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Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court's Use of Social Science

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Online Essay

EYES WIDE OPEN: WHAT SOCIAL SCIENCE CAN TELL US ABOUT THE SUPREME COURT'S USE OF SOCIAL SCIENCE[†]

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ABSTRACT—The *Northwestern University Law Review*'s 2017 Symposium asked whether *McCleskey v. Kemp* closed the door on social science's ability to meaningfully contribute to equal protection deliberations. This inquiry is understandable; *McCleskey* is widely understood to have rendered statistical racial disparities doctrinally irrelevant in the equal protection context. We suggest, however, that this account overstates *McCleskey* and its doctrinal impact. Roughly fifteen years after *McCleskey*, Chief Justice William Rehnquist—himself part of the *McCleskey* majority—invoked admissions data to support his conclusion that the University of Michigan Law School unconstitutionally discriminated against white applicants.

Chief Justice Rehnquist's disparate treatment of statistical evidence in *McCleskey* and *Grutter v. Bollinger* reveals the doctrine's under-determinacy and invites a corresponding inquiry: why do Justices rely on social science in some cases, yet reject it in others? We propose that one answer lies at the intersections of Critical Race Theory (CRT) and empirical scholarship on motivated social cognition. This "eCRT" lens illuminates how ostensibly neutral biases and heuristics, when informed by socially salient racial stereotypes, will predictably and systematically lead judges to overvalue "evidence" that rationalizes existing racial disparities and, as a result, author legal opinions that re-instantiate and legitimize the status quo.

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INTRODUCTION

The *Northwestern University Law Review*'s 2017 Symposium: "*A Fear of Too Much Justice"?* asked whether *McCleskey v. Kemp*[1] "closed the door on the ability of the social sciences to meaningfully contribute to Equal Protection deliberations."[2] One straightforward response is yes: *McCleskey* rendered statistical evidence of racial disparities doctrinally irrelevant in the equal protection context.[3] Although understandable, this account overstates the degree to which *McCleskey* has constrained the Supreme Court's engagement with social science and, more specifically, its treatment of statistical evidence of racial disparities.

Roughly fifteen years after *McCleskey*, in *Grutter v. Bollinger*, Chief Justice William Rehnquist—himself part of the *McCleskey* majority—proffered statistical evidence as dispositive proof that the University of Michigan Law School had unconstitutionally discriminated against white

[1] 481 U.S. 279, 291–92 (1987) (rejecting an equal protection claim that was based on statistical racial disparities).

[2] *The* Northwestern University Law Review *2017 Symposium: "A Fear of Too Much Justice"?: Equal Protection and the Social Sciences 30 Years After* McCleskey v. Kemp, NW. U. L. REV., http://www.northwesternlawreview.org/symposium [https://perma.cc/J9BM-2V32].

[3] *See, e.g.*, David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 374 (1994) ("The decision has eliminated the federal courts as a forum for the consideration of statistically based claims of racial discrimination in capital sentencing."). Statistical evidence of systemic disparate treatment remains probative of unlawful conduct under statutory regimes such as Title VII. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385, 387 (1986) (per curiam) (reversing lower court's holding that regression analyses "were unacceptable as evidence of discrimination"); *see* Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1387–92 (2017) (describing Title VII systemic disparate treatment claims).

applicants.[4] Chief Justice Rehnquist's dissent in *Grutter* offers one notable example, but it reflects a broader practice, post-*McCleskey*, of Justices mobilizing "social science"[5] to support or contest claims of unconstitutional discrimination.[6]

The Court's continued interest in social science invites the following reframing of the Symposium's driving inquiry: Why does a judge mobilize social science in one instance, yet denounce it in another?[7] To interrogate this question, and in the spirit of "eCRT,"[8] we propose an approach that weds social science and Critical Race Theory (CRT). After first anchoring to core CRT insights, we add analytical texture by drawing on well-established scholarship from the field of motivated social cognition, which has illuminated the subjective yet subconscious ways in which humans adopt and maintain personal beliefs to satisfy psychological needs or goals.[9] This

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[4] *See* 539 U.S. 306, 378–87 (2003) (Rehnquist, C.J., dissenting) ("Petitioner may use these statistics to expose this sham, which is the basis for the Law School's admission of less qualified underrepresented minorities in preference to her. Surely strict scrutiny cannot permit these sorts of disparities without at least some explanation.").

[5] In this Essay, we use "social science" to broadly encompass all empirical research methods, whether quantitative or qualitative.

[6] *See, e.g.*, Fisher v. Texas, 136 S. Ct. 2198, 2212 (2016) (citing quantitative and qualitative evidence that racial diversity has pedagogical benefits); Fisher v. Texas, 133 S. Ct. 2411, 2431 (2013) (Thomas, J., concurring) (invoking research to suggest that affirmative action harms its beneficiaries who become "mis-match[ed]" at elite institutions); *Grutter,* 539 U.S. at 330 (invoking amici briefs describing research on the pedagogical benefits of racial diversity); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 494 & n.11 (1954) (citing psychology studies to support the contention that segregated schooling harmed African-American children). Social science has figured beyond the equal protection context. This includes, for instance, the Supreme Court's adjudication of Eighth Amendment claims brought on behalf of juveniles sentenced to life without parole. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 471–72 (2012) (noting that the Court's prior decisions relied on social science). Early twentieth-century citizenship cases reveal how the Court has selectively utilized social science to police the boundaries of Whiteness. *See, e.g.*, United States v. Thind, 261 U.S. 204, 208–09 (1923); Ozawa v. United States, 260 U.S. 178, 197 (1922). *See generally* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002) (analyzing trends in the way courts have used empirical research over time).

[7] By engaging this particular question, we are not suggesting that *McCleskey* is doctrinally or practically irrelevant vis-à-vis the role of social science in the equal protection context. *McCleskey* has and will continue to matter—for instance, by preventing capital defendants from contesting their sentences with inferential statistics revealing systemic racially disparate treatment. Nor should we forget that the state of Georgia executed Warren McCleskey on September 25, 1991. *See* Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES (Sept. 26, 1991), http://www.nytimes.com/1991/09/26/us/georgia-inmate-is-executed-after-chaotic-legal-move.html [https://perma.cc/8ZLE-FBAX].

[8] "eCRT" refers to a theoretical approach that intentionally engages and interrogates the intersections of empirical social science and CRT. *See generally* Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149 (2014) (exploring the prospects of a collaboration between CRT and social science).

[9] *E.g.*, John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339 (2003) (meta-analysis identifying psychological variables that predict political conservatism).

interdisciplinary approach situates the analysis at the intersections of complex societal structures and forces (e.g., legal doctrine, media representations, and existing racial disparities) and individual decision-making (e.g., judicial engagement with social science).

