INFLUENCING *BAKKE:* A QUALITATIVE CONTENT ANALYSIS OF HIGHER EDUCATION'S *AMICUS* BRIEFS

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Laura Fonseca

INFLUENCING *BAKKE:* A QUALITATIVE CONTENT ANALYSIS OF HIGHER EDUCATION'S *AMICUS* BRIEFS

Institutions of higher education came to the defense of affirmative action through their submission of *amicus curiae* briefs in *Regents of the University of California v. Bakke* (1978). While the *Bakke* case, affirmative action, and *amicus curiae* briefs have been studied extensively in their own right, there is little literature available that explores the intersection of the three and none that contextualizes higher education's depiction of mission within the briefs. This gap in the literature limits our understanding of higher education's influence on affirmative action rulings. At a time when diversity initiatives are under constant attack, it is essential to understand how the academy has chosen to present its interest in diversity to best inform future efforts.

Of the 57 briefs filed to the U.S. Supreme Court during the *Bakke* case, 13 were submitted directly or indirectly by the academy. All 13 favored the University of California's support of affirmative action. Through this study, the author used qualitative content analysis to explore how members of the academy presented affirmative action as part of their mission and uncover the underlying ideology within the briefs. The conventional approach allowed themes to emerge directly from the text. These themes were then analyzed using Critical Race Theory.

The findings of this study revealed that while different institutions approached their presentation of mission to the Court, all centered Whiteness within their briefs. The writers of the briefs primarily presented diversity in education as good, but most did so by explaining how its pursuit was of benefit to the majority. Likewise, those with an expressed mission to educate all largely failed to explore their own role within the historical context, which necessitated affirmative action in the first place. The *amici's* presentation of self to the Court also centered

Whiteness. Black-serving institutions highlighted their service to society at large. They illustrated their value through White systems, and the most privileged or elite of the *amici* presented little in their brief, rightfully assuming the Court already valued their words.

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Chapter 1: Introduction

On March 20, 2024, the Associated Press headlined with "Alabama governor signs bill barring diversity, equity and inclusion (DEI) programs" (Chandler, 2024). Not unexpected, this report came just 19 days after Florida's governor celebrated his state's passage of similar legislation through the tweet, "Florida is where DEI goes to die…" (DeSantis, 2024). The recent dismantling of diversity initiatives within education escalated following the U.S. Supreme Court's ruling on affirmative action in *Students for Fair Admissions v. Presidents and Fellows of Harvard College* (2023) on June 29, 2023. Under the guise of equality and the manipulation of the Fourteenth Amendment, lawsuits have been filed against schools, pathway programs, scholarship providers, firms, government offices, and nonprofits (Hannah-Jones, 2024). These threats are combined with increased numbers of anti-DEI legislation. In the wake of the *SFFA v. Harvard* ruling and the subsequent attacks, leaders of higher education are struggling to make sense of their espoused commitment to diversity while simultaneously balancing their institutional risk aversion. These attacks will inevitably lead back to the Court. If higher education leaders are to successfully defend their commitment to diversity, they must be better prepared to influence those rulings directly or indirectly through *amicus curiae* briefs. It is essential, then, to go beyond a general understanding of the Court or the use of *amicus* briefs for large-scale DEI issues like affirmative action and to critically review the academy's past attempts to defend the same, beginning with *Bakke*.

Through Justices' responses to cases and legal analysis, the Supreme Court generates and institutionalizes knowledge that it can use in the future to make decisions. In this way, the Supreme Court is a self-fulfilling institution. This makes the Supreme Court one of the most important avenues for large-scale impact towards social progress. From choosing whether or not

to hear a case to individual opinions and dissents, the bench's decisions ripple widely. In some cases, the Court's Justices hear arguments on specific legislative matters or lawsuits, declaring laws or policies constitutional or not. But on other matters, Justices must rule based on interpretations of loosely defined or emerging policy. In the latter, *amicus curiae* briefs become an even more important avenue of information for the Justices. Through these rulings and opinions, the Court acts more as a policy maker than a constitutionally mandated independent reviewer of justice. However, the outcome is the same. These opinions become institutionalized knowledge and affect future rulings by the entire court system. This has been the case with affirmative action.

Affirmative action, as a tool to combat systemic inequality and increase minoritized individuals' access to opportunities, has faced continual criticism and legal challenges since the idea was first publicly presented by the government by then-president John F. Kennedy in 1961. In its first iteration, the executive order read, "the contractor will take affirmative action to ensure that applicants are employed, and employees are treated during their employment, without regard to their race, creed, color or national origin" (Exec. Order No. 10925, 1961). This mandate was later reiterated by President Lyndon Johnson under Executive Order 11246 in 1965. While affirmative action in these orders pertains specifically to hiring and promotion, its underlying principles have been applied outside of employment and became a known component of university admissions beginning in the late 1960s (Bowen & Bok, 1998, p. 6).

The Code of Federal Regulations provides the most complete non-judicial guidance for government contractors regarding affirmative action. The law reads, "The requirements of this part apply to nonconstruction (supply and service) contractors" (Affirmative Action Programs, § 60-2.1-a, 2000). The scope of agencies that provide goods or services to the government spans

all industries, and because of this, affirmative action has taken various forms. Colleges and universities are held to this standard as recipients of federal funds, either directly through things like grants or indirectly through federal loans and scholarships. For decades, institutions chose to apply affirmative action programs to address the underrepresentation of minoritized groups in the demographic of their faculty and staff and within their student body. The federal code defined

> an affirmative action program [as] a management tool designed to ensure equal employment opportunity. A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects. (Affirmative, § 60-2.10-a1, 2000)

Federal code requires government contractors to have a complete plan that addresses hiring inequality and representation.

Despite the detailed need for an affirmative action plan, the federal code is vague on the shape of the actions that an agency should take to address the lack of diverse representation. The initial vague description within the executive order and lack of complimentary legislative clarity left affirmative action particularly exposed to attacks and misrepresentation. These attacks, often centered around the flawed concept of reverse racism, have chipped away at the potential effectiveness of affirmative action as a tool towards employment equality for marginalized people. It is there that the Court has filled in as a policy maker, leaving outreach and recruitment activity as the predominant way affirmative action continues to exist.

Many of the most famous challenges against affirmative action center around university admissions, where admission selection is akin to hiring and generally expected to be competitive and merit-based. This is largely because of the mass, cyclical, and systemic application and

decision process carried out by universities. However, challenges against the use of affirmative action in admissions can have huge impacts outside of academia. Rojas (2012) described the use of legal challenges in higher education by outsiders to substantiate change in policy. “The goal, in many cases, was to use one student’s grievance to set a precedent for further legal activism outside the academy” (p. 264). Other scholars have explored at length the role of the U.S. education system as a setting for proxy wars on liberal policy (Driver, 2018; Shepherd, 2023). While not all pursue higher education, it is a highly visible and prominent part of our society. College sports fill TV screens and provide shared identity both to alums and longtime followers, and despite the many public criticisms surrounding the utility of a college degree, higher education continues to exist for many as a path towards the mythical American Dream. The public has, therefore, a vested interest in how universities make admissions decisions, positioning these institutions as a prime location for a proxy war on progressive social movements and diversity initiatives.

The Supreme Court has heard numerous challenges to affirmative action. Because details of how affirmative action can be carried out are not embedded in a single legal document or policy but instead pieced together from executive orders and administrative remarks, the Court has continuously played the role of policymaker on this issue through each opinion and ruling. But the Supreme Court was not established as a policy-making institution. Instead, Justices evaluate cases and rule based on interpretations of their own selection of past laws and decisions, many of which were originally created or supported by the Court to uphold White power and privilege (Bell, 1992b). This means that any law or policy intended to dismantle this power structure must be defended and accepted within new interpretations of existing institutionalized knowledge. Change must, therefore, be accompanied by new information than that found in

existing structures. For example, in founding documents, the definition of "men" in "all men are created equal" included only White, landowning, able-bodied, Protestant males. While amendments were added over time to give rights to other groups of people, the word "men" was never altered; it simply carries a new meaning within judicial review due to revised knowledge and definitions.

Affirmative action policy requires the same. To accept that affirmative or substantive actions must be taken to promote equality, the Justices must also accept and understand that a disparity occurs within the existing structure that is worth fixing outside the perceived parameters of active racist law intended to uphold the status quo. For this, new interpretations of socialized or accepted concepts are needed.

The strenuous relationship between foundational law and a policy that can be used to address the systemic injustice upheld by those same laws is one of the reasons that the Supreme Court has reviewed affirmative action as often as it has. This is further emphasized by the complex outcomes and opinions of landmark affirmative action admissions cases, beginning with *Bakke* in 1978, continuing with *Grutter v. Bollinger* and *Gratz v. Bollinger* in 2003, *Fisher v. University of Texas* in 2016, and most recently, *Students for Fair Admissions v. President and Fellows of Harvard College* in 2023. These cases brought new challenges to affirmative action policy, but each centered on the same flawed concept of reverse racism.

The first four cases centered on a White applicant who had been denied entry to a university program. The applicants claimed that the universities' use of affirmative action in their admissions process was to blame for them not being admitted as it discriminated against them on the basis of race. In all four cases, the applicants claimed that this violated the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. Despite the

similarities in the cases, the Court continued to hear arguments against affirmative action policy, and with each ruling drew in additional parameters the way a legislature is expected to do.

In the first ruled upon Supreme Court case on affirmative action, *Regents of the University of California v. Bakke* (1978), the Justices simultaneously ruled in favor of the White plaintiff, Allan Bakke, upheld the use of affirmative action and handed a significant blow to the effectiveness of the policy by banning the use of quotas in admissions practices. While institutions were still able to consider race in admissions decisions, they could not reserve a certain number of spots in their admissions classes for individuals of a certain race. Over two decades later, in *Grutter v. Bollinger* (2003), the Supreme Court confirmed diversity as a compelling interest in higher education. It affirmed the use of race as one factor in a holistic evaluation of candidates but warned that its use must be narrowly tailored until a critical mass of representation is achieved. In the linked case *Gratz v. Bollinger*, the Court again upheld affirmative action but said that the University of Michigan's automated award of points to a candidate's overall score based on race was not sufficiently tailored. In *Fisher v. University of Texas*, the Court again upheld the use of affirmative action through narrow tailoring. Further, it affirmed that strict scrutiny should be used when determining if race as a factor for admissions violates the Fourteenth Amendment and Title VI of the Civil Rights Act. In the *Fisher* opinion, written by Justice Kennedy, the Court granted deference to the school to determine the need for race to be a factor in admissions but stated that this need should be regularly reevaluated, "ensuring that race plays no greater role than is necessary to meet [the university's] compelling interest" (579 U.S. 365, 2016). The *SFFA v. Harvard* decision struck down the use of race-conscious admissions systems used by Harvard and the University of North Carolina, citing the Fourteenth Amendment's Equal Protection Clause (600 U.S. 181, 2023). The majority opinion

stated that universities should not consider race in admissions decisions. However, they can consider experiences that candidates explicitly relate to their racial identities through narrative. With this ruling, the remnants of affirmative action in university admissions have essentially disappeared.

With each decision on affirmative action, the Court has upheld the notion that diversity in higher education is good and that steps should be taken to increase diversity until a critical mass of representation is achieved. But the Court's loose definitions of what critical mass was, who got to determine it, and what was considered a narrowly tailored approach to the application of affirmative action demonstrated the Court's 50-year struggle with what it means to combat the systemic effects of racism and discrimination in education. This made the issue of affirmative action one in which the Court remained open to influence. One of the ways in which the Court welcomed influential information was through the submission of *amicus curiae* briefs.

Amicus curiae

Amicus curiae briefs or "friend of the court" briefs serve as opportunities for parties not directly involved in a case to present information to the Court as it pertains to their own interests in the outcome. These briefs are reviewed by Justices and clerks prior to the Court hearing and can, therefore, directly influence a Justice's initial thoughts on an issue. The submission of *amici* is strictly governed by Supreme Court Rule 37 which restricts who can submit briefs to attorneys licensed to practice before the Supreme Court (Supreme Court, 2023). This limits the number of briefs submitted and increases their quality. Occasionally, the Court will actively seek briefs from agencies that it recognizes may have specialized knowledge that could benefit the outcome of the case. However, organizations or individuals do not need to be summoned by the Court to present a brief. While there is no specific cost to filing a brief, the expertise required to write one

is high, thus significantly increasing the labor cost of the process. Briefs can be submitted individually or as a part of a collective. As part of the brief, parties must define why they are submitting the brief and how that relates directly to their interests or mission (Harris, 2023).

Institutions of higher education have used *amicus* briefs to defend affirmative action in each of the aforementioned cases. The centrality of higher education in so many affirmative action cases meant that these institutions were poised to heavily influence policy broadly across society. As submitting institutions must define their interest in the cases they respond to, each brief submitted in defense of affirmative action must touch on the ineffectiveness of race-neutral policy and point to the importance of diversity in their own mission. How these are defined can have far-reaching and consequential outcomes.

To increase the effectiveness of *amicus* briefs in defense of equity-affirming policies like affirmative action, it is essential to review past arguments through a critical lens. This level of review acknowledges the subjectivity of legal arguments and can be used to inform new and improved tactics for the defense of diversity initiatives in coming cases. Specifically, writers must better understand how their positioning in briefs through their portrayal of self or mission either helps shape, battle, or condone the attitudes and opinions that continue to be used to limit the ability of affirmative action policy to act as an active agent for change.

Regents of the University of California v. Bakke (1978)

Judicial interpretations of *amici* can go beyond simply informing a Judge's ruling. The interpretations of the information presented in the briefs can become institutionalized as it did in *Regents of the University of California v. Bakke* (1978). The *Bakke* Court Opinion, penned by Justice Powell, is a complex legal argument studied widely by scholars. In the Opinion, Justice Powell goes beyond simply ruling on the constitutionality of affirmative action as applied by the

University of California Medical School. The opinion sets precedence for future affirmative action policy by conceding the need for affirmative steps to be taken by agencies to support diversity efforts but striking down the use of racial quotas as unconstitutional. Justice Powell cited Harvard University as a model for the use of affirmative action in admissions decisions without these quotas. Harvard was not directly involved in the *Bakke* case; however, as part of their jointly filed *amicus* brief supporting the University of California, the university included a descriptor of its admissions policies.

Those who have looked critically at Justice Powell's use of this *amicus* brief question the damage done by Harvard to affirmative action in an attempt to defend the policy (Alleyne, 1981; Dershowitz and Hanft, 1979; Melnick, 1978). Though Harvard claims in its brief that it does not use any quota systems, their admission numbers show a different story, with a steady 7 percent of the classes from 1973 to 1981 identified as Black (Dershowitz and Haft, 1979, p. 383). This begs the question, was Harvard truly avoiding the use of a quota system? Or was their brief, unquestioned due to the privilege Harvard was afforded by the Court, misleading? If so, the opinion of the Court, which set a precedent for affirmative action practices henceforth not to use quota or target systems, is flawed, and quotas should have been understood to be a potentially necessary part of affirmative action programs.

Justice Powell's interpretation of the brief submitted by Harvard drips with an individualistic lens that incorrectly assumes that the law is blind and, therefore, equitably applied when it ignores differences. Even if Harvard's admission policy had been a successful example of the use of affirmative action without quotas or targets, it would still be an anomaly to build new practices around. As one of the most prestigious and well-endowed schools in the world and a private institution, Harvard's recruitment and admissions process were hardly representative of

the experience of other schools. Harvard's defending brief may have caused more damage than good to the future of affirmative action. From *Bakke*, it is evident that the information presented in *amicus* briefs matters. It is not sufficient for higher education institutions to come to the defense of diversity initiatives. They must review critically what they are presenting to the Court as it may have outcomes beyond their original intent. Moreover, because of the institutionalized memory of the Court, it is essential to critically review all *amicus* briefs submitted by higher education institutions to best prepare for the challenges ahead. This must begin with *Bakke.*

In *Bakke*, the Court's decision and opinion was a strong policy statement as opposed to what many expected to be a legal explanation or block. As such, the *Bakke* case is not only a monumental legal decision that framed the use of affirmative action from there on out. It is also uniquely poised to serve as a case study for how universities can leverage their mission to influence diversity policy through *amicus* briefs.

This outcome of *Bakke* demonstrates the essential need not only to know and understand the interest in diversity presented by universities in defense of affirmative action but also to analyze these briefs for their potential long-term impact. To that end, this study explores two questions: (1) how did members of the academy present affirmative action as part of their own mission or purpose within *amicus* briefs submitted for *Bakke*? And (2) what ideology is embedded in these arguments?

Significance of Study

Writers of *amici* in support of affirmative action have had a challenging task. They must be persuasive within their time to influence Justices and be aware of future precedence and implications of their words. In other words, to have the most positive impact, writers must strike a balance between creating meaningful change and providing a comfortable ideology that the

Justices are ready and open to hear. This includes an awareness of the potential long-term impact of language that has been negotiated down to be more easily digested. Studying the briefs submitted for a single case, *Bakke*, allows for a more in-depth analysis of the information provided in support of affirmative action within the same societal context and therefore without comparison to a different time. Knowing how these institutions defined their interest in affirmative action and diversity and analyzing these through CRT explores a nuanced intersection of law and higher education research that is seldom explored within either field.

The findings of this study can be used to further the efforts of socially progressive higher education institutions seeking to influence and defend future diversity initiatives through *amicus* briefs, DEI advocates, and practitioners. A closer look at how higher education institutions presented themselves and their mission to the Court in the first ruled-upon affirmative action admissions case is necessary for institutions to assess the strengths and deficits in their approach. Learning from past brief writers allows for more compelling arguments to support affirmative action and DEI in future cases. It also helps practitioners understand how to combat and navigate the current attacks on DEI.

With the deference the Court has granted universities regarding the importance of diversity in fulfilling their mission (*Fisher I*), universities must consistently portray the value of diversity in a manner that does not harm future cases or contradict existing supportive institutionalized knowledge. Because of the Court's long-term memory, writers of *amicus* briefs need to understand how past institutions have spoken of the relationship between their mission and diversity and build upon those arguments in increasingly informed ways. While these initial arguments may have flaws, negating them could come at the expense of existing deference.

Additionally, a critical exploration of past arguments can prevent writers from presenting shortsighted information to the Court that could limit affirmative action in the future. How *amicus* writers depict the privileges afforded to their institutions while acknowledging their strides in trying to diversify their student body is important. This is especially true at a time when several states have gone beyond the latest ruling by the court on affirmative action to limit or end all diversity, equity, and inclusion initiatives on educational campuses.

Finally, in a time when the arguments used to create affirmative action and promote racial equality are being coopted by the far-right to challenge socially progressive movements, it is essential to understand higher education's original efforts to support the policy. Taking a critical approach to reviewing and understanding these arguments will further prepare higher education policymakers and *amici* writers to defend affirmative efforts to diversify the student body and prevent the original defenses from being coopted to dismantle the policy they were created to protect. This is a pressing need following the ruling on *Students for Fair Admissions (SFFA) v. Harvard*. In this new challenge, opponents of affirmative action took a different approach to challenging the policy by claiming that Harvard's affirmative action policy discriminated against Asian applicants by holding them to a higher standard than other applicants.

By placing individuals with marginalized identities at the center of this legal challenge, Edward Blum, the far-right activist spearheading the attack, used a new tactic to dismantle affirmative action and attempted to pin racial minorities against each other. While the United States Court of Appeals for the First Circuit ruled in favor of Harvard, SFFA appealed for the case to be heard by a conservative-leaning Supreme Court and won. Institutions of higher

education braced themselves for what they expected to be another blow to an increasingly feeble policy and must now prepare to come to the defense of all of their diversity initiatives.

This study presents a new way of understanding and combating the anti-DEI movement for advocates and practitioners of DEI. The current attacks from the far-right have highjacked language used by institutions of higher education to justify the use of affirmative action in the past. By better understanding the mission alignment presented by higher education institutions and the underlying ideology it carries, practitioners can be better prepared when this same language is used to attack. Furthermore, the application of CRT helpfully situates the use of narrative in supporting and promoting DEI initiatives.

Critical Race Theory

I apply critical race theory (CRT) to explore how briefs written in support of affirmative action can have long-lasting and unintended impacts within the Court, including promoting White power and ideas that can accidentally harm the future defense of diversity initiatives. CRT is a theoretical framework, born in the form of legal analysis, that acknowledges the ever-present racism and power struggle that exists within our laws and institutions in order to push toward social and racial progress and equity (Delgado & Stefancic, 2012). Using CRT, I bridge literature from various disciplines on affirmative action, allowing for a fuller exploration and understanding of *amicus* briefs. CRT's foundational tenets further allow for the analysis of the information presented to the Court. I recognize that racism exists everywhere, including within our government institutions as well as our institutions of higher education. The acknowledgment of this tenet encourages a deeper analysis of amicus briefs by accepting that they are often being presented by institutions where racist ideology exists to a Court that, while presented as neutral, is upheld by White power and whose guiding documents are embedded with racism.

Other tenets of CRT are also applied in this study for the purpose of better informing future writers of *amici,* not simply of the presentation of mission that has been previously submitted in support of affirmative action, but to assist writers in understanding the layered nuance of this work and the long-term impact it can have. CRT calls for a recentering of minority voices. Legal cases are often analyzed by centering the opinion of the court or even the individual justices. This study centers racial minorities by examining how the presented interest and mission alignment of *amici* affects the potential effectiveness of affirmative action in lifting individuals with minoritized racial identities instead of the legality of the arguments or the Court's response to the same.

Focus on race

While affirmative action is used to consider "race, color, religion, sex, sexual orientation, gender identity, or national origin" (Affirmative Action Programs, § 60-2.16-e2, 2000), this study focuses on race. It is important to recognize that these other identity markers are also discriminated against in systemic and individual hiring and promotional decisions, and this effect is compounded for those with multiple, intersecting, minoritized identities. Cases brought to the Supreme Court and information presented through *amicus* briefs regarding the use of affirmative action on any of these identity markers affect affirmative action policy on all of them.

In this study I focus on race because it has been centered in many of the higher education cases heard by the Supreme Court regarding affirmative action, and specifically the *Bakke* case. As a socially constructed concept, race adds a layer of complexity to legal exploration. Its existence has been acknowledged by the Court and legally used to enslave, subjugate, segregate, and discriminate at various points in our history. The construct of race was solidified legally in the founding documents of the United States in a manner that upheld White power over other

races, often citing false differences in ability, intelligence, or worth. Through hard-fought physical and social battles, the Court's portrayal of race has changed. What was first used to subjugate others was later used to separate. Now, under the guise of equality, it is used to protect the status quo of power and privilege. In supporting affirmative action, writers of *amici* must present race in a tangible way that cannot also be used towards further discrimination.

Additionally, many of the cases presented to the Supreme Court and the writing around affirmative action during *Bakke* speak only of Black and White races. This oversimplified presentation of race ignores the systemic discrimination of other minoritized identities and creates additional room for legal attacks on affirmative action that pin underrepresented identities against each other for the benefit of White individuals, as occurred in *Students for Fair Admissions v. Harvard*. This is a major flaw in affirmative action literature as well as in the *amici* presented to the Court for *Bakke*. Within the briefs, it is a reflection of the binary nature of how race was socially understood in the 1970s. When I speak of minoritized racial identities, I refer to all non-White racial identities.

Many of the texts written on this topic present the enslavement of Black individuals and the subsequent treatment of their descendants as justification for affirmative action. While this is an important argument, discrimination in employment against Black individuals affects the entire Black community, regardless of history of enslavement within the United States. While experiences within the United States are affected by these differences, for the purpose of this study, I use the term Black to include all Black individuals regardless of history of ancestry or ethnicity.

Key Terms

This study explores complex concepts by bridging them across multiple fields of study. As such, it necessitates clarity around key terms to increase accessibility and utility for academics and practitioners alike. This section outlines each of these terms as they are used within this study.

Affirmative action

Delgado and Stefancic define affirmative action as a "policy that strives for increased minority enrollment, activity, or membership, often with the intention of diversifying a certain environment such as a school or workplace" (p. 155). Urofsky (2020) presents a similar definition while expanding on three essential components of the policy; "affirmative action takes seriously the discrimination certain groups have suffered; it attempts to overcome those prejudices and provide equal opportunity; and it defines who is covered" (p. xii).

Despite congruency in these definitions, both completely ignore the specific methods by which those employing the policy can enact and, therefore, lack specificity. Urofsky credits the imprecision of these definitions to the consistent fluctuation of the policy over time.

Within higher education, tools and actions purposefully enacted by an organization to increase the enrollment of minoritized or underrepresented individuals can all be grouped under the name of affirmative action. Bowen and Bok (1998) noted that interest in these types of actions was taken by a select handful of institutions of higher education as early as 1835 when Oberlin College first pursued the education of non-White individuals as a central interest to the institution. "It is probably safe to say, however, that prior to 1960, no selective college or university was making determined efforts to seek out and admit substantial numbers of African Americans" (Bowen & Bok, 1998, p. 4).

