Data Matters:
Making a Compelling Case for
Diversity in Education

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ABSTRACT

The purpose of this study is to assess the relative influence of social science research regarding the educational benefits of diversity on judicial rulings in competitive admissions court cases. My research question is whether social science evidence influences the determination of the constitutional appropriateness of affirmative action as a means to achieve diversity in educational institutions. To analyze this question, I employ a behavioral model of adjudication to assess the relative impact of social science research in competitive admissions decisions. The dataset contains 28 district and circuit court decisions: 12 higher education and 16 elementary and secondary education. The court decisions are adjudicated by 38 judges. Results show that the impact of social science research in this context is limited, considering the degree of political contention. As such, judicial political philosophy is a greater predictor of competitive admissions case outcomes than the presence, quantity, or quality of social science research presented. Nevertheless, the employment of social science in litigation remains of import, as it provides judges on the margin of the political divide an anchor of objectivity for pro-affirmative action decisions.
I. Introduction

One university. Two trials. Two different outcomes. Such is the case of the University of Michigan and the divergent district court opinions regarding the inclusion of race as a factor in undergraduate and law school admissions. In the case of *Gratz v. Bollinger* (2000), the court ruled in favor of affirmative action policies at the undergraduate level; however, in *Grutter v. Bollinger* (2001), the affirmative action policy at the law school was struck down. The legal battle over affirmative action in the Michigan cases largely boils down to a single question: the structure of the policy notwithstanding, is diversity in collegiate class composition 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* (1996) and *Smith v. Washington* (2000), the Supreme Court heard the Michigan cases in what may be the most significant civil rights decisions by the Rhenquist Court. In these cases, the Court formally endorses race-conscious admissions, fully embracing the diversity rationale as proffered by Justice Powell in *Bakke* (1978) and followed by educational institutions for the last twenty-five years.

The present inquiry focuses on the question of whether the introduction of social science evidence affects the judicial assessment of the benefits of diversity. Does social science evidence affect the constitutional appropriateness of affirmative action as a means to achieve these goals? Given the political salience (Spaeth and Segal, 1999) and lack of clarity in the law of affirmative action (Carp and Stidham, 2001), in addition to the relative novelty of social science on the costs and benefits of diversity (Carp and Stidham, 2001), it is my hypothesis that social science evidence has little effect on the outcomes of competitive admissions cases. More succinctly, the relationship between social science evidence and the outcomes of cases will not be significantly different from zero.
In the case of competitive admissions, there is a public perception that European American (white) and Asian applicants are passed over for admissions, to the immediate benefit of African American (blacks) and Latino/a students, who would otherwise be relegated to lower levels of the higher education pyramid. The normative issue is how does society weigh the equal protection interests of the individual students passed over for admissions against the economic and social interest in a pluralistic, educated workforce, as well as the academic freedom of universities to compose classes that foster cross-cultural academic exchange. Given the politically charged nature of these tradeoffs, it may be the case that political philosophy and other judicial predispositions are a greater predictor of the outcomes of competitive admissions cases than the quantity or quality of social science evidence presented.

However, such a state of the world is rather problematic. If judicial decision-making is purely subjective and the use of social science trials is purposeless, then the employment of social science evidence in trials is irrational. This, then, raises questions of why the expenditure on expert witnesses and why some judges suggest that data, when absent, is critical to their decisions? The revealed preference of litigants and attorneys to utilize research and of judges to request data suggests there is some value to social science research in politically controversial trials. I posit that both attorneys and judges are more comfortable anchoring normative arguments for affirmative action in data, giving credence to the ultimate decision. In addition, for judges who are undecided as to case outcomes, social science research may be informative.

Part II of this paper begins with a discussion of socio-political factors influencing judicial consideration of affirmative action in education, a review of the current status of
affirmative action law in education and a summarization of the research offered in
competitive admissions trials directly addressing the benefits and costs of diversity. In
Part III, I present a behavioral model of adjudication designed to assess the relative
weight of social science evidence against judicial political philosophy and race. Findings
indicate that while there are more defendant wins with the proffer of social science
research, that difference is dwarfed by judicial philosophical views. Part IV concludes
with an assessment of how socio-politics and social science intersect in the Supreme
Court's *Gratz* and *Grutter v. Bollinger* decisions.

