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Social Science Evidence in Higher Education  
Affirmative Action and K-12 Voluntary  
Desegregation Cases**

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A Fighting Chance:  
An Analysis of the Role of Social Science Evidence in Higher Education  
Affirmative Action and K-12 Voluntary Desegregation Cases

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## Abstract

The present inquiry focuses on the role of social science evidence contemporarily, using observations from judicial opinions in race conscious admissions cases. Using a set of judicial opinions from K-12 voluntary desegregation and higher education affirmative action in admissions, I use legal and statistical analysis to argue that social science data presented into evidence is of limited effect. In fact, judicial political philosophy seems the greatest predictor of judicial opinions in this area of law. However, the question is not whether social science evidence is influential or even persuasive, but whether it is useful in politically contentious cases. It is influential on the margins, but beyond its use in influencing marginal judges, it provides additional sources to support the opinions of judges already persuaded. In effect, the social science research presented in these cases gives defendant educational institutions a fighting chance.

## I. Introduction

Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.<sup>2</sup>

In 1908 the Supreme Court recognized the legitimacy of using social science evidence to illuminate questions of fact as they related to understanding the law generally, constitutional matters in particular. This was the case of *Muller v. Oregon* wherein a young attorney, Louis Brandies, presented the Court with two pages of legal argumentation and over one hundred pages of social

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<sup>2</sup> *Muller v. Oregon*, 208 U.S. 412, 426 (1908).

science data. The “Brandeis Brief” used social science observations to make the argument that long hours negatively affected the health of women and their families. The court system then was generally open to the use of social science in furtherance of legal claims.<sup>3</sup>

Since *Muller*, social science evidence has been used to discern a variety of facts regarding the state of society. For example, in employment discrimination and anti-trust actions, statistical and other studies are used on both sides to show disparities, harm or lack of either. Normative questions as to whether employment discrimination and anticompetitive behavior are wrong have been asked and answered, resulting in the promulgation of federal laws designed to curtail such behaviors. Judicial inquiries in such matters are narrow in scope. Holding all else constant, either there are or are not disparities generated by the misbehavior of a firm. As such, conclusions of law are indicated from the facts.<sup>4</sup>

In contrast, the mid-twentieth century concern of segregation in education did not pose such a narrow inquiry. Competing normative questions of whether a state’s right to preserve a way of life and the equal protection rights of African American students came to the pinnacle decision of *Brown v. Board of Education*.<sup>5</sup>

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<sup>3</sup> For more on Justice Brandeis and the “Brandeis Brief” see STEPHEN.W. BASKERVILLE, OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS (1994); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN’S LIFE (1946); and, MELVIN I. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM (1971).

<sup>4</sup> Although the inquiries in these cases are straightforward, the remedies are not. See e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (2001).

<sup>5</sup> 347 U.S. 483 (1954).

Of particular concern to Justice Earl Warren, author of the *Brown* decision, was the question of morality. For Warren, the moral principle of equality dictated desegregation, without regard for the judicial means to arrive at that end.<sup>6</sup> Social science evidence provided by Kenneth Clark and others supported this end. Yet the scholarship of legal historians as well as Warren's own footnote reference to the Clark evidence suggest that the data was not central to his reasoning.<sup>7</sup> The precedent of *Brown* with regard to the use of social science seems to indicate that so long as a social science research holds moral or other external validity, judges are free to use it to bolster their previously framed opinions. Thus, as the atmosphere in the 1970s was generally more supportive of affirmative action as compared to today, it is likely that Justice Powell did not need to rely on data to render his opinion in *University of California Board of Regents v. Bakke*.<sup>8</sup> However, 25 years later deference to social science data in *Grutter v. Bollinger* by Justice Sandra Day O'Connor was a key element in preserving the ability of educational institutions to use race conscious measures,

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<sup>6</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY*, SPECIAL EDITION (1976).

<sup>7</sup> JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

<sup>8</sup> 438 U.S. 265 (1978).

subsequent Court rulings in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith vs. Jefferson County Schools* notwithstanding.<sup>9</sup>

The present inquiry focuses on the role of social science evidence contemporarily, using observations from judicial opinions in race conscious admissions cases. These cases are the affirmative action in higher education and voluntary desegregation in K-12 education cases adjudicated in the lower courts beginning in 1994, culminating in the Supreme Court's decisions in *Gratz*<sup>10</sup> and *Grutter v. Bollinger*<sup>11</sup> in 2003 and reinforced by the Court's 2007 opinion in the Seattle and Kentucky voluntary desegregation cases. It is my argument that in the aggregate social science data presented into evidence does not affect the outcomes of court cases involving normative subject matters for which there is no public consensus. In the case of race conscious higher education admissions, popular and scholarly literature suggest that there is a strong perception that white, Asian, and female applicants are passed over for admissions, to the immediate benefit of males and persons of color, who would otherwise be relegated to lower rings of the higher education pyramid. In the K-12 environment, the argument is not that a child was unable to attend a better

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<sup>9</sup> 127 S. Ct. 2738; 2746 (2007). As there is no majority consensus in the justices opinions on whether benign race conscious measures can ever be used, there is continued permissibility of their use under *Grutter*, the extent of which is dubious given factions within the Court.

<sup>10</sup> 122 F.Supp. 2d 811 (MI 2000), *cert. granted*, 537 U.S. 1044 (2002), *decided*, 539 U.S. 244 (2003).

<sup>11</sup> 137 F.Supp. 2d 821 (MI 2001), 288 F.3d 732 (6<sup>th</sup> Circ. 2002), *cert. granted*, 537 U.S. 1043 (2002), *decided*, 539 U.S. 306 (2003).

school per se, but was not permitted to attend the school of his/ her parent's choosing because of the child's race. The normative issue is how do we as a society weigh the equal protection interests of the individual students against the social interest in having a pluralistic educated workforce, and the freedom of association rights of K-12 schools and universities to compose classes that foster cross-cultural academic exchange? Given the politically charged nature of these values, it may be the case that policy preferences and other judicial predispositions are greater predictors of the outcomes of race conscious admissions cases than empirical social science data, when presented. Why then attorneys make great expenditures to include such information in their cases and why judges suggest that such data is critical to their decisions when absent? I posit that both attorneys and judges are more comfortable anchoring normative arguments for and against affirmative action in data, rendering the ultimate decision an appearance of greater objectivity. This latter proposition is best illustrated by Justice O'Connor's deference to the University of Michigan's employment of social science data to justify the affirmative action policy of the law school.<sup>12</sup>

In Part II, I briefly review the landscape of race conscious admissions within the broader context of the development of equal protection law between the Supreme Court's decisions in *Bakke* and *Grutter*. This review highlights the

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<sup>12</sup> *Id.*

increasing rigor of the strict scrutiny standard and the relationship of strict scrutiny inquiry to the need for social science evidence. Part III is an analysis of the role of social science evidence in race conscious admissions cases, utilizing a set of district and circuit court decisions arising between *Bakke* and *Grutter*. Here I compare the outcomes of these decisions with the presence or absence of social science evidence at trial, utilizing a set of race conscious admissions cases spanning K-12 and higher education. This includes an assessment of the role of social science evidence in the Supreme Court's disposition of *Gratz* and *Grutter* in 2003, as reaffirmed in the Court's 2007 decisions regarding voluntary integration plans in Seattle, WA and Jefferson County, KY. While these latter cases are decided on strict scrutiny's narrow tailoring prong, the dicta is informative as to how the Justices use social science research in their decision making. In Part V, I conclude. Given the stark divergence on the Court and the predictability of judicial opinions by political philosophy, it may be the case that questions of how to use benign racial classifications should be relegated to the political process.

## II. From *Bakke* to *Grutter*: Race Conscious Admissions and the Development of Equal Protection Jurisprudence

### A. Strict Scrutiny, Affirmative Action, and *University of California v. Bakke*

The late 1970s into the early 1990s are marked by a series of Supreme Court decisions in the area of equal protection law that focused on the permissibility of affirmative action. *Black's Law Dictionary* defines affirmative action as, “[a] set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.”<sup>13</sup> These systems and procedures often specifically enumerate the set of persons who are intended beneficiaries. Constitutional problems arise when these enumerations specify race, as the Fourteenth Amendment generally prohibits legal distinctions on that basis.

However, as Justice Blackmun once contended, in light of American (U.S.) history with respect to race, “[i]n order to get beyond racism, we must first take account of race. There is no other way.”<sup>14</sup> For this reason the Court, under the rubric of strict scrutiny takes into account both the purpose (compelling interest) and policy form (narrow tailoring/ least restrictive means) of governmental policies and programs that are facially race conscious. Under this heightened level of review, governmental agencies, including public schools and universities, must first demonstrate that their rationale for the race-specific policy is compelling. They must also show how their policy is narrowly tailored,

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<sup>13</sup> BRYAN A. GARNER, *BLACK'S LAW DICTIONARY* 64 (8<sup>th</sup> ed. 2004).

<sup>14</sup> *Bakke*, 438 U.S. at 407 (separate opinion).

circumspect in scope focusing on the intended persons while minimizing perverse effects to other people.

Unfortunately, the above “black letter law” digest sounds more straightforward than is the Court’s practice in its application of strict scrutiny. For example, regarding *Grutter v. Bollinger* it has been argued that the level of review employed was not strict, but intermediate scrutiny.<sup>15</sup> In fact, Justice O’Connor’s specific approach of deferring to the University of Michigan’s judgment was at best a controversial nod to the traditional deference given educational institutions, at worst inappropriate as judicial deference is usually applied to policies analyzed under rational basis review. Under rational basis review heightened levels of judicial review are not triggered, as opposed to the context of race conscious admissions when the highest level of scrutiny is used. As such, under the contours of contemporary equal protection jurisprudence, the way deference is used in *Grutter* is enigmatic.<sup>16</sup>

In a more circumspect analysis of the Court’s approach to applying the tiers of review, University of California Professor Ashutosh Bhagwat argues

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<sup>15</sup> See, e.g., Gail Heriot, *Thoughts on Grutter v. Bollinger and Gratz v. Bollinger as Law and as Practical Politics*, 36 LOY. U. CHI. L.J. 137 (2004) and Libby Huskey, *Affirmative Action in Higher Education – Strict in Theory, Intermediate in Fact? Grutter v. Bollinger*, 123 S.Ct. 2325 (2003) 4 WYO. L. REV. (2004).

<sup>16</sup> See Marisa Lopez, *Lowering the Standard of Strict Scrutiny*, 56 FLA. L. REV. 841 (2004) , and Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?* 6 U. PA. J. CONST. LAW 945 (2004) (arguing that judicial deference is antithetical to strict scrutiny). Cf. Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Constitutionalizing and Defining Racial Equality: In Defense of Deference*, 21 CONST. COMMENTARY 133 (2004).

despite its sweeping embrace of the concept of tiered review, the Supreme Court has paid essentially no attention to the practical details of that review. ... [T]he Court has failed to develop any coherent framework regarding how, in applying the tiers of scrutiny, courts are to assess whether the governmental interest asserted satisfies the requirements of the level of scrutiny at issue.<sup>17</sup>

Less cynically, Randall Kelso, Professor of Law, South Texas College of Law, finds a pattern to the Court's decisions, arguing that the Court employs a base plus six levels of heightened scrutiny (a base of rational basis review, plus two levels of heightened rational basis review, two levels of intermediate scrutiny and two tiers of strict scrutiny), reflecting variations in the level of review and the nexus between the policy and governmental interest.<sup>18</sup> Alternatively, it may be the case that the Court engages balancing of interests in an ad hoc fashion, under the guise of heightened scrutiny.<sup>19</sup> Given the Court's inconsistencies in its application of the tiered system of review, several have argued for its re-

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<sup>17</sup> *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. LAW 260, 270 (2002).

<sup>18</sup> *Standards of Review under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 5 (2002).

conception in light of the principles for which it was adopted,<sup>20</sup> as rote application reinforces the structure of Equal Protection law, not the substance.<sup>21</sup>

In its ideal then, the Court's heightened suspicion protects individuals against direct discrimination by the government, but it also constrains government redress of the present effects of past injustices as well as impinges on governmental aid in the building of an inclusive, pluralistic society.<sup>22</sup> It is the latter conception of affirmative action with which this paper is primarily concerned. As articulated by Catharine R. Stimpson, Dean of the Graduate School of Arts and Science New York University, affirmative action is

[a]n umbrella term for a broader set of activities that public and private institutions have voluntarily undertaken in order to increase diversity, equity, and opportunity. Here, affirmative action is an institutional policy and spirit. Affirmative action so defined also embodies two strategies for the achievement of its goals. One is to erase inequities, for example, to fund both men's and women's athletics fully,

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<sup>19</sup> See Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961 (1998) and David L. Faigman, *Normative Constitutional Fact-Finding - Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991).

<sup>20</sup> See, e.g., Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004) and Suzanne B. Goldberg, *Equality without Tiers*, 77 S. CAL. L. REV. 481 (2004)

<sup>21</sup> Kermit Roosevelt, III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

without cavil. The second is to create a community that prizes diversity and differences.<sup>23</sup>

However, this ability to create racially diverse communities within educational systems is at best difficult, as historically strict scrutiny is the death knell of policies to which it is applied, with few exceptions.<sup>24</sup>

This abridged legal overview of equal protection jurisprudence focuses on the abilities of educators to create racially diverse communities in higher and K-12 education. For that reason, I begin in 1978 with the Supreme Court's badly split decision in *University of California Board of Regents v. Bakke*,<sup>25</sup> as it is the first case in which the Supreme Court rendered a decision on the merits of race conscious admissions.<sup>26</sup>

Allan Bakke applied to the medical school at the University of California at Davis (UC Davis) in 1973. At that time, to determine general admissions, the

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<sup>22</sup> See, Kim Forde-Mazuri, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEORGETOWN L.J. 2232, 2340-2346 (2000).

<sup>23</sup> *Rethinking Affirmative Action*, 25 CHANGE 2 (1993).