Affirmative action as a federal policy was first enacted under Executive Order 10925 in 1961, which called for federal contractors to take actions to prevent hiring discrimination, "Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship" (Exec. Order No. 10925, 1961, sect. 301). While executive orders do not go through a legislative process, they are binding for employees and contractors of the executive branch. Most higher education institutions are included in these mandates as recipients of federal funds.

From the mid-1960s until the *Bakke* ruling in 1978, affirmative action methods used by institutions of higher education varied by school. Some, like the University of California School of Medicine, enacted quotas, which held a certain number of seats within an admitted class for individuals with minoritized racial identities. Others tailored recruitment efforts to reach more diverse candidates, created pathway programs and found ways to incorporate the race of candidates as a factor in their admissions decisions (Bowen & Bok, 1998).

Amicus briefs

Amicus curiae briefs are documents composed by parties not directly involved in a case and filed with a court with a given purpose in mind and typically with a goal of persuasion. "Through these briefs, amici can present courts with new or alternative legal positions, social scientific and factual information, and perspectives regarding the policy implications of their decisions" (Collins, 2018, p. 220). Within the United States, *amicus* briefs can be filed at different levels of the court.

The *Rules of the Supreme Court of the United States* govern the submission of *amicus curiae* briefs to the U.S. Supreme Court. "The only required sections of text of an amicus brief

are the interests of the amicus, the summary of argument, the argument and a conclusion" (Harris, 2023, p2).

DEI initiatives

Diversity, equity, and inclusion (DEI) initiatives are efforts designed and carried out with the purpose of increasing and supporting the underrepresented or marginalized populations within a given space. These initiatives vary greatly between institutions of higher education and can exist differently across comparable campuses, including cultural centers, scholarships, student affairs positions, and bias response teams. Similarly, these efforts exist under varying levels of commitment, support, and effectiveness (Jayakumar & Museus, 2012). Many of these campus-wide efforts began or expanded after the Association of American Colleges and Universities' (AAC&U's) launch of the Making Excellence Inclusive campaign in 2005 (Yi et al., 2022).

While this study does not focus on DEI initiatives at large, affirmative action practices are often grouped within these efforts, and attacks on affirmative action impact the broader campus DEI practices. Similarly, since the *SFFA v. Harvard* ruling in 2023, DEI initiatives at large have become a focal point for right-wing attacks, including anti-DEI legislation.

Racism

Affirmative action policy, as advocated for by leaders of the Black labor movement in the 1960s, was imagined as a tool to help combat the persistent racism experienced by Black individuals in hiring and promotion practices. In its simplest definition, racism is "any program or practice of discrimination, segregation, persecution, or mistreatment based on membership in a race or ethnic group" (Delgado & Stefanicic, 2012, p 171). More explicitly, "racism is a system of dominance across economic, political, and social realms that shift resources for example,

housing, education, employment, health, and political voice-to the advantage of Whites" (Roussell et al., 2017, p. E6). Through CRT, I recognize that racism is embedded into every part of our society (Bell, 1992b). Because of this, the absence of a specifically designated program or practice, as described above, does not indicate an absence of racism. The embedding of racism within the framework of the United States means that racism prevails and is even supported within policies claimed to be colorblind (Jason, 2020).

Chapter 2: Literature Review

Amicus briefs contain research, information, and analysis for the Court, which writers believe could sway the bench towards a stated outcome that aligns with the writers' interests. An analysis of the briefs' stated goals, the information included within, and the presentation of the research are all, therefore, necessary to properly explore the writers' defense of affirmative action and its effect. Traditionally, all briefs include a section in which they describe the represented parties and their respective interest in the case. A narrower review of self-presentation in briefs provides an opportunity for review that helps us better understand the interests of submitting organizations within their time and their respective impact. CRT gives us the framework by which to more fully consider both what writers presented in their briefs as important to their mission and what they chose to omit. It also allows us to take ideology presented at a given point in time and pull findings that can be applied to the present-day defense of diversity initiatives.

In pursuit of this understanding, I first review the literature available on affirmative action using CRT. This serves to set the stage for this study by presenting an overview of the *Bakke* case and an overview of affirmative action and *amicus* briefs. It also provides the contextualization, complete with hindsight, that intersects the fields of history, law, and the social sciences necessary for a complete analysis of higher education's mission presented in defense of affirmative action.

Historical, legal, and social science research each provide unique and useful insight into the use of *amici* to influence Court opinions. However, it is not within one field of study but at the intersection of all three that the literature provides the greatest insight into the academy's influence on affirmative action through the use of *amicus* briefs. This literature review presents

the findings and limitations within each of these fields and exposes the necessity for an intersectional approach in studying the role that higher education has in impacting Court opinion and, therefore, policy regarding affirmative action through *amicus curiae* briefs. I pay specific attention to how affirmative action and *amicus* briefs are presented as the literature on both topics impacts general understanding and opinion. I also present a summary of *University of California v. Bakke* as well as an overview of how it was presented within the fields of law and higher education.

I begin by describing how I use history and CRT to frame this issue and research. Then, I present and critique the literature surrounding the creation of affirmative action in the United States, particularly the events leading up to 1978 when affirmative action and higher education met for the first time in a ruled-upon Supreme Court Case. Finally, I review the standing literature on higher education's influence on Supreme Court decisions, which, although rooted in different time periods, inform my study.

Theoretical Framework

The literature reviewed in this paper crosses multiple fields of study, including education, history, law, and the social sciences. Each of these fields presents unique strengths and carries certain limitations. In order to best analyze the academy's influence on large-scale affirmative action policy through *amicus* briefs, it is essential to view the actions taken by the institutions within their own time. As such, history is a useful tool to bring together the work of multiple fields in order to represent a holistic review of the impact of the *amicus* briefs on court opinions. The benefit of hindsight allows for a substantial look at the long-term implications of briefs on Court opinions and subsequentially on policy. By contextualizing *Bakke* studies and the

arguments made within their time, I can better assess the impact, opportunity, and harm caused by the briefs and the way they are presented and studied.

I focus on a single court case, *Regents of the University of California v. Bakke* (1978), in order to more fully flesh out the historical context in which Universities submitted their *amici*. Not only was *Bakke* the first major affirmative action case ruled on by the Court, but the case also turned an issue that was predominantly a hiring policy into a central issue in higher education, uniquely positioning universities to affect large-scale national policy. Not lost on me is the irony of studying a policy heralded as a tool for racial equity within a case in which universities, institutions largely founded on racist ideology and to promote Eurocentric knowledge and power structures, are attacked for actions taken to rectify decades of institutionalized racism in admission by a white male. The entire case, within its time, is centered on Whiteness, and yet, its effect is perceived as a threat to that same power structure.

Within a historical lens, the use of a theoretical framework provides consistency and clarity when curating work from various fields. I apply CRT to explore a well-known case and the influence of the academy on affirmative action policy in a new way. CRT originated in the legal field. At the heels of *Brown v. Board of Education of Topeka* (347 U.S. 483) and the Civil Rights movement, Black scholars sought to better understand and explain the barriers that were systemically woven into the legal system despite legislative changes. Among these scholars were Kimberlé Crenshaw and Derrick Bell who built on the ideas of critical legal studies to demonstrate that the law is neither apolitical nor fully objective; the law is racially charged. Crenshaw (2010) was clear that CRT extended beyond "simply a product of a philosophical critique of the dominant frames on racial powers. It was also a product of activists' engagement with the material manifestations of liberal reform" (p. 1260). CRT did not take on its modern

shape or name until 1989, when 24 legal scholars met at the University of Wisconsin to "workshop" CRT (Crenshaw, 2002, p.1361). However, scholars had already been applying its principles to their analysis.

Through CRT, Bell (1976) demonstrated that though the ruling for *Brown v. Board* had been popularly proclaimed as a pro-Black ruling, the Court had once again maintained White power dominance in its ruling by failing to tackle the underlying racial injustice upon which segregation was founded. Bell's strong critique emphasized the need for further study and action. It presented a new way of looking at our legal environment that could create positive change in the future. The scholar later wrote, "I rather think that this writing is the response to a need for expressing views that cannot be communicated effectively through existing techniques" (Bell, 1995, p. 902).

Specifically, Bell (1976) explored the failure of the *Brown* ruling in creating substantive change by demonstrating through the use of narrative that the legal foundations of our society are built upon racist ideology and for the purpose of maintaining a White dominant power structure even within rulings that seem to address inequity. Unlike prior critical legal work, Bell emphasized the need for action and a continued pursuit of change.

Through CRT, I bring together work from different fields of study to demonstrate the influence that institutions of higher education can have on policy and, specifically, on policy regarding affirmative action in a manner that would be impossible to explore through a single field. While each discipline reviewed brings its own strengths and values, it also uses its own language and carries its own purpose. CRT, as a singularly applied theoretical framework, provides consistency and clarity in analysis and purpose. Harper et al. (2009) applied CRT in their historical overview of affirmative action admissions policies. They noted, "CRT is

interdisciplinary in nature, incorporating intellectual traditions and scholarly perspectives from law, sociology, history, ethnic studies, and women's studies to advance and give voice to the ongoing quest for racial justice" (p. 390).

Additionally, although affirmative action has been proclaimed as a tool to combat systemic racial inequity, studies regarding the policy often center White power structures such as signatory policymakers of the time, the Court, or Universities. It is imperative, then, to consciously apply a framework that reframes the conversation across these same institutions by centering racial minorities and focuses on furthering progress toward equality. CRT is useful in reviewing and outlining the policies that have led to affirmative action as it is defined today. It provides language and tools with which to critically evaluate these policies and how the voices within the academy have shaped rulings that have directly impacted minoritized populations but within which the voices of minorities in policy are largely unrepresented.

While there is some consensus on the main tenets of CRT, it is challenging to perfectly enumerate these as the field is purposefully and continuously expanded and defined by scholars. For the purposes of my analysis, I will be using four tenets of CRT to analyze both available literature that informs this study and the codes found in the *amicus curiae* briefs presented to the Court in the Bakke case and their impact on affirmative action.

First and most notably for this study, racism is an everyday and normal part of our society, our systems, and therefore, our institutions (Bell, 1992a). Bell (1992b) specifically pointed out the need to recognize the role racism played within the judiciary. The scholar wrote, "By viewing the law—and by extension, the courts—as instruments for preserving the status quo and only periodically and unpredictably serving as a refuge of oppressed people, Blacks can refine the work of the Realists" (p. 364). Realists pushed back on formalist views, which

portrayed laws as unwavering truth and, in accordance with the expanding fields of the social sciences in the twentieth century, accepted the subjectivity of law and its interpretations and applications by legal systems and, more specifically, the judiciary. As an example, Bell (1992b) pointed to judicial choice on case precedence. Since no two cases are exactly alike, judges make a subjective choice of which cases are similar enough to prior cases to pull from. "Such a choice basically is about the relevancy of facts, and decisions about relevancy are never logically compelled" (p. 367). CRT, and what Bell refers to as Racial Realism, builds off the work of Realists through the application of this tenet. The subjectivity of these decisions is inevitable, and within that subjectivity, there exists racism.

Bell (1992b) specifically identified the *Bakke* decision as an example of this existing racism. The Justices could have used a prior case, *Griggs v. Duke Power* (401 U.S. 424, 1971) as a precedent by which to review *Bakke*. In *Griggs v. Duke Power*, the Court recognized the additional discrimination Black individuals were subjected to within the educational system and "used flexible reasoning in arriving at its decision" that Duke Power could not, therefore, hold all workers to the same education standard of a high school diploma and passing a standardized test (Bell, 1992b, p. 367). *Griggs* (1971), had it been centrally positioned by the Justices in *Bakke*, could have set the foundation for affirmative action by recognizing the existing and institutionalized inequities within our systems and the unjust way in which these disproportionally affect racially minoritized individuals.

This tenet has two large-scale applications to this study: (1) understanding that no party is neutrally reviewing or presenting information, and (2) despite how they are commonly presented, both the Courts and institutions of higher education can act as policymakers and influence society. It is essential to look beyond statements made in support of racial equity and justice and

understand that although institutions, such as courts and universities are portrayed as neutral parties, upholding neutral laws and swayed only by logical and neutral ideology, they are not. By applying CRT, I recognize that neither Courts nor systems of higher education are neutral, and both have played a role in creating and upholding systemic racism. "A CRT lens unveils the various forms in which racism continually manifests itself, despite espoused institutional values regarding equity and social justice" (Harper et al., 2009, p. 390).

Second, under CRT I recognize that White power structures only support policy advantageous to non-White groups when these also propel White interests. This notion, coined *interest convergence*, is displayed not simply in the challenge to affirmative action by Alan Bakke but also in the arguments universities brought up in their *amicus* briefs. Through this tenet, I understand that *amicus* briefs make the biggest impact when the arguments or information presented are tied not only to the interests of the minority, but to those of the majority. Bell (1992b) discussed how terminology or concepts that present on the surface as supportive of minority rights could and have been manipulated "to mask policy choices and value judgments" (p.369) made by Judges. Bell wrote, "abstraction in the place of flexible reasoning, removes a heavy burden from a judge's task" (p. 369). As an example, Bell presented the concept of "equality" as the justification for the ruling in *Bakke*. When hiding behind the abstract concept of equality, it is challenging to combat the perception of a ruling. As an alternative example, Bell presented the appointment of Clarence Thomas to the Supreme Court by President George H. W. Bush in 1991. While Justice Thomas' rise to the Court was portrayed as a step towards equality with increased minority representation on the bench, this move only furthered conservative power in the judiciary. "Its proximate cause was the President's hypocrisy

in using race to shield his effort to stack the Supreme Court with conservative judges" (Bell, 1992, p. 372).

Bell (1992b) emphasized the third tenet I apply in this study in the exploration of the nomination and rise of Justice Thomas to the bench: counter storytelling is essential in combating racism and, as such, encourages the role of non-White voices. Including the voices of those not in power is an essential component of CRT and of racial progress. The silencing of Professor Anita Hill during the Senate hearing for Justice Thomas' nomination is a powerful example of how certain voices can be augmented in support of the existing power structures while those with less institutional power or alignment, in this case a Black woman, can be silenced thus influencing the narrative.

> In acknowledging the validity of these lived experiences among persons of color, CRT scholars can place racism in a realistic context and actively work to eliminate it. CRT uses counternarratives as a way to highlight discrimination, offer racially different interpretations of policy, and challenge the universality of assumptions made about people of color. (Harper et al., 2009, p. 391)

Crenshaw (2010) explained that counternarratives are an essential tool in the defense of affirmative action. "One could not sustain an argument for affirmative action against the reverse discrimination/lowering standards line without at the same time addressing the racial preferences built into the existing standards" (Crenshaw, 2010, p. 1287). Defenders of affirmative action failed to move beyond this contradiction using counternarratives, thus fueling future attacks on the policy. "Concessions made to occupy only the space that is pragmatically useful limits the ability to explore possibilities not yet discovered, to tell stories and counternarratives that hold

the possibilities of broadening rather than constraining the terrain of social discourse" (Crenshaw, 2010, p. 1347).

Finally, studies, including this one, should be applicable in order to spur further change toward increased equity. Applying CRT can be a difficult process of introspection, and it inherently challenges the systems that sustain our current power structures. However, CRT is intended to add pressure to that standing structure for the purpose of change. It is my hope that increasing understanding of the relationship that higher education has on affirmative action through the use of *amicus curiae* briefs will lead to further use of this and other tools by universities to be active agents of anti-racism within society.

Nesting the study: the origins of affirmative action

Affirmative action was not born of a single article of legislation. Instead, it was pieced together over time, with politicians often heralding its victories as part of their own master plans to fight employment discrimination while blaming its limits and downfalls on the courts or inappropriate interpretations by individual entities. Its convoluted beginnings and lack of clear origin are widely studied and discussed in literature. However, the lack of specificity in expectations is responsible for the ample room for judicial interpretation. Understanding and nesting any study on affirmative action in its history is essential to an understanding of just how much room exists for judicial interpretation and effective analysis of points of influence. Conversely, both supporters and critics of affirmative action can choose to highlight or omit certain aspects in the history of affirmative action to encourage sentiment towards the policy in a given direction.

An initial dilemma in presenting affirmative action is deciding how far back to trace its origins. While affirmative action by name did not begin to take shape until the mid-twentieth

century, the need for its existence in the United States traces back to colonial times. Built at the expense of enslaved people and on the land of forcefully removed tribes, institutionalized racism and disparity resides at the foundation of the United States and, as such, its laws (Bell, 1992a). Omitting this history for the sake of brevity or simplicity presents affirmative action as a response to an existing or natural order as opposed to one of many restitutions necessary to address the harm that those in power accepted and institutionalized through the continued subjugation of non-White individuals. Scholars who choose to present affirmative action within the context of historical oppression force a different and less comfortable discourse.

Harper et al. (2009) presented the history of affirmative action as it related to access to higher education beginning in 1832 when Alexander Lucius Twilight became the first recorded African American man to receive a degree from a college in the United States (p. 393). From there, the scholars depicted the temulent path towards increased access for African Americans that further perpetuated the inequity initially established through the capturing and enslavement of Africans as a labor force for White colonists. The authors maintained that even a law like the Morrill Act of 1890, storied for the role it played in the expansion of Black colleges across seventeen states, maintained and even propelled racist ideology. The Morrill Act of 1890 legalized segregation in higher education and was used to justify what became the *Plessy v. Ferguson* ruling of 1896 that separate was equal. By using CRT to present affirmative action within the storied history of racist policy in the United States, the authors rooted the need for the policy in the initial oppressive action supported by the government.

A limited focus on affirmative action history solely as it pertains to education fails to capture the complexity of the policy and its development within a larger societal, economic, and legal landscape. While affirmative action legal battles have been argued within specific cases and

industries, the implications of these have much larger parameters. More wholistic historical overviews, such as Urofsky's (2020) The Affirmative Action Policy: A Living History from Reconstruction to Today, provided this broader contextualization of the policy's creation beginning with the end of legalized enslavement in the United States. Urofsky traced the beginnings of affirmative action as a practice to post-Civil War Reconstruction and the Civil Rights Act of 1866. While concepts of equity were embedded in early legislation guaranteeing civil rights and "[making] it a crime to interfere with a person's exercise of civil rights" (Urofsky, 2020, p. 3), these laws only pertained to White men and efforts to expand interpretation were quickly quailed. Urofsky's work focused primarily on the progression toward the current existing affirmative action policy. However, it is equally important to understand failed attempts at restorative justice as well as the arguments that have, through time, been used to limit such efforts.

Those who choose to study affirmative action in higher education should use this broader lens as the policy was not originally intended to be applied to admissions in education, although this is where current broad critiques are based. However, even broad historical texts have gaps. Urofsky presented affirmative action without the inclusion of the voices of the people whom affirmative action was described as intended to support. The policy was presented while centering the White policymakers, and its effect was analyzed without the voices of the minoritized communities it was intended to serve. Additionally, only briefly mentioned by Urofsky (2020) are the Freedman Bureau Acts of 1864, 1865, and 1866, which Schnapper (1985) pointed to as being directly at the root of affirmative action efforts.

The 1864 Freedman's Bureau Act, stalled and eventually rejected by Congress, was one of the most radical restorative justice initiatives debated by Congress after the Civil War

(Schnapper, 1985). Under this act, the government was to set aside specific funds, lands, and buildings for the education and support of formerly enslaved people. The same idea of reverse racism currently used to hijack affirmative action was used then by Southern Democrats who rejected and stalled this effort. A more diluted version of the act arose a year later, which included aid to White individuals affected by the Civil War and lessened benefits to former enslaved people. The 1865 Freedman's Bureau Act established a temporary Freedman's Bureau under the Department of Treasury. In 1866, another Act was set forth to more permanently establish the Freedman's Bureau and expand services beyond the former Confederate states. "Objections to the 1866 bill were similar to those advanced earlier, but the arguments against special treatment for blacks were more fully developed" (Schnapper, 1985, p. 763). After multiple rejections by President Andrew Johnson, the 1866 Act eventually passed both houses of Congress and established the Bureau for two additional years. It was President Johnson's view, as echoed by many others at the time, that a few years of support should have been enough to balance out the negative social and economic effects of enslavement on an entire race. This sentiment continues to live in the Courts as opponents of affirmative action ask, "when has the policy done enough?" or "is affirmative action still necessary?"

It is important to emphasize that the arguments against affirmative action today are the same as those held over 150 years ago. Congressman Taylor of Missouri argued against these efforts and cited the need for legislative equality, "Such partial legislation, Mr. Speaker, cannot be lasting; it seems to me to be in opposition to the plain spirit pervading nearly every section of the Constitution that congressional legislation should in its operation affect all alike" (39 Cong. Rec. 544, 1886). Other opponents, such as Senator Saulsbury of Delaware and Senator

McDougal of California, opposed the notion that one race would receive more at the expense of another. Though it did not carry the name of reverse racism at the time, that was the argument.

"Congressmen Marshall [of Illinois] and Ritter [of Kentucky] contended the bill would result in two separate governments, 'one government for one race and another for another'" (Schnapper, 1985, p. 764). This was an effective argument at the time against affirmative action, but it was not used to combat the notion that separate was equal. In other words, the argument held legitimacy only when it supported the White dominant power structure.

Understanding the reoccurrence of these arguments despite the many and significant changes in the United States from the end of the Civil War to the hearing of *Bakke* in 1978 is important for *amicus* writers who are choosing to defend affirmative action. Addressing concerns regarding the policy is essential to its defense. *Amici* writers must be prepared to question the validity of these attacks which often hide under the guise of appropriated terminology such as "equality" or a quest for "fairness." Failure to do this further institutionalizes these concerns as legitimate or even new as opposed to what they are.

Katznelson (2005) took a different approach in *When Affirmative Action was White*. In this book, Katznelson focused on the post-Second World War pro-white policies that led to the formation and later the attempted dismantling of affirmative action. Katznelson pointed to how these policies, often hailed as monumental promoters of economic opportunity for all, created even more economic racial disparity in the United States and furthered the position of power of White Americans. Specifically, Katznelson signaled out the creation of Social Security, the GI Bill of 1944, and the labor laws that allowed for the formation of unions and protected white-collar workers. These policies, though racially blind in language, disproportionately took affirmative actions to benefit mostly White Americans. Katznelson's historical overview and

policy focus demonstrated how the necessity for affirmative action grew from continued favorability given to White Americans and, specifically, White males.

"But most Blacks were left out. The damage to racial equity caused by each program was immense. Taken together, the effects of these public laws were devastating" (Katznelson, 2005, p. 142-143). Whether purposefully or not, Katznelson speaks only of Blacks as the intended beneficiaries of affirmative action and leaves out other marginalized populations. This oversimplified presentation of race ignores the systemic discrimination of other minoritized identities and creates additional room for legal attacks on affirmative action that pin underrepresented identities against each other for the benefit of White individuals as occurred in *Students for Fair Admissions v. Harvard*.

The utility of Katznelson's (2005) and Urofsky's (2020) histories for the purpose of this study is limited by the absence of a stated theoretical framework or acknowledgment of positionality. While historians seldom present work under a stated framework, they are not free from the preconceived notions or biases that play out in their research. On the whole, this does not affect the integrity or validity of the work. However, what parts of history are selected and who is centered in the research can have long-term implications for the perception of affirmative action policy. The absence of a positionality statement means that the reader must often make their own assumption as to why the scholar made the choice to approach their exploration in a certain way. Additionally, the lack of positionality presents significant challenges when integrating historical work with other fields of study. Certain portions of historical overviews may fall under a given framework, such as Katznelson's portrayal of interest convergence. However, his application is inconsistent. While Katznelson's presentation acknowledges with hindsight the harm of racist actions and their negative influence on policies that are credited with

serving all, his approach continues the systemic harm that is caused when scholars fail to apply the lessons they point to in their own work and continually center those in power. This presentation frames the conversation around affirmative action in an inconsistent manner: at times as a response to decades of pro-White policy and at times as a manifestation of the government's new progressive commitment to equality. For writers of *amici* looking to defend affirmative action or other diversity efforts in the court, this recount of history is incomplete.

