she will still wake up in a superstructure of racial power maintained by the Supreme Court's three pillars of racial power I identified in this essay. These I's of the Court, Ideology, Institutional power, and Individual rights, construct and define race in a multitude of ways, focusing on racial categories, pseudoscientific

evidence of racial superiority/inferiority, ahistorically, historical but "complete," as a form of status property, or even as a definitional status of personhood. Across these varied definitions of race, the Court consistently defines race and racism with the purpose of maintaining the legitimacy of racial hierarchy—namely white supremacy and antiblackness—as well as maintaining the legitimacy of the Court and the Constitution as driving, objective forces for adjudicating disputes. Though there are some sources of hope for remedying injustices, with symbolic victories over established norms of racism, the Court's ideology, institutional power, and construction of individual rights consistently regress to norms of white supremacy.

Though the Constitution no longer provides an explicit outline for racial power—with the elimination of the three-fifths clause—even the Fourteenth Amendment's guarantee of equal protection has become twisted into supporting white supremacist racial framings of the constitution in the opinions of the Supreme Court. Chief Justice Robert's opinion in *Parents Involved v. Seattle School District No. 1* morphs an amendment that was created after the Civil War—during a time of reconstruction when guarantees of rights and citizenship were being made to Black peoples whose freedom and personhood was so recently recognized—into a means for white school parents to ensure their choice of school is prioritized over desegregation plans meant to remedy ongoing racial inequalities. The Supreme Court plays an active role in the ongoing definition and redefinition of race and racism in the United States, by defining the scope of Constitutional protections, social programs, and governmental policy. Each opinion is

infused with an ideological purpose, overt or unconscious, which maintains and perpetuates the Constitution and established power structures—namely white supremacy.

Identifying and analyzing the Supreme Court as a pressure valve makes the institutional ethnography even more important in identifying what types of evidence influence the Court. Evidence may not sway the Court easily, but an institutional ethnography of the Court can identify what types of facts the Court uses and how they are used or misused. Even though the Court is only looking after the Constitutional structure and the racial hierarchies embedded therein, identifying how the Court currently works can identify strategies for change, either in the Court, legislation, or otherwise. The next chapter moves us one step closer by looking at the historical development of social sciences at the Supreme Court and he different ways of thinking about and classifying facts the Court has considered.

3 Modern Authorities: Facts and Evidence

"Quantum physics could never show you the world I was in"
- Kendrick Lamar, Pusha T (f. Kendrick Lamar) - Nosetalgia

Social science has always been embedded in the law of the United States. Early opinions of the Supreme Court engaged in lengthy historiography rather than social scientific data, describing the evolution of law from England to the United States, or some assumed fundamental principle of the natural law that is deemed inherent in the structure of governance. Take, for example, the landmark opinion in *Marbury v. Madison*. In *Marbury*, Chief Justice John Marshall spends nearly forty pages explaining why the Supreme Court lacks the jurisdiction to decide the case.[1] Justice Marshall's discussion of the evolution of British law and constitutional history to establish doctrines of judicial review of legislation and outline the constitutional powers of the judiciary is more historically significant than the holding—lack of original jurisdiction to issue a writ of mandamus.[2] Chief Justice Marshall's historiography is used as empirical data to reach a legal conclusion, providing an early example of how external sources get incorporated into a particular legal case.

[1] *Marbury v. Madison*, 5 U.S. 137, 179 (1803).

[2] *Id.* at 178 (concluding judicial review of legislation is "the very essence of judicial duty" under the constitution).

In the early twentieth century, shortly after the birth of modern sociology,[33] social scientific studies were submitted to the Court to legitimize socially progressive legislation. In 1903, Louis Brandeis—a progressive lawyer and future Supreme Court Justice—submitted extensive briefing on economic, demographic, and sociological studies in defense of legislation limiting women's maximum work hours in *Muller v. Oregon*.[4] Social science evidence was so central to Brandeis' brief in *Muller*, the term "Brandeis Brief" has become synonymous with briefs that emphasize social science evidence over legal precedent. The ultimate usefulness of the evidence in *Muller* is thoroughly disputed; most scholars conclude the brief may have simply confirmed the Court's preexisting conceptions of gender and subordination of women.[5] While the scientific studies "would probably not satisfy contemporary methodological standards," the Brandeis Brief waves in both the Courts and social sciences as progressive labor attorneys used social sciences to protect and create legislation that was beneficial to workers, while activist social scientists similarly framed their work to appeal to courts.[6]

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[3] As Aldon D. Morris notes, the origins of modern sociology are typically traced to the Chicago school, founded in 1893 but blossoming in the early twentieth century. Morris argues instead that W.E.B. Du Bois' school of sociology at Atlanta University which birthed systematic empirical research in social life. *See* Aldon D. Morris, THE SCHOLAR DENIED: W.E.B. DU BOIS AND THE BIRTH OF MODERN SOCIOLOGY (2015).

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[4] 208 U.S. 412 (1908).

[5] *See* Angelo Ancheta, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 29 (2006); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L. J. 1005, 1008 (1989); Ruth Bader Ginsburg, Muller v. Oregon*: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 365 (2008)(also noting Brandies' predominantly female research team which crafted the scientific argument presented before the Court); Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59, 88 (2013).

[6] Ancheta, *supra* note 5, at 30; Faigman, *supra* note 5, at 1009 ("social science as suitor has been alternately embraced and rejected by the law"); Morag-Levine, *supra* note 5, at 99 ("The political and legal

Courts typically echoed and reaffirmed prevailing social sciences of their day; mixing—often unsourced—historiography and judicial/constitutional doctrine with racist science to create a judicial "commonsense" which legitimizes social difference. For example in *Ozawa v. United States*, the Supreme Court rejected Mr. Ozawa's application for naturalization because the law allowed only "free white persons" and Mr. Ozawa was of Japanese descent.[7] The Court reasoned that Japanese people could not be classified as white because "numerous scientific authorities, which we do not deem it necessary to review" indicated whiteness was "synonymous with the words 'a person of the Caucasian race.'"[8] Race in the Supreme Court was often legitimized through biological and anthropological assumptions, following the dominant scientific philosophies of the era, like Social Darwinism and eugenics.[9] Even if the Court did not directly cite to a scientific source, the Court made blanket assertions of fact and generalizations with an air of scientificity. Forced sterilization laws worked in tandem with anti-miscegenation laws under the guise of public health—giving white supremacist eugenics legal legitimacy in cases like *Buck v. Bell* when Justice Oliver Wendell Holmes gave "eugenic theory the

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requirement that social and economic reforms be framed as traditional health measures gave rise to a body of social scientific work aimed at providing the requisite justifications for legislation").

[7] *Ozawa v. United States*, 260 U.S. 178 (1922), qtd. in Ian Haney López, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 60 (1997).

[8] *Id.*

[9] *See* Ancheta, *supra* note 5, at 30-41 (describing the use of social science and racism throughout the mid-twentieth century, including segregation cases, eugenics and naturalization cases); Troy Duster, BACKDOOR TO EUGENICS 11 (2nd ed. 2003)(emphasizing *Buck v. Bell* as a part of the legalization of eugenic social science); Haney López, *supra* note 7 (historicizing the Court's development of whiteness, noting how the Court would use social science to legitimize opinions on race).

imprimatur of constitutional law in his infamous declaration, 'three generation of imbeciles are enough,'" and upholding the forced sterilization of a woman for feeblemindness.[10] Unlike the Brandies briefs, assertions of scientific fact like in *Buck v. Bell* did not merit lengthy citation to reiterate a white supremacist assumption. Before *Brown* the Court lacked a trend in citation, wavering between Brandies briefs and blanket assumptions depending on the assumption of the judge. *Brown* effectively bucked the trend, adding a layer of evidence and analysis that would expand the Supreme Court's use of external facts through a seemingly innocuous footnote.

3.1 Shifting the Status Quo

By the mid-twentieth century, social scientific discourse on race in the United States had shifted. Mainstream sociology reconceptualized studies of inequality based on culture and conditions rather than race and biology—though often reinforcing the same principles of white supremacy and antiblackness through "social pathology."[11] Wealthy philanthropists increased funding for studies on race, though largely out of fear of riots with the growth of Black veterans and Black social movements rather than dissatisfaction with social inequality.[12] Black social scientists had also grown in numbers and

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[10] Dorothy Roberts, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 41 (2011); *see also Buck v. Bell* 274 U.S. 200 (1927); Duster, *supra* note 9.

[11] Ancheta, *supra* note 5, at 46 (quoting John P. Jackson, Jr., *Social Scientists for Social Justice: Making the Case against Segregation* (New York: New York University Press, 2005): 17-42); Khalil Gibran Muhammad, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 275-276 (2010).

[12] Morris explains this was more out of fear than benevolence:

> The Carnegie Foundation had deep interest in funding a comprehensive study on race during the World War II period. The explosiveness of race was exacerbated as the Allied Forces geared up to defeat Hitler's forces, which were tenaciously pursuing white Aryan supremacy. African Americans were restless as they confronted lynching and racial degradation while their men

prominence, creating an alternative to dominant narratives of race in social sciences.[13] In the law, the Legal Defense Fund for the National Association for the Advancement of Colored People had successfully challenged segregation in graduate education and housing at the Supreme Court,[14] but had yet to reach the goal: "the total destruction of state-enforced segregation."[15]

To meet this goal, the NAACP chose a broad strategy attacking the legitimacy of segregation as a legal and social force, beginning with an attack on the idea that separate could be equal. Social scientists provided expert opinion at trial and consultation to lead attorneys on how to use the social science evidence in the cases that would be consolidated as *Brown v. Board of Education* at the Supreme Court.[16] Using experts at trial was nothing new, but *Brown* represents a rare instance the majority opinion of the Court used to upend the status quo, rather than reaffirm or legitimize it. Footnote 11 of *Brown* describes a collection modern authority on social science that

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> donned the uniform to fight racism in a segregated military. The fear of riots and other racial conflagrations hung heavy in the air. Because these tensions concerned the philanthropic community, it prepared to open its coffers to fund a comprehensive race study.

Morris, *supra* note 3, at 199.

[13] *Id.* at 196.

[14] *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (states must provide legal training to all qualified persons within the state, including Black students; without a Black law school in the state, the University of Missouri Law School was required to admit Mr. Gaines); *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948) (reaffirming *Gaines*); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (striking down racially restrictive covenants in housing); *Sweatt v. Painter*, 339 U.S. 629 (1950).

[15] Derrick Bell, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 16 (2004).

[16] 387 U.S. 483 (1954).

indicates the problems of segregation in society, not a particular study of the clients.[17] By some accounts, the social science cited by the Chief Justice was an afterthought.[18] Although the Court's reasoning in *Brown* relied on the "modern authority" presented by social science, *Brown* did not make social science evidence a necessary or sufficient element in proving discrimination or its' harms upon people of color. Sanjay Mody argues that "Footnote eleven was a consequence of ordinary human intuition, not grand strategy. . . . [It] can most plausibly be understood as an effort, though an accidental one, to lend authoritative force to an opinion that threatened to undermine its institutional standing."[19] Law has a legitimating power, but *Brown*'s use of social science shows that the law may also require external validation—using outside sources to ensure legal conclusions are supported outside the courtroom. *Brown*'s use of social science was not only to inform lower courts of the harm of segregation, but to lend authority to an area in

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[17] Cited works are:

> K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., (1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).

347 U.S. at 495 fn. 11.

[18] Ancheta, *supra* note 5, at 66.

[19] Sanjay Mody, *Brown* Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy, 54 STAN. L. REV. 793, 828 (2002).

which the Court has less direct expertise.[20] The Supreme Court is the ultimate arbiter of federal law and the Constitution, which is why making blanket assertions of fact, comes quite easily. *Brown* could just as well have simply stated segregation is unconstitutional, and be legally sufficient—incorporating external evidence as validation of the Court's conclusions legitimizes the Court's conclusion socially and historically.[21]

Constitutional scholars of the time expressed concern over *Brown*—not because of the result, but due to the Court's supposed reliance on social science in evaluating constitutional rights. Law professor Edmond Cahn argued that *Brown* reaches the correct result, but that social science is a "dangerous" addition to jurisprudence:

> It is one thing to use the current scientific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the findings as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature.[22]

For Cahn, Brandies briefs are not useful to a Court, since "shrewd, resourceful lawyers can put together a Brandies Brief in support of almost any conceivable exercise of legislative judgement."[23] Cahn's hypercritical approach to using social sciences in the

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[20] Ancheta, *supra* note 5, at 77-78 (noting social science in particularly used in cases on controversial social issues).

[21] Michael Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 Cornell L. Rev. 279, 294 (2005).

[22] Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955) (Cahn focuses heavily on Clark's doll test, arguing that the study is not rigorous enough to warrant the conclusions Clark draws, and questioning the methodological rigor of social psychology as a field—arguing that it is unreliable because not all psychologists agree and there is a lack of "extrinsic empirical means" for verification).

[23] *Id.* at 153-54.

law was part of a larger disparagement of *Brown* and footnote eleven, with some calling the Court "the nine sociologists" and "commies" who "reject[ed] the intent of the framers."[24] Sociologists at the time did not take this slander kindly and adamantly defended *Brown* and Brandeis Briefs—what harm is caused by including data to demonstrate the reasonableness or unreasonableness of legislation?[25] Harold Garfinkel argued that the footnoting of social science was by no means lowers its importance:

> The 'modern authority' which is called upon is graced with notice in the body of the opinion itself as is the argument which it serves to document. However, the 'finding' is that of the Court; the 'authority' of social science is called upon to support the finding of the justices, not vice versa.[26]

Though *Brown* may have changed interpretation of the equal protection clause, the Constitution was still the centerpiece of the decision.

However, some scholars believe the Constitution alone is enough. Ronald Dworkin later echoed Cahn's uneasiness with social science, arguing that it was unnecessary in *Brown* since "there is a fact of the matter, namely that segregation is an insult, but we need no evidence for that fact—we just know it. It's an interpretive fact."[27] Clark's doll test was a focal point for criticism of *Brown* and footnote 11,[28] with many—mostly legal scholars—questioning the methodology and implications, though is more a

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[24] Herbert Garfinkel, *Social Science Evidence and the School Segregation Cases*, 21 J. POL. 37 (1959).

[25] *Id.* at 41.

[26] *Id.* at 58.

[27] Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J. L. & EDUC. 3, 5 (1977).

[28] Ancheta, *supra* note 5, at 57-58; Martha Minow, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 142-143 (2010).

misinterpretation of scope of Clark's claims rather than a deficiency in the study itself.[29] David Faigman argues that the criticisms of empirical data in *Brown* and other cases where the Court arguably misuses social science research damages the credibility of the Court and limits the social impact of opinions like *Brown* or *Roe v. Wade*: "rulings which rest on suspect factual bases will themselves be suspect. Holdings resting on faulty premises have little or no persuasiveness, for they lack rationality—the source of judicial power."[30] In this view, the law has the potential to identify and redefine normative values, which social science may disrupt—it is the belief that the law has a permanence that social science may disrupt, and legal interpretations can identify problems and make social change without extensive empirical studies.

Though legal scholars like Cahn and Dworkin challenged the worth of social science to the *Brown* opinion—and the law generally—*Brown*'s use of social science bonded equal protection and social sciences. Civil Rights attorney and law professor Angelo Ancheta argues that *Brown*'s true influence is with advocates. Attorneys understand the potential role social science may play, readying studies and experts in civil rights cases; social scientists better understand the potential for their studies to reach legal authorities and potentially influence opinions of the Court.

> Almost every major civil rights case after Brown has scientific authorities appearing somewhere—in the trial record, in the parties' briefs, in amicus

[29] David Faigman, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 64 (2008).

[30] David Faigman, *'Normative Constitutional Fact-Finding:' Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PENN. L. REV. 541, 604 (1991).

> brief, or in the court opinions themselves. The use of science in one form or another is nearly inescapable in contemporary civil rights legislation.[31]

Similarly, Michael Heise argues that *Brown* indirectly empiricized equal protection law, particularly in educational opportunity, by conceptualizing equality in terms of measurable variables that indicate whether opportunity exists.[32] Beyond equal protection, Heise argues that *Brown* was an "accelerant" for what he calls "multidisciplinarity" in the law—the integration of other non-legal disciplines as valid input on legal matters.[33] Brandeis briefs planted the seed, but *Brown* signaled a huge growth in the Court and in legal scholarship.[34] Regardless of the intentionality of footnote 11 or its importance to the outcome of *Brown* at the time, the effects are clear: social scientific evidence on racism has gained legitimacy in the Supreme Court.

In the years following *Brown*, legislative changes spurred by social movements altered legal landscape on racial discrimination, and litigation turned to existing racial disparities that did not result from strict or overt policies, but from general social conditions caused by years of racial discrimination. The Court analyzed racially disproportionate voting districts[35] and jury selection practices,[36] finding that the

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[31] Ancheta, *supra* note 5, at 68.

[32] Heise, *supra* note 21, at 296.

[33] *Id.* at 318.

[34] Heise notes that the "Law & Society movement" has rapidly grown over the past fifty years, integrating law and social sciences, especially economics, history, psychology and sociology. *Id.* at 316.

[35] *See e.g. Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (finding that the shape and apportionment of voting districts did not comport with the racial demographics of the area, excluding nearly all Black voters, and signified racial discrimination).

[36] *See e.g. Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (

statistical, demographic discrepancies were sufficient indicia of racial discrimination. Michael Selmi summarizes that "once states moved away from overt racial exclusions, the Court found it considerably more difficult to define what constituted discrimination. Yet the Court remained willing to invalidate discriminatory practices when it saw them."[37] By the 1970s, proving racial discrimination through statistical disparities had reached mixed results, with no clear standard.[38] In *Washington v. Davis* the Court articulated a standard of proof, focusing on individual acts rather than disparate impacts:

> A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. . . . An invidious discriminatory purpose may often be inferred from the totality of the relevant facts. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.[39]

Thus, while the totality of the circumstances matters in racial discrimination lawsuits, statistical evidence is insufficient, absent a showing of individualized action or intent.

> Under [the existing system for juror selection] the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the petitioners. Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion.)

[37] Michael Selmi, *Proving Intentional Discrimination and the Reality of Supreme Court Rhetoric*, 86 GEO. L. J. 279, 300 (1997) (noting the early case law "seem[ed] to share the principle that underlies the Court's pornography cases—that the Court knows discriminatory acts when it sees them.").

[38] *Compare Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) (finding that because the Civil Rights Act of 1964 protected against racially discriminatory consequences of employment practices, a showing of disparate impact was sufficient to show a statutory violation) *with Jefferson v. Hackney*, 406 U.S. 535, 548-49 (1972) (finding statistical racial disparities in computation of welfare "would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts . . . could survive such scrutiny, and we do not find it required by the Fourteenth Amendment").

[39] *Washington v. Davis*, 426 U.S. 229, 241-242 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

The Court would turn the *Davis* interpretation of invidious discrimination into a more acute evidentiary standard the next year in *Village of Arlington Heights v. Metropolitan Housing Development Corp* by identifying "subjects of proper inquiry."[40] *Arlington Heights* began with the denial of a zoning variance that would have allowed construction of a multiple-family low- and moderate-income housing development. Arlington Heights is a Chicago suburb, and at the time, was approximately 99.9996 percent white,[41] but "approximately forty percent of those eligible to live in the proposed 190-unit development would have been African-American."[42] Assuming Black residents made up forty percent of the development, "the village's African-American population would have increased by one thousand percent."[43] The village did not state the housing was denied to prevent Black residents, but the respondents' argued it would have the disparate racial effect of excluding Black residents from housing.

Echoing *Davis*, the Court explained that a disparate impact "may provide an important starting point," but absent a "clear pattern, unexplainable on grounds other than race . . . impact alone is not determinative, and the Court must look to other evidence."[44] Therefore *Arlington Heights* presents important, but not exhaustive, factors for determining invidious racial discrimination: first the "historical background . . .

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[40] 429 U.S. 252, 266 (1977).

[41] *Id.* at 255 ("According to the 1970 census, only 27 of the Village's 64,000 residents were black").

[42] Selmi, *supra* note 37, at 303.

[43] *Id.*

[44] *Arlington Heights*, 429 U.S. at 266.

particularly if it reveals a series of official actions taken for invidious purposes," "the specific sequence of events leading up to the challenged decision," procedural or substantive departures from the normal sequence of events, "legislative or administrative history" including "contemporary statements by members of the decision making body, minutes of its meetings, or reports."[45] However in a footnote, the Court concludes that even if the proposed standard of proof was met, and racially discriminatory purpose was shown to be part of the motivation, it would not invalidate the challenged decision but instead "shifted . . . the burden of establishing the same decision would have resulted even had the impermissible purpose not been considered."[46] Thus the ambiguous standards of racially discriminatory disparate impact previous cases had morphed into a multiple factor test, that, if met, was still insufficient to overturn a discriminatory law or policy outright, but instead only shifted the burden of proof to the policymaker that racial discrimination was not the primary purpose. Under the *Arlington Heights* standard, the Court rarely found racially discriminatory impacts sufficient, even when policies were novel and failed to meet procedural requirements.[47]

3.2 Twenty-First Century Empirical Evidence

[45] *Id.* at 267-68 (testimony of elected officials could be included, but "frequently . . . barred by privilege").

[46] *Id.*at 271 n. 21.

[47] *Compare. Memphis v Greene*, 451 U.S. 100,129 (1981) (The City' barricade on a main street connecting a predominantly Black area of the city and an all-White area, to reduce "undesirable traffic;" was exclusively supported by and benefitted the White area of town, but the Court however found that a racially disparate impact is bound to happen in "almost any traffic violation.") *with Id.*at 135-36 (Marshall, J. *dissenting*) (observing "the case is easier than the majority makes it appear," since the reasoning for the city's closure of the street are "little more than code phrases for racial discrimination").

In the past decade, the relationship between social science and the law has blossomed as the Court is inundated with empirical data, especially in cases involving race. Empirical data serves "factual inquiries to fill gaps in knowledge," either providing case-specific precision or a broader social context and background for factual scenarios involved in the case.[48] Legal evidence comes before the Court either through trial procedure—introduced by an expert in the original trial, under federal rules of evidence—or through amicus curiae, Latin for "friend of the court." Amicus briefs are submitted in bulk, vastly expanding the potential field of information before the Court. The amicus curiae brief vastly predates the Supreme Court, dating back to Roman law, but since *Brown* the number of amicus briefs has increased over 800% and are included in the majority of cases.[49]

For example, in the 2013 affirmative action case *Fisher v. University of Texas*[50] nearly 100 amicus briefs were submitted—seventeen on behalf of Abigail Fisher (the party opposing affirmative action) and seventy-four on behalf of the University of Texas (defending affirmative action).[51] A meta-analyses of the amicus briefs in *Fisher* by Eckes, et. al. indicated that most of Fisher's briefs cited little to no social science research. Some briefs "explicitly argued that social science research should not be relied

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[48] Angelo Ancheta, *Science and Constitutional Fact Finding in Equal Protection Analysis*, 69 OHIO ST. L.J. 1115, 1140 (2008).

[49] Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1758 (2014).

[50] 133 S.Ct. 2411 (2013) (*hereinafter Fisher I*).

[51] Suzanne E. Eckes, David Nguyen, & Jessica Ulm, Fisher v. University of Texas*: The Potential for Social Science Research in Race-Conscious Admissions*, 288 ED. LAW REP. 1, 9-10 (2013).

upon" ironically relying on research to influence the Court to ignore other research.[52] The majority of the briefs defending affirmative action used empirical data, including qualitative studies of student experiences, longitudinal studies indicating correlations between diversity and critical thinking, and meta-analyses of social science research indicating diversity reduces prejudice.[53]

However, there are very little regulations on amicus curiae. No explicit standards exist for what may be included in an amicus brief, with little screening or quality control before a brief is submitted to the Court.[54] The only major requirement is in Supreme Court Rule 37 which formally requires consent of the parties involved in a case.[55] Without a filtering mechanism, other than the Justice's own expertise in reading briefs, misleading data, misstatements, unreliable sources, or even falsehoods, can infiltrate Supreme Court opinions masquerading as fact. Allison Orr Larsen notes that many amicus cite information which is simply "on file" with the author, allowing information that may be unsupported by a large body of scientific research to appear as evidence.[56] For example, in the case against California's proposition banning gay marriage *Hollingsworth v. Perry*,[57] "social scientists supporting Hollingsworth [against gay

[52] *Id.* at 12.

[53] *Id.* at 13.

[54] Larsen, *supra* note 49, at 1764.

[55] Rules of the Supreme Court, Rule 37.

[56] Larsen, *supra* note 49, at 1784.

[57] 133 S. Ct. 2652 (2013).

marriage] . . . filed data supposedly culled from the Canadian census to support the claim that children of gay and lesbian couples are less likely to finish high school. This study is 'on file with' the authors and not available publicly."[58] The validity or reliability of the studies in amicus briefs can therefore become obscured through citations, allowing blanket claims with little methodological explanation—that can be cited by the Supreme Court in a Justice's opinion, validating bad evidence.[59] Social scientists also submit briefs in opposition to bad scientific data, allowing some internal policing, but this does guarantee a Supreme Court justice will accept the more methodologically sound research.

Standards for social science evidence are obscured when justices are citing evidence, but feature heavily in opinions attempting to dismiss or counter social scientific evidence. Objections to social science evidence typically attempt to expose methodological flaws or claim studies are inaccurate based on researcher bias.[60] Ben Grunwald summarizes that the most common methodological criticisms of quantitative data are: imprecise data/bad data gathering techniques, poor sampling design, presenting only data that confirms the hypothesis, and omitted variables which skew correlation results.[61] For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[62] the plurality opinion does not use any empirical data in its discussion of

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[58] Larsen, *supra* note 49, at 1785.

[59] *Id.* at 1786.

[60] Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. Penn. L. Rev. 1409 (2013).

[61] *Id.*

[62] 127 S.Ct. 2738 (2007).

inequality in public schools while Justice Breyer's dissent emphasizes the litany of social science studies highlighting demographic and economic inequalities to be remedied. Meanwhile Justice Thomas' concurrence dismisses social science evidence on school desegregation for lacking "unanimity" and "causal" linkages between race-conscious policies, racial diversity, and educational achievement.[63] Both Justice Thomas' concurrence and Chief Justice Roberts's plurality in *Parents* place "stringent criteria for considering social science is so demanding as to make irrelevant many experts findings that could have informed the Court's analysis."[64] Erica Frankenberg and Lilliana Garces argue that because Justices are not always trained in scientific research and "may not be necessarily inclined to consider social science evidence unless they can unambiguously understand: (1) the findings; (2) the strength of the research; and (3) how particular findings relate to an issue under consideration."[65] In essence, when the Justices disagree with social scientific findings, they can set the bar for methodological soundness impossibly high—requiring a level of scientific rigor that is not required by the most stringent review boards—so as to exclude the data and conclusions from legal analysis.

With such high standards for external sources, there are no restrictions on the Court finding its own data. Allison Orr Larsen argues that "judicial fact-finding" occurs frequently in the Supreme Court as the ubiquity of the internet has created ways for

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[63] Erica Frankenberg & Liliana M. Garces, *The Use of Social Science Evidence in Parents Involved and Meredith: Implications for Researchers and Schools*, 46 U. LOUISVILLE L. REV. 703, 708 (2008).

[64] *Id.* at 733.

[65] *Id.* at 745.

Justices to add more non-legal sources.[66] Larsen's non-exhaustive study of significant Supreme Court decisions between 2000 and 2010 indicates that a majority of opinions contain facts found "in-house," by the Justice's (or their clerk's) own research.[67] While most of the citations within Larsen's study are to "traditional legal sources" like law journals, nearly half were non-legal—ranging from academic sources to newspapers to personal correspondence.[68] Larsen finds this incredibly problematic since citations are part of the "currency" of the legal system,[69] arguing that law requires an adversarial process to present data and help screen sources for relevance and validity.[70] Judges and Justices are not trained in the fields they are citing, making data analysis more difficult.[71]

Justices have put their own gloss on empirical data since the foundation of the Supreme Court. The modern trend of heavy citation simply makes external sources and interpretation more apparent—sometimes creating the illusion of legitimacy with dated or inaccurate research. Since *Brown* the amount of research available to the Court has expanded exponentially, but the Court rarely makes its methods or methodology in researching or finding these new sources of information. What is known for certain is that the Court is inundated with research from opposing parties in a case, amicus curiae,

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[66] Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

[67] *Id.* at 1261.

[68] *Id.* at 1286-88.

[69] *Id.* at 1282 (quoting Frank B. Cross et. al, *Citations in the United States Supreme Court: An Empirical Study of their Use and Significance*, 2010 U. Ill. L. Rev. 490 (2010)).

[70] *Id.* at 1297.

[71] *Id.* at 1299-1300.

and even their own researching skills. The Court cites to any and all of these sources in the course of an opinion, but how the Court distinguishes between fact and opinion is only made apparent in the way a Justice writes their opinion.

3.3 Classifying Facts in the Supreme Court

With so much empirical data appearing before the Supreme Court, different typologies have developed to classify the research, data, and evidence used by the Court. The foundational dichotomy, which has been integrated into the Federal Rules of Evidence, comes from Kenneth Culp Davis' distinction between adjudicative and legislative fact-finding.[72] Davis explains that adjudicative facts are highly particularized determinations of a judge or jury "concerning immediate parties—what the parties did, what the circumstances were, and what the background conditions were."[73] These are the juicy details that typically get reported first in news commentary or are the focus of your typical episode of "Law and Order"—who was at the crime scene at the night of the murder, whether the killer really contacted the victim from inside the house. Adjudicative facts are specific who, what, where, when, why, and how details of a case that are usually agreed on by the opposing parties or ultimately decided by the jury, i.e. whether the defendant committed the crime. Conversely, legislative facts are those that deal with the "creation of law and determination of policy;" contextual data that helps to explain why or how a policy has developed.[74] Examples include the Congressional

[72] Kenneth Culp Davis, *An approach to Problems of Evidence in the Administrative Process,* 55 HARV. L. REV. 364, 402 (1942).

[73] *Id.*

[74] *Id.*

record, statements made by legislators leading to the passage of a law or official notice and comments by administrative agencies on a new policy. Appellate courts have very limited power of review over adjudicative facts since the judge or jury is more familiar with the details of a case. Legislative facts are reviewed *de novo*—Latin for "from the beginning"—heavily scrutinized and often involve experts and extensive empirical data. Decisions of the Supreme Court deal primarily with legislative facts in trying to set general policy for other courts to follow, rather than the adjudicative fact of guilt, innocence, or liability.

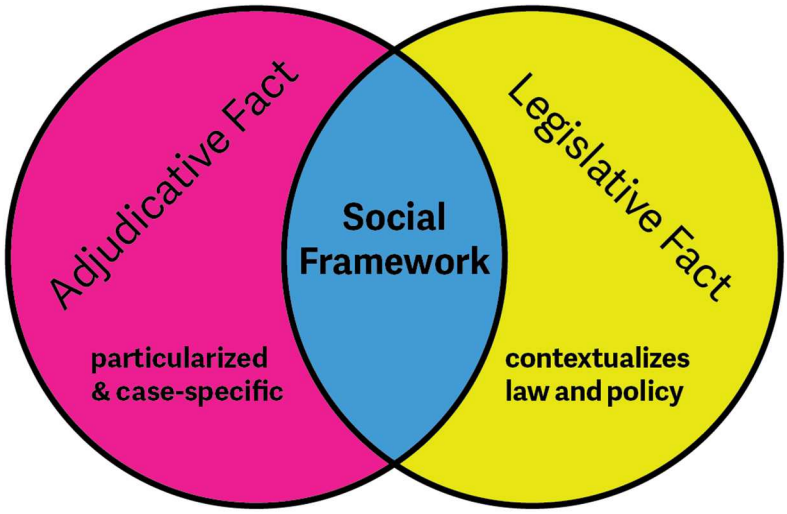

Figure 2: Davis, Monahan, and Walker taxonomies of fact

Adjudicative and legislative facts can also overlap, as a broader social analysis is necessary to contextualize a fact in a case. John Monahan and Laurens Walker therefore suggest a third category of "social frameworks" for cases which use "general conclusions

from social science research to determine a specific fact in a case."[75] For example, introducing social science evidence on the reliability of eyewitness identification to prove innocence in a criminal case that relies on the testimony of two eyewitnesses[76] applies general social science data (legislative facts) to facts of a particular case (adjudicative facts), and does not cleanly fit in either category. Courts perform a validity check within the field, to ensure that the type of data presented best fits the circumstances of a case. This type of analysis is rarer at the Supreme Court, since the Supreme Court is more likely to decide on a general standard and remand questions of particularized fact to an appellate or trial court for further hearings.

Instead the Supreme Court focuses primarily on legislative facts—general questions of rights and responsibilities under the law, which often include some form of science from medical opinions to social science research. David Faigman therefore refines the adjudicative/legislative fact distinction for Supreme Court cases through a trio of what he calls "Constitutional Facts," which categorize the types of evidence presented to substantiate constitutional rights.

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[75] John Monahan & Laurens Walker, *Social Frameworks: A New Use of Social Science in Law*, 73 VA L. REV. 559, 563-70 (1987).

[76] *See State v. Chapple,* 660 P.2d 1208 (Ariz. 1983) (the Arizona Supreme Court ordered a retrial because "there were a number of substantive issues of ultimate fact on which the expert's testimony would have been of significant assistance" in assessing the reliability of eyewitness testimony based on social science research).

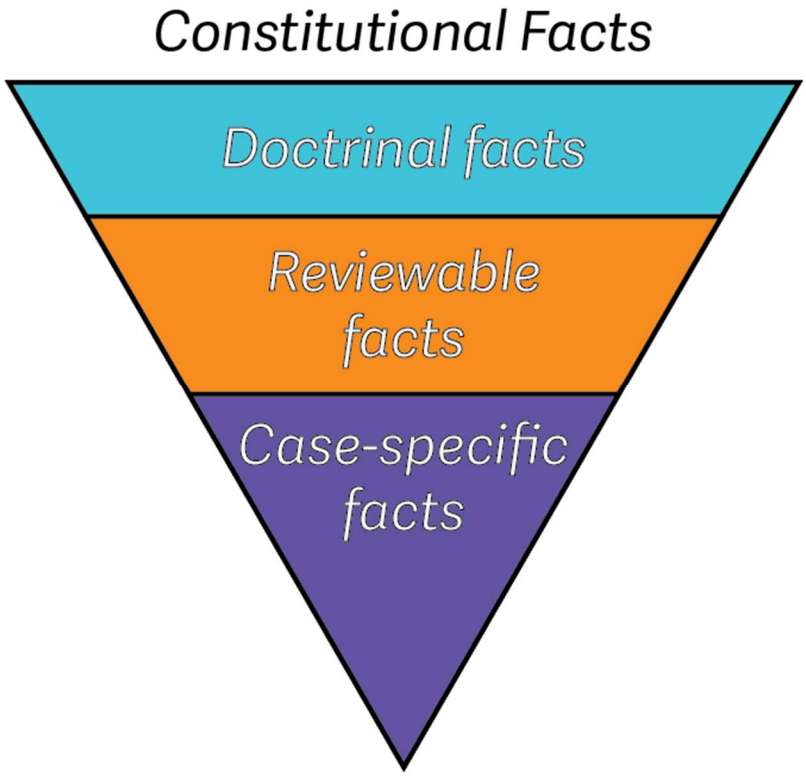

Figure 3: Faigman's taxonomy of facts

First are "Constitutional doctrinal facts" which substantiate a particular interpretation of the constitution and justify development of rules or standards that would apply to all similarly situated cases.[77] Debates over originalism and textualism rely on doctrinal facts, usually using historiography and document analysis in establishing constitutional meaning, but can include social sciences.[78] Second are "Constitutional reviewable facts," which mirror Monahan and Walker's social frameworks and are used

[77] Faigman, *supra* note 29, at 46. In previous writings Faigman identified this area as "Constitutional-rule facts" which serve essentially the same purpose, but with amended language to understand it is more than just the ruling but also the doctrine of the Court. *See* Faigman, *supra* note 30, at 553.