II. Factors Influencing Judicial Decision-making

There are two major camps of scholars presenting models of how judges make
their decisions. On the one hand, scholars proffering the legal model of adjudication
argue that judges rule on the basis of precedent, deductively arriving at an opinion which
is either similar or distinguishable from previously decided cases (Stinchcombe, 2001;
Markovits, 1998; Greenwalt, 1992; Dworkin, 1988).1 On the other hand, behavioral legal
scholars argue that law is made rather than ascertained, and that the content of made-up
law is, in fact, the product of judicial pre-dispositions. Put more succinctly by the
foremost scholars in this area, Harold Spaeth and his prodigy Jeffrey Segal,
behavioralists,2 or more specifically,

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1 For further explanation and critique of the legal model see Spaeth and Segal (1999) and Segal
and Spaeth (2002).

2 Note the attitudinal model is one of three behavioral models of judicial decision making. Other
models include the public opinion model, which is a variation of the attitudinal model suggesting that
judicial attitudes mirror the opinions of the general American public by a lag of 2 to 7 years (Link, 1993;
Mishler and Sheehan, 1996; Segal and Spaeth, 2002); the separation of powers model, which focuses on the
influences of the executive, legislature, as well as the composition of courts to predict individual judicial
Attitudinalists argue that because 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 (2002, p. 111).

They find that out of 2,245 Supreme Court votes and opinions, 88.1 percent align with judicial preferences; whereas, 11.9 percent are attributable to *stare decisis* (Spaeth and Segal, 1999).

The work of Segal and Spaeth focuses on Supreme Court decision making, which they concede may be different from that of lower courts, given the Court’s heightened prestige and general status as a terminal appointment and unfettered ability to rule without interference from Congress, the President, and among judges, all but their colleagues on the Supreme Court. On the other hand, lower courts are constrained, not only by the court above them and their own precedent, but also by the defense of their reputation, namely the fear of being reversed on appeal (Miceli and Cosgel, 1994). However, these fears are subdued in cases where:

1. the law is new, the case is without precedent, or the applicability of past precedent is unclear (Carp and Stidham, 2001);

2. the evidence is contradictory or of equal weight on both sides of the issue (Carp and Stidham, 2001); and,

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behavior (Clayton and May, 1999; for a critique see Spaeth and Segal, 1999); and the rational choice model, another variation of the attitudinal model, which focuses on judicial policy goals, including the following of precedent as an aim for judicial policy (Miceli and Cosgel, 1994; Klein, 2002; for a doctrinal critique see Siegel, 1999 and Spaeth and Segal, 1999).

Johnson (1987) finds that the legal model, marked by its adherence to precedent, accounts for more variation in lower court decisions. This finding is concurred by Lloyd (1995). In this study, Lloyd finds no correlation between the appointer of the judge and decision-making in redistricting decisions, despite the degree of political salience. This study points to judges being impartial with regard partisan issues, but is silent with regard to political issues with philosophical undertones, such as competitive admissions.
3. the issues presented are politically salient (Spaeth and Segal, 1999).

Under these conditions, the routine of norm enforcement undertaken by most judges, most of the time, is by definition supplanted by judicial policymaking. Given the questionable legal status of race-conscious prior to the Supreme Court’s Michigan decisions, the novelty of social science research on the benefits of diversity, and the political salience of affirmative action in admissions, the context of competitive admissions is ripe for ideologically influenced judicial decision-making.5

A. The Socio-Political Salience of Affirmative Action in Education

While there is little agreement as to the meaning of affirmative action, the issue of the utilization of the race factor in higher education admissions ranks high on the list of contemporary issues that divides Americans by race, gender, and political philosophy. A recent poll by the Los Angeles Times appraising the public’s view of President Bush’s stance against the University of Michigan policies announced that of the 1,385 persons sampled, 55 percent were in favor. This included 59 percent of the whites sampled, 77 percent of Republicans, 68 percent of conservatives, and 53-54 percent of moderates and independents, respectively. Only 21 percent of white surveyed disapproved of Bush’s stance, as compared to 41 percent of minorities, 39 percent of democrats, and 47 percent of liberals (Savage, 2003). These figures compare well with Gallup Poll surveys in 1996 in which 61 percent of respondents supported a national policy modeled on California’s

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4 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%) (Carp and Stidham, 2001, p. 160).

5 Note here that the argument is not that judges are behaving politically, as in a partisan manner, but that judges have political philosophies, a philosophical viewpoint, that informs their decision-making.
Proposition 209, which prohibits affirmative action in public employment, education, and contracting.

The results of these polls suggest that the middle has been captured; however, the language of survey, including frequent reference to the phrase “racial preferences”, suggest that numbers for median voters may be over inflated (Schmidt, 2003; Jacoby, 2000). As such, the above results contrast with 2003 Associated Press findings (N = 1,013) that 51 percent of respondents believed affirmative action was still necessary to achieve racial integration, with 53 percent supporting continued programs in both the employment and education contexts (Lester, 2003). Furthermore, when Gallup divided its sample, asking half of respondents whether they favored or opposed racial preferences and the other half whether they favored or opposed affirmative action programs, the former responded favorably at a rate of 42 percent, the latter at 56 percent (1995).

