

## A Fighting Chance: Race Conscious Admissions, Social Science, and the Law

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## Introduction

One university; two trials; two district court outcomes: such is the case of the University of Michigan and the divergent court opinions regarding the inclusion of race as a factor in undergraduate and law school admissions. In the case of *Gratz v. Bollinger*,<sup>2</sup> the district court ruled in favor of race conscious admissions at the undergraduate level; however, in *Grutter v. Bollinger*,<sup>3</sup> the district court struck down the policy at the law school. In the wait between the district court opinions in the Michigan cases and the Supreme Court's decisions, reversing the outcomes of the district courts, a question of legal principle hung in the balance: can diversity in collegiate class composition ever be a sufficiently compelling goal to permit the use of racial classifications in the admissions process? After declining review in the cases of *Hopwood v. State of Texas*<sup>4</sup> and *Smith v. Washington*,<sup>5</sup> the Supreme Court heard the Michigan cases in what may be one of the most significant civil rights decisions by the Rehnquist Court. In these cases, the Court formally endorsed race-conscious admissions. Thus, race conscious admissions policies are constitutionally permissible, so long as they are narrowly tailored towards advancing compelling goals. These goals include the pursuit of the educational benefits yielded through a diverse student body. In

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

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

<sup>4</sup> *Hopwood v. State of Texas*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

<sup>5</sup> *Smith v. University of Washington*, 233 F.3d 188 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

this vein, the Court fully embraced the diversity rationale as proffered by Justice Powell in *Bakke v. Board of Regents*<sup>6</sup> and followed by educational institutions for the last twenty-five years.

The present inquiry focuses on identifying a potential relationship between the introduction of social science evidence at trial and judicial assessment of the costs and benefits of diversity, within the educational context. Given the politically charged nature of the affirmative action debate, with many people having entrenched, diametrically opposed views,<sup>7</sup> and the relative novelty of social science on the costs and benefits of diversity, it may be the case that the influence of social science evidence is limited. As the expenditures of the University of Michigan on expert witnesses throughout the course of the Michigan cases were considerable,<sup>8</sup> it is appropriate to assess, in a pragmatic sense, the degree to which such expenditures are warranted. In short, does employment of expert witnesses increase the likelihood for college and university defendants in race conscious admissions suits?

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<sup>6</sup> *University of California Board of Regents v. Bakke*, 438 U.S. 265 (1978).

<sup>7</sup> See Harold J. Spaeth & Jeffrey A. Segal, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999), pp. 235-6, (looking specifically at affirmative action). See generally, Spaeth & Segal, at 18-19, 308-311 (arguing that in highly salient cases justices are less likely to adhere to precedent; citing Justice Scalia's quotation of Justice Douglass in *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989), "[a] judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949)."

<sup>8</sup> The Associated Press reports that expenditures on the *Gratz* and *Grutter* cases cost the University of Michigan total \$9 million. Associated Press, *Admissions Lawsuits Cost U-M \$9 Million*, THE DETROIT NEWS, March 22, 2003, at <http://www.detnews.com/2003/schools/0303/27/schools-115479.htm>. Most of the costs were associated with attorney's fees, as Lee Bollinger specifically sought counsel with significant experience of success before the Supreme Court. Costs would have been much higher had the University not received discounts from outside counsel. In addition, many of the experts for the University waived compensation. Janet Miller, *U-M Suit Cost Already \$9 Million: University-Owned Insurance Company Covering Affirmative Action Case's Legal Expenses – Most for Outside Counsel*, ANN ARBOR NEWS, March, 21, 2003 at <http://aad.english.ucsb.edu/docs/umsuit2.html>.

In Part II, I briefly review the landscape of equal protection law between the Supreme Court's decisions in *Bakke* and *Grutter*. Part III presents 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. Part IV concludes with the assessment of the role of social science evidence in the outcome of the Supreme Court's decisions in *Gratz* and *Grutter*.

## II. The Landscape of Race Conscious Admissions Cases From *Bakke* to *Grutter*

### A. Jurisprudential Divisions Over Strict Scrutiny and the *Bakke* Decision

From the late 1970s into the early 1990s the Supreme Court issued a series of decisions, shaping the broader contours of equal protection law with respect to the permissibility of affirmative action policies in both purpose (compelling interest) and policy form (narrow tailoring).<sup>9</sup> This period is marked by jurisprudential battles over the

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<sup>9</sup> *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." Bryan A. Garner, BLACK'S LAW DICTIONARY 64 (8<sup>th</sup> ed. 2004). *The Modern Dictionary for the Legal Profession* goes so far as to state that "[t]he constitutionality of many of these programs is uncertain because the programs themselves may impermissibly discriminate." Gerry W. Beyer, Kenneth R. Redden, and Margaret Beyer, Eds., THE MODERN DICTIONARY FOR THE LEGAL PROFESSION, 20 (2001). Within the context of this paper, a broader conception of affirmative action will be used as the focus of this inquiry is not to address past discrimination, but the use of race conscious admissions to gain the benefits of a racially diverse student body. For purposes of a working definition of affirmative action, this paper draws upon an alternative definition articulated by Catharine R. Stimpson, Dean of the Graduate School of Arts and Science New

issues of the appropriate standard of review for benign race conscious policies, strict versus intermediate scrutiny, and whether the standard of review should vary given the level of government, federal versus state and local. Of concern is the burden accorded the defendant governmental entities when employing race conscious measures. Given our nation's history of *de jure* segregation and other invidious racially and ethnically targeted measures, the Court is inherently suspicious of measures including terms designating people along racial/ ethnic lines. While the Court's heightened suspicion protects individuals against direct discrimination by the government, it also constrains the flexibility of governmental entities in addressing the lingering effects of past injustices and aiding the building of an inclusive, pluralistic society.<sup>10</sup>

Historically, strict scrutiny has meant the death knell of any policy to which it is applied, with few exceptions.<sup>11</sup> Strict scrutiny requires that the government prove that its interest in the proffered policy - the goal the government seeks - is compelling. In

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York University, in the March/ April 1993 edition of *Change* magazine. According to this definition, 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, without cavil. The second is to create a community that prizes diversity and differences." Catharine R. Stimpson, *Rethinking Affirmative Action*, 25 *CHANGE* 2 (1993).

<sup>10</sup> See, Kim Forde-Mazuri, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 *GEORGETOWN L.J.* 2232, 2340-2346 (2000).

<sup>11</sup> Until *Grutter v. Bollinger*, in all but one occasion, *U.S. v. Paradise*, 480 U.S. 149 (1987), race-based classifications did not survive strict scrutiny since the inception of the strict scrutiny 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 *HARVARD L. REV.* 1 (1972). For a further discussion of the effects of strict scrutiny see M. L. Manuel, *Adarand Constructors, Inc. v. Peña: Is Strict Scrutiny Fatal in Fact for Governmental Affirmative Action Programs*, 31 *NEW ENGLAND LAW REVIEW* 975 (1997).

addition the nexus between the goal sought and the policy enacted must be tight and direct, what the Court calls narrowly tailored. In effect, under strict scrutiny the burden between protecting innocent third parties and addressing injustice and/ or promoting diversity is thrown in favor of the innocents and protecting targeted classes from the perverse effects of benign policies.<sup>12</sup> Traditionally, the standard of intermediate scrutiny is more lenient, albeit slightly, requiring the government to show merely that the proffered goal is important and that there is a substantial relationship between that goal and the policy.<sup>13</sup>

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<sup>12</sup> See Forde-Mazuri, *supra* note 10 at 2359-2364.

<sup>13</sup> The Supreme Court in *Fontiero v. Richardson* announced that a heightened standard was necessary when reviewing sex-based classifications. 411 U.S. 677, 93 S. Ct. 1764 (1973)(invalidating a military rule which permitted servicemen to automatically claim their spouses as dependents, but required servicewomen to prove that their spouses were dependent in fact). However, it wasn't until three years later, in *Craig v. Boren*, when the Supreme Court articulated the intermediate scrutiny standard as we have come to know it. 429 U.S. 190, 97 S. Ct. 451 (1976)(invalidating an Oklahoma law denying 18 year old men from purchasing 3.2% beer, but allowing the purchase of such beer by young women of the same age).