[78] Faigman, *supra* note 29, at 46.

to examine facts "under the pertinent constitutional rule" but "transcend particular disputes and thus can recur in identical form in different cases and varying jurisdictions."[79] Here facts underlying a particular piece of legislation are utilized in conjunction with Constitutional doctrine—for example the Supreme Court in affirmative action cases which look at the facts underlying the policies of affirmative action and then applies strict scrutiny to decide whether the state or federal power acted within its constitutional authority to pass legislation.

Finally, is what Faigman calls "Constitutional case-specific facts. . . [which] refer to factual determinations that are relevant to the application of constitutional rules in particular cases."[80] Analysis of facts in these cases is more specific and may lead to general standards, but is highly particularized. Questioning whether an employer intentionally discriminated against an employee in using standardized testing that statistically favors whites is a case-specific fact since it looks at the particularities of the test in that case, rather than the general idea of testing or whether testing is a constitutional right, even though there may be constitutional rights at issue. Faigman emphasizes these categories are not exclusive and there are no clear boundaries between the three. Doctrinal facts set the standards, reviewable facts apply the standards, and case-specific facts establish how well the standard fits the case before the Court.

To illustrate, imagine a Supreme Court case involving claims of racial discrimination in violation of the Voting Rights Act. Doctrinal facts would be the text of

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[79] *Id.* at 47.

[80] *Id.* at 48.

the Voting Rights Act and documents indicating for what purpose it was passed (to stop racial discrimination in housing), possibly even histories or studies submitted to Congress with examples or statistics on racial voting and representative disparities. Reviewable facts would be previous decisions of lower courts regarding voting rights that apply to the same type of situation, even though some details may be different—one case was in Texas involving Mexican Americans, another in Florida involving Puerto Ricans, while the case at hand is in Arizona involving Black and Latina/o communities in a major metropolitan area. Case-specific facts could include any Arizona voting discrimination legislation, previous applications of voting law to Arizona, studies of voting patterns in Arizona, maps of voting districts etc. Doctrinal are the broad legal histories and assumptions underlying a case, reviewable facts would be the decision of a lower court or an authorized monitor of voting rights.

While Faigman's typology establishes the importance of facts at every level of legal reasoning in the Supreme Court, Angelo Ancheta suggests that within the development of equal protection doctrine, there are five key functions of scientific evidence. First, the most basic function of social science is informational, "enlightening courts on the state of the world" by shaping the perceptions of justices on current issues—like the research presented in *Brown* that informed the justices on feelings of inferiority among Black school-age youth.[81] Second, social science serves an authoritative function in tandem with "constitutional precedent, theory, or contemporary values" to provide a support for legal reasoning in areas where the court lacks expertise—

[81] Ancheta, *supra* note 5, at 77.

precisely how it was used in *Brown* to establish Black children's feelings of inferiority due to segregated schools.[82] The third function is illuminating, to "reveal the underlying assumptions and values of the frameworks that guide their interpretations of the constitution," particularly in questions of race as the social science provides concrete benefits which the court may rely on.[83] Conversely, social science serves a legitimating function, demonstrating "thoroughness and circumspection in their analyses, even though normative judgements may ultimately be at the root of their decisions."[84] In other words, rather than propose vague hypotheticals, scientific literature is used to add credibility to the Court's assumptions of the world. The final function is rhetorical, as courts invoke "an independent expertise and trustworthiness that is untainted by the partiality of advocates. . . . [and] science, left unquestioned, thus becomes 'truth' in the constitutional analysis."[85] In other words, because both sides in the legal case cannot agree on an issue, (any) scientific third party becomes an "objective" source since they lack stake in the claim before the Court. Ancheta's functional approach highlights the many ways the Court may interpret and therefore use scientific evidence, though which use the Court favors will depend on specific facts, or even a Justice's own interpretation of the evidence.

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[82] *Id.* at 78.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 79.

For all these typologies, a key element of is still missing: "because the courts have not developed clear methodologies to engage in constitutional fact finding, all of these different roles for scientific evidence . . . can be at play in a given case."[86] Each of these five functions blur together in the Supreme Court's opinions, as a citation like footnote eleven in *Brown* may serve many functions simultaneously—illuminating the harms of segregation, while providing an authoritative counterpoint to previous opinions of the Court, legitimating the Court's overturning of precedent and making a rhetorical appeal to end segregation. Faigman argues that the Court's failure to "impose any systematic order on its reception of facts in constitutional cases . . . gives the Court great latitude in its interpretation and application of the Constitution, [and] weakens the institution's rightful authority."[87] Particularly in equal protection, Ancheta argues that "when push comes to shove, constitutional theories and judicial values can trump the factual and scientific evidence. . . . Constitutional interpretation is, at bottom, an art and not a science."[88] However the existence of patterns that give rise to typologies proposed by Davis, Faigman, and Ancheta signify that there is something systematic at play, blurred by the Court's shifting usages. The Court's use of social science is more than just an amalgam of citations that bulk up lengthy opinions, but a means of understanding. Faigman concludes his book on constitutional facts saying that "it is, therefore, incumbent on the Court to have a good understanding of [the social] world if it is to give

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[86] *Id.*

[87] Faigman, *supra* note 29, at 180.

[88] Ancheta, *supra* note 5, at 160.

the Constitution effect."[89] The Court's understanding of research, the ontology and epistemology of scientific evidence in the Supreme Court, may then hint at the understanding of the world—legal understandings of philosophies of science may be a significant breadcrumb on the path to a legal methodology.

3.4 Legal or Social Philosophies of Science

Underlying the frayed connection between social science and the law is an apparent conflict between the ontology of the law and social sciences. Like Nick Carraway in *The Great Gatsby*, the law's relationship to social science is "within and without, simultaneously enchanted and repelled by the inexhaustible variety of life."[90] Justices are simultaneously enchanted with social science's potential for discovering grand social truths and repelled by social science's perceived subjectivity that may undermine the presumed objectivity of legal truths. The Supreme Court tends to "construct an empirical world that serves the normative vision it holds for the Constitution."[91] Law and the Supreme Court operate under a presumption of permanence; the constitution may be amended but the text remains the same since it was originally written. Interpretations of the text may shift, but the idea of the law, supposedly remains the same. Edmond Cahn and Ronald Dworkin's uneasiness with *Brown* hinged on the idea that the law could become subject to fads in social science that might alter fundamental rights.

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[89] Faigman, *supra* note 29, at 181.

[90] F. Scott Fitzgerald, THE GREAT GATSBY 35 (1925, 2004).

[91] *Id.* at 25.

Similarly, Allison Orr Larsen's analyses of the Supreme Court's use of amicus briefs and in-house empirical research are very concerned with facts distorting the law. Within this is an assumption that there may be some form legal reasoning or constitutional doctrine that develops independent of empirical analysis which may be tainted by the addition of external analysis. Larsen suggests "minimalist" and "maximalist" views on the inclusion of empirical data. Minimalists would severely restrict fact-finding "to sources presented by the adversary system" while maximalists would "open up the adversary system so that information flows more freely."[92] Yet both approaches assume that the Court's epistemology of empirical data is correct.

The Supreme Court will often accept the soundness of research while denying its application to a particular case under the auspices of criticizing social science methodology—"accepting the validity of empirical research, while simultaneously discounting the relevance of that very research."[93] The Supreme Court's mistreatment of social science often misuses, rejects, or disparages data "when the research does not support its views" in spite of the rigor and soundness of social scientific techniques.[94] Donald Bersoff and David Glass are less kind in their assessment of the Supreme Court as "the ultimate arbiters" on the legal validity of social science research: "it is frustrating to work in an area where the judges are, at times, ignorant, arbitrary, fraudulent,

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[92] Larsen, *supra* note 66, at 1305.

[93] Faigman, *supra* note 30, at 593.

[94] Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279, 293 (1995).

duplicitous, confused, and unprincipled."[95] Even if research indicates social or statistical significance, legal significance may be entirely divorced from scientific principles.

Normative values in constitutional law have a "romance" that "inspire lawyers to poetic heights" in advocating for principles of equality, fairness, or justice. Faigman argues that "knowledge of the factual world cannot dictate constitutional values. But such knowledge is a tool upon which the Court must sometimes rely to ensure that those values are realized."[96] The Supreme Court and the law thus need procedural guidelines that would systematize scientific evidence since "the poetry actually lies in the details."[97] The abstract concepts that inspire lawyers and others to work within the boundaries of the law are inherently tied to practical realities of a particular case or a particular law.

Process and practicality ground abstract values, but too often become mired in legal rhetoric; becoming what Felix Cohen called "transcendental nonsense."[98] Writing against legal fictions like corporate personhood, Cohen argued that law's conceptualization of society exists outside of ideals and reality, yet depends on both.

> In every field of law we should find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social process.[99]

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[95] *Id.* at 302.

[96] Faigman, *supra* note 29, at 181.

[97] *Id.*

[98] Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 36 COLUM. L. REV. 809 (1935).

[99] *Id.* at 820

Instead, Cohen argued for legal "functionalism," a form of positivism that would remove legal fictions—terms-of-art given social meaning by the law—and jurisprudential questions of law in favor of two basic questions: "How do courts actually decide cases of a given kind? [and] How ought they to decide cases of a given kind?"[100] Functionalism, in Cohen's view, creates an "independent science of law" through a blend of "objective description of the causes and consequences of legal decisions" and "a critical theory of social values."[101] In other words, the law has become so mired in legalese that it has lost social relevance other than the power of "the law," and must be realigned with scientific thought by incorporating a positivist approach. Cohen's functionalism predicts a fundamental shift in legal philosophy and methods that would integrate (positivist) social sciences[102] that never came to be as present-day United States courts continue misunderstand, misuse, or fail to use social science evidence.[103]

At the core of this conflict is a misunderstanding of social scientific subjectivity. Methodological criticisms of social science often get mired in debates over researcher bias—though the biases of the justices and the Court are rarely, if ever, brought into play within the opinions of the Court. Faigman praises replicability and the predictive value of social science methodology because it lacks a "particular ideological

[100] *Id.* at 824.

[101] *Id.* at 849.

[102] *Id.* at 834.

[103] *See* Ancheta, *supra* note 5; Faigman, *supra* note 29.

agenda,"[104] bemoaning the biases of social science researchers while acknowledging that common practice requires disclosure from researchers.[105] For Faigman, the problem is "ideology masquerading as science" which interferes with what he believes to be the ideal purpose: "Social science does not make the difficult policy choices easier; its value lies in making the difficult choices clearer."[106] However, this acknowledgment of a "difficult choice" still acknowledges the value laden decision of the Court—a justice's ideological frame of reference will alters perspective of both law and fact. Faigman's belief in the rigors of methodology and the biases of researchers mirrors Larsen's skepticism of amicus curiae and judicial research. Both seem to believe that there is a *correct* decision to be made; the question is only whether the evidence is strong enough to support it. Even Cohen's functionalist approach relies on a positivist scientific philosophy, an objective nature of reality that can be explored through scientific rigor.

Yet despite the pages upon pages of procedure used by lawyers, scholars, and judges, law has failed to match social scientists' understanding that rigor and subjectivity are not mutually exclusive. Gayle Leatherby, John Scott and Malcolm William's discussion of objectivity explains that the values and subjectivity of a social scientist are in fact necessary to the objectivity of research in creating robust descriptions that are

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[104] Faigman, *supra* note 5, at 1094.

[105] *Id.* at 1030.

[106] *Id.* at 1094.

necessarily in flux with society.[107] Malcolm Williams argues that objectivity is not neutral, but is a value unto itself consisting of three necessary values: purpose, differentiation, and truth.[108] Purpose refers to the investigation and motivation, the driving force that inspires action and the practices which define how that investigation takes place—both of which are contextually defined by varied societal values. Differentiation refers to the means of categorization, levels of measurement, or whichever mechanism by which a researcher refers to and distinguishes between objects. Finally, truth refers to claims and hypotheses made by researchers which are necessarily disputed and falsifiable, though not necessarily always what is found in social science research. Williams therefore argues for "situated objectivity," understanding that objective is not a dichotomous concept—one is not simply objective or unobjective—but rather exists in tandem with subjectivity, defined by social context/applicability and disciplinary culture/methodology.[109]

Gayle Leatherby supplements Williams' situated objectivity with "theorized subjectivity," finding objectivity in the researcher's reflexive social practice, which "requires the constant, critical interrogation of our personhood—both intellectual and personal—within the knowledge production process."[110] However voyeuristic social

[107] Gayle Leatherby, John Scott, & Malcolm Williams, OBJECTIVITY AND SUBJECTIVITY IN SOCIAL RESEARCH 6 (2013).

[108] *Id.* at 61.

[109] *Id.* at 71-72.

[110] *Id.* at 80.

sciences may seem, Leatherby draws on Charles Wright Mills' sociological imagination to understand that "the social scientist is part of society and not an externally located observer. . . 'the question is where he [*sic*] stands within it.'"[111] Rather than define objectivity by the removal of bias, Leatherby, Scott, and Williams argue that objectivity is derived by embracing subjectivity, both in qualitative and quantitative methods. Objectivity in this sense is less a question of neutrality, and instead a question of methodology "as a bridge between a metaphysics of the social world . . . and its methods."[112] Methodology identifies the epistemological and ontological assumptions that drive decisions about how research is performed. It is the 'why' embedded beneath a description of 'how.' Objectivity becomes problematic by failing to acknowledge bias and underlying values, in trying to "work without an ontology" and sticking exclusively to the observable—which, Williams argues, "shows order, but very little else."[113]

Ontological assumptions happen all the time in law, and particularly in the Supreme Court—the problem is that they are never acknowledged as ontology. Take, for example, Chief Justice John Robert's perspective on the role of a Supreme Court Justice, as described in his senate confirmation hearing:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the

[111] *Id.* (alteration in original).

[112] *Id.* at 115.

[113] *Id.*

> rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.[114]

What Chief Justice Roberts' analogy fails to appreciate is the unique position of justices to make doctrine—to define the meaning of the constitutional principle. Like umpires, justices and the Supreme Court get to make the decisions that under the written rules of the game, and their interpretive styles are consistently disputed by angry onlookers. While nobody went to a game to see an umpire, the umpire's calling of the game has a profound effect on the way the game is enjoyed. If the fan's favorite player strikes out rather than getting the opportunity to hit a home run, everyone goes home disappointed (except maybe the opposing team). Justices largely keep their ontological assumptions of society under the robes, with a few notable exceptions.[115] Even the justices themselves are part of the larger machinations of the Court as an institutional body—votes determine the outcome of a case and a justice's writing style influences the reasoning in an opinion. Obscuring the ontology also obfuscates methodology, as the methods of research (either in-house or gathering from secondary sources) are hidden behind a veneer of objectivity. The question now becomes whether a situated objectivity

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[114] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary, United States Senate*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

[115] For example Justice Sotomayor was incredibly candid on how her personal outlook, and her legal opinion, are influenced by her identity as a Latina. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be Associate Justice of the Supreme Court of the United States: Hearing Before the Committee on the Judiciary, United States Senate*, 111th Cong. 126 (2005) (statement of Hon. Sonia Sotomayor, Nominee to be Associate Justice of the Supreme Court of the United States). Similarly Justice Ruth Bader Ginsburg's past as a lawyer working for social causes like civil rights and gender equity are part of the reason for her nomination. *See Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearing before the Committee on the Judiciary, United States Senate*, 103rd Cong. (1993).

or theorized subjectivity is even possible at the Supreme Court. Opinions are often gilded with transcendental nonsense of constitutional rhetoric, even when drawing on social science evidence.

3.5 Towards a Critical Race Methodology

Key to developing a methodology for law is divorcing notions of neutrality from objectivity. Positionality and reflexivity have developed special importance in critical social sciences as researchers recognize the power of knowledge production based on the experiences of marginalized peoples and try to work for the betterment of others.[116] Tukufu Zuberi and Eduardo Bonilla-Silva argue that

> critical social scientists on race matters can provide data, arguments, counternarratives, and all sorts of intellectual ammunition against dominant representations about racial groups and racial inequality . . . . [by being] race conscious and engaged in systematic analysis of racial stratification and its effects.[117]

But all the ammunition gathered against white supremacy becomes futile if the Court does not accept the methods, premises, or conclusions—or outright ignores its existence altogether. Mapping and analyzing the Supreme Court's use of evidence through institutional ethnography will therefore provide a way of identifying sensitivities and weak points in white supremacist ideologies at the Court. Of course, in the previous chapter I concluded noting the permanence of racism, meaning that any vulnerabilities to

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[116] *See generally* Tukufu Zuberi and Eduardo Bonilla Silva, WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY (2008); Leatherby, Scott, & Williams, *supra* note 107; *and* Dorothy Smith, INSTITUTIONAL ETHNOGRAPHY: A SOCIOLOGY FOR PEOPLE (2005).

[117] Tukufu Zuberi & Bonilla-Silva, Eduardo, *Telling the Real Tale of the Hunt: Toward a Race Conscious Sociology of Racial Stratification*, in WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY 338 (Tukufu Zuberi & Eduardo Bonilla-Silva eds., 2008).

be exploited might lead to a strengthening of the structure, rather than a change for oppressed racialized peoples—like the retrenchment and shift to colorblindness that the Court has taken post-*Brown*. Yet the two cases I explore in the next two chapters represent a departure from the retrenchment that has been common place, since Justice Kennedy, author of both opinions, has rarely, if ever, authored the opinion of the Court in favor of racialized peoples, typically siding with the conservative wing of the Court. Mapping the social scientific evidence in these two major cases may indicate if there is any scientific evidence that lead to this change, or even if there is an intervening variable that needs to be accounted for.

Intermission: Processing Methods

Rethinking legal research and methods begins with an intervention for sake of transparency. Discussions of justice in the Supreme Court often center on the legal process, but much less detail is given to the research process. In law, the thinking, reasoning, discussion, or general hemming and hawing that leads up to a substantive decision is known as "dicta." Latin for "thing said," dicta has become the catchall for legal reasoning that has weight because it is written in an opinion of the Court and therefore imbued with institutional power. Often this is used to distinguish quotations or statements of law that appear in a judicial opinion, since the judgement of the Court—known as the ruling or holding—becomes binding precedent that future cases should follow. The dicta, nearly everything said leading up to that point, is reasoning and suggestion; it may influence a future opinion, but future courts are not obligated to follow its same reasoning. This holding/dicta distinction can be frustrating. Why read a lengthy opinion when the majority is dismissed as non-binding "dicta" and only the holding matters? Some scholars feel that it is an efficiency standard, used to narrow down tomes of opinion into precise statements of law, and maintain the ultimate authority of the Court.[1] In theory, dicta "helps ensure that like cases are decided alike while simultaneously confining the lawmaking authority of the courts to areas of their institutional competence"[2] In essence, the dicta/holding divide is rooted in the idea that

[1] *See e.g.* Michael C. Dorf, *Dicta and Article II*I, 142 U. PA. L. REV. 1997 (1994) (discussing the role of dicta in courts under Article III); Thomas L. Fowler, *Holding, Dictum ... Whatever*, 25 N.C. CENT. L.J. 139, 162 (2003) (discussing the role of electronic research in blurring boundaries between holding and dicta).

[2] Dorf, *supra* note 1, at 2070.

the Court, as an institution, is not meant to be bound by the writings of an individual judge, but through decisions on facts that establish general principles. Dicta is the process by which the Court makes decisions, supporting reasoning with facts and opinions of a Justice and other external sources. Much of what is studied and discussed in the law is ultimately dicta, and not binding, but supremely important. Drawing attention to dicta draws attention to how law is understood by the judges and Justices who define the metes and bounds of the law; signaling ontological, axiological, or epistemological assumptions underlying the reasoning of a judge or Justice.

In turn I want to use this chapter to draw attention to my own processes of analyzing the law, with this interlude on methods. In the previous chapters I have summarized the theoretical and methodological underpinnings for this study, but I want to take a few pages to consider what it looks like in practice, to define and operationalize terms of study, and describe the coding process that developed throughout the analysis—noting some mistakes and missteps along the way. Some of this material is information that is usually stashed in appendices, or even footnotes, but I wanted to extract and collect this material in its own chapter that sits simultaneously in the middle of the Dissertation and outside the structure of the argument in the Dissertation. This intermission documents practices to establish standards of analysis, to help create consistency in future research that I do, or anyone who reads this and wants to try and replicate or verify, following the notions of objectivity discussed by Leatherby, Scott and Williams, in creating subjective, but reflexive and (somewhat) replicable, research.

Though my methodology is firmly grounded in institutional ethnography, centering the Court and development of a decision, in practice the coding and reading of documents for this analysis draws heavily from David Altheide's description of Ethnographic Content Analysis (ECA).[3] Content analysis is usually quantitative; counting and cataloging recurring themes or terms within a document to "measure the frequency or variety of messages. . . . To verify or confirm hypothesized relationships."[4] Altheide explains that ECA decenters notions of objectivity by emphasizing the "reflexive and highly interactive nature of the investigator, concepts, data collection and analysis."[5] The goal is to "document and understand the communication of meaning. . . . [through] reflexive movement between concept development, sampling, data collection, data coding, data analysis, and interpretation. The aim is to be systematic and analytic but not rigid."[6] ECA adapts to data by beginning from some general theoretical concepts, creating descriptive categories and narrative markers over the course of the analysis. But as much as the researcher must be reflexive and engaged in the process of coding and analyzing documents, "the aim of ECA is to place documents in context just as members do, in order to theoretically relate products to their organizational production."[7] Institutional ethnography and ECA therefore overlap in their use of institutional texts to

[3] David L. Altheide, *Reflections: Ethnographic Content Analysis*, 10(1) QUALITATIVE SOCIOLOGY 65 (1987).

[4] *Id.* at 66-68.

[5] *Id.* at 68.

[6] *Id.*

[7] *Id.* at 74.

analyze and theorize about the structure and function of institutions in society, but importantly centralizing the reflexivity of the researcher in the process. Institutional ethnography focuses on the development of meaning through the institutional process, while ECA reinforces the methodological motivation with a reflexive process of transforming institutional documents into data for analysis.

For both cases I followed the same general process, but as Altheide emphasizes with ECA, the process necessarily requires the structured "reflexive appraisal of documents,"[8] and each chapter contains unique elements related to disparate impact or critical mass, but equally focus on race, the Supreme Court, and social scientific evidence. This intermission represents an intervention for the sake of transparency in the coding process, not only in remaining descriptive, but honest and reflexive in the process of coding so I can say why specific data collection, coding, and analysis choices were made. I wanted to forefront these issues, since my dissertation emphasizes the lack of these issues within the law, while also keeping this information from being lost in footnotes or asides. That said, this intermission is less focused on formalities than the development and expression of a process that generates the final half of this dissertation.

Data Collection

Supreme Court briefs, even those of amicus curiae, are available for free online. All merits and amicus briefs were retrieved from the American Bar Association website which lists briefs from recent Supreme Court cases for the past twelve years.[9] I used the

[8] *Id.*

[9] American Bar Association, Preview Briefs of the United States Supreme Court Cases, www.americanbar.org/publications/preview_home.html (last visited Feb. 1, 2017).

official transcripts of the Court for documenting oral argument, and the official slip opinion released the day the case is announced, both of which are freely available on the Supreme Court's website.[10]

All documents are downloaded as .pdfs then organized in folders by type (record, amicus, merits, oral argument, opinion) and loaded in to an NVivo project. NVivo is a qualitative coding software, typically used for interviews, but has capability to code, organize, and connect a variety of data from different mediums, text, audio or visual. I chose NVivo primarily because it had an emphasis on relationships and textual mapping embedded in the software which I thought would coordinate well with institutional ethnography. NVIVO is also capable of reading text from .pdf files as searchable, and looked to be a user-friendly software, with discount subscriptions for my university. Other software seems equally capable or beneficial, but I have less experience with them, and many of the alternatives require internet access. I wanted the ability to code, read and write from any location and not frustrate my efforts by relying on a quality internet connection to access my data.

NVivo provides multiple ways of cataloging data, but for this analysis I focused mostly on using the Nodes, Cases, and Relationships classifications. Nodes are general thematic markers that can be applied to text, and organized in hierarchies. Cases are ways of distinguishing where data comes from, not only which document source, but also

[10] Supreme Court of the United States, Argument Transcripts, https://www.supremecourt.gov/oral_arguments/argument_transcript (last visited Feb. 1, 2017); Supreme Court of the United States, Opinions, https://www.supremecourt.gov/opinions/opinions.aspx (last visited Feb. 1, 2017).

identifying a speaker or author in any given source document. Relationships allow you to classify ways in which different nodes or cases interact. Here, I use cases to identify the source of the data being coded. Cases were divided into Amicus Curiae, Merits Briefs, Oral Argument, and Supreme Court opinion. Each was subdivided by the side supported, respondent or petitioner, and the author or speaker to better contrast different thematic codes based on the original speaker. With each document coded based on the source of information, I turned to reading the documents to develop my substantive, thematic codes.

How to Code

Drawing on the "constant discovery and constant comparison of relevant situations, settings, styles, images, meanings, and nuances"[1112] of reflexive analysis in Ethnographic Content Analysis, I wanted to avoid rigidly defined categories at the outset of the analysis. Therefore, I did two simultaneous layers of coding, focusing on race, social science, and the institution of the Supreme Court. The first layer of analysis happened in NVivo, building reflexive thematic categories that would grow over the course of the analysis. This layer made it easier for creating the kind of maps imagined by institutional ethnography, creates quick reference points to important details, and helps to keep track of some basic data points on frequency. The second layer was old fashioned pen and paper to track important ideas in five categories: Law, Scientific Evidence, Supreme Court Case law, Theoretical Asides, and Race. These categories

[11] Altheide, *supra* note

[12] Altheide, Reflections, at 68.

developed from the three focus areas of this dissertation (Race, Scientific Evidence, and Race), with two additional categories to note case law to highlight discussions of precedent, and a theoretical asides category so I could make substantive notes to myself on ideas or issues that arose from the text. This category became the most free-form and reflexive in the coding process, identifying areas for analysis in the proceeding chapters. In a more traditional ethnography involving site visits and interviews, the NVivo codes function like interview transcripts, while the hand-written notes are like my field-notes for the coding process.

NVivo Nodes and Cases

After loading all the documents into NVivo for analysis, for *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* discussed in Chapter 4, I created a few preliminary categories in NVivo based on hypothesized importance: definition of disparate impact, when disparate impact applies, and sources. Similarly, in Chapter 5 analysis of *Fisher II,* I focused on definitions and applications of critical mass, descriptions of the University of Texas' admissions policy, demographics, and sources. The definition and application of disparate impact and critical mass respectively help me to illuminate how statistical evidence is useful in defining legal principles. Neither is an exact quantitative standard, but representative of policy aims in desegregating housing and higher education through the law. Sources, then, show what authority is used to define these concepts.

Originally the "sources" node in NVivo was a few discrete categories including Caselaw (grouping opinions of the Supreme Court, federal courts of appeals, and federal

district courts), procedural records (the judgments of lower courts in this case), and a general "external sources" category (books, law journals, etc.).

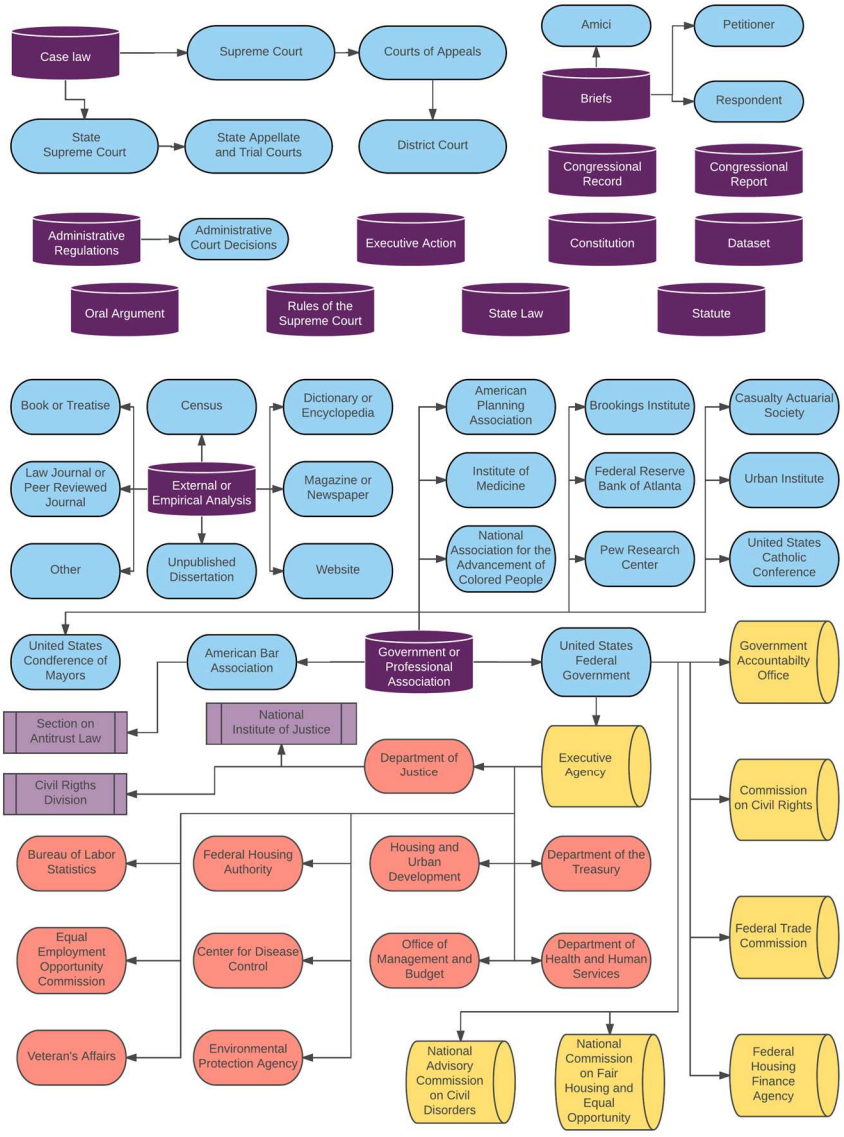

Figure 4: Map of "Sources" node in NVivo for Chapter 4.

As the analysis went on the Sources node grew into more categories, as shown above in Figure I.1. Two categories, "External/Empirical data" and "Government or Professional Association," grew dramatically as I thought it was important to note the

differences between the types of sources within these groups. Different professional associations may be more authoritative or indicate the political leanings of a source—reports by the Brennan Center and Heritage Foundation, in my mind, are not necessarily qualitatively the same.

Other categories grew in NVivo coding, thinking about the purpose of legislation like the FHA, the role and effects of segregation, and even general comments on race, racialization, and segregation. The full list of NVivo nodes for Chapters 4 and 5 are included in the appendices.

Thematic Categories

I used the hand-written notes to help conceptualize and operationalize the ways in which these themes emerge in the writings of the Court and involved parties, filtered through my own thinking. The first category, law, refers to the ways in which the document enforces the "rule of law" or describes a legal purpose—whether that is the institutional legal purpose of the courts or the role and function of a statute like the Fair Housing Act. This was probably my most used hand-written category, since so much of the Court's opinions refer to the purpose of law, legislation, or courts, while the briefs try to impress some sort of duty upon the Court to either confront, resolve, or avoid a serious constitutional issue. Second, scientific evidence, was used far less than expected, but refers to the use or treatment of scientific evidence, or even offhanded comments that are given the air of science. Take, for example, Justice Thomas's dissent in *Inclusive Communities*, that quotes various economists for general assertions on "measurable disparities" like the fact the National Basketball Association is predominantly Black, to

assert that racial disparities are not indicative of discrimination.[12] While the NVivo coding captures what types of sources he is using for these statistics, the handwritten coding is noting that these non-legal sources are used to make a point about the role of statistics.

My third thematic code, Case law, is a slight modification of the law thematic code, since this point looks at how the Court structures it's authority in making a statement of precedent. For the most part this was a very direct example, and overlaps with the NVivo coding since the recurrence of cases across multiple sources is captured both by NVivo coding and the thematic coding. Fourth, Theoretical Asides, was used to draw attention connections and insights that emerged during the coding analysis. Part of this was used to develop hypotheses or other NVivo codes as a part of the reflexive process, but also to pre-write commentary that would become part of my analysis. The fifth and final thematic code was race and racialization, to identify areas when the Court made statements about race as a concept, experience, or practice. This helped inspire the segregation and desegregation coding that became part of my NVivo coding, listed in appendices A and B. Coding for race and racism in the Supreme Court was also important as a potential future source of data and information for other projects, considering that the Supreme Court Database, the most comprehensive quantitative summary of the Supreme Court,[14] contains codes for civil rights issues and some finer

[12] *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 576 U.S. ___, 135 S. Ct. 46

[14] Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2016 Supreme Court Database, Version 2016 Release 01. URL: http://Supremecourtdatabase.org

legal points on segregation and discrimination, but lacks a code for race or racialization that I think would be important to future analyses, especially from a Critical Race perspective. Thus, this category explores the ways that race is discussed, particularly "race neutral" and "race consciousness" that becomes a recurring argument in both cases. Developing codes for race, particularly with legislation, could assist in future studies of the Supreme Court and how courts define racial categories that it plays such a large role in defining—even as authorities like Chief Justice Roberts decry the existence of race.

Coding Process

My coding process involved a close reading of the document, coding the document in NVivo as it was read, making handwritten notes on thematic categories along the way. In each case I worked my way backwards, beginning by coding the final decision of the Court—starting with the ending in each case to see what arguments were most important to the Court, and working backwards. After coding Justice Kennedy's majority opinion and Justice Thomas' and Justice Alito's dissents, I moved back into coding the Oral Argument, identifying each speaker as a "case" in NVivo. After oral argument were Merits Briefs, followed by the many Amici in both cases, and finally the petitions for Certiorari that initiate the proceeding.

Coding in this way enhanced my reflexive thematic coding in NVivo and by hand because then I could see in Amicus Briefs and Merits briefs which arguments inspired or directly influenced the final opinions. It also helped to make connections through Oral Argument, identifying what arguments were most salient to the final decision, and which justices and counsel teased out those ideas at oral argument, if at all.

After manually coding in NVivo and in my own notes, I used NVivo to retroactively code the entirety of my data for key terms that emerged from my previous reading, and to map terms. NVivo contains a word-tree and word chart features, which allow me to create additional visualizations based on key features from the texts. Coding schemes in this way are straightforward, as the concepts are drawn directly from their use in the text. I want to focus on how the Court develops ideologies, arguments, and meaning through its institutional authority, and what types of authorities are used to develop or reinforce the statements of the Justices of the Court.

Foreshadowing and Missteps

Remaining true to institutional ethnography, I proposed to visually map my analysis in the following chapters. To keep the visuals streamlined, I will display the five phases of institutionally action in a Supreme Court Case (Certiorari, Merit Briefs, Amicus Briefs, Oral Argument, and Decision), and use charts to try and map the movement of sources, ideas, hypotheticals, and other elements of argumentation in reaching the ultimate decision.