Legal scholars often group the creation of affirmative action with the increased number of federal policies addressing social and market changes after World War II. In *The Color of Law*, Rothstein (2017) complemented historical overviews with a critical race critique of the aggregated influence that pro-White and anti-Black laws have had in institutionalizing racial disparity within the United States. Affirmative action is explored as one of these policies. Rothstein embraced some CRT tenets and very briefly presented the colonial and pre-World War II laws and policies that further institutionalized racism as accepted social truths. While Rothstein focused on housing segregation within this work, the exploration of these same laws through non-White-centric storytelling depicted the tangible need for racial reparations in a way that historical overviews often fail to do. Furthermore, Rothstein portrayed the beginnings of affirmative action as a way to address *de jure* segregation in addition to the *de facto* segregation that simply existed in the fabric of American life. In other words, affirmative action was (and is) necessary not only to address the segregation that exists due to the embedded cultural and societal norms built on our nation’s oppressive history (*de facto* segregation), but it was (and is) necessary to address the judicially maintained segregation (*de jure* segregation) and racial disparity. How this is presented through *amicus* briefs plays a significant role in acknowledging

that the Court has played the role of policymaker in many instances and should, therefore, rule acknowledging the social implications of its past.

Additionally, in the preface to the book *The Color of Law*, Rothstein (2017) directly addressed the discomfort Americans feel in discussing the unequal treatment of races. “Over the past few decades, we have developed euphemisms to help us forget how we, as a nation, have segregated African American citizens” (p. XVI). Rothstein emphasized the need to accept responsibility for our founding laws, “By failing to recognize that we now live with the severe, enduring effects of *de jure* segregations, we avoid confronting our constitutional obligation to reverse it” (p. XI).

Brown et al. v. Board of Education of Topeka et al. (1954) is often cited as the springboard to civil rights legislation of the mid-twentieth century including affirmative action. In its unanimous ruling, the Supreme Court overturned the notion of “separate but equal” in public education. In doing so, the Court declared the previously upheld *de jure* segregation unconstitutional and required laws and policies that enforced segregation to change. Though a significant boost for civil rights advocates, this ruling did nothing to address the *de facto* segregation that existed and had been institutionalized through laws that the ruling now declared unconstitutional. Instead, the *Brown* ruling was wildly unpopular and led to manifestations of White power across the country.

The significant sacrifices, relentlessness, and mass organization efforts on behalf of Black Civil Rights leaders forced the passing and signing of the Civil Rights Act of 1964. The Act provided protection against workplace, hiring, and firing discrimination on the basis of race, color, religion, sex, or national origin. But like with the *Brown* ruling, simply ending overt and legal discrimination was not enough; after decades of pro-White policy, affirmative steps had to

be taken in pursuit of equity in opportunity. While Katznelson (2005), Urofsky (2020), Rai and Critzer (2000), and many other legal historians presented laws as constitutional until they are declared to not be by the Courts, Rothstein (2017) wrote,

> I reject the widespread view that an action is not unconstitutional until the Supreme Court says so. Few Americans think that racial segregation in schools was constitutional before 1954, when the Supreme Court prohibited it. Rather, segregation was always unconstitutional, although misguided Supreme Court majority mistakenly failed to recognize this. (p. x-xi)

If the constitutionality or justness of segregation is not bound by the Court and its interpretation of them, then neither is the effect of the same. This shift in perspective allows for a more holistic understanding of the movements that led to the creation of affirmative action and how the policy can be properly defended.

While President John F. Kennedy is credited with the first mention of affirmative action in federal policy, his successor, President Lyndon Johnson, is often credited with formalizing the concept and expanding it across industries. It is noteworthy that by the time President Lyndon Johnson addressed the 1965 graduating class at Howard University and famously touted this policy, the concept of affirmative action had already taken shape and was described as a measure of corrective action intended to right the systemic injustices born from enslavement but continued and propelled through policy. Katznelson (2005) described Johnson's vision for affirmative action as a revolutionary one that never fully took shape. The author writes, "But a first cousin, so to speak, a more limited race-conscious version of affirmative action, did soon develop" (p. 144). Katznelson (2005) and Urofsky (2020) continually placed White leaders, and specifically President Lyndon Johnson, at the helm of progress toward racial equity as opposed

to the many civil rights leaders whose actions pushed the administration to create policy to address inequity. Placing sole or even main recognition on the creation of affirmative action on White lawmakers creates flaws in its judicial and constitutional defense. Centering White policymakers in this conversation portrays affirmative action as an altruistic gift by well-intentioned White individuals in power instead of a hard-fought and then negotiated policy born of the demands of people seeking justice and opportunity after centuries of legalized oppression.

Legal scholars have attempted to provide additional context to the creation of affirmative action. Rai and Critzer (2000) presented a historical legal analysis of affirmative actions taken by the federal government to desegregate opportunity specifically as it pertains to Black Americans. Their overview of policy is a useful timeline of causal policy events that grew the initial idea of affirmative action into what it is today. However, the authors' positivist lens ignored the lived experiences of the communities these policies were intended to serve, and like Katznelson (2005), they overtly praised White male political figures for their personal contributions to the expansion of affirmative action while ignoring the activists involved in struggles and who shaped policies from the ground. This approach to the documentation of affirmative action policy presents challenges in telling an accurate story of the evolution of the policy and its effect. Further, a strict focus solely on its legal evolution ignores the societal implementation and impact of the policy, thus making the isolated use of legal reviews insufficient when exploring the academy's investment in affirmative action or analyzing the impact it has realistically had on hiring or admissions.

I was only able to find a more complete history of the policy's development, which included the specific roles of Black leaders like Philip Randolph and Hobart Taylor Jr, through tailored research. This purposeful search for the names of those omitted from mainstream

literature yielded a fuller story of activism and persistence. In 1941, Black union leader and member of the Sleeping Car Porters, Philip Randolph, pushed Eisenhower towards the passing of Executive Order 8802 under the threat of a mass march on Washington, D.C., scheduled for just five days later (Stokes et al., 2003). Randolph collectivized the power of the Black workforce in a show of unified strength to push the administration to not only acknowledge the hiring discrimination taking place within the defense industry, but to recognize that active steps needed to be taken to dissuade this behavior. This order and the formation of the Fair Employment Practice Committee (FEPC) became an example for the future creation of the Equal Employment Opportunity Commission (EEOC). The FEPC protected against the discrimination of racial ethnic, and religious minorities by employers who supported war efforts and, for the first time, collected post-employment records from organizations for the purpose of tracking hiring (Boris, 1998, p. 142.) Gender and sex were notably omitted from FEPC efforts.

Randolph continued his work as a Black labor leader and eventually joined forces with the National Association for the Advancement of Colored People (NAACP) to pressure the government to enforce the *Brown v. Board* ruling through a protest by 25,000 citizens on the steps of the Lincoln Memorial in 1957. Randolph's unwavering commitment to the Black labor movement led to his leadership of the Negro American Labor Council, where he served as president and helped preside over the famous March on Washington for Jobs and Freedom on August 28, 1963. This mass mobilization of over 250,000 Americans pressured the passing of the Civil Rights Act of 1964, which was foundational in the creation of affirmative action policy. The most commonly named leaders of the March on Washington included John R. Lewis (Director of the Student Nonviolent Coordinating Committee), Whitney Young (Executive Director of the National Urban League), James L. Farmer Jr. (Director of the Congress of Racial

Equality), Roy Wilkins (Executive Secretary for the NAACP), and Martin Luther King Jr. (President of the Southern Christian leadership Conference).

Even more hidden in historical texts are the women who participated in the March on Washington and held critical roles in the civil rights movement. Collier-Thomas and Franklin (2001) elevate many of these stories in their book *Sisters in the Struggle: African American Women in the Civil Rights-Black Power Movement*. Dorothy Height (2001) named Pauli Murray, Deborah Partridge Wolfe, and Anna Arnold Hedgeman as just some of the Black women prevented from speaking at the March on Washington but nevertheless leaders in the movement. Height (2001) wrote,

> The men seemed to feel that women were digressing and pulling the discussion off the main track. But it wasn't just a male attitude. There were black women who felt that we needed to stick with the "real" issue of race. It was thought that we were making a lot of fuss about an insignificant issue, that we did not recognize that the March was about racism, not sexism. (p. 86).

In the end, women were not included as speakers and are often overlooked in the historical narrative of the battle for civil rights and affirmative action. Height (2001) reflects, "Essentially, the race issue, and not the gender issue, had won out again. In the end, like everyone else, we were thrilled by the success of the March" (p. 88). Their experience speaks of the importance of recognizing the intersectionality of identities and representation when considering historical depiction.

Within the executive branch and in response to the pressures from the civil rights movement, Hobart Taylor Jr. was hired by Lyndon Johnson in 1961 to help draft Executive Order 10925 (Hannah-Jones, 2024). It was Taylor who shaped the language of the executive

order and who ultimately gave the policy its name, affirmative action. Despite this, his name is largely omitted from the literature, and when included, it ignores his own story as the descendant of enslaved people. The absence of his story and identities further credits affirmative action as a White gift.

The inclusion of these names in the history of affirmative action is essential to its defense. The centering of their stories depicts an image of inequality forged by racist law and whose dismantling can only occur through affirmative steps. Centering Whiteness in this discussion glosses through the oppression of minorities and supports the racist idea that affirmative action was a bandage, graciously applied by those in power, to allow time for those who did not join in on White progress to heal themselves and catch up.

1970s and Higher Education

In order to more fully understand the stances taken by institutions of higher education in the *Bakke* case, it is important to explore what was happening in the academy of the time. Tosh (2022) wrote, "the underlying principle of all historical work is that the subject of our enquiry must not be wrenched from its setting" (p. 10). While I do not claim this study as a historical work, I invoke history as an important tool for contextualization. This section provides a limited and brief description of the setting in which the *Bakke amicus* briefs were written.

Increased federal funding in the mid-1900s through the G.I. bill and educational grants brought about significant expansion of higher education (Rudolph, 1977). Simultaneously, the end of legal segregation in the classrooms and the use of affirmative action in admissions increased diverse representation in the academy. Largely, the academy shifted to be seen as a resource and tool available widely to anyone interested in pursuing continued education and opportunity. "Enrollments soared, faculty hiring increased rapidly, and new construction

abounded" (Mc Intyre, 1974, p.73). Newman studied this growth and its effect on the higher education landscape within the reports requested by the federal government on the status of higher education. In a summary of the first report, he wrote, "college presidents [saw] growth as the primary vehicle for solving problems" (Newman, 1972, p. 30). Within this exploration, Newman noted that this expansion was not necessarily thoughtfully done in a manner that bettered the academic experience and further questioned what this meant within the academy's mission or purpose.

The growth of higher education paralleled increased student involvement and activism as the civil rights movement and later antiwar movement found homes on college campuses (Rudolph (1977). The role of students in these democratic movements was popularly portrayed, and the academy was often seen, rightfully or not, as a hub for liberal ideology.

Major works often take a colorblind approach to their description of this growth (Rudolph, 1977; Newman, 1972; Mc Intyre, 1974). They describe the expansion of the academy as singularly experienced and mostly ignore the experiences of minority-serving institutions during this time. Rudolph's very limited exploration of the unique experiences of minoritized individuals contains uncited generalizations that further harmed efforts to increase access by legitimizing claims of mismatching. Of higher education shifting its focus to the education of all, Rudolph (1977) wrote,

> Once the instruments of the elite and then of the middle class, they were required to adapt their courses of study to all classes–to first-generation college students and minorities, especially blacks, for many of whom the college experience was in some ways a laboratory and culture shock. (p. 282)

This type of limited exploration portrays the expansion of higher education as a failure by institutions to reject the pressures to expand access and the diversification of the student body as a misstep that required educators to lower the standards of the academy. In other words, it portrays the admission of minoritized individuals as leading to the lowering of standards. Mc Intyre (1974) provides additional context by portraying instead the failure of higher education to understand that new populations, including minority students, "would have needs and interests different from those of middle-class white students" (p.44).

The expansion of the academy slowed in the 1970s due to reduced federal resources and a weakened national economy. Institutions of higher education were forced to grapple with the effects of their rapid growth and their quick but largely unplanned shift toward mass education. They did this while under the vigilance of critics of what was portrayed as a leftist expansion.

> The American people are no longer mesmerized by higher education. Campus disruptions, a cost-conscious economy, changing goals, and unemployed college-trained professionals all suggest that budgets will be scrutinized before appropriations are approved or gifts offered. (Mc Intyre, 1974, p. 47)

It was at this intersection that the academy came to the defense of the University of California and affirmative action in *Bakke*.

Regents of the University of California v. Bakke

With limited guidelines available on how universities and colleges could employ affirmative action in their admissions efforts, institutions were largely left to interpret and apply the policy as they saw fit. It was somewhat inevitable, then, that the Court would have a say in this implementation. *Regents of the University of California v. Bakke* was not the first affirmative action case brought to the Supreme Court. In fact, it wasn't even the first admissions case. In

1974, *Defunis v. Odegard* made it all the way to the Supreme Court. However, by the time the case was heard, the plaintiff, Marc Defunis, had graduated from the University of Washington Law School, and a decision on his specific case was moot. The Court punted, knowing that another case would shortly follow as tension and public interest on the outcome of affirmative action cases grew. This created a perfect storm for a landmark case that had the potential to influence civil rights legislation across the country (Ball, 2000). This was not lost on universities and colleges who found themselves in prime conditions to influence the future of affirmative action and its implementation. That opportunity came a few short years later with a case that was already working its way through the California court system.

Urofsky (2020) presented an in-depth review of the events leading to the Supreme Court's 1978 ruling on *Regents v. Bakke*. Of the plaintiff, the author wrote, "Alan Paul Bakke had been born in 1940 and stood at just under 6 feet, and his blonde hair and blue eyes testified to his Norwegian ancestry" (p. 141). Bakke grew up middle class; he began his career in the military, serving as a Marine and eventually working for NASA. At the age of 32, Bakke decided to pursue medical school. He unsuccessfully applied to medical schools around the country in 1972 and again in 1973. Instead of identifying what in his applications could have caused his rejection from programs around the country, Bakke hired attorney Reynold Colvin to file suit against the University of California at Davis when he learned that minority students with lower application scores than him had been accepted while he had been denied. According to Hannah-Jones (2024),

> A friend described Bakke as developing an "almost religious zeal" to fight what he felt was a system that discriminated against white people in favor of so-called

> minorities. Bakke decided to sue, claiming he had been a victim of "reverse" discrimination. (sect. 4)

Bakke's attorney claimed that the University of California's affirmative action plan discriminated against him on the basis of race and, therefore, violated the 1964 Civil Rights Act. The concept of reverse racism, a White construct, was the pivotal argument for Bakke and his attorneys (Allen, 1977).

At the time, University of California's medical school admitted approximately 50 students each year (Ball, 2000, p. 49). Of those 50, eight spots, or 16 percent, were held for minorities in what Donald Reidnar, the lead defender for the University of California, called a goal for the school. "Reidnar Claimed that preferential treatment for minorities did not violate the Constitution or the Civil Rights Act when the school used race as a positive factor to overcome centuries of slavery and race discrimination" (Urofsky, 2020, p. 142)

The lawsuit made its way through lower courts and eventually into the California Supreme Court which ruled in favor of Bakke. Not only did the California Supreme Court rule that the University of California had to admit Alan Bakke into its medical program and cover his legal fees, but Judge Staley Mosk attacked the constitutionality of any preferential treatment by race. He went on to advise the University on how it could diversify its student populations in manners the court deemed constitutional. While civil rights activists pressured the University of California to simply accept the ruling in fear of a Supreme Court decision that would dismantle affirmative action efforts, the case was appealed and accepted to be heard in 1977 (Allen, 1977). *Regents v. Bakke* quickly gained national attention, and constituents around the country sought to persuade the outcome in their favor. The academy was no different.

Amicus Curiae Briefs

Fifty-nine *amicus* briefs were filed with the Supreme Court in *Regents v. Bakke*. The number of *amicus* briefs filed signified the high level of attention and potential impact the *Bakke* ruling could have across the country. In September of 1977, *The Washington Post* published an article entitled "57 Law Briefs on *Bakke*." In the article, released before the last two briefs were filed, the *Post* drew attention to the diversity of representation in the briefs by private entities, civil liberties unions, government offices, and members of the academy. Of the total briefs filed, 42 supported the University of California and 11 supported Bakke. Five briefs were filed by independently named schools, and another eight of them represented higher education affiliate organizations. All 13 were in support of the University of California.

The outcome of *Regents v. Bakke* is widely studied and debated in literature across fields of study. In a 5-4 split decision, the Court simultaneously sided with Alan Bakke and upheld the use of affirmative action. Justice Lewis Powell handed down a complex legal argument that set guidance for all future affirmative action cases. In the opinion, Justice Powell presented affirmative action as a necessary tool but struck down the use of racial quotas as unconstitutional. Justice Powell went on to cite Harvard University's consideration of race in admissions as a model for others and goes as far as including its description of the proper implementation of affirmative action as an addendum to the opinion of the Court *(Regents of the University of California v. Bakke*, 1978).

Justice Powell's use of Harvard as an example most clearly demonstrates the influence that universities not directly represented in the case had on the outcome. The addendum descriptor of Harvard's admissions policies was submitted to the court as part of the *amicus*

curiae brief jointly filed by Columbia University, Harvard University, Stanford University, and the University of Pennsylvania *(Regents of the University of California v. Bakke*, 1978).

Despite this, *amicus curiae* briefs and their influence on cases, and specifically the *Bakke* case, are largely understated in affirmative action literature, especially within educational and historical studies which often focus on the outcome of the case and its effects. Their omission from the narrative by historians and higher-ed scholars ignores a major avenue of influence for the academy and thus fails to illustrate and teach how future academics can impact modern threats to affirmative action and diversity initiatives. Even Ball (2000), a political scientist whose body of work covers civil rights cases and has been published in law review journals, only minimally explores the role of *amici* in the book *The Bakke Case: Race, Education, and Affirmative Action*. Ball dedicated a short section to describing the *amici* submitted in general and outlining some of the arguments these presented to the Court. This overview was broadly summarized by Ball.

> Other than the basic premise held by all of [the *amici*] that, ideally, there should be diversity in the college classroom, two stark positions emerged: Either the Constitution is color-blind and prohibits preferential racial discrimination, or the Constitution is flexible enough to tolerate the temporary use of a preferential program that use race and ethnicity to enable minority students to enter professional schools. (p. 84)

What Ball (2000) failed to explore was the weighted nuances between how the *amici* were presented and received. Whose ideas were heard by the Justices; which *amici* influenced case outcome and how do we know that; how do the *amici's* authors represent or not the ideas of their time; and why were the submitting institutions so invested in the Court's decision? The decision to present *amicus* briefs in this cumulative manner overlooks a major point of influence

for vested parties and feeds the commonly accepted notion that the law and Court view all parties equally and are not influenced by power or systemic racial inequities in our society.

Alleyne (1981) provided a much more critical look at the impact of *amicus* briefs on the outcome of the *Bakke* case. Specifically, Alleyne questioned the Court's focus on Harvard's admissions policy as presented through their own brief. In the Court Opinion, Justice Powell used Harvard's description of their use of affirmative action as an example for others to follow. He emphasized that if Harvard could consider race without the use of quotas and still meet their goal of a diverse student body, so could other universities. But, as Alleyne points out, "The Court's opinion does not observe that the student body at Harvard College was about eight percent black, year after year" (p. 291). Dershowitz and Hanft (1979) also pointed out this same discrepancy and noted, "One would expect the percentage of specified minority enrollees produced by such a system to vacillate widely from year to year, reflecting changes in each year's applicant pool" (382). They reported a jump in minority admissions from 1972 to 1973 from three percent to seven percent, respectively. The admissions numbers then held steady at seven percent until 1981, with the notable exception of 1980, when they jumped to eight percent (Melnick, 1978).

These findings are indicative of the bias afforded towards a powerful institution like Harvard University. Despite briefs filed by universities across the country, many of whom are much more similarly structured to the University of California's Medical School, Justice Powell, who received his Master of Laws degree at Harvard University in 1932, chose this one to become a model for how affirmative action is implemented across industries. Dershowitz and Hanft (1979) pointed to three main issues with this decision: the fact that Harvard's admissions process was intended for undergraduate admissions despite the case being for a professional

graduate program, Harvard's legal obligations as a private institution, and third, that "an admissions system developed in the context of Harvard's unique abundance of wealth and enormous pool of applicants will necessarily have only limited applicability at institutions with lesser resources" (p. 383).

Dershowitz and Haft's (1979) critique was contextualized through Harvard's history of discriminatory admissions practices,

> By approving the Harvard College system- the paradigm of the "diversity-discretion model" of admissions-Mr. Justice Powell legitimated an admissions process that is inherently capable of gross abuse and that, as we will demonstrate, has in fact been deliberately manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions. (p. 385)

Their study incorporated historical context beyond what was usually available in legal review journals at this time and therefore raised important questions regarding the Court's bias and how it affects the interpretation of *amicus* briefs. The study rightfully pointed out that affirmative action was not a solution to the deeply rooted racial injustice in the United States. However, the demand that a viable solution must singularly address all the injustices of the past is an evasion of responsibility that further curtails progress. Instead, as scholars, we have a responsibility to point out these limitations, provide critical analysis, and continue to push forward, knowing that progress may be slow.

Studies on the *Bakke* case that fail to contextualize *amicus* briefs' impact on the outcome of the case often overly praise Justice Powell for his elegant balance of support and dissent. The Court's decision and opinion were strong policy statements, as opposed to what many expected to be a legal explanation. As such, the *Bakke* case is not only a monumental legal decision that

framed the use of affirmative action from there on out; it is also uniquely poised to serve as a case study for the role universities can have in influencing policy through their use of *amicus curiae* briefs. Additionally, the potentially unintended and negative effect of a single brief is a reminder to future writers of the importance of critically approaching their submissions. It is important that those who choose to come to affirmative action's defense are aware of the Court's proclivity towards a maintained power structure and present information and research in a manner that limits the opportunity for misuse or harm then or in the future.

Impact of Amicus Briefs

Outside of the *Bakke* trial, legal scholars have studied the effect of *amicus curiae* briefs on Court decisions to determine their degree of influence and value. Scholars have established that *amicus* briefs do impact the Court and its decisions (Calderia and Wright,1988; McGuire, 1990; Kearney and Merrill, 2000). However, as Collins (2004) pointed out, earlier work failed to explore why *amici* are successful. Most studies focused on large sample legal document analyses. By not situating the studies within their time or taking into account context, early studies fail to provide meaningful insight into how institutions can shape the Court through their briefs.

Collins (2004) hypothesized that having accepted that *amici* affect Court action, it is possible to discern that "*amicus* briefs are efficacious because they signal to the Court that wide variety of outsiders to the suit will be affected by the Court's decision" (p. 808) and because they present additional "social scientific, legal, or political information" (p. 808) that litigants can use in their arguments. Collins reviewed 32 years of Court decisions by mathematically analyzing the outcome of a case in relation to *amici* participation. Through this study, Collins found that these hypotheses were not necessarily supported and external party participation through *amicus*

briefs was not necessarily predictive of Court decision. Collins recommended that interested parties were better off organizing and submitting briefs in coalition than as individual parties. However, this analysis did not recognize the Supreme Court as an entity that despite its widespread influence on policy, is also the product of the current political and social landscape. Justices are appointed and approved within a system built to uphold White supremacy, and while the Court has ruled in favor of progressive reform at times, it does so often by benefiting a majority interpretation of documents that, in their own right, defend an existing power structure. In ignoring this, Collins failed to differentiate between a heavily followed Court case on the eve of a major civil rights discussion and a case with limited following but significant impact. The author also failed to recognize the individual bias of the Justices and how this affected the relative influence of a brief.

In later work, Collins, Corley, and Hamner (2015) studied the influence of *amicus* briefs on Court majority opinions by using plagiarism detection software. The researchers "collected the texts of Supreme Court majority opinions and *amicus* briefs during the 2002-2004 term" (p. 927), amounting to 229 opinions and 2,016 briefs. Briefs and opinions were then scanned by software to identify matching strings of six words or more at a minimum match percentage of 80% to allow for slight alterations in phrasing. The authors took into account the quality of the briefs as they pertained to cognitive clarity and use of plain language, lower Court congruence, and identity of the Justices. They found that "under certain conditions, *amicus* briefs can have a substantial influence on Supreme Court opinion, evincing the ability of friend of the Court to contribute to federal law" (p.938). As part of "certain conditions," they found that *amici* of higher quality were cited more, as well as briefs that echoed the opinions of lower courts. The authors found that briefs filed by certain parties also held a higher scope of influence and wrote,

"this suggests that the Court does view certain elite interests differently than other *amici* and looks favorably on the information supplied by these high status *amici*" (p. 937).

These findings are reassuring to universities who seek to influence decisions and reinforce the use of clear language and attention to logical reasoning. However, the lack of contextualization or focus on a particular case or set of *amici* fails to distinguish when the Court is more likely to be influenced. As mentioned in prior critiques, Collins, Corley, and Hamner (2015) failed to recognize the bias of Justices. While they did acknowledge the different gravity placed on briefs based on who submits the brief, this is attributed to the strength of the organization or its status which is entirely subjective. The authors did not discuss how this status is determined by the Court.

