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**LEGAL RHETORIC AND SOCIAL
SCIENCE: A HYPOTHESIS FOR
WHY DOCTRINE MATTERS IN
JUDICIAL DECISIONMAKING**

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* J.D., Boston University School of Law. B.A., Cornell University. I thank Professor Gerald Leonard for providing this article with a guiding light and Professor Michael Harper for inspiring me to understand, in an honest yet creative manner, how legal doctrine interacts with this crazy world of ours. I would also like to thank the editors and staff members of the *Boston University Public Interest Law Journal* and the *Pace International Law Review*. Finally and most importantly, this article is for Mom. In all her majesty.

ABSTRACT

In the realm of American jurisprudence, little draws more excitement or controversy than investigating the role of federal judges in our constitutional order. Yet, at the same time, the scholarly literature has not settled upon a singular descriptive device to explain how federal judges actually carry out this role. In broad strokes, current academic commentary appears to be divided on the issue of whether fidelity to the law or fidelity to political ideology largely determines how judges decide cases. This division, however interesting it may be, should not be afforded the luxury of being examined on a level playing field. Given the fact that the federal judiciary's existence, as a matter of first principles, is usually justified by its unique ability to be guided by legal principle over popular pressure, those who subscribe to the political view of judging should have the burden of persuasion. The object of this article, then, is to render that burden a bit more onerous by offering a novel method for thinking about how legal doctrine constrains judges in deciding cases.

This novel method takes the form of a hypothesis and posits that the precise rhetorical form of the standard of review impacts how judges import non-legal sources into their opinions. That is, I contend that the standard of review, through its rhetorical posture, serves as an institutional boundary that depicts how far the law is willing to go to recognize the reality of other disciplines by using, or avoiding, vocabulary that is readily accessible by these disciplines. In sum, legal vocabulary matters, and it matters because it grants discursive permission, or not, for judicial consideration of a specific type of non-legal source in coming to a legal conclusion.

I. INTRODUCTION

Explaining how judges decide hard cases, esteemed scholar and jurist Richard Posner has forthrightly stated that the Supreme Court "is in fact a political court."¹ Over time, a vast

¹ RICHARD A. POSNER, *HOW JUDGES THINK* 41 (2008). I recognize that Posner uses the term "political" in a very precise sense. In that regard, I use

scholarly literature² has emerged suggesting that judicial application of legal doctrine is informed to a great extent by political preferences. At first blush, this seems to be an appealing line of argument for it gives due consideration to Holmes's notion that judges have an affirmative duty to grapple with the pragmatic consequences of their decisions (at least in common law adjudication).³ Given the institutional justifications for the Court's existence, however, we must be extremely careful to avoid the conclusion that law *is* politics. Taking Alexander Hamilton seriously in *The Federalist No. 78*,⁴ the judicial branch garners institutional legitimacy, in part, precisely because of its non-political nature. Indeed, Hamilton writes that the "*independence* of the judges is equally requisite to guard the Constitution and the rights of individuals."⁵ As a means of ensuring that this independence is put to meritorious ends, Hamilton envisioned a judiciary bound by legal rules and precedent.⁶ In the vein of Hamilton's political theory, another body of legal scholarship has developed⁷ to emphasize the role that

his statement only as an instructive tool. Moreover, Posner himself would not subscribe to the view that doctrine never matters. However, Posner does seem to think that the Supreme Court, especially when deciding constitutional cases, "is largely a political court." *Id.* at 8.

² Although I go into some detail about the literature in Part II, I give a brief flavor of it here. For a work of political science that serves as a common citation in this field, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (asserting that the justices' political ideologies play an instrumental role in deciding cases). Numerous articles in the legal academy further suggest that politics is intertwined with judicial decisionmaking. See also Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155 (1998) (arguing that partisanship influences when a court will defer to an agency); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *VA. L. REV.* 1717, 1719 (1997) (arguing that ideology "significantly influences judicial decisionmaking on the D.C. Circuit," especially when a judge's vote is examined in light of the political composition of the panel).

³ See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 467 (1897) (writing that judges have "failed adequately to recognize their duty of weighing considerations of social advantage").

⁴ *THE FEDERALIST NO. 78* (Alexander Hamilton).

⁵ *Id.* at 392 (emphasis added).

⁶ See *id.* at 394.

⁷ To parallel footnote 2, some representative works of this scholarship are presented at this stage. For a theoretical analysis of how legal doctrine

legal doctrine plays in judicial decisionmaking and to dispel any claim that Posner's observation exhaustively captures how judges, for lack of a better word, "judge."

The overall thrust of this article resides with the Hamiltonians. The contribution of this article lies in its ability to provide a new way for thinking about why doctrine might matter in judicial decisionmaking and thus fashion another analytical weapon, albeit a modest one, to combat wholesale allegiance to Posner's claim. More specifically, this article creates a hypothesis that aims to explain why the formality of judicial scrutiny matters in light of judicial consideration of non-legal sources.⁸ The hypothesis suggests that a formalized standard of review that uses technical legal vocabulary, as current equal protection scrutiny does, constrains judges in importing social science sources into their legal analysis at the outset. This constraint occurs because the formalized standard of review's "code words,"⁹ words such as "compelling purpose" and "narrowly tailored," can only be defined by more legal doctrine which, in turn, generates additional legal rhetoric that the social science literature must internalize if that literature harbors any ambition of entering the court's opinion. To put it differently, a standard of review grounded in technical legalese conceals a discursive link between the primary legal issue and applicable social science sources until such a link is rendered intelligible through the explication of additional legal doctrine. This addi-

guides judicial decisionmaking, see Frederick Schauer, *Does Doctrine Matter?*, 82 MICH. L. REV. 655 (1984). For empirical counterparts, see Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369, 371 (2008) (finding that legal principles influence the decisions of Supreme Court justices); Ward Farnsworth, *The Role of Law in Close Cases: Some Evidence From the Federal Courts of Appeals*, 86 B.U. L. REV. 1083, 1095 (2006) (agreeing that the expression of policy preferences may be precluded by the relevant text or precedent in routine cases where the controlling law is clear).

⁸ See Richard A. Posner, *Some Realism About Judges: A Reply to Edwards and Livermore*, 59 DUKE L.J. 1177, 1179 (2010) (arguing that novel cases cannot be decided solely upon "the orthodox legal materials of text and precedent").

⁹ I borrow this word from Siegel. See Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2344 (2006) (maintaining that judges use these "code words" to sort out the easy cases from the hard ones).

tional doctrine, though perhaps essential to the forging of an alliance between law and other disciplines, reveals itself to be a judicial constraint because it creates an institutional boundary depicting how far the law is willing to go to accommodate the reality of other disciplines.¹⁰ The precise rhetorical form of the standard of review, by calling forth additional legal doctrine commensurate with this rhetorical form's technicality, determines where that boundary falls.¹¹

In order to put the hypothesis to work and show how it can be applied to a particular area of jurisprudence, I focus on two distinct forms of equal protection scrutiny. The first and most familiar form, deemed tiered scrutiny, employs different levels of judicial scrutiny depending on the precise governmental classification at hand.¹² The second and probably less familiar form, revolving around Professor Andrew Siegel's interpretation of Justice Stevens's approach to the Equal Protection Clause, asks judges to grapple with the words of the Constitution directly and without the use of mediating doctrine.¹³ As Professor Ryan has noted, "social science evidence can influence the outcome of a court decision if the *relevant legal standards* allow some consideration of such evidence."¹⁴ The object of the hypothesis in this article, then, is to provide a method for understanding how this dynamic takes hold given these two forms of equal protection scrutiny.

To explore this dynamic in detail, this article undertakes a case study of racial classifications in lower education by comparing how the articulation of scrutiny, or lack thereof, affected

¹⁰ One wonders whether this is a particular manifestation of the claim that courts "develop a form of reasoning (through doctrine) that is internal to itself and assertive of a particular kind of power." Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 123 (2009).

¹¹ Professor Schauer has also recognized that the law does not absorb the entire content of other disciplines. See Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1914-15 (2004).

¹² See Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1150 (1987).

¹³ Siegel, *supra* note 9, at 2340.

¹⁴ James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1678 (2003) (emphasis added).

judicial consideration of social science data in the Supreme Court cases of *Brown v. Board of Education*¹⁵ and *Parents Involved in Community Schools v. Seattle School District No. 1*.¹⁶ This study comes in two parts. First, as a baseline for comparison, I argue that the articulation of scrutiny significantly changes as we move from *Brown* to *Parents Involved*. That is, while *Brown* can plausibly be read as involving “the unmediated application of judicial judgment to the constitutional text,”¹⁷ Chief Justice Roberts’s plurality opinion and Justice Thomas’s concurrence in *Parents Involved* applied traditional strict scrutiny analysis.¹⁸ Second, I contend that the verbal presentation of scrutiny played a role in influencing the choice of social science sources that the justices used to address the harms of racial segregation.¹⁹ On the one hand, *Brown*’s reluctance to articulate any formally cognizable standard of review²⁰ allowed the Court to consult various sources depicting the harms of segregation without filtering those sources through any additional doctrine above and beyond the standard of review. On the other hand, the articulation of strict scrutiny in Roberts and Thomas’s opinions in *Parents Involved* prompted these two Justices to define the racial harm that the school districts could

¹⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

¹⁷ Siegel, *supra* note 9, at 2342; see JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 157 (2011) (writing that, “*Brown v. Board of Education* does not use the language of scrutiny”); Johnny C. Parker, *Equal Protection Minus Strict Scrutiny Plus Benign Classification Equals What? Equality of Opportunity*, 11 PACE L. REV. 213, 227 (1991) (stating that *Brown* did not employ the traditional strict scrutiny test).

¹⁸ See Nicole Love, Note, *Parents Involved in Community Schools v. Seattle School District No. 1: The Application of Strict Scrutiny to Race-Conscious Student Assignment Policies in K-12 Public Schools*, 29 B.C. THIRD WORLD L.J. 115, 132 (2009).

¹⁹ The *Brown* opinion dropped a footnote citing support for the notion that black students were psychologically harmed by segregation. See Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 293 (2005). Mirroring *Brown*, *Parents Involved* also considered data that focused, in part, on the harms attending racially segregated schools. See Erica Frankenberg & Liliana Garces, *The Use of Social Science Evidence in Parents Involved and Meredith: Implications for Researchers and Schools*, 46 U. LOUISVILLE L. REV. 703, 717 (2007-2008).

²⁰ See Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROBS. 7, 9 (1975).

remedy in terms of de jure and de facto segregation.²¹ Since the social science literature itself does not make this distinction,²² the two Justices' adoption of the de jure/de facto construct served to filter the types of social science sources that they found relevant to their opinions. As we will further see, Justice Breyer's dissent in *Parents Involved* provides a wrinkle to this analysis.