From this point of departure, we narrow our analysis by introducing a model that outlines how socially salient stereotypes that privilege and center Whiteness and ostensibly neutral biases and heuristics intersect to rationalize the underrepresentation of African-American students in colleges and universities. If left unchecked, these intersecting forces will predictably and systematically lead judges to show greater deference to statistical evidence that aligns with, and perpetuates, prevailing lay theories that explain racial disparities not as a product of discrimination, but rather as a consequence of neutral and natural market forces.

I. DOCTRINE'S UNDER-DETERMINACY: *MCCLESKEY* V. *GRUTTER*

A. Rejecting Statistical Disparities (in McCleskey*)*

In 1987, the Supreme Court rejected Warren McCleskey's claim that systemic racial discrimination in Georgia's capital punishment regime rendered his death sentence unconstitutional.[10] To advance his claim, McCleskey relied principally on the "Baldus study," which "purport[ed] to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant."[11] The Baldus study comprised "two sophisticated statistical studies" that analyzed over 2,000 Georgia murder cases from the 1970s.[12] These studies accounted for "230 variables that could have explained the disparities on nonracial grounds," and suggested that the race of the defendant and the victim had a statistically significant impact on whether a defendant received a death sentence.[13]

[10] McCleskey v. Kemp, 481 U.S. 279, 291–92 (1987).
[11] *Id*. at 286.
[12] *Id*.
[13] *Id.* at 287.

The Court determined that the Baldus study was insufficient to support McCleskey's constitutional claim.[14] According to the Court,[15] a defendant asserting an equal protection violation must (a) establish the existence of "purposeful discrimination"[16] and (b) causally link this "purposeful discrimination" to their individual case.[17] The Baldus Study was insufficient because it "offer[ed] no evidence specific to [McCleskey's] own case that would support an inference that racial considerations played a part in his sentence."[18] In effect, the Court rendered the study irrelevant because it did not directly link a prohibited mental state ("purposeful discrimination") to the decision-makers (a jury) who determined McCleskey's sentence.

The Court tethered this doctrinal argument to normative policy concerns. For instance, the Court noted that were the Baldus study sufficient to establish an equal protection violation, it would have rendered constitutionally suspect Georgia's entire capital punishment regime.[19] In

[14] *Id.* at 292–306 (rejecting the equal protection and Eighth Amendment claims). This outcome was not preordained by precedent, as existing case law had permitted statistical disparities to establish discriminatory intent. *Id*. at 293 ("The Court has accepted statistics as proof of intent to discriminate in certain limited contexts."); *see also* Castaneda v. Partida, 430 U.S. 482, 501 (1977) (Marshall, J., concurring) ("The statistical evidence, then, at the very least supports an inference that Mexican-Americans were discriminated against in the choice of grand jurors."). The Court, however, distinguished this precedent from the capital sentencing context. *McCleskey*, 481 U.S. at 294–97.

[15] The Court did not dispute that the Baldus study supported an inference of systemic discrimination endemic to Georgia's criminal justice system. To the contrary, Justice Antonin Scalia's posthumously released conference memorandum revealed that he appreciated the prevalence of racial bias. *See* Memorandum to the Conference from Justice Antonin Scalia (Jan. 6, 1987) (located in Justice Powell's *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 148), http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles [https://perma.cc/8G5R-FK56] ("Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof.").

[16] *McCleskey*, 481 U.S. at 292 ("Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967))). For an extensive critique of the Court's evolving use of "purposeful discrimination" in the equal protection context, see Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

[17] *McCleskey*, 481 U.S. at 292 ("Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose.").

[18] *Id*. at 292–93.

[19] *Id*. ("In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. . . . McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black."). This reasoning inspired Justice William Brennan's now-famous rhetorical response that the majority exhibited "a fear of too much justice." *Id.* at 339 (Brennan, J., dissenting) ("The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's

other words, doctrinally legitimating the Baldus study would have risked destabilizing fundamental sites of state power in Georgia and beyond.[20] This anxiety was not foreign to the *McCleskey* majority; similar concerns had animated the Court's rejection of disparate impact theory in the constitutional context only a decade earlier.[21]

B. Invoking Statistical Disparities (in Grutter*)*

McCleskey reflects a Court hostile to claims of unconstitutional race discrimination predicated on statistical evidence of racial disparities. Yet roughly fifteen years later, Chief Justice Rehnquist, who had joined the *McCleskey* majority, employed evidence of racial disparities to support his conclusion that the University of Michigan Law School unconstitutionally discriminated against white applicants in its admission procedures.[22]

In 1997, Barbara Grutter sued the University of Michigan Law School after it had rejected her application the previous year.[23] The law school utilized a "highly individualized, holistic review of each applicant's file" that permitted the consideration of an applicant's race.[24] Grutter argued that the policy unconstitutionally discriminated against her in violation of the Fourteenth Amendment.[25] The Court rejected her claim, concluding that the law school's policy was narrowly tailored to serve the compelling interest of student body diversity.[26]

In dissent, Chief Justice Rehnquist focused much of his opinion on six years of the law school's admissions data spanning from 1995 through

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claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a *fear of too much justice*." (emphasis added) (internal citation omitted)).

[20] This disruption likely would have extended beyond Georgia. *See* Rook v. Rice, 478 U.S. 1040, 1040 (1986) (Brennan, J., dissenting) ("[Petitioner] contends that newly available social science evidence demonstrates unconstitutional, system-wide racial disparities in North Carolina's capital sentencing system. . . . Other petitioners have presented similar claims of system-wide racial disparities in capital sentencing and have requested stays of execution from this Court in light of our grants of certiorari in *McCleskey* and *Hitchcock*.").

[21] *See* Washington v. Davis, 426 U.S. 229, 248 (1976) (expressing concern that a disparate impact cause of action "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white"); *see also* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1082 (2011); Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1275 (2016).

[22] *See* Grutter v. Bollinger, 539 U.S. 306, 381–87 (Rehnquist, C.J, dissenting). Justice Scalia, who joined Chief Justice Rehnquist's *Grutter* dissent, was also a member of the *McCleskey* majority.

[23] *Id.* at 316.

[24] *Id.* at 337.

[25] *Id*. at 317 (Grutter also alleged that the law school violated Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981).

[26] *Id.* at 334–35.