<sup>24</sup> *Grutter v. Bollinger* is only the second occasion in which a race-based classification survived strict scrutiny since the inception of the concept in *Korematsu v. United States*, 323 U.S. 214 (1944). The adage "strict in theory, but fatal in fact" was coined by Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*. 86 HARV. L. REV. 1 (1972). For a further discussion of the effects of strict scrutiny see M. L. Manuel, *Adarand Constructors, Inc. v. Pena: Is Strict Scrutiny Fatal in Fact for Governmental Affirmative Action Programs*, 31 NEW ENG. L. REV. 975 (1997).

<sup>25</sup> 438 U.S. 265 (1978).

medical school awarded applicants up to 500 points for their grade point average (GPA), Medical College Admissions Test (MCAT) scores, strength of letters of recommendation, extracurricular activities, and other biographical information. Even though Bakke was considered a “very desirable applicant”<sup>27</sup> he was denied admission along with each of the other general admissions applicants with a score below 470.<sup>28</sup>

In addition to a general admissions process, the medical school also had a special admissions process that weighed candidates’ qualifications similar to that in the general admissions procedure, except that special admissions candidates had to be of a racial minority background and prove social and/ or economic disadvantage. In addition candidates needed to show they were not subject to the automatic 2.5 GPA cut off.<sup>29</sup> A total of eight slots were allotted for special admissions, four of which were unfilled at the time the medical school rejected Bakke’s application. Bakke was neither considered for these slots, nor wait-listed. He reapplied in 1974 was rejected outright with his relative score dropping substantially, to 549 out of 600. While again there were special

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<sup>26</sup> The Supreme Court dismissed the case of *DeFunis v. Odegaard*, 416 U.S. 312, for mootness as the plaintiff’s graduation from the University of Washington School of Law was imminent by the time the case was heard by the Court (1974).

<sup>27</sup> 438 U.S. at 276.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 272-273.

admissions slots open, these slots were filled with students with lower grade point averages and MCAT exam scores.<sup>30</sup>

Bakke sued to compel his admission to UC Davis, alleging discrimination on the basis of his race in violation of the Fourteenth Amendment's Equal Protection Clause, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Article I of the California Constitution. While the Superior Court of California ruled that the special admissions process acted as an illegal quota, the court did not compel Bakke's admission, as Bakke had not proven that but for the quota he would have been admitted.<sup>31</sup> Bakke appealed directly to the California Supreme Court,<sup>32</sup> which assumed, *arguendo*, that the medical school's goals of integrating the student body and thereby the medical profession in addition to improving minority healthcare was compelling. However, the court held that the means used were not narrowly tailored towards the proffered goals.<sup>33</sup> According to the California Supreme Court, "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race."<sup>34</sup> The school was then enjoined from using race as a factor in admissions decisions.<sup>35</sup>

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<sup>30</sup> *Id.* at 277.

<sup>31</sup> *Id.* at 278-279.

<sup>32</sup> *Bakke v. The Regents of the University of California*, 553 P. 2d 1152, 1156 (1976).

<sup>33</sup> *See id.* at 1165.

<sup>34</sup> *Id.* at 1166.

The Board of Regents appealed this latter decision to the U.S. Supreme Court. Writing for an equally divided court, Justice Powell affirmed the California Supreme Court's decision, insofar as it applied strict scrutiny as the appropriate level of review and rescinded the specific special admissions policy at UC Davis. Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist joined this part of Powell's opinion. However, Powell reversed the summary ban on race conscious admissions, herein joined by Justices Brennan, Marshall, Blackmun and White. The latter group of Justices dissented from Powell's opinion as they endorsed the more lenient standard of intermediate scrutiny for benign race conscious measures. Neither the Burger faction nor the Brennan contingency formally endorsed the section of Powell's opinion supporting the use of race conscious admissions for the purpose of attaining a diverse student body. Yet, Justice Brennan later refers to the diversity in education justification as law in *Metro Broadcasting v. Federal Communications Commission*:

Just as a "'diverse student body'" contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal'" on which a race-conscious university admissions program may be predicated, *Regents of University of California v. Bakke*,

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<sup>35</sup> *Id.*

[*citations omitted*] the diversity of views and information on the airwaves serves important First Amendment values.<sup>36</sup>

As articulated by Powell, diversity “*clearly* is a constitutionally permissible goal for an institution of higher education [*emphasis added*]” as part of an institution’s academic freedom to encourage the “robust exchange of ideas” as protected by the First Amendment.<sup>37</sup> Citing *Keyishian v. Board of Regents*,<sup>38</sup> Powell asserted that an atmosphere of “speculation, experiment and creation” is essential in higher education and that it is a student body diverse in its ideas and that mores creates this atmosphere. Students from different backgrounds “whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”<sup>39</sup>

To support this conclusion, that there are educational benefits to diversity, Justice Powell cited then Princeton President William Bowen’s editorial to

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<sup>36</sup> 497 U.S. 547, 568 (1990):

<sup>37</sup> *Bakke*, 438 U.S. at 314.

<sup>38</sup> In *Keyishian*, 385 U.S. 589, the Supreme Court struck a regulation requiring teachers at state universities in New York to pledge a loyalty oath, finding the act in violation of academic freedom as protected by the First Amendment (1967).

<sup>39</sup> *Bakke*, 438 U.S. at 314.

Princeton alumni.<sup>40</sup> This editorial contained no specific data analysis, and was of a general observational tone.<sup>41</sup>

Powell's endorsement of the benefits of diversity as a general policy goal did not extend to the specifics of the UC Davis Medical School policy. He generally found that policy too rigid.<sup>42</sup> As a model plan, Powell offered the admissions policy of Harvard, which took into account a plethora of factors of which race was but one, a "racial plus". Additionally, there were no reserved seats for any sets of students.<sup>43</sup> According to the former Dean of the University of Virginia's Law School, John Jeffries, holding out the Harvard Plan was a pragmatic strategy on Powell's part. While the ends of the UC Davis and

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<sup>40</sup> *Bakke*, 438 U.S. at 314. Briefs by *amici* may have also played a role in Powell's decision making as a few years prior Powell was recounted as "doubtful of the educational policy" supporting the University of Washington Law School's affirmative action policy challenged in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Support for the Davis policy was provided by the American Bar Association, the American Civil Liberties Union, the National Association for the Advancement of Colored People, the Association of American Law Schools, the American Association for Medical Colleges, several universities and the National Council of Churches. Jewish organizations including the American Jewish Committee and the Anti-Defamation League of B'nai B'rith generally opposed the policy, given the historical use of quotas to restrict the access of Jewish Americans to elite institutions. A brief was also submitted by the federal government, which condemned the sixteen-seat set aside as unconstitutional. For more information on influences on Justice Powell's decision see John Jeffries, JUSTICE LEWIS F. POWELL, JR., 455-501 (1994).

<sup>41</sup> Several courts later discredit this same tone in presidential testimony as mere anecdote. See, e.g., *supra* note 91 & accompanying text.

<sup>42</sup> *Bakke*, 438 U.S. at 318.

<sup>43</sup> *Id.* at 316-318.

Harvard approaches were similar, the rigidity of the UC Davis policy gave the appearance of blatant discrimination by institutions.<sup>44</sup>

The “Harvard Plan” was taken to heart and was emulated by colleges and universities throughout the country until the 1990s. By the 1990s the weakness in the fabric of the consensus Powell brought to the *Bakke* decision was beginning to unravel through a series of Supreme Court decisions in the areas of employment and government contract law. Threads further unwound as lower courts adjudicating race conscious admissions cases began to insert alternative interpretations of the *Bakke* decision.

#### B. The Supreme Court and Standards of Review Confusions Post-*Bakke*

In *Bakke* five Justices supported strict scrutiny as the appropriate level of review, while four endorsed intermediate scrutiny. Battles over the appropriate standard of review in cases where race conscious measures are ostensibly benign lasted into the 1990s.

In 1980, two years after *Bakke*, six members of the Supreme Court upheld a congressional program awarding ten-percent of all federal construction projects to minority contractors in *Fullilove v. Klutznick*.<sup>45</sup> Yet the majority remained

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<sup>44</sup> Jeffries, *supra* note 40 at 484-485.

<sup>45</sup> 448 U.S. 448 (1980).

divided as to the appropriate level of review. In 1986 the divides continued and the Court in the case of *Wygant v. Jackson Board of Education* used five separate opinions to strike a collective bargaining agreement that included a race-conscious stipulation to prevent the loss of faculty diversity in the case of a layoff.<sup>46</sup> In this case, Justice O'Connor acknowledging the confusion states that, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."<sup>47</sup> Justice O'Connor's dicta that race conscious policies were not *per se* illegal rang true one year later in the case of *U.S. v. Paradise* (1987).<sup>48</sup> In that case, the Court employed strict scrutiny to uphold an Alabama policy remediating discriminatory hiring and promotion practices by the Department of Public Safety.

In the 1989 case of *City of Richmond v. Croson* that the Supreme Court solidly endorses strict scrutiny for state and local race conscious policies, regardless of intention.<sup>49</sup> Writing for the majority, Justice O'Connor reasons that government intentions and even when the government has the best of

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<sup>46</sup> 476 U.S. 267 (1986).

<sup>47</sup> *Id.* at 286.

<sup>48</sup> 480 U.S. 149 (1987). Note that Justice O'Connor was not part of the majority supporting the affirmative action plan in *Paradise*.

<sup>49</sup> 488 U.S. 469 (1989).

motivations, perverse effects in the form of negative stereotypes are formed and perpetuated.<sup>50</sup> In *Croson* the Court struck the City of Richmond's minority business program modeled after the congressionally-sponsored program upheld in *Fullilove*. While as in *Fullilove*, the Court found remediation of the effects of past discrimination constitutionally compelling, the second prong of strict scrutiny, narrow tailoring, was not satisfied, in part, for evidentiary reasons.

Statistics offered by the City of Richmond confirmed nationally there were disproportionately fewer minority contractors; however, city specific data documenting discrimination in city contract awards and/ or disparities in awards along racial lines was limited.<sup>51</sup> The Court looked for a ratio comparison of contracts awarded to qualified minority firms versus contracts awarded to majority firms: the city's data compared the number of minority-awarded contracts to the city's general population, not the pool of qualified minority contractors.<sup>52</sup> Additionally, the Court found the policy overly broad in that it

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<sup>50</sup> *Id.* at 493-494. The research on the stigmatism of affirmative action on people of color is unclear, *see e.g.*, Ashley M. Hibbetf, *The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education*, 21 HARV. BLACKLETTER L. J. 75 (2005) *cf.* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004). Anecdotally speaking some African American students have been told to take their opportunities as they come and pay for a counselor later if need be.

<sup>51</sup> *See id.* at 487- 491(generally using federalism to distinguish the Court's decision in *Fullilove* from *Croson*) and *id.* at 500-503 (focusing on the lack of on the award of city contracts to minority firms). The Court seemed particularly concerned about "racial spoils," the awarding of minority contracts in a city in which African Americans constituted about half of the population and held five of nine city council seats. *Id.* at 495-496, 500.

<sup>52</sup> *Id.* at 501-502.

allowed any nationally underrepresented firm to apply, as opposed to limiting the policy to groups historically discriminated against by City of Richmond.<sup>53</sup>

One year after *Croson*, in 1990, the Court in *Metro Broadcasting v. Federal Communications Commission* applied intermediate scrutiny to a federal program, finding diversity in broadcasting an important governmental goal.<sup>54</sup> However, five years later, in *Adarand Constructors, Inc. v. Peña*, the Court reversed, announcing that the appropriate standard for review for all race conscious measures is strict scrutiny.<sup>55</sup>

In analyzing the Court's majority opinions from *Bakke* to *Adarand*, there is a dominant reliance on the strict scrutiny standard for race conscious policies, which is supported by formal endorsement in *Adarand*. However, while most majority opinions in *Adarand* and *Bakke* rely on strict scrutiny, the burden of proof seems to have increased. In *Bakke*, 1978, it was sufficient for the Court that Justice Powell anchors his benefits diversity rationale in William Bowen's Princeton alumni editorial. By *Croson*, decided in 1989, the Court asks for geographically and inquiry specific data. Also, with increasing demands for evidence, the Supreme Court's divisions over the *Bakke* case, and the subsequent seventeen years of uneven, non-linear precedent in equal protection

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<sup>53</sup> *Id.*

<sup>54</sup> 497 U.S. 547 (1990).

<sup>55</sup> 515 U.S. 200 (1995). The dispute in *Adarand* involved a federal construction contract, which included incentives for contractors to employ small, disadvantaged minority firms.

jurisprudence, lower courts posed with race conscious admissions cases became confused as to how much of Powell's opinion in *Bakke* was still valid.

### C. Race Conscious Admissions and the Status of Powell's Opinion in *Bakke*, 1996-2003

The general consensus among colleges and universities that *Bakke* remained "good law" was shattered in 1996, with the Fifth Circuit's pronouncement in *Hopwood v. The State of Texas* that diversity was not a constitutionally compelling rationale for race-conscious admissions. According to that court the diversity rationale is contrary to the intended purposes of the Fourteenth Amendment as "diversity in higher education contradicts, rather than furthers, the aims of equal protection."<sup>56</sup> *Hopwood* marks the beginning of a wave of race conscious admissions litigation. From *Hopwood* in Texas to the Michigan cases, admissions policies at a total of four public universities, in addition to the elite high schools of Boston, and other voluntary desegregation policies were challenged in court for their use of race as an admissions factor. In spite of the lack of clear direction from the Supreme Court on the application of strict scrutiny frames and Justice Powell's analysis in *Bakke*, district and circuit courts were more or less on their own to handle the cases before them.

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<sup>56</sup> 78 F.3d at 932, 945 (5<sup>th</sup> Cir. 1996), *cert. denied* 518 U.S. 1033 (1996).