The blueprint of the article is as follows. In Part II, I lay the foundations for the hypothesis. I first provide broader context to the law/politics debate in judicial decisionmaking by exploring the theoretical and empirical underpinnings of each side. I then provide an overview of the doctrine that the hypothesis will work with to enter that debate, which comes in the form of equal protection scrutiny and the *Brown* and *Parents Involved* decisions. In Part III, I describe the hypothesis in detail and begin to substantiate it with a somewhat in-depth case study. The case study observes the interplay between the type of scrutiny applied and the types of social science sources consulted in *Brown* and *Parents Involved*. Should this article prove to be convincing in any way, Part IV concludes with a respectful challenge to scholars to corroborate my article on a larger scale.

A word of warning. Explaining the relationship between law and social science with any sort of precision is an incredibly difficult endeavor for, as Kafka presciently recognized, the world of law can sometimes be unto itself.²³ For what it is worth, the hypothesis I put forth is meant only to stir thought; like most things academic, it does not embody anything conclusive or authoritative.

II. LAYING THE FOUNDATIONS FOR THE HYPOTHESIS: WHY IT

²¹ See Frankenberg & Garces, *supra* note 19, at 710 (stating that this threshold question determined how the justices approached the social science data); see also Ansley T. Erickson, *The Rhetoric of Choice: Segregation, Desegregation, and Charter Schools*, DISSENT, Fall 2011, at 41, 42 (arguing that both the plurality opinion and Justice Thomas's concurrence used the de jure/de facto distinction to define the harms that could be remedied).

²² See Frankenberg & Garces, *supra* note 19, at 712.

²³ FRANZ KAFKA, THE TRIAL 6 (1937) (using the character of Joseph K. to question the visibility of law to the layperson).

MATTERS AND THE DOCTRINE IT WILL WORK WITH

A. *Why it Matters: The Law/Politics Divide in Understanding How Judges Decide Cases*

The hypothesis is embedded in a broader project to understand precisely how judges decide cases. As briefly stated in the introduction, the structure of judicial decisionmaking has been embroiled in a debate over whether politics or legal doctrine largely controls how judges behave. Furthering this debate in an intelligent manner holds fundamental importance for both the general public and academics in two ways. First, this debate serves as a practical tool for structuring how we talk about the judicial branch.²⁴ In a recent article examining public perceptions of judicial decisionmaking, James Gibson and Gregory Caldeira assert that, “[t]he American people know that the justices of the Supreme Court exercise discretion in making their decisions.”²⁵ Thus, gaining a better understanding of what processes constitute this “discretion” will help us speak more accurately about what judges do. Second, there appears to be a subtle disconnect between the institutional legitimacy of the Supreme Court in theory and the legitimacy of the Court in the eyes of the public. In the realm of theory, a principal justification for the existence of the judicial branch is that judges are to be disciplined by legal principles in adjudicating cases.²⁶ Yet, Gibson and Caldeira have found that the American people both believe that judges are influenced by ideology and base the legitimacy of the Court on the justices’ ability to apply that ideology in a principled manner.²⁷ It would

²⁴ See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180 (1986) (describing the concepts of “legal formalism” and “legal realism” as playing a prominent role in legal thought).

²⁵ James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC’Y REV. 195, 213 (2011).

²⁶ See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997) (writing that, “[t]he rule of law is *about* form . . . Long live formalism. It is what makes a government a government of laws and not of men.”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (contending that the main component of judicial decisionmaking is a “genuinely principled” analysis).

²⁷ See Gibson & Caldeira, *supra* note 25, at 214.

seem, then, that attempting to align the theoretical justifications for the Court's work with that work's current popular perception is a laudable goal. If this is correct, and I think it is, gaining a firmer grasp on the debate between law and politics in judicial decisionmaking might allow for that alignment to occur.

i. Political Explanations for Judicial Decisionmaking

Structuring an argument that contends that the political leanings of judges influence judicial decisionmaking might begin with an appreciation of the school of thought known as legal realism. In general, legal realists were primarily concerned with understanding how judges actually reason through cases.²⁸ That is, if, as Holmes says, law is "the prophecies of what the courts will do in fact,"²⁹ the realists aimed to uncover the types of sources and reasoning that lawyers should consider if they want to take part in this prophetic exercise. A mainstay of legal realism was its proclamation that analytical reasoning relying solely upon legal doctrine has limited value in explaining how courts operate.³⁰ This is so, the realists maintained, because legal doctrine, such as interpreting common law precedents and employing tools of statutory construction, is inherently self-contradictory.³¹ Taking up this contention, Karl Llewellyn famously proposed that there are opposing canons of statutory construction applicable for every point of argumentation.³² Thus, the realists argued that cases are determined with reference to factors other than legal rules.³³ For example, a majority of realists recognized the particular personality of the judge as a significant motivating force in the crafting of ju-

²⁸ AMERICAN LEGAL REALISM 164 (William W. Fisher III et. al. eds., 1993).

²⁹ Holmes, *supra* note 3, at 460-61.

³⁰ See AMERICAN LEGAL REALISM, *supra* note 28, at 164.

³¹ See *id.* at 165.

³² See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (presenting a table of the opposing canons of statutory construction).

³³ See Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 474 (1988) (stating that, for the realists, law is based on considerations outside formal logic, such as human experience and policy).

dicial opinions.³⁴

Exploiting the realist position, some scholars have emphasized that legal doctrine serves, rather than constrains, the justices' political persuasions. A prominent work in this regard is that of Jeffrey Segal and Harold Spaeth, which asserts that the outcomes of Supreme Court cases are heavily influenced by the justices' political attitudes.³⁵ Attacking the view that precedent constrains the justices' political preferences, Segal and Spaeth claim that precedent serves to merely rationalize a pre-ordained outcome.³⁶ Mirroring Segal and Spaeth's discussion of *stare decisis*, Julie Margetta Morgan and Diana Pullin attest that the use of social science data in legal analysis has been thought to justify a judicial determination only after the fact.³⁷

In addition, other scholars have taken a more empirical approach to establish that judicial decisionmaking is substantially influenced by ideology, psychology, and politics. To illustrate, Frank Cross and Emerson Tiller conclude that a court's willingness to defer to agency policy is guided by the alignment of that policy with the political outlook of the court.³⁸ Cross and Tiller suggest that the political component of agency deference has caused minority judges to point out the majority's abdication of legal doctrine to higher courts.³⁹ Other studies by law professors outside of the administrative law context further support the idea that politics greatly determines legal outcomes.⁴⁰

Giving due consideration to this field of scholarship, it does not seem unreasonable to suggest that politics plays but one role in judicial decisionmaking. At this point, it may be a foregone conclusion. What proves to be disturbing to readers wish-

³⁴ See AMERICAN LEGAL REALISM, *supra* note 28, at 165.

³⁵ See generally SEGAL & SPAETH, *supra* note 2.

³⁶ See *id.* at 66.

³⁷ See Julie Margetta Morgan & Diana Pullin, *Social Science and the Courts: Challenges and Strategies for Bridging Gaps Between Law and Research*, 39 EDUC. RESEARCHER 515, 517 (2010).

³⁸ See Cross & Tiller, *supra* note 2, at 2169.

³⁹ See *id.* at 2173.

⁴⁰ See Revesz, *supra* note 2, at 1719; see also Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 N.W. U. L. REV. 743, 746 (2005) (finding that ideology influences how lower federal courts adjudicate religious freedom cases).

ing to see the judicial branch approximate something like Alexander Hamilton's outlook, however, is the suggestion that politics plays an exhaustive and absolute role in determining how judges decide cases.⁴¹ Fortunately for these readers (and myself), a distinct body of scholarly literature exists to ensure that this suggestion does not morph into an incontrovertible given. It is to this literature that we now turn.

ii. Legal Explanations for Judicial Decisionmaking

On February 14, 1989, Justice Scalia gave the Oliver Wendell Holmes, Jr. Lecture at Harvard University.⁴² In that speech-turned-essay, Scalia argues, “[t]hat the *Rule* of law, the law of *rules*, be extended as far as the nature of the question allows.”⁴³ If that is Scalia's ultimate thesis, he arrives at it through two crucial statements. First, he writes, “that we should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances . . . he begins to resemble a finder of fact more than a determiner of law.”⁴⁴ Almost immediately after this sentence, Scalia states that if judges employ “totality of the circumstances” tests when they are not absolutely necessary, “predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.”⁴⁵ In order to resurrect this “judicial courage,” scholars have discerned two constraining roles for legal doctrine in determining cases.

The first constraining role for doctrine is theoretical. In simple terms, doctrine is the language of judicial reasoning and supplies a vocabulary for judges to converse with other judges

⁴¹ This is not, I think, a straw-man argument. Consider the backdrop against which these scholars are writing. See POSNER, *supra* note 1, at 1 (prefacing his argument with the proposition that, “[i]f changing judges changes law, it is not even clear what law is.”); Schauer, *supra* note 7, at 656 (responding to the thesis that, “doctrine does not matter and that a change in personnel on the Court will produce decisions unfettered by the developed principles of previous courts.”).

⁴² Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

⁴³ *Id.* at 1187.

⁴⁴ *Id.* at 1182.

⁴⁵ *Id.*

in the same jurisdiction who are no longer alive and who have yet to be born.⁴⁶ In other words, if judges are constrained “by the necessity of justifying their decisions in written opinions,”⁴⁷ doctrine serves as the primary intellectual ground where judges look to understand the form of reasoning that they must employ throughout the opinion. Indeed, Professor Charles Fried explicitly recognizes doctrine as an essential attribute of judicial reasoning because it is doctrine that allows judges’ holdings to transcend the particular case at hand and structure future behavior.⁴⁸

The second constraining role for doctrine is institutional. Whereas the theoretical role focuses on the judicial decision-process itself, the institutional role locates that decision-process within a larger institutional context that provides external constraints on judicial decisionmaking.⁴⁹ More specifically, legal doctrine can be said to limit the choices that judges make because institutional norms may foster a duty or obligation on the part of judges to ground their decisions in law.⁵⁰ Perhaps the clearest example of a rules-based institutional constraint comes in the form of precedent, or *stare decisis*, which is the notion that previous rulings should guide current decisions.⁵¹ While a complete discussion of precedent lies beyond the scope of this article, a short discussion of three scholarly works offers some empirical evidence for the constraining influence of precedent on judicial discretion.

First, in analyzing the continuity between the Warren and Burger Courts, some scholars have concluded that adherence to

⁴⁶ See Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1156-57 (1994) (asserting that doctrine assures that judges will be mindful of how courts have ruled in the past).

⁴⁷ Schauer, *supra* note 7, at 663.

⁴⁸ See Fried, *supra* note 46, at 1148-49.

⁴⁹ See JACK KNIGHT & LEE EPSTEIN, *THE CHOICES JUSTICES MAKE* 10 (1997).

⁵⁰ See Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369, 370 (2008) (asserting that these norms may arise from law schools and the broader legal community); Schauer, *supra* note 7, at 664 (stating that, given the internalization of legal doctrine in society and law school, it should come as no surprise that Supreme Court Justices are constrained by rules.).