2000.[27] After first comparing the percentages of applicants and admittees by race,[28] Chief Justice Rehnquist highlighted that in the 2000 admissions cycle, the Law School admitted a higher percentage of African-Americans who fell within certain LSAT and GPA ranges than Hispanics who fell into those same ranges.[29]

According to the Chief Justice, these statistics "ha[d] a significant bearing on petitioner's case" by "expos[ing]" that the Law School impermissibly considered race during its admissions process.[30] The correlation between the percentages of African-American, Hispanic, and Native American applicants and admittees was, in the Chief Justice's view, "far too precise to be dismissed as merely the result of" constitutionally permissible behavior.[31] To the contrary, he concluded, the "tight correlation between the percentage of applicants and admittees of a given race . . . must result from careful race based planning by the Law School."[32]

C. Identifying Inconsistencies

We highlight Chief Justice Rehnquist's *Grutter* dissent not to debate, on the merits, his reliance on admissions data. Nor do we mean to suggest that *Grutter* and *McCleskey* present factual analogues. Nonetheless, we highlight the Chief Justice's dissent because his treatment of data in *Grutter* appears facially irreconcilable with the majority's denouncement of the Baldus study in *McCleskey*. Multiple distinctions across these two opinions deserve mention.

First, the data. The admissions statistics in *Grutter* constituted "descriptive statistics"[33]—that is, raw numbers, averages, and percentages that describe a population (here, law school applicants and admittees). Importantly, descriptive statistics do not permit conclusions beyond the

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[27] *Id.* at 381–86 & tbls.1, 2 & 3 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist did not discuss data regarding white and Asian applicants and admittees. *Id.*

[28] *Id*.

[29] *Id*. at 382 ("[I]n 2000, 12 Hispanics who scored between a 159–160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted. Likewise, that same year, 16 Hispanics who scored between a 151–153 on the LSAT and earned a 3.00 or higher applied for admission and only 1 of those applicants was admitted. Twenty-three similarly qualified African-Americans applied for admission and 14 were admitted." (internal citations omitted)).

[30] *Id*. at 382–83.

[31] *Id.* at 383.

[32] *Id*. at 385.

[33] Descriptive statistics report and describe quantitative information. *See* JERROLD H. ZAR, BIOSTATISTICAL ANALYSIS 22–35 (5th ed. 2009).

statistics themselves.[34] The admissions data—although in certain ways revealing[35]—were therefore of limited use to answer, for instance, whether and to what extent race was a causal factor in the law school's admissions process generally, and whether race could be causally linked to Barbara Grutter's personal rejection.[36] Additional statistical analyses would have been required to answer such questions.

In *McCleskey*, by contrast, the Baldus study consisted of "inferential statistics," which use samples of data to draw broader inferences about a population.[37] Thus, the Baldus study was competent to make a supportable claim, in ways that the descriptive statistics in *Grutter* could not, that systemic racially disparate treatment pervaded Georgia's capital punishment regime.[38]

Second, the doctrine. In *McCleskey*, the Court required evidence that causally linked a particular mental state (*purposeful* discrimination) to the alleged harm (McCleskey's sentence). The Baldus study, which could not causally establish that McCleskey's sentence was the product of purposeful discrimination, was rendered doctrinally irrelevant.[39]

In contrast, Chief Justice Rehnquist never suggested that Grutter's discrimination claim required causal proof that the law school rejected her—consciously or otherwise—because she was white.[40] Even if such causal

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[34] *See* John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKELEY BUS. L.J. 1, 13 n.38 (2010) ("Perceived differences based on percentages are misleading. What may seem different at first glance may actually have a high amount of variability within and among the data. Therefore, a difference seen between two different factors may not actually be a real statistical difference. This is the main difference between *descriptive statistics* and *inferential* or *inductive statistics*. Descriptive statistics allow for an overall quantitative picture of the data. Inferential statistics allow testing of inferential relationships among data." (citing ZAR, *supra* note 33, at 22–35)).

[35] We are not suggesting that descriptive statistics are never probative of unconstitutional discrimination. Nonetheless, judges should take care not to read too much into, or draw unwarranted empirical conclusions from, descriptive statistics.

[36] There is no indication that the admissions data were subjected to any statistical analyses that, like the Baldus study, controlled for nonracial factors relevant to the admissions process.

[37] *See generally* A.F. HAYES, INTRODUCTION TO MEDIATION, MODERATION, AND CONDITIONAL PROCESS ANALYSIS: A REGRESSION-BASED APPROACH (2013) (explaining the concept whereby studies of a small group are used to infer conclusions about larger populations). *See also* McCleskey v. Kemp, 481 U.S. 279, 287–92, 287 n.5, 288 n.6, 291 n.7 (1987).

[38] *See McCleskey*, 481 U.S. at 287–92, 287 n.5, 288 n.6, 291 n.7.

[39] *Id.* at 297 ("Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.").

[40] Nor did the majority. *See* Grutter v. Bollinger, 539 U.S. 306, 327–44 (2003) (no discussion of causation requirements). The fact that a university permits the consideration of race in its admissions process does not establish that the institution took a particular applicant's race into account, or whether—even if it had—the applicant would have been admitted but for her or his race. The Court's treatment of causation in *Grutter* avoids this reality by drawing on precedent that links constitutional standing and causation to the plaintiff's right to compete, not the denial of admission (which the plaintiff may not have obtained even under a formally colorblind regime). *See id.* at 317 (citing Ne. Fla. Chapter of Associated

evidence had been required, the descriptive statistics likely would have satisfied the Chief Justice, who appeared to conclude that the admissions data proved causation and unconstitutional discrimination in Grutter's individual case: "[Grutter] may use these statistics to expose this sham, which is the basis for the Law School's admission of less qualified underrepresented minorities in preference to her."[41]

Third, the presumptions. The *McCleskey* majority muted the Baldus study's probative value, in part, by noting that a nonracial reason explained McCleskey's sentence: McCleskey had committed a crime that was punishable by death.[42] In so stating, the Court subordinated McCleskey's discrimination theory to other, more "plausible" explanations. The reverse occurred in *Grutter*, where Chief Justice Rehnquist appeared to presume racial discrimination and subordinate alternative explanations. He never, for instance, questioned whether something other than race caused Grutter's rejection (for instance, that the law school had rejected Grutter because she was less qualified than other applicants).[43]

McCleskey and *Grutter* involved different factual circumstances and distinct types of statistical evidence of discrimination.[44] These distinctions do not, however, support the disparate ways in which Chief Justice Rehnquist (and Justice Antonin Scalia) engaged data across the two cases. Given this disparate treatment of data, these two opinions appear inconsistent. We would argue, however, that when viewed within the context of salient lay theories about discrimination and racial disparities in American society, the facially disparate treatment of data in *McCleskey* and *Grutter*

Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.")).

[41] *Id.* at 382–83 (Rehnquist, C.J., dissenting) (proclaiming that the admissions data "reflect[] a consistent practice" that had a "significant bearing on petitioner's case" and that "[t]hese different numbers, moreover, come only as a result of substantially different treatment among the three underrepresented minority groups . . . .").

[42] *See McCleskey*, 481 U.S. at 296–97 ("Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.").