When considering a black-white breakdown, the racial divide becomes clearer. Using the 1992 National Election Study, Kinder and Winter estimate the black-white divide at 36 percent on issues of equal employment opportunity, 43 percent with respect to hiring preferences, and 52 percent for college quotas (2001). Although their simulation models suggest some convergence in the divide when accounting for social class, the most significant variation is related to philosophical differences. In principle, blacks prize equal opportunity, while whites value limited government. Blacks express within group solidarity, while whites express racial resentment (Kinder & Winder, 2001), which becomes more pronounced during competition for resources (Oliver & Mendelberg, 2000). Thus, although higher education levels are associated with more

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6 Note here that the language utilized in the survey, “preferences” and “quotas” are particularly polarizing, overemphasizing the breadth of the racial divide on affirmative action.
liberal positions on questions of race (Jackman, 1973; Taylor, 1998), this liberality is
tempered, especially for whites, as income is directly related to conservatism and as
resource competition intensifies (Kinder & Winder, 2001; Oliver & Mendelberg, 2000).

Women are slightly more supportive of affirmative action than are men. In the
June 2003 Gallup Poll, 62 percent of women surveyed were supportive of affirmative
action for women as compared to 56 percent of men. However this support for
affirmative action on the basis of gender does not translate to support for racially or
ethnically based affirmative action (Saad, 2003).

With respect to political affiliation, the Associated Press reports that twice as
many Democrats than Republicans support the continuance of affirmative action
programs, a four percent marginal difference than the Los Angeles Times (Associated
Press, 2003). Republicans were also less likely to agree that racially diverse student
bodies are important and more likely to believe that the elimination of racial
discrimination in the United States is close at hand. The similarity in results between the
Associated Press and Los Angeles Times surveys is consistent with both symbolic
politics theory (Sears, 1993) and models of political orientation (Downs, 1957; Fiorina,
1981; Sniderman, Brody & Tetlock, 1991). As concluded by Jacoby (2000), there is
some convergence between partisan affiliation and philosophical stance, with both being
directly related to one’s assessment of racial issues, the framing of issues
notwithstanding. Thus, it seems to be the case that one’s race and political philosophy
significantly informs one’s judgment on affirmative action.
B. The Law of Affirmative Action in the Education Context

In the late 1980s early 1990s the Supreme Court issued a series of decisions which currently shape the contours of affirmative action law. *Bakke*, however, the last Supreme Court decision directly addressing the issue of affirmative action in university admissions, was a severely split decision handed down in 1978. Given the divergent opinions in *Bakke*, the post-*Bakke* precedents limiting the use of race in public policy, and the circuit splits over the question of race-conscious admissions, the Court in its *Gratz* and *Grutter v. Bollinger* decisions fulfilled expectations of a clearly articulated stance with respect to the constitutional acceptability of using the race factor in education policy. Yet with this new clarity, questions still linger as to whether the compelling interest the Court found in diversity is a question of fact, a matter of law, or a mixture of both. In addition, the degree to which the context of an institution’s diversity-justified affirmative action policy matters also is unclear.

When directly confronted on the issue of diversity and the appropriateness of the federal government to permit race-conscious initiatives to increase diversity in radio programming, the Supreme Court in *Metro Broadcasting v. Federal Communications Commission* (1990) found that diversity in broadcasting was an important governmental goal. In addition, the Court announced that the appropriate standard of review for benign race-conscious measures was intermediate scrutiny.\(^7\) However, the Supreme Court’s

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\(^7\) Note that the F.C.C. policy strictly applied to “disadvantaged” minorities. Query whether the approach taken by the F.C.C. in *Metro Broadcasting* was appropriate in its goal of obtaining diversity on the airwaves. By assuming pro forma that persons of color, with the notable exception of Asians, are disadvantaged, does not the agency do harm to the principle of equality? Although the agency did extend
assessment of diversity in *Metro Broadcasting* is an anomaly in the grander scheme of diversity jurisprudence and has since been overruled (*Adarand Constructors, Inc. v. Pena*, 1995). 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 is strict scrutiny and the decision was remanded for reconsideration under the strict scrutiny standard. Upon remand, the district court in Colorado granted summary judgment for *Adarand*, precluding the application of federal race-based preferences to construction contracts in the state. The Court’s decision in *Fullilove* upheld a congressional program awarding ten-percent of all federal construction projects to minority contractors.