Expressing frustration over the confusion that emerged, Judge Wiener in his *Hopwood* concurrence stated

Between the difficulty inherent in applying *Bakke* and the minimal guidance in *Adarand*, the definition and application of the compelling interest inquiry seems to be suspended somewhere in the interstices of constitutional interpretation. Until further clarification issues from the Supreme Court defining “compelling interest” (or telling us how to know one when we see one), I perceive no “compelling” reason to rush in where the Supreme Court fears – or at least declines – to tread.<sup>57</sup>

Six years after the Fifth Circuit’s decision, the Sixth Circuit in a five to four *en banc* decision created a circuit split in 2002. It upheld the University of Michigan’s law school’s race conscious admissions policy.<sup>58</sup> That case, *Grutter v. Bollinger*, involved the 1996 application of Barbara Grutter to the University of Michigan’s law school. Grutter was a fairly strong candidate, with a 3.8 undergraduate grade point average and an LSAT score of 161. She was waitlisted, but never admitted.<sup>59</sup> In a parallel case, *Gratz v. Bollinger*, arising out

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<sup>57</sup> *Hopwood*, 78 F.3d at 964-965.

<sup>58</sup> *Grutter v. Bollinger*, 288 F.3d 732 (6<sup>th</sup> Cir. 2002).

<sup>59</sup> *Grutter*, 539 U.S. 306, 324 (2003).

of the applications of Jennifer Gratz and Patrick Hamacher to the University of Michigan's College of Literature, Arts and Sciences in 1995 and 1997, respectively, Gratz was informed that she was "well qualified," but that "she was 'less competitive than the students who had been admitted on first review.'"<sup>60</sup> Hamacher's scores too were within the range of qualified applicants, but "they [were] not at the level needed for first review admission."<sup>61</sup> Both Michigan's Law School and the College of Literature, Arts, and Sciences employed race-based criteria among others in their admissions decisions. However, the approaches taken in the consideration of race varied. Those differences in policy structure form the basis of the Supreme Court's approval of the law school's plan and rejection of the College's plan.

Plans at both the law school and the College took into account multiple factors in addition to race. The law school considered an index undergraduate grade point averages (UGPA) and law school admissions test scores (LSAT), student activities and background characteristics, quality of essays, enthusiasm of recommendations, strength of undergraduate institution and curriculum, as well as potential for unique contributions to intellectual and social life in law school.<sup>62</sup> Similarly, the undergraduate plan considered academic factors,

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<sup>60</sup> *Gratz*, 539 U.S. 244, 249 (2003).

<sup>61</sup> *Id.*

<sup>62</sup> *Grutter*, 539 U.S. at 324.

including student high school grade point averages (GPA) and standardized test scores, and student background characteristics and activities. The key difference between the plans was that the plan at the College in *Gratz* assigned specific point values to each criterion with a maximum of 150 points. These point values were: academic factors (110 point maximum); 20 points for membership in an underrepresented minority group, socioeconomic disadvantage, attendance at a predominantly minority high school, athletics, or Provost discretion; in addition to points for residency, legacy, personal achievement, essay, leadership, and service.<sup>63</sup>

In evaluating the undergraduate plan in *Gratz v. Bollinger* at the district court level, Judge Duggan upheld summary judgment supporting the 1999-2000 admissions plan.<sup>64</sup> Duggan, relying on *Bakke* as precedent and the social science evidence presented at trial, found compelling the University's argument that there were significant educational benefits to diversity. Judge Friedman, evaluating the law school's plan at the district level in *Grutter* found the law school's policy in violation of Title VI of the Civil Rights Act of 1964, as he failed to find a compelling state interest in diversity. Moreover, Friedman contended that even if diversity were compelling, the policy was not narrowly tailored, as

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<sup>63</sup> See *Gratz*, 539 U.S. at 253-257 (detailing the undergraduate admissions policies from 1995 through 2000).

<sup>64</sup> *Gratz*, 122 F.Supp.2d at 831. Prior policies, however, were found constitutionally infirm for lack of narrow tailoring. *Id.* at 831-833, 836.

race neutral alternatives had not been exhausted, among other matters.<sup>65</sup> The Sixth Circuit heard appeals of both cases and a majority reversed Judge Friedman in *Grutter*, upholding the law school's policy.<sup>66</sup> However, the Supreme Court granted certiorari to both cases before the Sixth Circuit rendered a decision in the undergraduate case, *Gratz v. Bollinger*.<sup>67</sup>

In 2003 the Supreme Court endorsed the University of Michigan's interest in advancing the educational benefits of diversity compelling, deferring to the social science research the University brought to weigh in on the decision.<sup>68</sup> However, the Court found the policy in the undergraduate case, *Gratz v. Bollinger*, constitutionally infirm as it rigidly applied points, 20 out of 150, on the basis of race and ethnicity.<sup>69</sup> According to the Court, the infirmity in the undergraduate plan stemmed both from the weight of the consideration of race, one-fifth of the automatic admission cut off of 100 points, and the mechanical application of the points.<sup>70</sup> The Court found in *Grutter* that the law school

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<sup>65</sup> *Grutter*, 137 F.Supp.2d at 872.

<sup>66</sup> *Grutter*, 288 F.3d at 752.

<sup>67</sup> There were delays in the Sixth Circuit's rendering of the Gratz opinion due to controversy over alleged procedural irregularities is detailed in the appendix to Judge Boggs' dissent, *id.* at 810-815, and is discussed in Sheryl G. Snyder, *Gratz and Grutter in Context: A Comment on the Litigation Strategy, Judicial Politics and Political Context Which Produced Grutter and Gratz*. 92 Ky. L.J. 241 (2003). Given the closeness of the issues in the Michigan cases, the Supreme Court agreed resolve both cases, granting certiorari before judgment in the *Gratz* case. *Gratz*, 537 U.S. 1044 (2002).

<sup>68</sup> *Grutter*, 539 U.S. 306 (2003).

<sup>69</sup> *Gratz*, 539 U.S. 244 (2003).

<sup>70</sup> *Id.* at 272-274.

considered a broader array of factors, which were flexibly considered, allowing for an individual evaluation of each applicant's record. For that reason, in addition to others, it was considered narrowly tailored and the least restrictive means for attaining a diverse student body.<sup>71</sup>

Given the Supreme Court's divided decisions in the Michigan cases, subsequent striking of two K-12 voluntary desegregation cases in 2007, and the amount of social science evidence brought to bear on each, there remains a question of whether the social science data made any difference. The core of this manuscript is the contemporary role of social science research in the law, using affirmative action in college admissions and voluntary desegregation cases as a sample set of cases for observation. Towards that end, the rest of this paper focuses on compelling interest component of the strict scrutiny standard and the degree to which courts from the district level through the Supreme Court have employed social science evidence to help determine whether the educational benefits of diversity substantiated and are thus compelling.

### III. The Role of Social Science Evidence in Race Conscious Admissions Cases

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<sup>71</sup> See *Grutter*, 539 U.S. at 336-343 for the majority's opinion on the complicity of the law school's plan with narrow tailoring. For a fuller discussion of the *Gratz* and *Grutter* opinions see Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459 (2004).

Ever since the Supreme Court's initial acceptance of social science research *Muller v. Oregon*, it has been the case that social science evidence can be used to illuminate factual bearings on legal questions. Over time, standards for quality social science work have evolved, as well as legal standards for accepting social science work into evidence. The Federal Rules of Evidence state, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion."<sup>72</sup> Since this original statement of the Rules, the Supreme Court has enunciated a standard requiring that the research presented to federal courts is reliable and "fits", directly addresses, the case at issue.<sup>73</sup> Once research presented to the courts meets an initial "gate-keeping" assessment of reliability and fit, judicial evaluation of the evidence is then limited to the inferences made and conclusions drawn from the data.<sup>74</sup>

In the case of race conscious admissions, there was a general question of fact as to whether there were measurable educational benefits stemming from a

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<sup>72</sup> FED. R. EVID. 702 (2004).

<sup>73</sup> See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). For more on *Daubert* and its progeny see Leslie Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the "Gatekeeper" Function to Scientific and Non-Scientific Expert Evidence: Kumho's Expansion of Daubert*, 34 AKRON L. REV. 689 (2001).

<sup>74</sup> See Joelle Anne Moreno, *Eyes Wide Shut: Hidden Problems and Future Consequences of the Fact-Based Validity Standard*, 34 SETON HALL L. REV. 89 (2003).

racially diverse student body. While Justice Powell saw this matter “clearly,”<sup>75</sup> contemporarily jurists seek proof.<sup>76</sup> Additionally, data was brought to bear on the question of whether the policies in question were narrowly tailored, using the least restrictive means. Proof in the way of social science evidence was provided to address both questions, almost overwhelmingly so in the University of Michigan cases.<sup>77</sup> Social science data was also brought to bear in several K-12 voluntary desegregation cases. This section evaluates the evidentiary questions raised in contemporary race conscious admissions cases and analyzes the relationship between the presentation of social science evidence in these cases and defendant educational institution wins. This latter analysis employs the attitudinal model of judicial behavior,<sup>78</sup> using statistical analysis to estimate the relative degree of influence of social science evidence in the outcomes of race conscious admissions cases. Even in the light of overwhelming, albeit relatively novel, social science work touting the educational benefits of diversity there

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<sup>75</sup> *Bakke*, 438 U.S. at 314.

<sup>76</sup> See e.g., *Hopwood v. State of Texas*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996)(*cert. denied* 518 U.S. 1033 (1996)); *Johnson v. Board of Regents of the University of Georgia*, 106 F.Supp. 2d 1362 (GA 2000), 263 F.3d 1234 (11<sup>th</sup> Cir. 2001); and *Wessman v. Gittens*, 160 F.3d 790 (1<sup>st</sup> Cir.1998).

<sup>77</sup> In the Michigan cases five experts testified on the behalf of plaintiffs with six testifying on the behalf of defendants in the undergraduate case of *Gratz*, eight defense experts in the law school case of *Grutter*. For more on the social science case put forward by the University of Michigan see Patricia Gurin, *et. al.*, DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN (2004).

<sup>78</sup> See JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) and HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999).

remains open a question of even if this work is true, are these benefits constitutionally compelling.

#### A. Questions of Fact and Law in Contemporary Race Conscious Admissions Cases

From 1994 to 2003 there are a total of seventeen cases adjudicated in the federal courts that assess the constitutional validity of race conscious admissions. Four of these cases address race conscious affirmative action admissions policies at higher education institutions.<sup>79</sup> The rest are from the K-12 voluntary desegregation context. The core legal inquiry in both sets of cases is the same: whether there is a constitutionally compelling reason to employ race-specific criteria when composing a student body and if so, is the specific policy narrowly tailored using the least restrictive means.<sup>80</sup>

Analysis of these cases takes place at the level of the individual judges. In this vein, the seventeen cases are subdivided into 47 district and circuit court opinions. Seven judicial opinions decided on the basis of state laws banning

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<sup>79</sup> Note that the case of *Podberesky v. Kirwan*, 38 F.3d 147 (4<sup>th</sup> Cir. 1994) is not included in this analysis as *Podberesky* arises in the context of financial aid, specifically race-specific scholarships. While an offer of admissions and a financial aid award may be tied to a student's ability to enroll in a particular institution, the institutional decision to permit entry to the university and give financial aid are distinct. Financial aid in this context renders it more likely that a student will attend a particular school, rather than enabling their ability to attend college at all. Cf. Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 COLORADO LAW REVIEW 1065 (1997) (arguing that financial aid considerations are part of the admissions decision from the perspective of an applicant).

<sup>80</sup> See Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM AND MARY L. REV. 1691 (2004).

affirmative action in the State of Washington are excluded, as the state initiative precludes constitutional analysis.<sup>81</sup> The case of *Meredith v. Jefferson County School Board* was not included in the analysis as the case was first heard after the statistical analysis was conducted.<sup>82</sup> Additionally only one opinion per judge is included in the statistical analysis so as not to over-represent a particular judge's approach.<sup>83</sup> This latter of set of cases, while excluded from the numerical totals are included in the verbal analysis as judicial commentary within them are illuminative of judicial approaches to social science evidence in race conscious admissions cases. The total number of opinions included in the statistical is 40.

Looking at this set of judicial opinions from a legal analysis perspective, by the definitional contours of strict scrutiny, there are only plaintiff wins when a compelling interest in diversity is found. In total defendant institutions won fifteen cases, and from this baseline there were at least fifteen of the forty judges

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<sup>81</sup> Initiative 200 (I-200), also known as the Washington State Civil Rights Initiative, states that: "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting". WASH. REV. CODE § 49.60 (1998). It is modeled after California's Proposition 209. The decisions impacted by this law include Ninth Circuit's opinions in *Smith v. University of Washington*, 233 F.3d 1188 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) and *Parents Involved in Community Schools v. School Dist. No. 1*, 285 F.3d 1236 (9<sup>th</sup> Cir. 2002); as well as the district court opinion in *Smith*, 2 F.Supp. 2d 1324 (WA 1998).

<sup>82</sup> *McFarland v. Jefferson County School Board*, 416 F.3d 513 (6<sup>th</sup> Cir. Ky., 2005), *aff'd*, 416 F.3d 513 (6<sup>th</sup> Cir. 2005) *cert. granted*, *Meredith v. Jefferson County School Board*, 127 S. Ct. 2738 (2007).

<sup>83</sup> This includes Judge Gertner's opinion in *Boston's Children First v. City of Boston*, 62 F.Supp. 2d 247 (MA 1999); Judge Bryan's opinion in *Tito v. Arlington County School Board*, 1997 U.S. Dist. LEXIS 7932 (VA 1997) (unpublished opinion); and Judge Edenfield's opinions in *Tracy v. Board of Regents*, 59 F.Supp. 2d 1314 (GA 1999) as well as *Wooden v. Board of Regents*, 32 F.Supp. 2d 1370 (GA 1999). The latter two cases involve challenges to the University of Georgia's admissions policy.

with the opinion that the educational benefits of diversity are a compelling interest. At the other extreme four judges found that as a matter of law the diversity justification was not compelling.<sup>84</sup> The majority of judges, however, a total of 21, expressed uncertainty around the question of diversity. These judges raised a set of questions that can be divided into two categories: questions of fact and questions of law.