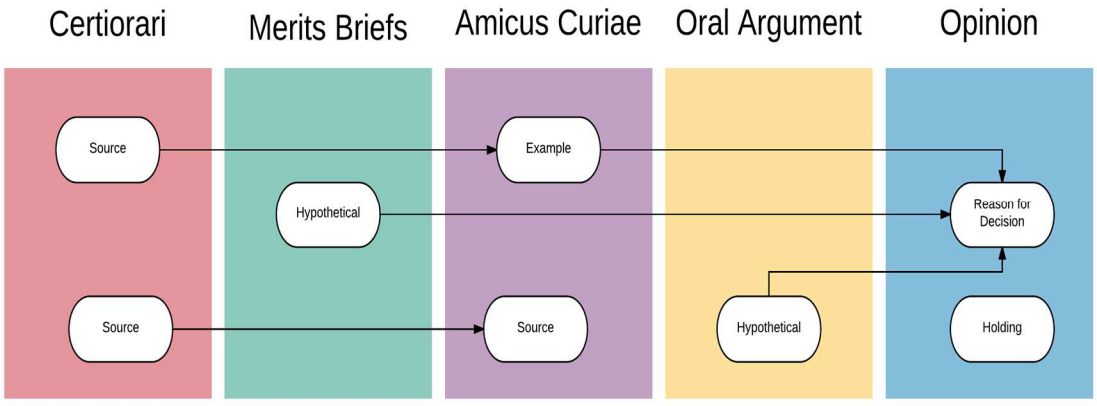

Figure 5: Example of Argument Map

The example above in figure I.2, demonstrates a simplified version of the maps that I intended to appear in Chapters four and five. I believed this method of visualizing information will help to keep the analysis simple, consistent, and maybe even visually appealing. However, in practice, these maps might be better suited to a narrower line of argumentation. The maps developed from my handwritten notes, supplemented by codes from NVivo, and tracked lines of argument based on the cited authority or the general thrust behind the argument. Attached in appendix c, Figure 17 shows a digitally mapped illustration of the line of argument from Chapter 4, and Figure 18 shows the hand drawn version that is used as the basis for the digital maps. Because there are so many parties and lines of argument involved, they became unwieldy for a visual map, and are likely better suited to a single opinion or brief. These maps are incredibly helpful thinking through such a glut of information, each case included thousands of pages of legal documents, with citations on top of that. Mapping was crucial to keeping track of argumentation, but the maps become less helpful in relating the information to a reader visually. Instead, the arguments are better deconstructed through text.

As a final note before ending the intermission and ushering readers back from concessions, I want to suggest a hypothesis about the use of scientific evidence and race in these cases: Based on the literature described in Chapter 3, I believe that more scientific evidence will come on the side advocating for racial change—meaning parties that are in favor of disparate impact analyses and affirmative action, seeking to alter, if not upend, existing status quos of race. This is how scientific evidence became important

through Brandies briefs, and footnote 11 in *Brown*,[13] it makes sense that tradition would continue into modern argument.

I now return you to your regularly scheduled programming.

[13] *See supra* Chapter 3.

4 Unfair Housing: Disparate-Impact and the Fair Housing Act

"Property, property, property, property, nigga I'm tryna invest"
- 2 Chainz, *Rick Ross (f. 2 Chainz and Gucci Mane) - Buy Back the Block*

"You know so we ain't really never had no old money
We got a whole lotta new money though"
- Offset, *Migos - Bad and Boujee*

In the summer of 2015, a group of teenagers gathered for a pool party in McKinney, Texas—only to have the police called on them. Local police were dispatched in response to a reported "disturbance involving multiple juveniles at the location, who do not live in the area or have permission to be there, refusing to leave."[1] Police officers arrived to break up the gathering of teens. One of the police officers was filmed drawing his gun on Black youths, using police training to tackle a young Black woman and pin her to the ground with his knees in her back.[2] Video of the incident went viral on YouTube and Twitter, becoming part of public discussions on anti-Black police violence, public spaces, and the historical and racial significance of swimming pools.[3] Later reports revealed the entire incident was instigated by a white woman assaulting Tatyana Rhodes, a 19-year-old Black woman hosting the party, who lives in the community with

[1] Yoni Applebaum, *McKinney, Texas, and the Racial History of American Swimming Pools: Backyard Pools and private clubs only proliferated after municipal pools were forcibly desegregated*, THE ATLANTIC (June 8, 2015), https://www.theatlantic.com/politics/archive/2015/06/troubled-waters-in-mckinney-texas/395150/.

[2] Brandon Brooks, *Cops Crash Pool Party (Original)*, YouTube https://youtu.be/R46-XTqXkzE.

[3] *See e.g.* Applebaum, *supra* note 1; Kriston Capps, *Race, the Supreme Court, and the McKinney Pool: A pending case will decide whether suburbs far beyond Texas can use income to bar poor, black residents from more than just pools*, CITY LAB (June 8, 2015), http://www.citylab.com/housing/2015/06/race-the-supreme-court-and-the-mckinney-pool/395144/; Gene Demby, *Who Gets to Hang Out at the Pool?*, NPR CODE SWITCH, (June 9, 2015), http://www.npr.org/sections/codeswitch/2015/06/09/412913702/who-gets-to-hang-out-at-the-pool.

her family.[4] By most accounts, the older white woman told Ms. Rhodes and other Black youth to leave the community pool and go back to section 8 housing[5]—housing rented through federal vouchers administered by the Department of Housing and Urban Development. Fundamentally, the conflict centers issues of race and belonging—who belongs in public space, the community pool, and private space, residence in McKinney.

Six years before the McKinney pool party incident, the Inclusive Communities Project (ICP), a Dallas-based nonprofit organization dedicated to opening access to housing in high-income communities, sued the city of McKinney and the McKinney municipal housing authority, alleging the city reinforced racial segregation by "making dwellings unavailable because of race."[6] The parties settled before trial. In the only decision of the case, Judge Michael Schneider denied the City's motion to dismiss, since the ICP pleaded facts sufficient to state a cause of action based on racial steering in violation of the Fair Housing Act.[7] McKinney, Texas is split by U.S. Highway 75; East McKinney is 49% white, West McKinney is 86% white.[8] All public housing and landlords willing to accept housing vouchers are in East McKinney. ICP alleged the city

[4] Naomi Martin, *Racist comments prompted McKinney pool party fight, host says*, DALLAS NEWS, (June 2015), http://www.dallasnews.com/news/crime/2015/06/08/racist-comments-prompted-mckinney-pool-party-fight-host-says.

[5] *Id.*

[6] *Inclusive Communities Project, Inc. v. City of McKinney Texas*, No. 4: 08-CV-434 (E.D. Tex. Aug. 18, 2009).

[7] *Id.*

[8] *Id.*

failed to "negotiate for and provide low-income housing units" in west McKinney.[9] The City and housing authorities moved to dismiss for "failure to state a claim for which relief may be granted," usually meaning the claim does not fall within the parameters for a claim or remedy under the applicable statutes or regulation.[10] The Judge found ICP provided sufficient evidence for a claim, and denied the motion to dismiss. But again, the parties settled out of Court, so the case never went to trial, and no trial record was made of the City's segregation or the housing authority's failure to remedy it.

One year before the suit against McKinney, ICP filed a similar, but separate, suit against the Texas Housing Authority. In the 2008 suit, ICP alleged the Texas Department of Housing and Community Affairs (TDHCA) "intentionally discriminated based on race, in violation of the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C. § 1982, or that TDHCA's allocation decisions had a disparate racial impact, in violation of §§ 3604(a) and 3605(a) of the Fair Housing Act."[11] After four years, a summary judgment decision and a bench trial, Judge Fitzwater found ICP proved the Low Income Housing Tax Credit program had a racially disparate impact under the FHA, but found in favor of the TDHCA on the intentional discrimination claims.[12] On appeal, the Fifth Circuit found the District Court decided the Case correctly, but still reversed and

[9] *Id.*

[10] Fed. R. Civ. P. 12(b)(6).

[11] *Inclusive Communities Project, Inc. v. TDHCA*., 860 F. Supp. 2d 312, 313-314 (N.D. Tex. 2012).

[12] *Id.*

remanded.[13] The District Court was instructed to apply the new standard for disparate impact under the Housing and Urban Development (HUD) guidelines published in 2013, the year after the original case was decided. By 2015, Texas Attorney General successfully appealed to the Supreme Court on the limited question of whether the FHA permits a claim of disparate impact.[14]

On June 25, 2015, twenty days after McKinney police arrived on the scene of pool party where White onlookers harassed Black partygoers to go back to section 8 housing, the Supreme Court affirmed the decision of the Fifth Circuit in *TDHCA v. Inclusive Communities Project*, confirming the viability of disparate-impact claims under the Fair Housing Act.[15] The McKinney incident and *Inclusive Communities* are rooted in segregated housing and racial discrimination, take place in the same metropolitan area, with an oddly parallel set of circumstances. Had the city of McKinney not settled its suit, it likely would have joined the appeals in *Inclusive Communities*.

Yet the synchronicity of these two events inverts business as usual in discrimination law. Typically, courts will only recognize discriminatory intent, individual acts of racial meanness—like white bystanders telling Black youth to return to section 8 housing, or Officer Casebolt unreasonably tackling, injuring, and pulling a firearm on Black youths. The Supreme Court rarely recognizes claims of discriminatory

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[13] *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 747 F.3d 275, 283

[14] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S.Ct. 46 (2014) (granting certiorari limited to question 1).

[15] 576 U.S. ___, 135 S. Ct. 2504, No. 13-1371 (2015).

effect, disparate impact, or other quantitative or qualitative showing of systematic bias and discrimination on the basis of race.[16] Yet in these instances of housing discrimination in Texas, the individual acts of meanness have, so far, gone unpunished in court,[17] but the Court upheld the disparate impact standard in *Inclusive Communities*.

Racialized housing disparities raised in disparate impact claims are aggregations of history, policy, and personal experience. The Court's analysis of disparate impact therefore necessarily draws in multiple sources of authority for understanding how housing disparities come in to being, and how those disparities are to be evaluated. Housing discrimination is about social engineering, controlling the daily lives of people and what resources are available to them—jobs, schools, other people, etc. This chapter therefore takes a close look on how the Court considers disparate-impact in housing, looking to what arguments and authorities were persuasive, and the role of social scientific evidence in the process.

Importantly, *Inclusive Communities* solidifying disparate impact signals potential for expanded consideration of racism, or at least institutional racial discrimination, in

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[16] *See e.g. McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that statistically significant showing of racial discrimination in the administration of the death penalty in Georgia was insufficient to indicate a violation of equal protection that would invalidate a defendant's death sentence); *Ricci v. DeStefano*, 557 U.S. 557 (2009) (holding a city's invalidation of test results based on racially disproportionate exclusion of non-whites violated Title VII of the Civil Rights Act).

[17] Neither Officer Casebolt, nor the woman who slapped the Black youth or bystanders who yelled epithets, faced any criminal charges, *see* Krishnadev Calamur, No Charges for the Texas Pool-Party Cop, *The Atlantic* (Jun. 23, 2016) (available at https://www.theatlantic.com/news/archive/2016/06/mckinney-pool-officer/488525/). However, the young Black woman tackled by Officer Casebolt has filed a civil suit against the officer, the city, and the police department. Julieta Chiquillo, Girl pinned down at McKinney pool party sues ex-cop, city for $5 million, *Dallas Morning News* (Jan. 4 2017 (available at http://www.dallasnews.com/news/mckinney/2017/01/03/girl-pinned-mckinney-pool-party-sues-ex-cop-city-5-million).

courts. Disparate impact is a theory of measuring racism, but this is not an exact science; no bright line statistical margin will automatically trigger a verdict for either side. Rather, disparate impact highlights an epistemology and ontology of scientific evidence in the law—allowing discrimination to be recognized as a structural, systematic effect, without having to prove particularized intent.

Therefore, this chapter analyzes how disparate impact is conceptually defined and applied by the Supreme Court in *TDHCA v. Inclusive Communities Project*. First, I contextualize housing discrimination in the Fair Housing Act (FHA), identifying the social, political, and historical context for the statutory controversy presented before the court in *Inclusive Communities*. Next, I look at how the Court defines disparate impact under the FHA in *Inclusive Communities*, mapping how the standard develops and what authorities are used to make disparate impact clear. From this working definition, I look to what hypotheticals, examples, and studies are used to illustrate or rebut disparate impact analyses in *Inclusive Communities*. Argumentation in the law largely happens by analogy, so the examples and authorities used in each line of argument may reveal additional meanings underlying stated reasons for decision or dissent.

Above all, this chapter examines how the Court conceptualizes claims of racism. *Inclusive Communities* revolves around a seemingly simple question of statutory interpretation: "whether disparate-impact claims are cognizable under the Fair Housing Act."[18] It is a question about the validity of standards and units of analysis—whether discrimination must be individual or can be shown in aggregate in a court of law. Could

[18] 576 U.S. ___, 135 S. Ct. 2504, No. 13-1371 at 1 (2015) (Slip Op.).

Courts remedy systemic issues of racism like segregation, particularly once they become covert and obscured by ostensibly neutral policy? Can systemic racism even be shown in a way courts will accept? And of course, what types of evidence does the Court use to legitimize or impugn disparate impact? The Court's conclusion that disparate impact is valid, as promulgated by Housing and Urban Development regulations, is just as important as the reasoning used to reach that point and the way the Court contextualizes the purpose of the FHA.

4.1 Identifying Housing Discrimination

Racialization and citizenship have consistently been tied to notions of home and property ownership in the United States. Sociologist Matthew Desmond calls the home "the center of life. . . . The home is the wellspring of personhood. It is where our identity takes root and blossoms."[19] Home's centrality to identity and personhood make it a key site for regulations to maintain racialized boundaries and hierarchies. Owning land was an early requirement for the right to vote, and many states carried that tradition into the 20th century by using land ownership as automatic exemptions to discriminatory voting requirements like registration, literacy tests, or poll taxes.[20] Race in the United States is embedded in systems of property—the dispossession of American Indian lands by reducing sovereignty to a right of use and occupancy[21] or the dehumanization of African

[19] Matthew Desmond, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 293 (2016).

[20] *See* Alexander Keyssar, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES. 6, 335-336 (2009).

[21] *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

peoples and their descendants under chattel slavery—because race, and whiteness in particular are forms of property under the law.[22] Housing is a basic element of civic life; where you live can determine what schools are available, what districts you vote in, access to affordable fresh foods, the types of policing strategies used near your home. Communities form around homes, not just in the style or type of housing, but in creating meaningful connections between people based on who lives in proximity to one another.

Segregated housing is a policy-driven manifestation of white supremacy with two-fold purpose: maintaining strict racial hierarchy by reserving quality housing—and thereby intergenerational wealth—for whites, and eliminating avenues for interracial community building. Richard Rothstein explains that segregated communities are not just the result of a few racist realtors, neighbors, or bad apples, but a coordinated effort between federal policy, homeowners' associations, and realty associations.[23] In an illuminating study on Ferguson, a segregated suburb of St. Louis, Missouri, Rothstein documents how a web of policies and practices create segregated, disparate housing standards at the expense of Black people:

> St. Louis was segregated by interlocking and racially explicit public policies of zoning, public housing, and suburban finance, and by publicly endorsed segregation policies of the real estate, banking, and insurance industries. These governmental policies interacted with public labor market and employment policies that denied African Americans access to jobs available to comparably skilled whites. When these mutually reinforcing public policies conspired with private prejudice to turn St. Louis's African American communities into slums, public officials razed those slums to

[22] *See* Cheryl I. Harris, *Whiteness as property*, 106 HARV. L. REV 1707 (1992)(arguing that whiteness is a form of status property to create rights and entitlements specific only to those who possess whiteness).

[23] Richard Rothstein, THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES 1 (Economic Policy Institute, 2014).

> devote acreage to more profitable (and less unsightly) uses. African Americans who were displaced then relocated to the few other places available, converting towns like Ferguson into new segregated enclaves.[24]

Thus, even short-lived discriminatory housing policies and practices create lasting racial disparities. Discriminatory, restrictive housing restricts employment—by proximity, transportation costs, or overall expenses—which creates more housing disparities since income is inversely proportional to the ability to buy a home or change housing situation. Housing is also linked to education, both in the localities of schools youth attend and the tax base used to fund public schools, which effects higher education, and future employment. Housing discrimination is thus a central feature in racialization and racial stratification in the United States.

The Fair Housing Act is the primary mechanism under federal law to remedy the cumulative effects of housing discrimination. President Lyndon B. Johnson created the Kerner Commission in 1967 to investigate sources of "civil unrest," following major race riots—Watts, Los Angeles in 1965, Chicago in 1966, and Newark in 1967.[25] The Commission's findings were to the point: "White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II."[26] The Kerner Report cited "[p]ervasive discrimination and segregation in employment, education and housing" as key areas where racism deprived Black people from "the benefits of economic progress," pulling no punches in the description of

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[24] *Id.* at 30-31.

[25] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 6 (1968).

[26] *Id.* at 15-16.

segregation, white supremacy, and systemic racism that continue to influence the everyday lives of Black people.[27] The Fair Housing Act was an attempt to remedy housing segregation through federal legislation, but had been blocked by filibuster for two years until the Kerner Report was released.[28] After passing the Senate, the bill was stuck in the House rules committee until April 4, 1968 when the assassination of Martin Luther King Jr. and ensuing riots provided a "tragic momentum" to pass the Fair Housing Act within a week.[29] While the Kerner Report directly indicted racism as the primary culprit of housing discrimination, the FHA makes broad prohibitions on discrimination in renting, selling, or to "otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[30]

However, the many exemptions permitted under the FHA, combined with the "anemic enforcement provisions" made the FHA "largely symbolic."[31] In such a crucial area, where racism is prevalent and even directly identified in congressional reports, indictments of racism in the laws meant to remedy or prevent discrimination are largely

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[27] *Id.*

[28] *See* Jean Eberhart Dubofsky, *Fair Housing: A Legislative Hsitory and a Perspective*, 8 *Washburn L. J.* 149, 153 (1969); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low-Income Housing Tax Credit*; 58 VAND. L. REV. 1747, 1766 (2005);

[29] Dubofsky, *supra* note 28, at 160; Orfield, *supra* note 28, at 1766; John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1069 (1998); john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 18 J. AFFORDABLE HOUSING & COMMUN. DEV. L. 145, 146 (2008) (author does not capitalize his name).

[30] 42 U.S.C. § 3604.

[31] powell, *supra* note 29, at 146.

missing.[32] Myron Orfield's analysis of the FHA is more generous, proclaiming it as "one of the most hallowed accomplishments of American Law" with clear congressional intent to achieve racial integration, but still recognize that, "without persistent advocacy, even the clearest legislative pronouncements will not enforce themselves" urging housing advocates to utilize the FHA in addition to other potential remedies.[33] John O. Calmore's review of the FHA after thirty years argues that "racism has simply overwhelmed fair housing" as racist housing practices moved and adapted faster than Federal housing programs or the FHA could combat discrimination.[34] john a. powell echoes Calmore's sentiment in his forty year review of the FHA, noting that the "narrow antidiscrimination measure" of the FHA targeted older manifestations of housing discrimination, meaning housing advocates must "posit new mechanisms for intervention" based on evolving structures.[35]

One of the major problems in the FHA's attempts to address housing segregation is focus on individualized discrimination and remedy. HUD surveys on public awareness in the early 2000's revealed that although most people understood that housing discrimination violated the FHA, "eighty percent of the adults who reported having experienced forms of federally prohibited discrimination took no action."[36] Even if these

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[32] *Id.*, *see also* Calmore, *supra* note 29, at 1071-1072.

[33] Orfield, *supra* note 29, at 1804.

[34] Calmore, *supra* note 29, at 1071.

[35] powell, *supra* note 29, at 159-60.

[36] Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 INDIANA L. REV. 797, 805 (2008).

individuals had taken action, the remedies provided are too individualized to provide relief against systemic and systematic discrimination— granting attorney's fees and small payments to successful plaintiffs.[37] Claims for individual discrimination require some showing of discriminatory intent, which is often incredibly difficult to come by. This requires plaintiffs to prove that a seller, realtor, landlord, or other person denied them housing because of their race—when a multitude of factors that correlate with race like credit score or criminal record can be used to claim non-racist motives and still maintain racist or discriminatory effects on people of color.[38] Overt, individual acts of meanness and subtle, structural decisions both have racist implications and support white supremacy. But despite these racialized harms, courts rarely use disparate impact to recognize the discriminatory effects beyond an individual act of meanness.

Disparate impact claims take a broader view, looking to policies and practices that create barriers to expanded housing choices or housing improvements within communities of color. Though the Fair Housing Act never says "disparate impact," the language and aims of the FHA imply this approach. Derived from the Court's decision on employment discrimination *Griggs v. Duke Power Co.* in 1971,[39] disparate impact litigation in housing took hold in district courts and courts of appeals in the mid-1970's to

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[37] *See* Margalynne J. Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purpose of the Fair Housing Act*, 64 TEMP. L.R. 909, 913 (1991).

[38] *See e.g.* Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing A*ct, 15 MICH. J. RACE & L. 181 (2009) (comparing existing enforcement guidance under the Fair Housing Act, suggesting increased access to housing for persons with criminal records, since criminal record screening policies disproportionately affect people of color).

[39] 401 U.S. 424, 431 (1971).

remove regulatory barriers to housing and help expose discriminatory intent in facially neutral practices.[40] Although courts have consistently and overwhelmingly approved of disparate impact litigation, Stacy Seicshnaydre's analysis of the past 40 years of disparate impact litigation in federal appellate courts shows that plaintiffs are rarely successful—just eighteen of the ninety-two disparate impact claims received positive decisions.[41] Still, federal appellate courts have been unanimous that disparate impact is cognizable under the FHA, but with different standards of proof and review, until HUD implemented a new rule in 2013.[42]

After forty years of judicial standards enforcing disparate impact standards derived from interpretation of the FHA, *Texas Department of Housing and Community Affairs v. Inclusive Communities* would be the first time the Supreme Court weighed in on disparate impact under the FHA. Disparate impact analyses are a courts way of engaging a sociological, quantitative, or even historical lens, in examining what housing practices have a discriminatory effect. With established appellate case law, commentators were pessimistic when the Court accepted review,[43] but as the next section explores, the Court surprisingly reinforced and centralized a disparate impact standard.

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[40] Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U.L. Rev. 357, 361-62 (2013).

[41] *Id.* at 393.

[42] *Id.* at 403.

[43] *See e.g.* Rigel C. Oliveri, *Beyond Disparate Impact: How the Fair Housing Movement Can Move On*, 54 WASHBURN L.J. 625, 625-626 (2015) (noting the conservative majority of Justices and recent decisions removing antidiscrimination law, "the Supreme Court may well pose an existential threat" to disparate impact); Cornelius J. Murray IV, *Promoting "Inclusive Communities": A Modified Approach to Disparate Impact Under the Fair Housing Act*, 75 LA. L. REV. 213, 232 (2014) (describing *Inclusive Communities* as the "potential knockout blow" to disparate impact under the FHA); Valerie Schneider, *In Defense of*

4.2 Disparate Impact under the Fair Housing Act

Inclusive Communities presents a seemingly straightforward question of statutory construction; can the statute be read to allow claims of disparate impact? Fundamentally, this is a question of method and fit—what legal approach best addresses problems of housing discrimination and segregation, and did Congress intend to facilitate such an approach? Both the Texas Department of Housing and Community Affairs (Texas) and the Inclusive Communities Project (ICP) agree the Fair Housing Act (FHA) was meant to address segregation by outlawing discrimination on the basis of race. The dispute comes from the scope of the solution.

The FHA gives a broad prohibition against discrimination, making it unlawful to "refuse to sell or rent. . . Or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. [or] to discriminate against any person [housing] because of race."[44] From the passage of the FHA, courts have interpreted these blanket statements against discrimination in housing to encompass both specific instances (discriminatory intent) and systemic issues (discriminatory effect or disparate impact).

Texas, and its amici, embraces only the intent-based description of the issue, going as far as to say that disparate impact claims create a "constitutional quagmire."[45]

Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act, 79 MO. L. REV. 540, 544 fn. 8 (2014) (describing the Supreme Court's "apparent interest in limiting disparate impact").

[44] 42 U.S.C. § 3604 (2012).

[45] Brief for Petitioner at 25, *TDHCA v. Inclusive Communities*, 576 U.S. ____ (2015) (No. 13-1371).

This near sighted, colorblind approach requires a conceptualization of racism as only individual acts of meanness, and frames any sort of consideration of race as an odious, unconstitutional practice in violation of the Equal Protection clause. Conversely, the disparate impact paradigm does not exclude an intent-based approach; it adds consideration of racially discriminatory consequences. Few housing authorities openly discuss how they intentionally deny housing or divide communities because of race.

Instead, disparate impact litigation attempts to determine a statistical link between policies and practices in housing and their effect based on race. The Housing and Urban Development regulations at the center of this litigation defined discriminatory effect as:

> a practice . . . [which] actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.[46]

Defendants may raise a "legally sufficient justification" by showing that the underlying practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" that could not be achieved by a less discriminatory alternative.[47] Plaintiffs have a burden of proving "that a challenged practice caused or predictably will cause a discriminatory effect," which in turn shifts the burden of proof to the defendant's legally sufficient justification, though the court may still find the practice may be served by a less discriminatory alternative.[48]

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[46] 24 C.F.R. § 100.500(a) (2014).

[47] *Id.* At § 100.500(b).

[48] *Id.* at § 100.500(c).

This regulation codifies a statistical burden of proof to indicate a direct relationship between a practice and racial discrimination or disparities. As a burden of proof, it is appropriately vague to facilitate application in different cases. There is no strict requirement of statistical correlation, significance, or method of showing the discriminatory effect in question. Rather, the rule requires a causal link: "caused or predictably will cause."[49] Comments at the publication of the rule emphasize claims should not involve "hypothetical or speculative" discrimination or justifications, but must involve evidence.[50]

Although these claims involve statistical evidence, notions of "proof" and "cause" are used in their legal, not statistical sense. Requiring evidence and avoiding hypothetical are meant to avoid speculation and restrict litigation to actual cases and controversies between parties that have been injured in some way—ensuring parties have standing to sue.[51] Cause is a legal requirement, not statistical one; courts are looking for statistically significant correlation that explains a relationship, not an absolute causal chain.[52] In disparate impact cases this does not merely mean that there is an uneven distribution; merely showing 58% on one side of town and 42% on another is not evidence of discrimination. Rather, the HUD rule and disparate impact claims identify

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[49] *Id.*

[50] Department of Housing and Urban Development, *Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule*, 78 Fed.Reg. 11,460 (Feb. 15, 2013) (Codified at 24 C.F.R. Pt. 100).

[51] U.S. Const. Art. III., § 2, Cl. 1.

[52] *See e.g.* Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773 (2009).

different factors in housing segregation; interrogating the relationships between these policies and race, and whether this relationship is acceptable under the Fair Housing Act.

4.2.1 Interpreting Statutes and Regulations

Nowhere in the FHA is there an explicit statement of disparate impact. The disparate impact theory of liability developed shortly after the FHA became law. However, when this standard was interpreted under other anti-discrimination laws, the Court relied on the phrase "otherwise adversely affect" to indicate that the legislation targets discrimination both in intent and effects, and thus "compel[s] recognition of disparate-impact liability."[53] Unfortunately, the FHA never uses the key "otherwise adversely affect" phrase. This lack of a key statutory phrase was a central point of contention in Texas' certiorari[54] and merits briefs.[55] Without the accepted key phrase, there is more room for interpretation of the statutory language and purpose, since the Court's decision is no longer so strictly limited by precedent.

Yet interpreting the language of a statute is never as simple as reading the text and consulting a dictionary, no matter how many textualists are on the bench. Rather, the Court typically refers to the legislative history, drafting documents, and previous opinions of the Court interpreting similar phrases. In this case, Justice Kennedy's majority opinion finds the FHA's use of "otherwise make unavailable" sufficiently

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[53] *Inclusive Communities*, Slip Op. at 10, (comparing *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (a disparate impact claim under the Age Discrimination in Employment Act) and *Griggs*, 401 U.S. at 426 (a disparate impact claim under Title VII of the Civil Rights Act)).

[54] Petition for Writ of Certiorari, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371).

[55] Brief for the Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371).

analogous to the "otherwise adversely affect" language, based on primary and secondary documents surrounding the passage of the FHA and previous opinions of the Court and courts of appeals. Citing to largely the same primary and secondary sources, Justices Thomas and Alito completely disagree with Justice Kennedy's conclusions, arguing that the "because of race" language that precedes the "otherwise make unavailable" limits the FHA to only discriminatory intent. A seemingly straightforward question of textual interpretation becomes part of a network of statutory language, interpretations of other cases involving similar statutory language like *Griggs* or *Smith*, and secondary sources.

4.2.1.1 "Otherwise Make Unavailable"

Justice Kennedy's majority opinion reflects the respondent ICP's line of argument, joined by various amici, that draws parallels between the "otherwise adversely affects" language approved of if previous disparate impact cases and the "otherwise make unavailable" language in the FHA. Justice Kennedy begins this argument by contextualizing the FHA through the Kerner Commission report.[56] Almost all of the amicus briefs in support of disparate impact emphasized the purpose of the FHA: desegregating housing and removing obstacles to housing for people of color.[57] Amici even included the drafters and sponsors the FHA, who bluntly stated it was their intent to remedy racial housing disparities and discriminatory effects.[58]

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[56] *Inclusive Communities*, Slip Op. at 5-7.

[57] By my analysis, 16 of the 19 briefs in favor of respondent discussed the purpose of the Fair Housing Act, compared with 9 of the 16 briefs in support of petitioner.

[58] Brief of Current and Former Members of Congress as *Amici Curiae* in Support of Affirmance, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) at 3.

Even though it was not the same "otherwise adversely effect" language that has triggered disparate impact previously, the legislative history, statutory context, and purpose show "otherwise make unavailable" is sufficient to trigger disparate impact litigation. Justice Kennedy resolves the issue primarily through case law and comparative analysis in the same way that ICP and its amici resolved the issue; applying the reasoning of *Griggs* and *Smith*, comparing statutory language of the FHA, Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act.[59] Although the language is not identical, Justice Kennedy reasons that using the exact language "would have made the relevant sentence awkward and unclear."[60] Making it unlawful to 'otherwise adversely affect a dwelling' "would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended."[61] We see how proper grammar pays dividends, as part of the justification for preserving a statutory scheme that comprehends systemic racism.

Justices Thomas and Alito present contrary interpretations to largely the same body of evidence. Justice Thomas bluntly asks the court to "drop the pretense that *Griggs'* interpretation of Title VII was legitimate."[62] Justice Alito extensively compares *Griggs*, *Smith*, and the FHA, but concludes that "make unavailable" is really an intent

[59] *Inclusive Communities*, Slip Op. at 12.

[60] *Id.*

[61] *Id.*

[62] *Inclusive Communities*, Slip Op. at 1 (Thomas, J. Dissenting).

requirement due to the "because of" language.[63] What Justice Kennedy and the majority interpreted as a causal link,[64] Justice Alito reads as a very strict intent requirement that necessitates direct actions and actors.[65] This obfuscates the entire purpose of Fair Housing, and even racial discrimination in housing. Although it makes for great fiction, racism was not engineered by a secret cabal who documented their illicit practices. Racism, and especially housing discrimination, was created openly and notoriously in its time as part of a white supremacist ideology of segregation that was put in to practice and made law by legislatures throughout the country. Law permits racial discrimination, even where segregation was not mandated and even now that segregation is unconstitutional. Housing discrimination in modern time relies on unspoken assertions and assumptions about people of color, like presumptions of criminality, that can go unpunished if unspoken. Using to a broad disparate impact standard asserts that housing discrimination and segregation are unconstitutional in principle, while using Justice Alito and Thomas' strict intent standard only recognizes the unconstitutionality of discrimination in very specific practices.

4.2.1.2 The 1988 Amendments

Interpreting the FHA also requires considering Congressional silence. Congress did not mention disparate impact within the original text of the FHA, which makes sense considering disparate impact emerges from *Griggs*, three years after the Civil Rights Act

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[63] *Inclusive Communities*, Slip Op. at 7 (Alito, J. Dissenting).

[64] *Inclusive Communities*, Slip Op. at 20.

[65] *Inclusive Communities*, Slip Op. at 8 (Alito, J. Dissenting).

and FHA became law.[66] Once *Griggs* was decided, lower courts heard disparate impact claims under Title VII, Fair Housing, and other nondiscrimination laws, to varying degrees of success.[67] By the 1980s, disparate impact litigation under the FHA was well established in district and appellate case law. Every appellate court reviewing a disparate impact claim accepted *Griggs* and its applicability to the FHA.[68] According to Stacy Seicschnaydre, disparate impact had its highest rate of success in the 1970s and 1980s, with plaintiffs succeeding in 12 of the 19 cases reviewed, with declining success for plaintiffs ever since.[69] In 1988, Congress amended the FHA to add prohibitions on discrimination on the basis of "handicap" and "familial status,"[70] as well as three exemptions to liability—number of occupants, drug distribution, and for appraisers.[71]

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[66] Justice Ginsburg made this point explicit at oral argument, calling it "a little artificial" to say whether Congress meant to say disparate impact at the time of the statute. Transcript of Oral Argument at 15-16, *Inclusive Communities*, 576 U.S. ___ (2015) (No. 13-1371).

[67] *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 738-7399 (2006) (summarizing district and appellate court decisions under disparate impact, showing a 19.2% success rate at the appellate level, and a 25.1% success rate at the district court level) *and* Seicshnaydre, *supra* note 40, at 400-403 (noting that disparate impact claims under fair housing do not have a high success rate, but claims challenging barriers to housing had a 44.4% percent success rate at the appellate level).

[68] See *Huntington Branch, NAACP v. Huntington*, 844 F. 2d 926 (2d Cir. 1988); *Resident Advisory Bd. v. Rizzo*, 564 F. 2d 126 (3rd Cir. 1977); *Smith v. Clarkton*, 682 F. 2d 1055 (4th Cir. 1982); *Hanson v. Veterans Administration*, 800 F. 2d 1381 (5th Cir. 1986); *Arthur v. Toledo*, 782 F. 2d 565 (6th Cir. 1986); *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F. 2d 1283 (7th Cir. 1977); *United States v. Black Jack*, 508 F. 2d 1179 (8th Cir. 1974); *Halet v. Wend Investment Co.*, 672 F. 2d 1305 (9th Cir. 1982); *United States v. Marengo Cty. Comm'n*, 731 F. 2d 1546 (11th Cir. 1984).

[69] Seicshnaydre, *supra* note 40, at 393-94.

[70] Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 1620 (1988).

[71] *Id.* at 1622-23.

Despite these changes, Congress kept the same language for discrimination and liability. Justices Kagan and Sotomayor pressed the issue at oral argument, particularly since the exemptions remove areas of litigation that could be used in a disparate impact analysis.[72] Justice Kennedy in the majority opinion agreed, the failure to remove disparate impact by amendment indicates its presence in the statute: "Congress was aware of this unanimous precedent [in appellate courts]. . . And made a considered judgment to retain the relevant statutory text."[73] Congress could have changed the statute to remove disparate impact, since the courts were so clearly following the standard, but did not.

Conversely, Petitioners and their amici held staunchly to Congress' silence on creating a disparate impact standard. At oral argument, Petitioner Texas introduced *O'Gilvie v. United States* as a justification that Congress' silence may simply have been Congress leaving the law where it found it.[74] Justice Alito's dissent uses *O'Gilvie* to draw parallels between the punitive damages amendment in *O'Gilvie* and the 1988 FHA amendments.[75] Justice Alito's parallels overlook the *O'Gilvie* court's reasoning that "the law was indeed uncertain at the time"[76] of amendment, necessitating clarification—here, courts may have accepted and rejected claims of disparate impact, but no court doubted that the claim itself is cognizable under the FHA.

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[72] Transcript of Oral Argument at 12-13, *Inclusive Communities*, 576 U.S. ___ (2015) (No. 13-1371).

[73] *Inclusive Communities*, Slip Op. at 13-14.

[74] Transcript of Oral Argument at 10, *Inclusive Communities*, 576 U.S. ___ (2015) (No. 13-1371).

[75] *Inclusive Communities*, Slip Op. at 18 (Alito, J. Dissenting).

[76] *O'Gilvie v. United States*, 519 U.S. 79, 89-90 (1996).