9 Notwithstanding the fact that less than one-percent (1%) of the city’s prime construction contracts had been awarded to minority contractors over the last five years, the Court reasoned that Richmond is a city in which the population is split fifty-fifty, majority to minority; thus, there was no compelling need for the program. The Justices were peculiarly concerned that the regulation constituted racial spoils, in this city where Blacks were not in the minority.

10 The public-private distinction implied in these cases rationalizes the specific targeting of public institutions in competitive admissions trials. It may be the case, however, that just as in the desegregation context public educational and other institutions were first targeted for complaints and the general principle of desegregation applied to private commercial institutions, it may be the case that a retraction of affirmative action at the Supreme Court may later encompass private institutions through Title VI of the Civil Rights Act. See Forde-Mazuri, K. (2000). The constitutional implications of race-neutral affirmative action. *Georgetown Law Journal*, 88, 2331-2398.
With the notable exception of *Metro Broadcasting*, the Supreme Court admits a failure in the ability to distinguish between invidious classifications, harmful to a particular racial or ethnic group, and benign classifications, designed for the benefit of group members. Justice O’Connor, the author of the majority opinions in both *Croson* and *Adarand*, states that

[absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classification are in fact motivated by illegitimate notions of racial inferiority or simple racial politics (*Croson*, 1989).

According to Justice O’Connor’s circular argumentation, the virtue of the strict scrutiny is that it “smoke[s] out” illegitimate uses of race-based classifications by reserving race-based classifications for legislative goals “important enough to warrant use of a highly suspect tool.”

12 New York University Professor Ronald Dworkin finds this line of argumentation perverse as “[c]areful inspection would almost always disclose … improper motives” (2000, p. 413). Furthermore, with respect to facially neutral laws, the Court requires proof of discriminatory intent, and hence an assessment of motives the Court is unwilling to undertake in the case of race conscious policies. Yet, by insisting on the use of strict scrutiny for racial classifications, the Court unduly constrains the use

12 Justice O’Connor, in *Adarand*, specifically states her desire to dispel the characterization of strict scrutiny as strict in theory, but fatal in fact (1995, p. 237). However, in the one case she cites for this proposition, *United States v. Paradise* (1987), 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 Public Safety.

13 See *Washington v. Davis*, 426 U.S. 229, where the court evaluated a test of verbal skills to police officer applicants, which disproportionately disqualified African-Americans (1976). The Court held that absent proof of discriminatory intent, facially neutral policies, even with a discriminatory impact, are to be evaluated at the level of rational basis review.
of affirmative action, "one of the most effective weapons we have against the racism that strict scrutiny is designed to thwart" (Dworkin, 2000, p. 413).

Even still, for the reason that O'Connor understands from personal experience as a female student at Stanford Law during the 1940s, what it means to be a minority, what a critical mass is, and that critical mass matters. Thus, while enunciating the stringency of the strict scrutiny standard, O'Connor continually asserted that strict scrutiny was not "fatal in fact" (Adarand, 1995, p. 237), suggesting that there are contexts in which an affirmative action policy can be justified. As such, O'Connor consistently has left open the door for race-conscious admissions policies in higher education. Specifically, in her concurrence in Wygant v. Jackson Board of Education (1986) O'Connor states

> 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.

However, as her statement was made in dicta, there was no surety regarding the status of race-conscious admissions until her specific adoption of Justice Powell's Bakke opinion in Grutter.

With respect to race-conscious admissions, strict scrutiny has been the appropriate standard of review for race-conscious admissions since University of California Board of

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14 O'Connor graduated from Stanford Law as one of four women in her class (Van Sickel, 1998), yet it appears that her most difficult encounters in the profession occurred post-graduation where despite being ranked third in her class overall, could not find a position in private practice above that of secretary (Van Sickel, 1998; Maveety, 1996). O'Connor notes that even as late as 1985, the gender gap in the legal profession is not in education, but in private practice and in judgeships (1985), a trend that continues today as women lawyers tend to be relegated to the lower rungs of the profession in both public and private practice (ABA Commission, 2003).

15 Wygant involves the constitutional challenge of a stipulation in the collective bargaining agreement of teachers in Jackson, Michigan, which 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 five separate opinions, a majority of the Supreme Court struck down the provision as violating the equal protection clause. However, there is no singular rationale from the court on this matter.
Regents v. Bakke (1978). Strict scrutiny’s demands are two-fold. First, the government must furnish a compelling justification, the laudable goal served, in having a race-based classification. Second, the government must show that the means used to achieve this goal are narrowly tailored, so as to minimize negative externalities borne by innocent third parties. The focus of the present inquiry is how this first prong of strict scrutiny is established. While the list of compelling goals as enunciated by the Supreme Court is non-exhaustive, prior to Grutter, it was unclear whether the goal of diversity was more like remediation of past discrimination, in which case it would be considered compelling. Or is the diversity goal about numerical representation, in which case it would clearly be unconstitutional (McCabe v. Atchison, Topeka & Santa Fe Railway, 1914). And how can you tell? How do you prove that diversity, or any laudable governmental interest, is compelling? Is it a factual inquiry that can be established through the use of social scientific evidence or a question of law requiring an independent basis of principle in order to withstand the fallibilities of social science?