⁵¹ Bailey & Maltzman, *supra* note 50, at 371.

precedent helps explain why the Burger Court, arguably at ideological odds with the Warren Court, perpetuated, rather than dismantled, the doctrinal underpinnings of the Warren Court.⁵² With a hint of irony, scholar Anthony Lewis notes that the conservative nature of the Burger Court prompted it to abide by the judicial precedent set by the Warren Court, even though the policy preferences of the Warren Court were not in direct harmony with those of the Burger Court.⁵³ Second, in response to the Critical Legal Studies Movement's contention that rules are used to legitimate judicial preferences only after the fact, Judge Alvin Rubin (then Judge on the United States Court of Appeals for the Fifth Circuit) concludes that, "legal doctrine is a real force, judges follow it, and they decide all but a small fraction of the cases that come before them in accordance with what they perceive to be the controlling legal rules."⁵⁴ Due to the fact that the composition of the three-judge panel on the Court of Appeals level is constantly in flux, Judge Rubin notes that it is adherence to precedent that allows for some sort of continuity in rulings across the panels.⁵⁵ Finally, Michael Bailey and Forrest Maltzman rely on a sample set of 842 Supreme Court cases from the period of 1977 until 2003 to show that precedent played (and still plays) an influential force in the decisionmaking of thirteen Supreme Court Justices.⁵⁶

B. The Doctrine That The Hypothesis Will Work With: Equal Protection Scrutiny and the Brown/Parents Involved Opinions

A possibility for developing a legal hypothesis that contributes to the aforementioned debate emerges through a case study of the *Brown* and *Parents Involved* opinions. While the

⁵² See Anthony Lewis, *Foreword* to *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T*, at vii-iii (Vincent Blasi ed., 1983); see also Schauer, *supra* note 7, at 656.

⁵³ See Lewis, *supra* note 52, at viii.

⁵⁴ Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 *J. LEGAL EDUC.* 307, 307-08 (1987).

⁵⁵ See *id.* at 310-12 (1987). Later on in the article, Judge Rubin provides data from the Fifth Circuit during the years of 1981-1985 that supports his idea that adherence to precedent allows for "decision by consensus." *Id.* at 312.

⁵⁶ See Bailey & Maltzman, *supra* note 50, at 374-77.

research design of that case study is mapped out in the following section, the inspiration that the hypothesis pulls from this case study is obvious. In general, constitutional cases at the Supreme Court level allow us to most readily explore the interplay between judicial discretion and the purported constraints of legal doctrine.⁵⁷ This is the reason that this article focuses on equal protection scrutiny. In particular, Professor Scott Brewer has labeled *Brown*, “a remarkable culmination of the legal realist project of taming abstract legal propositions with the whip of social science.”⁵⁸ Regardless of whether Brewer is correct, his characterization of *Brown* in those terms invites the use of opinions that employ social science to investigate broader trends in legal theory and doctrine. This is the reason that this article focuses on *Brown* and *Parents Involved*.

i. Equal Protection Scrutiny: The Contemporary Debate Over Tiered Scrutiny and Justice Stevens’s Unmediated Approach

On its face, the traditional approach to equal protection scrutiny is relatively easy to understand. Having roots in the infamous footnote four of *United States v. Carolene Products Co.*,⁵⁹ equal protection scrutiny purports to embrace a tiered form that governs when specific types of legislation are to be declared presumptively invalid.⁶⁰ On the one hand, courts employ rational basis review when a piece of legislation does not burden a fundamental right or rely on a suspect classification.⁶¹ Granting Congress a presumption of legality, courts will uphold legislation if it has some rational relation to a legitimate

⁵⁷ See POSNER, *supra* note 1, at 14 (stating that the constitutional context is an area “where the decisional guidance provided by the orthodox legal materials is weakest.”).

⁵⁸ Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1553 (1998).

⁵⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (contending that, “prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry.”).

⁶⁰ See Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 948 (2004).

⁶¹ See Randall P. Ewing, Jr., *Same Sex-Marriage: A Threat to Tiered Equal Protection Doctrine?*, 82 ST. JOHN’S L. REV. 1409, 1413 (2008) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

governmental end.⁶² On the other hand, when a piece of legislation burdens a fundamental right or relies on a suspect classification, such as race or national origin, courts presume that Congressional judgments cannot pass constitutional muster.⁶³ Invoking the test of strict scrutiny, legislation can overcome this presumption of illegality if it is narrowly tailored to serve a compelling governmental purpose.⁶⁴ Resting in between these two extremes lies a form of equal protection scrutiny deemed intermediate scrutiny. When Congress utilizes a quasi-suspect classification, such as gender, in legislative enactments, courts uphold such enactments if they are substantially related to the accomplishment of an important governmental purpose.⁶⁵

What proves to be more difficult to understand, however, is the precise operation of tiered scrutiny within the framework of judicial reasoning. This query has prompted many scholars to rethink both the theoretical and practical viability of using a formalized tiered scrutiny framework to adjudicate equal protection disputes.⁶⁶ While a comprehensive overview of the criticisms leveled at tiered scrutiny lies well beyond the scope of this article, it is beneficial to recognize where the current literature stands.⁶⁷ While scholars will differ in making generalizations from this literature, current critiques of tiered scrutiny can plausibly be read as taking two forms. First, tiered scrutiny has been criticized from a normative viewpoint, focusing on its inability to confront constitutional norms. More specifically, commentators have suggested that the tiered form constrains the ability of judges to grapple with the normative demands of the Equal Protection Clause by trivializing potentially im-

⁶² See *id.*

⁶³ See Massey, *supra* note 60, at 949.

⁶⁴ See Ewing, *supra* note 61, at 1413 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

⁶⁵ See Massey, *supra* note 60, at 950.

⁶⁶ See Ewing, *supra* note 61, at 1413 (maintaining that tiered scrutiny has been criticized since its inception); Siegel, *supra* note 9, at 2343 (commenting that tiered scrutiny remains the subject of sustained criticism).

⁶⁷ See Siegel, *supra* note 9, at 2343-46 (laying out three standard criticisms of tiered scrutiny); see also Ewing, *supra* note 61, at 1413-16 (stating general critiques of modern Federal Equal Protection Doctrine).

portant factors in the constitutional analysis.⁶⁸ Second, tiered scrutiny has been criticized from a descriptive viewpoint, focusing on the inconsistency of its application across and between different levels of review.⁶⁹

A critical analysis of the tiered framework has, in turn, produced numerous proposals for doctrinal reformation, which have ranged from reworking the tiered framework to parting ways with the tiered form altogether.⁷⁰ Yet, what has remained relatively consistent is that “academic critics of modern equal protection doctrine tend to treat the writings of Justice Stevens (and Justice Marshall) as prophetic and inspirational.”⁷¹ Ever since Justice Stevens famously declared that “[t]here is only one Equal Protection Clause,”⁷² his approach to equal protection jurisprudence continues to be applauded as a plausible alternative to tiered scrutiny. Within the midst of this praise, however, the exact posture of Justice Stevens’s approach has not been conclusively resolved. To be sure, his methodology is currently viewed under a variety of lenses.⁷³ One such lens strikes me as particularly enlightening. In what is arguably one of the most rigorous analyses of Justice Stevens’s equal protection jurisprudence, Professor Andrew Siegel, who served as a clerk for Justice Stevens, suggests that Justice

⁶⁸ See Siegel, *supra* note 9, at 2344-45; see also James E. Fleming, “*There is Only One Equal Protection Clause*”: An Appreciation of Justice Stevens’s Equal Protection Jurisprudence, 74 *FORDHAM L. REV.* 2301, 2302 (2006) (explaining that Justice Stevens views the tiered framework as hindering the ability of judges to make judgments about constitutional norms).

⁶⁹ See Suzanne B. Goldberg, *Equality Without Tiers*, 77 *S. CAL. L. REV.* 481, 513-14 (2004) (discussing the inconsistency of rational basis review); Massey, *supra* note 60, at 945 (arguing that recent Supreme Court decisions have undercut the ability to rely on tiered scrutiny for consistent application).

⁷⁰ See Siegel, *supra* note 9, at 2346 (noting the wide range of reforms). For examples of particular reform projects, see Goldberg, *supra* note 69, at 491-92 (advocating a single standard with three inquiries); Massey, *supra* note 60, at 992-93 (arguing that a possible reform includes a value-selection approach where justices openly articulate what values are protected by the Constitution).

⁷¹ Siegel, *supra* note 9, at 2347.

⁷² *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

⁷³ See Ewing, *supra* note 61, at 1416-17 (classifying Justice Stevens’s approach as a modified form of rational basis review); Fleming, *supra* note 68, at 2311 (analogizing Justice Stevens’s approach to Justice Marshall’s “spectrum of standards” approach).

Stevens advances an unmediated interpretive theory.⁷⁴ Describing what an unmediated approach might look like, Siegel writes:

In rough form, an unmediated approach to equal protection jurisprudence would begin by ascertaining in a largely nonlinguistic way a vision of the "equality" promised by the text. It would then proceed to frame every inquiry into the constitutionality of governmental action around the question whether that vision is thwarted by the regulatory scheme in question. In ascertaining the appropriate answer in any given case, a judge applying such a methodology might-and probably should-ask a variety of questions about the challenged statute, its impact on individuals, and the various overlapping contexts in which it emerged, but such a jurist would not be compelled to ask any particular set of questions in any given case or to reach a particular conclusion based on the matrix of answers he or she receives to those questions.⁷⁵

More recently, Professor William Araiza has confirmed this interpretation of Justice Stevens's equal protection jurisprudence.⁷⁶

ii. *The Brown/Parents Involved Opinions: Judicial Scrutiny and Social Science*

Brown represents a firm denial of state-sponsored racial segregation in the context of lower school public education.⁷⁷ Responding to *Plessy v. Ferguson*'s contention that social differences between the races mandated separate, yet equal, treatment,⁷⁸ *Brown* states the following: "We conclude that in

⁷⁴ See Siegel, *supra* note 9, at 2351. Professor Siegel's argument finds support in another piece of scholarship focusing solely on Justice Stevens. In a 1987 student note, the author writes that, "Justice Stevens' method . . . permits advocates directly to address the issue concerning the Court: whether the classification in its context violates a norm of equal protection." Note, *supra* note 12, at 1160-61.

⁷⁵ Siegel, *supra* note 9, at 2352.

⁷⁶ See William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L.A. L. REV. 889, 896-97 (2011).

⁷⁷ Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 796 (2002).