[43] To presume that Grutter was undeservedly rejected because of race requires the corresponding assumption that the law school admitted undeserving students of color. *See Grutter*, 539 U.S. at 385 (Rehnquist, C.J., dissenting) ("It suggests a formula for admission based on the aspirational assumption that all applicants are equally qualified academically, and therefore that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool."). In a sense, Chief Justice Rehnquist seems to suggest that were admissions markets functioning without racial discrimination, students of color would be *appropriately* underrepresented.

[44] One final inconsistency deserves mention: the stakes. *Grutter* involved admission to the University of Michigan Law School. Without doubt, entry into a competitive and elite institution of higher education is a coveted prize. But in *McCleskey*, life literally was on the line (and subsequently taken by the State).

reappear more harmonious than divergent.[45] To unpack this harmony, we now turn to CRT and complementary social science to explore why judges leverage statistical evidence of discrimination in some cases, yet reject it in others.

II. BLIND MOTIVATION

So what explains why judges accept social science data in some instances and reject it in others? A "legal realist"[46] might posit that Justices are simply ends-oriented. Doctrine cabins discretion, but Justices remain rational actors who consciously and selectively cite evidence to reach a desired and predetermined outcome.[47] The legal realist narrative is attractive; it disrupts deterministic accounts of the law and legal reasoning that fetishize doctrine as stable, inevitable, and detached from judges themselves.

We believe, however, that such an account is lacking in at least two respects. First, in ways familiar to contemporary equal protection jurisprudence, it overly privileges a judge's conscious and deliberate intent. In so doing, it discounts the degree to which automatic and unconscious mental processes—biases and heuristics—can impact judicial decision-making. Second, it is inattentive to how ostensibly neutral biases and heuristics, when situated within societal structures and forces that privilege Whiteness, can predictably and systematically position judges to overvalue statistical data that align with prevailing lay theories that explain existing racial disparities as the product of neutral market forces.

To fill this gap, we adopt an eCRT[48] approach that coheres around core insights from CRT and complementary findings from the motivated social cognition literature. As a point of departure, CRT can help locate the Court's facially inconsistent engagement with social science within a continuum of

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[45] One could argue that Chief Justice Rehnquist's disparate treatment of the data is an appropriate and principled application of prevailing equal protection doctrine. Even to the extent this is accurate, which we would contest, equal protection doctrine is not a natural and fixed phenomenon exogenous from the Justices who inhabit the Court. *See* Haney-López, *supra* note 16 (describing the Supreme Court's evolving equal protection jurisprudence).

[46] *See generally* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223 (1931) ("They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends.").

[47] We do not mean to deny that, at times, Justices might deliberately "cherry-pick" social science. Justices have offered such accounts of their colleagues. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 991 n.6 (1992) (Scalia, J., dissenting) ("But if a court can find an undue burden simply by *selectively string-citing the right social science articles*, I do not see the point of emphasizing or requiring 'detailed factual findings' in the District Court." (emphasis added)). Our more basic claim, which we explore in this Essay, is that the analysis should not focus on conscious intent at the expense of other causal factors—such as cognitive biases and heuristics.

[48] *See* Carbado & Roithmayr, *supra* note 8.

equal protection retrenchment over the past half century.[49] Somewhat more concretely, a CRT lens illuminates how the underlying logic of *McCleskey* and Chief Justice Rehnquist's *Grutter* dissent fits within a once nascent and now entrenched "colorblind" constitutionalism.[50] This "colorblindness" invites, and in many ways rationalizes, an equal protection doctrine that has become more hostile to race-conscious remedies than to race-neutral practices that reproduce and reify this country's history of racial subordination and stratification.[51]

This foundational CRT frame is well rehearsed and descriptively compelling. Nonetheless, we believe that room remains to build on fundamental CRT concepts by wedding the theory to the now well-established literature on motivated social cognition.[52] This intersectional approach offers a more textured account of judicial decision-making by combining a CRT lens mindful of structure and power with empirical accounts of individual decision-making.[53] We proceed in two parts.

First, we discuss the Justification-Suppression Model of Prejudice (JSM), a social-psychological model that can be used to explain how systems—such as the law—maintain structures of racial hierarchy.[54] Although historically siloed within the field of social psychology, JSM

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[49] In this sense, CRT offers a theoretical frame that situates *McCleskey* and Chief Justice Rehnquist's *Grutter* dissent within a constitutional tradition in which the rise of formal equality has proved insufficient to destabilize the basic racial regime that has defined America since its founding.

[50] *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 2–7 (1991).

[51] *Id*.

[52] There is a body of emerging legal scholarship that draws on social cognition literatures. *See, e.g.*, Jonathan Feingold, . . . *And Diversity for All*, UTAH L. REV. (forthcoming 2018) (discussing the social identity threat and stereotype threat literatures); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 467–68 (2010) (discussing the implicit bias literature). Scholars have also become increasingly intentional about bridging structural and individual actor analyses. *See, e.g.*, Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545 (2017).

[53] Our treatment of CRT and the motivated reasoning literatures is far from exhaustive. Multiple theories and frameworks from both could add to our analysis. Nonetheless, for purposes of scope, our primary intent is to demonstrate how integrating these often uncoupled perspectives offers a more comprehensive lens through which to appreciate the continuities that thread the Court's seemingly inconsistent relationship with statistical evidence in the equal protection context.

[54] Although prevalent in the social science literature, JSM is effectively absent from legal scholarship. We have identified only eleven law review articles that mention JSM (based on a Nov. 11, 2017 Westlaw search for "justification /1 suppression"). In the majority of the articles, JSM features as a footnote. *See, e.g.*, Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2240 & n.26 (2017) (invoking JSM in the context of a discussion on racial anxiety). Beyond JSM, other complementary theories from the social sciences that remain largely absent from the legal literature include, inter alia, social dominance theory. One notable exception includes David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, HOUS. L. REV. (forthcoming 2019).

naturally combines with CRT to provide a more comprehensive account of the way in which human cognition, as a function of the structures and societies in which we live, tends to reproduce inequality and racial stratification.[55] Second, using JSM as a bridge, we introduce the "elite student paradigm," a theoretical model that illuminates how independent yet intersecting and reinforcing cognitive biases and heuristics will predictably and systematically lead judges to defer to evidence (irrespective of its objective quality) that aligns with prevailing lay theories regarding racial disparities in American society.