In the case of Bakke, writing for an equally divided court, Justice Powell, with the approval of Justice Stevens, Chief Justice Burger, Justices Stewart and Rhenquist, affirmed the dissolution of the University of California’s Medical School at Davis minority admissions quota, but reversed the decision of the California Supreme Court insofar as it summarily banned affirmative action in admissions. This part of Powell’s decision is supported by Justices Brennan, Marshall, Blackmun, and White. Yet, neither of the factions specifically signed off on Powell’s benefits of a diverse student body justification.\(^{16}\) According to Powell, diversity “clearly is a constitutionally permissible

\(^{16}\) 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 (1990, p. 568).
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 (1967), Powell asserts 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 (Bakke, 1978).

However, other than anecdotal testimony from administrators at the University of California, Davis Medical School and a Princeton alumni magazine editorial by then President William Bowen describing the benefits of a diverse student body, it is unclear what set of facts or what experience drew Powell to this conclusion regarding diversity.18

To get a better sense of how a court may assimilate social science research in its decision-making process, the case of Brown v. Board of Education (1954) is instructive.

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17 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.

18 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. Odegard (1974). On the other hand, Powell found the policy within the institution’s purview (Jeffries, 1994, p. 461).

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 (Jeffries, 1994).
In the case of *Brown*, the Court ruled that separate was inherently unequal. It did so with a footnote citing social scientific research.\(^{19}\)

The *Brown* case was brought as part of a greater legal strategy by the National Association for the Advancement of Colored People (NAACP) for the purpose of securing civil rights. With the generosity of the Garland fund,\(^{20}\) the NAACP was empowered to hire its own team of scholars, most notably Howard University Law Dean Charles Hamilton Houston and his protégé, Thurgood Marshall, under the auspices of the NAACP Legal Defense Fund (hereinafter, LDF). In a string of *Plessy v. Ferguson* (1896).\(^{21}\) This challenge was relatively easy as the disparities between of Supreme Court victories from *Missouri ex. rel. Gaines v. Canada* (1938) to *McLaurin v. Oklahoma State Regents* and *Sweatt v. Painter* (1950)\(^{22}\) the LDF clearly and decisively cut into the

\(^{19}\) The Warren Court was the first Supreme Court to make extensive use of social science research (Rosen, 1972). Specifically in the *Brown* case, the Court in Footnote 11 cited seven works, including Kenneth Clark’s *Effect of Prejudice and Discrimination on Personality Development* (1950), around which the Brandeis brief for the plaintiffs was built. The rest of the works cited were included in the Brandeis brief’s appendices: Witmer and Kotinsky, *Personality in the Making* (1952); Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion* (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?* (1949); Brameld, *Educational Costs in MacIver, ed. Discrimination and National Welfare* (1949); Frazier, *The Negro in the United States* (1949); and, Myrdal, *An American Dilemma*. (1944). In total, 32 researchers signed to the social science brief in *Brown*.

\(^{20}\) The Garland Fund, named after the reluctant heir to a $1.5 million inheritance, Charles Garland, was designed to disburse its corpus for the purposes of supporting “new or experimental agencies”. Fund organizers, including Garland, were notably left-winged and supported the research, publication, education, and experimental enterprises for the cause of workers rights and minority rights, including the rights of African-Americans. Among its incorporators was James Weldon Johnson, executive director of the NAACP. From 1925 to 1929, the Fund financed $31,500 in NAACP projects including the anti-lynching campaign, legal defense and redress, the latter of which included a fact-gathering expedition detailing the disparities between black and white public educations in the South. To pursue the NAACP legal strategy, the NAACP applied for a grant of $300,000 in March 1930, and was awarded $100,000 from the Garland Fund to cover litigation expenses. Ultimately, the NAACP received just over $20,000 of the $100,000 grant, due to the exhaustion of capital in the Garland Fund (Tushnet, 1987).

\(^{21}\) In *Plessy* a United States citizen of 1/8 African and 7/8 Caucasian heritage paid for and boarded a first class coach car on an East Louisiana Railway train ride from New Orleans to Covington, L.A. Mr. Plessy was ejected from the train and thrown into jail for violating Black Codes promulgated by the Louisiana General Assembly. Plessy subsequently filed suit for the privileges and rights accorded Anglo-Americans under the law. The Supreme Court held that it was improper for the Court to rule whether Mr. Plessy was “white enough” for consideration as an Anglo, a question of state law, but that separate and equal facilities “established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order” (p. 260).