Scholars Marin, Horn, Miksch, Garces, and Yun, collectively and independently explored the use of use of extra-legal sources in *amici* briefs (Marin et al., 2018; Garces et al., 2019; Horn et al. 2020). Broadly, these studies looked at how non-legal scholarly research is presented in *amicus* briefs to affect policy change. All of them analyzed the 92 *amici* submitted to the Supreme Court for *Fisher I* (*Fisher v. University of Texas at Austin*). As in *Bakke*, *Fisher I*'s potential broad influence on affirmative action resulted in a large number of *amici* submitted by a wide range of parties.

Marin et al. (2018) identified different types of resources cited in *amicus* briefs to determine what types of extra-legal sources were most cited by the type of organization submitting the brief. The scholars then identified what type of resources were most used by whom the party supported. Among their findings, Marin et al. reported that *amici* supporting the University of Texas, and therefore in support of affirmative action, cited non-legal journal articles above any other reference type. Briefs supporting Fisher primarily cited media sources,

which “includes newspapers, magazines, news shows, and blogs” (p. 14). Though insightful in demonstrating the use of academic sources in *amicus* briefs, the tie between the research presented and what the Justices consider in the brief is not analyzed. Furthermore, since this study only looked at a singular case, the authors’ broad conclusions on types of sources cited by *amicus* briefs are unsupported, and therefore, their recommendations to researchers and policymakers are somewhat limited.

Horn et al. (2020) built on this prior work by delving specifically into the social science research presented in the *amicus* briefs submitted in *Fisher I* that hoped to influence educational policy. Instead of using citations to tally the use of types of literature (i.e., non-legal journal, media, law journal, book), this study tallies the different methodologies used in cited social science research (i.e., quantitative nonexperimental, analytic, mixed methodology). By contextualizing their data within existing literature, Horn et al. (2020) concluded

> that social scientists and educational policy makers may need to think of their engagement with the courts through *amicus* briefs not only through the research they cite, but also through the development of a validity hierarchy developed with the framework of the court in mind. (p. 468)

Like in the prior study, the limited focus on a single case makes it difficult to validate broader takeaways, especially since the findings were not contextualized within the societal circumstances around the case. Both studies also failed to recognize the bias of the Courts and instead assumed that all briefs, regardless of who filed them, were weighted equally by the Justices.

Garces, Marin, and Horn (2019) sought to bridge the intersection between the academy and legal briefs and identified *amici* as translators of academic research to the Court in an effort

to shape diversity-related policy. The scholars' continued focus on a single case allowed a deeper study into the *amici* and presented a more substantial perspective on the similarities and differences among the briefs' approach to presenting research. The scholars explored arguments presented by the individual briefs into varied categories. Through this approach, Garces et al. (2019) identified how research pertinent to defending race-conscious admissions programs could be presented in briefs but suggested that researchers search for alternative means of distributing their findings so that they can be echoed through a variety of sources outside of journal items. In doing so, the scholars recognize the importance of media in influencing society and that presentation in briefs can have significant weight. The scholars deputize researchers of diversity initiatives to seek new ways of distributing their research so that it can be used in policy-influencing documents such as *amicus* briefs.

Understanding the mediums of information used in *amicus* briefs can help shape future writer's decisions on what to include. However, the critical explorations of the topics presented by briefs are mostly unavailable in the literature. Young (2019) explored the rhetoric presented by *amici* writers in *Fisher v. Texas* and its effect on the Court Opinion using a Structured Topical Model (STM). Young's across-case analysis reveals the duplicity of arguments made during this case in support of affirmative action and in the way these arguments are presented. "The briefs analyzed here only seem to demonstrate how the legal process can sanitize and deemphasize the lived experiences of *amici* directly impacted by affirmative action policies" (Young, 2019, p. 74). While not explicitly said, the scholar's observation of the lack of individual voice in briefs submitted by parties deeply impacted by the outcome of the case is a strong critique of the whitening of arguments as presented to the Court. Young adds to a body of literature that helps future writers understand rhetoric presented in favor of affirmative action and the interrelated

nature of *amici* in order to strengthen future arguments in defense of diversity initiatives. However, Young, like others, fails to analyze the arguments themselves for the long-term merit they carry and instead positions all defense of affirmative action as positive. This ignores the structural racism that exists within a Court system that has continuously failed people of color and ignores the harm that can be made by well-intentioned White institutions in their attempt to sway the same.

Opportunities for Further Study

Despite the broad and increasing use of *amicus* briefs by universities to shape Court decisions, literature that explores the arguments presented remains surface-level overviews. The lack of critical analysis of these arguments continues to position higher education institutions as unquestionable defendants of justice, and subsequent studies focus more on how to make the effect of *amici* more pronounced than on understanding the role that these institutions have played in justifying the current legal discourse around the affirmative action.

In the monumental affirmative action case, *Regents v. Bakke*, *amicus* briefs are largely ignored by the literature despite their substantial influence on the outcome of the case and longstanding affirmative action policy banning the use of quotas. The research that exists in this area is often narrowly focused within a legal context or fails to consider the societal pressures and history around the Supreme Court and cases. By applying a CRT framework to an analysis of self-portrayal in these documents, I incorporate the scholarship of higher education scholars and historians to better prepare *amicus* brief writers in the future defense of diversity efforts. As scholars of higher education committed to a continued democratization of our institutions, we must grapple with the way our good intentions have fed limiting ideas around affirmative action that were used to dismantle the policy and are now being leveraged against all diversity and

equity initiatives. This level of study, beginning with our institutions' *amicus* briefs under *Bakke, can better prepare us to think long*-term as we're called to defend diversity efforts against well-funded and scaling attacks.

Chapter 3: Research Design

The questions presented in this study are born from an intersectional approach to available literature and framed through CRT. I ask, (1) how did members of the academy present affirmative action as part of their own mission or purpose within *amicus* briefs for *Bakke*, and (2) what ideology is embedded in these arguments? In this chapter, I present my research design. I begin with my own positionality, which inevitably affects the questions I ask and my framing of the issue. I then present the rationale behind my research design, use of qualitative content analysis, and methods, which include steps taken to increase the trustworthiness of the study.

Positionality

My prior experiences and my identities play out within this study and, therefore, create some degree of subjectivity in my findings. Peshkin (1988) wrote of subjectivity as pervasive in all research, "It is an amalgam of the persuasions that stems from the circumstances of one's class, statuses, and values interacting with the particulars of one's object of investigation. Our persuasions vary in time and in intensity" (p. 17). It is imperative to recognize and name these persuasions within the study. "By this consciousness I can possibly escape the thwarting biases that subjectivity engenders, while attaining the singular perspective its special persuasions promise" (Peshkin, 1988, p. 21).

My identities and experiences have shaped and grown my interest in this topic. As a Latiné, immigrant, woman, I have spent the entirety of my professional career as a minoritized individual in predominantly White and male spaces, within and outside of academia. I have both benefited from affirmative action practices and advocated for its use in hiring searches. However, my exposure to this policy has not always been dictated by pro-affirmative action ideology.

I was born into a White-presenting, upper-class Colombian family in Bogota. When my family emigrated to the United States for the first time, it lost many of the societal privileges our identities gave us in our home country. In an attempt to control this process, my parents stressed integration, emphasized the loss of accents, and did what they could to force our lives into what American television taught them was a standard privileged suburban lifestyle. We were taught to associate with our White neighbors and colleagues and emphasize our socio-economic status and lighter skin tone as the most important aspects of our identities. Our early exposure to the English language made this easier for my sisters and me than for my parents, who lived mostly isolated in our suburban life except from other similarly situated white-collar immigrant families.

My own White-passing experiences growing up made me privy to many conversations around affirmative action that I do not believe I would have been exposed to otherwise. I grew up afraid of the term, believing that affirmative action was a way for less qualified people to jump above the rest. I was praised for not emphasizing my otherness and feared being awarded something because of it instead of my own merits. While attending college at a predominantly White institution (PWI), I began challenging this conditioning and exploring the otherness of my own identities and how these had shaped my experiences. I came to understand that despite my parents' pursuit of privilege and acceptance, our existence in the spaces we inhabited was conditional. It wasn't until the end of my undergraduate studies that I began exploring the intersection of my own identities and experiences with U.S. law and policy. I have continued this pursuit ever since and, for the last several years, have applied it to my study of and appreciation for affirmative action.

I share these experiences because the key terminology to which I was exposed at these disparate points in my life did not differ. Both spoke of equality, merit, hard work, suffrage, and fairness. However, they were spoken by different people, with different goals, and assuming

different premises. The concepts were not stagnant despite a single definition but subjective, socially constructed, and influenced by power.

These concepts resurfaced within my first graduate degree, where I explored Brazil's conditional cash transfer programs and their service to so-called meninos da rua, or street children. I became increasingly aware of positioning and the importance of language use in building support for social programs. My career in international development eventually led me to the field of higher education. By this point, attacks on affirmative action in university admissions had returned to the front pages of newspapers.

Within my time in higher education, I spent four years of my professional life working within a law school where I worked with students and eventually carried the title of Director of Diversity, Equity, and Inclusion. As such, the anticipation of the outcome of the most recent affirmative action court case had a direct and immediate impact on the work I did while embarking on this study. The relationships I develop with students with underrepresented or marginalized identities serve as a constant reminder of the change that is coming to the legal profession. The students' active participation in campus life, advocacy, and commitment to improving the lived experiences of people with marginalized identities with the law inspires me daily. I am hopeful for the influence that can be had. I, therefore, initially approached these research questions as a means to better understand how we, as members of the academy, can best protect a necessary though flawed policy.

Because I used preexisting text for my study instead of engaging in active interviews, the effect of my positionality was limited to my research questions and analysis, and I took active steps to reduce subjectivity through a thorough exploration of methodology and methods. I apply CRT as it aids me in conceptualizing my positionality within a framework that can be used to better understand concepts and themes that extend beyond my own experiences.

Methodology

I approach this study from a social constructionist qualitative paradigm. Social constructionists believe that reality is constructed "through ongoing communication and negotiation of meaning and purpose" (Bess & Dee, 2008, p. 55). Additionally, "according to constructionists, knowledge and truth are created, not discovered by the mind, and they emphasize the pluralistic character of reality expressible in a variety of symbol and language systems" (Karataş-Özkan & Murphy, 2010, p. 454). I apply this paradigm not simply to my analysis of the themes presented in an amicus brief but to my understanding of organizations and, in this case, the American legal system. Laws are often portrayed as absolute truths whose meaning is stagnant through time unless interrupted or reviewed by the courts. At these points of review, court justices can participate in the reinterpretation of meaning. The highest level for this interpretation belongs to the United States Supreme Court. This emphasis on positivism and absolute and measurable reality embeds "a bias of [its] own—the domination of rationality of science itself, to the exclusion of values and subjectivity, even when there may be some social justification for it" (Bess & Dee, 2008, p. 62).

In contrast to this positivist view, I believe the reality of our legal system is a social construct where continued dialogue shapes meaning and experience. The Court, though formally interpreting this reality, is also socially constructed and, therefore, constantly influenced by society. *Amicus* briefs are one of the direct points of influence for Justices interpreting the law. As such, I recognize them as influential documents that reflect the socially constructed reality of the time regardless of whether they are directly quoted by Justices in final opinions. This understanding means that the entire rationale presented by higher education institutions as to how the defense of affirmative action aligns with their mission is important to identify. An open

analysis that does not seek specific pre-determined themes is necessary in order to properly answer the primary research question.

Through the application of critical theory, I understand that not all members of society have the same level of influence in the social construction of organizations. This means that the influence of an *amicus* brief is affected by how the submitting entity is perceived by the Justices and whether that ideology aligns with the deep structure of the Court (Bess & Dee, 2008). This power structure is influenced by the existing racism in the deep structure of all institutions. Additionally embedded in the briefs is ideology that shapes our reality. I can further understand how the ideology presented in the briefs was manifested by applying CRT to the analysis of systematically coded themes.

Qualitative Content Analysis

Amicus curiae briefs presented to the Supreme Court are thoughtfully and meticulously composed and edited in the hopes that they will be able to sway the direction of the Court towards an outcome that most aligns with the writers' opinions. In addition to the writer's argument and supporting content, briefs include descriptions of submitting organizations and alignment to the represented stance. A qualitative content analysis of this section of the briefs submitted in support of affirmative action for a single case can provide insight into how institutions of higher education present diversity as part of their mission at a given point in time. This thorough analysis and systemic coding of complex text identifies all existing themes without pre-conceived expectations of findings. Applying CRT to analyze the themes identified by this process provides insight into the longer-term implications of the concepts embedded in the briefs, which can aid future writers as they hope to influence the Court's review of diversity and equity initiatives.

Schreier (2014) defined "qualitative content analysis [as] a method for systemically describing the meaning of qualitative data" (p. 170). Hsieh and Shannon (2005) added, "qualitative content analysis is defined as a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns" (p. 1278). Each of these descriptive features is essential to this study as *amicus* briefs are both lengthy and substantively dense. Through the use of qualitative content analysis, I am able to review a larger sample for the study, increasing representation, and focus on identifying the themes that answer my primary research question. Qualitative content analysis allows me to identify the themes embedded within the briefs regardless of validity or ideological alignment using systematic coding. Through CRT, I understand that because of the existing racism within our institutions, as well as the role of interest convergence in judicial review, the validity of an argument does not necessarily dictate its influence on the Court. As such, identifying all themes, regardless of their presentation of ideology or their validity, is imperative to identifying the concepts and language around affirmative action that higher education institutions chose in their submissions for *Bakke*.

These briefs were the first opportunity for institutions of higher education to present their views on affirmative action to the Supreme Court. This makes the themes and language they presented foundational to what would become a decades-long interaction on the subject where schools communicate through *amicus* briefs, and the Court responds in rulings and opinions. By engaging in a purposeful and iterative process for coding the data, I can increase the validity and trustworthiness of my findings. The flexibility allowed by qualitative content analysis is ideal for exploring questions that rest at the intersection of multiple fields of study.

Methods

Schreier (2014) presents eight steps for qualitative content analysis: "(1) deciding on a research question, (2) selecting material, (3) building a coding frame, (4) segmentation, (5) trial coding, (6) evaluating and modifying the coding frame, (7) main analysis, [and] (8) presenting and interpreting findings" (p. 174). For this study, I grouped "selecting material" with "setting" as they are interwoven for the purpose of this study. Due to the potential subjective nature of qualitative content analysis, the research design discussed below includes steps taken to increase the trustworthiness of the study.

Research Questions (Step 1)

This study presents two questions: (1) how did members of the academy present affirmative action as part of their own mission or purpose within *amicus* briefs, and (2) what ideology is embedded in these arguments?

Setting and Sampling (Step 2)

An essential component of this study that differentiates it from other studies on *amicus briefs* is the narrow focus on briefs within a specific time and on the self-depiction of the submitting *amici.* In order to do this, I focus solely on the introductory sections of the briefs that describe the *amicus* and their interest in the case. I also limit my study to *amicus* briefs filed by the academy in response to a single Court case, *Regents of the University of California v. Bakke* (438 U.S. 265).

In this 5-4 split decision, the Court both upheld a more limited use of affirmative action while siding with Alan Bakke. The opinion, written by Justice Lewis Powell, is a complex and policy-setting argument. In it, Justice Powell went far beyond the expected ruling to provide the most descriptive guidance around the use of affirmative action available to organizations until

2003 in *Grutter v. Bollinger*. Powell defended a limited use of affirmative action through which organizations could use race as a factor in admissions but claimed that the use of any kind of quota system was unconstitutional (*Regents v. Bakke*, 1968). Justice Powell referenced Harvard University's admissions policy, included in Harvard's *amicus* brief, as a model for the use of affirmative action.

It is the national attention, historic placement, and Justice Powell's direct use of a submitted *amicus* brief for policymaking that makes the *Bakke* case an ideal setting for this study. A notable 59 *amicus* briefs representing over 150 entities were filed to the Supreme Court for this case (*Regents v. Bakke*, 1978). Six of these were filed at the petition stage and 53 at the merit stage. Of these, only 11 supported Bakke, four argued for neither party, one supported both parties, and the remaining 42 supported the University of California. An additional single brief filed by the United States government did not state a position.

Six of the total briefs represented 12 individually named schools: Antioch School of Law, Columbia University, Harvard University, Hastings College of the Law at the University of California, Howard University, Rutgers University, Stanford University, the University of Pennsylvania, the University of California at Davis, the University of California at Berkeley, the University of California at Los Angeles, and the University of Washington. Five additional briefs were filed by governing or affiliate organizations representing higher education institutions: the American Association of University Professors (AAUP), the Association of American Medical Colleges (AAMC), the Society of American Law Teachers (SALT), the Association of American Law Schools (AALS), and a final brief that included the National Association for Equal Opportunity in Higher Education (NAEOHE). These 13 briefs were all filed in favor of the petitioner, the Regents of the University of California.

The 13 *amicus* briefs filed directly or indirectly by universities make up the entirety of the research sample. This sample includes institutions that are large and small, public and private, historically Black and predominantly White. I chose to also include the five briefs filed by affiliate or governing organizations because institutions may have chosen to participate in these briefs as an effort to present a collective voice instead of filing their own. Additionally, not all schools have the resources to file independently or even collaboratively. Including the briefs filed by collective organizations increases representation in the study.

Not selected for this study were university-affiliated organizations that did not officially represent the organization or individuals paid by the organizations for their representation. An alphabetical full list of submitted briefs, their position, and inclusion in this study can be found in Appendix A. A number of briefs were filed by student organizations such as the Cleveland State Chapter of the Black American Law Student Association, the Law Raza National Law Student Association, and the American Medical Student Association. While these organizations represent important constituents of universities, the often unpaid or underpaid labor of students that inevitably went into these briefs presents an important but additional variable for this study that must be studied separately. Universities can choose to align or separate themselves from the content of these types of briefs depending on their reception by the Court. The same can be said for filing alumni organizations. Also omitted from this study were organizations that directly collaborate with or serve institutions of higher education but existed under separate missions such as the Council on Legal Education Opportunity (CLEO), or the Law School Admission Council (LSAC). A condensed list of selected briefs with the shorthand names that are used to simplify the findings of this study is depicted in Table 1

Table 1

Selected briefs and their shorthand name

Amicus	Shorthand
American Association of University Professors	AAUP
Antioch School of Law	Antioch
Association of American Law Schools	AALS
Association of American Medical Colleges	AAMC
Board of Governors of Rutgers; State University of New Jersey; Rutgers Law School Alumni Association; Student Bar Association of the Rutgers School of Law Newark	Rutgers
Cobbs, Price M.; Kahn, Ephraim; Allen, Professor Elaine; Aguilar, Jose Antonio; Bristow, President Lonnie R.; Chang, Professor Robert S.; Comer, Professor James P.; Fine, Richard H.; Fisher, June M.; Flores, Rodrigo; Higgenbotham, Robert M.; Lackner, Jerome; Lawrence, Professor Margaret Morgan; Levitin, Lawrence A.; Lightfoot, J. Kennedy; Mondanaro, Josette M.; Montoya, Roberto; Obrinsky, President William; Padilla, Stanley L.; Poussaint, Alvin F.; Terris, Milton; Thomson, Gerald E.; Young, Quentin D.	Cobbs et al.
Columbia University; Harvard University; Stanford University; University of Pennsylvania	Columbia et al.
Committee on Academic Nondiscrimination and Integrity; Mid-America Legal Foundation	CANI and MALF
Howard University	Howard
Kadish, Sanford H.; Loiseaux, Pierre R.; Warren, William D.; Anderson, Marvin J.	Deans at California law schools
National Medical Association; National Bar Association; National Association for Equal Opportunity in Higher Education	NMA, NBA, and NAEOHE
Society of American Law Teachers	SALT
Washington; University of Washington	Washington

Development of a coding frame (Step 3)

Hsieh and Shannon (2005) describe three different types of qualitative content analysis: conventional, "generally used with a study design whose aim is to describe a phenomenon" (p. 1279); directed, used to "validate or extend conceptually a theoretical framework" (p. 1291); and

summative, which does not "infer meaning, but rather [explores] usage" (p. 1283). While this study applies a theoretical framework, CRT, I am neither seeking to validate nor enforce its premises. I am, however, seeking to understand a phenomenon, not explore how it is used within a given text. As such, I used a conventional approach to qualitative content analysis and allow the categories and subcategories to emerge directly from the text. This approach is an essential component to view holistically the themes that higher education institutions understood to be important enough to present to the Supreme Court in defense of affirmative action. Identifying all the themes and not simply those that fit within a given framework provides a holistic picture of the beginning of what became a conversation between the Court and institutions of higher education. The application of CRT to the analysis that occurs after identifying categories helps contextualize the themes present.

Following the steps outlined by Schreier (2014), I built an initial coding framework using the brief submitted by Howard University to develop categories and subcategories that answer my two research questions. By using the brief submitted by Howard, I centered the work of a minority serving institution (MSI). Categories were developed in a concept-driven way using prior knowledge, while subcategories were developed in a data-driven way using subsumption to ensure that all concepts were coded properly. Each category covers a single topic to meet the standard of one-dimensionality, and all subcategories are defined to maintain mutual exclusivity in the manner described above to ensure exhaustiveness. For example, "service as part of mission" emerges as a category in the Howard brief. An application of CRT to the analysis of this category or theme displays the use of interest convergence as Howard justifies its existence by how it can contribute to a majority White society. The coding framework includes names, descriptions, indicators, and examples to increase the trustworthiness of the study. Rules to differentiate between subcategories are provided as needed where overlap is possible. "Within a

feedback loop those categories are revised, eventually reduced to main categories and checked in respect to their reliability" (Mayring, 2000, par. 12). This feedback loop begins with the segmentation and pilot step.

Segmentation (Step 4)

After the initial development of the coding framework, I segmented all text by theme. I did this in advance of any additional coding in order to fully separate the segmentation of the piece from the coding process. While more time-consuming, this approach considers that ideas in the amicus briefs often bridge across subcategories, and dividing the material using formal criteria such as by sentences requires the researcher to identify the main theme of the sentence subjectively. This would have decreased the reliability of the study.

Pilot and modifications (Steps 5-6)

"[Piloting the coding frame] is crucial for recognizing and modifying any shortcomings in the frame before the main analysis is carried out" (Schreier, 2014, p. 178). Mayring (2000) recommended piloting the coding frame with 10-50 percent of the material. For this study, I piloted the coding frame with three briefs (23 percent): one submitted by an individual university (Howard University), one by a collective (Rutgers et al.), and one by an umbrella organization (AAUP). Briefs were each coded twice with 10-14 days between the initial and secondary coding. This gap in time helps to prevent coding subjectivity caused by memories of prior coding.

After fully coding the three trial briefs, the results and coding frame were reviewed for validity and consistency. Specifically, the two iterations of coding for each brief were compared for inconsistencies in order to increase validity. Subcategories were analyzed for overlap, interchangeability, or vagueness in definition to ensure reliability. Additionally, concepts

identified that were not originally included in the coding frame were added. Categories and subcategories that had singular occurrences were reviewed for potential overlap or miscoding. This resulted in final modifications to the coding frame before I applied it to the entirety of the sample.

Through a systemic coding process, I identified five categories and 18 subcategories. The five categories are (i) policy, (ii) description of *amici*, (iii) institutional objectives, (iv) legal argument, and (v) historical contextualization. Appendix B outlines the breakdown and description of each of the categories and subcategories. Due to the nature of qualitative content analysis, the categories and subcategories identified are part of the findings and, as such, are discussed at length in the subsequent chapter.

Main Analysis and Presenting Findings (Steps 7-8)

The final coding frame was applied manually to all 13 *amicus* briefs, and results were entered into a coding sheet. As I applied the coding frame alone, any instances in coded segments where additional discrepancy than what was designated by the frame was identified and annotated in an addendum to the coding sheet. This addendum was reviewed at the end of the coding process to ensure that no categories or subcategories had been missed.

After the coding process was finalized, I uploaded all texts and codes into NVivo, a qualitative analysis software system. This allowed me to identify patterns across briefs. Finally, results were organized in accordance with the research question they answered using a text matrix.

Limitations

In this study, I analyze a subsection of the amicus curiae briefs filed for a singular case, which means that the general setting in which these briefs were written was consistent.

Therefore, the themes that emerge from the qualitative content analysis can and should be understood within that same setting. This approach makes this study unique both within the study of *amicus* briefs and affirmative action and presents opportunities for future study. However, by only analyzing specific briefs, I do not explore how the portrayal of mission or interest may compare to other filing groups.

Additional historical contextualization and primary documents that explore the context in which the individual schools wrote each *amicus* brief would expand the window into social memory allowed by this study and deepen understanding of the portrayed language.