A. The Justification-Suppression Model

Social psychologists have long examined the underpinnings of prejudice,[56] including its origins and manifestations in American society.[57] In an attempt to synthesize the "best known and empirically supported theories [of prejudice]," Christian Crandall and Amy Eshleman developed the Justification-Suppression Model of Prejudice (JSM).[58] This broad theory posits that everyone possesses "'genuine' prejudice," understood as "pure, unadulterated, original, unmanaged, and unambivalently negative feelings toward members of a devalued group."[59] Genuine prejudice, however, is rarely—if ever—expressed. Rather, internal[60] and external[61] factors allow (i.e., justify) or restrict (i.e., suppress) the actual expression of prejudice. The ultimate expression of prejudice, in turn, is a function of the balance between available and existing justifiers and suppressors.

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[55] Many of CRT's fundamental principles find echoes in social science scholarship, including concerns about biases, decision-making, and prejudice that span individual and structural accounts of discrimination. By integrating these literatures, we can build on scholarship that has thickened CRT with relevant empirical scholarship and buttressed the empirical literature by filtering it through a CRT lens. *See, e.g.*, Carbado & Roithmayr, *supra* note 8; Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183 (2013).

[56] The term "prejudice" is susceptible to many meanings. For purposes of this Essay, we adopt Crandall and Eshleman's definition that "prejudice [is] a negative evaluation of a social group or a negative evaluation of an individual that is significantly based on the individual's group membership." Christian S. Crandall & Amy Eshleman, *A Justification–Suppression Model of the Expression and Experience of Prejudice*, 129 PSYCHOL. BULL. 414, 414 (2003).

[57] *See generally* John Duckitt, *Psychology and Prejudice: A Historical Analysis and Integrative Framework*, 47 AM. PSYCHOL. 1182 (1992) (reviewing different social psychological approaches to researching and understanding prejudice).

[58] Crandall & Eshleman, *supra* note 56.

[59] *Id*. at 418.

[60] Internal factors include, inter alia, personal belief systems or values (e.g., religion) that proscribe discrimination. *See infra* Sections II.A–B.

[61] External factors include, inter alia, social norms (e.g., against being racist) and public accountability for transgressing such norms. *See id*.

For purposes of this Essay, we focus on the JSM's conception of a "justifier," which Crandall and Eshleman define as "any psychological or social process that can serve as an opportunity to express genuine prejudice without suffering external or internal sanction."[62] Justifiers function as the "releasers of prejudice,"[63] effectively providing "cover" for otherwise prejudiced behavior that would garner public rebuke. But justifiers do not operate solely to rationalize prejudice to an external audience. They also permit those engaging in prejudiced conduct to maintain an egalitarian concept of self.

The concept of a justifier effortlessly translates to Supreme Court jurisprudence. In situations where a decision will predictably be characterized and contested as racist, prejudiced, or otherwise contrary to salient egalitarian norms, the Court may mobilize a justifier to defend, mask, or otherwise rationalize its decision.[64] Multiple common justifiers, including the ostensibly neutral goal of status quo maintenance, visibly operate across the Court's equal protection jurisprudence.[65]

In *McCleskey*, for instance, the Court expressly rejected the Baldus study, in part, because of its potential to disrupt the status quo—specifically, the capital punishment regime in Georgia and beyond.[66] Although more oblique in *Grutter*, Chief Justice Rehnquist's skepticism of the law school's admissions policy was predicated, at least in part, on a colorblind vision of neutrality that associated any departure from the status quo (here, understood as race-blind admissions) as anathema to equality. In other words, by treating race-blind admissions as the neutral baseline, the Chief Justice could predicate on egalitarian norms his hostility to the law school's race-

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[62] Crandall & Eshleman, *supra* note 56, at 425.

[63] *Id.*

[64] Justifiers have a long history in the Supreme Court's Fourteenth Amendment jurisprudence. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 223 (1944) ("Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race."); The Civil Rights Cases, 109 U.S. 3, 25 (1883) ("When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.").

[65] *See* Crandall & Eshleman, *supra* note 56, at 426.

[66] *See* McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987) ("In its broadest form, McCleskey's claim of discrimination extends *to every actor in the Georgia capital sentencing process* . . . . McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black." (emphasis added)); *see also supra* note 20.

conscious admissions program. Moreover, any racial disparities that flow from a race-blind admissions regime—even if the product of biased admissions policies—are explained and rationalized as the product of natural and neutral market forces.[67]

Although the "justifier" terminology is foreign to CRT, it aligns with foundational CRT insights that have illuminated what effectively function as jurisprudential justifiers across legal doctrine and scholarship.[68] These include, for instance, the way in which proffered commitments to indeterminate concepts such as "neutrality," "merit," and "antidiscrimination," when situated within a colorblind frame, are employed to justify a constitutional jurisprudence that maintains racial hierarchy and reinstantiates racial subordination.[69] In the admissions context, for instance, status quo maintenance can naturalize disparities as the product of neutral processes such that racial parity requires departing from "fair" and "meritocratic" standards.

Accordingly, the JSM offers a complementary yet distinct frame that buttresses CRT by delivering an empirically based model of prejudice and its manifestation. The JSM also bridges CRT and other dimensions of the motivated social cognition literature. Specifically, we explore an integrated approach mindful of the relationship between common biases and heuristics on the one hand, and socially salient stereotypes on the other. This approach exposes how ostensibly neutral cognitive processes will predictably and systematically operate as justifiers that facilitate prejudice in the form of judicial deference to evidence that reinforces and perpetuates racial hierarchy in America.

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[67] *See* Crandall & Eshleman, *supra* note 56, at 426. For some, fidelity to neutral and natural market forces is predicated on the notion that "what is, is good." *Id*. The act of status quo baselining allows those who hold prejudices about marginalized groups to wash their hands of any responsibility to change them.

[68] For instance, scholars have critiqued opponents of affirmative action for mobilizing "model minority" rhetoric to deploy Asian-Pacific Americans as "racial mascots" in order to "insulat[e] themselves from charges of racism." Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. IRVINE L. REV. 947, 963 (2013) (quoting Sumi Cho, Remarks at the First Annual Asian Pacific American Law Professors Conference: A Theory of Racial Mascotting (Oct. 14, 1994)); *see also* Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 161 (1996) (noting that opponents of affirmative action have used Asian Pacific Americans to claim moral authority when advocating regressive policies); Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown*, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 120 (1998) ("[R]acial redemption theory is available for a wide range of purposes, including . . . explaining the increasing use of people of color as spokespersons or 'racial mascots' for racially regressive policies and reconciling the increasing equality discourse with the decreasing yield in material resources to redress inequality.").

[69] Translated to contemporary equal protection doctrine, one could characterize as a justifier any number of theoretical and jurisprudential moves that permit that court to state that the Equal Protection Clause is as skeptical of racial remedies designed to promote integration as it is with Jim Crow laws that mandated segregation.