"equal" part of the "separate but equal" doctrine espoused by the Court black and white accommodations were gross. However, in order for the Court to move beyond a case-by-case resolution of inequitable accommodations, the LDF sought evidence of a broader sociological theory of the effects of segregation.

To fulfill this need, the LDF enlisted University of Chicago anthropologist Robert Redfield to testify in the *Sweatt* case to the body of social science literature focusing on the socio-psychological, political, legal, and economic effects of the racial caste system on African-Americans. Most prominent among the works cited by Redfield is Gunnar Myrdal’s *American Dilemma* (1944). By the time of *Brown v. Board of Education* (1954), the Supreme Court had familiarity with Myrdal’s work and the LDF employed a cadre of scholars to testify to the impact of segregation, most notably social psychologist Kenneth B. Clark. A number of scholars have queried the degree of influence of the

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23 In South Carolina, for example, per pupil public school expenditures for black and white students, 1879-1880, were $2.51 and $2.75, respectively. In 1895, the year in which South Carolina approved its constitutional amendment to disenfranchise black citizens, that disparity grew to $1.05 for each African-American child, $3.11 for whites. By 1911, expenditures for white children increased dramatically, to $13.02, while funding for African-American children remained relatively stable, at $1.71. Thus, over a sixteen year period, differences in per pupil expenditures grew from $0.24 to $11.31, with funding for African-American students $0.80 less than in 1895 (Southern, 1968). Reports generated on the behalf of the LDF found comparable trends in Georgia where in 1927 average per pupil expenditures were $36.29 for white students and $4.59 for blacks. In Hinds County, Mississippi, per capita student expenditures were $24.37 and $4.77 respectively (Tushnet, 1987, p.5).

24 *American Dilemma*, celebrated as a monumental work in American race relations for five decades, is a 54 chapter, 1,500 paged, $3 million (current dollars) study employing scores of social scientists to document the legal, economic, political and social standing of African-Americans post-Reconstruction. The study’s principal investigator, Gunnar Myrdal, was a renown, Swedish sociologist and principal designer of Sweden’s modern welfare state (Steinberg, 1996).

25 Note that at the time of *Brown*, Clark was a relatively unknown scholar, and though his previous work included collaborations with Gunnar Myrdal and other reputable scholars, his work with his wife Mamie on the self-esteem of girls was particularly open to criticism. Marshall’s colleague, Justice Felix Frankfurter’s clerk William Coleman, particularly troubled by the employment of the doll study once exclaimed, “Jesus Christ, those damned dolls! I thought it was a joke” (Kluger, 1994, p. 321). The doll study is discussed further in the text below.

Given that Clark and his work were a gamble, the LDF sought the testimony of established social scientists including John Dewey’s protégé, William H. Kilpatrick at Columbia Teachers College, New York University Professor of Psychology Elsa E. Robinson, and former American Psychological Association President Gordon W. Allport, each of whom declined. The LDF was able to enlist the support of second best scholars described by Richard Kluger, author of the acclaimed *Simple Justice*, as an associate professor from Teachers College instead of William Kilpatrick; the dean of a little-known sectarian West Virginia college that just admitted Negroes for the first time; psychologist Helen Trager, then a Vassar lecturer, whose articles on the racial-attitude tests she and others had run with Philadelphia children dovetailed with the fieldwork by the Clarks (1976, p. 337).
social science research in *Brown* (Cahn 1955; Clark 1959; Maslow 1959; McGurk 1959; Wilkinson 1979; Scott 1997; Garrow 1997; Martin, Jr. 1998). From the viewpoint of Jack Greenberg, successor to Marshall as the Director-Counsel of the NAACP Legal Defense Fund and junior attorney on the *Brown* case, *Brown* was largely decided on the sheer will of Chief Justice Earl Warren (1994). For Warren, a legal pragmatist, the issue the Court in *Brown* was the morality of “separate but equal”, which he found indefensible. The key was how to get around the precedent of *Plessy*. What kind of argument or evidence was needed for the Court to overturn its decision half a century prior? Support came from the research of Kenneth and Mamie Clark.

Briefly, the Clark study asked two groups of children, one from northern integrated schools and one from southern segregated schools, to categorize black and white dolls as looking “good” or “bad” and which dolls had “nice color” based on their complexion. The results touted in *Brown* were that the southern children tended to identify the black doll as “bad” or not attractive.