Dealing with the latter first and dispose of it quickly, as it is not the focal point of the present inquiry, the questions of law revolved around the status of the *Bakke* precedent in light of subsequent Supreme Court decisions and the particular force of law to be accorded Justice Powell's opinion on diversity. The Fourth and Eleventh Circuits took the approach of assuming Powell's opinion was good law, withholding judgment on whether the educational institutions proved diversity yielded compelling educational benefits. Those courts then struck the programs before them on narrow tailoring grounds.<sup>85</sup>

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<sup>84</sup> This count includes two of the three circuit court judges in *Hopwood*, 78 F.3d at 944 ("We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."); Judge Friedman in *Grutter*, 137 F. Supp. 2d at 850 ("The court does not doubt that racial diversity in the law school population may provide these educational and societal benefits. ... Nonetheless, the fact remains that the attainment of a racially diverse class is not a compelling state interest because it was not recognized as such by *Bakke*..."); and, Judge Edenfield in the University of Georgia cases, *Johnson*, 106 F.Supp. 2d at 1374-1375 ("[T]he "diversity" interest is so inherently formless and malleable that *no* plan can be narrowly tailored to fit it.").

<sup>85</sup> See *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11<sup>th</sup> Cir. 2001); *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4<sup>th</sup> Cir. 1999); and *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4<sup>th</sup> Cir. 1999). Treatment of the narrow tailoring inquiry over this set of cases is analyzed in Crystal Gafford Muhammad, *Form or Substance: Does policy structure or*

The questions of fact, however, are fairly intricate legally speaking as the compelling interest in the educational benefits of diversity to which the Supreme Court deferred is a question of law, supported by social science “facts”.

Generally, an empirical inquiry involving a specific event presents an inquiry of fact. Thus, in the case of *United States v. Microsoft Corporation*, statistical evidence was used to document the fact of Microsoft’s anticompetitive behavior.<sup>86</sup> Under these inquiries of fact, the trial court as finder of fact assesses the facts presented at trial, to be overturned only under an appellate court’s finding of clear error.<sup>87</sup>

The questions posed in race conscious admissions cases, however, are different in that these cases raise questions in which an issue or policy centers “on the values society wishes to promote” alongside of questions of law.<sup>88</sup> Legal questions mixed with factual inquiries can be subjected to *de novo* review.<sup>89</sup> For example, in the case of *Stell v. Savannah-Chatham County Board of Education*<sup>90</sup> the district court found that the Supreme Court erred in its interpretation of facts in

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*rationale influence the constitutionality of race-conscious admissions policies?*, a paper presented at the American Education Researcher Association’s Annual Conference (April 2003).

<sup>86</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (2001).

<sup>87</sup> See, Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11(1994).

<sup>88</sup> *Id.* at 22.

<sup>89</sup> See Adam Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Court*. 50 DUKE L.J. 1427; See also, *Lilly v. Virginia*, 527 U.S. 116 (1999); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); and *Townsend v. Sain*, 372 U.S. 293 (1962).

<sup>90</sup> *Stell v. Savannah-Chatham County Board of Education*, 333 F. 2d 55 (5<sup>th</sup> Cir. 1964). Note that the State of Georgia is now part of the Eleventh Circuit.

*Brown v. Board of Education*. On that basis the district court declared “education is best given in separate schools.”<sup>91</sup> Upon review by Fifth Circuit, the appellate court reversed holding that the Supreme Court in *Brown* issued a statement of law pronouncing segregation inherently unequal. The social science evidence cited merely informed that statement of law.<sup>92</sup> Similarly, when Justice Powell in 1978 declared that the educational benefits of diversity serve a compelling governmental interest, it was a statement of law, informed by a reference to Princeton’s President William Bowen’s editorial. Twenty-five years later, when the Supreme Court upheld the educational benefits of diversity as compelling in the *Grutter* decision, the Court made a statement of law informed by deference to the research the University of Michigan summoned.

B. Lower Court Assessment of Law and Fact in Contemporary Race Conscious Admissions Cases

Given the Supreme Court’s statements of law in 1978 (*Bakke*) as reinforced in 2003 (*Gratz* and *Grutter*), several of the district and circuit courts got the inquiry wrong. Some courts seem to have treated the matter of the compelling governmental interest in the educational benefits of diversity as a question of

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<sup>91</sup> *Id.* at 61.

<sup>92</sup> 220 F. Supp. 667 (1963).

fact, an evidentiary issue, as opposed to a legal matter supported by facts. For example, the district court in *Johnson v. Board of Regents of the University of Georgia* found the University of Georgia's defense lacking sufficient evidence, as the evidence centered on the testimony of former University of Georgia President Charles Knapp.<sup>93</sup> Knapp testified on the basis of his experience as an administrator and professor that "college-age students benefit educationally and economically from interaction with peers drawn from diverse backgrounds and experiences" and that "student heterogeneity -- including, but not limited to racial diversity -- contributes to education that also occurs inside the classroom." Knapp's testimony was dismissed by the district court as "speculation and syllogism,"<sup>94</sup> while the circuit court desired more data on the narrow tailoring inquiry: the limitation of harm to white candidates and documented exploration of race-neutral alternatives.<sup>95</sup> Yet, Knapp's testimony parallels the editorial of William Bowen cited to by Justice Powell in *Bakke*.

Given the contours of *Bakke*, the approach of Judge Bryan in the district court decision of *Tuttle v. Arlington County School Board* was also flawed.<sup>96</sup> Bryan

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<sup>92</sup> *Stell*, 333 F. 2d at 61.

<sup>93</sup> *Johnson*, 106 F.Supp. 2d 1362, 1375 (GA 2000), *aff'd*, 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).

<sup>94</sup> *Id.* at 1371-1372.

<sup>95</sup> *Johnson*, 263 F.3d at 1258-1259.

<sup>96</sup> 1998 U.S. Dist. LEXIS at \*12. Prior to his decision in *Tuttle*, Judge Bryan directly ordered the district, in *Tito v. Arlington County School Board*, 1997 U.S. Dist. LEXIS 7932 (VA 1997) (unpublished opinion), to stop using race as a factor in admissions. Instead, the school instituted a new policy, using race as a weight in selecting its student body by lottery.

treated the inquiry as a question of law for which no factual presentation would be informative. In *Tuttle*, Bryan declined to permit the board to present evidence of the educational benefits of a diverse student body along with evidence that race conscious policies are the most efficient method of attaining that goal. Bryan explicitly states “[t]he court already has before it sufficient evidence to rule on the merits ... Even if racial classifications overwhelmingly increase the academic success of defendants’ educational program, they remain unconstitutional”.<sup>97</sup> In this vein, Bryan jumped to the legal conclusion without allowing himself to be informed by the facts.

Similarly, the district court judges in *McLaughlin v. Boston School Committee*,<sup>98</sup> *Equal Open Enrollment Association v. Board of Education*,<sup>99</sup> *Wessmann v. Gittens*,<sup>100</sup> *Brewer v. West Irondequoit Central School District*,<sup>101</sup> *Boston’s Children First v. City of Boston*,<sup>102</sup> *Comfort v. Lynn School Committee*,<sup>103</sup> and the other University of Georgia cases, *Wooden*<sup>104</sup> and *Tracy v. Board of Regents of the*

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<sup>97</sup> *Id.*

<sup>98</sup> 938 F.Supp. 1001 (MA 1996).

<sup>99</sup> 937 F. Supp. 700 (OH 1996).

<sup>100</sup> 996 F. Supp. 120 (MA 1998), *aff’d*, 160 F.3d 790 (1<sup>st</sup> Cir.1998).

<sup>101</sup> 32 F.Supp. 2d 619 (NY 1999).

<sup>102</sup> 62 F.Supp. 2d 247 (MA 1999).

<sup>103</sup> 100 F.Supp. 2d 57 (MA 2000).

<sup>104</sup> 32 F.Supp. 2d 1370 (GA 1999).

*University of Georgia*,<sup>105</sup> treated the inquiry as a mere matter of law. Four of these cases, *McLaughlin*, *Equal Open Enrollment Association*, *Boston's Children First*, and *Comfort*, disposed of the evidentiary inquiry on a truncated record, at preliminary hearings.

Having social science research presented does not guarantee an appropriate assessment of the law as bolstered by evidence. Of the four opinions in which judges specifically found the diversity rationale not compelling, there was only one in which social science evidence was offered. In the district court opinion of *Grutter v. Bollinger*, Judge Friedman made an assessment of the data from both plaintiffs and defendants, analyzing the works beyond the “gate-keeping” functions of *Daubert* and progeny. Testifying for the student plaintiff, Dr. Kinley Larntz, Professor Emeritus of the Department of Applied Statistics at the University of Minnesota, calculated the odds of admission for each racial group by LSAT and GPA and found that in a certain range of cells the relative odds of admission were tens to hundreds of times greater if one was not Caucasian.<sup>106</sup> However, Larntz specifically left out of his analysis cells in which the probability of acceptance or rejection was the same for all racial groups. Additionally, Dr. Stephen Raudenbaush, Professor of Education at the University of Michigan and testifying as an expert in statistics, found Dr. Larntz’s analysis

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<sup>105</sup> 59 F.Supp. 2d 1314 (GA 1999).

<sup>106</sup> *Grutter*, 137 F. Supp. 2d at 842.

flawed as it did not consider the “soft factors,” such as quality of the undergraduate institution (which may temper hard factors including grades and class rank), recommendations, and experience.<sup>107</sup> Nevertheless Friedman concluded that “[o]ne does not need to undergo sophisticated statistical analysis in order to see,” quoting Dr. Larntz, “membership in certain groups is an extremely strong factor in the decision for acceptance”.<sup>108</sup>

Contrary to Judge Friedman’s approach, the *en banc* assembly of the Sixth Circuit in *Grutter* took a more holistic assessment of the evidence before it. First, that court found that the statistical evidence of GPA and LSAT disparities between majority and underrepresented minority groups do not present a double standard, as suggested by the district court, but are the effect of the Harvard-style “racial plus.”<sup>109</sup> Thus, in the absence of further guidance from the Supreme Court, the majority found that “tip[ping] the balance”, holding SAT and GPA scores constant then making a coin toss in favor of race, is permissible.<sup>110</sup> Concurrences by Judge Clay as joined by others highlighted the work of Goodwin Liu, giving additional perspective on the facts surrounding the

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<sup>107</sup> *Id.* at 841-842.

<sup>108</sup> *Id.* at 841.

<sup>109</sup> *Grutter*, 288 F.3d at 746.

<sup>110</sup> *Id.*

*Bakke* decision;<sup>111</sup> the testimony of Harvard President, Derek Bok based on his work with William Bowen finding that ceasing affirmative action would increase the admissions rate of whites marginally, but harm blacks significantly; as well as the testimony of Patricia Gurin on the measurable educational benefits of diversity.<sup>112</sup> This data seemingly was ignored by the district court in *Grutter*. The district court in *Gratz*, which ruled in favor of the undergraduate policy, cited Gurin's work extensively. Quoting Dr. Gurin, Judge Duggan in *Gratz* writes that "students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting."<sup>113</sup>

Even the Ninth Circuit suggested that in the absence of a Washington State ban on affirmative action and if presented with appropriately supportive evidence the court would be open to diversity to finding a compelling interest in the educational benefits of diversity.<sup>114</sup> Initiative 200 (I-200) foreclosed the use of race conscious policies in the regular course of education in the State of

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<sup>111</sup> *Id.* at 766-768. Goodwin Liu points out that Bakke's scores were not only better than the average minority applicant, but also better than the average applicant; thus, suggesting other factors at play, and that Bakke was not merely competing for the 16 quota spaces. With the quota Bakke's probability of admissions was 2.7 percent (84 spots divided by the 3,109 applicants in the pool). Without the quota, Bakke's probability of success increases marginally to just under 3.2 percent or 100 spots divided by 3,109. For a fuller discussion see Goodwin Liu, *Affirmative action in higher education: The diversity rationale and the compelling interest test*, 33 HARV. C. R.-C. L. L. REV. 381 (1998).

<sup>112</sup> *Id.* at 761.

<sup>113</sup> *Gratz*, 122 F.Supp. 2d at 822.

Washington, the policy in *Parents* was found to be unlawful while the *Smith* case was rendered moot. Consider the Ninth Circuit's language in *Parents*:

As federal judges, we are not charged with the arduous task of choosing between these competing policy choices on their merits. Indeed, "how we judges might weigh competing policy considerations is simply irrelevant" [*citations omitted*] Instead, our proper role is a limited one; we do not decide which choice is "better," but only whose choice controls. We conclude that, in this case, the will of the School District must give way to the will of the people of Washington. <sup>115</sup>

Within the state of Washington the district court in *Parents Involved in Community Schools v. Seattle School District No.1* considered data from the district of how with the race conscious voluntary desegregation plan, only one of the high schools in the district would be out of racial balance as compared to the general population within the school district.<sup>116</sup> The district court also considered

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<sup>114</sup> See, *Smith v. University of Washington*, 233 F.3d 1188 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) and *Parents Involved in Community Schools v. Seattle School District No.1*, 285 F.3d 1236 (9<sup>th</sup> Cir. 2002).

<sup>115</sup> *Id.* at 1252-1253.

<sup>116</sup> *Parents*, 137 F.Supp. 2d at 1226. With the policy the student body composition of the most popular schools mirrored the general racial and ethnic mix of the population, 60 percent non-white. Without the policy students of color would compose only one-third to 40 percent of four of the five preferred high schools.

the expert testimony of Dr. William Trent, Professor of Educational Policy Studies at the University of Illinois at Urbana-Champaign who offered four social scientifically based rationales supporting the educational benefits of an integrated school district.<sup>117</sup> Trent's testimony was countered by Dr. David Armor, Professor of Public Policy at George Mason University; but as Dr. Armor ultimately admitted, "there is general agreement by both experts and the general public that integration is a desirable policy goal mainly for the social benefit of increased information and understanding about the cultural and social differences among the various racial and ethnic groups."<sup>118</sup> As such, Armor's testimony failed to discredit Dr. Trent and the defendants prevailed at the district level.<sup>119</sup>

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<sup>117</sup> *Id.* at 1236. First, desegregation research showed that integrated educational experiences lead to more networking in higher education and employment. Second, he offered testimony from work highlighting that both minority and non-minority improve critical thinking skills through cross-cultural dialogue, with students of color gaining the added benefit of access to better teachers and advanced curriculum. Third, Trent testified from work on the association between diversity and democracy outcomes including the imbue ment civic values, improvement of race relations, and decrease of prejudicial attitudes. Fourth, Trent asserted that a diverse scholastic experience works towards general societal desegregation as employment opportunities improve and minorities, in turn, seek suburban housing. Charles V. Willie, Professor Emeritus of Education of the Harvard Graduate School of Education, presented testimony to the same effect in the *McLaughlin* case. See *McLaughlin*, 938 F.Supp. 1001, 1014.