> The term 'social memory' accurately reflects the rationale of popular knowledge about the past. Social groupings need a record of prior experience, but they also require a picture of the past that serves to explain or justify the present, often at the cost of historical accuracy. (Tosh, 2022, p. 3)

This study is limited to the portrayal of mission and ideology presented in the briefs. Further exploration into who specifically was involved in the writing of each brief, funding sources for writing and filing, and the process by which the ideas represented were selected for inclusion would further the understanding of how the academy was grappling with attacks on affirmative action and a changing landscape. It would also reveal insight into the relationship between the Court and the academy.

This study is also limited by its focus on a singular case. Further studies can expand on this work by applying similar methods to *amicus* briefs filed in all subsequent Supreme Court cases. This expansion would yield insight into the evolution of the academy's relationship with affirmative action and how ideology around diversity initiatives deepened or changed over time.

Chapter 4: Findings

The use of a conventional content analysis means that the codes identified in the *amicus curiae* briefs emerged from the texts themselves and were not pre-determined and sought within each document. As such, the identification of code categories and subcategories are important findings for this study, and I have chosen to describe them in this section. I discuss the five coded categories and 18 subcategories identified through the texts that address the two original research questions. I use examples and the application of CRT to discuss the significance and relevance of the inclusion or exclusion of each identified category in understanding how higher education aligned its mission with affirmative action through the briefs. I then present a thorough analysis of the correlation between the codes and their significance to the original research questions.

Categories and Subcategories

As I explained in Chapter 3, the coding process led me to identify five categories and 18 subcategories across 13 *amicus* briefs. Table 2 depicts each subcategory and its presence within each brief. While the coding process naturally produces quantitative data that some may use to analyze content, this study relies on contextualization of the findings to portray more holistic results.

Table 2

Presence of subcategories within amicus curiae briefs

Category	Subcategory	Briefs
Policy	Description of admissions process	AALS, AAMC, Antioch, CANI and MALF, Deans of law schools, Rutgers, SALT, Washington
	Majority centered educational benefit	AAMC, Columbia et al., Rutgers, Washington

Category	Subcategory	Briefs
	MSI justification	Howard; NMA, NBA, and NAEOHE
	Non-specific statements of support	AALS, AAMC, Antioch, CANI and MALF, Deans of law schools, Howard, Rutgers SALT
	Race as admission factor	AAMC, AAUP, Antioch, CANI and MALF, Deans of law schools
	Success of affirmative action	Howard; NMA, NBA, and NAEOHE; Rutgers; Washington
	Threat of removal	AALS, AAMC, Antioch, Deans of law schools, Howard, Rutgers SALT, Washington
Description of Amici	Accomplishments	AAUP; CANI and MALF; Howard; NMA, NBA, and NAEOHE
	Description of institution	AALS; AAMC; AAUP; Antioch; CANI and MALF; Cobbs e t al.; Columbia et al.; Howard; Deans at California law schools; NMA, NBA, and NAEOHE; Rutgers; SALT; Washington
Institutional Objectives	Academic Freedom	AAMC; AAUP; CANI and MALF; Columbia et al.
	Advance knowledge in field of study	AALS; AAMC; AAUP; CANI and MALF; Columbia et al.; Howard; NMA, NBA, and NAEOHE
	Develop workforce across sectors (nonrace specific)	AALS, AAMC, Antioch, Columbia et al.
	Direct service to society	AAMC; Howard; NMA, NBA, and NAEOHE
	Increased training of minorities not explicitly in law or medicine	Columbia et al.; Howard; NMA, NBA, and NAEOHE; Rutgers; Washington
	Minority representation in law and medicine	AAMC; Cobbs et al.; Howard; NMA, NBA, and NAEOHE; Rutgers; SALT; Washington
	Pursuit of social justice	CANI and MALF; Howard; NMA, NBA, and NAEOHE; Rutgers; Washington

Category	Subcategory	Briefs
Legal Argument	Legal advice to Court	AALS, AAUP, CANI and MALF, Cobbs et al., Deans of law schools, Howard, Washington
United States History	Discrimination, segregation, and enslavement	CANI and MALF; Howard; NMA, NBA, and NAEOHE; Washington

Category: Policy

There is a lack of congruence in the presentation of affirmative action within briefs, with some identifying affirmative action as specific processes built into their admissions process (Columbia et al.), some alluding to affirmative action as national regulation justifying the existence of MSIs (Howard), and others lacking any kind of specific description at all. I use the term policy as a category in order to encompass the wide breadth of understanding and presentation by the *amici* and do not separate them out within this study. As such, the category of policy presents across seven subcategories: description of the admissions process, a majority centered educational benefit to affirmative action, affirmative action as a justification to the existence of minority serving institutions (MSIs), non-specific statements of support, the role of race as an admissions factor, the prior success of affirmative action programs, and the threat posed by the removal of affirmative action. The subcategories align with different underlying ideologies within the briefs.

The policy category identifies text in which the writers addressed the topic of affirmative action directly to the Court in their description of mission alignment. The brief writers' presentation of affirmative action is integral in their framing of how it is linked to the mission of each institution as well as the ideology within each brief. Due to the limited legislative and legal documentation available in the 1970s of what affirmative action actually was, its purpose, and

especially its use in higher education, the descriptions provided by these *amici* are some of the first publicly available national discussions and definitions of the policy within education. As such, they set the tone for the future of affirmative action.

With *Bakke* threatening the constitutionality of affirmative action, one would imagine that all the briefs would directly address the policy when explaining their own interest in the case. However, this did not happen. Policy was coded across 12 of the 13 *amicus* briefs. The brief submitted by a conglomerate of medical faculty (Cobbs et al.) was the only brief not to address affirmative action directly and instead spoke more generally about the need to diversify medical education. By contrast, the brief submitted by the State of Washington and the University of Washington (Washington) presented the policy code 19 times, centering their own use of affirmative action practices and policies heavily and thus personally aligning themselves directly to the cause and outcome of the case. This disparity in the presentation of information exists across all categories but is most noteworthy within 'policy' as it is the topic of the case. The absence of the topic by Cobbs et al. was significant in that it greatly reduced the impact of the brief and signified potential constriction by their respective institutions, which remain unnamed in the brief.

Unfortunately for those who had fought to use the policy to combat the systemic inequities created by legalized enslavement and oppression, much of the ideology presented by the briefs discusses affirmative action's goal as diversity, which is presented as a benefit to all (read, the majority.) In doing so, higher education's definition of affirmative action is centered in whiteness.

Amici writers presented affirmative action in the briefs with varying levels of confidence in the Court and hedging their bets on the outcome of the case. This is evident in the *amici's* willingness to tie themselves directly to the policy or not. As mentioned above, there is even one

brief that failed to mention affirmative action directly at all. Those organizations that openly presented their admissions process exhibited confidence in the fair review of the Court to understand the varied ways by which schools viewed affirmative action. This includes the University of Washington whose own use of affirmative action was previously upheld by the Supreme Court of the State of Washington in *DeFunis v. Odegaard*. Rutgers University (Rutgers), another large public institution, also described its own admissions program as including the use of affirmative action, but instead of centering self, it presented the use of affirmative action practices as necessary and widespread. The Society of American Law Teachers (SALT) echoed this in the description of law school admissions practices,

> Special minority admission programs vary somewhat among law schools, and while such programs may differ somewhat between law schools and medical schools, law school and medical school programs are sufficiently similar that this Court's decision with respect to one will have a direct impact on the other as well. (p. 2)

The brief submitted by the Committee on Academic Nondiscrimination and Integrity (CANI) and the Mid-America Legal Foundation (MALF) also discussed the widespread use of affirmative action without specifically tying any of its members to the outcome of the case,

> During its inquiries and studies, the Committee on Academic Nondiscrimination and Integrity has repeatedly encountered the rapidly spreading practice of administrative imposition of overt or covert quotas for members of selected racial or ethnic groups, or women, in both admissions and the hiring and promotion of instructors at institutions of higher education. (p. 3)

Specific institutional support for affirmative action was most often presented as majority centered. Coded across various categories, *amici* present the upheld notion that diversity was good for all. Some, like the Association of American Medical Colleges (AAMC), described the

majority benefit of affirmative action and defended diversity through a non-specific alignment of majority and all. They wrote, “Medical schools have a crucial interest in maintaining the diversity among students which contributes to the quality of education” (p. 4).

Others were more direct in acknowledging the benefit to the majority. In their jointly submitted brief, Columbia University, Harvard University, Stanford University, and the University of Pennsylvania (Columbia et al.) presented,

> By not enrolling minority students in significant numbers, the amici were continuing to deny intellectual house room to a broad spectrum of diverse cultural insights, thereby perpetuating a sort of white myopia among students and faculty in many academic disciplines-most particularly the professions, the social sciences and the humanities. (p. 3)

To borrow words from the *amicus* brief submitted by those institutions considered elite (Columbia et al.), this equation of majority as all “[perpetuates] a sort of white myopia” (p. 3) that ultimately only preserves diversity efforts when they can be justified to benefit the White majority. When the majority of the *amici* defense of affirmative action and diversity is presented in this manner and then analyzed through CRT, two questions arise: (1) did the majority of *amici* believe the ideology they were presenting that diversity should be upheld only because it benefits all (the majority), or (2) did the *amici* hold the belief that the Court would only rule in the defense of affirmative action if it was justifiable for the White majority? The organizations’ presentation of affirmative action, combined with the brief’s depiction of institutional objectives, determines who the brief centers in their argument and provides insight into these questions.

The exceptions to this presentation of policy in the briefs are that of Howard University (Howard) and the National Medical Association, the National Bar Association, and the National Association for Equal Opportunity in Higher Education (NMA, NBA, and NAEOHE) who

described affirmative action as necessary in justifying their own existence as well as that of other MSIs. NMA, NBA, and NAEOHE wrote, "[MSIs] were founded and remain today as 'Affirmative Action' programs committed to a public offering of education attainment" (p. 7). Howard's description of affirmative action was very personal and a high legal risk. By tying its own existence to affirmative action, Howard became personally dependent on the outcome of the case and demonstrated some hope or belief that the Court would be swayed by this and find value in MSIs. Howard wrote, "This Court's decision may significantly affect the unique mission and continued integrity of historically black institutions" (p. 3). Therefore, Howard spent much of the introduction of its brief convincing the Justices of its own merit and value. In support of MSIs and specifically HBCUs, the NMA, NBA, and NAEOHE stated, "In a number of instances, Black institutions have been more profoundly representative of the American Ethic than the larger, more affluent, schools of Higher Education in this country" (p. 7).

Category: Description of Amici

Submitted *amicus briefs* contain self-descriptions as standard practice. Sections coded under the category 'description of *amici*' presented to the Court not why the *amici* were writing the brief, but why their words should have been considered when evaluating the case. These descriptions fall into two subcategories: (1) descriptions of the institution and (2) accomplishments. The amount of precious space each organization spent describing itself shows us how much knowledge the *amici* believed the Court already had about their respective organizations, as well as what they believed the Court would value. Coded within accomplishments are statements of external recognition to build legitimacy in the brief, such as a mention of other moments in which the submitting institution or persons were recognized as experts in the field. The *amicus* brief collectively submitted by Sanford H. Kadish, Pierre R.

Loiseaux, William D. Warren, and Marvin J. Anderson (Deans at California law schools) presented in this way seven times – more than triple any other brief.

The subcategory "description of institution" provides information on the founding, history, size, scope, and type of institution represented by the brief. Of the briefs submitted by universities, Howard spent the most space providing a description of the physical university, ties to federal funding, and scope. The only brief with more descriptions is that jointly submitted by the NMA, NBA, and NAEOHE. The unique and varied nature of the organizations that submitted the latter brief justifies why so much of the brief is dedicated to a personal description. Each organization provided an exact office address and listed specific members of its leadership. They also provided counts of Black membership or representation. The NMA "represent[ed] the 8,000 American Physicians who are Black," the NBA "represent[ed] the 8,000 American Physicians who are Black," and NAEOHE was the "voluntarily independent association of Presidents of 107 predominantly Negro Colleges and Universities."

In the case of Howard, the only named HBCU to submit a brief, the extensive description stood as a justification for why the brief should be considered at all. In its description, Howard presented information on its founding, number of graduates (40,000 including over 14,000 graduate degrees conferred), academic disciplines (starting with six departments and presented as having grown to 17 schools and colleges), and even number of buildings. Much of their description was rooted in White ideology that equated wealth to value and White institutions for credibility. The *amicus* writers described, "[Howard] University's land, buildings and equipment are valued at more than 90 million dollars" (p. 3). While maintaining that Howard is a private university, the writers repeatedly mentioned federal and congressional support for the school. They wrote, "Howard University was established as a private nonsectarian institution by Act of Congress on March 2, 1867" (p. 2). Later, they described the government support, "Since 1928

Howard University, while remaining a private institution, has received continuous annual financial support from the federal government" (p. 2). This section of Howard's brief reads like an employment cover letter's first paragraph, leveraging one connection to a new one as if to say, "this other institution that is like you can vouch for me, so please pay attention to what I have to say.", The government funding also positioned Howard as serving or providing services of value to the public.

Howard's brief stands in stark contrast to the assumption of credibility and judicial merit presented within the brief filed by Columbia et al. These schools simply claimed the collective excellence of the filing institutions without any proof or justification for the claim.

> They are institutions which differ in geography and history, in size, in resources, and in structure; but they are united by a principle which transcends their differences-namely, that the governing standard for establishing and maintaining class, room and research functions alike is, not quantity or multiplicity, but excellence. (p. 1)

Columbia et al. provided none of the details presented by Howard, or even resemble that provided by named public universities like Washington and Rutgers, both of which provided matriculation numbers and brief successes in their description of self. Washington included not simply the total number of enrollees but a short breakdown regarding participation in professional degrees. Rutgers wrote, "The Board 'of Governors of Rutgers, The State University of New Jersey, governs the entire university system, with its many campuses and some 40,000 graduate and undergraduate students" (p.1). The prestigious institutions represented in the Columbia et al. brief provided no specifics as to size, number of buildings, degrees conferred, racial makeup, monetary impact, or community engagement; they simply claimed their excellence.

The only brief to provide even less information was submitted by Cobbs et al.. Their description-of-self included a list of the represented individuals, their title, and school of employment and stated, "*amici* are physicians and surgeons, educators, psychiatrists and other members of the medical profession in California and elsewhere" (p.1). The only other descriptor included was to claim that some of the listed individuals were "members of various minority groups" (p. 3).

Category: Institutional Objectives

Institutional missions are complex and multifaceted, and briefs are not intended to contain manifestos. *Amicus* brief writers must be selective about what they include and how they describe their organization's objectives. They must do so in a way that supports their interests in the case and signifies that the information they have provided is relevant and worth considering. As with other categories, what institutions choose to focus on in their briefs to define their objectives is intentional. Thus, this category most directly answers research question one. All but one *amicus* brief discussed writers' institutional objectives to advocate for either the necessity to protect affirmative action to accomplish their institutional goals or described the active protection of policies like affirmative action as a fulfillment of their mission.

While the *amici* are each unique, there was significant overlap in their missions. I identified seven subcategories that encompass how organizations present their objectives to the court: (1) preservation of academic freedom, (2) advance knowledge and standards in various fields of study, (3) development of workforce across fields regardless of race, (4) direct service to society, (5) increased training of minorities not explicitly in law and medicine, (6) minority representation in law and medicine.

Of these subcategories, only the preservation of academic freedom appears as an independent mission for an institution to be respected on its own authority as opposed to linking

the mission with a societal need or service, and it is only present in four briefs (AAUP, AAMC, Columbia et al., and CANI & MALF) despite it being a core argument for educational autonomy from government restriction. Academic freedom was presented both as a tool integral to fulfilling mission and as part of the mission of higher education itself. The AAMC reminded the Court that "Society has wisely fostered this tradition by erecting guarantees of academic freedom and by delegating to the academic community substantial autonomy in the management of the internal affairs of the institution" (p. 3). Institutions, therefore, both hold and are responsible for upholding academic freedom as part of their mission.

As it relates to providing access to education, Columbia et al. wrote, "In pursuing these functions and these goals, colleges and universities, with rare exceptions, historically accorded freedom from external influence and intrusion" (p. 2). The writers presented this as an accepted societal value, "Our society has recognized that higher education can flourish only so long as educators have substantial independence to formulate and implement the policies by which it is transmitted."

The presentation of academic freedom as both a mission and argument for keeping affirmative action is not directly connected to diversity or even affirmative action itself. There is no discussion of the historical and purposeful omission of diverse voices in the academy and the necessity to actively pursue inclusion for any benefit or reason. The closest to this idea was presented by the American Association of University Professors (AAUP) when it ties academic freedom as a tool for educating all. The AAUP wrote,

> [This] decision may well affect a faculty's ability to select a class in order to achieve a degree of student diversity which, in its educational judgment, it believes necessary to the institution's objective of providing an optimal education for all the students selected. (p. 2)

The other subcategories within institutional objectives more directly call for the court to retain affirmative action in order to accomplish institutional goals.

Research, a mission so often described as a central objective of higher education, surprisingly only appears in one subcategory (advance knowledge and standards in various fields of study) and across seven briefs (only two of which are filed by named universities). Despite research being tied directly to university funding, partnerships, and faculty tenure, only a handful of briefs thought it meaningful to address it as connected to a central mission. The Association of American Law Schools (AALS) wrote of law schools, "[they] [assist] in developing policy on national issues of legal education" (p. 1). Most of these briefs failed to connect their ability to pursue the part of their mission linked to research to diversity. In hindsight, this is indicative of the lack of credit historically given to individuals with minoritized identities in research areas.

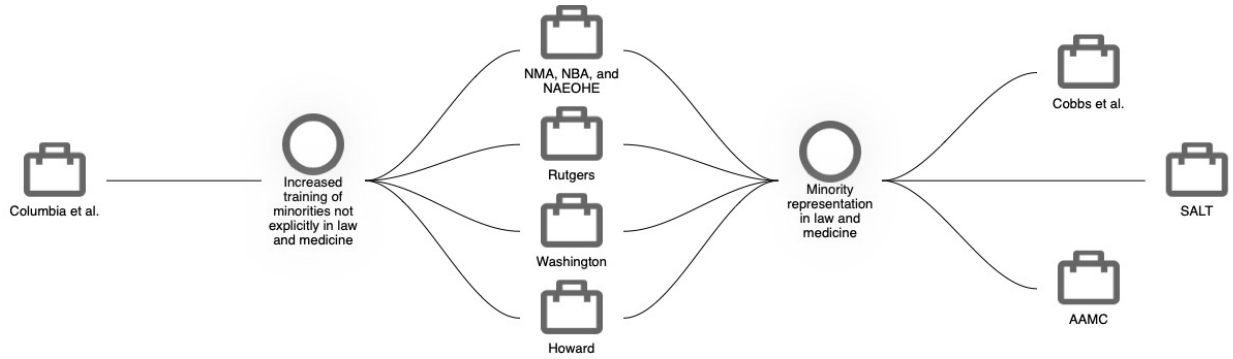
The value of academic discourse and research without linking the study directly to community impact assumed that the Court held in high enough regard this specific mission without the need to contextualize it within a broader landscape. Those named universities with this code discussed vaguely the areas by which diversity has allowed research to expand. Of its graduates, Howard wrote, "[They] have gone on to make significant contributions in fields such as African and Black American history, marine biology, music and the performing arts, religion and theology, child and family life, education and international diplomacy" (p. 5). The AAMC presented more broadly, "The medical schools of this country share with other professional schools and institutions of higher learning a proud tradition of dedication to scholarship and public service" (p. 3).

Two of the subcategories, (5) increased training of minorities not explicitly in law and medicine and (6) minority representation in law and medicine, directly address race-conscious institutional objectives. The former presents across five briefs, the latter across seven, four of

which overlap and present across both (see Figure 1.) These objectives on their own demonstrate some commitment to serve and educationally support racially minoritized people. The Board of Governors of Rutgers, State University of New Jersey, Rutgers Law School Alumni Association, and the Student Bar Association of the Rutgers School of Law Newark (Rutgers) presented the role of Rutgers University to educate all in a non-specific way, "As a state institution, [Rutgers] is responsible for providing equal educational opportunity for all New Jersey residents" (p. 2). The University of Washington was more specific and described this as part of its mission "to alleviate gross under-representation of minority races in professions for which the University provides education" (p. 1). Howard justified a shared mission of educating and training minorities, "There is a continuing need for more minorities in every vocation-in the North as well as in the South…The demand for minorities with college and professional training is far in excess of the number presently available" (p. 5). Absent from these quotes is why the training of minorities matters and why there exists a need to specifically pursue it.

Figure 1

Overlay of subcategories training of minorities not in law and medicine and minority representation in law and medicine within briefs



Professional schools and institutions were well represented in the *amicus* briefs due to the medical school admissions being centered in the case. The training of non-White physicians is

discussed as a central mission within several briefs. Howard boasted its role as the primary educator of Black physicians. Cobbs et al. wrote of themselves, "[the *amici*] share a common concern that the opportunity for medical education be extended equally to all persons in our society" (p. 3). Washington wrote, "The University of Washington's medical school also seeks to increase the number of certain minorities within its classes" (p. 4). The latter leads to further questions – which minorities and why? Other briefs highlighted a mission to diversify legal education.

Some briefs went on to indicate their reasoning for their mission to educate racial minorities. The AAMC wrote,

> The Association also believes that a serious national need may be fulfilled by educating those qualified students who will be most likely to provide medical care in urban ghettos, rural areas, and other sections of the United States that presently are underserved by professionals adequately trained to provide such care. (p. 3-4).

Howard echoed this sentiment, "Howard has always been sensitive to the need to furnish adequate legal, health and other services to disadvantaged persons" (p. 4). This links the mission of educating non-White individuals with that of service to society at large and as necessary to do jobs that the majority either can't or won't do. At the very least, it indicated the need to train non-White individuals to do jobs that White individuals weren't doing.

The subcategory within mission of service to society is indicative of the ideology embedded in the *amicus* briefs. A close look at the text provides insight into not only who each writing institution centered but also on how these individuals were presented within society. While Howard did not shy from its identity as a Black serving institution, it presented its mission as one that helps society as a whole. This is similar to Rutgers's mission to educate all New Jersey residents. Howard wrote, "Howard University and its sister black colleges and universities

are steeped in the tradition of service to our society" (p. 6). NMA, NBA, and NAEOHE wrote, "The institutions whose views are presented in this *Amici* Brief have backgrounds of perpetual service to all people…" (p.7).

The final identified subcategory, pursuit of social justice, was presented as an institutional objective by five briefs. Once again, how social justice is portrayed and who it centers helps us better understand the underlying ideology behind the brief. The inclusion of historical contextualization for the necessity of this pursuit is important in understanding the ownership of injustice as presented to the Court. Washington acknowledged its role "to contribute to overcoming pervasive and invidious racial discrimination." Similarly, the Committee on Academic Nondiscrimination and Integrity and the Mid-America Legal Foundation (CANI and MALF) shared, "Furthermore, the Committee seeks to help members of the academic community who are seeking redress against discrimination." Absent from the briefs is the role education played in social justice and, more specifically, the role education played in an individual's ability to advance economically and socially.

Category: United States History

Text coded as United States History and more specifically under the subcategory discrimination, segregation, and enslavement, acknowledges the legal and systemic oppression of Black individuals to substantiate a claim for change and indirectly the necessity for affirmative action. This code is present in the briefs submitted by CANI and MALF; Howard; NMA, NBA, and NAOHE; and Washington. All briefs with this code also aligned their institutional objectives with the subcategory of pursuit of social justice. Briefs with this overlap portrayed their mission as agents of change from a systemic and man-made issue of injustice. Those institutions affirmed the role of education as an essential tool for justice.

Several briefs used this code to indicate the role that MSIs had in educating individuals with minoritized identities despite historical oppression. NMA, NBA, and NAEOHE wrote, “These historically Black Institutions of Higher Education have welcomed, nurtured, and developed the progeny of the slave system” (p. 7). Howard quoted its thirteenth president, Dr. Mordecai Wyatt Johnson, who in 1926 said, “During all the early years, while the founder [of Howard University] and his associates worked, pseudoscientific men were 'busily engaged in giving various reasons why serious education of the kind here undertaken should never be attempted among Negroes” (p. 2).

Absent from the briefs was information from the named predominantly White serving institutions on their own role in creating the status quo or internal practices that produced disparity in access. NMA, NBA, and NAEOHE wrote, “It is common knowledge that until a few years ago, all but a minuscule number of Blacks were excluded from the profession” (p. 4). But they did not write that this exclusion was sustained and, in fact, advocated for by specific leaders in the field, some of whom were named *amici* who came to the defense of affirmative action.