B. The Perils of Presuming "Fit"

Cognitive biases and heuristics function as mental filters and shortcuts that help humans quickly and effortlessly process, interpret, and manage information.[70] These automatic and subconscious cognitive processes are critical. Without them, we could never process the millions (if not billions) of bits of data we consume every second.[71] Although these processes are beneficial, unchecked reliance on biases and heuristics creates predictable and systematic judgment errors—for instance, by eliciting lopsided information search and retrieval—that compromise our ability to engage in "rational"[72] behavior and decision-making. This occurs because biases and heuristics, as helpful as they are, often entice us to "incorporate the irrelevant"[73] when making decisions, often without us even knowing it.[74] Our decisions and behavior pay the price.

1. Biases and Heuristics

Two common heuristics include the "representativeness heuristic" and the "availability heuristic."[75] Both are frequently activated when humans encounter questions of probability. The representativeness heuristic describes the process in which humans, when assessing the probability that an object belongs to a category, (over)rely on prototypical objects that one

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[70] Richard. E. Nisbett et al., *The Use of Statistical Heuristics in Everyday Inductive Reasoning*, 90 PSYCHOL. REV. 339, 340 (1983) (describing heuristics as "rapid and more or less automatic judgmental rules of thumb" that allow humans to process the millions of pieces of information we encounter on a daily basis).

[71] *See id.* (explaining that biases and heuristics help relieve our brains of more menial decisions to create space for more complex interactions and behaviors); *see also* C. Neil Macrae et al., *Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox*, 66 J. PERSONALITY & SOC. PSYCHOL. 37, 44–45 (1994).

[72] An ongoing debate exists in the social sciences about whether biases are rational or irrational. Cognitive processes that employ rules to help us get to faster, and largely accurate, decisions are beneficial. However, our decision-making can be swayed, or biased, by any number of factors. When factors like subtle shifts in the environment or question order materially impact our judgment or decisions, many would describe this as irrational.

[73] *See* Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (T. Gilovich et al. eds., 2002).

[74] Irrelevant information can come from a variety of sources, including ourselves (e.g., the "how-do-I-feel-about-it" heuristic), *see* Norbert Schwarz & Gerald L. Clore, *Mood, Misattribution, and Judgments of Well-Being: Informative and Directive Functions of Affective States*, 45 J. PERSONALITY & SOC. PSYCHOL. 513, 513 (1983); a speaker's attributes (e.g., whether they are attractive), *see* Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, 19 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 123, 125 (1986); or the sequence of questions, *see* Norbert Schwarz et al., *Assimilation and Contrast Effects in Part-Whole Question Sequences: A Conversational Logic Analysis*, 55 PUB. OPINION Q. 3, 19 (1991).

[75] *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124, 1127 (1974).

associates with that category.[76] In other words, the representativeness heuristic offers a shortcut (the use of a prototypical case) to assess the "fit" between an object and a given category.[77]

To provide a concrete example, consider the following question: Is a tomato a fruit or a vegetable?[78] There are multiple ways to answer this question, but people frequently draw on prototypical fruits and vegetables, and then ask with which the tomato is a better fit. If, for you, "fruit" conjures apple, banana, and grape, while "vegetable" elicits lettuce, carrots, and cucumber, then tomato likely goes in the vegetable category. Why? Because a tomato probably does not fit in your fruit salad, but would nicely complement your vegetable salad. Here, relying on fit alone leads you down the incorrect path; a tomato is a fruit, not a vegetable.[79]

The availability heuristic describes the tendency to assess the probability of an event as a function of how easily the particular outcome comes to mind.[80] Although not inherently problematic, the likelihood of a given outcome rarely tracks how easily one can imagine the scenario unfolding. Thus, when an event is particularly salient—regardless of actual "base rates"—we fail to adjust our mental calculations and overestimate its likelihood.

For instance, a nervous traveler boarding an airplane may wonder about the likelihood that her plane will crash. The availability heuristic suggests that if this person can easily imagine the plane crashing (perhaps because a recent crash is dominating news headlines), she might conclude that the likelihood of the plane crashing is quite high. Notwithstanding how easily the terrifying crash can be imagined, its actual likelihood is minute.[81] The passenger nonetheless remains concerned about a crash throughout the flight.

Automatic mental shortcuts such as the representativeness and availability heuristics can create the illusion that we have all the information we need to render a responsible judgment. This illusion can interfere with

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[76] *Id*. at 1124.

[77] *See* Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293 (1983).

[78] Thanks to Victor Quintanilla for suggesting this helpful analogy.

[79] Colloquially tomatoes are more commonly understood as vegetables, but this is exactly where the representativeness heuristic fails us in decision-making. Instead of asking deeper questions about what assumptions we are making, and weighing the available information (in a way that would require incorporating our conscious, controlled processing mechanisms), we use the faster shortcut and determine "good enough."

[80] *See* Tversky & Kahneman, *supra* note 77.

[81] Recent statistics from the International Air Transport Association (IATA) reveal that, out of 36.4 million flights in 2013, only 81 accidents occurred, 16 of which were fatal. Press Release, Int'l Air Transport Ass'n, IATA Releases 2013 Safety Performance – Encouraging Signs for African Safety (Apr. 1, 2014), http://www.iata.org/pressroom/pr/Pages/2014-04-01-02.aspx [https://perma.cc/YYL8-MM7L].

our motivation to conduct a more thorough information search, even when one would be prudent. To complicate matters, these heuristics often interact with other mental processes that undermine "rational" judgment.

Take, for instance, the phenomenon of confirmation bias. To appreciate how it functions, consider the following riddle.[82] We have defined a rule that all sequences of three numbers must obey. The following sequence of three numbers obeys our rule: 2 | 4 | 8. Can you identify the rule? You likely have a working hypothesis. But before answering, consider the following sequences:

A: 4 | 8 | 16
B: 5 | 7 | 10
C: 3 | 1 | 23

Of these three, which (if any) also obey the rule? Most readers are likely thinking the following: "It's *A*. Obviously, it's *A*. The rule is straightforward: moving left to right, double the preceding number." That response is incorrect yet predictably common. *A* is not the only sequence from the above list that satisfies the rule. Rather, *A* and *B* satisfy the rule, which requires only that, moving left to right, each number be larger than the one preceding it.

Surprised? You are not alone.[83] Although simple, the exercise activates the pervasive and common cognitive process known as confirmation bias, which captures the human tendency to overemphasize information that supports an initial hypothesis and discount or ignore countervailing evidence.[84] In the foregoing exercise, most participants overvalue *A* because it satisfies an initial hypothesis. This occurs at the expense of other available information and potential hypotheses (that may, as here, also be correct).