<sup>118</sup> *Id.*

<sup>119</sup> While the defendants in this case prevailed at the district court, at the Ninth Circuit, the court found that the admissions policy violated Washington State Law. See, *supra* note 115 & accompanying text.

The approach of the First Circuit in *Wessmann v. Gittens*<sup>120</sup> and the district court in *Comfort v. Lynn School Committee* also followed this law bolstered by fact frame. The outcomes of the two cases differ, however, on the basis of the nexus between the general social science evidence presented, the specific facts of the case, and the legal claim proffered by the defendant school districts. In the *Wessmann* case Dr. William Trent's testimony focused on the lingering effects of past discrimination based on the results of racial climate surveys in Kansas which revealed that low teacher expectations correlate with prior discrimination and lower student achievement.<sup>121</sup> The First Circuit found this evidence inapplicable as: 1) the Boston School System was previously declared unitary; 2) the lingering vestiges of past discrimination were in the court's view insignificant; 3) the evidence did not directly address the educational benefits of diversity; and, 4) the evidence was based on results in Kansas, not Boston.

Drawing parallels from the Supreme Court's analysis of the City of Richmond's data mismatch in the *Croson* case, the Court found that research on the vestiges

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<sup>120</sup> 996 F. Supp. 120 (MA 1998), *rev'd*, 160 F.3d 790 (1<sup>st</sup> Cir.1998). Note that the desegregation decree for Boston Public Schools established in *Morgan v. Kerrigan*, 401 F. Supp. 216, 258 (D. Mass. 1975), *aff'd*, 530 F.2d 401, 425 (1<sup>st</sup> Cir. 1976), designated 35 percent of seats in the Boston Examination Schools for black and Hispanic students. The decree was lifted by the First Circuit in *Morgan v. Nucci*, 831 F.2d 313, 326 (1<sup>st</sup> Cir. 1987) and two years thereafter the Boston School Committee elected to continue quota voluntarily. The voluntary policy was the subject of *McLaughlin v. Boston School Committee*, 938 F.Supp. 1001 (MA 1996), also included in this analysis. The plaintiff in *McLaughlin* ultimately enrolled in Boston Latin School, rendering the case moot. In the wake of *McLaughlin*, the policy was revised and the new policy was the subject of the *Wessmann* case.

<sup>121</sup> *Wessmann*, 160 F.3d 790, 804 (1<sup>st</sup> Cir.1998). On the other hand, Trent's work also found that higher teacher expectations positively correlated with higher student achievement.

of prior discrimination in Kansas did not support the diversity rationale advanced by defendants.<sup>122</sup>

What is particularly interesting in this case is how the court critiqued the social science research after it was entered into evidence: an assessment beyond “the gate”. With respect to Dr. Trent’s testimony, the court found there was no formal evaluation of the Boston school system conducted, and that the Boston-specific evidence proffered was based upon less than systematic observations and interviews.<sup>123</sup> This is a valid matching between data and the legal and factual inquiry, akin to the Supreme Court in *Croson*. The however, court also critiqued the qualitatively based work of then Deputy Superintendent Janice Jackson, testifying in an expert rather than administrative capacity, regarding the association between teacher expectations and student outcomes.<sup>124</sup> However, if Jackson’s methodology was as poorly described as the court asserts and she failed to document critical aspects of her observations, such as the number of schools, classrooms, and people observed, then under *Daubert* and progeny the court should not have allowed in the data.<sup>125</sup>

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<sup>122</sup> *Id.* at 804-805.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 806.

<sup>125</sup> *Id.* at 808-807. Based on the Court’s description, employed qualitative research techniques. Thus, the Court’s critique that she failed to use statistical analysis is inappropriate as qualitative work generally does not include statistics. However, there are methodological standards in qualitative research, and to the extent that she failed to recall basics, such as the names of the schools observed and the number of classrooms, it was appropriate for the court find her testimony unreliable. In fact, the “data” should not have been admitted into evidence. For more

Compare the First Circuit's assessment of the data in *Wessman* with Judge Gertner's district court opinion in *Comfort v. Lynn School Committee*. In *Comfort*, the affidavit of Dr. Gary Orfield of the Harvard Civil Rights Project included general data on the essentialness of integrated education to prepare students to live in a pluralistic society.<sup>126</sup> Additionally the affidavit included data from Lynn, Massachusetts. In comparison to other studies conducted by Orfield, the simulation using data from Lynn suggested that the dismantling of the district's transfer policy's racial component would detrimentally affect the academic performance of minority students.<sup>127</sup> Judge Gertner distinguished the case in *Comfort* from *Wessmann* finding the First Circuit's opinion fact-bound, and given the facts before it, the First Circuit could not rule that diversity was a compelling interest.<sup>128</sup> With Orfield's testimony specific to Lynn, Massachusetts as well as to the link between student diversity and educational benefits, Gertner denied a preliminary injunction, as plaintiffs could not meet their burden in proving their likelihood of success on the merits.<sup>129</sup>

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information on standards in qualitative research *see generally*, Gary King, Robert O. Keohane, and Sidney Verba, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994).

<sup>126</sup> *Comfort*, 100 F.Supp. 2d at 66.

<sup>127</sup> *Id.*

<sup>128</sup> *See id.* at 67-68.

<sup>129</sup> *Id.* at 68. The district court hearing in *Comfort* was a preliminary matter, ultimately dismissed for lack of standing. *See Comfort*, 131 F.Supp. 2d 253 (MA 2001), 150 F.Supp. 2d 285 (MA 2001). In the particular decision described above, Judge Gertner also found that with respect to the balance of harms, reassigning students across the district was significantly more burdensome than requiring a student to stay in a previously assigned school. Unlike the case in Boston, there were

Overall in only two of the cases in which social science was presented, *Grutter* and *Comfort*, where the continued use of the race conscious admissions policy in effect at the time of litigation permitted. The suggestion is that in the aggregate, the use of social science evidence is limited in influencing the outcomes of race conscious admissions cases.

c. Statistical Analysis of the Role of Social Science Evidence in the Judicial Decisions of Lower Court Judges in Affirmative Action in Admissions and Voluntary Desegregation Cases

Statistically speaking, nearly two-thirds, 25 out of 40, of all judges rendering opinions in race conscious admissions cases between 1994 and 2003 ruled in favor of plaintiff students (See Table 1). However, when comparing the percentage of total wins of plaintiffs and defendants, the odds of a defendant educational institution winning improve to a rate of just over 50 percent when social science research is introduced. Thus, while the introduction of social science research in race conscious admissions cases does increase the win rate of defendant educational institutions, the improvement merely reflects a fighting chance, an even footing with plaintiff students.

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no elite schools at the elementary level in Lynn; therefore, the district court reasoned that there was little to no deprivation of an advanced curriculum. *Id.* at 69.

The imagery of “a fighting chance” parallels the trial preparation of attorneys in race conscious admissions suits. In conducting my analysis I interviewed Michael E. Rosman, attorney for the Center for Individual Rights (CIR), a conservative public interest law firm active on the behalf of plaintiffs in

Table 1

Plaintiffs and Defendants Wins by the Introduction of Social Science Evidence, Raw Number and Percentages

	<i>Plaintiff</i>	<i>Defendant</i>	
	<i>Wins</i>	<i>Wins</i>	<i>Total</i>
Social Science Evidence	8 (32% Plaintiff Wins) (20% Total Wins)	9 (60% Defendant Wins) (22.5% Total Wins)	17 (42.5% Total Wins)
No Social Science Evidence	17 (68% Plaintiff Wins) (42.5% Total Wins)	6 (40% Defendant Wins) (15% Total Wins)	23 (57.5% Total Wins)
<b>Total</b>	<b>25</b> <b>(62.5% Total Wins)</b>	<b>15</b> <b>(37.5% Total Wins)</b>	<b>40</b> <b>(100% Total Wins)</b>

many of these suits. Rosman informs that rather than any concerted effort on the part of the CIR to gather a team of experts for plaintiffs in competitive admissions trials the CIR treats cases individually and makes decisions with respect to the employment of experts for trial on a case-by-case basis.

In effect the presentation of social science evidence reflects the enthusiasm and effort with which the defendant educational institutions make their case. Thus, as a result of the rally of defendant experts by Lee Bollinger, former president of the University of Michigan and named plaintiff in the *Gratz* and *Grutter* cases, the CIR recommended Kinley Larntz to testify on the behalf of plaintiffs. No such employment of experts was used in either the *Hopwood* or *Smith* cases, because defendants presented no social science research at the *Hopwood* or *Smith* trials.

Additionally, evidence on the behalf of defendant educational institutions seems to be more substantive content-wise. This may be due to the careful planning of defense attorneys and expert witnesses. When looking at the content of defendants' evidence I find that 60 percent of evidence presented by defendants is based on research, whether quantitative or qualitative, conducted by the testifying expert and speaks directly to the issue of the value of diversity in an educational setting (See Table 2). This compares to plaintiffs' testimony in which only 46 percent of the evidence is original, speaking directly to the value of diversity in education or its broader social implications. In five instances,

plaintiffs' evidence is strictly rebuttal, exposing the flaws of research conducted by defendants' experts. In two additional cases, plaintiffs' testimony was based solely on the research of others. Although defendants presented two experts testifying only on the basis of their personal experience, plaintiffs proffered the testimony of at least one witness who testified outside of his discipline.<sup>130</sup> In

Table 2

Expert Witnesses of Plaintiff Students and Defendant Educational Institutions by the Average Number of Experts Testifying in Each Case, and the Content of the Expert's Testimony, with Standard Deviations (in parenthesis)

	<i>Plaintiffs</i>	<i>Defendants</i>
	(N=13)	(N=20)
Average Number of Experts	2.6	4.0
Testifying per Case	(1.96)	(2.61)
Percentage of Evidence	46.15	60.0
Data-Based v. Descriptive	(0.52)	(0.5)

Note standard deviations are presented in parenthesis.

<sup>130</sup> Charles L. Gesbekter, a mid-tiered professor of African History at the California State University, Chico testified in the Michigan cases to the stigmatizing effects of racial classifications in the United States. Gesbekter's analysis was meant to counter that of Thomas Surgue and Eric Foner, Full Professors of American History (History and Sociology in the case of Sugrue) at the University of Pennsylvania and Columbia University, respectively.

total, over the set of cases plaintiffs presented data-based expert testimony six times, as compared with fourteen such presentations by defendants.<sup>131</sup>

With respect to the number of experts testifying in these trials, there are more who testify on the behalf of defendant educational institutions than for plaintiff students. According to Rosman of the CIR, “there is no secret that academics do not want to testify in these trials” due to inherent conflicts of interests related to one’s testifying against one’s employer. As such, it may be more difficult for plaintiffs to find quality experts to testify in these cases.

In accordance with the gate-keeping assessment of social science evidence as provided in *Daubert*, its progeny, and the Federal Rules of Evidence, it should not matter whether the expert evidence testified to be data-driven, rebuttal, or other. The number of experts should not be accorded weight accorded by judges as well. However, as Judge Duggan in his opinion in *Gratz* notes

Plaintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions,

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<sup>131</sup> By data-based I mean that the scientific method was employed. As such, I do not consider the four defendant testimonies based on demographic descriptions as data-based.

that diversity in institutions of higher education is "good, important, and valuable."<sup>132</sup>

Duggan's reflection is indicative of the evidence display by plaintiffs across the cases in which data is presented. In this vein, the overall strength of social science research presented in race conscious admissions cases weighs in favor of defendant educational institutions. The fact that the presentation of social science evidence only increases the probability of a defense victory to 50 percent suggests that the influence of social science work is limited in these cases.

As social science does not seem to be driving the outcomes of these cases, a broader consideration of factors within the attitudinal model of adjudication may be informative. The attitudinal model is one of three behavioral models of judicial decision making,<sup>133</sup> which suggests that at the level of the Supreme

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<sup>132</sup> 122 F. Supp.2d at 823.

<sup>133</sup> See Segal & Spaeth, 2002, *supra* note 28 and Spaeth & Segal, 1999, *supra* note 28. Other models include the public opinion model, which suggests that judicial attitudes mirror the opinions of the general American public by a lag of 2 to 7 years (Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-time Analyses of Criminal Procedure and Civil Rights Cases*. 48 POLITICAL RESEARCH QUARTERLY 61 (1993); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-analytic Prospective*. 58 THE JOURNAL OF POLITICS 169 (1996); Segal & Spaeth, 2002, *supra* note 28); the separation of powers model, focusing on influences of other governmental branches as well as court composition in the prediction individual judicial behavior (Cornell Clayton & David A. May, *A political regimes approach to the analysis of legal decisions*. POLITY, Winter, 2000 at 233; for a critique see Spaeth & Segal, 1999, *supra* note 28); and the rational choice model in which the center of inquiry is judicial policy goals, including the following of precedent (Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-making*. 23 JOURNAL OF ECONOMIC BEHAVIOR AND ORGANIZATION 31 (1994); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002)).

Court, “legal rules governing decision making (e.g., precedent, plain meaning) in the cases that come to the Court do not limit discretion; because the justices, unlike their lower court colleagues, may freely implement their policy preferences.”<sup>134</sup> Comparatively speaking judges at the circuit and district court levels are norm enforcers.<sup>135</sup> However in cases where 1) the law is new, the case is without precedent, or the applicability of past precedent is unclear;<sup>136</sup> 2) the evidence is contradictory or of equal weight on both sides of the issue;<sup>137</sup> and, 3) the issues presented are politically salient,<sup>138</sup> lower courts are likely to depart from their function of norm enforcement to policymaking.

In considering the attitudinal dispositions of lower court judges, I find that judicial political philosophy is a significant predictor of the outcomes of race conscious admissions cases, far greater than social science evidence. To consider the attitudinal dispositions of the judges in this data set I employ measures of their political philosophy, race, and gender.