⁷⁸ See Michael W. Combs & Gwendolyn M. Combs, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal, and Political Perspective*,

the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."⁷⁹ Two themes permeate the Court's decision.⁸⁰ First, Chief Justice Earl Warren stressed the changing status of public education in the South during the middle of the twentieth century.⁸¹ Indeed, he writes that, "[t]oday, education is perhaps the most important function of state and local governments . . . [i]t is the very foundation of good citizenship."⁸² Second, and most important for our purposes, the Court recognized, in footnote eleven,⁸³ that segregation visited psychological harm upon black children.⁸⁴ In that footnote, the Court cited to research conducted by Dr. Kenneth Clark⁸⁵ that concluded that segregation impeded the development of black children's personalities.⁸⁶ While that study has been a main talking point in analyzing the Warren Court's reliance on social science data,⁸⁷ it must be noted that footnote eleven contains other non-legal sources, such as *An American Dilemma* by Gunnar Myrdal and *The Negro in the United States* by E. Franklin Frazier.⁸⁸

After *Brown*, legal doctrine in the area of dismantling segregation relied on a distinction between segregation resulting from intentional governmental actions, called de jure segregation, and segregation resulting from actions outside the purview of the government, called de facto segregation.⁸⁹ De jure segregation refers to a school system's deliberate design to seg-

47 How. L.J. 627, 636 (2004).

⁷⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

⁸⁰ These themes are taken from the work of Sanjay Mody. See Mody, *supra* note 77, at 796-802.

⁸¹ See *id.* at 798 (stating that when the Fourteenth Amendment was drafted, public education did not occupy an important place in the South).

⁸² *Brown*, 347 U.S. at 493.

⁸³ *Id.* at 495 n.11.

⁸⁴ See Heise, *supra* note 19, at 293-96.

⁸⁵ *Brown*, 347 U.S. at 495 n.11.

⁸⁶ See Combs & Combs, *supra* note 78, at 640-41.

⁸⁷ See Heise, *supra* note 19, at 294 (arguing that Dr. Clark's research is a primary reason that footnote eleven has come under sustained scrutiny).

⁸⁸ *Brown*, 347 U.S. at 495 n.11.

⁸⁹ See Jonathan Fischbach, Will Rhee, & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L.REV. 491, 496 (2008).

regate students on the basis of race as a result of local ordinances or state statutes.⁹⁰ In turn, this type of segregation constitutionally necessitates a remedy by the government.⁹¹ In contrast, de facto segregation refers to the presence of a racial imbalance brought about by housing patterns or other forms of societal inequalities not directly caused by governmental action.⁹² Due to the fact that this type of segregation is not per se unconstitutional, a court cannot order a school district to implement a desegregation policy.⁹³

Parents Involved, an opinion that relies on the de jure/de facto distinction, presented the question whether it was constitutional under the Equal Protection Clause for school districts to voluntarily consider race as a factor in assigning kids to specific schools in order to foster racial and ethnic heterogeneity.⁹⁴ On the facts of the case, school districts in Seattle and Louisville had used race as a factor in determining “whether a student could attend the school of his or her choice.”⁹⁵ Between the two districts, however, different policies were employed.⁹⁶ They varied both in terms of the breadth of the policy’s application and in terms of the desired racial composition of each school in reference to broader racial patterns of the school district as a whole.⁹⁷ The policies did converge on one point: that a racially diverse learning environment is a moral good and, consequently, a compelling state interest.⁹⁸

In anticipation of the case study, I use two observations to frame how different justices approached the case. First, the justices differed in their reading of desegregation doctrine and

⁹⁰ See *id.* at 496.

⁹¹ See Rachel Elliot & Natalie Soter, Note, *Race-Based Decision Making—Narrowly Tailored or Narrow Minded? Breaking Open Our Definition of Diversity*, 3 EMPIRE C. L. REV. 33, 38 (2008).

⁹² See *id.* at 39.

⁹³ See Fischbach, Rhee, & Cacace, *supra* note 89, at 504.

⁹⁴ See Sharon L. Browne & Elizabeth A. Yi, *The Spirit of Brown in Parents Involved and Beyond*, 63 U. MIAMI L. REV. 657, 658 (2009); Jonathan L. Entin, *Parents Involved and the Meaning of Brown: An Old Debate Renewed*, 31 SEATTLE U. L. REV. 923, 924 (2008).

⁹⁵ Browne & Yi, *supra* note 94, at 658.

⁹⁶ See *id.*

⁹⁷ See Entin, *supra* note 94, at 924-25.

⁹⁸ See Love, *supra* note 18, at 131.

the fate it held for the school's policies as a matter of law.⁹⁹ Second, they differed in their interpretation of the relevant social science literature.¹⁰⁰ For the sake of making the upcoming case study as clear as possible, I focus only on the opinions of Chief Justice Roberts, Justice Thomas, and Justice Breyer and exclude those of Justice Kennedy and Justice Stevens.¹⁰¹

Applying strict scrutiny¹⁰² and emphatically relying on the history of *Brown*, Chief Justice John Roberts, joined in full by Justices Alito, Scalia, and Thomas,¹⁰³ struck down the assignment policies as violating the constitutional mandate of equal protection of the laws.¹⁰⁴ Two themes undergird the Chief Justice's opinion. First, Chief Justice Roberts makes it painstakingly clear that he believed *Brown* to require elementary schools to adopt a colorblind attitude in assignment policies, even if the purpose of the policies is to foster racial integration.¹⁰⁵ To be sure, Roberts writes the following:

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.¹⁰⁶

Second, Roberts did not explicitly cite to any social science

⁹⁹ The scholarly literature is replete with commentary documenting the justices' invocation of *Brown* in the opinion. For a taste of that scholarship, see the following articles. See James E. Fleming, *Rewriting Brown, Resurrecting Plessy*, 52 ST. LOUIS U. L.J. 1141 (2008); Pamela S. Karlan, *What Can Brown® Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049 (2009); David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065 (2008).

¹⁰⁰ See Frankenberg & Garces, *supra* note 19, at 717.

¹⁰¹ I do not believe that this exclusion renders my hypothesis any less forceful. Rather, by focusing my analysis on these three Justices, I am able to present the case study's variables, that of judicial scrutiny and the use of social science data, in the clearest light. After all, it is my overly-optimistic hope that the hypothesis has something to say when applied beyond *Brown* and *Parents Involved*.

¹⁰² See Love, *supra* note 18, at 132.

¹⁰³ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (plurality opinion) (Kennedy, J., concurring in part).

¹⁰⁴ *Parents Involved*, 551 U.S. at 748.

¹⁰⁵ Brown & Yi, *supra* note 94, at 658.

¹⁰⁶ *Parents Involved*, 551 U.S. at 747-48.

data.¹⁰⁷ While Roberts did make reference to the social science data cited in the amicus briefs, he did not give the social science literature a causal role in the outcome of his opinion.¹⁰⁸

Justice Thomas filed a concurring opinion in which he seemed to take Justice Roberts's reasoning to its logical conclusion. That is, Thomas analogized arguments made in favor of the assignment policies to arguments made by segregationists during the era of *Brown*.¹⁰⁹ For Thomas, race serves no legitimate role in classifying students in the context of public education.¹¹⁰ Invoking strict scrutiny, Thomas asserts that, "[a]s these programs demonstrate, every time the government uses racial criteria to 'bring the races together,' . . . someone gets excluded, and the person excluded suffers an injury solely because of his or her race."¹¹¹ Regarding the social science data, Thomas subscribed to the view that he need only consider evidence of de jure segregation.¹¹² Since, for Thomas, mere "[r]acial imbalance is not segregation,"¹¹³ evidence of de facto segregation held no relevance in assessing the constitutionality of the race-based programs at issue.¹¹⁴

Justice Breyer filed a forceful dissenting opinion. Mirroring both Chief Justice Roberts and Justice Thomas, Justice Breyer purported to apply traditional strict scrutiny analysis.¹¹⁵ However, unlike those Justices, Justice Breyer concluded that the school board plans of Seattle and Louisville were permitted under the Constitution.¹¹⁶ A handful of key interpretive moves on the part of Justice Breyer may make clear why

¹⁰⁷ Frankenberg & Garces, *supra* note 19, at 732-33 (arguing that Roberts's extraordinarily strict criteria for allowing social science data into the opinion probably rendered many applicable studies irrelevant).

¹⁰⁸ See Morgan & Pullin, *supra* note 37, at 521.

¹⁰⁹ See Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 212 (2008); Brad Snyder, *What Would Justice Holmes Do (WWJHD)?: Rehnquist's Plessy Memo, Majoritarianism, and Parents Involved*, 69 OHIO ST. L.J. 873, 902 (2008).

¹¹⁰ See Browne & Yi, *supra* note 94, at 675.

¹¹¹ *Parents Involved*, 551 U.S. at 759 (Thomas, J., concurring).

¹¹² See Frankenberg & Garces, *supra* note 19, at 715.

¹¹³ *Parents Involved*, 551 U.S. at 750 (Thomas, J., concurring).

¹¹⁴ See Frankenberg & Garces, *supra* note 19, at 715.

¹¹⁵ *Parents Involved*, 551 U.S. at 837 (Breyer, J., dissenting).

¹¹⁶ *Id.*

his opinion came out the way that it did. Justice Breyer's application of strict scrutiny seemed to be informed by a contextual approach that took into account the benign purpose behind the race-conscious policies.¹¹⁷ To be sure, Justice Breyer opines that, "[t]he context here is one of racial limits that seek, not to keep the races apart, but to bring them together."¹¹⁸ As a result, Justice Breyer did not think that the de jure/de facto distinction controlled "what a school district is voluntarily allowed to do."¹¹⁹ Negating the validity of this distinction, Justice Breyer considered evidence of de facto segregation relevant in framing the racial harm that the school districts could constitutionally correct.¹²⁰

III. A HYPOTHESIS FOR WHY DOCTRINE MATTERS: THE *BROWN/PARENTS INVOLVED* CASE STUDY

This section directly enters the debate over judicial decisionmaking by supplying a hypothesis that serves to counteract any talismanic enchantment with a purely political explanation for Supreme Court decisionmaking. The proposed hypothesis treads carefully. While it aims to illustrate that doctrine matters in some nontrivial way throughout the course of judicial decisionmaking, it does not pretend to prove that doctrine is all that matters. In other words, the hypothesis is in line with Frederick Schauer's proposition that legal doctrine helps to structure, rather than consume, the thinking of judges.¹²¹ Therefore, as seen in Part A below, the hypothesis contextualizes Schauer's proposition within the Court's use of social science data.

In order to instill the hypothesis with explanatory power in the equal protection context, I analyze the *Brown* and *Parents Involved* opinions by asking the following two questions: first, is there a change in how judicial scrutiny was articulated in *Brown* as opposed to *Parents Involved* and second, did that change matter in terms of the types of social science data used

¹¹⁷ See Love, *supra* note 18, at 133-34.

¹¹⁸ *Parents Involved*, 551 U.S. at 835 (Breyer, J., dissenting).

¹¹⁹ *Id.* at 844.

¹²⁰ See Frankenberg & Garces, *supra* note 19, at 714.