Category: Legal Arguments

The introductory section within *amicus* briefs largely focuses on the writing parties and their alignment with the case. As such, legal arguments are only presented in seven briefs while discussing the *amici*’s interest in the case (typically, the remainder of an *amicus* brief will contain additional legal material.) The appearance of this code displays an interest of the *amici* to be seen as an authority in legal reasoning. The writers who included this reasoning in the opening of their brief assumed that their legal advocacy and guidance would be awarded merit by the Court or see the provision of this reasoning as a fulfillment of their own mission. Additionally, the *amici* relied specifically on prior rulings by the judiciary to legitimize their

stance, portraying a certain amount of buy-in to the legal justice system to uphold affirmative action as it was defined within that same brief.

Washington presented this subcategory the most as its own use of affirmative action was upheld by the State of Washington Supreme Court, and the brief outlined the findings of the court's ruling in its brief. "The University of Washington law school's program was the first such program challenged by a disappointed applicant who contended that he had been unconstitutionally discriminated against on the basis of his Caucasian race" (p. 3). The deans of law schools, as legal scholars, also tied their legal arguments to their mission alignment within their brief. They did not specifically claim their credibility but jumped specifically to the presentation of legal interpretation within their description of interest,

> The interest of the amici, in this case is, therefore, transparently clear. The opinion of the Supreme Court of California in this case, although rendered in a case involving admissions at the medical school of the University at Davis, also declares the law under the Constitution of the United States, as that Court interprets it, on the constitutionality of any admissions program which makes distinctions based on race. Unless this Court grants review of that decision it will remain as the authoritative statement of the highest court of the state as to the restrictions imposed by the Constitution of the United States upon the professional schools of the University of California. (p. 2).

Research Question Findings

Each brief presented affirmative action as part of the organizational mission differently, with a focus on either its own model affirmative action plan, its role in developing a diverse workforce, its service and, therefore, value to society, or its positioning as a legal resource. The initial glimpse into this is depicted in the code descriptions (found in Appendix B), with a singular lens on individual codes found within each brief. However, it is at the intersection of

presented codes and only when viewed wholistically that institutional alignment and not simply presentation is evident.

Furthermore, each *amicus* either crafted or assumed its own legitimacy as a valuable source to the Court. This presentation of self is intricately woven into the alignment between the *amici* and affirmative action, for the writers are purposeful in what they present and how that presentation will move their argument further with the Justices.

Q1- How did members of the academy present affirmative action as part of their own mission or purpose within amicus briefs?

My original presentation of this question sought to engage the language used by the briefs to identify the reasoning the *amici* presented for defending affirmative action. The codes help guide this exploration. However, a more wholistic review of the coded material reveals a secondary response to this same question. Through an analysis of presented codes, I was able to also explore the manner or voice used in the alignment of mission and affirmative action thus providing a fuller response to the research question.

Educating all

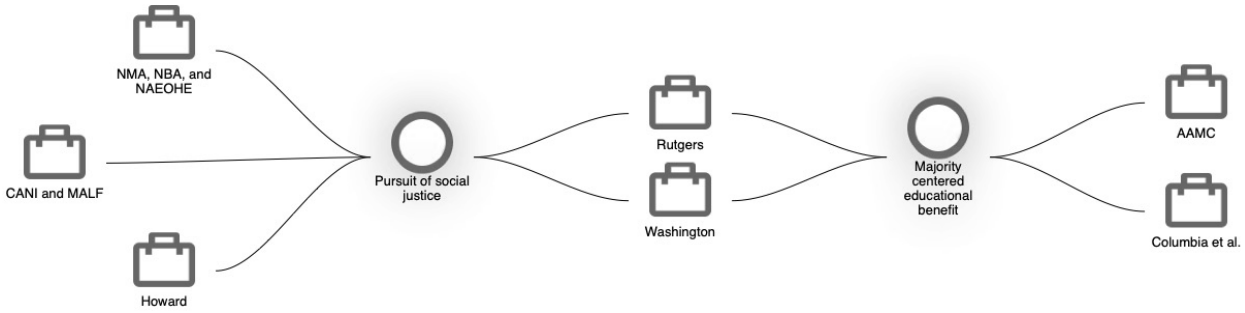
The briefs differed on how they linked affirmative action to their mission, but some portrayed a connection between higher education's mission to educate all individuals and the necessity for most institutions, even if not necessarily their own, to take affirmative steps in the admissions process to accomplish this central institutional objective. In this approach, most *amici* were timid, even those who directly mentioned education. Despite coming to the defense of race-conscious policies, their mission presentation was vaguely obscured in race-neutral language that protected them from the Court's final decision and future legal action. Columbia et al. wrote, "Underlying this principle is the conviction that a university's highest function is to give people of great talent and motivation the opportunity to participate, as students and as teachers, in

rigorous intellectual training" (p. 2). Most writers simply implied the use of affirmative action, although like the AALS directly stated, "We are convinced that these carefully designed and thoughtfully administered [affirmative action] programs represent the only realistic possibility for increasing the very small number of minority group members in the legal profession" (p. 2).

While at face value this appears to be a strong stance, these organizations pre-existed desegregation when their mission would largely have been presented as the same but with a different and socially subjective definition of "all" that excluded racial minorities. In other words, should the Court have struck down affirmative action, the organizations could continue to meet their stated objective, with a significant but interpretive change to their mission's target audience. Rutgers, for example, recognized its mission to create educational opportunity for all of its residents. However, this non-descript mission alignment lacked a concrete measurement and could be easily disputed as met simply by the absence of exclusionary policy.

Figure 2

Comparison of briefs including social justice as organizational mission and those defending affirmative action as having a majority centered educational benefit.



When organizations decided to present the education of all as part of institutional mission, some provided insight into why this was a central pillar of mission. The most insight can be gained by comparing codes that highlighted pursuit of social justice as a mission and those who presented a diverse classroom as a benefit to the majority. As presented in Figure 2,

the organizations that only presented social justice as a mission without centering the majority have very specific minority centered objectives. Howard was an HBCU; the NMA, NBA, and NAEOHE were all Black serving organizations; and CANI promoted change away from discriminatory policy. The two large public institutions that submitted briefs, the University of Washington and Rutgers, hedged both their mission toward social justice and a majority centered educational benefit.

On the opposite end of the spectrum, two of the *amici* with the greatest privilege and clout, Columbia et al. and AAMC, did not discuss social justice and instead focused on the benefit that a diverse learning environment can have for the majority centered "all." If those with the most clout and who were most likely to be heard did not identify social justice as mission critical for higher education, the argument would likely be lost in a Court built by and for those in power. Importantly, it was the majority centered benefit to education that resonated and made its way to the Court's Opinion and everyday language. This led to the misappropriation of efforts rooted in the pursuit of equity, to watered-down slogans like "diversity is good for everyone," which can just as easily be used to oppress as it can be used to uplift, and those in power get to decide which way to interpret them.

Organizations that sought closer institutional alignment with the use and purpose of affirmative action presented the pursuit of social justice as either a direct purpose to education or a separate institutional mission. Despite standing assumptions of education as the great equalizer, only five briefs named the pursuit of social justice as an institutional mission necessitating the defense of affirmative action: Howard; CANI and MALF; NMA, NBA, and NAEOHE; Rutgers; and Washington. These organizations chose different approaches to tie their educational mission to social justice. Howard; NMA, NBA, and NAEOHE; and Washington, all provided descriptions of historic discrimination against racial minorities as part of their defense and

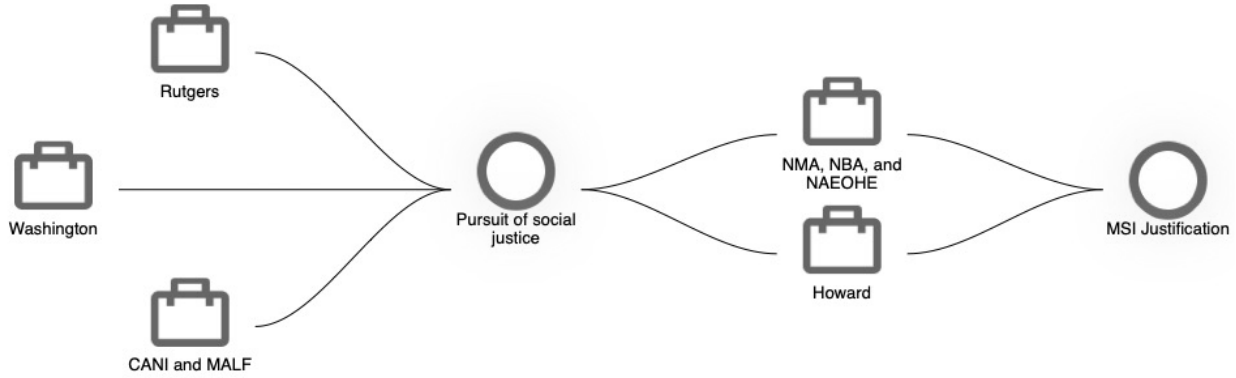
justification for affirmative action. In this way, they came closest to aligning their use of affirmative action as a form of remediation for those it is intended to benefit. Washington wrote of affirmative action policies, “They have been undertaken voluntarily by the agencies to meet the perceived and acknowledged need to correct the effects of slavery, segregation and discrimination against certain insular minorities within our society” (p. 5).

It is noteworthy that the connection that organizations made between higher education and social justice was once removed by the notion of education. If the organizational mission was to educate all (or at least increase the number of individuals), and one of the ways they sought to do this was by addressing the effects of injustice through affirmative action, then affirmative action was not directly aligned with the mission but instead with a secondary function to education. This meant that, like other tools, it could be replaced. Institutions could have presented themselves differently, discussing their mission alignment of social justice and pointing to education and even research as the manner by which they accomplished this task. This would have more directly tied them to the use of affirmative action as a remediation tool necessary for accomplishing their central mission.

MSI Defense

Figure 3

Overlay of social justice and defense of affirmative action



Howard and NMA, NBA, and NAEOHE all connected their organization's mission of social justice with their personal defense. Their presentation of institutional alignment was uniquely expressed as a concern for the future of MSIs around the country (Figure 3). As MSIs and organizations that represented a conglomerate of MSIs, this is not surprising. However, it is noteworthy that no other briefs discussed this point despite the fact that members of MSIs were part of national academic associations, that predominantly White graduate programs often recruited from MSIs, and that graduates of MSIs were members of professional associations represented in other *amici*. The absence of this point in other briefs means that these two briefs read as pleas of self-justification.

Description of Self

Figure 4

Comparison of categories and subcategories within briefs filed by Howard University and Columbia et al.

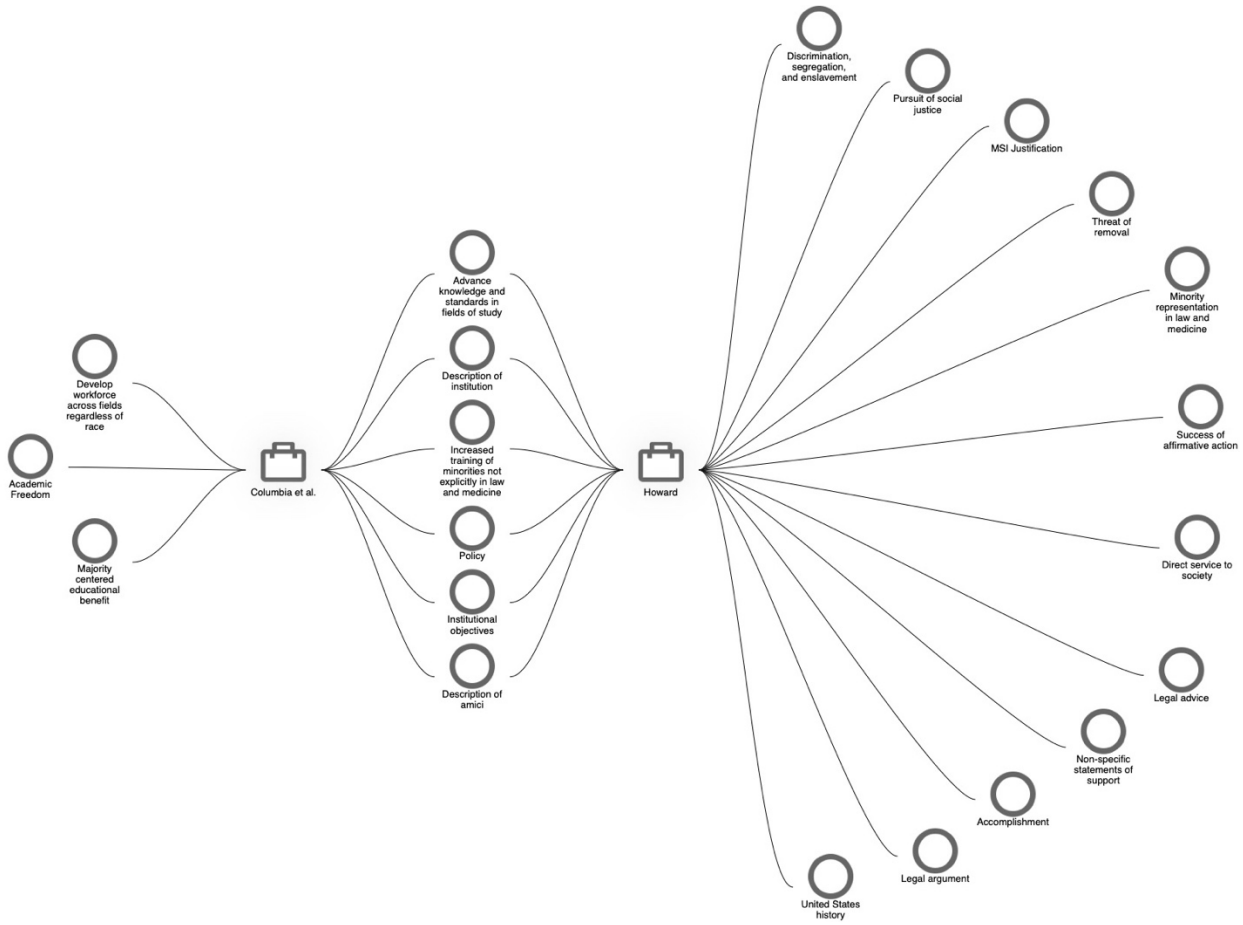
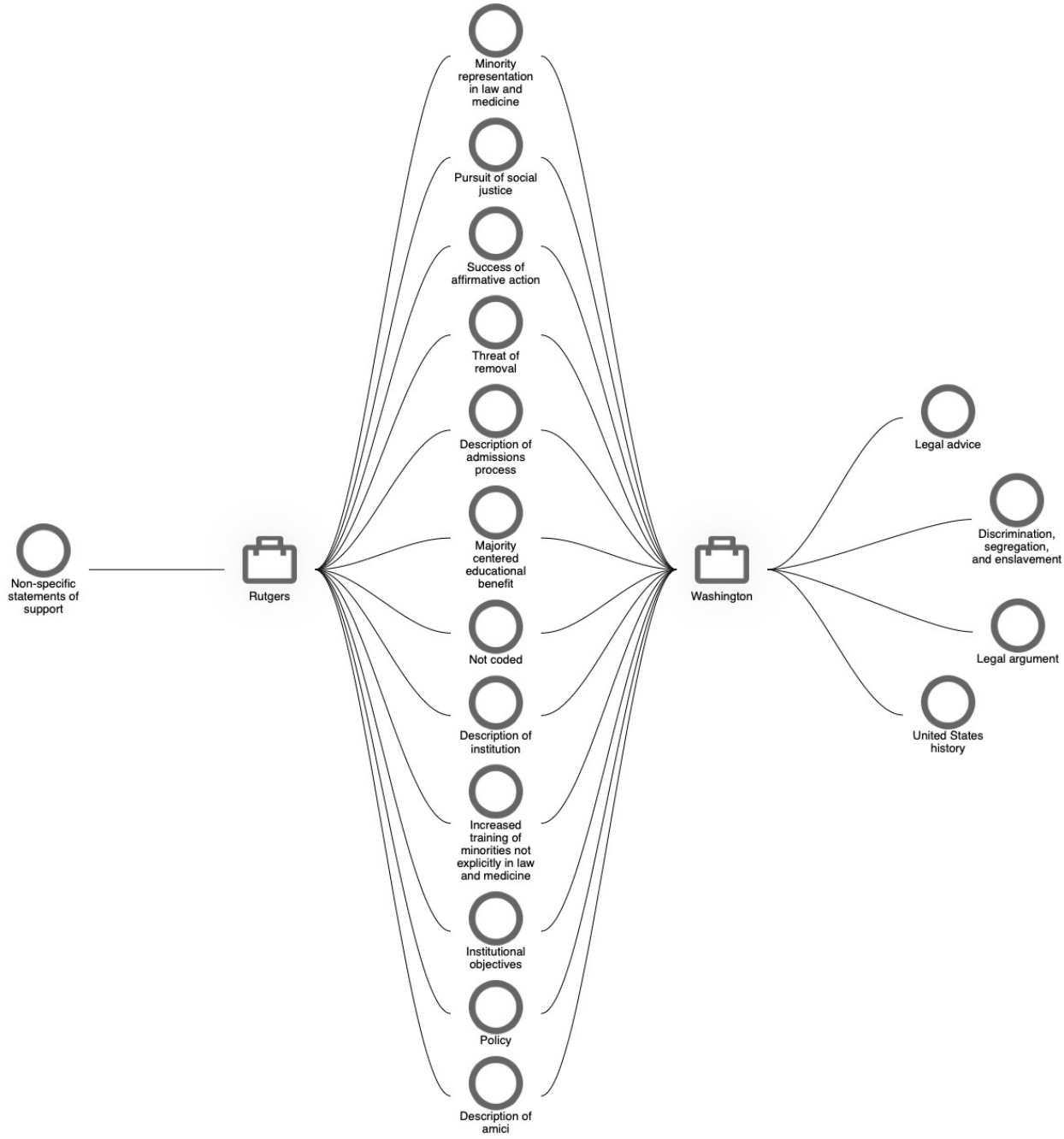


Figure 5

Comparison of categories and subcategories within briefs filed by Rutgers University and the University of Washington



For named university *amici*, the biggest difference in how affirmative action was tied to institutional objective was in the support used by each brief to justify their claim as it pertained to a larger scale mission and the legitimization of their own voice. The dichotomy between the brief submitted by Howard and the Columbia et al. brief is portrayed in Figure 4. While both briefs shared a commitment to educating a diverse community, Howard spent a considerable

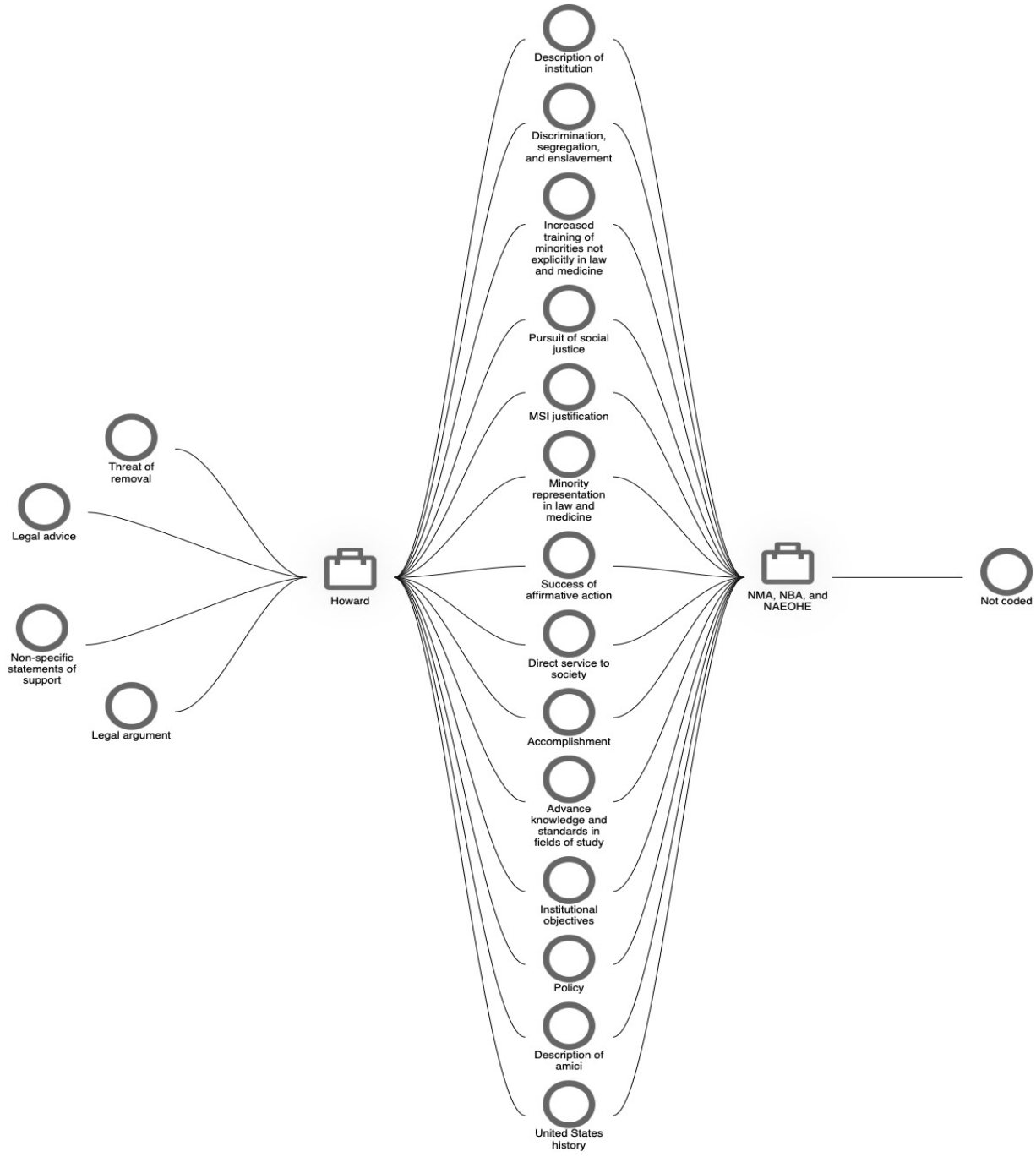
amount of its brief justifying its relevance and existence, as well as the education of racial minorities, as a service to society at large. Columbia et al. took a differing approach; under the assumption of their own value by the Court, the universities bypassed lengthy discussions of their own merit or objectives and presented themselves as authorities and race-neutral advocates for academia.

Conversely, the briefs filed by Rutgers and Washington, the two named public universities who filed briefs, were far more similar. The only significant differences between the two are Washington's discussion of the historical necessity of affirmative action due to discrimination, segregation, and enslavement and the *amici*'s addition of legal precedence so early in the brief (Figure 5). The latter speaks less to Washington's claim as a legal authority and more about its own experience with affirmative action cases and the shared presence of the State of Washington in the brief.

Briefs submitted by organizations representing conglomerates of universities or colleges mirrored what is presented in those briefs submitted by named universities. The NMA, NBA, and NAEOHE brief, like Howard's (Figure 6), also focused more on its own accomplishments and service to society than its peer *amici*, demonstrating again a need for non-White centered organizations to justify their existence to a White institution. Like Washington and Rutgers, AALS and AAMC take a different approach than NMA, NBA, and NAEOHE. They presented similarly to each other as they reflected the needs of *all* unnamed universities. Figure 7 maps the codes displayed by each of these two organizations. AALS, as a conglomerate of law schools with direct ties to the judiciary, presented legal arguments. Meanwhile, the AAMC did more to describe affirmative action through a description of race-conscious admissions and majority centered institutional objectives under the guise of education for all.

Figure 6

Comparison of categories and subcategories within briefs filed by Howard and NMA, NBA, and NAEOHE



Q2 - What ideology is embedded in these arguments?

Across all briefs, writers supported a generic concept of diversity, one that would eventually be echoed through the Court's opinions for all future Supreme Court affirmative

action cases, not just *Bakke*. Coincidentally, no definition of this concept is provided, though both the brief writers and the Court opinion focused on race as either Black or White. While how writers portrayed themselves or aligned their mission with the need for affirmative action differed by brief, all briefs accepted or furthered White supremacist ideology. In doing so, they dangerously promoted the ideology.

This study is narrowly focused on the initial section of each *amicus* brief, where writers often began by establishing credibility with the Courts. It is here that White supremacist ideology is first present either through the omission of detail, as is the case with the briefs filed by Columbia et al., or in establishing merit through reliance on capitalist values, as is present in the Howard brief.

Columbia et al.'s lackluster presentation of self but boldness in claiming undefined academic responsibility assumed rightfully that the Court would weigh their ideas and mission heavily. In their description of self, the writers vaguely pointed to there being differences between the author schools and noted their defining and shared quality as "excellence." The presenting schools provided limited self-description and assumed that their notoriety as the educators of former and current White leaders gave them credibility with the Court. More accurately, they did not have to question the credibility they held nor present additional information regarding their merit. This accepted the ideology that institutional ranking, notoriety, and age of institution mattered to the Court.