The Clark’s research has been widely criticized, in both social science and legal forums for methodological flaws and an overstatement of results. Clark and his wife Mamie found that both northern and southern children favored the white doll and that the northern children found the black doll looking “bad” or not having a “nice color” more frequently than the southern children. This discrepancy, in addition to other research

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The one notable scholar the LDF was able to employ was psychologist David Krech of the University of California, Berkeley. Among other accolades, Krech was named Fulbright Professor 1949-1950 and visited at Oslo University. In addition, Krech was co-author of a college textbook, *Theory and Problems of Psychology*, which was widely used for the fifteen years following its publication in 1948.


suggesting that desegregation would impinge upon student ability to foster self-identity in relation to the group as well as enflame racial hostilities, justified one post-*Brown* district court holding that the Supreme Court got the facts wrong, and on the basis of the facts before the district court, "education is best given in separate schools" (*Stell v. Savannah-Chatham County Board of Education*, 1963). However, upon review the Fifth Circuit found that the Supreme Court’s decision in *Brown* did not turn on the facts of the data presented. According that court,

[we do not read the major premise of the decision of the Supreme Court in the first Brown case as being limited to the facts of the cases there presented. We read it as proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal. (333 F. 2d 55, 61 (5th Cir. 1964).]

The Fifth Circuit’s reaction to the district court in *Stell v. Savannah-Chatham County Board of Education* is indicative of the manner in which the courts distinguish between questions of fact and questions of law. 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, then the inquiry is one 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. 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 (Kunsch, 1994, p. 22). Legal questions may 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 (Hoffman, 2001; *Lilly v. VA*, 1999; *Bose Corp. v. Consumers Union*, 1984). Hence, 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 presented.
Similarly, the compelling interest the Supreme Court found in diversity is a question of law. 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 propensity for the upward socioeconomic mobility of all Americans. For the sake of the consistency, this matter should not be adjudicated on an ad hoc basis of factual presentations.

However, the nature of the narrow tailoring inquiry is inherently fact driven, determined by the specifics of the policy in question and the nexus between that policy and its purported goal.\(^{29}\) Hence, in the cases of *Gratz* and *Grutter*, the presentation of evidence was virtually the same. Both the College of Literature, Arts and Sciences and the Law School contended that diversity was integral to the University of Michigan experience.\(^{30}\) Yet the Supreme Court, while consistently endorsing the diversity goal, produced divergent decisions opposite of the decisions rendered by the Michigan district court. In *Grutter*, the Court found constitutional the law school’s policy. 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. 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 well as points for residency, legacy, personal achievement, essay, leadership, and service. The Supreme Court found this policy unconstitutional, as it did not permit individualized consideration of candidates in a

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\(^{29}\) Note in several contracting cases post-Adarand summary judgment was precluded due to the presence of questions of fact regarding the degree to which affirmative action policies in question were narrowly tailored to the purported governmental compelling interest. See Lee, K. 1996, p. 955 note 199. See, e.g., *Concrete Works of Colorado v. City of Denver*, 36 F.3d 1513 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995); *Contractors Association of East PA v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993); *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

\(^{30}\) One admissions objective of the undergraduate College is to “increase the intellectual vitality of education, scholarship, service, and communal life” (*Gratz*, 2000, p.813) while the law school’s goal is “to admit a group of students who individually and collectively are among the most capable students applying to American law schools” (*Grutter*, 2001, p. 825).
manner allowing the race factor to be considered without being decisive (Gratz, 2003). Thus, in the context of the University of Michigan and its specific mission with respect to diversity, race-conscious admissions is permissible, so long as the race factor is not decisive. This latter standard, however, may prove problematic especially in close cases where the single most differentiating student characteristic is race. Is it okay, all other things being equal, to flip a coin in favor of minority status? Furthermore, is how the Court knows that diversity is compelling influenced by the set of facts presented? If so, what then is the influential value of research on the benefits of diversity?

C. Social Science Evidence of the Benefits of Diversity

Central to the affirmative defense proffered by the University of Michigan is Patricia Gurin’s three studies on the effects of diversity on academic, social and democratic outcomes (1999). At the macro level, Gurin analyzes the effects of diversity through a sample from the Cooperative Institutional Research Program (CIRP) longitudinal survey of 9,316 students across approximately 200 colleges and universities. At a micro level, she follows 1,321 University of Michigan students in a four-year longitudinal study (the Michigan Student Study or MSS), a subsample of which is included in a experimental study involving 174 students, half of whom are used as a control, to test an intervention to foster cross-cultural relations (called the Intergroup Relations, Conflict and Community [IRCC] intervention). After establishing that structural diversity, diversity in numerical representation, is a predicate to academic and other outcomes, Gurin finds that the greater student involvement in campus diversity experiences, the greater the propensity for active thinking, intellectual engagement and

31 Briefs detailing the testimony for each of the experts testifying on the behalf of the University of Michigan are available online at www.umich.edu/~urel/admissions.
academic motivation. In addition, former college presidents William Bowen and Derek Bok also testified for the defense as to the economic benefits of diversity, specifically, the enhanced earnings associated with a diverse student body (Bowen and Bok, 1998).