Note that the above text provides the "black letter" discussion of the tiers of scrutiny as enunciated by the Supreme Court. However, the Court's practice often deviates from the proffered standards. According to University of California Professor Ashutosh Bhagwat,

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. *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, 260, 270 (2002).

Finding a pattern of review, Randall Kelso, Professor of Law, South Texas College of Law, argues 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. In addition to those seven levels of review, three additional tiers could be added based on recent decisions adding language, such as the phrase "exceedingly persuasive" to intermediate scrutiny in the *VMI* decision. *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 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, 5 (2002). Others have argued that the Court engages in an ad hoc balancing of interests, under the guise of heightened scrutiny. See Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONNECTICUT LAW REVIEW, 961 (1998) and

This abridged legal overview begins in 1978 with the Supreme Court’s decision in *University of California Board of Regents v. Bakke*.<sup>14</sup> *Bakke* is a significant milestone when considering race conscious admissions as it is the first case in which the Supreme Court rendered a decision on the merits of race conscious admissions.<sup>15</sup>

The case of Allan Bakke began in 1973 when Bakke applied to the medical school at the University of California at Davis (UC-Davis). The medical school scored applicant up to 500 points based on one’s grade point average (GPA), Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical information. While Bakke was thought to be a “very desirable applicant to [the] medical school”,<sup>16</sup> his application was denied along with all other general admissions applicants with a score below 470.<sup>17</sup>

Concurrent with the general admissions procedure at UC-Davis Medical School was a special admissions procedure designed to increase the number of “disadvantaged” minorities at the school. The special admissions procedure 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

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David L. Faigman, *Normative Constitutional Fact-Finding - Exploring the Empirical Component of Constitutional Interpretation*, 139 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 541 (1991). Most recently scholars argue that the level of review employed in the Grutter decision was not strict, but intermediate scrutiny. *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).

<sup>14</sup> *Id.* at 265 (1978).

<sup>15</sup> The first case was *DeFunis v. Odegaard*, 416 U.S. 312, which involved a race conscious policy at the University of Washington School of Law (1974). That case was dismissed for mootness as the plaintiff’s graduation from the school of law was imminent at the time the case was heard by the Court.

<sup>16</sup> 438 U.S.. at 276.

<sup>17</sup> *Id.*

economic disadvantage. In addition candidates needed to show they were not subject to the automatic 2.5 GPA cut off.<sup>18</sup>

In 1973 there were eight slots 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. Bakke mailed a letter to the Associate Dean and Chairman of the Admissions committee, Dr. George H. Lowrey, protesting the application process, stating that the special admissions procedure functioned as an illegal quota.<sup>19</sup> Bakke reapplied in 1974 and his relative score dropped substantially to 549 out of 600. Again, Bakke was rejected outright with seats in the special admissions program to spare, slots that were filled with students with significantly lower grade point averages and MCAT exam scores.<sup>20</sup>

Bakke filed suit with the Superior Court of California, seeking to compel his admission to UC-Davis, alleging that he was excluded from the school 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. The court ruled that the special admissions procedure acted as an illegal racial quota as it did not allow for the comparison of candidates from the special and general admissions pools. However, the court stopped short of compelling Bakke's admission, as Bakke had not proven that but for the quota he would have been admitted.<sup>21</sup> Bakke appealed this

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<sup>18</sup> *Id.* at 272-273.

<sup>19</sup> *Id.* at 276.

<sup>20</sup> *Id.* at 277.

<sup>21</sup> *Id.* at 278-279.

latter part of the decision directly to the California Supreme Court, which accepted, finding the issues raised in the case to be of significant import.<sup>22</sup> The California Supreme Court assumed, *arguendo*, that the medical school's goals of integrating the student body and thereby the medical profession, as well as improving minority healthcare, were compelling, but that the procedures employed were not narrowly tailored towards those goals.<sup>23</sup> The court specifically stated, "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" and enjoined the school from using race as a factor in its admissions policies.<sup>24</sup>

The Board of Regents appealed to the U.S. Supreme Court. Writing for an equally divided court, Justice Powell affirmed the dissolution of the UC-Davis policy under the rubric of strict scrutiny, with the approval of Justice Stevens, Chief Justice Burger, Justices Stewart and Rehnquist, but reversed the decision insofar as it summarily banned affirmative action in admissions. Justices Brennan, Marshall, Blackmun and White supported this latter action.

Neither of the factions signed off on Powell's benefits of a diverse student body justification for the use of race conscious admissions,<sup>25</sup> which according to Powell

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<sup>22</sup> See, *Bakke v. The Regents of the University of California*, 553 P. 2d 1152, 1156 (1976).

<sup>23</sup> See *Id.* at 1165 ("The two major aims of the University are to integrate the student body and to improve medical care for minorities. In our view, the University has not established that a program which discriminates against white applicants because of their race is necessary to achieve either of these goals.").

<sup>24</sup> *Id.* at 1166.

<sup>25</sup> Justice Brennan later refers to the diversity in education justification in *Metro Broadcasting* where he discusses Justice Powell's opinion on diversity as if it was the proper statement of the law:

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*, [citations omitted] the diversity of views and information on the airwaves serves important First Amendment values. *Metro Broadcasting*, 497 U.S. at 568.

“clearly is a constitutionally permissible goal for an institution of higher education” as part of an institution’s academic freedom to encourage the “robust exchange of ideas” as protected by the First Amendment. Citing *Keyishian v. Board of Regents*,<sup>26</sup> Powell asserted that the belief that an atmosphere of “speculation, experiment and creation” is an essential quality of higher education is widely held and a student body that is diverse in its ideas and 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>27</sup>

How Justice Powell arrived at the conclusion that diversity serves a compelling purpose is unclear. In *Bakke* he cited then Princeton President William Bowen’s editorial to Princeton alumni that discussed, without specific data analysis, the benefits of a diverse class.<sup>28</sup> According to legal scholar and Dean of the University of Virginia School

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<sup>26</sup> *Keyishian* involved a regulation requiring teachers at state universities in New York to pledge an oath that they had not engaged in treasonable or seditious conversation or acts. The Supreme Court struck down the law as violating academic freedom as protected by the First Amendment. *Keyishian*, 385 U.S. 589 (1967).

<sup>27</sup> *Bakke*, 438 U.S. at 314.

<sup>28</sup> *Bakke*, 438 U.S. at 314. In *Bakke*, briefs by amici, friends of the court, may have also played a role. On the one hand, support for affirmative action in admissions 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, as well as 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 history of the use of quotas to restrain Jewish American enrollments at elite institutions. The government weighed in as well with the second African American Solicitor General Wade McCree, the first being Thurgood Marshall, presenting a brief, written by conservative jurist then attorney Frank Easterbrook, which condemned the sixteen-seat set aside as per se unconstitutional. Other parts of the Solicitor General’s brief reflected the office infighting and were generally dismissed by Justice Powell. For

of Law, John Jeffries, a few years prior to the decision in *Bakke*, Justice Powell was recounted as being “doubtful of the educational policy” supporting the University of Washington Law School’s affirmative action policy challenged in *DeFunis v. Odegaard*.<sup>29</sup> On the other hand, Powell found the policy within the institution’s purview.<sup>30</sup>

While Powell ultimately endorsed diversity as a valid policy goal, he did disagree as to the mechanics of the UC-Davis policy. Instead he offered the admissions policy of Harvard, the “Harvard Plan”, as a counterfactual to the Davis policy. While employing the same aims, the Harvard Plan took into account a plethora of factors of which race was but one, a “racial plus”. In addition, all students were considered for all seats.<sup>31</sup> According to Jeffries, holding out the Harvard Plan was a pragmatic strategy. Thus, while the ends of the UC-Davis and Harvard approaches may have been similar, the rigidity of the UC-Davis policy gave the appearance of blatant discrimination by institutions.<sup>32</sup> In Powell’s own words,

[i]t has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated -- but no less effective -- means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic

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more information on Justice Powell’s thoughts on race conscious admissions see John Jeffries, JUSTICE LEWIS F. POWELL, JR., 455-501 (1994).