The foregoing examples—this riddle, the probability of a plane crash, classifying a tomato—may seem inconsequential and only tangentially related to the inquiry motivating this Essay. However, these seemingly neutral and innocuous processes also impact our judgments about people,

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[82] The inspiration for this puzzle comes from a 2015 David Leonhardt article. *See* David Leonhardt, *A Quick Puzzle to Test Your Problem Solving*, N.Y. TIMES: THE UPSHOT (July 2, 2015), https://www.nytimes.com/interactive/2015/07/03/upshot/a-quick-puzzle-to-test-your-problem-solving.html [https://perma.cc/467P-642S].

[83] We regularly give presentations on biases and heuristics and often employ this exercise. On multiple occasions, an audience member has rejected our answer, suggested that we were incorrect (that is, about *our* rule), or accused us of being unfair.

[84] Confirmation bias falls in the category of "positive test strategies." Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211, 225 (1987).

discrimination, and existing societal inequalities. Often, when they do, it is in part a function of socially salient stereotypes about relevant social categories such as race, gender, or age.

2. Stereotypes

Stereotypes refer to attributes or traits associated with a social category.[85] Although sometimes siloed from the broader cognitive biases and heuristics literature, stereotypes are critical to our analysis of the Justices' seemingly inconsistent use of social science.[86] At one level, cognitive biases and heuristics exist independent of stereotypes and the broader social, political, and historical context in which we live.[87] However, when it comes to perceiving individual people and society more broadly, stereotypes frequently form the substantive content that undergirds cognitive biases and heuristics and their influence on how we see the world.[88] That is, just as societal forces (such as media portrayals and common discourse) determine what we "know" as the prototypical fruit, societal forces also impact what we "know" about the prototypical criminal, student, or surgeon.

Stereotypes have multiple origins. On the one hand, stereotypes arise from direct experiences—that is, actual interpersonal encounters with individuals from a particular social group. But stereotypes, particularly as they operate across social groups,[89] are often the product of vicarious experiences—that is, "simulated engagements with racial others provided through various forms of the media or narrated by parents and our peers."[90] Regardless of their origin—direct or vicarious experience—stereotypes, often by informing the operation of cognitive biases and heuristics, influence our judgments about people.

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[85] *See* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes* Really *Fading?: The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139, 1140 (1995).

[86] Beyond concerns about racial inequality, biases and heuristics can produce results that many would find unjust, or problematically vulnerable to subtle environmental changes that are otherwise irrelevant to the merits of an individual case. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 791–94 (2001) (describing how anchoring affected the judgments of magistrate judges).

[87] Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 365–66 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

[88] Consider, for instance, Jerry Kang's notion of "racial mechanics." Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1139–45 (2000); *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–1504 (2005) [hereinafter Kang, *Trojan Horses*] (describing how "racial mechanics" operates in part through racial categories into which individuals are placed, and this process triggers meanings associated with the category, thereby affecting interpersonal interactions).

[89] Given racial segregation in contemporary American society, meaningful intergroup contact can be rare. *See* Daniel Cox et al., *Race, Religion, and Political Affiliation of Americans' Core Social Networks*, PUB. RELIGION RES. INST. (Aug. 3, 2016) https://www.prri.org/research/poll-race-religion-politics-americans-social-networks [https://perma.cc/4FAA-XBBR].

[90] *See* Kang, *Trojan Horses*, *supra* note 88, at 1539–40.

To appreciate the way in which stereotypes interact with otherwise neutral cognitive processes, consider the findings from John M. Darley and Paget H. Gross's 1983 study on the hypothesis-confirming effect of stereotypes.[91] Darley and Gross asked participants to watch a video of "Hannah," an elementary school-aged girl, perform a variety of academic tasks.[92] Here's the twist: although all participants watched the exact same video, half of the participants were told that Hannah was poor; the other half were told that she came from a wealthy family.[93]

Darley and Gross predicted that socially salient stereotypes about class would impact the participants' evaluations.[94] They were correct. On average, participants who believed Hannah was wealthy rated her performance across various criteria higher than did those who believed Hannah was poor.[95] Thus, in the same way that other heuristics encourage people to "incorporate the irrelevant" into their decisions, so too did participants in the Darley and Gross study—who unknowingly incorporated information concerning Hannah's socioeconomic status, notwithstanding its irrelevance, in a way that impacted their actual evaluations.

3. The Elite Student Paradigm

Although there has been an observable shift toward egalitarian norms and commitments, American society remains defined by socially salient stereotypes and attitudes that privilege and normalize Whiteness.[96] We suggest that these stereotypes serve as a filter through which the aforementioned biases and heuristics impact real world behavior—including, for instance, a judge's engagement with statistical evidence of discrimination.

Other scholars have previously linked stereotypes and heuristics to biased judgments and decision-making. In 2012, L. Song Richardson and Phillip Atiba Goff developed the suspicion heuristic "to explain the predictable errors in perception, decision-making, and action that can occur

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[91] *See generally* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20 (1983) (concluding that some stereotype information creates falsely confirmed hypotheses about stereotyped individuals).

[92] *Id.* at 23.

[93] *Id*.

[94] *Id*. at 22.

[95] *Id.* at 28.

[96] Socially salient stereotypes extend beyond race to include, inter alia, gender, age, religion, ability, and status. For purposes of scope, we focus on the relationship between biases and heuristics and socially salient racial stereotypes. We recognize that this one-dimensional analysis is limited, and inevitably tells an artificially shallow story about the relationship between identities, society, social psychology, and the law.

when individuals make judgments of criminality."[97] The suspicion heuristic bridged insights from scholarship on heuristics and implicit racial biases to explain how perceiving race—absent explicit racial prejudice—can nonetheless bias judgments about criminality.

Building on this concept, Devon W. Carbado and Daria Roithmayr developed the "black suspicion paradigm," which offered a more racially inflected model depicting the many discrete but interacting and intersecting cognitive processes and social phenomena that contribute to disparate policing of African-Americans.[98] The "black suspicion paradigm" effectively operates as follows: First, interstitial social forces (e.g., media representations, public discourse, lay theories about race) produce pervasive racial stereotypes (linking Black with criminality) and salient images of the prototypical criminal (the African-American).[99] This "racial epistemology" then produces the "black criminal availability heuristic" and "black criminal representativeness heuristic," respectively.[100] Although distinct, these co-constitutive and reinforcing heuristics collectively form the "racial suspicion heuristic," which shapes behavior in the real world.

We translate this analysis to the higher-education context, where socially salient stereotypes about Black intellectual inferiority are particularly relevant. Grounded in Carbado and Roithmayr's model, our "elite student paradigm" goes one step further by integrating an additional cognitive process: confirmation bias. Tracking the "black suspicion paradigm," our model begins with societal forces that create "racial lay theories" in the domain of higher education.[101] These racial lay theories contain multiple components, each of which reinforces a collective imagination that renders black students perpetual outsiders to the elite institution. These components include: (a) racialized conceptions about the prototypical student (white students) and (b) racial stereotypes concerning intellectual capacity (lacking in black students). Individually and collectively, these components create racialized understandings regarding who belongs at, and who deserves to be at, elite institutions (white students).[102]

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[97] *See* L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 296 (2012).