Debating the purpose of the 1988 amendments reveals the relationship between knowledges developed in the Courts and Congress for statutory analysis. Justices Kennedy and Alito both rely on the congressional record at the time of the amendments. Justice Alito reads the floor debates over disparate impact liability against the 1988 amendments and sees "all the hallmarks of a compromise" between proponents of disparate impact and those who wanted to reduce the FHA to strictly intent-based paradigms.[77] However, the inclusion of exemptions for areas that might otherwise correlate with race indicate to Justice Kennedy, that Congress ratified disparate impact by narrowing the scope of disparate impact liability.[78]

Ultimately the statutory interpretation comes down to a legal conceptualization of racism and standards of proof. If racism is individual acts of meanness, then for anything to be done "because of" race means an individual choice was made to engage in discrimination in each instance of racial discrimination. If racism can be institutional or systemic, then discrimination "because of" race contemplates broader connections and relationships. Justice Alito's emphasis on individual intent ignores the congressional purpose Justice Kennedy centralizes in his opinion: the FHA exists to remedy housing discrimination and widespread discrimination caused, in part, by governmental policy. Changing histories of segregation and discrimination is no small task, but Congressional policy at the passage of the FHA aimed at that ultimate purpose. Disparate impact

[77] *Inclusive Communities*, Slip Op. at 17 (Alito, J. Dissenting).

[78] *Inclusive Communities*, Slip Op. at 14.

emerged as a potential tool in combating discrimination because it understands racism to be ingrained in decision making processes, even those that are not overtly racist.

This textual dispute between "otherwise make unavailable" and "because of" shows an epistemological and ontological clash over the methods used for demonstrating racism and discrimination. It revolves around a conceptualization of race as individual acts of meanness, represented by Justices Alito and Thomas, against a more contextual history of discrimination and attempts at remedying the lasting effects of racist policies, represented by Justice Kennedy and the majority opinion. This textual dispute evokes a scientific debate in the standard of proof, whether race and racial discrimination can be shown by statistical evidence. But before incorporating social sciences into a discussion of disparate impact and race, the Court must first operationalize—defining the measurement or meaning of—race and discrimination in housing.

4.2.2 What's Race Got to do with it?

Unfortunately, in operationalizing race, the Roberts Court tends to conflate race and racism.[79] Considering race in determining how to remedy histories of segregation and racial discrimination are made equivalent to racism in the eyes of the Court. Remember Chief Justice Roberts' wonderfully circular conceptualization of race and

[79] *See* Sumi Cho, *Postracialism*, 94 IOWA L. REV 1589, 1594 (2008); Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L.REV. 653 (2015) (the Court's recent opinions on race reflect that racial equality is a goal, but must be achieved through "race-neutral" criteria); Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 961-962 (2008)(describing the Roberts Court's preference for reading the Fourteenth Amendment as colorblindness, countering that when Congress ratified the Fourteenth Amendment it did not engage in race-neutral policies, but created programs explicitly to benefit people based on race); and john a. powell, *Post-Racialism or Targeted Universalism?*, 86 DEN. U.L. REV. 785, 787 (2009) ("The conservative uses colorblindness not just as a bar to engage the issue of race, but also as a justification to preclude any intervention").

racism: "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[80] In this view, even the use of race to contemplate programs that would remedy histories of white supremacy and racial oppression are, in fact, racist and unconstitutional because they consider race. Chief Justice Roberts' race-blind approach to racial discrimination subverts the goals of remedial policy and reinstates the norms of white supremacy in society. Failing to consider race, in any respect, decontextualizes racial discrimination; turning a policy like Fair Housing, meant to remedy a history of discrimination against people of color, into a toothless procedure that bars only the most blatant individualized racism while remaining apathetic to the ongoing, systematic function of white supremacy, segregation, and racialized poverty in housing.

In *Inclusive Communities*, the HUD regulation at issue violates Chief Justice Roberts' race-blind preferences by requiring a court to consider race in the presentation of statistical evidence of disparate impact and in determining a less discriminatory alternative in a burden-shifting framework. Considering race in statistical evidence means not only defining race as a factor for analysis, but in an advanced statistical analysis that could identify how race is a statistically significant factor in housing disparities, requires significant consideration of race and circumstances that could work as intervening variables or lead to spurious correlations. Furthermore, the search for a less discriminatory alternative under the HUD regulation consideration of disparate impact requires some consideration of race to determine what alternatives are more or

[80] *Parents Involved*, 127 S. Ct. at 2768.

less discriminatory. Chief Justice Roberts' approach to race in the Supreme Court is playing an incredibly high stakes game of Taboo,[81] where all parties must attempt to guess a remedy for racial discrimination without ever naming "race." Ignoring race cannot prevent, remedy, or even describe racial discrimination.

Disparate impact and social scientific analyses reveal the ways in which race effects and influences society, even when race is not explicitly mentioned. Discrimination case law, particularly under the Roberts Court, has evolved into the search for "race-neutral" solutions that ignore or obfuscate the continuing significance of race and racism. This line of thought frames race itself as the problem, conflating any consideration of race with racism. The Roberts approach to racial discrimination envisions the Civil Rights movement as a clean slate for the United States; because policy has changed, slightly, there is no more need to remedy, rectify, or even consider the way that racism and white supremacy have shaped outcomes, lived experiences, and futures for people of color. This leaves a status quo of racial inequality and racial inequities intact, while claiming success for having passed legislation that is consistently narrowed in applicability and consideration.[82]

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[81] For all those who have never played the board game Taboo, the board game is played by two opposing teams trying to earn the most points by correctly guessing the word on a card. In each round, one member of a team gives clues to their teammates, trying to get them to say the word on the card without ever saying the actual word or a list of "taboo" words provided on the card. Each team gains a point by correctly guessing a word, but loses a point if the clue giver says the word or taboo words on a card. Hasbro, *Taboo Instructions* (2000) *available at https://www.hasbro.com/common/instruct/Taboo(2000).PDF*.

[82] For a fuller analysis of the Roberts Court's early penchant for postracialism see Cho, *supra* note 79, at 1621 (noting Chief Justice Roberts is 'quite adept' at moral equivalences between racial remediation and racial discrimination). *See also Ricci v. DeStefano*, 557 U.S. 557 (2009)(concluding that New Haven took "impermissible. . . race-based action" in throwing out test results for promotion of firefighters because the test a severe statistical disparity in favor of white firefighters); *Shelby County v. Holder*, 570 U.S. ___, 133

Central to the legal significance of race at the Robert's court, particularly in *Inclusive Communities,* is the division of "race-neutral" and "race-conscious" policies and practices. In this context, race-neutral, or colorblind, policy theoretically does not mention or state race within the text or as a factor, but is somehow supposed to remedy racial discrimination. In *Inclusive Communities*, race-neutral is described as a goal of anti-discrimination and civil rights laws; following Justice Roberts' goals of post-racialism and colorblindness. Parties opposed to disparate impact are concerned that acknowledging statistical disparities may "compel race-conscious decisions," which supposedly violate the Fourteenth Amendment.[83] Respondent ICP and its amici highlight the importance of considering race in meeting the goals of the FHA,[84], remedying racial discrimination, and in rooting out facially neutral policies that create significant racial disparities using disparate impact.[85]

S. Ct. 1236 (2013) (finding the coverage formula in section 4(b) of the Voting Rights Act unconstitutional because of its outdated data).

[83] *See e.g.* Brief for Petitioner, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) at 65-66.

[84] *See* Brief for Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) at 63.

[85] *See* Brief of Amicus Curiae the Housing Equality Center of Pennsylvania in Support of Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) (reviewing examples of litigation where facially neutral policies disproportionately effect families based on race and family size, and the importance of disparate impact in combating those policies); Brief for Constitutional Accountability Center as Amicus Curiae In Support of Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) at 11-12 (noting the Equal Protection clause explicitly rejected language that would outlaw the consideration of race), Brief of Students from the New York University School of Law Seminar on Critical Narratives in Civil Rights as Amici Curiae in Support of Respondent , *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) (discussing racial disparities and discrimination in other facially neutral practices like felony status, jury selection, and welfare); Brief for John R. Dunne, J. Stanley Pottinger, Victoria Schultz, James P. Turner, Brian K. Landsberg, and Joan A. Magagna as Amici Curiae in Support of Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) (former Department of Justice officials noting that individual racial classifications trigger strict scrutiny and usually violate equal protection, while "mere" race consciousness does not)

In contrast, race consciousness is given a negative connotation by those opposed to the consideration of race. Compare the uses of "race-conscious" by petitioners, respondents, and their respective amici, demonstrated by word trees in figures 7 and 8.

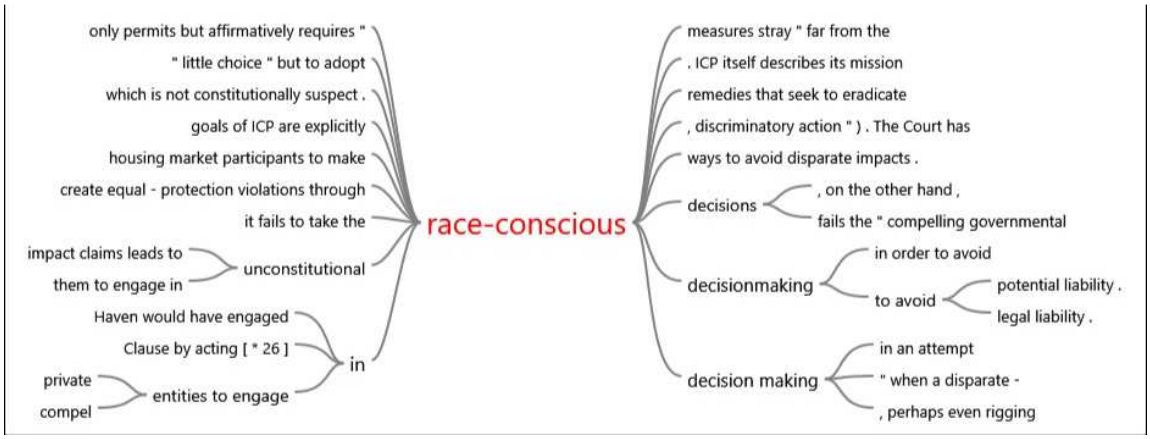

Figure 6: Word tree of "race-conscious" in briefs supporting the petitioner

Arguments for the petitioner in figure 7 are certain of the unconstitutionality of race-consciousness, with many arguing that disparate impact will compel governments and private actors to consider race "in order to avoid" liability.[86] Figure 7 demonstrates how Texas and its amici frequently link race-consciousness to unconstitutional decision-making, making it seem as if even thinking of race is what causes their actions to have discriminatory effects. Notably, arguments for petitioner do not deny that their actions

[86] *See* e.g. Brief for Petitioner, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) at 65-66; Brief of Amicus Curiae American Civil Rights Union in Support of Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief for the American Financial Services Association, the Consumer Mortgage Coalition, the Independent Community Bankers of America, and the Mortgage Bankers Association as Amici Curiae in Support of Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief Amicus Curiae of Eagle Forum Education & Legal Defense Fund, Inc., in Support of Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief of Amici Curiae Judicial Watch, Inc. And Allied Educational Foundation in Support of Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief of Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, Competitive Enterprise Institute, CATO institute, Individual Rights Foundation, Reason Foundation, Project 21, and Atlantic Legal Foundation in Support of Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371).

have discriminatory effect, but that providing disparate impact will force them to consider race. In other words, if they are forced to think about race they could be found liable for racist actions, and this, to petitioner and their amici, is bad. This oversimplification demonstrates the problematic association with racism and intent. If racism is reduced only to intent, or something that exists in the minds of someone who acts (consciously or unconsciously), then it becomes an unthinkable tautology—so long as a person, government, or institution is not thinking about race, their actions cannot be considered racist. Thus race-consciousness paradoxically becomes the culprit for racism, rather than parties, like petitioner and their amici, who enable racism and white supremacy by harshly enforcing the status quo.

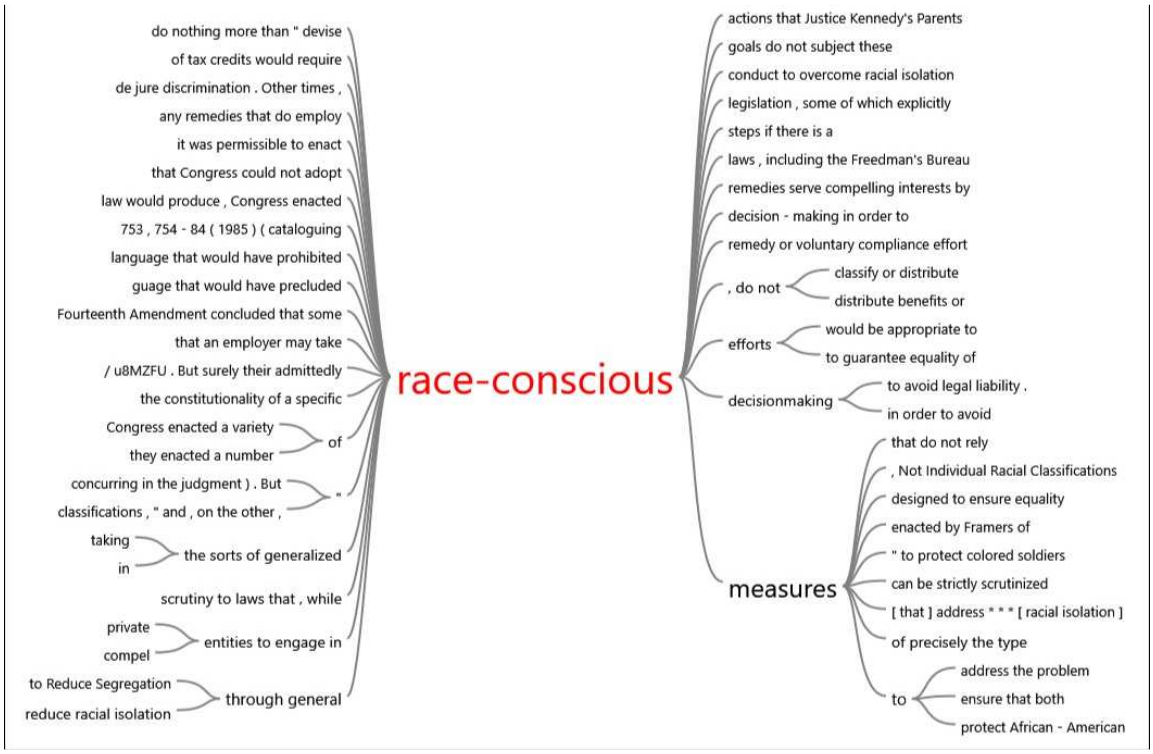

Figure 7: Word tree of "race-conscious" in briefs supporting the respondent

Respondent and their amici in figure 8, above, demonstrate a broader discussion surrounding race-conscious actions, but mostly centered on efforts, decisions, and

measures that are meant to remedy racial discrimination.[87] In this view, race-consciousness is a necessary part of the measurement process. There is no asserted causal relationship between the consideration of race and racist action, but that the consideration of race permits measures to address, ensure, or otherwise remedy issues of racism and racial discrimination.

Disparate impact litigation necessitates some form of race consciousness because the analysis involves consideration of race as a factor. For Justice Kennedy, who has almost always sided with the colorblind wing of the Court,[88] considering race in disparate impact does not undermine his belief in race-neutral remedies, seen below in figure 9.

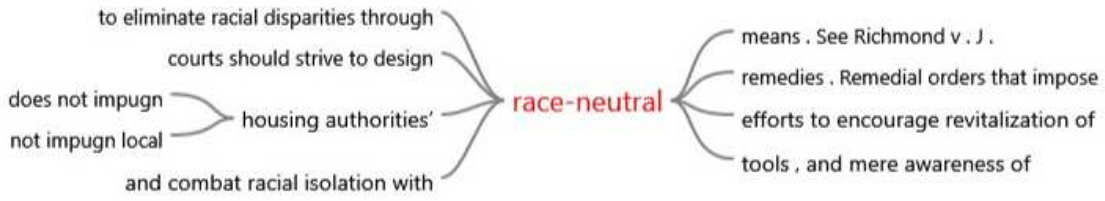

Figure 8: Justice Kennedy "race-neutral" word tree.

[87] Brief for Constitutional Accountability Center as Amicus Curiae In Support of Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief for John R. Dunne, J. Stanley Pottinger, Victoria Schultz, James P. Turner, Brian K. Landsberg, and Joan A. Magagna as Amici Curiae in Support of Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief for the United States as Amicus Curiae Supporting Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief of Amicus Curiae National Community Land Trust Network in Support of Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief of Sutdents from the New York University School of Law Seminar on Critical Narratives in Civil Rights as Amici Curiae in Support of Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Breif for Citites of San Francisco; Atlanta; Baltimore; Boston; Birmingham, Alabama; Carrboro; Chapel Hill; Columbia, South Carolina; Dubuque; Durham; Flint; Los Angeles; Memphis; Miami; Miami Gardens; New Haven; New York; Oakland; Philadelphia; Seattle; and Toledo and King County Washington as Amici Curiae in Suppot of Respondent the Inclusive Communities Project, Inc., *Inclusive Communities*, 576 U.S. ___ (No. 13-1371).

[88] Erwin Chemerinsky, The 2016 Election, the Supreme Court, and Racial Justice, 83 U.CHI. L.REV. Online 49, 52 (2016) ("since coming on the Court in 1988, Kennedy had never voted to uphold an affirmative action plan—not in education, not in contracting, not in employment—until Fisher v University of Texas at Austin13 was decided on June 23, 2016).

Instead, Justice Kennedy frames disparate impact as a race-neutral tool. Disparate impact is used to identify policies that create disparities, but liability is not "so expansive as to inject racial considerations into every housing decision."[89] Though he never mentions race-conscious policy, for better or worse, Justice Kennedy's majority opinion centralizes the importance of diversity and combating "racial isolation" using disparate impact with racial considerations.[90] Remedying histories of racial discrimination necessarily require taking some account of race, but for Justice Kennedy "mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."[91] For a Justice that regularly subscribed to colorblindness, "mere awareness" of race is a large departure from a totalizing race-neutral view. Justice Kennedy has opened his mind to the consideration of race—even if it is a mere awareness—opening doors for scientific evidence to inform, educate, or just demonstrate the ongoing significance of race in society. Mere awareness is not enough to start remedying the long history of racist, white supremacist policies and practices that created problems in housing discrimination and segregation in the first place, but it does signal more open standards for the types of evidence considered at the Supreme Court.

For any kind of statistical analysis on race to take place, race must be operationalized—racial meaning must be given some form to identify disparities in their historical origin or meaning. Advancing the colorblind, race-neutral view of Justices

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[89] *Inclusive Communities*, Slip Op. at 21.

[90] *Id.* at 23.

[91] *Id.*

Thomas and Alito's dissents would remove consideration of racialized effects of housing policies and practices from a statute designed to consider and combat the racialized effects of housing policies and practices—unless there is a stated intent to discriminate.[92] Reducing racism to individual acts of meanness, particularly in Fair Housing Legislation which is explicitly aimed at remedying systematic racism, is a conceptual mismatch.

Justice Kennedy's re-framing of disparate impact as a race-neutral tool is an acknowledgment of disparate impact as social scientific method—a means of analyzing a social issue or problem. Affirming a disparate impact analysis does not proscribe a set disparity or scenario that would statistically indicate discrimination. Instead, *Inclusive Communities* affirms statistics as a legally significant and sufficient approach to considering racial discrimination in housing. This means taking a holistic view of racism in housing, considering both the racist realtor *and* the policy that disproportionately directs funding and resources to some communities rather than others. To approach disparate impact without an understanding of race and racism as systemic and institutional, particularly in housing, is to miss the forest for the trees—narrowly focusing on specific acts without understanding their connections. Incorporating disparate impact expands the Court's frame of racism in housing, accepting that there are circumstances when people are effected by racism without an individualized act and intent. The Court's

[92] *See e.g. Inclusive Communities*, slip op. at 8 (Thomas, J. dissenting) (arguing that "the fact that a practice has a disparate impact is not conclusive evidence. . . that a practice is discriminatory," while noting the Court's "role in the development" of housing discrimination.); *and Inclusive Communities*, slip op. at 5 (Alito, J. dissenting) ("Congress accordingly outlawed the covered actions only when they are motivated by race or one of the other protected characteristics").

conceptualization of race thus necessarily colors it's understanding of data, particularly in framing intent, effects, neutrality, or consciousness.

4.2.3 Significant Statistics and Statistical Significance

The Court's interpretation of the Fair Housing Act and its ontological assumptions about race set boundaries for statistical evidence of disparate impact. Even data, terms, or theories well accepted within social sciences may be disregarded if they do not match the Court's understanding of the problem. In law, the Supreme Court is the ultimate authority; no matter how rigorous, valid, or thorough the research.

Ultimately, this was the lesson of *McCleskey v. Kemp*, when the Court refused to "infer a discriminatory purpose" in Georgia's death penalty sentencing practices, despite the Baldus study's statistically significant findings that Black defendants with white victims were 4.3 times more likely to be sentenced to death than Black defendants with Black victims after controlling for other potential intervening factors.[93] Although the Court acknowledged the findings, methods, and evidence, because the Baldus study did not "*prove* that race enters into any capital sentencing decisions" there was no "constitutionally significant risk of racial bias."[94] The statistically significant increase in death sentences by race, dramatically increasing the number of Black men killed by the death penalty in Georgia, was not deemed constitutionally significant because it did not fit within the Court's framing of race and the constitution.

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[93] *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987)

[94] *Id.* at 308, 313.

Here, there is not a specific study indicating a systematic disparity, but an argument over whether studies can be proof of discrimination in housing in the first place. *Inclusive Communities* centers on a HUD regulation implementing a burden shifting framework for disparate impact, but the actual statistics become a key point of contention in determining whether disparate impact is a workable standard. As always, the litany of numbers, statistics, and quantitative data presented are meaningless without context and analysis. Data not only refers to the statistical analyses presented before the court, but also the authorities used by the Court.

As discussed in Chapter 3, Decisions of the Court are grounded in evidence from a variety of sources. While the Court may not hear original research or testimony, it is nevertheless inundated with arguments, data, and analysis in any given case. In *Inclusive Communities*, the Court received 36 amicus briefs, 19 in support of the respondent, 16 in support of the petitioner, and one in support of affirmance. These are in addition to the merits briefs from each side, and any independent research from a Justice or clerk.

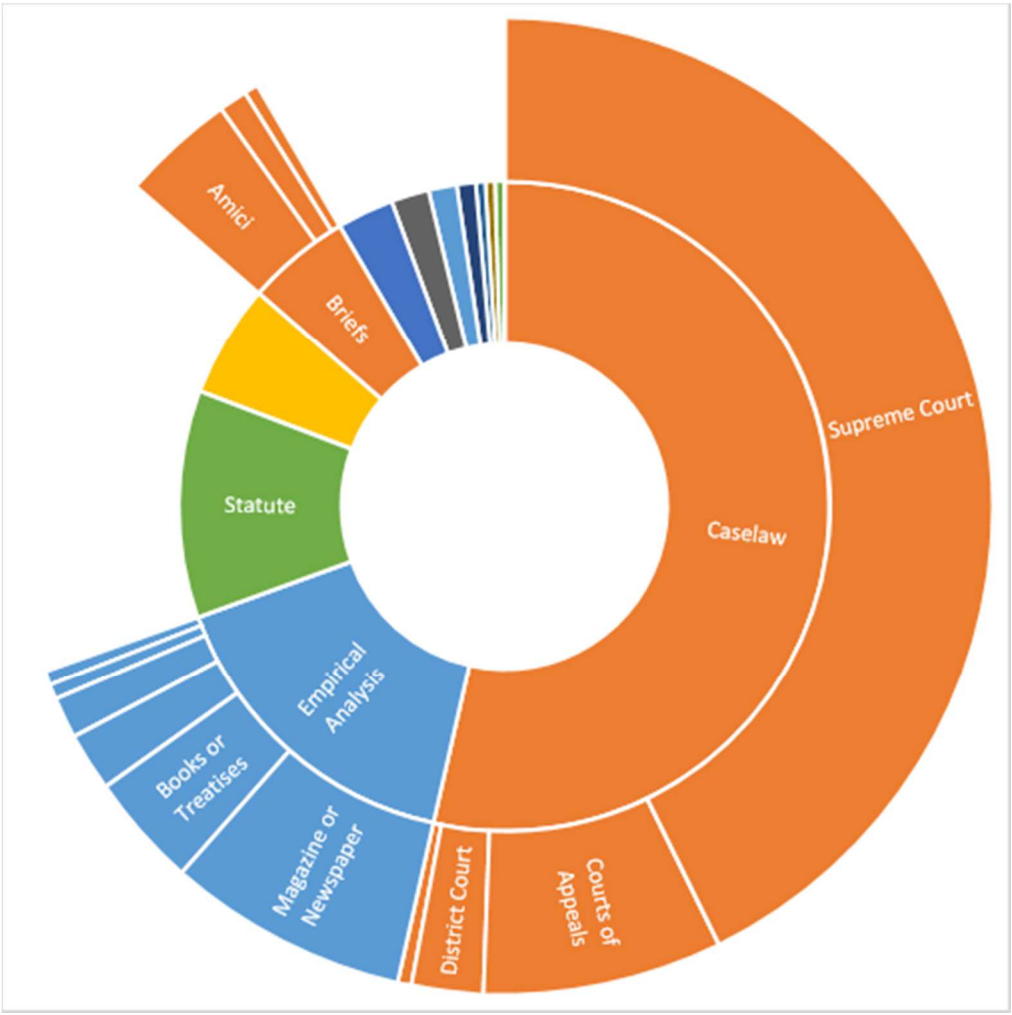

Figure 9: Hierarchy Chart of authorities in *Inclusive Communities* opinions.

As Figure 9 illustrates, the opinions in *Inclusive Communities* draw the most from case law, heavily emphasizing Supreme Court precedent and cases from Courts of Appeals. Surprisingly, there is a sizable amount of authority coming from external or empirical analyses,[95] particularly in the dissenting opinions by Justices Alito and Thomas. I assumed that these conservative Justices would rely more strictly on tradition, the opinions of the Court and constitutional or statutory texts, rather than drawing on

[95] For complete definitions s*ee supra* Intermission: Nvivo Codes and Cases *and infra* Appendices A, B.

external data to make their point. Justice Kennedy's majority opinion, Figure 10, occasionally steps into external data, but focuses mostly on case law, statutory authority, and the congressional record. Compare this with Justices Thomas' and Alito's dissenting opinions, Figures 11 and 12, which supplement case law with extensive external analysis.

Figure 10: Hierarchy Chart of Sources of Authority used by Justice Kennedy

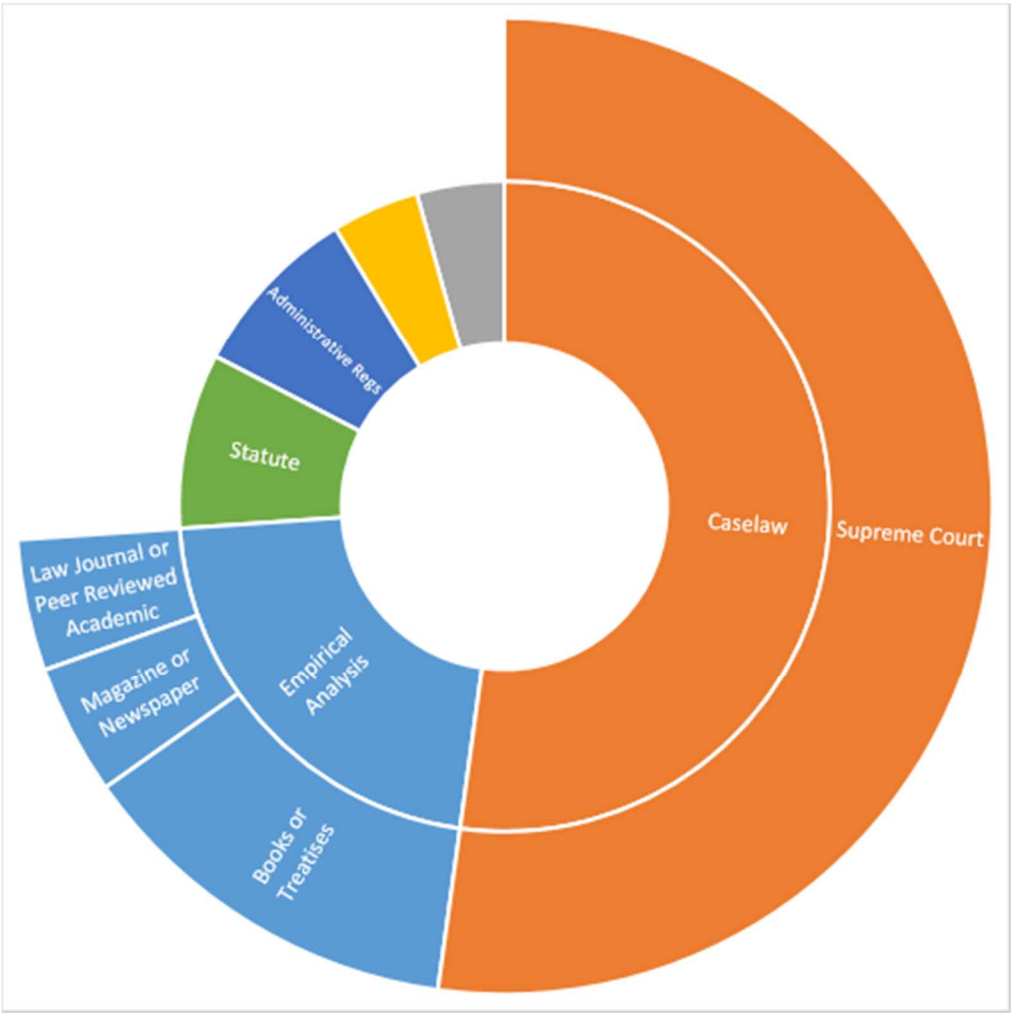

Figure 11: Hierarchy Chart of Sources of Authority used by Justice Thomas

Justice Thomas, an extremely-conservative originalist, has become known for prioritizing his own interpretation of the constitution over that of previous decisions of the Court.[96] After dismissing *Griggs* as wrongly decided, Justice Thomas' dissent rejects

[96] *See e.g.* Jeffrey Toobin, Clarence Thomas has his Own Constitution, THE NEW YORKER *(*June 30, 2016) (available at http://www.newyorker.com/news/daily-comment/clarence-thomas-has-his-own-constitution); *and* Lincoln Caplan, Clarence Thomas's Brand of Judicial Logic, THE NEW YORK TIMES, (Oct. 22, 2011) (available at http://www.nytimes.com/2011/10/23/opinion/sunday/clarence-thomass-brand-of-judicial-logic.html).

disparate impact again because it "defies not only the statutory text, but reality itself."[97] Justice Thomas' dissent is a reification of racial disparities, arguing that such imbalances are not only natural, but argues that racial minorities are not always disfavored around the world[98]—drawing on, if not outright paraphrasing and citing the same sources as, the writings of Black conservative economist Thomas Sowell.[99]. In Justice Thomas' view, statistical disparities indicated by disparate impact analyses are meaningless before a court without some showing of discriminatory intent.[100]

[97] *Inclusive Communities*, Slip Op. at 8 (Thomas, J. Dissenting).

[98] *Id.* at 8-9.

[99] *Compare Id. with* Thomas Sowell, THE THOMAS SOWELL READER 291 (2011).

[100] *Inclusive Communities*, slip op. at 8.

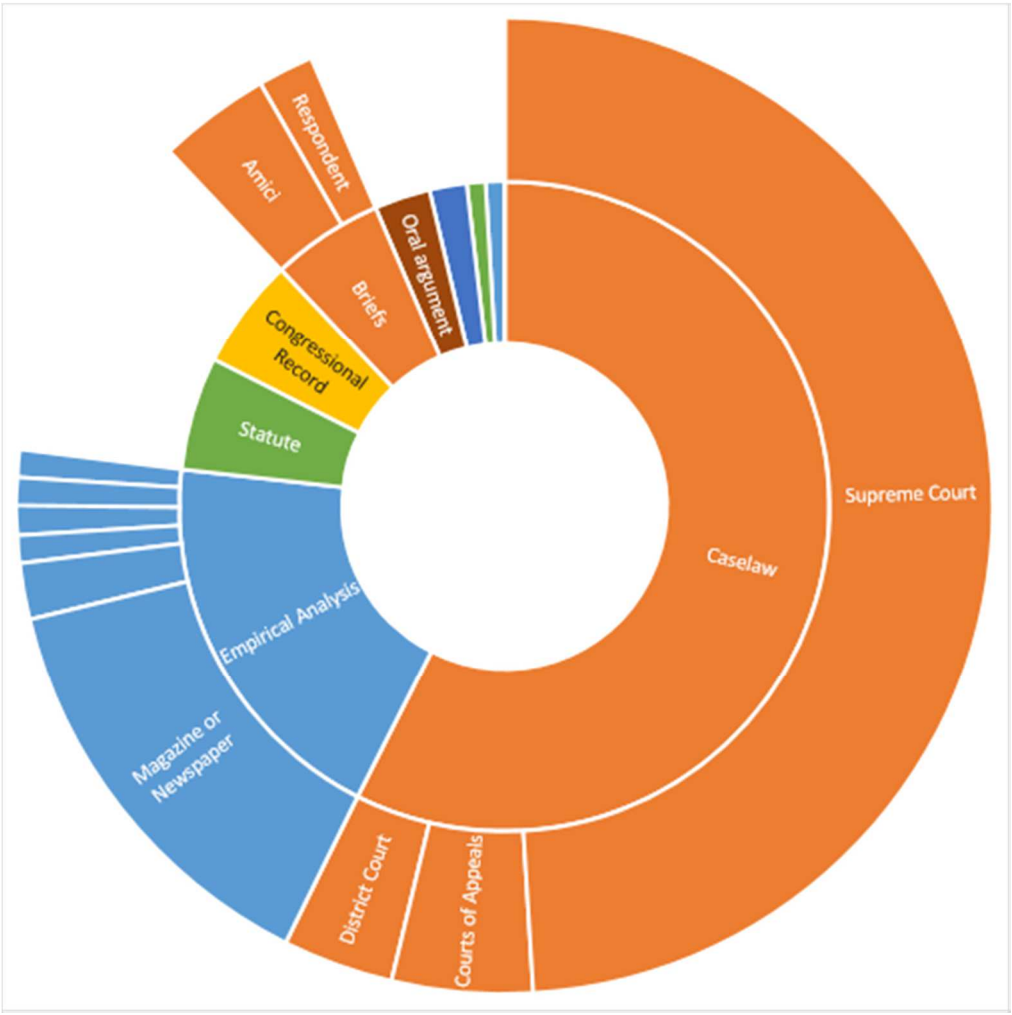

Figure 12: Hierarchy Chart of Sources of Authority used by Justice Alito

In an odd twist, precedent, case law, and statutory reasoning saved disparate impact, with dubious social science research playing a key role in the case against disparate impact. Not only does this undermine my own assumptions about scientific evidence at the Court, but it overlooks the immense weight of scientific evidence in *favor* of disparate impact and the dearth of scientific evidence *against* disparate impact presented in amici briefs. Unlike the Brandies brief, which used scientific evidence to

push the law to change with society,[101] the conservative Justices' paradoxically use scientific evidence to argue against using scientific evidence. In *Inclusive Communities*, scientific evidence is more often used to entrench existing racial disparities than support a rule that would undermine the long history of racialized housing segregation in Texas. Yet at the end of the case, the disparate impact standard for scientific evidence remains, despite the scientific evidence presented against it.