<sup>29</sup> 416 U.S. 312 (1974).

<sup>30</sup> Jeffries, *supra* note 28 at 461.

<sup>31</sup> *Bakke*, 438 U.S. at 316-318.

<sup>32</sup> Jeffries, *supra* note 28 at 484-485.

background is simply one element -- to be weighed fairly against other elements -- in the selection process.<sup>33</sup>

Until the 1990s, general consensus among colleges and universities indicated that Powell's approach was in fact the opinion of the Court and hence race conscious admissions became a national norm.

#### B. Equal Protection Jurisprudence Post-*Bakke*

Throughout the eighties and into the nineties, divisions over the appropriate standard of review remained. In 1980 the Court in *Fullilove v. Klutznick* upheld a congressionally-sponsored program awarding ten-percent of all federal construction projects to minority contractors.<sup>34</sup> While a majority of six members of the Court supported this conclusion, this majority was divided equally as to whether benign race conscious measures should be subjected to strict or intermediate scrutiny.

Within the education context, the Court in *Wygant v. Jackson Board of Education* struck down a collective bargaining agreement that included a race-conscious stipulation to prevent the loss of faculty diversity in the case of a layoff.<sup>35</sup> The stipulation provided that in the event of lay-offs, they would occur on the basis of seniority, except that the percentage of minority teachers laid-off could not exceed the percentage of minority teachers employed at the time of the layoff. In 1986 the Court in five separate opinions, a

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<sup>33</sup> *Bakke*, 438 U.S. at 318.

<sup>34</sup> 448 U.S. 448 (1980).

<sup>35</sup> 476 U.S. 267 (1986).

majority of the Court struck down the provision as violating the equal protection clause. However, there is no singular rationale from the court on this matter.

Germane to the issue of race conscious admissions, Justice O'Connor in *Wygant* acknowledged the confusion generated by the Court's split, but confirmed support for the idea that under appropriate conditions race conscious policies generally, admissions policies in particular, are constitutional. She writes, "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>36</sup>

One year after *Wygant*, in 1987, the Court held true to O'Connor's dicta that race conscious policies were not *per se* illegal. In *U.S. v. Paradise*<sup>37</sup> the Court upheld Alabama Department of Public Safety's race conscious policy aimed towards remediating prior open and pervasive discriminatory conduct by the Department. This is the first case in which a race-based classification survived strict scrutiny since the inception of the strict scrutiny concept in *Korematsu v. United States*.<sup>38</sup>

In 1989, the Court decided the case of *City of Richmond v. J.A. Croson Co.*, in which the City of Richmond, Virginia modeled its minority business program after the one upheld by the Court in *Fullilove*, allowing 30 percent of contracts to be awarded to minority firms.<sup>39</sup> Here, the Court struck down the city's policy requiring prime

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<sup>36</sup> *Id.* at 286.

<sup>37</sup> 480 U.S. 149 (1987).

<sup>38</sup> 323 U.S. 214 (1944). The next time would not be until 2003 when the Court decided *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>39</sup> 488 U.S. 469 (1989).

contractors to subcontract to minority business enterprises, under the stringent standards of strict scrutiny. Justice O'Connor, writing for the majority, asserts that strict scrutiny is the appropriate standard of review for all racial classifications, insidious or benign, as applied to states and localities. She reasons that it is difficult to assess governmental motivations and recites potential perverse effects stemming from ostensibly benign policies.<sup>40</sup> The idea here is that, among other considerations, even when the government has the best of intents, it may be harming the targeted group by perpetuating negative stereotypes.<sup>41</sup> The Court also found that while generally the remediation of the effects of past discrimination was valid, the second prong of strict scrutiny, narrow tailoring, was not satisfied, in part, for evidentiary reasons.

The City of Richmond's proffer of statistics, which confirmed that nationally there were disproportionately fewer minority contractors, failed to provide specific data regarding the state of minority contracting in Richmond.<sup>42</sup> From the Court's view, this seemed to be significant folly on the part of the City of Richmond. Here the Court was looking for evidence documenting discrimination in awards of city contracts and/ or of disparities in awards along racial lines.<sup>43</sup> With respect to the latter, the disparity would need to be evidenced by the compared ratios of contracts awarded to qualified minority

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<sup>40</sup> *Id.* at 493-494.

<sup>41</sup> *Id.*

<sup>42</sup> *See Id.* at 487- 491 (generally distinguishing the Court's decision in *Fullilove* from the facts presented in *Croson* on federalism grounds) and *id.* at 500-503 (specifically focusing on the dearth of evidence germane to the issue of disparities in the award of city contracts to minority firms). The Court seemed particularly concerned about 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.

<sup>43</sup> *Id.* at 500.

firms versus contracts awarded to majority firms.<sup>44</sup> The city's data only compared the number of minority-awarded contracts to the general population and not to the pool of qualified minority contractors. In addition, in terms of the award of minority contracts, the city allowed for any nationally underrepresented firm to apply, rather than those groups historically discriminated against in and around the City of Richmond.<sup>45</sup>

The next year, 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 under the rubric of intermediate scrutiny.<sup>46</sup> Five years later, in *Adarand Constructors, Inc. v. Peña*, the Court reversed.<sup>47</sup> The dispute in *Adarand* involved a federal construction contract, which included incentives for contractors to employ small, disadvantaged minority firms. Here, the Court announced that the appropriate standard for review for all race conscious measures is strict scrutiny.

Writing for the majority once again, O'Connor specifically stated her desire to dispel the characterization of strict scrutiny as strict in theory, but fatal in fact. However, in the one case she cites for this proposition, *Paradise*,<sup>48</sup> she along with Justices Rehnquist and Scalia dissented from the majority's approval of the state's program to remediate open and pervasive discriminatory conduct by the Alabama Department of

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<sup>44</sup> *Id.* at 501-502.

<sup>45</sup> *Id.*

<sup>46</sup> 497 U.S. 547 (1990).

<sup>47</sup> 515 U.S. 200 (1995).

<sup>48</sup> 480 U.S. 149 (1987).

Public Safety. It is not until O'Connor's opinion in *Grutter v. Bollinger*,<sup>49</sup> upholding the Michigan Law School's race conscious admissions policy, that she "makes good" on the *Adarand* assertion, rendering the seemingly fatal impact of strict scrutiny a function of policy construction rather than application of strict scrutiny *per se*.

Majority opinions in both *Adarand* and *Bakke* rely on the strict scrutiny standard of review as a basis for analyzing the constitutionality of race conscious public policies. However, the burden of proof seems to have increased. Whereas in *Bakke*, Justice Powell could in part anchor his diversity rationale William Bowen's editorial to Princeton alumni; by *Croson*, the Court is looking for location and inquiry specific data. In addition, between the deep divisions in the Court at the time of *Bakke* and the seventeen years of uneven, non-linear precedent by the Supreme Court, it became unclear how much of Powell's opinion in *Bakke* was still a valid guide.

General consensus among colleges and universities that *Bakke* remained "good law" was shattered in 1996, when the Fifth Circuit announced in its decision of *Hopwood v. The State of Texas* that racial diversity could never be a sufficient justification for race-conscious admissions. According to that court "diversity in higher education contradicts, rather than furthers, the aims of equal protection" and as such is contrary to the intended purpose of the Fourteenth Amendment.<sup>50</sup> While it was the first circuit to address the issue of race conscious admissions post-*Bakke*, the fifth circuit was hardly the last.

The *Hopwood* decision ushered in a new wave of litigation over race conscious admissions. At the turn of the century, from *Hopwood* to the Michigan cases, admissions

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<sup>49</sup> 539 U.S. 306 (2003).