¹²¹ See Schauer, *supra* note 7, at 664.

in the two opinions? I answer both questions in the affirmative. In Part B, I argue that while the *Brown* opinion can plausibly be viewed as adopting something like Justice Stevens's unmediated approach,¹²² each opinion in *Parents Involved* employed some form of strict scrutiny analysis.¹²³ In Part C, I then argue that this doctrinal difference influenced how specific types of social science sources became relevant to the legal issue at hand by prompting, or failing to prompt, the justices to filter their choice of social science data through additional legal doctrine beyond the standard of review.¹²⁴

A. *The Hypothesis in Detail*

At times, the formality of legal doctrine can call for the use of “elaborate technical vocabularies.”¹²⁵ Indeed, Professor Victoria Nourse has recognized a scholarly consensus that observes how doctrine has been utilizing a more formalized vocabulary over time.¹²⁶ Moreover, Professor Robert Nagel has described the Court's rhetoric as “an amalgam of the bureaucratic and the academic.”¹²⁷ Given the tenor of these statements, it does not seem outrageous to suggest that the technical vocabulary that these scholars had in mind looks something like strict scrutiny's use of the terms “compelling purpose” and “narrowly tailored.”¹²⁸ The hypothesis seeks to understand the effect of this technical vocabulary, as enunciated in the standard of review, on judicial consideration of social

¹²² See Siegel, *supra* note 9, at 2352.

¹²³ See Love, *supra* note 18, at 132-33.

¹²⁴ I must give credit to Professor Siegel for acknowledging that the mere existence of a complex doctrinal framework may have a “distortive or transformative effect, building substantive content into the body of constitutional law.” Siegel, *supra* note 9, at 2346.

¹²⁵ Marouf Hasian, Jr., Celeste Michelle Condit, & John Louis Lucaites, *The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate But Equal' Doctrine*, 82 Q.J. SPEECH 323, 325 (1996).

¹²⁶ See Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1402 (1997).

¹²⁷ Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 177 (1985).

¹²⁸ See Siegel, *supra* note 9, at 2345 (noting that the rhetoric of strict scrutiny might qualify as a “complicated doctrinal structure”).

science sources.

The hypothesis of this article contends that judges feel more legitimated in interacting with a broader range of non-legal sources when they apply a less formal standard of review that contains little, if any, technical legal words because the standard of review frames the legal issue in linguistic terms that are discursively accessible to other disciplines. This discursive accessibility, in turn, ensures that an additional legal construct is not needed to render intelligible a link between the legal issue and the non-legal sources. Thus, non-legal sources need only compete with the substantive content embodied in the legal issue in order to enter the opinion; these sources need not fight through an additional legal construct, and its potentially disarming legal rhetoric, to reach that content in the first place.

However, when judges employ a formalized judicial scrutiny that relies heavily on a technical legal vocabulary, as something like strict scrutiny does, judges feel more comfortable in giving initial meaning to that vocabulary by citing to more legal doctrine. This time, the standard of review frames the legal issue in linguistic terms that are discursively accessible only to more legal language. As the amount of legal language multiplies, the opportunity for non-legal sources to help draw out that language also multiplies due to the ever-increasing possibility that the legal rhetoric will touch upon a principle of thought that transcends the legal arena. Yet, this process of legal language multiplication comes at a cost. While this process can indeed provide the principle of thought that serves as an access point into the social science literature, it does so only by connecting that principle to the primary legal issue through a legal construct. As a result, this exercise in linguistics limits the types of social science sources that enter the opinion to those that can comport with the rhetoric of this additional legal construct.

B. A Closer Look at the Articulation of Judicial Scrutiny in Brown and Parents Involved

A satisfactory evaluation of judicial scrutiny employed in an opinion should focus on the language of the opinion itself in addition to how scholars have categorized that scrutiny. Both

methods of analysis are adopted here in examining the type of judicial scrutiny applied in *Brown* and *Parents Involved*. The argument here is simple: while *Brown* can be interpreted as adopting Justice Stevens's unmediated approach,¹²⁹ Chief Justice Roberts, Justice Thomas, and Justice Breyer implemented some version of strict scrutiny analysis in *Parents Involved*.¹³⁰

i. *Brown's* Unmediated Standard of Review

Any discussion of the judicial scrutiny used in *Brown* should be informed by the fact that strict scrutiny was first enunciated as applying to racial classifications in cases involving Japanese Americans challenging their internment in the midst of World War II.¹³¹ To be sure, Professors Greg and Toni Robinson maintain that, "the most decisive contribution of the Japanese Americans to the legal struggle for civil rights was in laying the foundation for the doctrine of strict scrutiny on which *Brown* and the other cases were based."¹³² The 1944 Supreme Court case of *Korematsu v. United States*¹³³ serves as a case in point. In that case, Toyosaburo Korematsu, an American citizen, was convicted for remaining in an unauthorized military zone in California.¹³⁴ Justice Black begins the opinion by declaring the following:

It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.¹³⁵

Given this strong language, commentators awaiting the *Brown* decision ten years later could reasonably have assumed that Chief Justice Earl Warren would cite to *Korematsu* or oth-

¹²⁹ See *id.* at 2352.

¹³⁰ See Love, *supra* note 18, at 132-33.

¹³¹ See Greg Robinson & Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29, 30, 32 (2005).

¹³² See *id.* at 30. As we will see shortly, the authors' invocation of *Brown* is misleading. Nonetheless, their point is well taken.

¹³³ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹³⁴ *Id.* at 215-16.

¹³⁵ *Id.*

er Japanese internment cases to strike down segregation in public education. Indeed, the segregation at issue in *Brown* was arguably a restriction which burdened “the civil rights of a single racial group.”¹³⁶ However, the *Brown* opinion is devoid of any such citation.

If *Brown* was not decided under a doctrine of strict scrutiny laid down during the Japanese internment cases, what type of judicial scrutiny did Chief Justice Warren apply? The language of *Brown* itself is instructive. Chief Justice Warren acknowledged from the outset that every District Court in the case, other than Delaware,¹³⁷ and six previous Supreme Court cases decided after *Plessy* applied the “separate but equal” doctrine.¹³⁸ He went on to say that the “separate but equal” doctrine itself had not been challenged in previous cases involving public education.¹³⁹ After proclaiming that the equality of educational facilities must take into account intangible factors,¹⁴⁰ Chief Justice Warren phrases the question presented to the Court as follows: “[d]oes segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”¹⁴¹ In what can plausibly be read as the holding, Chief Justice Warren states that, “in the field of public education the doctrine of ‘separate but equal’ has no place”¹⁴² and that, “[s]eparate educational facilities are inherently unequal.”¹⁴³

Given the absence of any explicit language recognizing a form of judicial scrutiny, it is difficult to pinpoint the precise form of scrutiny in the case.¹⁴⁴ Chief Justice Warren was simp-

¹³⁶ *Id.* Perhaps an answer can be found if we allow for the possibility that lower school education did not constitute a “civil right” within the meaning of the *Korematsu* language. I find this highly unlikely, though, due to Chief Justice Warren’s detailed discussion of the importance of public education. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹³⁷ See *Brown*, 347 U.S. at 488.

¹³⁸ See *id.* at 491.

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 492 (stating that the Court’s decision “cannot turn on merely a comparison of these tangible factors”).

¹⁴¹ *Id.* at 493.

¹⁴² *Id.* at 495.

¹⁴³ *Id.*

¹⁴⁴ See Jack Balkin, *What Brown Teaches Us About Constitutional Theo-*

ly unclear in articulating the doctrinal grounds on which the case rested. What I wish to suggest, though, is that Justice Stevens's unmediated approach to constitutional interpretation inspired Chief Justice Warren's framing of the legal question. Recall, Justice Stevens's approach "[i]nvolves nothing more and nothing less than the direct and unmediated application of the Constitution's guarantee of 'equal protection of the laws.'"¹⁴⁵ While Chief Justice Warren did not use the phrase "equal protection of the laws" in presenting the legal question at hand, he nonetheless asked whether segregation deprived "children of the minority group of equal educational opportunities."¹⁴⁶ In my mind, Chief Justice Warren's phrasing is as close as one can get to applying the actual language of the Fourteenth Amendment to a concrete fact pattern.

At first blush, one could offer a retort by making the argument that the case was decided in light of the mediating doctrine of "separate but equal." Indeed, some scholars have made that argument.¹⁴⁷ However, this reading seems unlikely for two reasons. First, a case cannot be decided on a ground that is explicitly rejected in the opinion itself. Applying this to *Brown*, if the "separate but equal" doctrine was ultimately rejected in the context of public education, the decision could not possibly have turned on this doctrine alone. There must have been some broader constitutional principle at play, presumably the phrase "equal protection of the laws,"¹⁴⁸ that provided Chief Justice Warren with the criteria for determining whether the "separate but equal" doctrine was appropriate in the first place. Second, after stating the holding, Chief Justice Warren writes that, "[w]e have now announced that such segregation is a denial of the equal protection of the laws."¹⁴⁹ With that sentence,

ry, 90 VA. L. REV. 1537, 1564 (2004) (stating that when *Brown* was handed down, the import of the opinion was unclear).

¹⁴⁵ Siegel, *supra* note 9, at 2351.

¹⁴⁶ *Brown*, 347 U.S. at 493.

¹⁴⁷ See Edward J. Erler, *Still Separate But Equal*, CLAREMONT REV. BOOKS 47, 48 (Summer 2004) (arguing that although the Warren Court could have overturned the "separate but equal" doctrine, it chose to perpetuate it throughout the opinion).

¹⁴⁸ U.S. CONST. amend. XIV.

¹⁴⁹ *Brown*, 347 U.S. at 495.

Chief Justice Warren gives us a first-hand account of what he thought *Brown* stood for. And, of course, the “separate but equal” doctrine is nowhere to be found.

Since the language of the opinion is concededly ambiguous, the writings of two scholars investigating *Brown* in more detail may offer some insight into the judicial scrutiny applied. Stating that the negative implications of *Brown* must be appreciated, Professor Parker posits that, “while the facts presented in the case included a suspect classification, state legislation and an equal protection challenge, the Court failed to refer to the traditional strict scrutiny test.”¹⁵⁰ Although Professor Parker does not give a positive account for what standard of review was employed, Professor Frank Read does. In an article that surveys desegregation doctrine in the wake of *Brown*, Professor Read writes, “the opinion in *Brown I* is, at its essence, a straight-forward legal interpretation of the equal protection clause.”¹⁵¹ This is probably the clearest corroboration for the idea that Justice Stevens’s interpretive theory inspired Chief Justice Warren’s decision.

ii. *Parents Involved* and The Variants of Strict Scrutiny

Any description of the judicial scrutiny used in *Parents Involved* is manifestly easier to construct than that of *Brown* primarily because the three Justices that I focus on in *Parents Involved* are explicit about the standard of review they subscribed to. With that being said, there is a key difference in how the standard of review was invoked between Chief Justice Roberts and Justice Thomas, on the one hand, and Justice Breyer, on the other. Mirroring the analysis of *Brown*, the description of judicial scrutiny in *Parents Involved* begins with the language of the opinion itself.

At the beginning of the plurality opinion, Chief Justice Roberts makes it clear that he believed that strict scrutiny must control the case.¹⁵² That is, Chief Justice Roberts states that, “the school districts must demonstrate that the use of in-

¹⁵⁰ Parker, *supra* note 17, at 227.

¹⁵¹ Read, *supra* note 20, at 9.