4.2.3.1 Sporting Percentages

Statistical analyses, especially those presented in disparate impact claims, are more than simple comparisons of percentages. Disparate impact usually involves advanced statistical techniques like multiple regression. Multiple regression analyses in the Supreme Court appear in cases involving discrimination in some form (race, sex, age, etc.), because multiple regression analyses have the power to indicate the potential effects of social classifications like race, sex, or age, on outcomes like income.[102] Disparate impact cases typically use multivariate regression, because the technique estimates the statistical significance of different variables like race, income, geography, age, or any

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[101] *See* Angelo Ancheta, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 29 (2006); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L. J. 1005, 1008 (1989); Ruth Bader Ginsburg, Muller v. Oregon*: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 365 (2008)(also noting Brandies' predominantly female research team which crafted the scientific argument presented before the Court); Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59, 88 (2013).

[102] Daniel L. Rubinfield, *Reference Guide on Multiple Regression*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211 (Federal Judicial Center, 3d ed. 2011); PAUL D. ALLISON, MULTIPLE REGRESSION: A PRIMER 16 (1997); Brief of Ian Ayres as Amicus Curiae in support of Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) (describing rigorous statistical techniques, including regression, used to make disparate impact analyses). *See also County of Washington v. Gunther*, 421 U.S. 161 (1981) (finding that claims of "discriminatory undercompensation" are valid, respondents used multiple regression analysis in expressing the effect of sex on pay, though the court did not factor this in to its final determination).

quantifiable variable in the analysis.[103] Statistical significance does not mean that it is the most or least important issue in the analysis, but that you can reject the "null hypothesis" that a variable has no effect.[104] Statistical analysis of race in this context therefore affirms the need for race conscious policies, since rejecting the null hypothesis simply means that, statistically, there is evidence that race effects the studied outcome.

Despite the litany of statistical tests available, the Court and many of the amici in *Inclusive Communities*, rely on directly comparing percentages, which does little more than indicate the possibility of an idea. Amici on both sides argued over the statistical tests best suited for disparate impact, most notably Ian Ayer's amicus brief responding to the amicus brief of James P. Scanlan. Though the brief of James P. Scanlan goes at length about statistics being insufficient to measure disparate impact,[105] he fails to discuss regression or statistical significance, both of which are well accepted scientific measures of disparate impact.[106] Using only basic statistical comparisons can indicate a potential disparity, but techniques like multivariate regression can indicate statistically significant

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[103] Importantly the p-values in a multiple regression indicate the level of statistical significance, generally accepted in most social sciences at a .05 level. So long as the p-value is less than .05, the variable is deemed statistically significant, though some studies and fields require higher threshold for significance at .005 or .001. *See also* ALLISON, MULTIPLE REGRESSION AT 16; Rubinfeld, Reference Guide on Multiple Regression, at 321.

[104] Rubenfeld, *supra* note 95, at 321; Terance D. Miethe and Jane Florence Gauthier, SIMPLE STATISTICS APPLICATIONS IN SOCIAL RESEARCH 156-57 (2008).

[105] Brief for James P. Scanlan as Amicus Curiae in Support of Petitioner, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371).

[106] Brief for Ian Ayers as Amicus Curiae in Support of Respondent, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371).

variables, allowing parties and courts to measure to what extent race, income, familial status, or other variables effect housing options.

However, the dissenting opinions in *Inclusive Communities* present statistical disparities of their own to counter disparate impact. Justice Thomas notes that "for roughly a quarter-century now, over 70 percent of the National Basketball Association players have been black."[107] Justice Alito also goes for the sports comparison, "of the 32 college players selected by the National Football League (NFL) teams in the first round of the 2015 draft, it appears that the overwhelming majority were members of racial minorities."[108] Justice Thomas and Alito's un-scientific analyses of the prevalence of Black and Brown athletes in professional sports leagues is used to refute disparate impact in housing—pitting professions where there is a prominence of people of color against policies that disproportionately exclude people of color from housing opportunities. Small areas of success are used against prevailing social inequalities, feeding into myths of exceptionalism. Because there are relatively more Black professional athletes in two sports, significant housing disparities are normalized and legitimized.

Justice Alito and Thomas' hypotheticals are supposed to show how disparities are not necessarily "because of" race but race can be a statistically significant factor in professional sports, especially when intersecting with other statuses like class or family status.[109] Here the use of statistics is not to facilitate changes in law or policy for the

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[107] *Inclusive Communities*, slip op. at 9 (Thomas, J. Dissenting).

[108] *Inclusive Communities*, slip op. At 9 (Alito, J. Dissenting).

[109] Joshua Kjerulf Dubrow and Jimi Adams. *Hoop inequalities: Race, class and family structure background and the odds of playing in the National Basketball Association*. 47 *International Review for the*

benefit of those disadvantaged, but to remove beneficial standards under the illusion of colorblindness. Both Justices, in this case and others, advocate for an exclusively intent-based analysis of discrimination. Their percentages in representation in the NFL and NBA are not indicative of any kind of discrimination, but bare statistics to imply that racial disparities may simply be the result of meritocratic processes since "teams chose the players they think are most likely to help them win games."[110] Implying meritocracy, even within professional sports, is an attempt to cover the fact that statistical disparities can indicate larger social problems when properly analyzed.

4.2.3.2 Avoiding Pretext

Disparate impact and statistical analyses can be designed to reveal how facially neutral tests, measures, and policy have disproportionate effect on racialized, gendered, or otherwise marginalized peoples. The illusions of meritocracy like in Justice Thomas and Alito's hypotheticals gloss over the fact that statistical disparities in particular contexts can be indicative of larger issues. In *Inclusive Communities*, the statistical disparity is rooted in the distribution of Low Income Housing Tax Credits (LIHTCs), which disproportionately favor concentrating people of color in communities separate from whites.[111] Here the disparate impact analysis was triggered by the Texas Department of Housing and Community Affairs (TDHCA) point-system and

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Sociology of Sport 43 (2012) (finding that the stereotype of Basketball players coming from poverty is flawed, and statistically untrue).

[110] *Inclusive Communities*, slip op. at 9 (Alito, J. Dissenting).

[111] *See* Joint Appendix, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371).

discretionary policies in distribution of LIHTCs which disproportionately concentrated in low-income communities of color.[112] The TDHCA's proffered explanation that the concentration of LIHTC's was to promote revitalization efforts serving low-income tenants, but the district court found this reason was "pretextual to require trial."[113] Thus the disparate impact test worked to identify potential substitutes for race that are used to reify housing segregation.

Amici for the respondent were very concerned about potentially being found liable for factors that correlate to race under the same pretextual standard. Amici like the American Financial Services Association wants to shun the disparate impact rule, because "risk-based underwriting criteria results in differential outcomes which merely reflect the heterogeneity of our society," a fancy way of saying it's just the way things are and we need to accept it.[114] In fact, the majority of Amici for the Petitioner in the housing industry's primary concern was increasing litigation costs[115]—a concern that

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[112] *See* Joint Appendix, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) at 110-114 (Summary judment opinion of the lower court finding that ICP had met its burden in the disparate impact analysis).

[113] *Id.* at 115.

[114] Brief for the American Financial Services Association, The Consumer Mortgage coalition, the Independent Community Bankers of America, and the Mortgage Bankers Association as *Amici Curiae* in Support of Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) at 27.

[115] *See* Brief for the American Financial Services Association, The Consumer Mortgage coalition, the Independent Community Bankers of America, and the Mortgage Bankers Association as *Amici Curiae* in Support of Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371) at 27; Brief of Amicus Curiae Texas Apartment Association in Support of Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief for the American Insurance Association, the national Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America as Amici Curiae Supporting Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371); Brief of the Consumer Data Industr Association; National Consumer Reporting Assocation; and the National Association of Professional Background Screeners as Amici Curiae in Support of Petitioners, *Inclusive Communities*, 576 U.S. ___ (No. 13-1371).

their existing practices which disproportionately benefit whites, like credit scores or criminal background checks could open them up to disparate impact claims.[116] However, the low success rate of disparate impact claims,[117] and the unanimous recognition for disparate impact claims in lower courts shows these Associations are more concerned with the potential publicity problems than an outbreak of litigation after *Inclusive Communities*.

4.3 Rebuilding Fair Housing

Fair Housing is dedicated to the grand purpose of increasing opportunities for residential living, both in creating diverse heterogenous communities while ensuring that people of color are not confined to low-income areas due to racial biases. Racist sentiments creating divisions in housing still exist, as evidenced by the pool party incident in McKinney that opened this chapter. The disparaging calls for Black youth to leave the neighborhood and the Officer's use of force against Black youth are acts of interpersonal hostility which fit the Supreme Court's usually narrow view of racism as individualized. The systemic housing disparities that entrench racial segregation, and attempts to dismantle housing discrimination that instigate white supremacist anxieties over Black teens playing in a pool in a predominantly white community, are harder to pin down in a court of law. Systemic issues of discrimination in housing inform individualized racisms. Calls for Black youth to return to "section 8" housing in

[116] *See e.g.* Oyama, *supra* note 38; Turner, *supra* note 36.

[117] *See* Selmi, *supra* note 67, at 738-39 *and* Seicshnaydre, *supra* note 40, at 400-403.

McKinney speak to the historic and ongoing issues of racial segregation in Texas, since reducing Blackness to low income housing is not just a white supremacist tactic of associating Blackness with poverty or welfare, but also identifying the ways in which housing is divided by race in Texas. Notions of belonging in Texas suburban communities are driven by histories of discrimination; slavery reduced Black people to property, the Freedmen's Bureau and post-emancipation plans for Black economic advancement were eliminated.[118] Segregation, by law or social pressure, limits home ownership, employment, education, and other forms that would accumulate wealth in a capitalist society. Black people showing up in white suburbia, even as residents hosting a pool party like in McKinney, become an apparent outsider that, in a white supremacist frame must be ostracized—leading to incidents like McKinney in 2015.

At the center of this analysis is understanding the role of scientific evidence in antidiscrimination law like the FHA. Disparate impact necessarily invokes some type of social scientific evidence, but the reliability or scientificity of this evidence is still questionable. Justice Kennedy's majority opinion reaffirms a commitment to disparate impact analysis in revealing discriminatory effects, as a race-neutral tool that can force housing authorities to be more mindful of the effects of policy on race. The question that drives disparate impact—does this policy have a disparate effect based on race and is it related to discrimination—remains a legally valid, scientifically answerable question, imbued with the authority of the Supreme Court. *Inclusive Communities* does not

[118] *See* W.E.B. Du Bois, BLACK RECONSTRUCTION IN AMERICA: 1860-1880 (1935, 1998).

validate any set pattern of housing. Instead it legitimizes the interrogation of housing disparities based on statistical, social scientific, analyses.

However, what evidence is sufficient for the Supreme Court is still in doubt. Justice Thomas and Alito use extensive empirical data to support their opinions, but these are largely to project hypotheticals that simply compare percentages. Their dependence on the predominance of Black athletes in professional sports is curious, equating an occupation that is hyper-selective with a housing policy under the FHA that is meant to maximize housing opportunities. Moreover, the dissents do not deny the statistical tests that can be used in these cases; there is no statistical baseline for disparate impact, only a question of whether a statistical disparity is acceptable. Disparate impact is more than an arbitrary comparison of percentages.

In *Inclusive Communities*, the Court accepts the importance of scientific evidence in looking at racial disparities in housing, but its significance is still hazy. The burden shifting framework provided by HUD provides many opportunities to present evidence at the district court. Unfortunately, when *Inclusive Communities* returned to the district court, the case was dismissed for failing to make a prima facie case of discrimination since it identifies a network of discretionary practices as the source of a discriminatory effect, rather than "affirmatively identify a specific policy that produced a disparate impact."[119] Disparate impact claims were recognized in principle, but in this particular case, there was no relief for the distribution of low income housing credits that arguably

[119] Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs, et al., No. 3:08-CV-0546-D (N.D. Tex.) Mem. Op. at 13.

perpetuate housing segregation in Texas. Here, the principles and analysis rooted in legislation were affirmed at the Supreme Court, but the practical implementation did not meet the standards established by the Court. In the next chapter looking at affirmative action the court accepts the principles as a given, but focuses almost entirely on Texas' implementation.

At the Supreme Court, the congressional record and legislative history made the purpose of the Fair Housing Act clear; the record well illustrates the terms of analysis and concepts. What is less clear is how the Court's allergy to quotas but its fascination with statistical comparison will play out when the purpose of federal legislation is hazier, or the Court is analyzing general principles of racial equity. For these answers, I turn to Affirmative Action in the next chapter and trying to discern how strategies for achieving social goals of inclusion can survive colorblind rhetoric.

5 Measurement Mismatch: Affirmative Action in Fisher II

"Sound so smart like you graduated college,
like you went to Yale but you probably went to Howard, knowing you."
- *Drake (f. Nicki Minaj) – Make Me Proud*

Higher education has been a cornerstone of civil rights strategy at the Supreme Court. Victories in *Missouri ex rel. Gaines v. Canada*,[1] *Sipuel v. Board of Regents of the University of Oklahoma*,[2] *Sweatt v. Painter*,[3] and *McLaurin v. Oklahoma*[4] declared segregation unconstitutional in law schools and graduate education, setting the stage for *Brown v. Board of Education* to declare racial segregation in public education unconstitutional.[5] However, as seen in Chapter 4, segregation, desegregation, and integration are very different concepts, in theory and practice.[6] Segregation in higher education was found unconstitutional in *Sweatt* and *McLaurin* in 1950. With the passage of the Civil Rights Act in the in1964, federal policies shifted toward policies of inclusion like affirmative action.[7] Colleges and universities developed their own race-conscious

[1] 305 U.S. 337 (1938) (finding that Missouri must either provide a separate law school for Black students or allow Black students to take classes at the white Law School).

[2] 332 U.S. 361 (1948) (finding that the University of Oklahoma must provide equal instruction, and admit qualified Black applicants like Ms. Sipuel).

[3] 339 U.S. 629 (1950) (finding the Black law school provided by Texas was quantitatively and qualitatively inferior to the all-white University of Texas law school).

[4] 339 U.S. 637 (1950) (decided the same day as *Sweatt* for similar reasons, as applied to graduate schools).

[5] *See Brown v. Board of Education*, 347 U.S. 483, 492 (1954) (citing *Gaines*, *Sipuel*, *Sweatt*, and *McLaurin*)

[6] For an extensive discussion of the problematic, at best, transition from unconstitutional segregation, desegregation, and integration *see* Lino A. Graglia, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND SCHOOLS (1976).

[7] *See* Tara J. Yosso, Laurence Parker, and Daniel G. Solórzano, and Marvin Lynn, *From Jim Crow to Affirmative Action and Back Again: A Critical Race Discussion of Racialized Rationales and Access to Higher Education*, 28 REV. OF RESEARCH IN ED. 1, 9 (2004) (discussing the development of affirmative

affirmative action policies, but just 28 years after *Sweatt* and *McLaurin* ended segregated school policy, affirmative action was challenged and curbed by the Supreme Court in *University of California Regents v. Bakke*.[8] Affirmative action survived, in principle, since Universities have a "substantial interest that legitimately may be served by . . . consideration of race and ethnic origin,"[9] but the University of California's reserved seat program, a quota system, was struck down. Twenty-five years later the Court would again affirm racially integrated and diverse institutions as a constitutionally protected goal in *Grutter v. Bollinger*,[10] though Justice O'Connor hypothesized that affirmative action would no longer be necessary in another twenty-five years.[11] More than sixty years after segregation in higher education was found unconstitutional, the Court seems

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action and ensuing litigation) *and* Ira Katznelson, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2006).

[8] Bakke sued as an individual white male student because he was waitlisted and denied admission at the University of California Davis medical school in 1973 and 1974, while the University used a special admissions program to admit racialized minorities to 16 out of the total available 100 placements in the program. Bakke sought a writ of mandamus, a special order from the Court mandating his admission to the medical school. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).)

[9] *Id.* 438 U.S. at 320.

[10] *Grutter v. Bollinger*, 539 U.S. 306 (2003) (affirming affirmative action, finding diversity is a compelling state interest, and University of Michigan Law School's use of race as a plus factor was narrowly tailored to meet that end); but see *Gratz v. Bollinger*, 539 U.S. 244 (2003) (finding the University of Michigan's use of a points system which included race did not pass strict scrutiny, and resembled a quota).

[11] Justice O'Connor mused that in the 25 years since Regents of the University of California v. Bakke, "the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343 (internal citations omitted) (citing to oral argument transcripts for the increasing "high grades and test scores" among students of color). At oral argument in *Fisher I*, Chief Justice Roberts questioned whether there was a "deadline" on affirmative action, and whether University of Texas will achieve its goal of diversity by 2028. Transcript of Oral Argument at 49-50, *Fisher v. University of Texas*, 570 U.S. ___ (2015) (No. 14-981).

to accept that racially integrated and diverse institutions are an important, and constitutionally sanctioned, goal for universities.[12]

Problems remain in deciphering how and in what ways the Court believes racial diversity should be achieved. For some Justices, it also means deciphering how long that goal is protected. The ends are agreeable, but the means have become the controversy. In *Fisher v. University of Texas at Austin* (2013) (*Fisher I*), the Court agreed with the University's goal of a racially diverse campus, but remanded for the Fifth Circuit to decide whether the University's use of race met the standards established by previous opinions of the Supreme Court.[13] Like a bad penny or a boomerang, *Fisher* returned to the Supreme Court in 2015.[14] This time the question did not turn on principles or lofty goals, but on matters of practicality; did the University of Texas properly calibrate its admission policy to use race in a justifiable, but limited way? *Fisher II* is not a purely legal question, but is heavily, if not entirely, reliant on facts and policy. In other words, the Court is no longer weighing affirmative action in principle, but its practice.

If the disparate impact standard is about identifying a standard of proof, the question in affirmative action is one of measurement. In social sciences or law, standards of proof set a baseline for what is acceptable to reach a goal, while questions of

[12] The Court is one of the last to the party, as discussed *infra* the amicus briefs from the Military, major corporations, most elite universities, a wealth of state schools, and a plethora of social scientists describing the crucial importance of racial diversity in education, the workplace, and in society.

[13] *Fisher v. University of Texas*, 570 U.S. ___, 133 S. Ct. 2411, 2421 (2013)(*Fisher I*) (finding diversity to be a compelling interest, but remanding to the Fifth Circuit for a determination of whether the University's admissions program is narrowly tailored to achieve that end)..

[14] *Fisher v. University of Texas*, 570 U.S. ___, 136 S.Ct. 2198 (2016) (*Fisher II*).

measurement look for efficient, productive, or scientifically valid means of reaching it. *Fisher II*'s interrogation of affirmative action policy under the standards of the Court is really a question of measurement and methodology. What methods are permissible for achieving a racially diverse learning environment? How should Universities conceptualize or operationalize race in its strategies to increase the population of students of color, without engaging in unconstitutional quotas or racial balancing? The Court has left the practical implementation of policy to Universities and legislatures, reserving judgement on the constitutionality of University policy. In this chapter, I analyze what standards and measures the Court applied to the University of Texas' consideration of race in its holistic admissions policy, and how the Court evaluated the University's justification for its policy and Fisher's counterarguments.

None of the Justices of the Court are educators or have expertise in educational policy, but they have help. In *Fisher I*, over 100 amicus curiae briefs were submitted, and most briefs for the University used social science to show the importance of race conscious policies.[15] In *Fisher II*, there were 84 amicus briefs: thirteen in favor of the petitioner, Abigail Fisher, 68 in favor of the respondent, the University of Texas, and three in favor of neither party. This time only four briefs *did not* cite to some form of empirical data, grounding this debate in the implementation of educational policy.

Here the nexus of race, social science, and law is not in the burdens of proof for trial courts, like in Chapter 4's discussion of *Inclusive Communities*, but the

[15] Suzanne E. Eckes, David Nguyen, & Jessica Ulm, Fisher v. University of Texas*: The Potential for Social Science Research in Race-Conscious Admissions*, 288 ED. LAW REP. 1, 9-10 (2013).

implementation of social policies set forth through the opinions of the Supreme Court. Social sciences are used to explain how and in what ways the University's implementation of race-conscious reaches the ends prescribed by the Court. Theories of social sciences and policy recommendations become central to the Court's understanding of whether the University's use of race in admissions is "narrowly tailored" to achieving the agreed-upon goal of a racially diverse university. Many of the briefs focus on the goal itself, whether racial diversity is actually beneficial to a University, but for the most part this point has already been litigated and decided by *Fisher I*.[16] The following sections provide a brief background on the origins of Texas' hybrid percent/holistic review plan, followed by a summary of the strict scrutiny standard the Court uses to evaluate affirmative action claims based on *Bakke* and *Grutter*. From there I go to a substantive analysis of *Fisher II*, looking at what authorities are used in Kennedy's majority and Alito's dissent, and to what ends. Then I evaluate how race in higher education is conceptualized and operationalized in the social science data and the Court. Finally, I analyze the "mismatch theory" that Justice Scalia brought up in *Fisher II* at oral argument, which suggests that students of color attend less competitive, lower tier universities to increase their performance. Ultimately, my goal is to examine how the Supreme Court uses social science to operationalize its affirmative action policy, and uncover the ways in which ideologies of racism underlie race-neutral alternatives.

5.1 The Texas Plan: Residential Segregation and the path to Fisher II

[16] 133 S. Ct. at 2421.

Fisher and *Inclusive Communities* are rooted in the same underlying facts of segregation. Chapter 4 discusses the extensive housing segregation that continues to plague Texas, and the far-reaching effects of the resultant housing disparities, including education. Just as in housing, Texas high school districts continue to be intensely racially segregated.[17] In 1996, seven years before *Grutter*, the Fifth Circuit in *Hopwood v. State of Texas* found the University of Texas's affirmative action program was an "unconstitutional admissions system" because it considered race as a factor.[18]

In response, the Texas legislature passed a "Top 10%" law the next year as a race-neutral alternative to affirmative action; guaranteeing admission to all state universities for any Texas applicant in the top ten percent of their high school graduating class.[19] In the 1994-1995 school year, 31.9% of Black students and 43% of Latino students in Texas attended intensely segregated schools, or schools where 90-100% of the student population is not white.[20] Over the next seven years, the top ten percent plan ensured admission of Black and Latina/o students, but enrollments failed to reach pre-*Hopwood* numbers.[21] All gains from the top 10% plan directly result from intense residential

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[17] *See also* Gary Orfield and Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality*, THE CIVIL RIGHTS PROJECT (January 2005); Marta Tienda and Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and hte Texas Top 10% Law*, 8.2 AM. L. AND ECON. REV. 312 (2006).

[18] *Hopwood v. State of Texas*, 78 F.3d 932 (1996).

[19] Tex. Educ. Code § 51.803 (2015). *See also* Tienda and Niu, *supra* note 16, at 314 (discussing the legislative background to passing the top ten percent plan).

[20] Gary Orfield, Mark D. Bachmeier, David R. James, and Tamela Eitle, *Deepening Segregation in Public Schools: A Special Report from the Harvard Project on School Desegregation, Equity & Excellence in Education* 30.2, 5, 14 (1997).

[21] Tienda and Nu, *supra* note 17, at 340.

segregation throughout Texas.[22] At top tier institutions, like the University of Texas at Austin, the gains are even smaller since the expense of a high prestige school deters top 10% students, who choose less selective Texas universities even though they are otherwise guaranteed admission.[23] The race-neutral educational policy depends on the ongoing legacy of racial segregation and white supremacy in Texas, but still fails to meet the levels of enrollment achieved under affirmative action.

In deciding *Grutter* in 2003, the Supreme Court implicitly overturned *Hopwood* and provided the University of Texas (UT) and the Texas legislature an opportunity to use race-conscious admissions once again. Soon after *Grutter*, UT began a yearlong "Diversity Study" which found that Students of Color were severely underrepresented in small classes and on campus: 90% had one or no Black students, 46% had one or no Asian American students, and 43% had one or no Latina/o students.[24] The University therefore instituted a new policy in 2004 to generate the *Grutter* approved "critical mass"[25] of students it severely lacked, without abandoning the Top 10% Plan. UT admissions now caps top 10% admissions as 75% of the places in the freshman class,

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[22] *Id.* at 342.

[23] *Id.*

[24] The study defined small classes as 5-24 students. *See* Joint Appendix at 445-446, *Fisher I* 133. S. Ct. 2411 (2013) (No.14-981) (quoting University of Texas at Austin, Diversity Levels of Undergraduate Classes at the University of Texas at Austin, 1996-2002 (2003)). *See also* Uma M. Jayakumar and Annie S. Adamian, with Mitchell James Chang, *Reflections on the Diversity (Rationale) Literature: Examining the Potential and Need for Critical Diversity Praxis*, *in* AFFIRMATIVE ACTION AND RACIAL EQUITY: CONSIDERING THE FISHER CASE TO FORGE THE PATH AHEAD 186, (Uma M. Jayakumar and Liliana M. Garces eds., 2015).

[25] *Grutter*, 539 U.S. at 340 ("We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission").

reserving 25% for holistic review. The holistic review process utilizes an Academic Index score (SAT and High School GPA) supplemented with a "Personal Achievement Index" which scores two essays with a review of the student's application file with six other factors, including "special circumstances." A version of holistic review was in effect after *Hopwood*, but after 2004, the University amended the "special circumstances" factor to include a seventh sub-factor: race.[26]

Abigail Fisher was not in the Top 10% of her graduating class and was denied admission to the University of Texas at Austin in 2008. Ms. Fisher alleged it was the inclusion of race as the seventh sub factor to the special circumstances factor in the PAI was an unconstitutional violation of the equal protection clause. Ms. Fisher sued the University of Texas in 2008 to recover her $100 application fee, since she alleged the University's use of race violated the equal protection clause. Both the Texas District Court and Fifth Circuit found in favor of the University; noting the tendency of percentage plans to rely on residential segregation, but finding the use of race through the ten percent plan and holistic admissions were narrowly tailored to generate a critical mass and meet the compelling interest of diversity.[27]

When the Supreme Court ruled in *Fisher I* (2013), only Justice Ginsburg's dissent noted the ten percent plan's dependence on segregation. "It is race consciousness, not blindness to race, that drives [Texas' top ten percent plan.] If universities cannot

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[26] *Fisher v. University of Texas at Austin*, 758 F.3d 633, 638-639 (5th Cir. 2015). *See also* Joint Appendix at 447-448, *Fisher I* 133. S. Ct. 2411 (2013) (No.14-981); *see also* Brief Amicus Curiae of Kimberly West-Faulcon in Support of Respondents at 11, *Fisher I* 133. S. Ct. 2411 (2013) (No.14-981).

[27] *See Fisher v. University of Texas at Austin*, 631 F. 3d 213, 241-247 (5th Cir. 2011).

explicitly include race as a factor, many may resort to camouflage to maintain their minority enrollment."[28] Instead the seven-Justice majority treated the University's interest in racially diverse educational setting as a given: "an academic judgment to which some, but not complete, judicial deference is proper."[29] *Fisher I* was not about the constitutionality of affirmative action in principle, despite Justices Scalia and Thomas' desire to overturn *Grutter*.[30] The Court never addressed the constitutionality of the top ten percent plan, remanding the case for the Fifth Circuit to determine "whether the University has offered sufficient evidence that would prove its admissions program is narrowly tailored to obtain the educational benefits of diversity."[31]

The Court focused on racial segregation in Texas in *Inclusive Communities* in 2015, but Texas' segregation was also a point of emphasis two years earlier in *Fisher I*. Neither *Fisher* nor *Inclusive Communities* disturbs the systemic racism manifested in housing segregation, but *Fisher I* and *II*'s support of the top 10% plan makes it an element of racial diversity in admissions. The denial of a single white applicant, who would not have been eligible for admission even if race was not part of the admissions process, triggered a constitutional inquiry into the University of Texas' holistic admissions process. Here the Court interrogates institutional behavior and nearly upends

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[28] *Fisher I*, 133 S. Ct. at 2433 (Ginsburg, J. dissenting) (internal quotations omitted) (quoting *Gratz*, 539 U.S. at 304 (Ginsburg, J. dissenting).

[29] *Fisher I*, 133 S. Ct. at 2419.

[30] *Fisher I*, 133 S. Ct. at 2422 (Scalia, J. Dissenting) *and Fisher I*, 133 S. Ct. at 2422 (Thomas, J. Dissenting).

[31] *Fisher I*, 133 S. Ct. at 2421.

affirmative action not because Ms. Fisher was denied a necessity like housing or an education, but because of Ms. Fisher's "unjustly committed" application fee.[32] But treatment of diversity and educational opportunities for students of color in the opinions and arguments in *Fisher I* and *II* reveal the real injury is the potential threat to white entitlements that affirmative action supposedly presents.[33]

5.2 Scrutinizing *Fisher I*

In the closing words of his majority opinion in *Fisher I*, Justice Kennedy reminded the Fifth Circuit to apply the strict scrutiny standard without deferring to assurances of "good intention."[34] Justice Kennedy quoted the saying that strict scrutiny "must not be strict in theory, but fatal in fact" and then put his own spin on the saying: "strict scrutiny must not be strict in theory but feeble in fact."[35] Justice Kennedy parallels fatal and feeble to remind the lower courts, and observers, strict scrutiny mandates thorough review, not a preemptive decision. As discussed in Chapter 2, strict scrutiny is a legal doctrine of judicial review that requires "more searching judicial inquiry" in cases which touch on a fundamental right or involve "prejudice against discrete and insular

[32] Here the injury the Court was supposed to remedy comes down to the application fee. Transcript of Oral Argument at 12-13, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[33] This "rhetoric of white innocence" at the Supreme Court fashions an injury around the whiteness of the complaining party, rather than a denial of opportunity since, even in quota cases like *Bakke*, immense opportunity exists for white students and there is no history of oppression. *See* Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477 (2005); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990).

[34] *Id.*

[35] *Id.*

minorities."[36] From a footnote in *United States v. Carolene Products*, the doctrine has evolved into a two-pronged analysis as to whether a law or policy is (a) narrowly tailored to (b) further a compelling government interest. In other words, if the goal is sufficiently compelling and constitutional, then the means of achieving it must do no more (and no less) than necessary to meet that goal.

By the 1970s, strict scrutiny had been applied in a variety of different cases, usually invalidating restrictive state laws,[37] with glaring exceptions like affirming Japanese internment in *Korematsu v. United States*.[38] Strict scrutiny is not designed to eliminate all legislation, but to proscribe a means of analyzing legislation to meet exacting judicial standards. In *Grutter*, the Court scrutinized and approved of race-conscious admission policies at the University of Michigan. The "educational benefits that flow from student body diversity" are a compelling interest with "real" benefits, drawing heavily on evidence from amicus curiae.[39] Nearly a third of the *Grutter* opinion is dedicated to the narrow tailoring requirement, ultimately finding that the University's diversity interest was not achievable through race-neutral alternatives, and taking solace in the notion that Michigan's race-conscious admissions "have a termination point,"

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[36] *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (overturning *Lochner v. New York*, 198 U.S. 45 (1905) and ending the Courts' strict judicial restrictions on progressive economic legislation from Congress). *See also* Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59:3 VAND. L. REV. 793, 799 (2006).

[37] *See* Winkler, Fatal in Theory, at 805.

[38] 323 U.S. 214 (1944).

[39] *See Grutter*, 539 U.S. at 330-334 (finding "these benefits are not theoretical, but real").

beginning the implied deadline described earlier.[40] However, Justice Kennedy's dissent called the Court's narrow tailoring analysis "nothing short of perfunctory,"[41] giving undue deference when the University failed to "produce a convincing explanation or show it has taken adequate steps to ensure individual assessment."[42]

It makes sense that it would be Justice Kennedy writing for the majority a decade later in *Fisher I*, ordering a remand for further analysis as to whether the University of Texas "offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."[43] Again, six of the other Justices of the Court joined in Justice Kennedy's opinion,[44] with Justice Ginsburg dissenting on the grounds that the case should simply be decided in favor of the University without having to remand. Even Justices Scalia and Thomas joined in the opinion in full, not in part, accepting the Court's remand only on narrow tailoring—even though Justices Scalia and Thomas wrote separately to note they would revisit and overrule *Grutter* given the opportunity.[45] But even with this open invitation, *Fisher I* settled the University of Texas' compelling interest in diversity and a critical mass by

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[40] *Id.* 539 U.S. at 342.

[41] *Id.* 539 U.S. at 389.

[42] *Id.* 539 U.S. at 391.

[43] *Fisher I.*, 133 S. Ct. at 2421.

[44] Justice Kagan did not take part in the consideration or decision of either *Fisher* decision, most likely because she participated in the case previously when she was Solicitor General, who argued in favor of the University of Texas as amici during and after her tenure.

[45] *Id.*, 133 S. Ct. 2422 (Scalia J. concurring) and *Id.* (Thomas, J. concurring). Justice Thomas's lengthy dissent is also notable in the many rhetorical strategies used to equivocate affirmative action to segregation, including the mismatch theory discussed *infra* § 5.4.

precedent and by the majority of the Justices of the Court. Surprisingly it was Justice Kennedy who would write for the majority in *Fisher II* to find the University's had met the narrow tailoring requirement.[46] Justice Kennedy's swing from dissent in *Grutter* to majority in *Fisher II* shocked many,[47] and left even Justice Alito to remark that "something strange" had happened since *Fisher I*.[48]

5.3 Stranger Things: Educational Authorities in *Fisher II*

On remanding, after some additional briefing, the Fifth Circuit came to the same conclusion it made three years earlier: the University's use of race-conscious admissions was narrowly tailored to meet the compelling interest in the educational benefits that flow from diversity.[49] Both the majority and Judge Garza's dissenting opinion engage in extensive analysis of the factual record, effectively following Justice Kennedy's instructions to scrutinize the factual record presented by both parties. Neither the Fifth Circuit nor the Supreme Court question the underlying quantitative or qualitative data in their opinions. Instead the controversy entirely boils down to contextualizing and applying that data to policy; determining the correct methodological framework for

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[46] *Fisher II*, 136 S. Ct. at 2214-15.

[47] *See e.g.* Steve Vladeck, Sympo*sium: So what happened between* Fisher I *and* Fisher II, SCOTUSBLOG.COM, (June 23, 2016) (It's hard to view today's ruling in the second *Fisher v. University of Texas at Austin* . . . as anything other than a stunning surprise); Kimberly West-Faulcon, *Symposium: Surprisingly, facts rule the day in Fisher II*, SCOTUSBLOG.COM (June 24, 2016) ("Unwilling to sound the death knell on racial affirmative action in higher education, Kennedy ventured down a path he had never taken before. He upheld the race-conscious component of the University of Texas at Austin's admissions policy as satisfying the stringent strict-scrutiny standard of review"); Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, THE NEW YORK TIMES (June 23, 2016) ("the decision, by a 4-to-3 vote was unexpected).

[48] *Fisher II*, 136 S. Ct. at 2215.

[49] *Fisher II*, 758 F.3d 633, 660 (2014).

analysis. The Fifth Circuit utilized extensive background data, both from the factual record and external sources, including two appendices graphing the admission data in the factual record. At the Supreme Court, the controversy is less over the quantitative admissions data, but the extent to which that quantitative data presents a reliable interpretation of the University's application of race-conscious admissions.

Looking to the different authorities used in the opinions lends insight on how the Court evaluates the importance of information provided by the parties and the Fifth Circuit, as well as what weight is given to these authorities in the opinion. Below, in Table 1, I have listed the sources referenced in the three opinions in *Fisher II*, by authority. The N represents the number of sources cited to—not the number of citations in total, but the number of different sources used in each area of authority. The percent column represents the percent of the total for that opinion.