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<sup>134</sup> Segal & Spaeth, 2002, *supra* note 28, at 111.

<sup>135</sup> Only 14-15% of federal judges can be classified as activists who regularly engage in judicial policy making. More than half of district court judges are interpreters who mechanically apply precedent (52%), whereas most appellate judges are pragmatic, blending interpretivist and innovationist techniques (59%) (ROBERT A. CARP & RONALD STIDHAM, *THE FEDERAL COURTS* (2001), p. 160). *Cf.* the Supreme Court where out of 2,245 Supreme Court votes and opinions, Spaeth & Segal find 88.1 percent attributable to judicial preferences; whereas, merely 11.9 percent follow *stare decisis*. *supra* note 28.

<sup>136</sup> See Carp & Stidham, *supra* note 135.

<sup>137</sup> See *id.*

<sup>138</sup> See Spaeth & Segal, 1999, *supra* note 28.

The political philosophy of politically active judges is available in the public domain, but, the philosophies of judges more discrete with respect to their personal politics are not. In lieu, the party of the President appointing the judge is used as a proxy for judicial political philosophy. This information is readily ascertainable in *Who's Who in American Law* for federal judges.<sup>139</sup> Although executive politics and judicial philosophy are not perfectly aligned, on average judges tend towards ideologies aligned with their appointer. Using a sample of 26,372 judges appointed between 1933 and 1977, political scientists Robert Carp and C. K. Rowland found that 46 percent of Democratic judges rendered liberal decisions, whereas 61 percent of Republican judges ruled conservatively. Considering the party of the appointing president, 37 percent of Republicans appointed by Republicans vote liberally, 42 percent of Democrats appointed by Republicans and Republicans appointed by Democrats vote liberally, and 46 percent of Democrats appointed by Democrats vote liberally.<sup>140</sup>

The next factor considered in the model is the judge's race. Although there are several sociological factors related to judicial decision-making, including the judge's religion, socioeconomic status, and geography,<sup>141</sup> at the forefront of affirmative action in college admissions and voluntary K-12 integration is race,

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<sup>139</sup> (14<sup>th</sup> Ed., 2005).

<sup>140</sup> See Robert A. Carp & C. K. Rowland, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* (1983).

<sup>141</sup> Carp & Stidham, *supra* note 135 at 134.

and the constitutional appropriateness of the race factor in education policy. As this issue historically is framed in terms of black and white, only the designations of black, non-black are used.<sup>142</sup> The null hypothesis here is that there is no relationship between the race of the judge and case outcomes. As argued by Sylvia R. Lazos Vargas, judging is complex, even for judges of color. She concludes that only when there is diverse representation on the courts can there be an honest dialogue about the factor race plays in the consideration of judicial opinions and in society more broadly.<sup>143</sup>

The *Who's Who* biographical database was used to identify the race of judges. *Who's Who* flags self-identified judges of African American heritage in the *Who's Who among African Americans*. Judges are coded as either black or white/ not indicated. Other races/ethnicities are not indicated in the *Who's Who* Biographical Database. For accuracy, judges were also cross-referenced in the American Bar Association's *Directory of Minority Judges of the United States*.<sup>144</sup>

In broader societal outlets, gender is considered a factor in one's support for affirmative action, with women more likely to be supporters.<sup>145</sup> For that

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<sup>142</sup> David A. Hollinger, *Group Preference, Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action* in RACE AND REPRESENTATION: AFFIRMATIVE ACTION (1998).

<sup>143</sup> *Does a Diverse Judiciary Attain a Rule of Law that is Inclusive?: What Grutter v. Bollinger has to Say about Diversity on the Bench*, 10 MICH. J. RACE & L. 101 (2004).

<sup>144</sup> (2001).

<sup>145</sup> Carp & Stidham, *supra* note 135 at 134.

reason gender is included in the present analysis. Gender is coded on the basis of male/ female using *Who's Who* in American Law for confirmation.

Table 3 contains descriptive statistics for the judges under review. Of the 40 judges deciding contemporary competitive admissions cases, 25 are Republican appointees, 62.5 percent, as compared to 15 appointments by Democrats, 37.5 percent. In addition, three African American judges compose 7.9 percent of the sample and five women comprise 13.2 percent.

Query whether this set of judges reflects the demographics of the American judiciary? Nationally 6.75 percent (N=4,045) of American judges are identified as racial or ethnic minorities. Of this group, 1,798 are African American.<sup>146</sup> Thus, African American judges are slightly over-represented in the present sample. Republican judges are also over-represented, which makes sense considering that disputes over competitive admissions are more likely to arise in more conservative states. As of the 2000 election, 52 percent of appointments from previous administrations judges in the federal judiciary were Clinton or Carter appointees.

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<sup>146</sup> ABA, *Directory of Minority Judges of the United States* (2001).

Table 3

Descriptive Statistics of Lower Court Judges Deciding Contemporary Race Conscious Admissions Cases: Political Philosophy, Race, and Gender (Percentage)

Political Philosophy		Race		Gender	
<i>Republican</i>	<i>Democrat</i>	<i>White/ Not Indicated</i>	<i>African American</i>	<i>Male</i>	<i>Female</i>
62.5	37.5	92.1	7.9	86.8	13.2

Note: N=40

Forty-four percent (44%) were Reagan or Bush, Sr. appointees. The remaining judges (2%) are from previous administrations.<sup>147</sup> Women, on the other hand, are slightly underrepresented, as approximately 20 percent (20%) of federal judges are women and only thirteen percent (13.2%) of judges in this sample are female.<sup>148</sup> Nationally, until Justice O'Connor's retirement, two of the nine Supreme Court Justices were women; 17.4 percent of U.S. Court of Appeals Judges are women; 16.2 percent of U.S. District Court Judges are women; and 28 percent of the justices on state courts of last resort are women.<sup>149</sup>

<sup>147</sup> Mark A. Hoffman, *Next president to fill vacancies in judiciary*. BUSINESS INSURANCE, Sept. 11, 2000, at 34.

<sup>148</sup> ABA, COMMISSION ON WOMEN IN THE PROFESSION (2003).

<sup>149</sup> *Id.*

As depicted in Table 1, plaintiff students overall have been more successful at winning race conscious admissions suits. Additionally, social science evidence in this domain seems to merely offer a fighting chance to defendant institutions.<sup>150</sup> Looking at Table 4, however, it becomes clear that a driving factor in the outcomes of this set of cases is judicial political philosophy. According to the data presented in Table 4, regardless of the presence of data, Republican appointees are more likely to rule for plaintiff student and Democratic appointees are more likely to rule for defendant educational institutions. The idea here is not that judges are partisans, but that the political philosophies and ideas to which they individually subscribe influence decision making in cases that polarize the general public, like race conscious admissions.<sup>151</sup> Social science is only minimally influential. By influential here I mean that when social science evidence is presented, it results in a ruling opposite of the generally predicted manner for a judge of his/ her political philosophy.<sup>152</sup> By this definition social science data is influential in the decisions of Republican appointees 2.6 percent of the time. With respect to Democratic

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<sup>150</sup> Cf. James E. Ryan, *What Roles Should Courts Play in Influencing Educational Policy?: The Limited Influence of Social Science Evidence in Modern Desegregation Cases*. 81 N.C.L.REV. 1659 (2003) (arguing that the focus of the fight for school districts for the ability to use race conscious measures to achieve and maintain integrated schools should focus more on strong legal argumentation and less on social science).

<sup>151</sup> See Segal & Spaeth, 1999, *supra* note 28; Spaeth & Segal, 2002, *supra* note 28; and Donald R. Kinder & Nicholas Winter, *Exploring the Racial Divide: Blacks, Whites, and Opinion on National Policy*. 45 AMERICAN JOURNAL OF POLITICAL SCIENCE 439 (2001).

<sup>152</sup> Segal & Spaeth, 1999, *supra* note 28.

appointees, the absence of social science evidence results in plaintiff students wins 5.3 percent of the time.

Table 4

Interactions Between Party Philosophy and Data by Judicial Ruling, Percentage

Total Number of Cases

	<i>Plaintiff</i>	<i>Defendant</i>
	<i>Wins</i>	<i>Wins</i>
Republican		
Data	15.8	2.6
No Data	34.2	5.3
Democrat		
Data	5.3	21.1
No Data	5.3	10.5

Note - 0.1% rounding error

Table 5

Logit Estimates and Standard Errors Defendant Wins by Judicial Ruling<sup>153</sup>

	<i>Model A</i>	<i>Model B</i>	<i>Model C</i>
Party	2.75*	2.78*	2.94*
	(0.88)	(0.86)	(0.85)
Gender	1.35	1.43	-
	(1.42)	(1.4)	
Data	0.23	-	-
	(0.9)		
Race	-	-	-

The models in Table 5 are derived from binomial logistic regression analysis, a statistical technique designed to measure the relative association between a dependent variable (in this case judicial ruling in favor of defendant educational institutions) with a categorical distribution (win/ not win) and one or more independent variables (here the political philosophy, race, and gender of

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<sup>153</sup> Model A: Percentage correctly predicted = 81.6% overall, 80% defense wins, 82.6% plaintiff wins; -2LLR=34.28; model  $\chi^2=16.7$ , df=3,  $p<0.001$ . N=38, mean number of defense wins = 0.39.

Model B: Percentage correctly predicted = 81.6% overall, 80% defense wins, 82.6% plaintiff wins; -2LLR=34.34; model  $\chi^2=16.6$ , df=2,  $p<0.001$ . N=38, mean number of defense wins = 0.39.

Model C: Percentage correctly predicted = 81.6% overall, 80% defense wins, 82.6% plaintiff wins; -2LLR=35.5; model  $\chi^2=15.4$ , df=1,  $p<0.001$ . N=38, mean number of defense wins = 0.39.

judges, the presence of social science data).<sup>154</sup> The top numbers in Table 5, the betas are estimates the relative degree of association between the political philosophy, race, and gender of judges, the presence of social science data, as they influence defendant educational institution wins. The numbers in brackets on the bottom represent the standard errors, the amount of variation within the observations. Generally speaking, an association between a dependent variable and an independent variable are statistically significant, 95 percent or more probably true, if the beta is twice or more larger than the standard deviation.

Looking at the data in Table 5, it is clear that irrespective of a judge's race, gender, or the presence or absence of social science data, the political philosophy of the judge is the strongest predictor of defendant victories. Model A reveals that the association of judicial rulings with gender and social science evidence is respectively weak, from a statistical perspective. Note here race factor drops out for reasons of co-linearity: all of the African American judges in the sample are Democratic appointees and one factor cannot be disaggregated from the other. In Model B, the data is rerun taking away the factor of social science data, and the relative predictive power of gender and political philosophy remain fairly constant. In Model C, gender is taken out of the equation and while there is some, albeit small, change in the beta associated with judicial philosophy, the

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<sup>154</sup> For a fuller discussion of binomial logistic analysis see ELAZAR J. PEDHAZUR, *MULTIPLE REGRESSION IN BEHAVIORAL RESEARCH*, 714-717 (3d ed. 1997).

model maintains a prediction accuracy rate of 81.6% overall, predicting 80% of defense wins and 82.6% of plaintiff wins.

Yet, if political philosophy is the strongest predictor of race conscious admissions case outcomes, what explains the Supreme Court's decision in *Grutter* when seven of the Justices are Republican appointees?

D. The Supreme Court's Assessment of Law and Fact in Contemporary Affirmative Action in Admissions and Voluntary Desegregation Cases

The marginalization of social science evidence in the decision making of lower court judges mirrors the limited attention paid to it by the Supreme Court in *Gratz* and *Grutter v. Bollinger* in 2003 then four years later in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Schools*. In all but *Grutter*, the race conscious policies failed, not for reasons of the interests pursued, but because they were found deficient for reasons of narrow tailoring. Even in *Grutter* the discussion of the social science evidence presented is short, ultimately resting on traditional judicial deference to educational institutions that demonstrate an exercise of due diligence in developing a race conscious policy. The University of Michigan first demonstrated that there was a compelling need for the policy, based on the need for the free of exchange of ideas in a law school, a context with which the Justices are most familiar. Second, the law school's individualized consideration of applications which

emphasized a wide array of diverse characteristics convinced the Court that its policy was narrowly tailored to its compelling goal.

1. Upholding Race Conscious Admissions through Deference in *Grutter v. Bollinger*

True to what had become tradition on the longest composed Supreme Court in American (U.S.) history, Justice Sandra Day O'Connor provided the swing vote and authored the majority opinion upholding the Michigan law school's race conscious admissions policy in *Grutter v. Bollinger*. Appointed to the bench by President Ronald Reagan in 1981 as the Court's first woman and a conservative, O'Connor's work balances the preservation opportunities for those she perceives as perhaps being disadvantaged and a dogged dedication to formal inequality and limited government. In the government contracts and employment contexts, O'Connor voted against a series of affirmative action policies, quite vocal in her opinions whether or not in the majority.<sup>155</sup> While voting against the race conscious union lay-off plan in *Wygant*, she suggests in her concurrence that higher education admissions may be a context in which a policy taking account of race is permissible. O'Connor holds out hope, even in

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<sup>155</sup> For more on Justice O'Connor and her jurisprudence see Joan Biskupic, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE (2005).

*Adarand*, as she specifically states that strict scrutiny need not be fatal in fact. While O'Connor's actions suggested otherwise as she never supported a race conscious policy, even the one in *Paradise*, she continued to hold out that hope. In *Grutter v. Bollinger* she made her words truth.

The facts of *Grutter* are recited in detail above. As for the Court's decision, O'Connor writing for the 5-4 majority begins the analysis with *Bakke* and Justice Powell's opinion in that badly fractured decision. She then formally endorses the educational benefits of diversity as a compelling interest as proffered by Justice Powell. Yet rather than announcing that diversity was clearly compelling, she deferred to the educational judgment of the University of Michigan based upon the social science evidence presented: "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*."<sup>156</sup>

Hence here, in the case of *Grutter v. Bollinger*, social science was influential. For years O'Connor's opinions have been poised to want to accept governmental interventions towards opening opportunity, but until the full record of social science work in *Grutter*, the set of facts and data before the Court never seemed to permit the proper opportunity. At a baseline, the social science record provided an anchor of objectivity upon which O'Connor could rest her

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<sup>156</sup> *Grutter*, 539 U.S. at 332 (Opinion O'Connor, J).

opinion and preserve affirmative action, if only for the time being. Additionally, O'Connor's deference to the University of Michigan honors the historic and traditional deference courts have made towards educational institutions. In this vein, the presentation of social science evidence represents the substantiation of the thought processes administrators at the University of Michigan, which if sufficiently rigorous deserves deference.