<sup>50</sup> *Hopwood*, 78 F.3d at 945.

policies at four public universities, the elite high schools of Boston, and transfer policies at several magnet schools were challenged for their explicit use of racial criteria.

Without clear direction from the Supreme Court as to how Justice Powell’s framework for understanding race conscious admissions fit into the broader context of the legality of affirmative action under equal protection, district and circuit courts proceeded to handle the cases before them. 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>51</sup>

The lack of clear Supreme Court guidance, to which Judge Wiener alludes, left district and circuit court judges on their own to parse the precedents before them. A circuit split resulted.

The circuit split emerged in 2002, when the sixth circuit in a 5-4 *en banc* decision upheld the University of Michigan’s law school policy under Justice Powell’s guidelines established in *Bakke*.<sup>52</sup> In this case, *Grutter v. Bollinger*, Barbara Grutter applied to the University of Michigan’s law school in 1996, with fairly strong qualifications: a 3.8 undergraduate grade point average and an LSAT score of 161. Her scores were strong

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<sup>51</sup> 78 F.3d at 964-965.

<sup>52</sup> *Grutter v. Bollinger*, 288 F.3d 732 (6<sup>th</sup> Cir. 2002).

enough to get her on the waitlist, but not enough to gain admittance.<sup>53</sup> In a parallel case, *Gratz v. Bollinger* Jennifer Gratz and Patrick Hamacher applied 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>54</sup> Hamacher's scores also placed him within the range of qualified applicants, "they [were] not at the level needed for first review admission."<sup>55</sup> Both University of Michigan schools contained affirmative action policies that considered race as a factor in admissions decisions. However, the policies took different approaches in making this consideration.

At the law school, the policy blended the use of: an index undergraduate grade point averages (UGPA) and law school admissions test scores (LSAT); consideration of other student characteristics, essays, enthusiasm of recommenders, quality of undergraduate institution, difficulty of undergraduate curriculum, and potential for unique contributions to intellectual and social life in law school.<sup>56</sup> The undergraduate plan in *Gratz*, however, assigned specific point values 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; as

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<sup>53</sup> *Grutter*, 539 U.S. 306, 324.

<sup>54</sup> *Gratz*, 539 U.S. 244, 249.

<sup>55</sup> *Id.*

<sup>56</sup> *Grutter*, 539 U.S. at 324.

well as points for residency, legacy, personal achievement, essay, leadership, and service.<sup>57</sup>

At the district court, Judge Friedman in *Grutter v. Bollinger* found the law school's policy to violate Title VI of the Civil Rights Act of 1964, as he failed to find a compelling state interest in diversity. Furthermore, as race neutral alternatives had not been exhausted, among other matters, Judge Friedman found the law school's policy as failing to meet narrow tailoring standards.<sup>58</sup> On the other hand, Judge Duggan in *Gratz v. Bollinger* generally found the principle of diversity compelling, relying on *Bakke* as precedent and the social science evidence presented at trial, upholding under summary judgment the undergraduate admissions policy in place for 1999 and 2000.<sup>59</sup> Both decisions were appealed to the Sixth Circuit, where a majority reversed Judge Friedman in *Grutter*, upholding the law school's policy.<sup>60</sup> A decision on the undergraduate case, *Gratz v. Bollinger* was not reached, however.<sup>61</sup>

Amid controversy over procedural matters,<sup>62</sup> the Supreme Court granted certiorari to both University of Michigan cases. In 2003 the Supreme Court upheld the

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<sup>57</sup> See *Gratz*, 539 U.S. at 253-257 (detailing the undergraduate admissions policies from 1995 through 2000).

<sup>58</sup> *Grutter*, 137 F.Supp.2d at 872.

<sup>59</sup> *Gratz*, 122 F.Supp.2d at 831. Prior policies, however, were found constitutionally infirm. *Id.* at 831-833, 836.

<sup>60</sup> 288 F.3d at 752.

<sup>61</sup> 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>62</sup> The 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).

constitutionality of narrowly tailored race conscious admissions policies aimed at advancing the educational benefits of diversity.<sup>63</sup> While the Court found the university's interest in advancing the educational benefits of diversity compelling in both cases, in the undergraduate case, *Gratz v. Bollinger*,<sup>64</sup> the Court found that the policy was constitutionally infirm as it routinely applied a set amount of points, 20 out of 150, to racial and ethnic considerations. This infirmity 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, comparable to the quota used by UC-Davis medical school in the *Bakke* case.<sup>65</sup> By comparison, the law school policy at issue in *Grutter v. Bollinger* reviewed a broader array of factors to be considered individually when determining admissions decisions. For that reason, among others, it was considered narrowly tailored and the least restrictive means for attaining a diverse student body.<sup>66</sup>

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<sup>63</sup> *Grutter* 539 U.S. 306 (2003).

<sup>64</sup> 539 U.S. 244 (2003).

<sup>65</sup> *Id.* at 272-274.

<sup>66</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).

### III. Social Science Evidence in Race Conscious Admissions Cases

#### A. The Evidentiary Question in Race Conscious Admissions Cases

The divergent approaches district and circuit court judges took in analyzing the constitutional validity of race conscious admissions policies provide a set of seventeen cases wherein one can explore the degree to which social science evidence is influential in the outcomes of these cases. Four of these cases arise in the higher education context.<sup>67</sup> The other thirteen are from K-12 voluntary desegregation cases. Given the small number of higher education cases, the addition of K-12 cases helps to fill out the analysis. Furthermore, the general constitutional inquiry is parallel: whether or not diversity is a compelling governmental interest sufficient to justify race conscious integration plans.

For purposes of this inquiry, the seventeen cases are subdivided to present the opinions of 47 district and circuit court judges. Seven judges are excluded from the numerical counts presented in the table below, as they are decided on state law grounds.<sup>68</sup>

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<sup>67</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 the context of *Podberesky* differs from other race conscious admissions cases in the field of education. In particular, *Podberesky* arises in the context of financial aid, specifically race-specific scholarships. While an offer of admissions and a financial aid award are tied to a students' ability to enroll in a particular institution, the institutional decision to permit entry to the university and give financial aid are distinct. The presence or absence of 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 the context of financial aid and admissions are tied, such that the financial aid consideration is part of the admissions decision from the perspective of an applicant.

<sup>68</sup> Cases arising in the State of Washington were ultimately disposed of under Initiative 200 (I-200), also known as the Washington State Civil Rights Initiative. Implemented November 3, 1998, I-200

The decisions excluded include Ninth Circuit’s opinions in *Smith v. University of Washington*<sup>69</sup> and *Parents Involved in Community Schools v. School Dist. No. 1*<sup>70</sup> and the district court opinion in *Smith*.<sup>71</sup> Also note that only one opinion per judge is included so as not to over-represent a particular judge’s approach to the cases. For that reason Judge Gertner’s opinion in *Boston’s Children First v. City of Boston*,<sup>72</sup> Judge Bryan’s opinion in *Tito v. Arlington County School Board*<sup>73</sup> and Judge Edenfield’s opinions in *Tracy v. Board of Regents*<sup>74</sup> and *Wooden v. Board of Regents*,<sup>75</sup> both involving admissions at the University of Georgia, are also excluded from the total count. These cases are, however, noted in the analysis below. The total number of judges included in the count is 40.

Overall, nearly two-thirds of all judges hearing race conscious admissions cases between *Bakke* and *Grutter* ruled in favor of plaintiff students, 25 out of 40. Yet the odds of a judge ruling in favor of defendants improved relative to plaintiffs to about 50-50 when social science evidence was presented at trial. This happens as the odds of

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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). This initiative is modeled after California’s Proposition 209.

<sup>69</sup> 233 F.3d 1188 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

<sup>70</sup> 285 F.3d 1236 (9<sup>th</sup> Cir. 2002).

<sup>71</sup> 2 F.Supp. 2d 1324 (WA 1998).

<sup>72</sup> 62 F.Supp. 2d 247 (MA 1999).