Table 1: Authorities referenced in *Fisher* II Opinions

Authority[50]	Majority (Kennedy)		Dissent (Alito)		Dissent (Thomas)	
	N	%	N	%	N	%
Amicus Brief	1	4%	12	13%	0	0%
Brief of Petitioner	1	4%	1	1%	0	0%
Brief of Respondent	0	0%	2	2%	0	0%
District Court	0	0%	1	1%	0	0%
Appellate Court	2	7%	3	3%	0	0%
Supreme Court	10	37%	17	19%	2	100%
U.S. Constitution	1	4%	0	0%	0	0%
Book or Treatise	0	0%	1	1%	0	0%
Census	0	0%	2	2%	0	0%
Academic Journal (Peer-Review or Law)	0	0%	2	2%	0	0%
Magazine or Newspaper	0	0%	9	10%	0	0%
Other	0	0%	1	1%	0	0%
University of Texas Admissions Office	0	0%	2	2%	0	0%
Website	0	0%	13	15%	0	0%
Factual Record	10	37%	17	19%	0	0%
Government or Professional Association Report	0	0%	4	4%	0	0%
Oral Argument	1	4%	1	1%	0	0%
State Law	1	4%	1	1%	0	0%
Total	27	100%	89	100%	2	100%

As Table 1 demonstrates, both Kennedy and Alito lean heavily on the Supreme Court precedent and the factual record to reach their conclusion, with Justice Kennedy almost entirely relying on the analysis of the Fifth Circuit, the factual record, and the standards provided by previous opinions. As in *Inclusive Communities* in Chapter 4, it is surprising

[50] The method for coding and conceptualization for the authorities is described in the intermission before Chapter 4, *see supra* Intermission.

to see conservative, textualist Justices lean so heavily on external authorities in their dissenting opinions. Justice Alito's extensive use of amicus curiae and external sources expands the information presented beyond a narrower view of the text of the constitution or opinions of the Court. Drawing support from this variety of sources indicates that precedent, on its own, is insufficient to rebut the majority's interpretation. Even in terms of the facts and data on educational policy, the opinion of the Court appears to grant substantial deference to the University, while Justice Alito's dissent finds the University's position in opposition to established case law, particularly the opinions of Justice Kennedy, offering alternative sources for race-neutral remedies. This contrast in sources, explored in the next two sections, highlights how the Court's institutional power is sufficient authority when in the majority, but dissenting opinions must prove that the Court is taking the wrong direction using alternative authorities.

5.3.1 Narrow Tailoring: Justice Kennedy's Majority

Justice Kennedy's historical opposition to affirmative action and deference to University policy suddenly fades in *Fisher II*, leaving a very context-specific evaluation of the University of Texas' "sui generis" approach.[51] Most of the Court's opinion is spent reciting the factual record and establishing the three controlling principles established by previous opinions of the Court: (1) a university's consideration of race triggers strict scrutiny, (2) the educational benefits that flow from student body diversity is a compelling interest, and the Court will defer to a University's "reasoned, principled

[51] *Fisher II*, 136 S. Ct. at 2208.

explanation," and (3) no deference is owed to the University in the narrow tailoring inquiry.[52] Up to this point the Court relies almost entirely on its own precedent, but once the analysis turns to apply these principles to the University of Texas, the analysis almost entirely relies on different parts of the factual record, shown below in Figure 13.

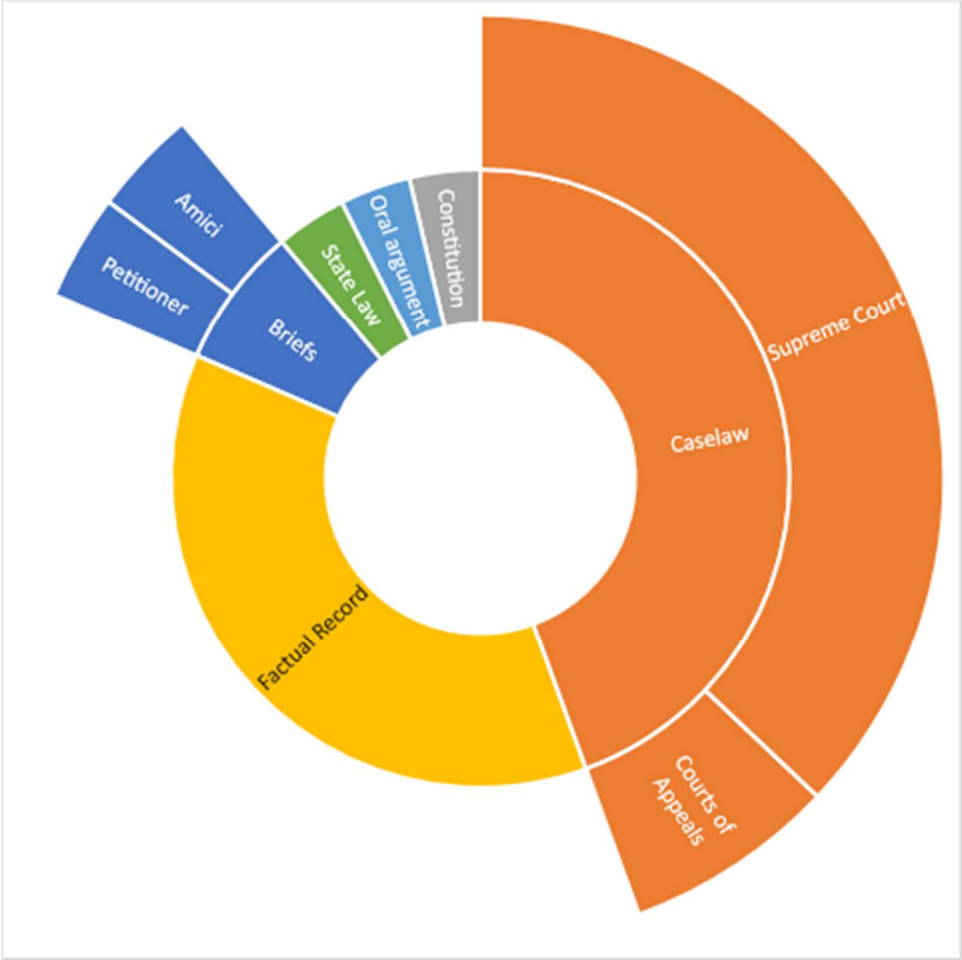

Figure 13: Hierarchy Chart of Authorities used in the Majority Opinion

The Court's interpretation of the factual record relies heavily on the University's ongoing assessment of diversity in admissions, the student body and campus climate. The 2004 Diversity Study, along with related depositions and materials in the record,

[52] *Id.*,

provides the backbone for much of the Court's analysis. This study provides a quantitative and qualitative assessment of the failure of the top ten percent plan to generate sufficient student body diversity. Because the petitioner never challenged "the University's good faith in conducting its studies," the Court accepts them as the central ingredients in justifying the use of race in holistic admissions.[53] Rather than defer to the University's broad policy aims, Justice Kennedy's majority opinion defers to the University's methods of data collection and interpretations of that data. Quantitatively registrar data shows demographic shifts that have failed to provide adequate diversity in the classroom, and qualitative "anecdotal evidence . . . that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation."[54] In the opinion of the Court, these data indicate a sufficient need for diversity which caused the University to narrowly tailor the race-conscious holistic admissions program.

Importantly, Justice Kennedy emphasizes time spent evaluating and reevaluating admissions. The University spent seven years attempting to achieve diversity through the ten percent plan and holistic review without considering race, but "none of these efforts succeeded."[55] The University's ensuing study, and commitment to repeating the diversity study every five years to calibrate the holistic admissions process, become crucial to Justice Kennedy's evaluation of the use of race in admissions by placing time-sensitive limits on race-conscious action. If the University is calibrating its admissions process

[53] *Id.*, 136 S.Ct. at 2211.

[54] *Id.,* 136 S.Ct at 2212.

[55] *Id.*

every five years, then if it determines that race is no longer helpful in achieving student body diversity, it can do away with it. Next, Justice Kennedy reasons that existing data on admissions must be accepted because the race-conscious admission program was only in effect for three years before Fisher filed suit, and remanding for more data would be "limited to a narrow 3-year sample, review of which might yield little insight."[56] In other words, Justice Kennedy gives significant deference to the University's self-assessment of the use of race, emphasizing available data and sample size in making practical determinations from an educational perspective, rather than imposing a constitutional ceiling. Measuring and evaluating race-consciousness in higher education thus becomes more about educational policy and implementation at a university level, not a constitutional argument.

For the majority, there is enough data to show that race-neutral policies are insufficient to meet the constitutionally valid goal of racial diversity. But rather than weigh in on exactly how Texas is achieving that goal, Justice Kennedy's majority makes reflexivity the central standard of measuring the validity of race-conscious admissions. In other words, the constitutional measure of race-conscious admissions is based on the University's, not the Court's, recurring evaluation of whether its admissions policies are achieving its goals. Recognizing Texas' top ten percent plan as insufficient reaffirms Justice Ginsburg's dissents that emphasized percentage plan's reliance on segregation,[57]

[56] *Id.*, 136 S.Ct at 2209.

[57] *Id.*, 136 S.Ct at 2213.

but interestingly never citing to the *Inclusive Communities* opinion which also documented residential segregation in Texas.

Accepting the University's findings that race-neutral policy failed to achieve student body diversity in qualitative or quantitative ways is very important since it leaves the University's use of race-conscious admissions intact; providing doctrinal justification for affirmative action and practical educational benefits to students of color by providing increased opportunities for admissions. However, this continues the obfuscation of systemic issues of racial discrimination, and how institutional racisms are intertwined. The fact that percentage plans in admissions create some racial diversity, even though insufficient, is entirely reliant on racial discrimination and segregation in housing, which influences primary and secondary education. Percentage plans are frequently offered as the race-neutral alternative, but acknowledging their reliance on segregation could expose, at least in part, how race-neutral policies are reliant on other systematic, racially discriminatory practices.

5.3.2 Surprised Strawmen: Justice Alito's Dissent

Justice Kennedy's liberal turn in favor of affirmative action shocked outside observers, but it also appears to have affected his colleagues as well. Justice Alito's dismay is tangible in his dissenting opinion. Like Justice Kennedy, he cites extensively to the factual record and to previous opinions of the court. However, almost half (8 out of 17) of the opinions that Justice Alito quotes or cites to in his dissent is either a

majority, concurrence, or dissent written by Justice Kennedy.[58] This subtle level of citation not only demonstrates the extent to which Justice Kennedy's majority opinion differs from his previous opinions on involving race or affirmative action, but also Justice Alito's measurable surprise that Justice Kennedy has joined the side of affirmative action. Justice Alito's use of case law, and the opinions of Justice Kennedy, mostly follow the post-racial tropes documented by Sumi Cho, equivocating historical discrimination and racism against racialized minorities with programs designed to remedy those histories of oppression.[59] For Justice Alito, and his many citations to Justice Kennedy's former opinions, this means equivocating the use of race as a sub-factor in holistic review to increase the number of students of color as "systematic racial discrimination."[60]

In this view, race-conscious remedies to racial discrimination are a form of racial discrimination; equivocating affirmative action to systematic, historical restrictions on opportunities for higher education for people of color. Ms. Fisher was denied admission because she was not in the top ten percent of her class and her combined SAT, GPA,

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[58] *See Fisher II*, 136 S. Ct. 2215 (Alito, J. dissenting) (citing *Fisher I*, 133 S.Ct. 2411 (2013)); *Fisher II*, 136 S. Ct. 2221 (Alito, J. dissenting) (citing *Richmond v. Ja.A. Croson Co.*, 4388 U.S. 469 (1989) (Kennedy, J. concurring in part and concurring in judgement)); *Fisher II*, 136 S. Ct. 2221 (Alito, J. dissenting) (citing *Miller v. Johnson*, 515 U.S. 900 (1995) (Justice Kennedy writing for the majority)); *Fisher II*, 136 S. Ct. 2221 (Alito, J. dissenting) (quoting *Grutter*, 539 U.S. at 388 (Kennedy, J. dissenting)); *Fisher II*, 136 S. Ct. 2221 (Alito, J. dissenting) (quoting Edmonson v. Leesville Concrete co., 500 U.S. 614, 619 (1991) (Justice Kennedy writing for the majority)); *Fisher II*, 136 S. Ct. 2224 (Alito, J. dissenting) (quoting *Parents Involved v. Seattle Unified School Dist. No. 1*, 127 S. Ct. 2738 (Kennedy, J. concurring in part and concurring in judgement)); *Fisher II*, 136 S. Ct. 2215 (Alito, J. dissenting) (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (Justice Kennedy writing for the majority)); *Fisher II*, 136 S. Ct. 2228 (Alito, J. dissenting) (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (Kennedy, J. dissenting)).

[59] Sumi Cho, *Postracialism*, 94 IOWA L. REV 1589, 1594 (2008).

[60] *Fisher II*, 136 S. Ct. at 2242 (Alito, J. dissenting).

essays, and extracurricular activities were not more outstanding than other admitted students. Nearly seventy years before Ms. Fisher, Mr. Herman Sweatt was denied admission to the University of Texas Law School because he is Black and the Texas constitution at that time barred Black students from the University of Texas.[61] Justice Alito's moral equivocation places these two in the same category of racial discrimination, even though Mr. Sweatt's denial was rooted in overt, covert, and historical discrimination and Ms. Fisher's was based on an implied entitlement to admission based on her whiteness, with no showing of historical, statistical, or other discriminatory treatment, intent, or effect against whites. Justice Alito would still accept Ms. Fisher's assertions, because of the implication, and therefore offers extensive authorities beyond the opinions of the Court to support his argument.

[61] *Sweatt v. Painter*, 339 U.S. 629 (1950).

Figure 14: Hierarchy Chart of Justice Alito's Dissent in Fisher II

Like Justice Kennedy, Justice Alito also leans on the factual record established by the lower court. Where he differs is in incorporating different elements of empirical data to make his case. As shown in Table 5.1 and Figure 14, Justice Alito makes generous use of Amici and Empirical information, though as noted earlier the empirical data presented here is mostly websites of the admissions offices of different Universities. Justice Alito incorporates amicus briefs, the factual record, and other empirical data to discuss Asian American students, multiracial students, intraracial diversity, and standardized testing. These four examples are cornerstones of Justice Alito's attempt to muddle measures of campus diversity and offer race-neutral alternatives to create racially diverse campus.

5.3.2.1 Asian American Representation

First, in section II.C.2 of his dissent, Justice Alito attacks the University's classroom diversity justification (the dramatic underrepresentation of students of color in classes where there is one or less of Black, Latino or Asian American student in a class) for narrow tailoring, because he believes Asian Americans are not properly represented in the process. Quoting the Amicus Asian American Legal Foundation (AALF), a conservative legal group devoted to colorblind admissions policies, Justice Alito argues that UT Austin's emphasis on classroom diversity prioritizes Latinos over Asian Americans because Latinos "outnumber" Asian Americans demographically, remarking that "apparently 'Asian Americans are not worth as much as Hispanics.'"[62] Here Justice Alito's dissent tries to undermine diversity and statistical analyses of the University of Texas by asserting that Asian Americans are undervalued in the admissions process, since increasing the number of Black and Latina/o students "inevitably harms students who do not receive the same boost" because of the limited number of admissions.[63] Not mentioned are two other Asian American organizations provide amicus briefs for the Respondent, countering AALF's assertions with statistical analyses on the rapid rise in representation of Asian Americans both in the State and at the collegiate level.[64]

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[62] *Fisher II.* 136 S. Ct. at 2227 (Alito, J. Dissenting) (quoting Brief for Asian American Legal Foundation et. al. as Amici Curiae at 11 (*Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981)).

[63] *Id.* at 2227 n. 4.

[64] *See* Brief of the Asian American Legal Defense and Education Fund, et. al. in Support of Respondents, at 12-23 (*Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Amici Curiae Members of Asian Americans Advancing Justice et al., in Support of Respondents at 28-40 (*Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

Justice Alito's argument highlights a central component of the case against affirmative action: the idea that creating programs to benefit Blacks and Latina/os must automatically discriminate against or harm everyone else, namely whites and occasionally Asian Americans, and to think otherwise "defies the laws of mathematics."[65] This straw man argument creates the specter of discrimination against populations who are already admitted in significant numbers to the institution, reasoning that the finite number of admissions means any benefits to one group harms all others. This fallacious line of reasoning underestimates the myriad of advantages and disadvantages that go into collegiate admissions, like racialized biases in standardized testing, preparation courses, advanced placement classes, or even familial and professional ties. These unearned benefits not considered as such, and are left alone. Moreover, there is a presumption of entitlement to the pre-existing finite seats for those who are supposedly harmed by affirmative action. Finally, it does not contemplate expansion—if the problem is the limited number of seats, then simply increase the number of seats to include well qualified individuals being left out and leave affirmative action untouched. This would include a racialized remedy for discrimination and the claimed harm of non-benefit for whiteness. Instead, Justice Alito uses Asian American students and their experiences based on the limited and hyperbolic understanding of one brief, without consideration of the other briefs and studies presented before the Court noting how Asian Americans benefit from affirmative action generally, and at the University of Texas specifically.

5.3.2.2 Self-Identification and Multiraciality

[65] *Fisher II*, 136 S. Ct. at 2227 n.4 (Alito, J. Dissenting).

However, Justice Alito's concern for Asian American students in admissions does not stop there. The UT admissions policy does not define or verify an applicant's racial identification, inviting them to self-identify with a provided category. Justice Alito expresses concern for "individuals with ancestors from different groups" citing to two recent reports from the Pew Research Center finding that 28% of Asian Americans and "26% of Hispanics" marry a spouse of a different race or ethnicity.[66] Similarly he cites the census bureau, reporting that "individuals describing themselves as members of multiple races grew by 32% from 2000 to 2010."[67] Justice Alito's interest in growing multiracial community is less sympathy than suspicion, suggesting that UT's policy of self-identification by race is an "invitation for applicants to game the system."[68] In essence, Justice Alito's line of argument seems to advocate for overall racial purity, while his comment on gaming the system misunderstands both multiraciality and admissions.

Multiracial people, however they identify, still bring a different, diverse perspective to the university setting. Similarly, Justice Alito sets up this argument by saying that more students will have ancestors of different races "as racial and ethnic prejudice recedes,"[69] yet this would simply mean that *more* students are eligible for the

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[66] *Id.*, at 2229 (Alito, J. dissenting) (citing United States Census Bureau, 2010 Census Shows Multiple-Race Population Grew Faster Than Single-Race Population (Sept. 27, 2012), online at https://www.census.gov/ newsroom/releases/archives/race/cb12-182. Html).

[67] *Fisher II*, 136 S. Ct. at 2229 (Alito, J. dissenting) (citing W. Wang, Pew Research Center, *Interracial Marriage: Who Is "Marrying Out"?* (June 12, 2015), online at http://www.pewresearch.org/ fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/; W. Wang, Pew Research Center, *The Rise of Intermarriage* (Feb. 16, 2012), online at http://www.pew socialtrends.org/2012/02/16/the-rise-ofintermarriage/).

[68] *Fisher II*, 136 S. Ct. at 2230.

[69] *Id.*

benefit of affirmative action, in direct contrast to his earlier argument of mathematical impossibility. Somehow affirmative action is keeping students out based on limited seats while letting too many students in thanks to interracial marriage—assuming all the married couples in Justice Alito's quoted studies are having children.

Moreover, the admissions at the University of Texas consider race based on self-identification which arises in the holistic review consideration of essays the student has written. Justice Alito's line of argumentation is reductionist, assuming simply checking a box next to a race will guarantee admission, when a full file review would reveal students who may identify as multiracial but whose experiences are qualitatively identical to white students applying to the University. Even then, all this would do is eliminate one of the many factors considered in holistic review. Practically, this concern has little effect on admissions. In principle, it is an argument for racial purity and white supremacy.

5.3.2.3 Intraracial Diversity

Next, in section II.C.3 of his opinion, Justice Alito attacks the University's intraracial diversity rationale for narrow tailoring. Intraracial diversity in this sense refers to UT's use of holistic review to ensure that the applicant pool and admitted students represent both many different racial minorities and different experiences as racialized peoples. However for the Petitioner, its Amicus, and Justice Alito, this translates to "seeking affluent minorities . . . rely[ing] on the baseless assumption that there is something wrong with African-American and Hispanic students admitted through the Top Ten Percent Plan."[70] Justice Alito draws on census data to argue that the Top Ten

[70] *Id.* at 2231 (Alito, J. Dissenting).

percent plan still draws in minorities "wealthier than the average Texas family," which he defines as children raised in households with a household income above the Texas median, $49,453.[71] Again, Justice Alito twists the University's attempt to include a variety of racialized perspectives into a deficit approach, arguing that because the University would beneficially consider the race of students of color from any socioeconomic status, affirmative action has inverted to ensure admissions for affluent students and demean low income students.

First, this falsely equivocates race and class, being Black, American Indian, or Latina/o does not always indicate lower socioeconomic status. Even though there may be intersections and correlations between race and class thanks to the rampant function of white supremacy and capitalism in the United States, there is no one-to-one relationship. Second, it underestimates the fact that racial diversity considers that there is a benefit to considering race and including more people of color that is unquantifiable by any other factor—there is something about being a person of color in the United States that, regardless of other intersecting identities, creating qualitatively different experiences that add to the learning environment for all. Racism is inherently discriminatory, but does not discriminate based on class. While affluent students of color may not have experienced poverty, they likely have experienced racism or discrimination, which creates a different perspective on society. Using intraracial diversity as a justification for holistic review ensures that racialized experiences are not essentialized in the University, meaning that

[71] *Id.* 136 S. Ct. at 2233 (Alito, J. Dissenting) (citing United States Census Bureau, A. Noss, Household Income for States: 2008 and 2009, p. 4 (2010), online at https://www.census.gov/prod/2010pubs/ acsbr09-2.pdf.)

admissions attempt to ensure that no one student is made to be a spokesperson for their race, and that no one set of experiences is representative of all people of a particular race.

5.3.2.4 Standardized Testing

Furthermore, Justice Alito argues the intraracial diversity justification is defeated by the University's use of SAT scores, "which has often been accused of reflecting racial and cultural bias, as a reason for dissatisfaction with poor and disadvantaged African-American and Hispanic students."[72] Though he admits he is "ill equipped to express a view" on the racial bias in the SAT, he notes that "SAT scores clearly correlate with wealth."[73] On this point Justice Alito cites extensively to the briefs for the respondent, particularly Top Tier Universities whose briefs extensively support the University's use of race in holistic admissions, but do not use SAT testing in their own admissions policies.[74] Justice Alito also supplements this with his own research on admissions, citing the websites of multiple universities who do not require the SAT.[75] But the Universities amicus briefs are not cited for their use of race-conscious admissions, but their lack of SAT scores due to racial and class bias, that he conveniently overlooks due to his professed lack of expertise.

5.3.2.5 Have a Little Fire Scarecrow: Deconstructing Alito's Strawmen

[72] *Id.* 136 S. Ct. at 2234 (Alito, J. Dissenting).

[73] *Id.*

[74] *Id.* at n.13 (extensive discussion of Universities who do not require the SAT).

[75] *Id.*

In the context of classroom diversity or intraracial diversity, Justice Alito's idea of narrow tailoring is an immeasurable, unwinnable game. Rather than an intersectional, holistic approach to match the holistic review the University is supposed to give students, Justice Alito attempts to pin the University either as unconcerned with Asian Americans—who are still admitted in large numbers under holistic review considering race—or a rising threat of multiracial students who will somehow damage the University by self-identifying with a broad racial category. Justice Alito's comments on "gaming the system" strike an oddly defensive tone in his statistically informed rhetorical assault on the University's admissions policy. This accusation of cheating draws on meritocratic tropes of white supremacy—perceiving affirmative action only as a beneficial advantage rather than a remedy to the litany of social and cultural oppressions that have historically created persistent and continuous, systematic disadvantage for racialized minorities, all while failing to recognize these disadvantages may exist. Even the qualitative findings that students experience loneliness, isolation, and a racially hostile campus climate, are heavily scrutinized; Justice Alito asks for quantification, "we are not told how many," before quickly noting that any quantification seeking demographic parity is impermissible racial balancing, and illogical to link to demographics.[76] Like much of his dissent, Justice Alito attacks the University's position as vague, then uses census and other demographic statistics to build a strawman argument, which he quickly tears down as impermissible racial discrimination. Social scientific evidence is thus decontextualized, parted out, or isolated to create the illusion of deficit. Shifting the

[76] *Id.* 136 S. Ct. at 2235 (Alito, J. dissenting).

measures and studies used to evaluate what types of diversity are good, achievable, or important for a University creates a moving target, rendering sound affirmative action policy unenforceable.

Whether using Asian Americans, SAT's or Multiracial students, Justice Alito constructs an illusory series of injured parties who are not at issue in the case, and then dismisses them as impermissible beneficiaries of the University's holistic review process. The narrow tailoring requirement, under Justice Kennedy's view, is a call for methodological transparency and periodic retooling of the plan. In Justice Alito's estimation, there can be no narrowly tailored program since any estimation based on race would invoke unsavory racial preferences that could be better accomplished by race-neutral means. Again, the compelling interest in achieving a racially diverse campus is never disturbed in Justice Alito's opinion, he does not try to revisit *Fisher I* or *Grutter* as Justice Thomas did in his *Fisher I* concurrence. Rather, Justice Alito would eliminate the University's use of race in holistic review in favor of the race-blind holistic review system, which the University showed in its Diversity study was not achieving the agreed upon objective of a racially diverse campus.

The use of social science and empirical data in Justice Alito's dissent is, at best, an oversimplification of the factors that go in to considering racialized diversity, a statistical game of smoke and mirrors. At worst, it is white supremacist dogma. Concluding his analysis of the narrow tailoring argument in section II.D, Justice Alito hypothesizes that

> In 2004 when race was not a factor, 3.6% of non-Top Ten Percent Texas enrollees were African-American and 11.6% were Hispanic. It would stand

> to reason that at least the same percentages of African-American and Hispanic students would have been admitted through holistic review in 2008 even if race was not a factor.[77]

There are many sound, reliable, verifiable, predictive statistical measures that could answers Justice Alito's questions on patterns in enrollment—many of them are within the Amicus Curiae briefs, like the briefs Justice Alito cited for his data on the SAT's.[78] He instead ponders his own hypotheticals based on a single data point to upend a holistic admissions program. Scientific evidence in Justice Alito's dissent is not considered rigorously, or systematically, but selectively; only accounting for data that support his assumptions, dismissing contrary evidence by imposing deficit-oriented assumptions. The hypothetical Justice Alito poses, whether race-neutral holistic review was sufficiently increasing racially diverse admissions, was at the center of the University's Diversity Study, which lead to the race-conscious holistic review at the center of this case. Instead, Justice Alito is content to reason that hypothetical race neutral policies, like socio-economic status or simply race-blind review, will sufficiently increase racial diversity. Again, Justice Alito's dissent does not question the goal of a racially diverse campus, only how it is achieved. One Justice's statistical speculation on the benefits of race-neutral admissions is thus superimposed over the immense weight of social scientific authorities advocating for race-conscious policy. The questions, hypotheticals, and problems presented in Justice Alito's dissent have all been directly or indirectly

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[77] *Id.* 136 S. Ct. at 2237 (Alito, J. dissenting).

[78] *Id.* 136 S. Ct. at 2234 n.11 (Alito, J. dissenting) (citing Brief for Amherst University et al. as Amici Curiae 15-16; Brief for Experimental Psychologists as Amici Curiae 7; Brief for Six Educational Nonprofit Organizations as Amici Curiae 21).

addressed by social science research documenting the importance of racial diversity and race-conscious admissions, briefed by one or more of the many amicus social scientists,[79] nonprofits,[80] corporations,[81] or college basketball coaches.[82]

5.4 Critical Masses: Social Scientists and Race Neutral Alternatives

Unfortunately, Justice Alito is not alone in his estimations on racial diversity and the proper means of achieving that end. Though he extensively references amici curiae in favor of the respondent, beneath the surface of the opinions is a battle of empirical analysis in predicting the effects different policies have on collegiate admissions. In *Fisher II* there are three groups of amici offering scientific evidence for the Court: the petitioner's race-blind advocates, amici for neither party advocating for the elimination of race-based affirmative action and incorporation of class-based affirmative action, and

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[79] Brief of Social and Organizational Psychologists as Amicus Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Empirical Scholars as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of the American Educational Research Association et al., as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of 823 Social Scientists Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[80] *See e.g.* Brief of Six Educational Nonprofit Organizations as Amicus Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief Amicus Curiae of the National Education Association, et al., in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[81] Brief of Fortune-100 and Other Leading American Businesses as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of DuPont, IBM, Intel, and the National Action Council for Minorities in Engineering in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[82] Brief of National Association of Basketball Coaches, Women's Basketball Coaches Association, the National Association for Coaching Equity and Development, Geno Auriemma, Jim Boeheim, John Chaney, Jody Conradt, Tom Izzo, Mike Krzyzewski, Joanne P. McCallie, George Raveling, Nolan Richardson, Sue Semrau, Orlando 'Tubby' Smith, John R. Thompson, Jr., Tara Vanderveer, Dick Vitale, Coquese Washington, and Gary Williams as Amicus Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

amici for the respondent arguing for the preservation and expansion of race-conscious admissions. Or, as I call them, the contentious colorblind, the class critics, and the race-conscious cheerleaders, respectively.

Amici for the respondent and neither party both argue that using race to achieve racial diversity is fatally flawed since any means of achieving diversity considers race and is in their eyes unconstitutional. These two groups diverge on proposed alternatives. The contentious colorblind would simply eliminate any consideration of race and let life find a way. The class critics follow the liberal wing of post-racialism,[83] acknowledging the struggles of people, of color but rooting their oppressions and systemic disadvantage in problems of class inequality. Class critics oppose race-conscious affirmative action in favor of alternatives that emphasize socioeconomic status; like the infamous Richard Sander whose mismatch theory is cited extensively by the amici for the petitioner and noted by Justice Scalia at oral argument. Sander argues that ending racial affirmative action and endorsing only socioeconomic affirmative action will achieve the same end. Amici for the respondent, the race-conscious cheerleaders, advocate for the use of race as a crucial factor in admissions for achieving the important goal of diversity and directly refute the other two groups of amici. All 68 of the amici for Respondent argue for affirmative action and the importance of racial diversity in higher education, with most of

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[83] Cho, *supra* note 59, at 1602 (explaining that for liberal post-racialists

> the fundamental concern is that race talk obscures "the truly disadvantaged"; they prefer an inchoate analysis that draws upon the class critique, although in a much more inert, but palatable, manner.30 Practical post-racialists decry race-based remedies because they pose a "zero-sum" game that injures whites in order to benefit people of color. In order to achieve racial equality, these post-racialists fear that "playing the race card" will ultimately destroy the willingness of whites to pursue racial justice due to false accusations of racism.)

these race-conscious cheerleaders arguing for expansion of existing affirmative action programs.

Most of the argument between social scientific standards happens in the amicus phase of the Case, with little making it in to the final opinions of the Court. Certain elements carry through, like the critique of SAT testing or the principles of Socioeconomic status, but few of the arguments made by amici make it to the final opinions of the justices. While this may make amici seem redundant, the fact that some of the sources and data make it into elements of the final opinion, even if the briefs are not cited, shows these opinions are at least considered. Table 2 shows the discrete differences in sources used and the number of amicus in favor of respondent outnumbering the number in favor of petitioner by nearly five to one. The many amici for respondent shows strong, diverse support for race-based affirmative action, but could also lead to reader fatigue in creating a larger workload for the justices, or more likely their clerks. Expressed as percentages of the authorities used in each area in Table 2, the respondent and the three briefs in support of neither party draw largely from academic articles, either law journals or peer-reviewed journals to support their arguments. Petitioner on the other hand relies most on the constitutional standard, though interestingly use periodicals slightly more than academic articles, in supporting its analyses. Each of the following sections takes a brief substantive look at the primary authorities in each camp, and with special note to how these arguments intersect and are taken up by the Court, if at all.

Table 2: Authorities Referenced in *Fisher II* Amicus Briefs

Source	Petitioner Amici (n = 13)		Respondent Amici (n = 68)		Neither Party (n = 3)	
	N	%	N	%	N	%
Administrative Regulations	0	0%	7	0%	0	0%
Amicus Curiae	5	1%	49	1%	1	1%
Petitioner: Merits Brief	0	0%	0	0%	0	0%
Respondent: Merits Brief	0	0%	0	0%	0	0%
Federal Appellate Courts	25	6%	70	2%	2	2%
Federal District Courts	18	4%	36	1%	1	1%
State Appellate Courts	3	1%	0	0%	0	0%
State Supreme Court	5	1%	14	0%	0	0%
Supreme Court	160	36%	745	22%	10	8%
Congressional Record	1	0%	46	1%	0	0%
Congressional Report	1	0%	0	0%	0	0%
U.S. Constitution	7	2%	26	1%	0	0%
Datasets	0	0%	9	0%	0	0%
Books or Treatises	29	7%	291	9%	46	37%
Census	1	0%	0	0%	0	0%
The College Board	0	0%	19	1%	0	0%
Academic Article (Law Journal or Peer Reviewed)	54	12%	888	27%	34	27%
Periodical (Magazine or Newspaper)	57	13%	169	5%	15	12%
Report	0	0%	212	6%	0	0%
Other	6	1%	47	1%	10	8%
UT Admissions Office	1	0%		0%		0%
Website	32	7%	418	13%	5	4%
Factual Record	2	0%	0	0%	0	0%
Government or Professional Association	18	4%	142	4%	1	1%
Oral Argument	0	0%	0	0%	0	0%
State Law	13	3%	51	2%	0	0%
Federal Statute	5	1%	52	2%	0	0%
U.N. and International Jurisdictions	0	0%	27	1%	0	0%
Totals	443	100%	3318	100%	125	100%

5.4.1 Colorblindness as Neutrality

From the Petitioner's brief and their Amicus, the line of argument follows traditional patterns of race-blind discourse that we saw in Alito's dissent and the different strategies of colorblindness discussed in Chapter 2. Petitioners and their amici make a moral equivocation between race-conscious remedies and racism or "racialism" of the past.[84] Affirmative action is treated the same as Jim Crow segregation, making any consideration of race hostile to principles of equal protection under the constitution. Petitioner's briefs for certiorari[85] and merits brief argue that the use of race "comes at extraordinarily high cost [because] . . . . it 'demeans the dignity and worth of a person.'"[86] Therefore by eliminating the consideration of race-conscious admissions, all of this indignity could be avoided, because this indignity "is far too high a price to pay for any marginal benefit the use of racial preferences may confer on underrepresented minority students."[87] Some of the amici argue that the race-conscious admissions go

[84] *Id.* at 1603.

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[86] Brief for Petitioner at 47, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) (quoting *Parents Involved*, 551 U.S. at 746 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000))).

[87] *Id.*

even further by conferring an "undue preference" for Black students in the admissions process,[88] and the University holds secret negative quotas against Asian Americans.[89]

Statistical analyses included to support these bold claims are not sound and do not withstand scrutiny—which may explain why they are not used in the final opinions. For example, the work of Althea K. Nagai gets cited in multiple briefs,[90] but is, at best, willfully obtuse, and, at worst, racist. Her calculations and logistic models claim to estimate odds of admission for whites and Asian Americans based on the median scores of "Black admittees." Nagai's methods are incredibly vague in how she conceptualizes her measures and probabilities, saying she controls for "other factors" without describing what factors are eliminated or what confounding variables might exist.[91] This is methodologically crucial since describing the way data is presented, narrowed, and evaluated defines the measured effects and identifies whether the correlation is measuring what Nagai proposes to measure, or simply a series of false positives known in statistics as Type I error. Similarly, Nagai does not include a coefficient of determination, "r^2" for

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[88] Brief Amicus Curiae of Pacific Legal Foundation et. al in Support of Petitioner at 27, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief for the CATO institute as Amicus Curiae in Support of Petitioner at 27, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[89] Brief Amicus Curiae of Jonathan Zell in Support of Petitioner at 25-27, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Amici Curiae the Asian American Legal Foundation and the Asian American Coalition for Education (Representing 117 Affiliated Asian American Organizations) in Support of Petitioner at 9-23, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[90] Brief Amicus Curiae of Pacific Legal Foundation et. al in Support of Petitioner at 27, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief for the CATO institute as Amicus Curiae in Support of Petitioner at 27, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[91] *See e.g.* Althea K. Nagai, R*acial and Ethnic Preferences in Undergraduate Admissions at the University of Wisconsin-Madison*, Center for Equal Opportunity (September 13, 2011) (online at http://www.ceousa.org/attachments/article/546/U.Wisc.undergrad.pdf)

any of her regression models, or any other measures for goodness-of-fit. R^2 describes how well a regression model describes the variation in a dependent variable based on the included data, allowing researchers to see whether there could be additional variables that would explain changes in the dependent variable.[92] In other words, for all the sweeping statistical assumptions Nagai makes about the relationship between race and admissions, there is nothing in her data that would indicate it is a direct relationship, and not effected by the presence of other confounding, intervening variables. The statistical significance she describes only means that it is unlikely the differences in the data are due to chance.