¹⁵² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

dividual racial classifications in the assignment plans here under review is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.”¹⁵³ Throughout the opinion, Chief Justice Roberts dismissed the idea of applying a different standard of review to racial classifications that serve praiseworthy, rather than destructive, ends by stating that “all racial classifications must be reviewed under strict scrutiny.”¹⁵⁴ Justice Thomas’s concurrence, which was written to address several arguments made by Justice Breyer,¹⁵⁵ does not contest Chief Justice Roberts’s invocation and application of strict scrutiny. Like Chief Justice Roberts, Justice Thomas dismissed the idea that a different standard of review should be applied when programs use racial classifications to advance a benign purpose.¹⁵⁶

On its face, it would seem that Justice Breyer’s dissent did not depart from his colleagues on the issue of judicial scrutiny because he insisted that he was applying strict scrutiny.¹⁵⁷ Indeed, Justice Breyer states that he will conduct his inquiry as follows: “I shall consequently ask whether the school boards in Seattle and Louisville adopted these plans to serve a ‘compelling governmental interest’ and, if so, whether the plans are ‘narrowly tailored’ to achieve that interest.”¹⁵⁸ However true that may be, it is also true that Justice Breyer was informed by a “contextual approach to scrutiny”¹⁵⁹ that appreciates the distinction that Chief Justice Roberts and Justice Thomas were quick to condemn, that of using race to exclude as opposed to include.¹⁶⁰ To be sure, Justice Breyer writes that, “the ‘fundamental purpose’ of strict scrutiny review is to ‘take relevant differences’ between ‘fundamentally different situations . . . into account”¹⁶¹ and that, “the law requires application here of a standard of review that is not ‘strict’ in the traditional sense of

¹⁵³ *Id.* (citing *Adarand Constructors Inc.*, 515 U.S. 200, 227 (1995)).

¹⁵⁴ *Id.* at 741.

¹⁵⁵ *Id.* at 748 (Thomas, J., concurring).

¹⁵⁶ *Id.* at 758.

¹⁵⁷ *Id.* at 837 (Breyer, J., dissenting).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 834-35.

¹⁶¹ *Id.* (citing *Adarand Constructors Inc.*, 515 U.S. 200, 228 (1995)).

that word.”¹⁶² Nevertheless, Justice Breyer acknowledged that some sort of rigorous review was called for as “the judge would carefully examine the program's details to determine whether the use of race-conscious criteria is proportionate to the important ends it serves.”¹⁶³ While indeed purporting to apply the strictures of strict scrutiny, one must wonder to what extent this “contextual approach” actually structured Justice Breyer’s application of strict scrutiny.

Turning to the academic commentary, it is relatively clear that there is no serious contestation that Chief Justice Roberts and Justice Thomas applied, or thought they applied, strict scrutiny review.¹⁶⁴ Instead, the more interesting debate revolves around the type of scrutiny that Justice Breyer utilized. Nicole Love explicitly addresses Justice Breyer’s “contextual approach” to strict scrutiny.¹⁶⁵ Love tends to believe that not only did the “contextual approach” inform Justice Breyer’s application of strict scrutiny (as I do), but that it also supplanted strict scrutiny review altogether.¹⁶⁶ Paralleling Love, Professor Brad Snyder has recognized another area where Justice Breyer’s purported application of strict scrutiny departed from that of the plurality. Specifically, he points out that Justice Breyer concluded his opinion “with a Holmesian plea for deference to elected officials.”¹⁶⁷ Both Chief Justice Roberts¹⁶⁸ and Justice Thomas¹⁶⁹ rebuked this grant of deference as being adverse to traditional strict scrutiny principles.

C. The Effect of Scrutiny on Judicial Consideration of Social Science in Brown and Parents Involved: Filtering Social Science Sources Through Additional Legal Doctrine Above and

¹⁶² *Id.* at 837.

¹⁶³ *Id.*

¹⁶⁴ See Browne & Yi, *supra* note 94, at 674 (stating that the plurality opinion declined the invitation to depart from a strict scrutiny analysis); Love, *supra* note 18, at 133 (noting that Justice Thomas endorsed strict scrutiny).

¹⁶⁵ See Love, *supra* note 18, at 133-34.

¹⁶⁶ See *id.* at 133 (stating that Justice Breyer employed a “contextual approach” to scrutiny without qualification).

¹⁶⁷ Snyder, *supra* note 109, at 905.

¹⁶⁸ See *Parents Involved*, 551 U.S. at 744-45 (plurality opinion).

¹⁶⁹ See *id.* at 774 (Thomas, J., concurring).

Beyond the Standard of Review?

Once the difference in the articulation of scrutiny employed in *Brown* and *Parents Involved* has been established with some level of precision, the next task involves understanding whether that difference holds any power in explaining how different types of social science sources made their way into these opinions. In the words of Julie Margetta Morgan and Diana Pullin, “[i]f *Brown* raised the possibility that judges might use social science in decision making, it also gave rise to enduring questions of how and why particular research was selected.”¹⁷⁰ In this section, the research selection in *Brown* and *Parents Involved* is evaluated in light of the specific type of scrutiny applied.

The argument in this section runs as follows. On the one hand, *Brown’s* adoption of Justice Stevens’s unmediated approach to judicial scrutiny granted the Warren Court great flexibility in deeming certain types of social science sources relevant to the legal issue at hand because a direct application of the constitutional text¹⁷¹ did not prompt the Court to filter those sources through any additional legal construct. On the other hand, the articulation of strict scrutiny in Chief Justice Roberts’s plurality opinion and Justice Thomas’s concurrence in *Parents Involved* inspired these two Justices to rely on the distinction between de jure and de facto segregation¹⁷² to define the legally relevant harm that could be voluntarily remedied. In turn, that distinction served to filter the type of social science sources that these two Justices found relevant to the legal question at hand.¹⁷³ Because, as we have seen, Justice Breyer’s application of strict scrutiny differed from that of both the Chief Justice and Justice Thomas, his legal reasoning does not appear to be constrained by the de jure/de facto distinction¹⁷⁴

¹⁷⁰ Morgan & Pullin, *supra* note 37, at 515.

¹⁷¹ See Read, *supra* note 20, at 9 (arguing that *Brown* directly applied the constitutional text of the Fourteenth Amendment to the legal issue presented).

¹⁷² See Browne & Yi, *supra* note 94, at 673.

¹⁷³ See Frankenberg & Garces, *supra* note 19, at 710.

¹⁷⁴ Michael L. Wells, *Race-Conscious Student Assignment Plans After Parents Involved: Bringing State Action Principles to Bear on the De Jure/De*

and, therefore, did not rely on that construct to filter the social science literature.¹⁷⁵

i. *Brown*: Social Science Unfiltered By Additional Legal Doctrine

Recall that in the *Brown* opinion, Chief Justice Warren dropped a footnote that cited to various social science sources documenting the psychological harm that segregation imposed on black children.¹⁷⁶ Over time, footnote eleven has generated controversy that has found expression in the form of two distinct debates.¹⁷⁷ Although “*Brown’s* overall legacy will likely remain a subject of vigorous debate in the future,”¹⁷⁸ it would serve us well to understand the general tenor of those debates so that we can see how this article departs from them. To be clear, the discussion here is not meant to advance either of these two debates for my inquiry does not, at this time, purport to involve normative questions of institutional competence or descriptive questions of how particular social science sources are used to supplement legal reasoning *once included* in the opinion.

The first debate is extremely broad in scope and centers on the propriety of using social science to validate normative judgments about the Constitution.¹⁷⁹ This debate asks whether courts are institutionally competent enough to sift through complex social science studies to determine which ones are persuasive and then integrate those studies into their legal reasoning.¹⁸⁰ Scholars who have criticized the Court for relying on this interdisciplinary approach have stated that, “attaching constitutional meaning to scientific opinion . . . condemns the Constitution to fluctuations in meaning as scientific knowledge

Facto Distinction, 112 PENN ST. L. REV. 1023, 1031 (2008).

¹⁷⁵ See Frankenberg & Garces, *supra* note 19, at 714.

¹⁷⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 n.11 (1954).

¹⁷⁷ I acknowledge Michael Heise’s work in helping to frame where the current literature on footnote eleven stands. See Heise, *supra* note 19, at 294 (laying out two general attacks against the use of footnote eleven in the *Brown* opinion).

¹⁷⁸ *Id.* at 296.

¹⁷⁹ See Brewer, *supra* note 58, at 1562.

¹⁸⁰ See *id.* at 1562-64.

changes.”¹⁸¹ The work of prominent legal theorist Ronald Dworkin has been read to further suggest that the social sciences are an inadequate foundation to rest constitutional rulings on.¹⁸² On the other side of the debate, some scholars have applauded the Court’s willingness to cite to social science sources as a way of ensuring that constitutional decisions are not at the mercy of “arbitrary judicial biases.”¹⁸³

The second debate is narrower in scope and attempts to understand whether the Warren Court’s citation to social science sources in footnote eleven actually influenced the outcome of the case.¹⁸⁴ This debate has produced an enormous literature, to the point that Professor James Ryan has described the debate as a “tired”¹⁸⁵ one, and, as such, I can only touch on it here. In general and at the risk of oversimplification, two camps of scholars have participated in this debate.¹⁸⁶ In the first camp, scholars who believe that the Court should, as a normative matter, look to social science sources for guidance tend to assume that the Warren Court did in fact rely on footnote eleven in determining the outcome of *Brown*.¹⁸⁷ In contrast, the second camp, including scholars such as Herbert Wechsler¹⁸⁸ and Charles Black,¹⁸⁹ asserts that it is doubtful that the Court was influenced in any significant way by footnote eleven. Recently, Sanjay Mody argues that footnote eleven should be seen as a legitimacy-enhancing tactic that at-

¹⁸¹ David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 573 (1991).

¹⁸² See *id.* at 569; see also Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J.L & EDUC. 3, 5 (1977).

¹⁸³ PAUL ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 157 (1972).

¹⁸⁴ For an article that nicely structures the debate and attempts to move it in a new direction, see Mody, *supra* note 77, at 796.

¹⁸⁵ Ryan, *supra* note 14, at 1660.

¹⁸⁶ I note that I categorize these two camps differently than Sanjay Mody. See Mody, *supra* note 77, at 804.

¹⁸⁷ See *id.*

¹⁸⁸ See Wechsler, *supra* note 26, at 33 (noting that it is hard to think that Brown “turned upon the facts.”).

¹⁸⁹ See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1960) (stating that the footnote can be seen as supporting intuition).

tempted to anchor *Brown* in the social science community amid legal controversy.¹⁹⁰

What both of these debates have in common is that they tend to focus on the doll study conducted by Dr. Clark¹⁹¹ as adequately embodying the intellectual essence of the other sources cited in footnote eleven. That is to say, a majority of the articles that have been instrumental in the previous two debates focus almost exclusively on Dr. Clark's doll study as representing the substantive content of the other types of sources consulted in footnote eleven.¹⁹² For example, Edmond Cahn's famous critique of the Warren Court's reliance on social science focuses exclusively on Dr. Clark's work.¹⁹³ After reading Professor Cahn's work, it would seem that footnote eleven contained only one source, as opposed to the seven actually cited. Furthermore, in noting that the social science sources in footnote eleven suffered from serious limitations, Professor Scott Brewer also seems to equate "the studies on which the Court relied"¹⁹⁴ with Dr. Clark's research.