<sup>73</sup> 1997 U.S. Dist. LEXIS 7932 (VA 1997) (unpublished opinion).

<sup>74</sup> 59 F.Supp. 2d 1314 (GA 1999).

<sup>75</sup> 32 F.Supp. 2d 1370 (GA 1999).

Table 1 - Judicial Rulings for Plaintiffs and Defendants by the Presence or Absence of Social Science Evidence at Trial

	<i>Plaintiff Wins</i>	<i>Defendant Wins</i>	<i>Total</i>
Social Science Evidence	8	9	17
No Social Science Evidence	17	6	23
<b>Total</b>	25	15	40

of plaintiffs wins decreased from just over two-thirds (17 of 25) to one-third (8 of 25) when social science evidence was introduced and the odds of defendant wins increased by one-third.

Looking at the numbers from a legal analysis perspective, by definition, there are only plaintiff wins when judges find a compelling governmental interest in diversity. Thus the fifteen plaintiff wins represent the fifteen opinions in which these judges state that diversity is a compelling governmental interest. On the other hand, only four judges find that as a matter of law, diversity is not compelling.<sup>76</sup>

In the majority of opinions, a total of 21 judges express uncertainty as to whether diversity is compelling. Generally, these courts raise two concerns: the first concern is evidentiary; the second is legal. Identifying the legal question is rather straightforward.

The legal question regards the status of Justice Powell’s opinion as good law and whether courts should rely on that opinion. For example, assuming Powell’s opinion was good law, the Fourth and Eleventh Circuits specifically withheld judgment on whether

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<sup>76</sup> These judges include 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.”).

the institutions proved that in their specific context diversity was compelling. These courts then decided the cases of *Johnson v. Board of Regents of the University of Georgia*,<sup>77</sup> *Tuttle v. Arlington County School Board*,<sup>78</sup> and *Eisenberg v. Montgomery County Public Schools*<sup>79</sup> on narrow tailoring grounds.<sup>80</sup>

The evidentiary question, however, is more intricate. The compelling interest the Supreme Court found in the educational benefits of diversity is a question of law, supported by social facts. While the Supreme Court has not given a bright-line rule signaling the distinction, the general guideline is that empirical inquiries, revolving around a specific set of events is an inquiry of fact. For these cases, the trial court as finder of fact is best suited to assess facts presented at trial. The overturning of such an assessment is only by an appellate court's finding of clear error.<sup>81</sup> However, questions in which an issue or policy centers "on the values society wishes to promote" along with questions requiring rote application of law are questions of law.<sup>82</sup> Legal questions may

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<sup>77</sup> 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).

<sup>78</sup> 195 F.3d 698 (4<sup>th</sup> Cir. 1999).

<sup>79</sup> 197 F.3d 123 (4<sup>th</sup> Cir. 1999).

<sup>80</sup> Treatment of the narrow tailoring inquiry during this time between Bakke and Grutter is of independent import and is explored in Crystal Gafford Muhammad, *Form or Substance: Does policy structure or rationale influence the constitutionality of race-conscious admissions policies?*, a paper presented at the American Education Researcher Association's Annual Conference (April 2003).

<sup>81</sup> See, Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE UNIVERSITY LAW REVIEW 11(1994).

<sup>82</sup> *Id.* at 22.

be mixed with factual inquiries, the mixture of which, for the purpose of maintaining a consistent system of laws, can be subjected to *de novo* review at the appellate level.<sup>83</sup>

For example, in the case of *Stell v. Savannah-Chatham County Board of Education* the district court held that the Supreme Court wrongly assessed the facts in *Brown v. Board of Education*, and on the basis of the facts before the district court declared, “education is best given in separate schools.”<sup>84</sup> As properly assessed by the Fifth Circuit in *Stell*, the Supreme Court in *Brown* issued a statement of law announcing the inherent inequality of segregation. That law, however, was merely informed by the social science evidence presented.

As in the case of desegregation, the policy implications for the Court’s decisions in *Gratz* and *Grutter* are broad, impacting accessibility to elite educational institutions and the propensity for the upward socioeconomic mobility of all Americans. Thus, when Justice Powell stated that diversity serves a compelling purpose, it was a statement of law, referencing William Bowen’s Princeton alumni editorial. That editorial discussed, without specific data analysis, the benefits of a diverse class.<sup>85</sup>

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<sup>83</sup> See Adam Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Court*, 50 DUKE LAW JOURNAL 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>84</sup> 220 F. Supp. 667 (1963).

<sup>84</sup> *Stell v. Savannah-Chatham County Board of Education*, 333 F. 2d 55, 61 (5<sup>th</sup> Cir. 1964). Note that the State of Georgia is now part of the Eleventh Circuit.

<sup>85</sup> *Bakke*, 438 U.S. at 314. According to legal scholar and Dean of the University of Virginia School of Law, John Jeffries, a few years prior to the decision in *Bakke*, Justice Powell was recounted as being “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). On the other hand, Powell found the policy within the institution’s purview. John Jeffries, JUSTICE LEWIS F. POWELL, JR., 461 (1994).

In *Bakke*, briefs by amici, friends of the court, may have also played a role. On the one hand, support for affirmative action in admissions was provided by the American Bar Association, the American Civil Liberties Union, the National Association for the Advancement of Colored People, the Association of

However, in interpreting *Bakke* and subsequent equal protection cases, district and circuit courts treated the matter as a question of fact, an evidentiary issue. For example, the district court in *Johnson v. Board of Regents of the University of Georgia* held that diversity was not a compelling interest.<sup>86</sup> In contrast to Justice Powell in *Bakke*, the district court was not convinced by testimony of former University of Georgia President Charles Knapp.<sup>87</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.” The district court described Knapp’s testimony as “speculation and syllogism.”<sup>88</sup> The Eleventh Circuit also found the University of Georgia’s defense lacking sufficient evidence, including a lack of statistical support for the proposition that white candidates are not harmed at the middle tier of admissions review, the tier in which the racial benefit was applied. The Court also cited the lack of documented consideration of race-neutral alternatives.<sup>89</sup>

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American Law Schools, as well as 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 history of the use of quotas to restrain Jewish American enrollments at elite institutions. The government weighed in as well with the second African American Solicitor General Wade McCree, the first being Thurgood Marshall, presenting a brief, written by conservative jurist then attorney Frank Easterbrook, which condemned the sixteen-seat set aside as per se unconstitutional. Other parts of the Solicitor General’s brief reflected the office infighting and were generally dismissed by Justice Powell. For more information on Justice Powell’s thoughts on race conscious admissions see John Jeffries, JUSTICE LEWIS F. POWELL, JR., 455-501 (1994).

<sup>86</sup> *Johnson*, 106 F.Supp. 2d 1362, 1375 (GA 2000), *aff’d*, 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).

<sup>87</sup> *Id.* at 1371-1372.

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

<sup>89</sup> *Johnson*, 263 F.3d at 1258-1259.

Similarly, the district court judges in *McLaughlin v. Boston School Committee*,<sup>90</sup> *Equal Open Enrollment Association v. Board of Education*,<sup>91</sup> *Wessmann v. Gittens*,<sup>92</sup> *Brewer v. West Irondequoit Central School District*,<sup>93</sup> *Boston's Children First v. City of Boston*,<sup>94</sup> *Comfort v. Lynn School Committee*,<sup>95</sup> and the other University of Georgia cases, *Wooden*<sup>96</sup> and *Tracy v. Board of Regents of the University of Georgia*,<sup>97</sup> found the evidence presented insufficient to make a compelling case for diversity. In four of these cases, *McLaughlin*, *Equal Open Enrollment Association*, *Boston's Children First*, and *Comfort*, the evidentiary question arose during preliminary hearings. As such, those judges rendered opinions on the basis of a truncated record, without the benefit of full discovery. In the cases of *Smith v. University of Washington*<sup>98</sup> and *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>99</sup> the Ninth Circuit suggested that if presented with appropriately supportive evidence, and in the absence of state law banning race conscious policies, that diversity may be found to be a compelling interest.<sup>100</sup>

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<sup>90</sup> 938 F.Supp. 1001 (MA 1996).