Furthermore, Nagai's predictions are statistically biased against Black students. Nagai uses the median standardized test score and GPA of admitted Black male students as her control, eliminating all data in her sample that does not match this variable. Every applicant she studies must a GPA and test score equal to the median score for Black males. Nagai does not state what this changes the sample size to, or how this drastic narrowing of the sample effects the demographics of her data. Instead, Nagai reports in multiple studies that Black students have a near 100% probability of admission, using this as evidence of bias against white and Asian students.[93] In essence, Nagai's probability model simply shows that nearly 100% of Black students with a specified test score and

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[92] Terance D. Miethe and Jane Florence Gauthier, SIMPLE STATISTICS APPLICATIONS IN SOCIAL RESEARCH 248 (2008); Anna Leon-Guerrero and Chava Frankfort-Nachmias. ESSENTIALS OF SOCIAL STATISTICS FOR A DIVERSE SOCIETY 274-248 (2011); David Faigman, Michael J. Saks, Joseph Sanders, & Edward K. Cheng, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY: STATISTICS AND RESEARCH METHODS 384 (2010).

[93] *Compare* Nagai, *supra* note 91, *with* Althea K. Nagai, R*acial and Ethnic Admission Preferences at Arizona State University College of Law*, Center for Equal Opportunity (September 13, 2011) (online at http://www.ceousa.org/attachments/article/541/ASU_LAw.pdf)

GPA have the same test score and GPA as a Black male student. In other words, all Black students admitted to the University with these scores and GPA were admitted to the University with these scores and GPA. All blue skies are blue.

Nagai's research is circular logic masquerading as quantitative analysis with the sole purpose of obscuring and confusing issues of race through statistics. Her statistical reports do not meet basic standards for statistical analysis and presentation of data, failing to describe the demographics of the cases in the sample, the meaning of variables, or even which variables are used as independent or dependent in the analysis. Nagai is not actually measuring or describing anything quantitatively or quantitatively significant to admissions, but only summarizing the percentages of students that fit into narrow arbitrarily defined categories. She refers to this data as a "chance" or "probability" of admission, but nothing indicates the weight a university gives to race in admissions. Nagai is not looking at rate of admission, but only how students fit to an arbitrarily defined median. None of her reports or data are from peer reviewed journals, but private reports posted online. Nagai's dubious, problematic, and racist, methodology and complete lack of explanation for data collection or control factors or other statistically sound techniques invalidate her approach, likely explaining why her studies are cited to but never fully addressed or interrogated.

Qualitatively, some in the contentious colorblind crowd argue that race is too confusing a topic, offering Elizabeth Warren, the Senator from Massachusetts with professed Cherokee heritage, and Rachel Dolezal, a white woman who claimed to be Black for many years, as examples of how self-identification in race conscious

admissions can go wrong. The greatest harm presented here is that self-identification by race is imprecise and arbitrary.[94] This fear of racial imposters presents very little in the way of substantively saying why race-conscious admissions do or do not work, but only that the consideration of race is sillier for having to deal with people like Ms. Dolezal. What these briefs leave out is the University's holistic review process, which considers a plethora of other factors in the application; the mere mention of self-identified race would not considerably effect Ms. Dolezal's application. Yet these spurious examples in the Judicial Watch brief filter in principle into Justice Alito's dissent, as noted earlier with his perplexed estimation of multiracial people. In all cases, the core principle goes to the idea that race is somehow an overriding plus factor that will guarantee admission, but much like Nagai's data or Justice Alito's examples, these tangents are more misdirection than application of race or substantive questions of policy.

5.4.2 Replacing Race with Class

Although submitted in support of neither party, the Briefs of David Orentlicher, Richard Kahlenberg, and Richard Sander all argue against the use of race in admissions, offering race-neutral alternatives that focus on socioeconomic status. All three of these White men are concerned that Universities are spending so much time focused on race that less attention is focused on socioeconomic status. Richard Sander, the most cited of the three across the many briefs on all sides, argues that racial diversity has actually harmed students of color at elite colleges and universities, because they are

[94] Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioner at 19, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

"mismatched" in multiple ways. Either they are mismatched in learning, and supposedly perform worse on standardized tests like the bar exam, mismatched in competition, since low grades lead to discouragement and dropout, and social mismatch, based on social isolation at a university.[95] Rather than contemplate the litany of intervening factors that contribute to the treatment of students of color at elite institutions and law schools, Richard Sander blames the institution for using affirmative action to accept students of color to elite institutions, where, in his mind, they do not belong.

Richard Sander's data and analysis are largely gathered from his own studies, and none of his studies on mismatch have appeared in peer-reviewed journals.[96] While law journals are important and valid publications for quantitative research, the fact that Sander's statistical analysis of his mismatch theory has never been published in quantitative or peer-reviewed journal means it has not received the same methodological scrutiny in publication as other social scientific studies affirming the importance of race and affirmative action. Instead it is evaluated for logical argumentation and legal validity, with less editorial supervision and revision of statistical measures than Sander's research would receive in peer-reviewed quantitative journals. Still, Sander's research is very popular among conservatives opposed to affirmative action, like Justice Thomas in

[95] Brief of Richard Sander in Favor of Neither Party at 17-19, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[96] Richard Sander has published in peer-reviewed journals, *see* Richard Sander and Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. Empirical Legal Studies 893 (2012). This publication is not about his mismatch theory, but arguing that "there is little empirical basis for the overwhelming importance students assign to 'eliteness' in choosing a law school." *Id.*

Fisher I,[97] multiple amicus for the petitioner,[98] and Justice Scalia at oral argument.[99] Mismatch theory provides the seemingly neutral, empirical ammunition that conservative, race-blind constitutional scholars are looking for. Statistics add an additional guise of neutrality, instead of embracing and acknowledging existing biases.

Sander's research is also popular among briefs for the respondent, but there the arguments are centered on disproving his underlying hypothesis, exposing his methodologies as flawed, and even pointing to underlying flaws in the data that in his work.[100] Amicus briefs from Richard Lempert, Empirical Scholars, and Kimberly West-Faulcon all explicitly state that they submitted their briefs in order to expose Richard Sander's mismatch theory and Richard Kahlenberg's research on socioeconomic status as scientifically unsound.

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[97] *Fisher I*, 133 S. Ct. 2431-2432 (Thomas, J. dissenting) (citing to Brief for Richard Sander as Amicus Curiae, *Fisher I*, 133 S. ct. 2414 (2013) (No. 11-345)).

[98] Brief of Gail Heriot and Peter Kirsanow as Amicus Curiae at 29, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief Amicus Curiae of Pacific Legal Foundation et. al in Support of Petitioner at 17-18, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief for the CATO institute as Amicus Curiae in Support of Petitioner at 22, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[99] Transcript of Oral Argument at 67-68, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981).

[100] Brief of Teach for America, et. al. as Amici Curiae in Support of Respondents at 17, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981); Brief of Amicus Curiae Professor W. Burlette Carter in Support of Respondents at 8, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981); Brief Amicus Curiae of the National Education Association, et al. in Support of Respondents at 35-36, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981); Brief of Amicus Curiae of Kimberly West-Faulcon in Support of Respondents, 16 – 28, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981); Brief of Empirical Scholars as Amici Curiae in Support in Respondents at 12-23, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981); Brief for Amicus Curiae Association of American Law Schools in Support of Respondents, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981); Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981); Brief of the American Educational Research Association et. al. as Amici Curiae in Support of Respondents, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981); Brief Amicus Curiae for Richard Lempert in Support of Respondents, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981).

While the arguments in favor of replacing racial affirmative action with socioeconomic status survived to Justice Alito's dissent, Richard Sander's mismatch theory was left at oral argument. When Justice Alito pressed counsel for the Respondent on the fact that selective institutions should recruit less students of color and have them admitted to "lesser schools" to increase performance, Mr. Garre quickly dismissed Justice Scalia's phrasing of mismatch theory, noting that holistic admits to the University of Texas fare better at school. He commented "I don't think the solution to the problems with student body diversity can be to set up a system in which not only are minorities going to separate schools, they're going to inferior schools."[101] Mr. Garre inverts postracial strategy, identifying the mismatch theory for what it is, a racist policy designed to redirect students of color from elite universities into lower tier schools. While lower tier schools provide excellent educations to all students, the central point is that denying access to elite institutions removes social, cultural, and economic benefits that come with it; benefits that even Sander acknowledges in his peer-reviewed empirical studies.[102]

5.4.3 Centralizing Race to Achieve Diversity

Finally, the amici for respondent present a variety of perspectives advocating for the use of race-conscious admissions. Ten of the briefs are from businesses, bar associations, doctors, college basketball coaches and military members, all arguing in favor of race-conscious admissions to recruit more students of color, to produce

[101] Transcript of Oral Argument at 68, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981).

[102] Sander & Bambauer, *supra* note 96.

graduates of color and white graduates who understand how to work in diverse environments.[103] Social scientists take up a large portion of the amicus curiae in favor of the University, not only arguing against mismatch theory but providing established social scientific evidence on intervening variables that explain racial isolation. The Brief for Experimental Psychologists for instance, lists fourteen professors of psychology and other social scientists at schools across the nation to provide an excellent metasynthesis of stereotype threat literature.[104] Simply put, they argue that when students are placed in learning environments where they are made to feel unwelcome, unable, or isolated because of racial stereotypes, academic performance suffers. This research provides scientifically sound, alternative explanations and intervening variables for correlations between race, isolation, and high performing universities that Sander's research ignores or fails to understand. The mismatch Sander describes is not on the student, but stereotype threat identifies that it may be due to institutional failure to include or provide for students of color. The experimental psychologists brief's synthesis of research concludes that the essential task of University admissions is to "remedy the experience of racial isolation and tokenism that renews and amplifies stereotype threat."[105] However,

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[103] Brief of Fortune-100 and Other Leading American Businesses as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of DuPont, IBM, Intel, and the National Action Council for Minorities in Engineering in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of National Association of Basketball Coaches, Women's Basketball Coaches Association, the National Association for Coaching Equity and Development, Geno Auriemma, Jim Boeheim, John Chaney, Jody Conradt, Tom Izzo, Mike Krzyzewski, Joanne P. McCallie, George Raveling, Nolan Richardson, Sue Semrau, Orlando 'Tubby' Smith, John R. Thompson, Jr., Tara Vanderveer, Dick Vitale, Coquese Washington, and Gary Williams as Amicus Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981);

[104] Brief Amicus Curiae for Experimental Psychologists, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981).

[105] *Id.* at 32.

this lengthy analysis does not make it into the final opinion of the court. Justice Kennedy's majority does identify underlying issues of campus climate; racial isolation and loneliness receive a brief mention in the majority's emphasis on the importance of classroom diversity. Still, the majority's discussion of the harms caused by a hostile campus climate only makes a rhetorical link to race-conscious admissions, without drawing from scientific evidence for support even in footnotes.

Fisher II is largely about the narrow tailoring in the University's implementation of policy—showing that the race-neutral policies suggested by petitioner and amici are ineffectual, and necessitated a use of race-conscious admissions. The University's diversity study presents an internal empirical justification, bolstered by the many amicus briefs from other colleges and universities who have found that race-neutral admissions simply do not work to achieve a racially diverse student body. Amici include other top-tier state schools like the University of Michigan or the University of California school system, as well multiple briefs from other private and public universities.[106] All of these

[106] Brief for the University of Michigan as Amicus Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Leading Public Research Universities The University of Delaware, Indiana University, The University of Kansas, The University of Minnesota, The University of Nebraska-Lincoln, The Pennsylvania State University, Purdue University, and Rutgers, The State University Of New Jersey, as Amici Curiae In Support Of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief for Amicus Curiae Harvard University in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of California Institute of Technology, Carnegie Mellon University, Case Western Reserve University, Emory University, George Washington University, Northwestern University, Rice University, Tulane University, University of Rochester and Washington University in St. Louis as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Brown University, University of Chicago, Columbia University, Cornell University, Dartmouth College, Duke University, Johns Hopkins University, Massachusetts Institute of Technology, University of Pennsylvania, Princeton University, Stanford University, Vanderbilt University, and Yale University in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief for Amicus Curiae Association of American Law Schools, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Amherst, Allegheny, Barnard, Bates, Bowdoin, Bryn Mawr, Carleton, Colby, Connecticut, Davidson, Dickinson, Franklin & Marshall, Grinnell, Hamilton, Hampshire, Haverford, Lafayette, Macalester, Middlebury, Mount Holyoke, Oberlin, Pomona,

universities urge the Court to strengthen its support of affirmative action, providing substantive examples of how bans on affirmative action in California and Michigan have harmed the admissions of students of color at top tier public universities in those states.

Despite the quantitative and qualitative data presented by the many amici scholars and schools, the Court does not draw on their briefs as authorities in its analysis. The only amicus brief cited by the Court comes from the Asian American Legal Defense and Education Fund, bolstering the Court's argument that students of all races benefit from race-conscious admissions, and "the contention that the University discriminates against Asian-Americans is 'entirely unsupported by evidence in the record or empirical data.'"[107] This secondary citation to empirical data is about as close as the Court gets to citing to a scientific source other than the University's diversity study, despite the wealth of options provided by amicus briefing. Oddly, Justice Alito's citations to universities for the notion that SAT scores correlate to race and class is the most extensive use of the race-conscious cheerleader amici, but quoted and used entirely out of context. For the majority, the Court's institutional authority on affirmative action is sufficient for the written opinion even though the amici and scientific evidence are overwhelmingly in support of race-based affirmative action. Justice Alito's a-contextual strawmen

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Reed, Sarah Lawrence, Simmons, Smith, St. Olaf, Swarthmore, Trinity, Union, Vassar, Wellesley, And Williams Colleges, and Bucknell, Colgate, Tufts, Washington & Lee, And Wesleyan Universities, Amici Curiae, Supporting Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Amicus Curiae The University of North Carolina at Chapel Hill in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of the President and Chancellors of the University of California as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[107] *Fisher II*, 136 S. Ct. 2207 (2016) (quoting Brief for Asian American Legal Defense and Education Fund et al. as Amici Curiae at 12).

arguments highlights the ways in which scientific evidence is merely another tool at the Court's disposal, and it does not have to be used for its intended purpose. In the end, the bounty of social scientific evidence presented to the Court is not crucial to the legal argument, either in citation or analogy, but the ideas seep in to the opinions of the Court. Social science amici inform the Court and the dissent's framings of race in education, but the arguments and analysis of social scientists get lost in translation as the majority declines to use most of the social science evidence and the dissent reframes and misuses evidence.

5.5 Conclusion: Conceptualizing Race and Policy

Justice Kennedy's sudden swing for the liberal wing of the Court to author his first ever majority opinion in favor of affirmative action placed him at the center of a methodological dispute over the use of race-conscious policies in higher education. Although the Court remanded *Fisher I* only on the question of narrow tailoring, the conceptualization of race was fore fronted by all parties in the litigation. The necessity of housing segregation to achieve some degree of admissions for people of color at the University of Texas was mentioned, but was never substantively or systematically addressed. Although the Court now approves of the top ten percent in hybrid form with the race-conscious holistic admissions policy, the necessity of the race-conscious admissions may only increase over time if anything is done about housing segregation in Texas—but this is unfortunately incredibly unlikely. Even though *Inclusive Communities* preserved disparate impact as a claim, the specificity that the district court interpreted the Court's opinion to require imposes a lofty standard. Housing discrimination and

educational segregation are networked in an interlocking, overlapping series of oppressions based on racial discrimination and white supremacy. Taken together *Fisher II* and *Inclusive Communities* theoretically are an indictment of Texas' history of racial discrimination, identifying how even remedial policies like fair housing or affirmative action have failed to stem the tide of white supremacy.

Instead we are left with a question of goodness of fit for the factor-of-a-factor use of race. Those opposed to race-conscious admissions, like the dissenting Justices and parties supporting the petitioner, want to establish the most stringent restrictions and narrowest of margins for the consideration of race. In this view, race cannot be quantified without becoming inappropriate racial balancing or seeking parity with state demographics. Chief Justice Roberts dismissed qualitative measures of race by balking at the idea of surveys to establish campus climate calling the questions "sophomoric" and inadequate.[108] These survey measures in the record were mean to gauge campus climate, and measure the diversity as experienced by students of color in the learning environment on campus. Still, Justice Alito, both at oral argument and in his dissenting opinion is focused on establishing limiting principles, that do not provide much room for operation or error, but only limitations. Taken together with the series of strawmen and cherrypicked statistics that accuse the University of using holistic admissions to admit legacies and affluent minorities, the dissenters' objection is not to any particular measure, but the concept of race-consciousness in and of itself.

[108] Transcript of Oral Argument at 68, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981).

Justice Breyer considered as much at oral argument, pushing the petitioner to answer when, if ever, race could be used to accomplish racial diversity, which the Court had previously established as constitutional. All the race neutral alternatives provided by the Petitioner focused on other factors like socioeconomic status or the top ten percent plan, but as Justice Breyer pushed at oral argument: "That's not to use race. I'm saying r-a-c-e, race. I want to know which are the things they could do that, in your view, would be okay. Because I'm really trying to find out. Not fatal in fact, we've said."[109] But the petitioner provided no answer other than Justice Powell's suggestion of racial tiebreakers in *Bakke*.[110] In order for race-conscious polices to be properly measured by the Supreme Court, it seems there needs to be some agreement on the operationalization of race in university policy: how can the University use race to meet the goals that the court has deemed acceptable?

Justice Kennedy's majority provides some answers by deferring to the University's contextual conceptualization of race and race-conscious policy, making the key measure of narrow tailoring transparency. While Justice Alito's dissent takes issue with the University's interpretation of the facts and its use of them, Justice Kennedy is quite taken with the University's continued, periodic assessment of its use of race-conscious policies. The constitutional measurement and significance in Justice Kennedy's estimation has already been established by precedent, it's just a matter of whether the University is properly interrogating its own practices. Measurement then is

[109] Transcript of Oral Argument at 31-32, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981).

[110] *Id.* at 33.

left to those who are closest to the subject matter, and most understanding of its practice. *Inclusive Communities* failed to make an impact after it was dismissed at the district court,[111] but *Fisher II* looks to have a broader reach as Justice Kennedy's opinion closes by giving "considerable deference" to a University's pursuit of diversity within constitutional boundaries. Rather than proscribe a method of affirmative action, Justice Kennedy compares public universities to states under federalism, to serve as "laboratories for experimentation" in their use of data to craft approaches to diversity, with "constant deliberation and continued reflection regarding its admissions policies."[112] Justice Alito used more social science in his dissenting opinion to rebut established evidence, but Justice Kennedy's opinion provides a research mandate for public universities. Scientific evidence may not have been cited by the majority, but the opinion of the Court necessitates rigorous, consistent study of race in higher education.

[111] Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs, et al., No. 3:08-CV-0546-D (N.D. Tex.) Mem. Op.

[112] *Fisher II*, 136 S. Ct. at 2214-15 (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J. concurring)).

6 Conclusion

It's important, therefore, to know who the real enemy is, and to know the function, the very serious function of racism, is distraction. It keeps you from doing your work. It keeps you explaining, over and over again, your reason for being. Somebody says you have no language, so you spend twenty years proving that you do. Somebody says your head isn't shaped properly, so you have scientists working on the fact that it is. Somebody says you have no art, so you dredge that up. Somebody says you have no kingdoms, so you dredge that up.
None of that is necessary.
There will always be one more thing.

– Toni Morrison, "Black Studies Center public dialogue," Portland State University, May 30, 1975

Precedent is the central paradigm of law in the United States. Prior decisions of the Court create a complex codification of tradition that is not easily overturned and guides the course of legal developments for future generations. The United States began as a country built on laws, but also ideologies and institutions. White supremacy, the enslavement of people as property, genocide of Indigenous peoples, and the expansion and privatization of land are part of the traditions of law in the United States. At one point, these were perfectly legal and accepted. Today they are less commonly accepted, but still embedded in the law in some part—they are still part of legal precedent. The law may bend, adapt, change directions, but it remains tied to its legacy of past decisions.

Sometimes policies change for the better, with the Supreme Court altering course on a legacy of oppression. *Brown v. Board of Education* remains the shining example in

a shift in the Court's interpretation of race, but this turn was anything but abrupt.[1] A series of previous opinions desegregated higher education,[2] providing precedent to make such a sweeping pronouncement against segregation in public education in *Brown*. However, the Court's incorporation of "modern authority," social science research on the harms of racial segregation, as grounds for rejecting *Plessy*'s precedent made *Brown* special.[3] Modern authority, as discussed in Chapter 3, signaled the Court's openness to alternative interpretations on race, and that scientific studies exposing oppression and racism are valid at the Court.

The problem with "modern authority" is that the ideologies, the institution, the epistemology of the Court remains untouched. It is the facts, the amicus, the circumstances that changed. Modern authority may offer fresh evidence on a social issue, but still validates the social, institutional, and ideological power of the Court. The machine is working, it simply had the wrong input. As Toni Morrison explains, racism "keeps you explaining, over and over again, your reason for being."[4] *Brown*'s authorities did not make a new or groundbreaking finding, the detrimental effects of racism and white supremacy were well known and studied, especially to social scientists, even at the

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[1] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[2] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (mandating a state law school for Black students or integration of the existing white law school); *Sipuel v. Board of Regents of the University of Oklahoma*,332 U.S. 361 (1948) (mandating that the University of Oklahoma provide equal instruction and admit qualified Black applicants); *Sweatt v. Painter*, 339 U.S. 629 (1950) (desegregating Texas' law school); *McLaurin v. Oklahoma*, 339 U.S. 637 (1950) (desegregating graduate schools).

[3] *Brown*, 347 U.S. at 494.

[4] Toni Morrison, "A Humanist View" (presentation, Black Studies Center Public Dialogue, Portland State University, Portland, Oregon, May 30, 1975).

time of *Plessy v. Ferguson*.[5] Just three years after the Court decided *Plessy v. Ferguson*, W.E.B. Du Bois published his groundbreaking mixed-method sociological study *the Philadelphia Negro*, which, in spite of its "Victorian moralizing,"[6] used qualitative surveys and quantitative statistical analyses to show oppressive conditions of crime and poverty in the Black Community were rooted in racial inequality—refuting the pseudoscientific racist assumptions of Black immorality or criminality.[7] Du Bois' work pioneered the field of sociology, both methodologically and substantively.[8] The social scientific authority was nearly contemporary with *Plessy*, long predated *Brown*, and provided ample verifiable evidence of the oppressive nature of racism.

But this Du Bois critical social science would not receive legal consideration until *Brown*, thanks to the legal strategizing of Charles Hamilton Houston. *Brown* solidified consideration of scientific evidence in equal protection law,[9] but provided no standards for evaluating or incorporating social scientific evidence. Since *Brown*, the Court has sent mixed messages in what scientific evidence is acceptable. At times the Court encourages and protects statistical analysis, like affirming disparate impact under the

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[5] 163 U.S. 537 (1896).

[6] Khalil Gibran Muhammad, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 272 (2010).

[7] W.E.B. DuBois, THE PHILADELPHIA NEGRO: A SOCIAL STUDY (1899, 1996).

[8] Aldon Morris, THE SCHOLAR DENIED: W.E.B. DU BOIS AND THE BIRTH OF MODERN SOCIOLOGY (2015).

[9] Michael Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 Cornell L. Rev. 279, 294 (2005); Sanjay Mody, *Brown* Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy, 54 STAN. L. REV. 793, 828 (2002); Michael Selmi, *Proving Intentional Discrimination and the Reality of Supreme Court Rhetoric*, 86 GEO. L. J. 279, 300 (1997);

Civil Rights Act in *Griggs v. Duke Power Co.*,[10] but at others acknowledging the scientific validity while rejecting the legal relevance of multivariate regressions indicating a statistically significant increase in application of the death penalty for Black defendants in *McCleskey v. Kemp*.[11] More than sixty years after *Brown* the Court is still searching for the proper methods and methodologies to consider race and scientific evidence at the Supreme Court, as evidenced in the recent opinions in *Inclusive Communities v. Texas Department of Housing and Community Affairs*[12] and *Fisher v. University of Texas*.[13]

6.1 Scientific evidence in *Fisher II* and *Inclusive Communities*

Inclusive Communities and *Fisher II* highlight the law's murky relationship with social sciences as the Court is given findings from a variety of social scientific sources to guide the Court's inquiry. In *Inclusive Communities*, at the district and appellate court the respondent provided data on the distribution of Low Income Housing Tax Credits with sufficient statistical disparity to indicate a discriminatory effect. The tax credit is disproportionately provided in majority minority communities, which perpetuates residential segregation by limiting federal and local funding for housing opportunities for people of color. In *Fisher II*, the University of Texas used a top ten percent program to try and increase student body diversity after the Fifth Circuit eliminated race-based

[10] 401 U.S. 424 (1971).

[11] 481 U.S. 279 (1987).

[12] 576 U.S. ___, 135 S. Ct. 2504 (2015).

[13] *(Fisher II)*, 579 U.S. ___, 136 S. Ct. 2198 (2016).

affirmative action in 1996. After years without successfully remedying its lack of diversity, the University studied campus climate and decided to supplement the top ten percent program with race-conscious holistic file review in admissions to add the lacking racial diversity on campus. In both cases, the Court considers problems faced by people of color arising from both the legacies of past policies of racial discrimination, the ongoing effects of racism in the lived experiences of people of color, and the purpose or efficacy of policies meant to remedy the harms of racial discrimination. The Court considered the specifics of each case, with studies and analyses of the context surrounding Inclusive Communities and Abigail fishers claims, supplemented with a multitude of social scientific analyses, but very few, if any, of these analyses became part of the Court's written decision.

Because the Court lacks methodology for analyzing facts and social scientific evidence, either arising from the case or amicus curiae, analyses of these cases are left only with the different typologies of fact described in Chapter 3. Whether David Faigman's typology of constitutional facts[14] or Angelo Ancheta's five functions of scientific evidence,[15] these after the fact categorizations of Supreme Court evidence and writings are informative as a retrospective but offer little for describing how to present evidence to the Court or understanding how the weight the Court may give these facts. In *Inclusive Communities,* the argument is both a doctrinal debate as to whether the equal protection clause and Fair Housing Act contemplate claims of discriminatory effect, as

[14] David Faigman, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008).

[15] Angelo Ancheta, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW (2006)

well as synthesis of reviewable facts drawn from legislative history and text of the Fair Housing Act. Similarly, in *Fisher II*, the Court considers whether the University of Texas' case-specific use of race-conscious admissions fit within the Court's doctrinal interpretation of the diversity under the equal protection. The combination of doctrinal and case-specific inquiry means the decision preserves the University's use of affirmative action, but because the Court's opinion emphasizes the uniqueness and reflexivity of Texas' consideration of race and admissions it potentially limits the future applicability of the opinion. While Justice Kennedy emphasizes that states are "laboratories" for experimenting with educational policy,[16] without a methodology described by the Court it makes the scientific method of testing and retesting all the more difficult. Yet if the dissent had won the day in *Fisher II*, the decision would not be limited to the facts of Texas' admissions program, but serve to seriously curb, if not eliminate, race-conscious admissions policy across the nation. For those invested in working against racism, and historical and present disadvantages created by white supremacy, the stakes are high.

The controversy and high-stakes nature of cases involving race and discrimination may explain, at least in part, the many authorities and facts presented in *Inclusive Communities* and *Fisher II*. In Chapters 4 and 5, I coded for the cited authorities used in all briefs and opinions. In both cases, this surprisingly revealed that Justice Kennedy's majority opinions in these cases, did not depend on scientific evidence and barely cited to data beyond the official record and previous opinions of the Court. Though there was a good deal of scientific evidence presented to the Court, especially in the eighty-four

[16] *Fisher II*, 136 S. Ct. at 2214.

amicus curiae briefs presented in *Fisher II*, the majority opinion focused on the factual record presented by the lower courts, and apply a constitutional interpretation to those pre-existing facts.

Instead it was the dissenting opinions that used scientific evidence to try and undermine the doctrinal interpretation of the Court. As mentioned in Chapter 2, it is important to understand the Court operates on three levels: ideology, institutional power, and individual rights. In these cases, the Majority speaks with the full judicial authority of the Supreme Court, lending ideological and institutional weight to its consideration of individual rights. Because the Supreme Court is the ultimate authority on the constitution, and the majority of the Court represents the official opinion and direction of constitutional law, there is less need for external support from social scientific evidence. In this sense, the Court only needs to rationalize its opinion within the four corners of the Constitution—squaring whatever the Court has decided against previous opinions, the Constitution, or statutes. Even in *Brown*, the modern authorities were only noted to contradict the *Plessy* Court's understanding of the harms of segregation. A change in context could change doctrine, but the circumstances for this kind of change are unclear.

Dissents on the other hand, particularly Justice Alito's dissents in *Inclusive Communities* and *Fisher II*, are trying to show that the majority is incorrect, not only as a matter of law, but as a matter of fact. Justice Alito's dissents are not demosprudential, in the sense that Lani Guinier and Gerald Torres use it, since Justice Alito is not "focused on enhancing the democratic potential of the work of lawyers, judges, and other legal

elites."[17] Instead the dissents use scientific evidence to undermine the framing of the majority's opinion, attempting to sever the majority's connection from a grounded reality. Justice Alito's dissents are less a call to the public to invest in democratic potential for social change outside the Court, and more of a one-sided strategy session for identifying potential test-cases and scenarios that could undermine the Court's ruling. There are exceptions to every rule, but Justice Alito in *Fisher II* and *Inclusive Communities* seeks the exceptions that could break, or overwhelm the ruling of the court. In *Fisher II*, for example, almost all the scientific evidence presented demonstrates the importance of race and diversity to higher education, but the Court does not cite any of the scientific studies and the dissent misuses the available data to meet its own ends. The Court's arguments are still deeply tied to the conclusions of scientific research, noting the qualitative feelings of loneliness and isolation and the importance of the University's study of campus climate, but the scientific evidence itself is not used.

Consistently, the Court resorts to implied science and armchair psychology in describing issues of race in society, with few studies or citations. Despite modern authorities, the Court is still caught in the same intent based presumption that won the day in *Plessy v. Ferguson*: if there is any social inferiority associated with racism it is "solely because the colored race chooses to put that construction upon it."[18] In other words, the harms of racism are in the mindset of people of color, avoiding any structural, social, or institutional conception of racism. This is same the oversimplification of

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[17] Guinier, Lani, "Demosprudence through Dissent," *Harvard Law Review* 122, no. 4 (2008): 16.

[18] 163 U.S.at 551.

racism that focuses on intent and individual acts of meanness, rather than effect. Even cases which seem to undermine social or structural oppression like segregation locate harms in the minds of people of color. *Brown*'s "modern authorities" included Kenneth Clark's doll test which identified the psychological harms of segregation on self-perception among Black youth.[19] This is the same basic argument advanced by Sander's mismatch theory and Justice Alito's view of race-conscious policy—people of color's individual self-perception is the focus, with little regard for the myriad structural and ideological factors of racism in crafting mindset. Amici responding to mismatch theory and psychological harms with studies of stereotype threat and other psychological evidence creates a rigorous study that implicates not only the intent, but effects of racism.

However, the Court does not rely on these studies. Instead the Court relies on the University's qualitative finding of "feelings of loneliness and isolation" among students of color, supplemented with references to a quantitative study of enrollment.[20] Chief Justice Roberts was less convinced of these studies, calling a survey to identify campus climate "sophomoric" at oral argument,[21] while Justice Alito dismissed these findings of isolation as "illogical" and needing clarification.[22] Racism is therefore framed as a

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[19] *Brown*, 347 U.S. at 494n.11 (1954)

[20] *Fisher II*, 136 S. Ct. at 2212.

[21] Transcript of Oral Argument at 68, *Fisher II*, 136 s. Ct. 2198 (2016) (No. 14-981).

[22] Justice Alito asked for more information, but implies that any justification would be insufficient:

> Ultimately, UT has failed to articulate its interest in preventing racial isolation with any clarity, and it has provided no clear indication of how it will know when such isolation no longer exists. Like UT's purported interests in demographic parity, classroom diversity, and intraracial diversity, its interest in avoiding racial isolation cannot justify the use of racial preferences.

psychological issue in the minds of people of color, at worst reactions to individual acts of meanness or at best feelings of loneliness and isolation, in need of clarification and further study. These studies already exist, many are presented to the Court,[23] and Justice Alito still finds them insufficient, even though he cites to these amici in his dissent.[24] As Toni Morrison said, "there will always be one more thing."[25]

So, what is left for defining the meaning of social science in the legal construction of race? Above all, if the goal is to undermine the ongoing presence of racism and white supremacy in society, there needs to be an epistemological and ontological shift in the way the Court conceptualizes issues of race. Psychological facts, showings of intent are important, and there is very important work being done in the fields of quantitative studies, social psychology, and critical race theory. These Critical Race Realists like Gregory S. Parks are driving a very important conversation on integrating empirical psychological data into legal pedagogies to "(1) expose racism where it may be found, (2) identify its effects on individuals and institutions, and (3) put forth a concerted attack

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Fisher II, 136 S. Ct. at 2235-36 (Alito, J. dissenting).

[23] Brief of Social and Organizational Psychologists as Amicus Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Empirical Scholars as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of the American Educational Research Association et al., as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief of 823 Social Scientists Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

[24] *Id.* 136 S. Ct. at 2234 n.11 (Alito, J. dissenting) (citing Brief for Amherst University et al. as Amici Curiae 15-16; Brief for Experimental Psychologists as Amici Curiae 7; Brief for Six Educational Nonprofit Organizations as Amici Curiae 21).

[25] Morrison, *supra* note 1.

against it, in part, via public policy arguments."[26] Empirical social sciences in psychology play a crucial role in undermining perceptions of intent, race, and racism.

Inclusive Communities and *Fisher II* involved argument over remedies to discriminatory effects, but became entrenched in a debate over intent. Disparate impact was justified in *Inclusive Communities* as a tool for rooting out discriminatory intent: "It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[27] The effects of housing segregation, social and structural racism are overlooked for identifying discriminatory intent in housing. Similarly, in *Fisher II*, the Court twice mentions the top ten percent plan's reliance on housing segregation, but still affirms this admissions policy as part of the larger scheme for meeting the institution's educational goals. The harms of segregated education or racism in education, particularly hostile campus climate, are drawn back to the way they impact individual rights—either Fisher's or individual students of color. However, these are not connected back to larger ideological forces of white supremacy and racism that influence both policy and individualized harms.

Racism in housing and education are interwoven in ideologies, institutions, and conceptions of individual rights throughout society. These I's of the Court discussed in Chapter 2 highlight the layers of power in the Court's opinions, yet the Court only seems to acknowledge a one-way effect from institution to individual—congress' effect on an

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[26] Gregory S. Parks, "Toward a Critical Race Realism," in *Critical Race Realism: Intersections of Psychology, Race, and Law*, eds. Gregory S. Parks, Shayne Jones, and W. Jonathan Cardi (New York, NY: The New Press, 2008) 7.