When looked at more carefully, however, footnote eleven is found to contain citations to *An American Dilemma* by Gunnar Myrdal and *The Negro in the United States* by E. Franklin Frazier.¹⁹⁵ In *An American Dilemma*, published in 1944, Myrdal undertakes a comprehensive study of race relations in the United States during the period leading up to *Brown*. Utilizing a multidisciplinary approach, Myrdal concludes that problems of "racism, discrimination, denial, and violence"¹⁹⁶ permeated encounters with the black population. In turn, Myrdal's book played a central role in the "sociological and historical attack upon segregation."¹⁹⁷ What is most important for our purposes

¹⁹⁰ See Mody, *supra* note 77, at 794.

¹⁹¹ For an overview of that study, see Brewer, *supra* note 58, at 1558.

¹⁹² See Heise, *supra* note 19, at 313 (reducing footnote eleven to the work of Dr. Clark).

¹⁹³ See Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 159-65 (1955).

¹⁹⁴ Brewer, *supra* note 58, at 1557-58.

¹⁹⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 n.11 (1954).

¹⁹⁶ Jon G. Crawford & Linda J. O'Neil, *A Mere Footnote? An American Dilemma and Supreme Court School Desegregation Jurisprudence*, 86 PEABODY J. EDUC. 506, 508-09 (2011).

¹⁹⁷ BROWN V. BOARD OF EDUCATION: A DOCUMENTARY HISTORY, at 21 (Mark Whitman ed., 2004).

is that Myrdal's study of race relations is not confined to the public education context. To be sure, Myrdal writes that, "*social segregation and discrimination is a system of deprivations forced upon the Negro group by the white group.*"¹⁹⁸ To add content to this observation, Myrdal observes the inner-workings of segregation within the context of churches, schools, public transportation, and the theater.¹⁹⁹ In *The Negro in the United States*, Dr. Frazier's general objective is to examine how the black population had assimilated into a culture colored by white privilege.²⁰⁰ In the words of Leon Epstein, Dr. Frazier "examined the life of the Negro under the slave regime, the accommodations of the Civil War and Reconstruction period . . . and the present problems of adjustment in the United States."²⁰¹ Like Myrdal's work, *The Negro in the United States* held (and might still hold) implications for understanding the harms of segregation in contexts beyond that of public education.

At this point, recall that the legal question in *Brown* arose in the context of public education. At first glance, it is not at all obvious how a legal issue confined to this specific context could be informed by a citation to sources comprising such breadth and depth. Indeed, perhaps one of the reasons that scholars choose to focus solely on the work of Dr. Clark is because his study of black schoolchildren is directly tied to the public education context. However, a possible answer becomes clear once we recall how Chief Justice Warren frames the legal issue in *Brown*: "[d]oes segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of *equal* educational opportunities?"²⁰² In framing the issue as a direct application of the Equal Protection Clause,²⁰³ it becomes imperative to define what "equal"

¹⁹⁸ GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944), *reprinted in* BROWN V. BOARD OF EDUCATION: A DOCUMENTARY HISTORY 22 (Mark Whitman ed., 2004).

¹⁹⁹ *Id.* at 22-23.

²⁰⁰ See Leon D. Epstein, Book Review, 2 W. POL. Q. 674, 675 (1949).

²⁰¹ *Id.* at 674.

²⁰² *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added).

²⁰³ See Read, *supra* note 20, at 9.

means in any given circumstance. Yet, this is no easy task. Where might one go to even begin to define how that term operates in a specific segment of society?

Comprehensive studies such as *An American Dilemma* and *The Negro in the United States* might be a perfectly logical and acceptable starting point. For the Warren Court, these works may have provided broader social context to segregation so that the Court could even begin to think about what “equal educational opportunities” might look like in a society riddled with racial inequality. Indeed, Chief Justice Warren writes that, “[w]e must consider public education in light of its full development and its present place in American life throughout the Nation.”²⁰⁴ This statement suggests that Warren was not merely concerned with the public education context *per se*, but also with the interaction between education and other areas that constituted “American life.” Accordingly, it is not implausible²⁰⁵ to propose that Warren utilized sources such as *An American Dilemma* and *The Negro in the United States* to make an initial determination about the harmful impact of segregation on the black population in general. Contextualizing this determination to the case at hand, Warren then found that the public education context amplified this impact in a manner that he could not condone.²⁰⁶

Overall, by asking whether such segregation was “a denial of the equal protection of the laws,”²⁰⁷ Chief Justice Warren did not use additional legal doctrine above and beyond this language to discipline his engagement with social science sources. Given his ultimate rejection of the “separate but equal” doc-

²⁰⁴ *Brown*, 347 U.S. at 492-93.

²⁰⁵ I use the term “implausible” here as some will reply that this is an overstatement because judges inherently know that segregation is wrong and thus do not need to be presented with evidence displaying the harms that segregation can cause. See Dworkin, *supra* note 182, at 5 (asserting that “we just know” that segregation is wrong). I think that this characterization is too generous. If judges are inflicted with the same biases that permeate a majority of the human population, social science may serve to resist those biases in some instances by highlighting how harmful they actually are. Harmful biases do not become any less harmful simply because they are popular.

²⁰⁶ See *Brown*, 347 U.S. at 494 (stating that a consideration of the intangible qualities of educational institutions applied with “added force” to lower education).

²⁰⁷ *Id.* at 495.

trine,²⁰⁸ he could not have used additional doctrine in this fashion. Instead, the unmediated standard of review at play in *Brown* gave Chief Justice Warren the necessary discursive flexibility to consult the social science sources that he did while simultaneously disciplining that flexibility by asking Warren to use those sources to help define what “equal protection of the laws”²⁰⁹ might look like in the context of public education.

Had Chief Justice Warren articulated a more exacting standard of review that relied on language different from the Constitution itself, it is less clear that sources like Myrdal’s *An American Dilemma* and Frazier’s *The Negro in the United States* make it into the opinion. Had different language been articulated, especially language unique to judicial discourse, it is unclear whether Warren would have given dispositive weight to precedent in giving content to that language.²¹⁰ As a result, the legal rhetoric employed in that precedent could have caused Warren to look only for non-legal sources that complied with that rhetoric. If, for example, that rhetoric focused squarely on the context of public education, it becomes harder to imagine that lengthy social science sources surveying other contexts would have been useful in decoding, with specificity, what the standard of review demanded in the realm of public education. When, however, Warren applied the broad mandate of “equal protection of the laws,”²¹¹ social science sources had just as legitimate a claim as precedent in defining what that language required.

ii. *Parents Involved*: Social Science Filtered Through the De Jure/De Facto Construct

A different dynamic seems to be at work as we move to *Parents Involved* because, unlike *Brown*, additional legal doctrine above and beyond the standard of review played a powerful role in filtering the social science sources that made their

²⁰⁸ *Id.*

²⁰⁹ U.S. CONST. amend. XIV.

²¹⁰ Without footnote eleven, I think Warren could still have comfortably achieved the desired outcome based on precedent alone. See *Brown*, 347 U.S. at 493.

²¹¹ U.S. CONST. amend. XIV.

way into the opinion. In order to observe how this dynamic takes hold in the opinions of Chief Justice Roberts, Justice Thomas, and Justice Breyer, the argument is divided into two parts. First, the way that each Justice framed how strict scrutiny should be applied to the facts of the case influenced whether the Justice used the construct of de jure and de facto segregation to define the legally relevant racial harm that could be remedied by the school districts.²¹² Second, the force with which each Justice abided by that construct determined the breadth of the social science literature that the Justice found relevant to the legal question at hand.²¹³

As previously stated, Chief Justice Roberts applied traditional strict scrutiny analysis by asking whether the school districts could show that their use of racial classifications served a compelling governmental purpose and was narrowly tailored to further that purpose.²¹⁴ In determining what constitutes a compelling purpose, Chief Justice Roberts notes that, "the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.'"²¹⁵ Criticizing Justice Breyer's interpretation of the compelling purpose prong, Chief Justice Roberts makes his reliance on the distinction between de jure and de facto segregation at this stage of the analysis explicit.²¹⁶ Indeed, Chief Justice Roberts opines that, "[t]he distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations."²¹⁷ The reason that the school districts could not adopt their plans, in the mind of Chief Justice Roberts, was because there was no evidence that they were currently subject to state policies of segregation or contained traces of segregation from

²¹² For a concise summary of how each justice approached the de jure/de facto distinction, see Wells, *supra* note 174, at 1030-31.

²¹³ See Frankenberg & Garces, *supra* note 19, at 714-15.

²¹⁴ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (citing *Adarand Constructors Inc.*, 515 U.S. 200, 227 (1995)).

²¹⁵ See *Parents Involved*, 551 U.S. at 721 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

²¹⁶ See *id.* at 736.

²¹⁷ *Id.*

previous state policies.²¹⁸ Thus, from the outset, Chief Justice Roberts makes clear that he defined the term “compelling purpose” by referencing additional legal doctrine above and beyond the standard of review.

Due to Chief Justice Roberts’s broader outlook on constitutional theory, it comes as no surprise that he made little mention of social science sources.²¹⁹ Yet, Chief Justice Roberts hinted at the types of social science evidence that he might consider persuasive in a case involving a school district’s desire to achieve racial diversity.²²⁰ After surveying the evidence presented by expert witnesses, he states that the evidence should be “working forward from some demonstration of the level of diversity that provides the purported benefits”²²¹ and not aiming to achieve a racial balance.²²² This statement provides convincing evidence that Chief Justice Roberts would use the de jure/de facto construct, a construct that is invoked within the course of a strict scrutiny analysis, to determine the relevance of social science sources to the legal question presented.

Paralleling the Chief Justice, Justice Thomas also employed strict scrutiny analysis.²²³ As in Chief Justice Roberts’s opinion, the invocation of the term “compelling purpose” generated the presence of additional legal doctrine. To be sure, Justice Thomas cited to his opinion in *Grutter v. Bollinger*²²⁴ to define “compelling purpose” as one that remedies past discrimination for which the government is responsible.²²⁵ At that moment, Thomas’s reliance on the de jure/de facto construct becomes obvious. To locate this construct within the explicit language of the opinion itself, one need look no further than Thomas’s statement that the school districts’ plans could

²¹⁸ See *id.* at 720; see also Matthew Scutari, Note, “The Great Equalizer”: Making Sense of the Supreme Court’s Equal Protection Jurisprudence in American Public Education and Beyond, 97 GEO. L.J. 917, 938 (2009).

²¹⁹ See Morgan & Pullin, *supra* note 37, at 521.