<sup>91</sup> 937 F. Supp. 700 (OH 1996).

<sup>92</sup> 996 F. Supp. 120 (MA 1998), *aff'd*, 160 F.3d 790 (1<sup>st</sup> Cir.1998).

<sup>93</sup> 32 F.Supp. 2d 619 (NY 1999).

<sup>94</sup> 62 F.Supp. 2d 247 (MA 1999).

<sup>95</sup> 100 F.Supp. 2d 57 (MA 2000).

<sup>96</sup> 32 F.Supp. 2d 1370 (GA 1999).

<sup>97</sup> 59 F.Supp. 2d 1314 (GA 1999).

<sup>98</sup> 233 F.3d 1188 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

<sup>99</sup> 285 F.3d 1236 (9<sup>th</sup> Cir. 2002).

<sup>100</sup> Initiative 200 (I-200) foreclosed the use of race conscious policies in the regular course of education in the State of 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*:

Yet, offering social science evidence did not guarantee a defendant win. Hence, even with the benefit of expert testimony and a full record, the Boston Public School District did not prevail in the *Wessmann* case.<sup>101</sup> In addition to *Wessmann*, defendants in *Gratz* and *Grutter v. Bollinger*, *McLaughlin*, *Parents* and *Comfort* offered scientifically informed testimony to support respectively the policy goals of diversity, the remediation of racial isolation, and *de facto* segregation.<sup>102</sup> While the evidentiary issue was not dispositive in all of these cases, within this set, only two, *Grutter* and *Comfort*, ultimately permitted the continued use of the race conscious admissions policy in effect at the time of litigation. At the level of individual judicial ruling, as listed in the table above, nine of seventeen did rule in favor of defendants when social science evidence was offered. On the surface, it seems as if the fairly daunting odds of winning race conscious admissions suit are improved when social science evidence is employed. The next section further explores the role played by social science evidence in race conscious admissions decisions.

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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." *Rucker v. Davis*, 203 F.3d 627, 639 (9th Cir. 2000), rev'd en banc, 237 F.3d 1113 (9th Cir. 2001), rev'd sub nom. *Dep't of Hous. and Urban Dev. v. Rucker*, 122 S. Ct. 1230, 2002 U.S. LEXIS 2144, 2002 WL 451887 (U.S. Mar. 26, 2001). 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.. *Id.* at 1252-1253.

<sup>101</sup> 160 F.3d at 808-809. ("While we appreciate the difficulty of the School Committee's task and admire the values that it seeks to nourish noble ends cannot justify the deployment of constitutionally impermissible means.").

<sup>102</sup> An expert witness was employed in *Equal Open Enrollment Association* (1996), however, the evidence presented constituted alternatives to the race-conscious policy.

## B. The Role of Social Science Evidence in District and Circuit Court Judges Decisions

Empirical evidence on the benefits of diversity is a product of social science research on the effects of peers on student achievement and other educational, social, and economic outcomes. While a relatively novel and growing body of literature, the gross majority of works support the proposition that diversity is an important component of broader educational strategies to provide optimal environments for teaching and learning. In addition, when diversity is nurtured, a diverse student environment fosters qualities within students, prompting them to reach out to others in society.<sup>103</sup>

At the cursory glance presented in Table 1, there seems to be some relationship between defendant wins and the presence of social science evidence at trial. The reverse seems also true: there are more plaintiff wins when social science is not offered. This result follows from the manner in which race conscious admissions cases are built. While plaintiffs bring the suit, defendant educational institutions use social science evidence as an affirmative defense as to why they specifically consider race when composing student bodies.<sup>104</sup> Thus, the employment of social science evidence may proxy the enthusiasm with which the defense makes its case. For example, 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

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<sup>103</sup> For a review of the literature on the benefits of diversity, see Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION (Mitchell Chang et al. eds., 2003).

<sup>104</sup> During my dissertation research, I had the opportunity to meet with Michael E. Rosman, attorney for the Center for Individual Rights (CIR), a conservative civil rights law firm which has played a major role in these law suits on the side of plaintiffs. Rosman informed that rather than any concerted effort on the part of the CIR to gather a team of experts for plaintiffs in race conscious admissions trials, the

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 evidence in those trials.

It is difficult to disentangle whether the increase in defendant (educational institution) wins when social science evidence is introduced is attributable to the motivation of defendants or an “effect” of the data. In either event, it does not seem to be the case that defendants are significantly more likely to win when social science evidence is presented. What the addition of social science evidence seems to signal is a “fighting chance,” an opportunity for defendant institutions to put forth a case in which a reasonable judge could vote in favor.

Judges are not equally receptive to social science evidence, generally, and this receptivity varies across issues. With regards to the present inquiry, there is least one judge whose opinion suggests that social science evidence in the context of race conscious admissions is irrelevant. Judge Bryan in *Tuttle* declined to permit Arlington County 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>105</sup> Other courts, such as the district court and Eleventh Circuit in *Johnson*, found the evidence before the court lacking.

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CIR treats cases individually and makes decisions with respect to the employment of experts for trial on a case-by-case basis.

Of the four cases asserting that diversity is not a compelling interest, social science evidence is presented in only one. In that sole case, Judge Friedman waded through data presented by both the plaintiffs and defendants in *Grutter* and focused on the statistical disparities in enrollment between whites and under-represented groups. Specifically, the court found that the Michigan Law School places too heavy an emphasis on race as an admissions factor.<sup>106</sup> Using admissions statistics for the 1995-1996 school year as an illustration, the court contended that the law school's attempt to compose a class that is racially representative of the applicant pool, violated its primary admission's goal of admitting student with the highest undergraduate grade point averages (GPA) and LSAT exam scores given the significant gap between minority and non-minority scores.<sup>107</sup> According to this line of reasoning, enrollment for minority groups should have been significantly less than their proportion in the applicant pool.<sup>108</sup>

Highlighting the disparities in admissions probabilities, 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 the relative odds of admission were tens to hundreds of times greater if one was not Caucasian. Based on this evidence the court concluded that “[o]ne does not need to undergo sophisticated statistical analysis in order to see,” quoting Dr. Larntz,

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<sup>105</sup> 1998 U.S. Dist. LEXIS\_ at \*12. Judge Bryan was also a bit perturbed that after he directly ordered the district, in *Tito*, to stop using race as a factor in admissions, Arlington Traditional School instituted a new policy, using race as a weight in selecting its student body by lottery.

<sup>106</sup> *Grutter* 137 F. Supp. 2d at 840.

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

<sup>108</sup> *Id.* at 182

“membership in certain groups is an extremely strong factor in the decision for acceptance”.<sup>109</sup>

Dr. Stephen Raudenbush, Professor of Education at the University of Michigan and qualified by the court as an expert in statistics, found Dr. Larntz’s analysis 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. In fact, such “soft factors” may be determinant. Dr. Larntz also excluded from his analysis episodes in which all students were rejected or all accepted, introducing bias at the high and low ends of the GPA-LSAT distribution. In addition, as odds ratios varied across the GPA-LSAT distribution, the summation of the distribution used was not informative.<sup>110</sup>

The court rejected Raudenbush’s critique, finding that the grid itself revealed such disparities in the odds of admission and that a statistician was not necessary for its interpretation.<sup>111</sup> Furthermore, the court specifically adopted the cell-by-cell analysis of Dr. Larntz’s, which suggests that the race factor is accorded a heavy weight in the admissions process.<sup>112</sup>

The Sixth Circuit assessed the social science data presented in *Grutter* differently. According to the court, the statistical evidence of GPA and LSAT disparities between majority and underrepresented minority groups do not present a double standard, as

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<sup>109</sup> *Id.* at 841.

<sup>110</sup> *Id.* at 841-842.

<sup>111</sup> *Id.* at 842.