The irony of this is that affirmative action is and was necessary because of our institution's racist and embedded understanding of merit. This understanding underlies our admissions and hiring processes and privileges those who have already benefited from the standing structure while simultaneously claiming fairness and neutrality to those who have or are suffering from the same.

As mentioned, Howard's writers spent a significant portion of their brief describing their own institution and accomplishments, thus boosting their credibility which they anchored in White institutional support such as congressional funding. In other words, they sought to legitimatize their argument in the eyes of the Court by presenting what they thought the Court would value the most. Writers included information regarding the size of Howard's campus and the number of academic buildings. There is no real or legal correlation between how many buildings an institution owns and the merit or importance of its ideas. But, in an *amicus* brief, it is not the actual correlation that matters but the perceived correlation assumed by the Court. In a short document with limited opportunity to identify why the *amici* should matter to the Court, Howard's writers chose to emphasize the merit of the school's brief through those things that White supremacist ideology values. And while the university presented a Black centered educational and training mission, it also boasted its purpose and accomplishments of service to society at large more than any other *amici*. In other words, its value was justified through interest convergence.

The other brief to take this approach was filed by the NMA et al., the only other *amici* explicitly representing Black serving institutions. The writers struck a balance between boasting their mission and service to the Black community and identifying ways that this mission benefited the majority in the likely belief that this alignment with White centered service would sway the Court effectively.

Antioch School of Law (Antioch) reflected similar ideology in what it chose not to emphasize to the Court. Despite the law school's diverse population and historical commitment to legal education that focuses on human rights and poverty reduction, the university stays clear of discussing its own objectives except to provide a single race-neutral statement of its commitment to educating future lawyers of all races. When deciding what to include in the brief,

the writers found the provision of these central services as not worth including in their attempt to influence the Court.

White supremacist ideology was also embedded in the manner by which many of the *amici* chose to discuss diversity's value in order to support affirmative action. Columbia et al., Rutgers, Washington, and the AAMC defended diversity as a benefit for all students and faculty. The *amici* for Columbia et al. wrote,

> …by not enrolling minority students in significant numbers, the amici were continuing to deny intellectual house room to a broad spectrum of diverse cultural insights, thereby perpetuating a sort of white myopia among students and faculty in many academic disciplines-most particularly the professions, the social sciences and the humanities. (p. 3)

The AAMC wrote, "Medical schools have a crucial interest in maintaining the diversity among students which contributes to the quality of education" (p. 4). Rutgers' brief, filed alongside their school's student bar association, presented a diverse school environment, "Those members profited immeasurably from a racially integrated law 'school experience" (p.3).

This White centered view on the benefit of diversity, shared across briefs, wrongfully centered the majority in policies hard fought by those who have been minoritized. It promoted the idea that laws and policies should be protected when they serve the most people and failed to correct past wrongs. Affirmative action was not designed to benefit the majority and, in fact, is necessary because of the structures that favor the majority in power. Defending affirmative action in this manner disregarded the necessity to take active steps against the systemic discrimination of racial minorities for the benefit of those same minorities. By centering Whiteness in the defense of the policy, well-intentioned academic institutions limited the potential impact of the policy and tied its future to its acceptance by majority serving institutions.

Finally, only four briefs discussed historic segregation and or barred access to higher education for Black individuals when reflecting on the need for affirmative action as it pertained to mission alignment. Those who did mention it wrote as if the discriminatory practices were perpetuated by an amorphous power within a situation that has now come to an end. For example, the brief submitted by the NMA, NBA, and NAEOHE reads, “It is common knowledge that until a few years ago, all but a minuscule number of Blacks were excluded from the profession” (p.4). CANI wrote, “Furthermore, the Committee seeks to help members of the academic community who are seeking redress against discrimination” (p. 3). The issue with this presentation is the lack of ownership of the damages done by this oppression or of the continued inequality that persists today because of those actions. Systemic injustice, which necessitates affirmative steps to address, was reduced to a couple of lines in a brief.

The absence of reflection removed responsibility from institutions still in power and encouraged an ideology of White saviorism by applauding basic efforts to allow Black individuals into institutions where they were once excluded. It ignored their role in continual oppression. So long as affirmative action remains unlinked to personal responsibility and remediation, it is depicted as a favor by the White majority to some, as opposed to a hard-fought and necessary policy that helps level a playing field that was intentionally built to oppress.

Interlude: Revisiting positionality

I began my research prior to the Supreme Court's agreement to hear the cases of *Harvard v. SFFA* and *North Carolina v. SFFA*. I knew the cases were on their way, but the Court was a different Court at the time, and there was some uncertainty as to how and when the cases would move forward. These cases moved through the judicial system and were ruled upon by various courts as I finished my own work and reflected on my findings. The final ruling by the Supreme Court came on June 29, 2023, after I had finished all my coding but before I had finalized my analysis. When the opinion became public, I was prepping for a meeting with several law school admissions professionals on how we could collaborate to help them reduce the disparities in law school admissions.

Because my coding was finalized, it was left unaffected by the changes in my own positionality. However, my professional role immersed me in the aftermath of the ruling, and it was impossible for me to remain unaffected. I was and continue to be tasked with the mission of addressing admission disparities in law school admissions. My understanding of the impact and importance of higher education's voice in the defense of affirmative action was highly affected. As I've read through the *Harvard v. SFFA* documents, sat in countless workshops, consulted with school officials shaping their future processes, and worked to ease the nerves and hurt of prospective law students of color, I have returned to my findings, and specifically to this concluding chapter with greater fervor. What began as curiosity has been shaped by the damages caused by the last ruling, and I write my concluding chapter from a different position.

My exposure to institutional response to the latest ruling has left me disappointed in our collective institutional ability to defend the values that we espouse. Our risk aversion as a response to the ruling, evident by the disappearance of the term 'diversity' from office names, has affected how I see the lack of boldness by the brief writers and its effect on the current

condition of diversity in education. We, as administrators and promoters of higher education, are nowhere done encountering legal opposition to diversity initiatives. Lawsuits by SFFA and similarly funded and backed organizations are ever-increasing, and state legislation is cutting funding for decade-old diversity initiatives at schools. We must look at our failures and learn to discuss our objectives openly in order to defend those policies and tools that allow us to pursue our goals boldly. This final chapter was written with that call to action weighing heavily on my mind.

Chapter 5: Conclusion

Thirteen *amicus* briefs were submitted on behalf of higher education in support of the University of California in Univ. of California v. Bakke. These briefs contained some of the first widely circulated language and ideology regarding the necessity of affirmative action in education and the value of pursuing diversity, not simply allowing it to exist. This study sought to better understand how higher education came to the defense of affirmative action and uncover the ideology embedded in this defense. Ideas and topics emerged directly from *amicus* briefs through a qualitative content analysis. In this manner, I could follow the codes and then analyze them using CRT without influencing the coding itself with preconceived notions from questions that narrowly limited the contents of the briefs. This approach was necessary to holistically understand the writing being presented and answer both research questions within their time. I answer two research questions: (1) how did members of the academy present affirmative action as part of their own mission or purpose within *amicus* briefs for *Bakke*, and (2) what ideology is embedded in these arguments?

Through the content analysis I found differences in the approaches and connections between mission and affirmative action that writers of the *amici* opted to include in the briefs. Institutional commitment to educating all was present in many of the briefs. However, not all briefs discussed the necessity for affirmative steps to be taken to accomplish this mission, and even fewer of them discussed the systemic oppression and exclusion of racial and ethnic groups that affirmative action sought to remedy. In other words, the briefs were unified in their presentation of diversity as good and in their understanding of the importance of not directly excluding anyone from educational institutions due to their racial identities. All of the briefs reviewed were built on these basic ideas, with varying degrees of commitment and aversion to legal risk.

This varying commitment is evident in the institutions' discussion of why educating all was an important pursuit for their organizational mission. The clearest divide existed between those who pointed to the pursuit of social justice as part of their mission and others who cited diversity as an educational benefit to the majority. Briefs submitted by Howard; NMA, NBA, and NAEOHE; and CANI and MALF, all centered social justice as part of their mission. In this way, they described the education of everyone as central to that pursuit. Their identities as Black serving institutions (Howard, NMA, NBA, and NAEOHE) and anti-discrimination organizations (CANI) are also unique from all other represented organizations. Their defense of affirmative action was therefore uniquely tied to their own existence as organizations, not simply their practices.

The University of Washington and Rutgers University, both large, public, research universities, were the only two to present both ideas (social justice and benefiting all) within their mission. These schools identified the pursuit of educating all as part of their mission to serve their representative communities as a social justice cause and leveraged their claim with a White centered framework on how this mission serves all. Through CRT we recognize phrasing around service to all as meaning in service to the majority. Most of the other briefs do not represent social justice as a function of their mission in any way, and center institutional belief in the education of all as a benefit to the majority. They claimed that affirmative action was necessary to create a diverse classroom in order to support a better classroom experience for all.

Underlying Ideology and CRT

In conventional content analysis, codes are derived directly from the content and not derived from a standing theory (Hsieh & Shannon, 2005). I did not seek to affirm CRT tenets in my findings. After the briefs were coded and their themes identified, I applied CRT to identify the underlying ideology and situate its impact. To this end, Chapter 2 discusses at length each of

the tenets of CRT applied to my findings. In this section, I apply each of these tenets to my findings to reveal transferable lessons that can be applied in the defense of diversity initiatives in the future.

The application of each tenet of CRT revealed additional depth to each brief and reinforced the theory by highlighting the ever presence of White supremacist ideology. In 1995, Bell reflected on CRT by describing its development as necessitated by ideology that lacked language by which to be shared. In many ways, that language struggle is evident within these *amicus* briefs, as writers tried to advocate for a policy necessary because of damages done by the very laws and institutions that created and upheld the power of the Court at which they presented their case.

A tenet notably reflected in this study is that racism is an everyday and normal part of our society, our systems, and therefore, our institutions. Locked in time, the documents present the brief writers as fierce advocates of justice presenting information to an open and fair Court that is willing and wanting to change. Historic contextualization through the application of this tenet reveals a richer and darker story. Most briefs fail to address their own institution's role in creating the need for affirmative action. Indeed, the briefs avoid the Court's role in the same. Even those few briefs that discuss racism and segregation do so as outsiders, not players, and they do not identify the Court's own role in the continual institutionalization of oppression. By avoiding ownership, the presenting institutions are failing to name the current prevalence of bias and racism in admissions practices and, therefore, failing to name one of the biggest reasons affirmative action is necessary. In other words, affirmative action is situated as a favor or form of welfare for others who have not succeeded in a presently just society as opposed to a way to better their institutions and move away from current harmful practices that are deeply embedded in our society. Affirmative action has been easier to dismantle because even in its defense, it has

been positioned as a handout, and within our White supremacist and capitalist society, handouts are negatively positioned as un-American.

The CRT tenet of interest convergence is reinforced by every brief. As stated above, the *amici* did not directly address the role of the Court in maintaining the existing White power structure in the Country. This omission does not mean that the arguments presented were not purposefully designed to align with White benefit. The four briefs that focused only on the educational benefit to *all* display the clearest evidence of White centered arguments. These briefs were filed by AAMC, Columbia et al., Rutgers, and Washington. They present the inclusion of non-White students in the classroom as necessary for the benefit of the other students. In presenting this argument, the "other" or White students' wellness is centrally situated as the benefit of affirmative action. This, presented by White institutions to a White Court, indicates both the White's institution's purpose for writing and how they've come to understand the benefit of affirmative action, and what they have identified as important enough to influence the Court. Black institutions echo this tenet in their briefs. Howard University, which presented a brief to defend its own existence as a Black serving institution, did so by presenting to the Court everything it did to serve a majority White society.

The absence of storytelling across the briefs further builds on the Court's capitalistic values. Howard presents the number of buildings it has and its Congress backing but does not describe the impact it has had on Black communities. It lists numbers of diplomas, but not why those diplomas matter to the marginalized communities it serves. The same can be true of the seven briefs that discuss affirmative action's role in helping to produce doctors and lawyers of color through numbers but not impact. It is true that the writers are limited in what they can produce, and they are not presenting cases to the Court, only information. However, the Court understands the concept of harm. By omitting the individual narratives of those our system is

failing to serve and for which we need to take affirmative steps, we accept a majority narrative and allow those in power to continue to make decisions based on their own narrative. Additionally, by discussing affirmative action as a policy without presenting its origins with Black leaders like Philip Randolph, the writers give no credence to the harm that necessitated and continues to necessitate its existence (Stokes et al., 2003).

The final tenet of CRT reinforced by the findings is displayed in the short-sightedness of all the briefs. This study focuses solely on the introductory writing of each brief, in which the writers discuss the interest of the *amici* in presenting an argument and describe themselves and their objectives. None of the briefs presented by institutions of higher education look to the future. Educational impact happens in the future and has a long-term effect on our society, yet no brief described their objectives in these terms. Affirmative action is necessary not simply for what it can do today but for the impact it will have on the future. Crenshaw (2010) presents CRT as a tool for reform. Despite the writers' claim as advocates of diversity, the briefs do not apply storytelling or other CRT tenets in their writing and fail to push for true reform.

Opportunities for further study

Existing literature on affirmative action defense, higher education, and *amicus* briefs, seldom overlaps. This study, situated at the intersection of all three topics and using CRT, expands existing literature by exploring the role of institutions of higher education as influencers of judicial change. Historical overviews on affirmative action or *Bakke* largely overlook the role of non-respondent agents of higher education in influencing the Court. This is a clear gap in the literature.

This study adds the official defense of affirmative action by non-respondent agents to existing literature on the history of affirmative action which has largely ignored *amicus* briefs.

Adding this paradigm gives a more holistic view, not simply as to what was happening within higher education admissions after its desegregation but also how this diversity was discussed and defended. Understanding this language and the ideology behind it extends available literature regarding the *de facto* segregation within higher education, which can influence what is happening now. However, while this study pulls from the field of history, it is not a historical study. A focused historical exploration that situates the briefs more fully within their setting would extend our understanding of the briefs and the academy. It would also extend applicability to future defenses of DEI initiatives by giving us context to which to connect.

Existing sociological research has shown the impact of *amicus* briefs in influencing Court opinions (Calderia and Wright,1988; McGuire, 1990; Kearney and Merrill, 2000), future rulings, and societal implications (Collins, 2004). This study builds on the work of *amicus* brief scholars both by providing a more narrow focus on the briefs submitted by a specific industry at a specific time, but more importantly, by using CRT to demonstrate how higher education leverages Whiteness to advocate for diversity. The contextualization of these findings within our own time situates these briefs as anchors within a half-century defense of a dying policy. In this way, this study presents *amicus* briefs as windows to the past and historical documents that help us understand not only what was important to a presenting institution at a given time, but also how institutions felt they could best leverage their own power.

This study calls for boldness in action. Higher education is a massive industry in this country, and it can leverage this power toward change through mission alignment. Yes, there is risk. To better understand this risk, more studies must be done to understand the entirety of higher education's display of mission through briefs over the last century. Understanding these documents, their ideology, and their limits can help future defenses carve a different, more effective path toward advocacy and equity. It would also help identify risks and opportunities.

Future cross discipline studies can provide insight that can be used to evaluate risk and increase the power of higher education in this space. In addition to a more robust qualitative analysis of *amicus* briefs, a quantitative study can provide detail as to methods for presentation of ideas, and a better understanding of the emphasis placed by different institutions that can help shed light on the effect of such efforts.

Additional historical research would provide insight as to the process by which a brief is written and clarity as to the conversations happening behind closed doors that produce a final document. This type of ethnographic approach to understanding the creation of *amicus* briefs could provide clarity as to whose voices are heard, and the process by which judicial risk is assessed. Complementary studies can be used by future advocates in their efforts to influence the Court on issues of diversity and equity.

Finally, initial work by Collins, Corley, and Hamner (2015) demonstrates that certain *amici* with prestige can have a higher influence on the Court. The disparities in how elite institutions described themselves in briefs versus their peers seem to demonstrate this as an accepted truth by writers. Left to be explored, however, is whether the extensive efforts that brief writers go through to be given credibility by the Court is an effective or efficient use of space in the brief or if less touted organizations would be better served if they partnered with a more prestigious name.

Applicability of study

Over five decades since the briefs presented in *Bakke* were reviewed by the Court, affirmative action in admissions exists only in outreach as a shell version of its original self. With each case ruled upon by the Supreme Court, affirmative action policy in admissions has lost teeth and, therefore, potential for influence. In *Bakke* (1978), it lost quotas and added strict scrutiny to the use of race; through *Grutter* (2003), the court added parameters to the use of race

and set time limitations on the use of the policy; the *Gratz* (2003) ruling lost automated use of race in admission decisions through point systems; In *Fisher* (2016), the Court reinforced strict scrutiny as a limitation to the use of race; finally, in *SFFA (2023)* the Court revoked the use of race altogether in decision making. The Court has managed to continue to position itself as a promoter of diversity and equality by keeping affirmative action alive in name but absent of the intent fought for by the Black labor movement in the 1960s.

With higher education institutions coming to the defense of affirmative action through *amicus* briefs every time a case has been brought to the Court, this begs the question as to the futility of the briefs. Despite this initial thought, scholars have demonstrated that *amicus* briefs impact the Court's decisions (Calderia and Wright,1988; McGuire, 1990; Kearney and Merrill, 2000) and influence the Court's opinions, which set the tone for future interpretations (Collins, 2004). The most obvious of these was Harvard's admissions model, presented as part of a defense brief, being used to eliminate the use of quotas (Dershowitz and Haft, 1979). However, it is not alone. Garces, Marin, and Horn (2019) demonstrated that this influence moves beyond the Court and, like the media, influences our society. The influence of *amicus* briefs may not always be fully evident in a ruling, but it can impact both opinions and dissents, both of which are powerful public documents.

By embracing the findings of prior studies regarding the power and impact of *amicus* briefs, the findings of this study take on larger implications. Not only can we point to the ideas shared in the briefs as having failed to defend the original intent of affirmative action, but we also begin to understand the negative impact of the underlying ideology on future rulings.

The briefs presented several ideas that connected affirmative action to educational mission. The most reoccurring of all of these is institutions are there to educate all. By applying CRT, we understand that the use of "all" in these briefs is synonymous with White people or

institutions unless it specifically states a centering of others. To cater to all means to cater to the majority, and when those in a position of power use it in non-descript ways, it underlies support for the status quo. This is the dual language of our judiciary, originating from our Constitution, where all men were claimed as equal so long as they were White, land-owning, protestant, able-bodied males. If higher education continues to leverage this language while failing to grapple with its exclusionary and harmful history (undertaken using this same language), it will progress educational reform only so far as it does not harm the fragility of our governing systems. Its influence as a legal advocate of social progress will be limited, as will its ability to truly be an educator to everyone.

Limiting ideology is paralleled with the presented idea that diversity is good for all. It is easily understandable why this statement was a core component of the *amicus* briefs, why it lingers in every affirmative action ruling since *Bakke*, and why it is echoed throughout our society to this day. It's an easy and digestible idea that is congruent with White interest. It centers those in power and gives credit or value to diversity only through interest convergence. This study implies that writers understood that to defend affirmative action, they had to tie its purpose to White interest. But, the danger of defending affirmative action through alignment with White interest is that when those in power deem that the White "all" is no longer benefiting from the policy, it becomes easy to dismantle as we've seen with affirmative action. Clear evidence of this can be found in the Supreme Court ruling of *SFFA v. Harvard* (2023), which dismantled affirmative action in university admissions but left it available to military academies. The Court found the increasing representation of minoritized individuals in the military a far more compelling interest than that of representation in other fields such as education, medicine, or law.

The simplicity of the anti-DEI movement spurred by the success of SFFA is that it has coopted the vague language that was used to support affirmative action and other diversity centered policies. With the loudest defense of these programs rooted in the idea of the benefit to all, programs are at risk anytime an individual can claim harm by the same. Interest convergence as a defense strategy only works so far as those in power can benefit the most from a movement. However, our capitalist values will continue to see opportunity and access through the economic lens of supply and demand. This means that if we accept the foundational premises of White power structures, addressing equity as providing for some can easily be reframed as not providing for others.

In these new attacks, the idea of racial blindness hides behind the coopted notion of equality and furthers White supremacy. Jason (2020) discusses colorblind policies as the fourth pillar of White supremacy,

> Colorblind benefits include solutions that involve the sometimes equal, but always inequitable, allocation of resources and opportunities. They include policies and rules that ostensibly benefit all races, but maintain the gap between nonwhites and whites or even benefit white recipients more than recipients of color. (p.151)

Our defense of diversity initiatives must turn away from coopted language that allows racist ideology to permeate how disparity is understood and addressed. “In this view, financial and educational failures are consequences of poor work ethic or lesser intellect” (Jason, 2020, p.146).

This is not intended to imply that a system of higher education that serves broadly or reflects the full diversity of our society is not something worth fighting for and defending as having a positive mass impact. It is imperative, however, to understand and accept that the pursuit of diversity in and of itself is not directly or immediately good for all. Schnapper’s (1985) historical overview of affirmative action reminds us that the opposition to affirmative

action and that presented against the Freedman Bureau Acts are the same. Equality in treatment by the law is used to oppose policies that address equity, and language used to fight *de jure* discrimination is now used to maintain *de facto* segregation. This means that to defend the pursuit of diversity, higher education must take a different approach than that applied by higher education within the *amicus* briefs filed in *Bakke*. It also means that the interest convergence used to influence the Court, while potentially having some positive short-term impact, causes long-term harm.

By identifying some of the failures of the past, this study presents a path forward. At a time when attacks on diversity initiatives feel as if they're consistently coming from every angle, those institutions that choose to align their mission with equity and justice must find a new approach for advocacy and influence. The coding of briefs and application of CRT demonstrated the absence of largely ignored approaches, counternarratives, and the open acknowledgment of racism in our institutions through historical context. Lewis and Eckes (2020) explored storytelling as used in *amicus* briefs seeking to influence transgender student inclusion policies. The scholars write, "Indeed, legal narrative will allow dominant groups to learn about the experiences of minority groups" (p.78). While counternarrative would surely increase majority awareness, its potential lies in the recentering of the conversation away from attacks that center privileged individuals and claim reverse racism. Second, owning our racist history and our institutional failures is necessary in justifying the need for diversity initiatives, however uncomfortable it may make those in power. "Ironically, the mere identification of racism is often criticized for fomenting divisiveness and sometimes even scrutinized more than racism itself" (Jason, 2020, p.143-144). In *Lawrence v. Texas*, ten academic historians submitted a brief to the Court cited in the opinion which overturned Texas' homosexual conduct law (Chauncey, 2004). Their *amicus* brief gained substantial attention from the press. Chauncey writes, "Our brief

sought to correct the historical errors used to bolster the majority's reasoning in Bowers by demonstrating the historical variability of sexual regulation and the historical specificity of the antigay hostility animating the Texas law" (p. 510). Both of these approaches are worth further exploring by defenders of diversity initiatives in higher education both in practice and study.

The institutions of higher education who sought to influence the Court in *Bakke* did so by leveraging what is important within the standing White power structure. Higher education puts at risk its privilege and safety net if it chooses to question the foundation of where it sits and the discriminatory and inequitable practices that got it there. But, it is these practices and history that require proactive or affirmative steps to dismantle. The industry's guile inability to do that has become a hindrance to social justice and racial progress. Through the guise of defenders of all and promoters of diversity, these briefs display evidence of the harm that higher education has had on the pursuit of equity.

On the role of scholarship in advocacy, Perna (2018) wrote, "The ways that we connect research, advocacy, and policy depend on how we define our relationships with relevant stakeholders" (p. 10). In the final sections of this study, I provide brief guidance and implications for stakeholders by placing the findings of this research within the context of my work as a DEI professional. The implications included begin a conversation about how members of the academy can apply findings from this study to their work. I do this with an understanding of the necessity for dialogue between researchers and practitioners to increase the utility of recommendations and with the hope to further explore implications in future work.

Implications for amicus writers

When submitting *amicus curiae* briefs, institutions of higher education should recognize the role that their words have not simply on the outcome of a case but in the future understanding

of a topic. While writers will not have the benefit of hindsight or know exactly what the future holds, the application of CRT tenets when drafting briefs will help prevent the promotion of harmful ideology.

The acknowledgment of persistent racism and interest convergence helps situate meaningful dialogue with the Court. Specifically, writers can and should acknowledge the necessity of affirmative action in addressing persistent barriers to access within their own institutions that prevent them from accomplishing their institutional mission. This requires submitting organizations to acknowledge their failures and flaws both in the past and present. One way of demonstrating this is through the use of narrative.