²²⁰ See *id.*

²²¹ See *Parents Involved*, 551 U.S. at 729.

²²² See *id.*

²²³ See *id.* at 752 (Thomas, J., concurring).

²²⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Thomas, J., concurring in part and dissenting in part).

²²⁵ See *Parents Involved*, 551 U.S. at 771 (Thomas, J., concurring).

not survive strict scrutiny given that “Seattle has no history of *de jure* segregation.”²²⁶

While Justice Thomas referenced social science sources to a greater extent than did the Chief Justice,²²⁷ he ultimately relied on the *de jure/de facto* construct to refine his view of the social science literature. Given Justice Thomas’s strong language surrounding the type of segregation that would permit the school districts’ plans to stand under the Constitution, it is almost certain that Justice Thomas did not, and would not, entertain evidence of *de facto* segregation.²²⁸ In fact, Erica Frankenberg and Liliana Garces make that exact argument when they maintain that Justice Thomas’s opinion “allows him to ignore social science evidence that demonstrates how structural inequalities and governmental policies in non-educational arenas perpetuate segregation.”²²⁹ Overall, for both Chief Justice Roberts and Justice Thomas, it would be hard to see citations to such voluminous social science sources as *An American Dilemma* and *The Negro in the United States* as a method of shedding light on the broader social consequences of school segregation. Given their reliance on the *de jure/de facto* distinction, a distinction made relevant by the “compelling purpose” language of strict scrutiny analysis, they had already determined that some social consequences could not possibly obtain legal relevance even before canvassing the social science literature.

In conversation with my analysis of *Brown*, one might inquire as to what these two Justices would have done with an unmediated standard of review. Of course, retroactive predictions of judicial decisions are always difficult in construction and uncertain in application. What I wish to suggest, though, is that the articulation of an unmediated standard of review could have changed the Justices’ approach to the social science literature, even if it would not have changed the outcome of their opinions. To begin, an unmediated approach would have asked the Justices to start their analysis by understanding

²²⁶ *Id.* at 753.

²²⁷ See Morgan & Pullin, *supra* note 37, at 521.

²²⁸ See Frankenberg & Garces, *supra* note 19, at 715.

²²⁹ *Id.*

what “equal protection of the laws”²³⁰ would require in this case.²³¹ This, obviously enough, would require the Justices to employ tools of interpretation. In a relatively recent interview, Chief Justice Roberts gives us a firsthand account of what types of tools he considers important by stating the following: “I have a copy of the Constitution on my desk and the first thing I do when I have a case involving the Constitution is read what it says. I also have a copy of the *Federalist Papers*.”²³² While I cannot surmise with mathematical precision the weight he gives to sources like the *Federalist Papers*, Roberts is clear that he resorts to interpretive tools beyond the “orthodox legal materials of text and precedent.”²³³ Conceding that sources like the *Federalist Papers* are appealing to Roberts probably because of their unique connection to the Constitution, the structure of Roberts’s thinking is enlightening because it suggests that he uses non-legal sources to inform his interpretation of the constitutional text at a very early stage in his decisionmaking.

It does not seem out of place, then, to suggest that a direct application of the constitutional text would have caused Roberts, and justices who think like Roberts, to be more rigorous in using non-legal sources as interpretive tools because there may be no precedent exactly on point in applying such a broad mandate to novel situations. Arguably, as the standard of review abstracts to a higher level of rhetorical generality, it becomes more difficult to apply that generality to the factual nuances of the case at hand solely in terms of precedent.²³⁴ In the absence

²³⁰ U.S. CONST. amend. XIV.

²³¹ Recall Siegel’s description of the unmediated approach. See Siegel, *supra* note 9, at 2352.

²³² *The Interview: Chief Justice John G. Roberts, Jr.*, SCHOLASTIC (Sept. 14, 2006), <http://www.scholastic.com/browse/article.jsp?id=7479>. Justice Thomas also uses the *Federalist Papers* to guide his vision of constitutional interpretation. See Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas*, 4 N.Y.U. J.L. & LIBERTY 494, 509-10 (2009).

²³³ Posner, *supra* note 8, at 1179.

²³⁴ Richard H. Fallon, Jr. argues that there is a distinction between “ordinary” and “extraordinary” cases in the Supreme Court. On the one hand, “ordinary” cases involve the direct application of precedent to resolve the controversy. On the other hand, “extraordinary” cases inspire justices to rely on a guiding principle before applying doctrine. See Richard H. Fallon, Jr., *The*

of a formalized standard of review, the Justices' decision could have been supported by a wider breadth of social science sources than that which was actually cited in order to more efficiently structure the application of more generalized legal rhetoric (even if their decision had been made by the time of oral argument).

A wide breadth of social science sources, however, did make its way into Justice Breyer's opinion because he took a unique approach to strict scrutiny that avoided reliance on the *de jure/de facto* construct. Although purporting to apply strict scrutiny in line with the plurality, Justice Breyer seemed to be influenced by a "contextual approach"²³⁵ that appreciates the distinction between using race to increase diversity and using race as a form of exclusion.²³⁶ In broad strokes, this approach allowed Justice Breyer to define what a compelling purpose was by referencing "three essential elements"²³⁷ that were couched in rhetoric that could not be reduced to legal doctrine. Consider the first element, that of remedying the historical injustice of segregation.²³⁸ In the paragraph describing what this element embodies, one will search in vain to find a single citation to a case or doctrine.²³⁹ The other two elements, namely an educational element and a democratic element, are defined in much the same way.²⁴⁰ Undeniably, citations to social science sources and the use of non-technical legal language dominated Justice Breyer's discussion of the "compelling purpose" prong.

In turn, the "contextual approach" allowed Justice Breyer

Supreme Court 1996 Term—Foreword: Implementing the Constitution, 111 HARV. L. REV. 54, 106-07 (1997). What I am suggesting here is that a move to an unmediated standard of review may shift a case from an "ordinary" case to an "extraordinary" one. In turn, this leaves more flexibility for justices to use non-legal sources in articulating the guiding principle that undergirds application of doctrine.

²³⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 837 (2007) (Breyer, J., dissenting).

²³⁶ See *Love*, *supra* note 18, at 133.

²³⁷ *Parents Involved*, 551 U.S. at 838 (Breyer, J., dissenting).

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ In Justice Breyer's initial discussion of these three elements (up until the paragraph that starts, "[m]oreover, this Court from *Swann*"), I can find only two citations to Court precedent. See *id.* at 838-41.

to declare that, “the distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, *e.g.*, by housing patterns or generalized societal discrimination) is meaningless in the present context.”²⁴¹ The scholarly literature further corroborates Justice Breyer’s disenchantment with the *de jure/de facto* distinction.²⁴² By applying the “contextual approach,” Justice Breyer was able to avoid reliance on this distinction because the non-technical language that he used to define the “compelling purpose” prong could be drawn out by non-legal sources. That is, the use of this construct became dispensable for Justice Breyer because his application of strict scrutiny did not rely on rhetoric that had to be given initial meaning by citing to more legal doctrine. Had Justice Breyer never mentioned the “contextual approach,” it is less clear that he would have categorized that distinction as embodying an element of “futility”²⁴³ because he might have been forced to deal more intimately with Justice Thomas’s observation that the traditional rhetoric of strict scrutiny only allows a school district to voluntarily remedy past discrimination by a governmental unit.²⁴⁴

In light of his strict scrutiny analysis, Justice Breyer took a holistic approach to the social science evidence²⁴⁵ that did not rely on the *de jure/de facto* distinction as a buffer between the legal question and the social science literature. Instead, Justice Breyer cited empirical data that confirmed the view that there was a real fear “of a return to school systems that are in fact (though not in law) resegregated.”²⁴⁶ In stark contrast to Chief Justice Roberts and Justice Thomas, Justice Breyer considered evidence of *de facto* segregation relevant to the harms

²⁴¹ *Id.* at 806.

²⁴² See Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1024 (2008); Wells, *supra* note 174, at 1031; see also Comment, *Parents Involved in Community Schools v. Seattle School District No. 1: Voluntary Racial Integration in Public Schools*, 121 HARV. L. REV. 98, 102 (2007).

²⁴³ *Parents Involved*, 551 U.S. at 820 (Breyer, J., dissenting).

²⁴⁴ See *id.* at 754 (Thomas, J., concurring).

²⁴⁵ See Morgan & Pullin, *supra* note 37, at 521.

²⁴⁶ *Parents Involved*, 551 U.S. at 806 (Breyer, J., dissenting).

that the school districts could remedy.²⁴⁷ As should come as no surprise, what helps to explain this difference, I think, is Justice Breyer's "contextual approach" to strict scrutiny. As I have aimed to show, this approach provided him with discretion to consult certain social science material that otherwise might have remained ignored had he relied more heavily on technical vocabulary in applying the "compelling purpose" prong. To come full circle in this case study, then, the "contextual approach" to strict scrutiny did for Justice Breyer indirectly what the unmediated standard of review did for Chief Justice Warren directly in terms of generating discursive flexibility for dealing with social science sources. Viewed in this way, Justice Breyer's dissent had a majority all along.

IV. CONCLUSION

In a famous dissent, Holmes writes that our Constitution is "an experiment, as all life is an experiment."²⁴⁸ At its heart, that is precisely what this article is. This article has experimented with the possibility that the enunciation of technical legal vocabulary in the standard of review constrains judicial consideration of social science sources. If this article proves to be successful, it will provide the Hamiltonians with further ammunition to duel²⁴⁹ with the Posner's of the world.

As should be apparent, this article is greatly limited in scope. This article serves as an initial talking point and nothing more. If this hypothesis is worth pursuing in the future, I respectfully call upon scholars (who inevitably will have more time, resources, and brain power than I) to help me corroborate it in a more comprehensive fashion. Within the context of school desegregation cases alone, this article needs to be supported by an analysis of how other opinions have dealt with social science evidence in light of the precise articulation of the standard of review.²⁵⁰ Further, if this article's hypothesis is to

²⁴⁷ See Frankenberg & Garces, *supra* note 19, at 714.

²⁴⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁴⁹ Unfortunately, Alexander Hamilton was killed during a duel with Aaron Burr in 1804. See THOMAS FLEMING, *DUEL: ALEXANDER HAMILTON, AARON BURR AND THE FUTURE OF AMERICA* (1999).

²⁵⁰ Professor Heise has investigated the Supreme Court's treatment of

encompass classifications beyond that of race, analysis will need to be done that investigates how both rational basis review and intermediate scrutiny constrain, or enable, a court's ability to engage with social science sources. If, however, this hypothesis is not worth pursuing for whatever reason, I seek refuge in the words of Herbert Wechsler: "Those of us to whom it is not given to 'live greatly in the law' are surely called upon to fail in the attempt."²⁵¹

social science sources in the *Grutter* and *Parents Involved* opinions. See Michael Heise, *Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863 (2008). Perhaps this article can steer such an analysis in a new direction.

²⁵¹ Wechsler, *supra* note 26, at 35 (quoting Holmes).