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

suggested by the district court, but are the effect of the Harvard-style “racial plus”.<sup>113</sup> This “racial plus” factor was not defined by Justice Powell, nor did Harvard append a list comparing minority and non-minority SAT and GPA scores. Thus, without further guidance on what is or is not permissible, the majority holds that “tip[ping] the balance”, holding SAT and GPA scores constant then making a coin toss in favor of race, is permissible.<sup>114</sup>

In addition, the concurrence by Judge Clay, joined by Judges Daughtry, Moore, Cole, highlights an article in the *Washington Post* written by Goodwin Liu, a Washington attorney and former Supreme Court law clerk, who firmly states that affirmative action does not give spaces to minority students at the expense of whites.<sup>115</sup> 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.<sup>116</sup>

Evidence presented by former Harvard President, Derek Bok suggests that there has been little change in this phenomenon since the days of *Bakke*. Judge Clay citing Bok and William Bowen’s book, *The Shape of the River* notes that within the Bowen and Bok dataset, eliminating the “racial plus” increases the likelihood of admissions of whites

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<sup>113</sup> *Grutter* 288 F.3d at 746

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 766-768.

<sup>116</sup> *Id.* According to the Liu article, 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 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 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 381 (1998).

from 25 to 26.5 percent.<sup>117</sup> At the undergraduate level, 60 percent of blacks scoring 1200-1249 on SAT are admitted as compared to 19 percent of whites. Ceasin affirmative action would increase the admissions rate of whites marginally, from 19 to 21 percent. Thus, the issue is not racial preferences to blacks, but the number of applicants in the pool competing for limited number of places.<sup>118</sup>

With respect to the compelling aspects of diversity, Judge Clay quotes extensively data on the benefits of a diverse student body presented by Patricia Y. Gurin, Professor of Psychology at the University of Michigan and Interim Dean of the College of Literature, Science and the Arts, and concludes that the evidence supports diversity as a compelling interest. This data seemingly was ignored by the district court in *Grutter*. Summing up his opinion, Clay states

the legal scholarship has indicated that a diverse student body serves to promote our nation's deep commitment to educational equality, provides significant benefits to all students – minorities and non-minorities alike, and does so using a system which is not foreign to the admissions process, but which allows for the benefit of all and not just some. Thus, although the majority does base its holding that diversity is a compelling governmental interest on Justice Powell's opinion in *Bakke*, it is clear that contrary to the dissent's criticism, this holding is not without foundation even when standing alone. On the other hand, the dissent's conclusion that diversity cannot serve as a compelling state interest for purposes of surviving constitutional muster under the Equal Protection Clause, is supported by neither legal scholarship nor empirical evidence.<sup>119</sup>

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<sup>117</sup> *Id.* See generally, Derek Bowen and William Bok, *THE SHAPE OF THE RIVER*, 1998.

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

<sup>119</sup> *Id.* at 763-764.

The district court in *Gratz*, which ruled in favor of the undergraduate policy, also cited Gurin's work extensively. Dr. Gurin testified 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>120</sup> Her analysis concludes that "students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."<sup>121</sup>

Exploring the role of expert testimony in judicial opinions in the Michigan cases highlights the degree to which judges differ in their receptivity to social science evidence and differences in gravitation towards experts for plaintiff students and defendant educational institutions. In these cases, more than ten experts plus *amici* submitted evidence,<sup>122</sup> with varying quantities and quality of social scientific data, in the *Gratz* and *Grutter* cases. By and large, defense witnesses outmatched plaintiffs' in the quantity of experts testifying, their credentials, and their breadth of current scholarship. Thus on the larger of issue of whether racial diversity and its benefits could be considered a compelling governmental interest, the defense in the Michigan cases won.<sup>123</sup> They won

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<sup>120</sup> *Gratz*, 122 F.Supp. 2d at 822.

<sup>121</sup> *Grutter* 288 F.3d at 761. Gurin's work, as well as the testimony of other defense experts in the Michigan cases can be found <http://www.umich.edu/~urel/admissions/legal/>.

<sup>122</sup> For more on the role of *amici* in the *Gratz* and *Grutter* cases, see Jonathan Alger and Marvin Krislov, You've Got to Have Friends: Lessons Learned from the Role of *Amici* in the University of Michigan Cases, 30 J.C.U.L. 503 (2004).

<sup>123</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) ("For the reasons set forth in *Grutter v. Bollinger*, [citations omitted], the Court has today rejected petitioners' argument that diversity cannot constitute a compelling state interest. However, the Court finds that the University's current policy, which automatically distributes 20 points, or one-fifth of the points

in part because Justice O'Connor was willing to defer to their educational expertise as supported by data.<sup>124</sup>

The use of experts is less extensive in the K-12 cases and plaintiff and defendant scholarship is more evenly matched. As such, it is somewhat easier in this context to disengage the effect of motivation in bringing together a team of scholars from the effect of the persuasive power of the social science evidence presented.

In *Parents*, data presented by the district included a statistical representation of racial isolation and *de facto* segregation in Seattle's schools. With the high school choice policy only one of the high schools, Garfield, was in racial balance.<sup>125</sup> Without the policy, the incoming ninth grade classes at the most popular schools were estimated to be 79.2 percent non-white at Franklin, 30.5 percent non-white at Hale, 33 percent at Ballard, 41.1 percent at Roosevelt. In a region where racial and ethnic minorities are in the majority, 60 percent, minority students would compose only one-third to 40 percent of four of the five preferred high schools. Under the policy, composition of those classes shifted from a range of 40.6 percent to nearly 60 percent.<sup>126</sup>

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needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve educational diversity.”).

<sup>124</sup> 539 U.S. at 328 (“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*.”) (Opinion O'Connor, J.). For further discussion of Justice O'Connor's deference in *Grutter* see Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004). Cf., 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).

<sup>125</sup> *Parents*, 137 F.Supp. 2d at 1226. Here racial balance meant representative of the general Seattle public school system plus or minus 15 percent deviation.

<sup>126</sup> *Id.*

In addition, the district hired Dr. William Trent, Professor of Educational Policy Studies at the University of Illinois at Urbana-Champaign, to testify. Trent presented four rationales for pursuing the diversity goal, each grounded in data. First, he contended that diversity provides opportunity and experience. To support his claim, he relied on desegregation research suggesting that educational experiences lead to more networking in higher education and employment, which is especially beneficial to minority students who are isolated from legacy networks.<sup>127</sup> Second, he offered that diversity improves the achievement of minority students through access to better teachers and advanced curriculum. Both minority and non-minority improve critical thinking skills through cross-cultural dialogue.<sup>128</sup> Third, Trent asserted that diversity imbues civic values, improves race relations, decreases prejudicial attitudes, provides a more democratic, inclusive experience for all students, and ultimately works to break down racial and cultural classifications.<sup>129</sup> Finally, diversity in school works towards societal desegregation as employment opportunities improve and minorities, in turn, seek suburban housing.<sup>130</sup>

The plaintiffs called Dr. David Armor, Professor of Public Policy at George Mason University, to critique Dr. Trent's analysis. 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

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<sup>127</sup> *Id.* at 1236.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

understanding about the cultural and social differences among the various racial and ethnic groups.”<sup>131</sup> As such, the district court found Dr. Armor’s testimony unsuccessful in casting doubt on Dr. Trent’s presentation.<sup>132</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.<sup>133</sup>

Dr. Trent also testified in the *Wessmann* case.<sup>134</sup> Here, Trent’s analysis focused on the lingering effects of past discrimination.<sup>135</sup> Trent presented the results of racial climate surveys distributed to teachers, students, and parents in Kansas which found that higher teacher expectations correlate with higher student achievement. On the other hand, low teacher expectations correlate with prior discrimination and lower student achievement.<sup>136</sup> Finding that the Boston School System was previously declared unitary and that the lingering vestiges of past discrimination were insignificant, the First Circuit

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<sup>130</sup> *Id.* Charles V. Willie, Professor Emeritus of Education at the Harvard Graduate School of Education, presented testimony to the same effect in the *McLaughlin* case. See *McLaughlin*, 938 F.Supp. 1001, 1014.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Referencing Initiative 200. See *supra* note 50.