Hannah-Jones (2024) wrote,

> To meet the moment, our society must forcefully recommit to racial justice by taking lessons from the past. We must reclaim the original intent of affirmative-action programs stretching all the way back to the end of slavery, when the Freedmen's Bureau focused not on race but on status, on alleviating the conditions of those who had endured slavery. Diversity matters in a diverse society, and American democracy by definition must push for the inclusion of all marginalized people. But remedies for injustice also need to be specific to the harm. (sec. 6)

Additionally, the inclusion of up-to-date scholarship within *amicus* briefs is necessary not simply within the body arguments provided to the Court, but in the understanding of self and mission. This was absent from *amicus* briefs filed by the academy in *Bakke* despite the central role research plays within organizations. The weight and responsibility of being included in these arguments are often put on the researchers themselves. Heller (2018) wrote, "It is incumbent upon the researchers to seek out opportunities to connect with outside groups and promote their scholarship in ways that make what are often dense, complex, and difficult-to-understand

concepts accessible to lay readers" (p. 35). *Amicus curiae* writers for the academy should recognize the value of representing research centers and seek to include not just the work of scholars, but their expertise in analyzing the arguments they are submitting.

Implications for advocates of DEI initiatives

Prior to *Bakke*, institutions of higher education had historically been afforded a great deal of deference and autonomy by the Court. Despite this, the *amicus* briefs filed under *Bakke* failed to demonstrate the need for deference through strong alignment between the use of affirmative action and the mission of institutions of higher education. The centering of the racial majority through a portrayed generic goal of educating all or service to society failed to demonstrate the very unique role of education in addressing systemic racial inequality. The briefs also failed to address existing inequalities in the admissions process that required an intervention through affirmative action.

If current advocates of DEI initiatives are to be successful, they must help their institutions articulate and articulate DEI principles and center them within their institution's mission. Importantly, they must do so in a way that de-centers the majority. For many, this means identifying systemic issues of inequity within the organization and identifying them as critical failures in mission fulfillment. Then, situating DEI programs as tools necessary to fulfill that mission.

Implications for DEI Practitioners

The increase in anti-DEI legislation and targeted attacks by the far-right means practitioners are having to adjust their work and approach to the risk level permitted by their institutions. Many are rewriting program objectives, changing office names, and situating their work as a benefit to all students in the manner portrayed by the writers of the briefs in *Bakke*.

I've spoken to several DEI professionals across multiple campuses who are actively logging how many White students they serve so that they can justify their role when the existence of their office inevitably comes under review.

The approach is understandable – the immediacy of the threat leads practitioners to find any way to continue to serve an underlying purpose, even if it means submerging the visibility of their work or watering down the impact. Flying under the radar can be a survival tactic for practitioners that are often removed from larger scale policy decisions.

To combat both the dismantling and watering down of DEI initiatives, practitioners can more specifically describe the necessity for their work through narrative. Practitioners are often focused on recording and promoting the good that their program or office does. This in and of itself is not a problem. However, when opponents are describing these services as benefits, handouts, or unfair beneficial treatment, this approach can be harmful. This study shows the necessity of narrative in the protection of affirmative action and DEI initiatives. Practitioners should log the specific harm experienced by marginalized students that their programs, initiatives, and interventions address. They should then report these within their organization to provide the administration with an accurate and specific description of the additional challenges faced by the marginalized students they serve. For some, it may also be an option to report outside the walls of their institutions through professional organizations. This shift will cause discomfort in spaces where the majority would prefer to claim ignorance and colorblindness. However, it is at the ground level that narratives exist that can be used to combat the highjacked language of equality being used to dismantle DEI initiatives.

Conclusion

Higher education has come a long way since its exclusionary and openly oppressive pasts. Since then, institutions have played a role in social progress, but they have done so in measured ways and erred too much on the side of risk aversion and maintaining power structures. This was perhaps necessary to move the needle in the beginning; more studies are required to explore this notion. What is clear is that at this point, this form of interest convergence and centering of Whiteness has failed to move the industry as far as needed to truly pursue equity in higher education. The most recent ruling on affirmative action is a clear indication of it.

From my position as a diversity advocate within the field of higher education, I have witnessed well-intentioned administrators mourn the loss of the use of race-conscious admissions while continuing their mission unaffected. I've attended dozens of trainings, both before the latest ruling and since, in which individuals claiming to be advocates of equity have discussed shifting the burden of access to minoritized candidates by emphasizing their role in writing a personal statement demonstrating trauma and grit. Meanwhile, courses continue as planned, and the stability of an institution depends not on who is seated at the desks, only that they pay tuition.

Whether institutions need to be agents of social change is a philosophical question. However, if higher education positions itself as such, then institutional missions must be more closely tied to the pursuit of diversity and decenter Whiteness to better effect change. This is especially true for public colleges and universities.

The *SFFA* ruling has been accompanied by anti-DEI legislation in states like Florida, Texas, and Ohio. Diversity offices across the country have changed their name to do good work under the cover of serving "all." Affirmative action was simply one policy used by higher education to increase diversity in its admissions process, and it has been dismantled in all but

name. The other tools will be challenged in the Courts next. If institutions of higher education continue to defend them by separating their mission from these practices in self-preservation or by aligning with White interest in the hopes of using it as a shield, these other efforts will be lost as well.

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Appendix A

Full list of *amicus curiae* briefs filed to the United States Supreme Court in *Regents of the University of California v. Bakke* (1978)

Amicus	Position	Included
American Association of University Professors	In support of petitioner	Yes
American Bar Association	In support of petitioner	No
American Civil Liberties Union; American Civil Liberties Union Foundation of Northern California; ACLU of Southern California	In support of petitioner	No
American Federation of Teachers	In support of petitioner	No
American Jewish Committee; American Jewish Congress; Hellenic Bar Association of Illinois; Italian-American Foundation; Polish American Affairs Council; Polish American Educators Association; Ukrainian Congress Committee of America (Chicago Division); UNICO National	In support of respondent	No
American Medical Student Association	In support of petitioner	No
American Subcontractors Association	In support of respondent	No
Anti-Defamation League of B'nai B'rith; Council of Supervisors and Administrators of the City of New York Local 1, AFSA, AFL-CIO; Jewish Labor Committee; National Jewish Commission on Law and Public Affairs; UNICO National	In support of petitioner	No
Antioch School of Law	In support of petitioner	Yes
Asian American Bar Association of the Greater Bay Area (AABA)	In support of petitioner	No
Association of American Law Schools	In support of petitioner	Yes
Association of American Medical Colleges	In support of petitioner	Yes
Bar Association of San Francisco; Los Angeles County Bar Association	In support of petitioner	No
Black Law Students Association - UC Berkeley School of Law	In support of petitioner	No
Black Law Students Association - UCLA School of Law; UCLA Black Law Alumni Association; Union Women's Alliance to Gain Equality	In support of petitioner	No
Board of Governors of Rutgers; State University of New Jersey; Rutgers Law School	In support of petitioner	Yes

Amicus	Position	Included
Alumni Association; Student Bar Association of the Rutgers School of Law Newark		
Chamber of Commerce of the U.S.	In support of respondent	No
Cleveland State University Chapter of the Black American Law Student Association	In support of petitioner	No
Cobbs, Price M.; Kahn, Ephraim; Allen, Professor Elaine; Aguilar, Jose Antonio; Bristow, President Lonnie R.; Chang, Professor Robert S.; Comer, Professor James P.; Fine, Richard H.; Fisher, June M.; Flores, Rodrigo; Higgenbotham, Robert M.; Lackner, Jerome; Lawrence, Professor Margaret Morgan; Levitin, Lawrence A.; Lightfoot, J. Kennedy; Mondanaro, Josette M.; Montoya, Roberto; Obrinsky, President William; Padilla, Stanley L.; Poussaint, Alvin F.; Terris, Milton; Thomson, Gerald E.; Young, Quentin D.	In support of petitioner	Yes
Columbia University; Harvard University; Stanford University; University of Pennsylvania	In support of petitioner	Yes
Committee on Academic Nondiscrimination and Integrity; Mid-America Legal Foundation	In support of petitioner	Yes
Council on Legal Education Opportunity	In support of petitioner	No
Equal Employment Advisory Council	In support of respondent	No
Fair Employment and Housing Commission of the State of California	In support of petitioner	No
Fraternal Order of Police; Conference of Pennsylvania State Police Lodges of the Fraternal Order of Police; International Conference of Police Associations; International Association of Chiefs of Police	In support of respondent	No
Galliano, Ralph J.	In support of both parties	No
Howard University	In support of petitioner	Yes
Hoy, Timothy J.	In support of neither party	No
Kadish, Sanford H.; Loiseaux, Pierre R.; Warren, William D.; Anderson, Marvin J.	In support of petitioner	No
Lackner, Jerome A.; Woods, Marion J.	In support of neither party	No
Law School Admission Council	In support of petitioner	No

Amicus	Position	Included
Lawyers' Committee for Civil Rights Under Law	In support of petitioner	No
Legal Services Corp.	In support of petitioner	No
Mexican American Legal Defense and Educational Fund; La Raza National Lawyers Assn.; Santa Clara County, Calif.; League of United Latin American Citizens; American GI Forum; National Council of La Raza; Los Angeles MECHA Central, Image; National Association for Equal Educational Opportunity; Association of Mexican American Educators; Vasconcello, John; UNITAS	In support of petitioner	No
NAACP	In support of petitioner	No
NAACP Legal Defense & Educational Fund, Inc.	In support of petitioner	No
National Association of Affirmative Action Officers	In support of neither party	No
National Association of Minority Contractors; Minority Contractors Association of Northern California, Inc.	In support of petitioner	No
National Conference of Black Lawyers	In support of petitioner	No
National Conference of Black Lawyers; National Lawyers Guild; California Rural Legal Assistance, Inc.	In support of respondent	No

Amicus	Position	Included
National Council of Churches of Christ in the USA; American Coalition of Citizens with Disabilities; Americans for Democratic Action; American Federation of State, County, and Municipal Employees; American Public Health Association; Children's Defense Fund; International Union of Electrical, Radio and Machine Workers, AFL-CIO; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; Japanese American Citizens League; Mexican American Political Association; National Council of Negro Women; National Education Association; National Health Law Program; National Lawyers Guild; National Legal Aid and Defender Association; National Organization for Women; National Urban League; United Farm Workers of America, AFL-CIO; United Mine Workers; United States National Student Association; Young Woman's Christian Association	In support of petitioner	No
National Employment Law Project	In support of petitioner	No
National Fund for Minority Engineering Students	In support of petitioner	No
National Medical Association; National Bar Association; National Association for Equal Opportunity in Higher Education	In support of petitioner	Yes
National Urban League; National Organization for Women; United Automobile, Aerospace and Agricultural Implement Workers of America; National Conference of Black Lawyers; La Raza Law Students Association; Mexican American Legal Defense and Educational Fund; Puerto Rican Legal Defense and Education Fund; California Rural Legal Assistance, Inc.; National Bar Association; UCLA Black Alumni Association; National Council of Women's Organizations; UC Davis Law School, Chicano Alumni Association; Charles Houston Bar Association; National Lawyers Guild; Black American Law Students Association	In support of petitioner	No

Amicus	Position	Included
Native American Student Union of the University of California at Davis; Native American Law Students at the University of California at Davis; American Indian Bar Association; American Indian Law Students Association; American Indian Law Center, Inc.	In support of petitioner	No
North Carolina Association of Black Lawyers	In support of petitioner	No
Order Sons of Italy in America	In support of respondent	No
Pacific Legal Foundation	In support of respondent	No
Polish American Congress; National Advocates Society; National Medical and Dental Association	In support of respondent	No
Puerto Rican Legal Defense and Education Fund; Aspira	In support of petitioner	No
Society of American Law Teachers	In support of petitioner	Yes
United states	In support of neither party	No
United states		No
Washington; University of Washington	In support of petitioner	Yes
Waxman, Henry A.	In support of respondent	No
Yale Black Law Students Association	In support of petitioner	No
Young Americans for Freedom, Inc.	In support of respondent	No

Appendix B

Coding frame

Category	Subcategory	Descriptions	Example
Policy	Description of admissions process	description of the manner by which admission decisions are made at an institution; unique approaches by each institution type	These "special admission" programs differ somewhat among the schools, both in the procedures used and in the size of the program.
	Majority centered educational benefit	cultural competency building of all or majority students	The SBA is committed to a pluralistic student body which enables students to learn from each other and to understand and appreciate each other's cultural differences and perspectives
	MSI justification	the existence of minority serving institutions and their value and need	This Court's decision may significantly affect the unique mission and continued integrity of historically black institutions.
	Non-specific statements of support	statements of support for University of California or affirmative action in admissions presented without reasoning	We file this brief, therefore, in support of the petition for certiorari herein.
	Race as admission factor	description of value of race as a factor in admissions	For reasons set forth within, the race of the applicant is highly significant to our interpretation of the evidence bearing on potential competence and potential contribution.

Category	Subcategory	Descriptions	Example
	Success of affirmative action	growth of diverse representation due to changing admissions programs	This growth is attributable almost exclusively to recently instituted programs specifically designed to recruit and train minority professionals.
	Threat of removal	description of what would occur without affirmative action	The decision below, if extended to law school admissions, would effectively destroy our ability to make predictions about the potential professional competence of applicants.
Description of Amici	Accomplishments	honors or awards that recognize contributions by the *amici*	Representatives of CANI have testified at congressional hearings and at those held by such agencies as the Equal Employment Opportunity Commission and the United States Commission on Civil Rights.
	Description of institution	origin of the *amici*, location, layout, size, scope, number of graduates, type of institution	Howard University was established as a private nonsectarian institution by Act of Congress on March 2, 1867.
Institutional Objectives	Academic Freedom	freedom of universities to make their own admissions decisions based on self-identified needs	Our society has recognized that higher education can flourish only so long as educators have substantial independence to formulate and implement the policies by which it is transmitted.

Category	Subcategory	Descriptions	Example
	Advance knowledge in field of study	description of research and progress within a field of study	... have gone on to make significant contributions in fields such as African and Black American history, marine biology, music and the performing arts, religion and theology, child and family life, education and international diplomacy.
	Develop workforce across sectors (nonrace specific)	presentation of workforce development and expansion as an objective of the institution - does not specifically mention diversification of said workforce	… and also the pool from which, increasingly, local and national leaders in the public and private sectors tend to be selected
	Direct service to society	discussion on how the work done by the institution directly benefits society	Howard University and its sister black colleges and universities are steeped in the tradition of service to our society.
	Increased training of minorities not explicitly in law or medicine	general statements of role of universities to educate all and increase representation across fields of study	Historically, Howard and the other black colleges and universities in this country have been the major training grounds for American blacks
	Minority representation in law and medicine	description of number of lawyers or doctors with underrepresented racial identities and need to increase those numbers	But despite its success, the Law School program represents only first steps toward full minority participation in the legal profession.
	Pursuit of social justice	amici present a goal of righting institutionalized injustice	What this means for us in education is that education must become the major instrument by which and through which this national commitment will be exercised.

Category	Subcategory	Descriptions	Example
Legal Argument	Legal advice to Court	Constitutional interpretations, role of Supreme Court and judicial precedence	He persuaded the trial court that he had been discriminated against because the Constitution is "color blind," but the Supreme Court of the State of Washington reversed."
United States History	Discrimination, segregation, and enslavement	separate but equal ideology; institutions built to only serve certain populations; lack of access given to education	It is common knowledge that until a few years ago, all but a minuscule number of Blacks were excluded from the profession.

Laura Fonseca

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EDUCATION & CERTIFICATIONS

Indiana University – School of Education Bloomington, IN
Doctorate of Education Candidate– Educational Leadership and Policy, Higher Education May 2024
- Dissertation Title: Influencing *Bakke:* A Qualitative Content Analysis of Higher Education's *Amicus* Briefs

Graduate Certificate in Education Law May 2020

University of Florida Gainesville, FL
Master of Arts - Latin American Studies-Development May 2009
- Thesis title: Conditional Cash Payment Policies in Brazil: The View from Below
- Tinker Foundation Research Grant Recipient; USDE FLAS Fellow – Portuguese

Indiana University – College of Arts + Sciences Bloomington, IN
Bachelor of Arts – International Studies May 2007
- Latin American Studies Minor

Additional Certifications
2022-3 National Association of Diversity Officers in Higher Education Standards of Professional Practice Institute; MyersBriggs Type Indicator (MBTI); Strong Interest Inventory

SELECT EXPERIENCE

Law School Admission Council Remote
Director of Diversity Equity and Inclusion Programs and Initiatives April 2023 – Present
- Develop and oversee year long, direct service legal pathway program for over 400 law school candidates that aims at reducing disparities in legal admissions and LSAT performance
- Collaborate with member law schools in the United States and Canada to increase the reach and efficiency of their diversity and equity initiatives
- Develop new pathway engagement community that brings together legal pathway directors from across the United States and Canada to provide training, research, and support that increases their capacity and impact in alignment with LSAC's DEI goals
- Use up to date research and data to inform program development and management
- Lead trainings and workshops for internal and external staff that promotes increased understanding of a diverse law student's journey and how data can be leveraged for increased impact
- Supervise staff and lead team meetings in a way that increases team unity, effective communication, individual development, and collaborative practices
- Track team progress in meeting long-term team goals using ClickUp task management software
- Represent LSAC as a speaker and panelist at meetings and events nationwide

Indiana University Maurer School of Law Bloomington, IN
Director of Diversity Equity and Inclusion March 2021 – March 2023
- Develop vision and structure for DEI efforts at the law school as inaugural Director while building support across all groups of stakeholders
- Create and lead both compulsory and optional trainings and programs on diversity, equity, inclusion, and belonging topics aimed at educating law students and staff
- Advise student affinity groups and encourage collaboration to increase awareness and celebration of student diversity as well as build community

- Increase communication channels from students to administration in order to create systems of trust towards positive change including launching student diversity advisory board
- Develop and launch school bias incident reporting tool and processes that maximize university wide resources to provide safe, timely, and comprehensive support for those who experience bias
- Partner with faculty members to assist them in addressing classroom concerns and increase awareness of issues affecting student learning within and outside the law school
- Supervise and train student diversity and inclusion fellows to provide direct support to peers and coordinate programing aimed at increasing sense of belonging
- Facilitate sessions for students to come together in community and process violent or hateful acts targeting members of specific identities occurring around the country and locally
- Advocate for and create physical space for affinity group members to call their own
- Recognized by Latino Faculty and Staff Council with 2022 Staff Award after student nomination
- Awarded Leonard D. Fromm Faculty Award for outstanding commitment to Public Interest Law

Adjunct Instructor; *B614: The Legal Profession* August 2021 - Present

- Incorporate content on diversity in law to increase awareness of the intersectionality of identities and experience and increase cross cultural competency through course for all first year JD students

Director, Career Services Office November 2018 – June 2021

- Advised and coached JD students and alumni on career-related topics including professionalism, skill development, application materials, values and interest identification, and career choices
- Designed and lead equitable process for school's public interest funding application and review process; oversee funding committee and decision-making process awarding over $80,000 annually
- Developed lesson plans and teach career topics within required legal profession course for first-year law students including values assessment, networking, interviewing, and implicit bias in the legal field
- Served as liaison with schools' affinity groups and provide tailored support for programming; increase student exposure to diversity opportunities and partnerships
- Facilitated workshops on career-related topics for law students with a special focus on public interest
- Led student fellows in planning and execution of reimagined career expo events for first two years

Indiana University School of Medicine Indianapolis, IN

EIC Project Member, Faculty Affairs-Professional Development-Diversity December 2019 – March 2020

- Reviewed literature on effective tools and resources to increasing diversity of faculty within the medical profession; wrote annotations, and aggregated references for recommendations for department Chairs
- Wrote and edited inclusive language guidelines for new faculty job postings

Indiana University School of Education Bloomington, IN

Teaching Assistant August – December 2019

- Taught session for required doctoral course EDUC-C620: Pro Seminar in Higher Education
- Graded and provided feedback to students on presentations and final topical papers

Indiana University Walter Center for Career Achievement Bloomington, IN

Senior Associate Director, Strategic Alumni Engagement June – November 2018

Senior Associate Director, Employer Relations November 2015 – May 2018

- Constructed tiered alumni engagement model and launched online flash mentorship platform, successfully giving alumni opportunities to invest time and talent in the success of 12,000 students
- Oversaw student career treks to key cities through partnerships with internal and external constituents to increase shadowing and networking opportunities for visiting students
- Managed Walter Center and Blatt Internship Funds by soliciting, reviewing and awarding scholarships
- Promote mission to College Alumni Board and Dean's Advisory Council to advocate for support to new and existing career initiatives and grow giving opportunities for development fund
- Led workshops and class presentations focused on networking best practices

- Coached students on career-related topics including finding opportunities, networking, careers in social service, interview preparation, and resume/cover letter review
- Grew and led team of six employer relations professionals and five interns to increase the career opportunities and professional network available to students across ten career communities, yielding three years of sustained growth in on-campus recruitment activity and rates of internship completion
- Developed and executed training program for employer relations staff centered around relationship management, long term strategic outreach, and impact
- Pursued and established MOUs with diverse organizations such as the National Endowment for Democracy, Peace Corps, and MFLF to increase student opportunities and employability
- Designed and implemented data driven CRM to track and evaluate employer participation
- Developed and implemented four-year strategic plan for new office as member of leadership team

Arts + Sciences Career Services – Indiana University Bloomington, IN
Associate Director, School of Global + International Studies July 2014 – October 2015

- Established new role to provide tailored services and opportunities for students in the newly launched School of Global and International Studies
- Established and maintained key contacts at businesses, nonprofits and government organizations around the world that increased internship and full-time employment opportunities for students
- Communicated mission of office to partner institutions to create sustainable relationships, increased opportunities, and additional funding for student services and programing
- Supervised and supported staff to maintain efficient and student-centered outreach and advising
- Coached students in exploring and narrowing interests and to achieve career goals focused on international and global opportunities

United States Peace Corps Louisville, KY and Chicago, IL
Regional Representative & Recruiter July 2010 – July 2014

- Developed and implemented recruitment strategy and budget for regional territory including a top 25 recruitment school and three metropolitan regions with a focus on diversity outreach
- Developed partnerships to increase awareness of Peace Corps service in underserved communities
- Worked with campus offices to offer and lead innovative outreach opportunities such as interview workshops, international development lectures, and community engagement seminars
- Created manuals and trainings for university staff and faculty to better engage interested students
- Planned and executed marketing campaigns by leveraging technology and grassroots tactics to strategically promote volunteer opportunities and source candidates
- Interviewed and assessed applicants for suitability and eligibility based on post requirements
- Counseled candidates on how to build their skills to become competitive for development work

SELECTED CONFERENCE PRESENTATIONS

Bodamer, E., Fonseca, L., Topczewski, A. (2024, June) *Effectively Leverage Data in Support of and Increasingly Diverse Legal Community* [Conference presentation]. Pre-Law Advisor Conference. New Orleans, LA.

Fonseca, L. and Scheller, R. (2024, May) *A New Dawn: Debriefing post SFFA Practices* [Conference presentation]. LSAC Annual Meeting and Educational Conference. Scottsdale, AZ.

Fonseca, L. and Akrong, A. (2023, June) *Developing Cultural Competency Training: Overcoming obstacles for meaningful dialogue* [Conference presentation]. National Conference on Race and Ethnicity. New Orleans, LA.

Eckes, S., Fonseca, L., Darden, E., and Butts J. (2022, March) P*anel: Increasing Legal & Policy Literacy to Promote Diversity, Equity, & Inclusion in Educational Institutions* [Conference Panel]. Martha McCarthy Education Law and Policy Institute. Bloomington, IN.

Fonseca, L. (2020, November) *The Case for a Bona Fide Occupational Qualification for Race in Higher Education* [Conference presentation]. Education Law Association Annual Conference. Norfolk, VA.

Gallimore, S. and Fonseca, L. (2020, November) *A State of Emergency: Persisting as Women of Color in STEM* [Conference presentation]. AAC&U's Transforming STEM Higher Education Conference. Chicago, IL. *Work coauthored but presented by S. Gallimore.

COMMUNITY ENGAGEMENT EXPERIENCE

Indiana University Education Law Advisory Board Bloomington, IN
Board Member August 2020 – Present

- Participate in quarterly meetings to discuss the status of program and opportunities for growth

United States Peace Corps Dzhankoy, Crimea, Ukraine
Project Manager & Education Volunteer September 2009 - March 2010

- Conducted assessment of town to determine needs and successfully integrate into Dzhankoy
- Planned and instructed English as a second language courses for elementary through high school students
- Organized, funded, and conducted teacher training seminars while collaborating with host country nationals to increase exposure to new pedagogical techniques
- Partnered with teachers and community leaders to develop tailored HIV/AIDS training, diversity awareness workshops, and language development programs for high schoolers

PETI – Bolsa Familia Itaparica, Brazil
Researcher and Volunteer Educator May - August 2006, 2008

- Conducted two rounds of qualitative data gathering and analysis on benefits and shortcomings of conditional cash transfer programs and taught literacy to elementary-aged recipients of PETI