The Court's tradition of deference to educational institutions, however, was lost on the dissent.<sup>157</sup> Writing for the minority, Chief Justice Rehnquist states

The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws. We have said that when it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that; it is not merely a question of "fit" between ends and means. Here the means actually used

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<sup>157</sup> For more on the Court's traditional deference to educational institutions see MARTHA M. MCCARTHY, NELDA H. CAMBRON-MCCABE, AND STEPHEN B. THOMAS, *LEGAL RIGHTS OF TEACHERS AND STUDENTS*, 17 (2<sup>nd</sup> ed. 2009) (stating educational deference as a matter of historical tradition and part of contemporary trends as "since the 1980s the federal judiciary has exhibited more deference to the decision of legislative and executive branches."). See also Erwin Chemerinski, *The Deconstitutionalization of Education*, 36 *Loy. U. Chi. L. J.* 111 (2004).

are forbidden by the Equal Protection Clause of the  
Constitution.<sup>158</sup>

This point is echoed in the separate opinions of Justices Scalia and Thomas. Justice Kennedy also wrote a separate opinion. Justices Rehnquist and Kennedy devote a substantial amount of their opinion to the idea that the critical mass espoused by the University of Michigan is not a critical mass as the fraction of students from underrepresented groups varies from group to group. In addition, the longitudinal data illustrates that the percentage of underrepresented students enrolled tended to mirror the percentage of applicants from their respective groups in the applicant pool. However, had an inflexible percentage been given under the guise of critical mass, then that fixed fraction would have been decried foul as an impermissible quota. Upon the facts as they are, the dissent's argument is not that there is a quota, but that the law school engaged in racial balancing. This theme is found in each of the dissenting opinions, which is labeled by Justice Thomas as a matter of aesthetics: "The Law School's argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits."<sup>159</sup>

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<sup>158</sup> *Grutter*, 539 U.S. at 387.

<sup>159</sup> *Id.* at 355.

According to Thomas, the Court's flaw extends beyond affirmative response "to a faddish slogan of the cognoscenti,"<sup>160</sup> but extends to the potential detriment of underrepresented students, African American students in particular. However after castigating the majority for relying "heavily on social science evidence to justify its deference," he then uses social science research to illustrate his argument that "racial experimentation [ergo the law school's plan] leads to educational benefits will, if adhered to, have serious collateral consequences." Beyond the racial stigma argument as articulated in *Adarand*,<sup>161</sup> Justice Thomas cites a litany of social science research, that integration harms African American students. In particular he cites Thomas Sowell's mismatch thesis which posits that African American students under prepared for the rigors of academic institutions, elite or otherwise, are harmed by the challenges posed. Without affirmative action, then students would be appropriately matched with institutions whose rigor they can handle.<sup>162</sup> Most recently Sowell's thesis has been debunked. It is not the case that without affirmative action, African Americans would attend lower ranked law schools,

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<sup>160</sup> *Id.* at 350.

<sup>161</sup> *See supra*. Note 50 & accompanying text.

<sup>162</sup> *See* Thomas Sowell, *Race and Culture* 176-177 (1994); *See also* Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 *UCLA L. Rev.* 1583 (1999) (a review of *The Shape of the River* by William G. Bowen and Derek Curtis Bok)..

but that fewer African Americans would attend law school period.<sup>163</sup> The struggle in law school does not translate into lower bar passage rates.<sup>164</sup> The latter is much more pertinent to the supply of lawyers from minoritized groups. Several of the other studies are mis-cited, distilled quips, devoid of context. For example while in “Cognitive Effects of College Racial Composition on African American Students After 3 Years of College” Flowers and Pascarella find significant cognitive benefits associated with racial homogeneity in Historically Black Colleges (HBCs), these benefits are strongly associated with a psychologically supportive atmosphere. As such, the authors conclude “an intensive effort aimed at identifying effective programs, policies, and practices at HBCs might constitute an important advance in creating a more supportive climate for African American students when they are a minority group on campus.”<sup>165</sup> Moreover, the authors themselves warn that the generalizability of their findings is limited as only two HBCs were included in their sample.<sup>166</sup>

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<sup>163</sup> Jesse Rothsetein & Albert Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?* 75 UNIVERSITY OF CHI. L. REV. 649 (2008).

<sup>164</sup> Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L. J. 1997, 2004 (2005) (“While it is true that similarly qualified black students get lower grades as a result of going to a higher-tier school, they perform equally well on the bar irrespective of law school tier.”). See also Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855 (2005); Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005).

<sup>165</sup> 40 J. of College Student Development 669, 674 (1999).

<sup>166</sup> *Id.*

That African American students tend to fare better at Historically Black Institutions is well established in the research literature.<sup>167</sup> Less well known is research indicating that white student too fare well and perhaps better at HBCUs than traditionally white colleges and universities as HBCU cultures permeate student supportiveness through academic and student affairs, without the need for special uni-cultural or multicultural centers.<sup>168</sup> Thomas' citation of Rothman, Lipset, and Nevitte's *Racial Diversity Reconsidered* supports a rationale of more integration rather than less.<sup>169</sup> According to Justice Thomas' digest of this study, "the racial mix of a student body produced by racial discrimination of the type practiced by the Law School in fact hinders

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<sup>167</sup> See, e.g., WALTER R. ALLEN, ET. AL., *COLLEGE IN BLACK AND WHITE: AFRICAN AMERICAN STUDENTS IN PREDOMINANTLY WHITE AND IN HISTORICALLY BLACK PUBLIC COLLEGES* (1991) and JULIAN B. ROEBUCK & KOMANDURI S. MURTY, *HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: THEIR PLACE IN AMERICAN HIGHER EDUCATION* (1993).

<sup>168</sup> See Clifton F. Conrad, et. al. C. F., *Factors contributing to the matriculation of White students in public HBCUs*, 3 *JOURNAL FOR A JUST AND CARING EDUCATION* 37(1997) (finding that White students are attracted by the supportive environments fostered at historically black institutions); see also M. Christopher Brown, III, *Good intentions: Collegiate desegregation and transdemographic enrollments* 25 *THE REVIEW OF HIGHER EDUCATION* 263 (2002), SERBRENIA J. SIMS, *DIVERSIFYING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: A NEW HIGHER EDUCATION PARADIGM* (1994); FREDERICK D. PATTERSON RESEARCH INSTITUTE, *THE AFRICAN AMERICAN EDUCATION DATABOOK. VOL. 1: HIGHER AND ADULT EDUCATION.* (1997); Charles V. Willie, (1983). *RACE, ETHNICITY AND SOCIOECONOMIC STATUS* (1983)]; and CHARLES V. WILLIE, ET. AL. *AFRICAN AMERICANS AND THE DOCTORAL EXPERIENCE: IMPLICATIONS FOR POLICY.* (1991)(finding that white faculty at HBCUs who leave to attain their doctorates at traditionally white institutions discover a chilly campus climate as compared to HBCUs; Cf. Brenda Hall and Rosemary B. Closson, *When the Majority is the Minority: White Graduate Students' Social Adjustment at a Historically Black University*, 46 *J. COLLEGE STUDENT DEVELOPMENT* 28 (2005) (finding that white students in the study experienced racial exclusion on this HBCU campus).

<sup>169</sup> 151 *PUBLIC INTEREST* 25 (2003).

students' perception of academic quality."<sup>170</sup> The perception here has much to do with stereotypical beliefs that any thing that is black is tainted, marred, or substandard.<sup>171</sup> However as more African Americans rise through the higher education ranks generally, elite institutions in particular, confidence in their competence garners as stereotypes are debunked.<sup>172</sup>

Thomas is not the sole Justice picking and choosing of convenient research citations. His opinion in *Grutter*, as well as that in the Seattle and Jefferson County cases, demonstrates a need for judges to consider research more circumspectly, not merely as good lawyers bolstering their arguments while zealously representing clients.

## 2. The Supreme Court in *Gratz*, *Parents*, and *Meredith*

In *Gratz* the majority, led by the late Justice Rehnquist found that the points system, as described above, did not allow for individualized

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<sup>170</sup> *Grutter*, 539 U.S. at 364.

<sup>171</sup> See Haig A. Bosmajian, *The Language of White Racism*, 31 COLLEGE ENGLISH 263 (1969) and Erdman B. Palmore, *Ethnophaulisms and Ethnocentrism*, 67 THE AMERICAN JOURNAL OF SOCIOLOGY 442 (1962); For a more contemporary account see CARROY U. FERGUSON, TRANSITIONS IN CONSCIOUSNESS FROM AN AFRICAN AMERICAN PERSPECTIVE: ORIGINAL ESSAYS IN PSYCHO-HISTORICAL CONTEXT (2004).

<sup>172</sup> See Willie, et. al. *supra* note 168.

consideration of student applicants.<sup>173</sup> According to the Court, the University's [LSA's] policy

automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *Bakke* [*citations omitted*], the LSA's automatic distribution of 20 points has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant.<sup>174</sup>

The Court's majority (6-3) was silent on the compelling interest inquiry in the respective concurring opinions as well as the majority opinion authored by the Chief Justice. The Court was content with the petitioner's argument that assuming *arguendo* that the diversity interest pursued was compelling, and

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<sup>173</sup> *Grutter*, 539 U.S. at 271-275.

<sup>174</sup> *Id.* at 271-272.

striking the policy on narrow tailoring grounds.<sup>175</sup> This educational benefits of diversity interest was already deferred to in *Gratz's* companion case, *Grutter v. Bollinger*.

In *Parents* and *Meredith*, the majority opinion by Justice Kennedy and the plurality opinion by Chief Justice Roberts both discuss whether the interests in the educational benefits of diversity and the avoidance of racial isolation as advanced by the districts were compelling. While there is some discussion of the research presented, in these two opinions that discussion is minimal. Chief Justice Roberts, in passing, notes that “the parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieved intangible socialization benefits. The debate is not one we need to resolve,” as the policies fail for lack of narrow tailoring.<sup>176</sup> Chief Justice Roberts does, however, find a research gap, a lack of connecting the benefits of a diverse class to “any pedagogic concept of the level of diversity needed to obtain the asserted benefits.”<sup>177</sup> Yet he later quotes Jefferson’s County’s expert, who asserts that it is important to have “‘at least 20 percent’ minority group representation for the group ‘to be visible enough to make a difference,’ ... ‘small isolated minority groups in a school are not likely to have a

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<sup>175</sup> *Id.* at 271-275.

<sup>176</sup> *Parents Involved in Community Schools*, 127 S.Ct. at 2755.

<sup>177</sup> *Id.*

strong effect on the overall school.”<sup>178</sup> This argument echoes the dissent in *Grutter* and their concern regarding the relationship between a critical mass and the number of students enrolled by race/ethnicity. The problem here, as it would have been in *Grutter*, is that if a fixed percentage had been rendered, it would have been struck down as a quota. Roberts quickly dismisses the critical mass point to emphasize his perspective of both cases. He sees them as primarily about racial balancing: “In design and operation, the plans are direct only to racial balance...an objective this Court has repeatedly condemned as illegitimate.”<sup>179</sup>

Moreover, the way in which race is considered by both policies privileges some racial configurations over others. Both Roberts and Kennedy is the bluntness with which the respective policies consider race, which is in binary terms – white/non-white in Seattle and black/“other” in Jefferson County. The hypothetical considered by the Justices is one in which one school that is 50-50 White and Asian American would be considered racially balanced under the Seattle plan, but another that is 30 percent Asian America, 25 percent African American, 25 percent Latino and 20 percent White would be considered racially concentrated.<sup>180</sup> The reality of the Jefferson County case is that the student, Joshua McDonald, was denied a transfer. The school to which he was assigned

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<sup>178</sup> *Id.* at 2756.

<sup>179</sup> *Id.* at 2755.

was 46.8 percent Black. As such, his transfer would not have brought the proportion of black students below that critical level of 20 percent. As such, from Chief Justice Roberts' perspective, the district was not after the educational benefits of diversity or the minimizing of racial imbalance as asserted by the expert, but in having a proportional representation of African American students in the district reflected in the individual schools.<sup>181</sup>

The majority and plurality share further perspectives on the policy defects in the Seattle and Jefferson County plans. Chief Justice Roberts notes the small number of students impacted by the racial components of either plan – less than 2 percent of all students in Jefferson County and only 52 students in Seattle – detract from the necessity of the policies. While, he discourages wider consideration of race, a more efficient, race neutral means, must be considered.<sup>182</sup> Justice Kennedy shares this view and goes further to note the vagueness of the Jefferson County plan and the inconsistencies in its administration as demonstrated by three different articulations of how the race factor was used.<sup>183</sup> “When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.”<sup>184</sup>

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<sup>180</sup> *Id.* at 2756, 2790-2791.

<sup>181</sup> *Id.* at 2756.

<sup>182</sup> *Id.* at 2760.

<sup>183</sup> *Id.* at 2789-2790.

<sup>184</sup> *Id.* at 2790.

Where the majority and plurality diverge is at the point of broader pronouncements on the constitutionality of using race in student assignments or other contexts. While Chief Justice Roberts does not outright condemn the use of race in government policy, he ends his opinion with the statement that, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>185</sup>

Before *Brown* schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again – even for very different reasons. For schools that have never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis, “*Brown II* [citations omitted], is to stop assigning student on a racial basis.<sup>186</sup>

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<sup>185</sup> *Id.* at 2768.