<sup>134</sup> *Wessmann*, 996 F. Supp. 120 (MA 1998), *rev’d*, 160 F.3d 790 (1<sup>st</sup> Cir.1998).

<sup>135</sup> *Id.* at 804. Note, according to 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 (1st Cir. 1976), 35 percent of seats in the Boston Examination Schools were set aside for black and Hispanic students. The First Circuit lifted the decree in 1987. See *Morgan v. Nucci*, 831 F.2d 313, 326 (1st Cir. 1987). Two years thereafter, the Boston School Committee elected to continue the 35 percent quota for black and Hispanic students. That policy was the subject of the *McLaughlin* decision included in this analysis. *McLaughlin v. Boston School Committee*, 938 F.Supp. 1001 (MA 1996). The plaintiff, McLaughlin, was ultimately enrolled in Boston Latin School, rendering the case moot. The School Committee, under the advisement of the district court in *McLaughlin*, revised the policy so as to be narrowly tailored. Narrow tailoring is discussed in the section below. The new policy gave rise to the *Wessmann* case where the First Circuit majority found insufficient evidence to support the diversity claim, despite expert testimony.

<sup>136</sup> *Id.*

was not persuaded by Dr. Trent's testimony. The First Circuit found this evidence inapplicable, as it did not directly address the question of diversity. 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 of prior discrimination in Kansas did not support the diversity rationale advanced by defendants.<sup>137</sup>

The court also critiqued the data collected by Trent as well as the testimony of an additional expert, finding the testimony of each wanting in methodological quality and connection to the diversity justification.<sup>138</sup> The primary fault the court found with Dr. Trent's testimony was that a formal evaluation of the Boston school system had not been conducted, and that the Boston-specific evidence proffered was based upon less than systematic observances and interviews.<sup>139</sup> Similarly, the Court found evidence given by then Deputy Superintendent Janice Jackson, testifying in an expert rather than administrative capacity, regarding the association between teacher expectations and student outcomes wanting for lack of scientific rigor. Extrapolating from Trent's research on Kansas and applying it to the Boston Public Schools, Jackson employed a technique called Teacher Expectations and Student Achievement (TEASA), and found through observation that teacher expectations of minority students were generally low.<sup>140</sup> However, Jackson's methodology was poorly described and she failed to document critical aspects of her observations, such as the number of schools, classrooms, and

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<sup>137</sup> *Id.* at 804-805.

<sup>138</sup> *Id.* at 805-806.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 806.

people observed. As such the Court was concerned, appropriately, about the scientific validity and reliability of Jackson's work.<sup>141</sup>

The court also heard what it deemed anecdotal testimony from school district administrators. The First Circuit then held that on the basis of the record before the court, the case for continued efforts to enroll more students of color in Boston's prestigious examination schools was not compelling.<sup>142</sup> Note that the Court's opinion was not unanimous. Judge Lipez, in dissent, found Dr. Trent's testimony both relevant and compelling in light of the city of Boston's history of racial discord.<sup>143</sup>

In *Comfort*, Dr. Gary Orfield of the Harvard Civil Rights Project submitted an affidavit stating that racially mixed education is essential to prepare students to live in a pluralistic society.<sup>144</sup> In addition, using a comparison of Lynn, Massachusetts School District demographic data to other studies conducted by Orfield, there is evidence that dismantling the transfer policy's racial component would detrimentally affect the academic performance of minority students.<sup>145</sup>

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<sup>141</sup> *Id.* at 808-807. Based on the Court's description, Ms. Jackson misemployed qualitative research techniques, which, by definition, do not employ numbers as a means of inquiry. 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. For more 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>142</sup> *Id.* at 807.

<sup>143</sup> *Id.* at 820-829.

<sup>144</sup> *Comfort*, 100 F.Supp. 2d 57, 66.

<sup>145</sup> *Id.*

Here, Judge Gertner was able to distinguish the case in *Comfort* from *Wessmann* where the First Circuit held that the diversity inquiry was fact-bound, and given the facts before it, could not rule that diversity was a compelling interest.<sup>146</sup> No social science evidence was proffered on the issue of diversity in the *Wessmann* case, although experts, including Dr. William Trent, testified to the lingering effects of segregation. Judge Gertner found that Professor Orfield's testimony was directly relevant as the data was both specific to Lynn, Massachusetts and was able to link student diversity to educational benefits, in particular student achievement.<sup>147</sup> Given Orfield's testimony, a preliminary injunction was averted as plaintiffs could not meet their burden in proving their likelihood of success on the merits.<sup>148</sup>

In sum, in the period between *Bakke* and the Michigan cases, more plaintiffs won race conscious admissions cases. While there are too few cases from which a general pattern can be ascertained, defendant educational institutions persuaded more judges to rule in their favor when social science evidence was presented. When social science research is added, the rate of defendant victories improves to 50-50. As such, the addition of social science research allows defendants a "fighting chance," lending support for the continued use of experts at these trials.

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<sup>146</sup> See *Id.* at 67-68.

<sup>147</sup> *Id.* at 68. The district court hearing in *Comfort* was a preliminary matter, which was ultimately dismissed on standing grounds. See *Comfort*, 131 F.Supp. 2d 253 (MA 2001), 150 F.Supp. 2d 285 (MA 2001).

<sup>148</sup> *Id.* 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 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.

#### IV. Conclusion: Data-Supported Deference in *Grutter* and Beyond

Author of the majority opinions in *Croson* and *Adarand*, Justice O'Connor provided the swing vote in the Court's 5-4 decision in *Grutter* upholding the Michigan law school's race conscious admissions policy. Since her appointment by President Reagan in 1981, O'Connor consistently has maintained a conservative stance in the government contracts and employment contexts, voting against each of the race conscious policies brought before the Court. Yet, in the education context O'Connor hinted support for race conscious policies, as is heard in her *Wygant* concurrence. Even in *Adarand* she holds out that strict scrutiny need not be fatal in fact. But as Justice Ginsberg's *Adarand* dissent highlights, O'Connor's actions suggested otherwise, as during O'Connor's tenure on the Court, she supported no race conscious policy, including the one upheld in *Paradise*. That was true until *Grutter v. Bollinger*.

Overall, O'Connor's stance on diversity as a compelling governmental interest was opaque until her announcement in *Grutter*. During the oral arguments of these cases, none of O'Connor's questions regarded the educational benefits of diversity. While reconciling the sociological concept of critical mass within the context of women in law school with the critical mass of African American students on campus, O'Connor's inquiry focused mainly on the narrow tailoring inquiry.

In O'Connor's majority decision in *Grutter*, she specifically endorsed 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.<sup>149</sup> So here, social science did play a role. It permitted Justice O'Connor the opportunity to see the degree to which the University of Michigan thought through its admissions policy and Michigan's willingness to support its educational judgment. Therefore, it seems that this research was just the evidence needed to allow this swing-voting judge to preserve the race-conscious admissions option for educational institutions seeking diverse student bodies.

In conclusion, while the overall legal developments in the area of race conscious admissions suggest that plaintiffs are more likely to win these suits, where most defense victories have been made, social science evidence was presented. In effect, social science research seems to give college/ university defendants a fighting chance. Towards that end, counsel should, as feasible, include social science research as part of their defense, because one never knows when it may have sway. That said, I do not think it is efficient in subsequent suits to employ the number of social scientists used in the Michigan cases. Data is but one means of persuasion, which alone does not assure victory.

Should institutions use the leeway provided by *Grutter* to continue race conscious policies, specific social science indicators of the relationship between diversity and educational outcomes as they relate to your campus, your educational purpose and mission, should be employed. In that manner the data folly of The City of Richmond in *Croson*, the utilization of national data to reflect a local condition will be avoided. How

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<sup>149</sup> See *Grutter* 539 U.S. at 332 (“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*.”) Opinion O'Connor, J.

do you develop that data? Look at your campus and other campuses in your region. The researcher you need may be right under your nose.