[98] *See* Carbado & Roithmayr, *supra* note 8, at 153.

[99] *Id.*

[100] *Id.*

[101] Prominent societal forces include "media representations, popular and political discourses, and existing racial stratification . . . ." *Id.*

[102] This model is stylized in ways that obscure important nuance. For instance, it would be incomplete to suggest that the intersection of stereotypes, biases, and heuristics operate only vis-à-vis white and black students. Asian students, as one additional example, often occupy a middle ground in

These lay theories, in turn, produce a white-student-representativeness heuristic (the prototypical student is white) and a white-student-availability heuristic (white students belong at elite institutions). These distinct but reinforcing heuristics center white students as the racial baseline and marginalize black students as perpetual elite university outsiders who are unable to enter on their own merit.

The elite student paradigm shapes real world behavior on multiple fronts, within and outside the university. Within the university, black students (and faculty)—regardless of the individual's talents and accolades—often confront a presumption of incompetence and nonbelonging.[103] As a result, particularly when severely underrepresented,[104] black students are presumed to have received preferential treatment pursuant to non-"meritocratic" admissions processes.[105]

Outside of the university, the elite student paradigm explains why theories of Black inferiority—regardless of the underlying methods or objective validity—gain greater traction in public discourse, the national media, and the Supreme Court than do countervailing theories that explain academic achievement gaps as the product of environmental contingencies that uniquely burden students of color—even if predicated on decades of social science.[106]

It is here that confirmation bias can help explain the tendency to defer to, and mobilize, "evidence" that aligns with salient lay theories about race in higher education. Recall that confirmation bias describes the tendency to

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which "model minority" stereotypes situate Asians as intellectually talented (and therefore presumably "deserving" of admission), yet Asians nonetheless remain racialized as perpetual foreigners to the university (and the nation). *See supra* note 68 and accompanying text.

[103] *See* Angela P. Harris & Carmen G. González, *Introduction* to PRESUMED INCOMPETENT 1, 1 (Gabriella Gutiérrez y Muhs et al. eds., 2012).

[104] *See* Deidre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1234 (2010). This result is, arguably, counterintuitive. If one presumes that racial disparities are the product of market forces, the ability of someone from a severely underrepresented group to access a competitive domain should signal unique talent and resilience. Instead, the common interpretation is that the person was the beneficiary of preferential treatment.

[105] In his *Grutter* dissent, Chief Justice Rehnquist suggested that the law school's admission of black students required a deviation from merit that occurred at the expense of more deserving white students. *See* Grutter v. Bollinger, 539 U.S. 306, 385–86 (2003) (Rehnquist, C.J., dissenting) ("The Law School cannot precisely control which of its admitted applicants decide to attend the university. But it can and, as the numbers demonstrate, clearly does employ racial preferences in extending offers of admission. Indeed, the ostensibly flexible nature of the Law School's admissions program that the Court finds appealing, appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups." (internal citations omitted)).

[106] *See, e.g.*, Dan Slater, *Does Affirmative Action Do What It Should?*, N.Y. TIMES (Mar. 16, 2013), http://www.nytimes.com/2013/03/17/opinion/sunday/does-affirmative-action-do-what-it-should.html (discussing the emergence of "mismatch theory" in affirmative action debates) [https://perma.cc/M4MQ-82SL].

overvalue evidence that supports one's underlying hypothesis and to discount or reject countervailing evidence. Thus, a Justice (or lay observer) who envisions the "typical" student in a way that tracks racial lay theories informed by the elite student paradigm will search for and prioritize information that confirms that, indeed, white students are inherently deserving of admission and that black students are not. Should that individual encounter evidence to the contrary, confirmation bias makes it more likely that the information will be dismissed or otherwise subordinated in the decision-making process.

The elite student paradigm can accordingly impact judicial adjudication and institutional governance in the admissions context. Importantly, the elite student paradigm's explanatory power is not limited to situations in which a judge, such as Chief Justice Rehnquist in his *Grutter* dissent, mobilizes descriptive statistics to support a claim of reverse racism.[107] Even the *Grutter* majority, for instance, treated race-conscious admissions as a deviation from fundamental equality norms—albeit one necessary to achieve the compelling interest of student body diversity.[108]

In this sense, although *Grutter* saved affirmative action in higher education, it was arguably premised on a vision of the university that centered and normalized Whiteness, while reinforcing the portrayal of black students as institutional outsiders.

CONCLUSION

Although stylized, the "elite student paradigm" demonstrates how deeply engrained stereotypes can operate as filters through which Justices interpret evidence and engineer doctrine. For many, a natural next question is how to mitigate these biases and heuristics in judicial decision-making.

To (begin to) answer this question, we turn to a lesson from a canonical 1978 study on confirmation bias by Mark Snyder and William B. Swann, Jr.[109] Among other things, Snyder and Swann wanted to test whether incentives for better performance would mitigate the effects of confirmation

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[107] To be clear, we are not suggesting that confirmation bias was necessarily a causal factor in Chief Justice Rehnquist's disparate treatment of data in *McCleskey* and *Grutter*. Nonetheless, the social science offers an evidence-based theory that helps explain, and in some sense harmonize, the Chief Justice's facially inconsistent treatment of data in these two cases.

[108] *See Grutter*, 539 U.S. at 342 ("[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.").

[109] Mark Snyder & William B. Swann, Jr., *Hypothesis-Testing Processes in Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 1202, 1209–10 (1978).

bias.[110] The incentives proved ineffective; even when prizes were offered, participants continued to engage in a biased information search that undermined performance.

We highlight this study not to concede that automatic cognitive processes inevitably and insurmountably undermine genuinely equitable judicial decision-making. Nonetheless, we find it useful to note that there is likely no panacea and that debiasing remains more difficult than many appreciate (even when we acknowledge our own fallibility).

That said, the social science provides valuable insights. At a minimum, we should all openly recognize that regardless of any earnest commitment to neutrality and objectivity, prevailing stereotypes, in conjunction with prevalent biases and heuristics, render us all—even judges—more receptive to evidence that aligns with lay theories regarding racial disparities and discrimination. This means that judges may unknowingly give greater deference to evidence of "reverse racism" than traditional discrimination claims. Therefore, and assuming that judges should treat all statistical evidence objectively and on the merits, executing equality may require structural counterpreference strategies designed to mitigate an invisible unevenness that, if unchecked, will predictably and systematically privilege and reinforce the status quo and existing racial hierarchies in American society.

[110] *Id.*