<sup>186</sup> *Id.*

Overall the plurality's opinion is ambiguous as to whether and to what extent race can be used in the future.<sup>187</sup> Justice Kennedy on the other hand firmly asserts, "school districts can seek to reach *Brown's* objective of equal educational opportunity" and where the plurality opinion "suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is ...profoundly mistaken."<sup>188</sup> Kennedy is clear that policies that are on their face racially neutral are preferred. However, if the necessity arises, race conscious policies with "a more nuanced, individual evaluation of school needs and student characteristics" are constitutionally permissible as informed by *Grutter*. With respect to this passage, James E. Ryan finds Kennedy's opinion opaque as it is unclear to what extent policies in a K-12 environment could or should mirror the wholistic school application appraisal conducted by the University of Michigan's law school. Ryan suggests "school officials interested in racial integration, as well as their attorneys, are rightly poring over the opinion for guidance going

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<sup>187</sup> However, note that Justice Thomas' opinion on this point is quite clear and his interpretation of a constitution that is "colorblind," would summarily reject all race conscious policies in the education context. *Id.* at 2782-2788.

<sup>188</sup> *Id.* at 2791.

forward,” and opines that this “exercise is likely to produce some frustration.<sup>189</sup>

Kennedy’s stance is most peculiar given his dissent in *Grutter* with perhaps one of the most well documented admissions plans designed to comply with the contours of *Bakke*. His jurisprudence in *Grutter* and the K-12 student assignment cases illustrates his position on the Court, the position of center once held by Justice O’Connor and before her Justice Powell.

Whereas Justice Kennedy’s majority opinion avoids direct reference to social science research and the plurality’s attention to the research is not much more, Justice Thomas’ concurrence and Justice Breyer’s dissent depict opposing assessments of social science on the educational benefits of an integrated student body. Justice Thomas’ digest of the social science research presented is divided into two parts - research on the educational benefits of integration for black children and the educational value of diversity in support of democracy. He begins his digest with the divergent conclusions of social scientists as indicated in amicus briefs. In writing on the behalf of defendants, the American Educational Researchers Association asserts at most a modest positive benefit on black student achievement, with no achievement loss to white students.<sup>190</sup> While

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<sup>189</sup> James E. Ryan, *Comment: The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 136-137 (2007).

<sup>190</sup> *Id.* at 2776.

it is generally agreed that white students are not harmed academically, there are scholars who dispute whether there are any academic benefits to any students.<sup>191</sup> By way of counter-example Thomas highlights a school in Seattle that is 99 percent nonwhite with an articulated focus on academic achievement. In this school, student test scores are high across its K-8 grade span in the areas of reading, writing, and math. Justice Thomas also brings in the fact of higher academic achievement of African American college students at Historically Black Colleges and Universities. His point is that racial isolation per se does not hamper student achievement. This point resonates with a growing number of scholars who focus on what makes a better school as opposed to racial integration as a proxy for better schools.<sup>192</sup> Moreover, Justice Thomas indicates that even if there are tangible, appreciable education benefits to racial diversity, there needs to be an assessment of the amount of racial mixing needed to attain these benefits, a point highlighted by the plurality.<sup>193</sup> Thomas concludes, “ given

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<sup>191</sup> *Id.* at 2776-2777.

<sup>192</sup> See e.g., PHILLIP C. SCHLECHTY, *INVENTING BETTER SCHOOLS: AN ACTION PLAN FOR EDUCATIONAL REFORM* (1997), Willis D. Hawley, *THE KEYS TO EFFECTIVE SCHOOLS: EDUCATIONAL REFORM AS CONTINUOUS IMPROVEMENT* (2003), and Paul Cooper, *EFFECTIVE SCHOOLS FOR DISAFFECTED STUDENTS* (2007).

<sup>193</sup> Generally speaking this is an area where the social science literature lapses. While there are vague considerations of “critical mass,” which are generally assessed from quasi-experimental situations where test scores from different schools with different racial compositions are compared, it would take experimental designs to precisely target the tipping point where the educational benefits of diversity are conferred. For a discussion of experimental design in the education context and its feasibility see Thomas D. Cook, *Randomized Experiments in Educational Policy Research: A Critical Examination of the Reasons the Educational Evaluation Community has Offered for not Doing Them*, 24 *EDUCATIONAL EVALUATION AND POLICY ANALYSIS* 175 (2002).

this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling.”<sup>194</sup>

With regard to the democracy justification advanced, that there is a compelling “interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live,” Justice Thomas regards it as another guise for racial balancing. He argues that such citizenship lessons can be conveyed to students in contexts other than the educational one and there is no time limit to the democracy interest. His treatment of this argument, however, is perhaps trite given the amount of time children spend at schools as compared to other arenas. He does, however, cite back to social science research that indicates that having students of races are in the same building does not assure racial interaction. Moreover, all interracial interaction is not positive. By way of footnote Justice Thomas cites a situation in a California prison where inmates were kept racially isolated to prevent murders on the basis of race. Given the life interest at stake, Thomas seems to argue that such a policy should have been adjudicated as compelling, whereas the interests proffered in this context are not as crucial. Thomas cites a 1975 study by St. John which finds more negative than

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<sup>194</sup> 127 S.Ct. at 2778.

positive developments in student attitudes through racial contact.<sup>195</sup> However, more circumspect accounts of school desegregation literature emphasize the conditions under which racial integration is attempted. In particular, the propensity for negative consequences is minimized when socioeconomic (SES) conditions are at parity among racial groups. Integrating within socioeconomic class boundaries avoids the conflation of race and poverty issues, allowing students to see the “normalcy” of others who do not look like them.<sup>196</sup> The pragmatic problem is that black and Latino students are disproportionately poor, making integration across racial lines and within socioeconomic classes difficult. Even if achievable, such a policy set would be problematic given the emphasis of segregation on the basis of class. The key problem with Justice Thomas’ recitation of the social science literature is the manner in which he picks and chooses studies. Rather than weighing individual studies on the quality of the methods executed and reasonableness of the conclusions drawn there from, he selects those works that are most beneficial to his argument. While highlighting the work most beneficial to one’s position may be part of a lawyer’s zealous pursuit in his or her case, a Justice’s evaluation should be more circumspect. In fact the “modest” achievement gains the American Educational Researchers Association asserts, and Thomas mocks, reflects a value in the social science

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<sup>195</sup> *Id.* at 2781.

<sup>196</sup> See, e.g., Thomas Cook, et. al., *School desegregation and Black achievement*, National Institute of Education (1984).

community to modesty in their claims and the avoidance of overstatements of research findings. Studies of high quality consider and weigh not only those studies in agreement with their assessments, but those with which the conclusions are at odds. In so doing they do not resort to *ad hominem* attacks. In contrast, Justice Thomas spends several pages comparing the school districts and their amici with ante-*Brown* segregationists, dismissing the social science proffered as both elitist and faddish.<sup>197</sup>

The minority opinion by Justice Breyer and signed to by Justices Stevens, Souter, and Ginsberg takes an approach that focuses on the interpretation of school desegregation precedents in a manner that may have been more consistent with the intentions of the Court over the 1960s and 1970s. Justice Stevens in his concurrence asserts that, “The Court has changed significantly since ... 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today.”<sup>198</sup> Moreover, “It is my firm contention that no Member of the Court that I joined in 1975 would have agreed with today’s opinion.”<sup>199</sup> In this vein the minority opinion obviates jurisprudential views on equal protection that were once the majority, but over time and with numerous

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<sup>197</sup> 127 S.Ct. at 2787. While Justice Thomas does make some strong points, some with which I even agree, the tenor of his argument harkens to the need for more emphasis on good citizenship and democracy education in schools, not less.

<sup>198</sup> *Id.* at 2800.

<sup>199</sup> *Id.*

split decisions were minoritized. It reflects an attempt by the Court's minority to focus on areas of genuine contention within equal protection law that the majority fiats as questions previously asked and answered.<sup>200</sup>

Justice Stevens' concurrence spotlights the significance of minority opinion within the context of contemporary precedent, "If we look at cases decided during the interim between *Brown* and *Adarand*, we can see how a rigid adherence to tiers of scrutiny obscures *Brown's* clear message."<sup>201</sup> Within this historico-legal context as well as contemporary trends toward reversing integration progress made, Justice Breyer asserts that the distinction between *de facto* and *de jure* segregation is meaningless. As such, policies to remedy racial segregation in school regardless of how the conditions giving rise to the need for address created, in Breyer's view are constitutionally permissible. Breyer finds as compelling "the school districts' interests in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience."<sup>202</sup> The reason he offers is threefold: 1) historical/remedial, 2) the educational achievement benefits of an integrated student body, and 3) the

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<sup>200</sup> See also *Grutter* at 344- 345 (Opinion Ginsberg, J.) ("The Court further observes that 'it has been 25 years since Justice Powell [citations omitted] approved the use of race to further an interest in student body diversity in the context of public higher education' ... For at least part of that time, however, the law could not fairly be described as 'settled.'").

<sup>201</sup> 127 S.Ct. at at 2800.

<sup>202</sup> *Id.* at 2820.

educational benefits of a pluralistic society within the schools. The first rationale regards the long histories towards achieving racial integration and the ability to remediate segregative conditions contemporarily. The latter two rationales are supported through social science research. With respects to the educational achievement benefits associated with an integrated student body, Breyer first cites research on the negative consequences of hyper-segregated schooling and how integration efforts boost academic achievement. He also cites work suggesting that academic achievement wanes as districts re-segregate. In response to Justice Thomas' recitation of adverse research Breyer suggests that here is a space where traditional deference to educational institutions and the electoral process is appropriate: "the evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one."<sup>203</sup> This statement of the social science is consistent with the preponderance of the research emanating from the field and digested in the American Educational Researchers Association Brief. However, Breyer does not refute Justice Thomas' recitation of work on high achieving predominantly minority K-12 schools and HBCUs. These achievements are by in large gained through concentrated administrative and teaching efforts to build effective schools within a racially isolated context. There is intentionality in these

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<sup>203</sup> *Id.* at 2821.

institutions and racial identity as conveyed to students is not characteristic of personal defect. Unfortunately, the tale of high achievement within racially isolated contexts tends to be the exception rather than the rule, especially as reported in the social science literature. Too often racially isolated schools, especially in K-12, are that way for *de facto* reasons, e.g., segregated housing patterns, white flight, and general societal discrimination. When racial isolation is a creation by default, as opposed to intentionality, hyper-segregation is also usually accompanied by concentrations of poverty among students as well as limited fiscal, personnel, and material school/ district resources. Perhaps here Justice Thomas has a legitimate point. In footnote 11 he quotes Hallinan's 1998 digest of diversity research, "it is not desegregation per se that improves academic achievement, but rather the learning advantages some desegregated schools provide."<sup>204</sup> Towards that end Thomas concludes, "evidence that race is a good proxy for other factors that might be correlated with educational benefits does not support a compelling interest in the use of race to achieve academic results."<sup>205</sup> It seems, however, that this proxy argument would bear more on the narrow tailoring aspect of strict scrutiny as opposed to the compelling interest asserted. The misstep harkens to the lack of user friendliness of the Court's tiers of review, even for one of its most staunch supporters.

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<sup>204</sup> *Id.* at 2776.

<sup>205</sup> *Id.* at 2776.

#### IV. Conclusion

Is social science evidence persuasive in politically and socially charged contexts like race conscious admissions? In the aggregate, probably not as most people, including judges, have strong thoughts on these matters that are not likely to change. This fact was displayed quiet evidently in the most recent plurality decisions of the Court in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*. Here, the four Justices signing to Chief Justice Robert's opinion seem to suggest that race conscious admissions plans for the sake of voluntary integration in K-12 environments per se do not invoke a compelling governmental interest. Justice Thomas' opinion makes this point explicitly. However, the plurality's views here should not be mistaken for law. Justice Kennedy's opinion, which provides the fifth vote for the majority, suggests that there may be circumstances under which race conscious policies can be used to achieve or maintain integrated. The majority's opinion in this case is rather limited as it was decided on the narrow tailoring prong of strict scrutiny. In this vein, the decisions only apply to Seattle's School District Number 1, the Jefferson County School District, and other

districts that did not amply consider race-neutral means to achieve and maintain an integrated student body.<sup>206</sup>

Nevertheless, should the plurality view become law, then the use of social science evidence in race conscious admissions cases, particularly pertaining to voluntary integration methods, would be obsolete. Until such a ruling is made definitively, the question is not whether social science evidence is influential or even persuasive, but whether it is useful in politically contentious cases. It seems that the body of research presented in the Michigan cases was just the evidence needed to allow one swing-voting judge, Justice O'Connor, preserve the race-conscious admissions option for educational institutions seeking diverse student bodies. Thus, while the attitudinal models are informative in the aggregate, judicial opinions come to just that, the opinions and decision making processes of individual judges. As such, the value of social science research is that it can be informative and help buttress judicial decisions when wide-reaching decisions are made from the bench. Caution, however, must be paid as "The blind use of complicated statistical procedures ... is doomed to lead to absurd conclusions."<sup>207</sup> In this vein, judges should take care to weigh social science evidence not just for the conclusions of studies, but for the internal validity, consistency, and

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<sup>206</sup> For a further discussion of the limited importance of the Seattle School District and Jefferson County cases see Ryan, *supra* note 189.

<sup>207</sup> See Paul W. Holland & Donald B. Rubin, *On Lord's Paradox*, in *PRINCIPALS OF MODERN PSYCHOLOGICAL MEASUREMENT: A Festschrift for Frederic M. Lord* 3, 18 (Howard Wainer & Samuel Messick eds., 1983).

generalizability of the studies themselves. More than a century has passed since Justice Oliver Wendell Holmes, Jr. predicted that “for the rational study of the law ...the man of the future is the man of statistics and the master of economics.”<sup>208</sup> Numerous courses in law schools as well as special training sessions for judges have sprung over the last fifteen years to help fill the need for lawyers and judges to become good consumers of social science research. As such, the excuse of disciplinary boundaries in the assessment of research wanes with time.

As for the value of social science research in higher education affirmative action and voluntary desegregation cases, the employment of data on the part of districts is useful. It is influential on the margins, but beyond its use in influencing marginal judges, it provides additional sources to support the opinions of judges already persuaded. In effect, social science research presented in these cases gives defendant educational institutions a fighting chance.

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<sup>208</sup> *The Path of the Law*, 10 HARV. L. REV. 457 (1897).