[27] Slip. Op. at 17.

individual realtor, higher education's effects on individual students, or psychological effects on individual tenants or students. However, what is missing is the connection back to ideology, even in Critical Race Realism. Ideology is masked and left behind the scenes, addressed in writings of Critical Race Theory, but not taken up by the Critical Race Realists in the social psychological, empirical studies branch of CRT. In the spirit of making "critical race theory more systematic,"[28] I want to conclude with a proposal for a Critical Race Methodology, adding an empirical and sociological lens to legal analysis.

6.2 Eyes on the Prize: Towards a Critical Race Methodology

> *Neither the life of an individual nor the history of a society can be understood without understanding both.*
> -C. Wright Mills, The Sociological Imagination

From the its roots in the pioneering work of W.E.B. Du Bois, the field of sociology is built upon what C. Wright Mills terms "the sociological imagination."[29] Mills situates the sociological imagination a lens of historical and sociocultural awareness that "enables its possessor to understand the larger historical scene in terms of its meaning for the inner life and the external career of a variety of individuals."[30] A sociological imagination is a call to context, understanding individuals and society in tandem and dialectical tension; "a sociological imagination enables us to grasp history and biography and the relations between the two within society. That is its task and its

[28] Parks, *supra* note 8.

[29] C. Wright Mills, The Sociological Imagination (1959, Oxford U.P. 2000) (Kindle edition).

[30] *Id.*

promise."[31] Wright's sociological imagination tasks social scientists not only with a methodology that keeps society and the individual in view, but fosters an important responsibility between power and knowledge, "to reveal. . . the meaning of structural trends and the decisions for these milleux."[32] John Calmore offers a similar charge for attorneys engaged in "rebellious" or social justice oriented lawyering, understanding "how to work *with* the client community, not just on behalf of it."[33] Mill and Calmore represent those in sociology and law who believe in social justice that stress the importance and obligation of the attorney or the scholar to society.

At the core of this commitment is a paradigmatic shift that simultaneously recognizes the parties, the case, and the context in which it arises. Du Bois understood this not just as a sociologist, but that as a Black man in the United States the disconnect between his sense of self and the structural, social hostility towards his blackness created a "second-sight," a "double consciousness" that searches for a unified vision of self both internally and externally.[34] From the sociological imagination, rebellious lawyering, and double consciousness, I argue that Critical Race Methodologies must be grounded in that second sight, by looking both at the law in the context of legal doctrine, but also the broader social context in which the law was formed, exists, and will continue to exist.

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[31] *Id.*

[32] *Id.*

[33] John O. Calmore, A Call to Context: The Professional Challenges of Cause Lawyering at the Intersections of Race, Space, and Poverty, 67 Fordham L. Rev.1936

[34] Du Bois, *supra* note

Connecting law's ideological, institutional, and individual powers is nothing new, and in fact is a core tenant of critical race theory: trying to understand that "vexed bond"[35] between race and the law identifies conditions of oppression and possibility. I argue that CRT can transform legal studies through a critical race methodology—a way of knowing, understanding, and researching the law which grounds the researcher, the law (both ideologically and institutionally), and individuals in society. Sociologist Mary Romero's critique of psychology in LatCrit and OutCrit offers three principles from the sociological imagination to strengthen Critical Race research and analysis: increased use of ethnographic research, establish connections between the personal and structural/historical, and ground analysis in institutional structure.[36] In turning to a Critical Race Methodology, I want to draw off of these principles, but supplement them with insights from institutional ethnography and the broader work in Critical Race Theory to offer some methodological principles of research that combine social scientific and legal insights. Critical Race Methodology can include analysis of psychology and intent, but must connect to sociohistorical context that recognizes the ideological, institutional, and individual function of racial power in law and everyday life.

Critical Race Methodology (CRM) therefore relies on the central tenants of critical race theory, but focuses on how these ideas are implemented in research. CRM will grow and evolve through use, critique, and practice, but from the outset I want to offer four guideposts to CRM studies of law.

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[35] Kimberlé Crenshaw, *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas eds., 1995).

[36] Mary Romero, Revisiting OutCrits with a Sociological Imagination, 50 Vill. L. Rev.925, 937-938 (2005).

6.2.1 The Centrality of Race

First, racism is endemic to society, and the status quo of legal power necessarily depends on the socio-legal construction of race and perpetuation of white supremacy in the United States. Just as Dorothy Smith and institutional ethnographers urge to keep the institution in view,[37] in CRM this means keeping racism, both historical and present, in view. Unlike the postracialism of the Roberts' Court, which historicizes and condemns oppression as prior bad acts that are now expunged from the record,[38] I want to repeat the wisdom of CRT in acknowledging race as a social construct with real and profound effects on the everyday lived experiences of people of color. Racial power is at the root of the social, economic, and political development of the United States. From slavery, land exchanges, and genocide that racial capitalism in the United States is built on, to the systems of mass incarceration, state violence, cultural appropriation, housing discrimination, and many other manifestations of white supremacy that exist today, the law makes this history and reality possible, legitimate, and insulated from systematic governmental critique.

But while I want to underscore the centrality of race, this is not to the exclusion of other social and political identities. Recognizing the centrality of race also means recognizing intersectionality, or how race, class, gender, sexuality, ability, and other

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[37] Dorothy Smith, INSTITUTIONAL ETHNOGRAPHY: A SOCIOLOGY FOR PEOPLE 59 (2005); Marjorie L. DeVault & Liza McCoy, *Institutional Ethnography: Using Interviews to Investigate Ruling Relations, in* INSTITUTIONAL ETHNOGRAPHY AS PRACTICE 17 (Dorothy Smith, ed., 2006).

[38] *See infra* Chapter 2; Sumi Cho, *Postracialism*, 94 IOWA L. REV 1589, 1594 (2008).

social identities are connected, and often regulated and defined by law.[39] Life is not as simple as one experience, and recognizing the way varied social identities and roles are imbricated, overlap, and shift fosters understanding of the law itself. In practice of research, this means applying a social lens to both empirical and legal data gathered. Law is an institution, but it is implemented by people as lawyers, judges, Justices, and clients. Taking notice of the identities and roles of these individuals in their institutional context adds an important lens to the operation of law. My goal is not a predictive model, which has eluded quantitative legal scholars,[40] which forecasts and synthesizes general behaviors of the Court and the nine Justices. Instead CRM centralizes the social and historic role that identity may play in any given legal case—from the parties involved, their attorneys, and judges. Just as Institutional Ethnography urges researchers to reflexively engage in research moving between researcher, individuals, and their institutional roles,[41] CRM keeps race, racism, white supremacy, and the lived, intersectional experiences of people in view as well.

6.2.2 Triangulating the I's of the Court

[39] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 140 (1989).

[40] Quantitative research has created great models for analysis of court behavior, but none of the models is able to forecast judicial behavior broadly. *See e.g.* Theodore Ruger, Pauline T. Kim, Andrew D. Martin, & Kevin M. Quinn. *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision making*, 104 COLUM. L. REV. 1150 (2011); Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L. J. 909 (2013); Jeffrey A. Segal & Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Jeffrey A. Segal, Harold J. Spaeth, & Sara C. Benesh, THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM (2005); Harold J. Spaeth & Michael F. Altfield, *Influence Relationships within the Supreme Court: A Comparison of the Warren and Burger Courts*, 38 WESTERN POL. Q. 70 (1985)

[41] Smith, *supra* note 37, at 50.

Second, to keep racism and white supremacy in view, CRM triangulates the function of racism in law through the ideological, institutional, and individual roles of the Court. Returning to Chapter 2's "I's of the Court," the law operates ideologically, through institutions, on individuals—both in the sense of a single person and as a representation of the shared lived experiences of groups. I suggest that by epistemologically and methodologically triangulating the function of race and the law between these I's, it creates a critical perspective to the social, legal, and historical context. Much of Critical Race Theory and critical sociology already engages in this task, I only ask that they do so in collaboration and in connection. In legal practice, the three I's of ideology, institutional, and individual become P's of precedent, procedure, and parties. There is little substantive difference between these connections, but the P's are simply legal translations of the underlying principles of the I's that would apply to academic legal research. The P's of practice represent how judicial ideology is crafted and implemented through precedent, institutional discourse is honed through legal procedure and rules of evidence to implement ideologies and precedent, and concerns the substantive rights of parties, defined by the institutional procedures like standing, and guided by precedent.

In legal research and writing, the I's of CRM identify necessary tools for identifying the sociological function of race and the law, but leave out a fourth I: "Intent." The law's obsession with intent in cases involving race and racism obfuscates the social consequences and lived experiences of people of color. Attributing racism only to intent, conscious or unconscious, gives racists both too much and too little credit.

Individuals participating in systematic oppression are simultaneously a cause and result of racism; just because someone did not invent racism does not mean their participation in it, active or passive, is not harmful and should not be held accountable. Focusing on intent obfuscates the ways in which institutions have developed to serve the needs of white supremacy by negatively effecting the lives of people of color and appearing as neutral, or natural for whites. The average white person may rarely intend to benefit from white supremacy, but that doesn't change the beneficial effects of that come from living in a white supremacist society. By centralizing race and triangulating between the I's of the Court avoids falling into the trap of intent by focusing legal analysis from a social perspective on race, racism and lived experiences.

6.2.3 Systematic, Subjective Legal Analysis

Finally, CRM bridges the artificial gap between sociological/empirical reasoning and legal reasoning. Though there are many movements, conferences, and scholars dedicated to the use of quantitative methods, empirical analysis of courts, or economic possibilities within the law, there still is no research method for the study of law itself. The most advanced quantitative studies of the Court present interesting longitudinal analyses of judicial behavior and ideology, but these general studies of judicial patterns are not common.[42] These interesting analyses create excellent guides to overall patterns in the Court, but when it comes to reading and analyzing a case it falls into traditional legal scholarship. Law students are taught how to "think like a lawyer," but there is no real practice or method of analysis beyond case law and legal writing. There are legal

[42] Segal & Spaeth, *supra* note 40; Segal, Spaeth, & Benesh, *supra* 40; Spaeth & Altfield, *supra* 40.

procedures for identifying a cause of action, harms, and remedies, but adding a sociological perspective broadens questions of research, while making legal research and analysis more systematic.

A systematic CRM analysis theoretically triangulates the importance of race in the legal issue, and locates the case in its social and historical context. In the Intermission, I begin establishing the systematic analysis by making my methods of research and analysis transparent. A large part of a CRM approach to legal analysis is incorporating the reflexivity necessary for methodological rigor, incorporating C. Wright Mill's sociological imagination and Gail Leatherby's theorized subjectivity[43] by understanding the researcher, lawyer, or interested observer is substantively involved in the process of making, understanding, and implementing law. This means evaluating controlling precedent and dicta on equal footing. It means investigating the sources and epistemologies of authorities within the particulars of a case. Not just from the judicial authorities, but from the evidence and briefs as well.

This also means changing legal education to include classes on research methods and methodologies; not just as tools for legal research or how to maximize available research resources. The research tools available to Lawyers in paid and free research databases are immense, making a rigorous, reflexive methodological approach necessary to ensure that these sources are analyzed thoroughly, consistently, and in theoretically informed ways. Law already has a lot in common with social scientific practice.

[43] Gayle Leatherby, John Scott, & Malcolm Williams, OBJECTIVITY AND SUBJECTIVITY IN SOCIAL RESEARCH 115 (2013).

Qualitative interviews, ethnography, and quantitative data gathering are very much a part of modern legal practice. Courts generate, record, and archive so much data there is a wealth of knowledge waiting to be analyzed and operationalized. Social scientific evidence is an important part of opinions, but the underlying social scientific principles are crucial to the evolution of the law in a data rich society. Understanding and implementing research methods and methodologies will help to reveal the validity or meaning of social scientific data presented to the Court, since all parties, lawyers, judges, and justices would be better equipped to make methodological judgements of research and evidence presented before a Court. Similarly adding methodological rigor to legal research and analysis would help make law and legal reasoning more transparent to other lawyers, social scientists, and ideally anyone interested in studying the law.

6.2.4 Race Matters

Law and social sciences the guiding social narratives that define race and maintain racial power in the United States. Law and science mutually reinforce white supremacy in defining racial categories as hierarchies of power; normalizing and legitimizing racism through a false neutrality. By placing racism, law, and social scientific research in context, we can identify the myriad of ways in which racial power is used to enforce inequalities, how social science may support or hurt visions of racial justice, and how legal actors understand the society the law is designed to regulate. To paraphrase Kimberlé Crenshaw, the key is not just to understand the vexed bond between race, law, and social science, but to change it.[44] Contextualizing social science and legal

[44] Crenshaw, *supra* note 35.

proceeding through a racism-conscious framework centralizes the function of race in the institutional, ideological, and individual power of the Court, identifying strategies for success and collaboration between bodies of literature. The Court has used social scientific evidence to make and unmake structures of racial power in the United States, but with no clear method or procedure for evaluating when social scientific evidence may be relevant, outcome determinative, or just another brief that a law clerk must go through. The Court's use of scientific evidence is fluid; shifting with judicial ideology, the institutional powers at stake, and the parties involved in a case. To add scientific rigor through CRM at a law school level and in legal practice will help to make social science matter in a legal sense, and make law more scientifically valid.

Of course, this all must begin with an epistemological, and in many ways ontological, shift in the law. The Court has become so concerned with being race-neutral, that the salience of race has become buried in tactics meant to evade the role the Court has played in entrenching white supremacy and racial power in the United States. It all begins, as Justice Sotomayor so beautifully summarizes in her dissent in *Schuette v. Coalition to Defend Affirmative Action*, with an acknowledgement that Race matters:

> Race matters in part because of the long history of racial minorities' being denied access to the political process. . . . Race also matters because of persistent racial inequality in society — inequality that cannot be ignored and that has produced stark socioeconomic disparities. . . .
> And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you really from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign

> language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."
>
> In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.[45]

Race consciousness makes Justices of the Court uncomfortable. The Court's role in making racial power makes the law a cornerstone for unmaking racial power, sometimes through decisions of the Court, but also in suggesting alternatives to legal practice. A race-conscious Supreme Court seems like a fantasy, but if we are dreaming I want to take it a step further. The Court must not only be race-conscious, but racism-conscious, reflexive, and methodologically rigorous in its analysis. This means understanding the social significance of race and interpersonal, institutional, and ideological racisms that effect the everyday lives of people of color.

[45] *Schuette v. Coatlition to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014).

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APPENDIX A

LIST OF NODES FROM NVIVO CODING FOR CHAPTER 4

NAME	DESCRIPTION
Amici Interests	Stated interest in joining case as amicus curiae.
Anti-Discrimination	Stated opposition to racial discrimination, including claims of discrimination against whites
dedicated to advancing racial equality and challenging all forms of segregation.	
Telling narratives of race in the United States	
Think-tank	
Business Interests	Financial or other property interest at stake.
developers, owners, managers, investors, local housing officials, and other persons interested in multifamily housing and speak on behalf of housing providers, who have daily experience in dealing with rules prohibiting discrimination in housing.	
legitimate business practices	
to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated	
Effectiveness of Disparate-Impact	Interest in preserving disparate-impact because of its litigation purposes.
Federalism	Belief in federal state relations, usually argued in favor of states.
Governmental body	Governmental interest in litigation, because it touches on governmental powers.
Cities	
enforces FHA	
Respond to arguments that federalism cuts against DI	
Litigants in related cases decided by district courts	
Litigation and public policy experience, colorblindness	
Minimizing lawsuits	
Officials who have enforced Disparate Impact under the FHA	
Opposition to government imposed racial preferences	
organizations that provide ~~representation, advocacy, and services on behalf of victims of housing discrimination, as well as victims of domestic and sexual violence.	
Protecting residents and communities against housing discrimination	
Provide history of governmental policies in creating segregated patterns	

provide the Court with current social science research on implicit bias, associations between race and space, and stereotyping, and to explain the role of these phenomena in present-day discrimination in housing decisions.	
reforming the analysis of group differences in the law and the social and medical sciences	
Response to other Amici	
Rule of Law	Legal authority of the courts.
This case is of interest to the ACRU because we are concerned that America be governed under the rule of law.	
transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files amicus curiae briefs as a means to advance its public interest mission and has appeared as an amicus curiae in this Court on a number o	
Sound Understanding of Pertinent Statistical Issues	
Statutory Background and Context	
Because of vs. otherwise make available language	Debate over the operative clause of the Fair Housing Act at issue in this case.
Contextualizing FHA	Historical or other background analysis contextualizing the passage and implementation of the Fair Housing Act.
Definition of Disparate Impact	How the author defines disparate impact.
Discriminatory Intent	Definition or principle of discriminatory intent.
Equal Protection	Reference to the use and purpose of the Equal Protection Clause.
Estoppel	Argument that petitioner should be legally barred from arguing against disparate impact since petitioner agreed to a disparate impact analysis in a lower court.
FHA Purpose	Purpose of the Fair Housing Act, stated in the act itself, legislative history, or other litigation.
Housing Segregation in Dallas	Present or historical housing discrimination in Dallas.
HUD Notice and Comment	Description of HUD Notice and Comment period, mandatory for all federal regulations and rules.
Original Research	Research conducted by a party or judge specifically for this case at the Supreme Court.
Other Details	Miscellaneous important details.
Procedural Background	Arguments, analysis, or evidence drawn from the record in this case.
5th Circuit Opinion	
Administrative Regulations	
HUD Regulation	
District Court Opinion	
Remedial Order	

Statistical Data	
Race, Race consciousness, racialization	Related to racialization, race, "race neutral" or "race conscious" policies or terminology.
Segregation and Harms	Description of segregation and different related harms, including the creation of housing segregation.
Federal public housing programs helped create segregated African American ghettos.	
Sources	Sources Cited to within the Document
Administrative Regs	Regulations issued by federal administrative agencies, codified in the Code of Federal Regulations (CFR).
Administrative Decisions	Decisions by administrative courts interpreting the CFR.
Briefs	Briefs presented in this case or previous.
Amici	Briefs of amicus curiae.
Cert petition	Briefs from the process of petitioning for certiorari.
Petitioner	Briefs from the petitioners.
Respondent	Briefs from the respondent.
Caselaw	Previous decisions of a court.
Courts of Appeals	Decisions from federal appellate courts.
District Court	Decisions from federal district courts.
State Court of Appeals	Decisions from state appellate courts.
State Supreme Court	Decisions from state supreme courts, or highest court of appeal.
State Trial Court	Decisions from state trial courts.
Supreme Court	Decisions of the Supreme Court of the United States.
Congressional Record	Documents from the Congressional record and general legislative documents.
Congressional Report	Official report from a Congressional hearing or
Constitution	Constitution of the United States.
Datasets	Publicly or privately available dataset used in statistical analysis.
Executive Action	Executive Orders or Presidential Signing Statements
External or Empirical Analysis	Citation of authority that uses empirical data or secondary analysis.
Books or Treatises	Books or legal treatise.
Census	Census data, not to be confused with reports from the census bureau.
Dictionary or Encyclopedia	
Law Journal or Peer Reviewed Academic	This aggregates all law journals, law reviews, and any academic article cited.
Magazine or Newspaper	Any regular periodicals.
Other	
Unpublished Dissertation	
Website	Online resource
Government or Professional Association	Report or document from a governmental agency, professional organization, or other official source.
ABA	American Bar Association
Section of Antitrust Law	

American Planning Association	
Brookings Institute	
Casualty Actuarial Society	
Commission on Civil Rights	
Executive Agency	
BLS	Bureau of Labor Statistics
CDC	Center for Disease Control
Department of the Treasury	
DHHS	Department of Health and Human Services
DOJ	Department of Justice
Civil Rights Division	
NIJ	National Institute of Justice
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
Federal Reserve Board	
FHA	Federal Housing Authority
HUD	Housing and Urban Development
OMB	Office of Management and Budget
Federal Housing Finance Agency	
Federal Reserve Bank of Atlanta	
FTC	Federal Trade Commission
GAO	Governmental Accountability Office
Institute of Medicine Commission on Environmental Justice	
NAACP	National Association for the Advancement of Colored People
National Advisory Commission on Civil Disorders	
National Commission on Fair Housing and Equal Opportunity	
Pew Research Center	
United States Catholic Conference	
Urban Institute	
US Census Bureau	
US Conference of Mayors	
VA	Veteran's Affairs
Rules of the Supreme Court	
State Law	
Atty. Gen. Opinion	
City Law	
Statute	
Statistical Analysis and Research Methods	Comments or analysis related to statistical analysis or methodologies.
Statistical Disparity	Description, analysis, or definition of a statistical disparity.
Wacky Hypos of Note	Odd or relevant hypotheticals or metaphors presented in argument.
When Disparate Impact Applies	Hypothetical or statement describing a scenario when a disparate impact analysis is valid.

APPENDIX B

LIST OF NODES FROM NVIVO CODING FOR CHAPTER 5

NAME	DESCRIPTION
Affirmative Action	Description of affirmative action caselaw.
Critical Mass	Description or definition of "critical mass."
Demographics	Analysis of demographics of Texas, the University of Texas, or other.
Diversity	Definition of diversity; on campus, in classroom, or other.
Equal Protection	Analysis of the Equal Protection clause of the Fourteenth Amendment.
Measurement	Describing, proscribing, or interrogating a way of measuring any of the concepts within the case.
Mismatch Theory	Advocacy for or critique of Richard Sander's "Mismatch Theory," which advocates for students of color to be placed in less selective colleges and universities.
Race, Race consciousness, racialization	Related to racialization, race, "race neutral" or "race conscious" policies or terminology.
Race-neutral Alternative	Description or policy agenda for a "race-neutral alternative" which the Court often searches for.
Sources	Sources Cited to within the Document
Administrative Regs	Regulations issued by federal administrative agencies, codified in the Code of Federal Regulations (CFR).
Administrative Decisions	Decisions by administrative courts interpreting the CFR.
Briefs	Briefs presented in this case or previous.
Amici	Briefs of amicus curiae.
Brief for Amherst University et al. as Amici Curiae	
Brief for Asian American Legal Defense and Education Fund et al. as Amici Curiae 12	
Brief for Asian American Legal Foundation et al. as Amici Curiae 11 (representing 117 Asian American organizations).	
Brief for Black Students Association, et. al. as Amici Curiae	
Brief for Brown University et. al as Amici Curiae	
Brief for California Institute of Technology et al. as Amici ~~Curiae	
Brief for Cato Institute as Amicus Curiae 12, and n. 4 (merits stage)	
Brief for Cato Institute as Amicus Curiae 8–12 (certiorari stage)	
Brief for Center for Individual Rights as Amicus Curiae	

Brief for David Orentlicher as Amicus Curiae Supporting Neither Party, Fisher v. Univ. of Tex. at Austin (No. 14-981) (2015)

Brief for Experimental Psychologists as Amici Curiae

Brief for Jonathan Zell as Amicus Curiae

Brief for Judicial Education Project as Amicus Curiae 5– 17

Brief for Judicial Watch, Inc., et al. as Amici Curiae 16.

Brief for Military Leaders as Amicus Curiae

Brief for NAACP as Amicus Curaie

Brief for National Association of Basketball Coaches

Brief for Richard D. Kahlenberg

Brief for Richard Sander In Support Of Neither Party

Brief for Six Educational Nonprofit Organizations as Amici Curiae

Brief for Sweatt Family

Brief for The Center for Individual Rights

Brief for the United States as Amicus Curiae

Fisher I Amici — Briefs of Amicus Curiae from *Fisher v. University of Texas I.*

- Brief Amici Curiae of 38 Current Members of the Texas State Senate and House of Representatives in Support of Respondents, Fisher I (No. 11-345) (filed Aug. 13, 2012)
- Brief Amici Curiae of Empirical Scholars
- Brief Amici Curiae of Gail Heriot, Peter Kirsanow & Todd Gaziano, Members of the United States Commission on Civil Rights in Support of Petitioner, Fisher I (No. 11-345) (filed May 29, 2012)
- Brief Amici Curiae of the California Association of Scholars, et al. in Support of the Petitioner, Fisher I (No.

11-345) (filed Oct. 19, 2011)	
Brief Amici Curiae of the California Association of Scholars, et al. in Support of the Petitioner, Fisher I (No. 11-345) (filed Oct. 19, 2011) (2)	
Brief Amicus Curiae of Richard Sander and Stuart Taylor	
Brief for Amici Curiae Fortune 100 and othe biz	
Brief for Amicus Curiae of the President and Chancellors of the University of California	
Brief for NAACP	
Brief for United States	
Brief of Lt. Gen. Julius W. Becton, Jr. et al., Fisher v. Univ. of Tex., 133 S.Ct. 2411 (2013) (No. 11-345)	
Cert petition	Briefs from the process of petitioning for certiorari.
Petitioner	Briefs from the petitioners.
Respondent	Briefs from the respondent.
Caselaw	Previous decisions of a court.
Courts of Appeals	Decisions from federal appellate courts.
District Court	Decisions from federal district courts.
State Court of Appeals	Decisions from state appellate courts.
State Supreme Court	Decisions from state supreme courts, or highest court of appeal.
State Trial Court	Decisions from state trial courts.
Supreme Court	Decisions of the Supreme Court of the United States.
Congressional Record	Documents from the Congressional record and general legislative documents.
Congressional Report	Official report from a Congressional hearing or
Constitution	Constitution of the United States.
14th Amendment	Fourteenth Amendment of the United States Constitution.
Datasets	Publicly or privately available dataset used in statistical analysis.
Executive Action	Executive Orders or Presidential Signing Statements
External or Empirical Analysis	Citation of authority that uses empirical data or secondary analysis.
Books or Treatises	Books or legal treatise.
Census	Census data, not to be confused with reports from the census bureau.
College Board	The College Board company.
Dictionary or Encyclopedia	

Law Journal or Peer Reviewed Academic	This aggregates all law journals, law reviews, and any academic article cited.
Magazine or Newspaper	Any regular periodicals.
Misc. Report	Report from an organization not listed under "government or Professional Association".
Other	
Unpublished Dissertation	
UT Admissions Office	University of Texas Admissions Office
Website	Online resource
Factual Record	Citation to the record presented either in the Joint Appendix, Supplemental Joint Appendix, or Petitioner's appendix to cert petition.
Government or Professional Association	Report or document from a governmental agency, professional organization, or other official source.
ABA	American Bar Association
Section of Antitrust Law	
AMA	American Medical Association
AAA	American Anthropological Association
American Planning Association	
AAMC	Association of American Medical Colleges
Brookings Institute	
Casualty Actuarial Society	
Center for Equal Opportunity	
Century Foundation	
Commission on Civil Rights	
CRO	Congressional Research Office
Executive Agency	
BLS	Bureau of Labor Statistics
CDC	Center for Disease Control
Department of the Treasury	
DHHS	Department of Health and Human Services
DOD	Department of Defense
DOE	Department of Education
NCES	National Center for Education Statistics
DOJ	Department of Justice
BJS	Bureau of Justice Statistics
Civil Rights Division	
NIJ	National Institute of Justice
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
FBI	Federal Bureau of Investigations
FBOP	Federal Bureau of Prisons
Federal Reserve Board	
FHA	Federal Housing Authority
Homeland Security	
HUD	Housing and Urban Development
OMB	Office of Management and Budget
Federal Housing Finance Agency	
Federal Reserve Bank of Atlanta	
FTC	Federal Trade Commission
GAO	Governmental Accountability Office
Heritage Foundation	
House Research Organization	

Institute of Medicine Commission on Environmental Justice	
LSAC	LSAC inc., organization in charge of law school entrance exams.
NAACP	National Association for the Advancement of Colored People
National Advisory Commission on Civil Disorders	
National Commission on Fair Housing and Equal Opportunity	
Pew Research Center	
United States Catholic Conference	
Urban Institute	
US Census Bureau	
US Conference of Mayors	
VA	Veteran's Affairs
Oral argument	
State Law	
State Attorney General Opinion.	
City Law	
Statute	
Sweatt v. Painter Record	Factual record from *Sweatt v. Painter*.
United Nations (UN) & Other Jurisdictions	Information from international organizations and laws of other nations.
Statistical Analysis and Research Methods	Comments or analysis related to statistical analysis or methodologies
UT Admissions Policy	Description of the admissions process for the University of Texas.
Wacky Hypos of Note	Odd or relevant hypotheticals or metaphors presented in argument.

APPENDIX C

INSTITUTIONAL ETHNOGRAPHIC MAPS

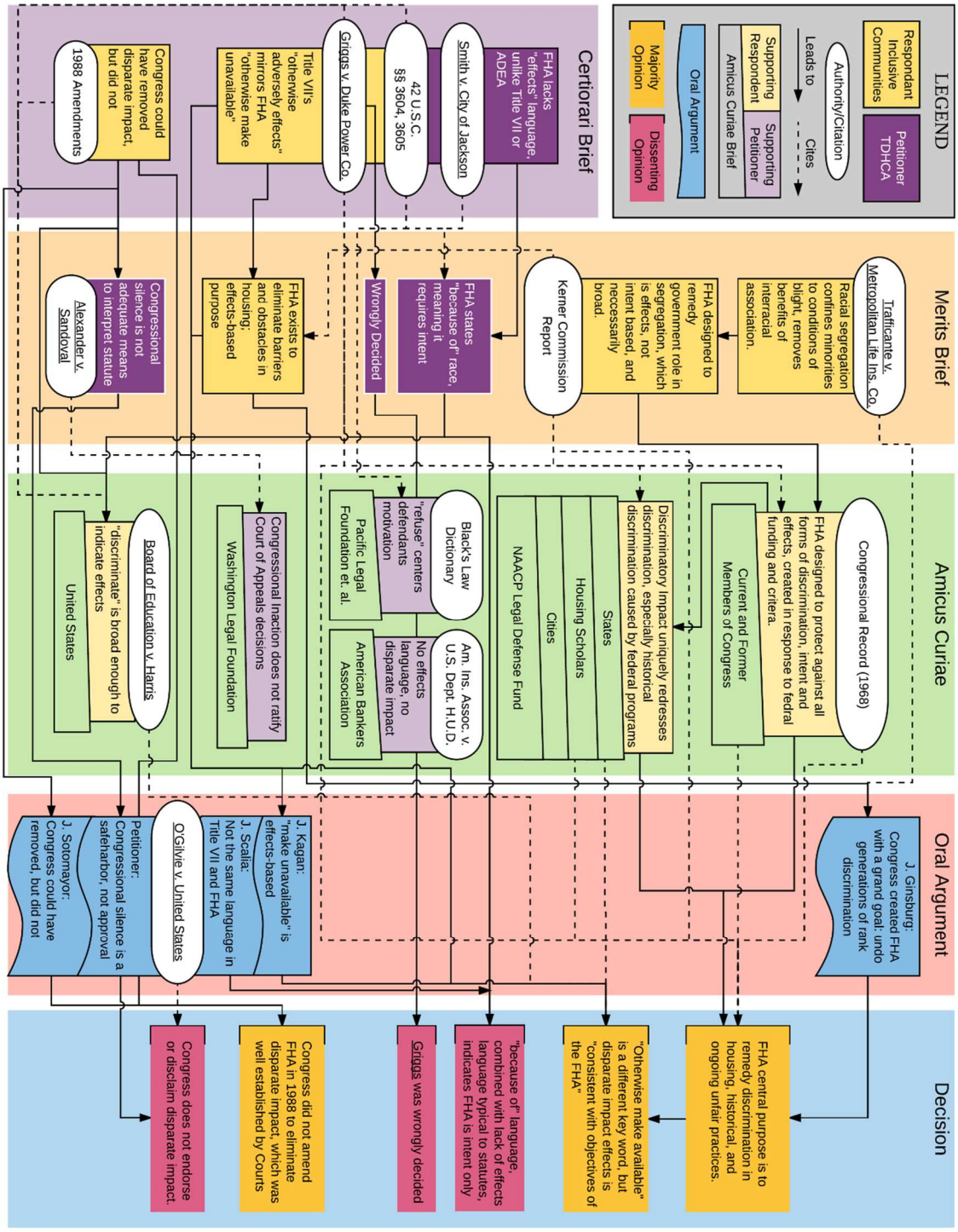

Figure 15: Institutional ethnographic map of Inclusive Communities

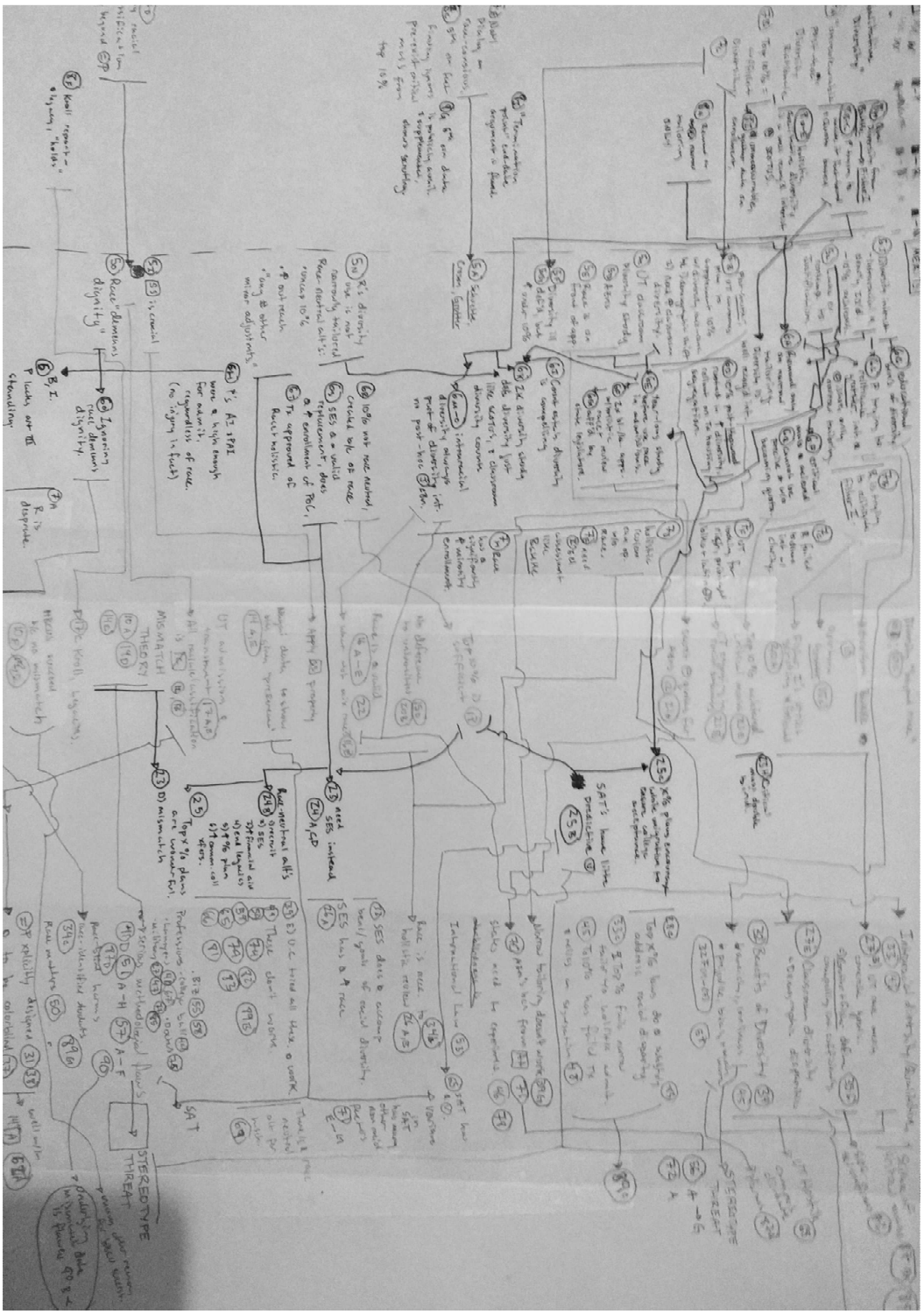

Figure 16: Photograph of Institutional Ethnographic Map of *Fisher v. Texas*