Research has been presented at the K-12 level as well. Charles V. Willie, Harvard University and William Trent, University of Illinois at Champagne-Urbana testified to the lingering effects of past discrimination in McLaughlin v. Boston School Committee (1996) and Wessmann v. Gittens (2001, 2002), respectively. Trent also testified in Parents Involved in Community Schools v. Seattle School District (1998) to four overarching benefits of diversity including enhanced educational opportunities and achievement, teaching and learning, civic values and employment. In Comfort v. Lynn School Committee (2000, 2001), Gary Orfield proffered an affidavit concluding that the inclusion of the consideration of race in intradistrict transfers in Lynn, Massachusetts was necessary to achieve the educational benefits of diversity. In addition, Orfield presented evidence that abandonment of the plan may affect the academic achievement of minority students given the propensity for racial isolation.

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32 With the CIRP data she finds that informal interaction has an effect of .15 on intellectual engagement and .16 on academic skills for white students. This compares with respective effects of .18 and .22 for Latino students and a 2 percent effect on intellectual engagement for African-American students. Informal interaction and a diversity-based curriculum together account for 30.2 percent of the variance in intellectual engagement and 18.3 percent of the variance in academic skills for white students. For Latino students, 36.5 percent of the variance in intellectual engagement and 28.4 percent of the variance in academic skills is explained by diversity factors. Similarly for African-American students, diversity explains 40 percent of the variance in intellectual engagement. At the University of Michigan, the diversity curriculum plays a larger role in the academic success of students than informal interaction. The combined effects, however, are not trivial.

Although the research presented in these trials has largely been lopsided, with most plaintiffs’ experts rebutting evidence proffered by the defense, plaintiffs have produced a limited amount of affirmative evidence. Most notably, the work of Harvard’s Stephen Thernstrom, testifying in *McLaughlin* and *Wessmann*, speaks directly to the question of diversity. He finds that affirmative action programs harm minority students by requiring them to compete at levels for which they are not prepared. As such, the gap in academic achievement between black and white students increases, and implicates lower retention and graduation rates for minority students (1995). Furthermore, Thernstrom posits that the removal of affirmative action policies will aid “qualified” students, regardless of race (1997, 1998).

The testimony of David Armor, George Mason University, in *Parents Involved in Community Schools v. Seattle School District* (1998), speaks to the effect of race-conscious admissions on white students, finding that desegregation policies increase white flight and thereby hinder integration efforts (1989). Furthermore, Armour finds limited the achievement benefits for minority students in desegregated settings (1984).

Most recently, the International Journal of Public Opinion Research and The Public Interest published articles revealing an inverse relationship between the number of black students on campus and student satisfaction, the perception of institutional education quality, and peer work ethic (Rothman, Lipset, & Nevitte 2003a, 2003b). Although research in these studies was produced too late to be included in the *Gratz* and *Grutter* trials, it may be influential on the Justices to the extent they seek information on the costs and benefits of diversity.
Overall, this particular body of research is relatively new.\textsuperscript{34} As such, even with the weight of social science evidence before the courts favoring defendants, judges may question to what extent is this body of literature settled, whether a strong body of contrary research will surface after their ruling. Hence, the lingering question is whether any of the research proffered at trial influences judicial assessment of whether diversity is a compelling interest.

III. Modeling Judicial Behavior in Competitive Admissions Cases

To answer this question I composed a catalogue of 28 competitive admissions decisions, district and circuit court, twelve of which arise in the higher education context. To supplement I use sixteen K-12 voluntary desegregation cases, as the general constitutional is parallel: whether diversity is a compelling governmental interest sufficient to justify race-conscious integration plans. Cases are sorted by: case outcome; judicial decision; judicial philosophy as proxied by the political party of the judges’ appointers; judges’ race; and the presence of social science evidence at trial. This latter factor is further divided into measures of quantity, a counting of the number of social science expert witnesses at trial, and proxies for institutional quality, which will be discussed below. Case names and other information are available in the Appendix.\textsuperscript{35}

\textsuperscript{34} Although the scientific inquiry in the desegregation context is similar, the Supreme Court has made a clear distinction between diversity and discrimination contexts. This distinction is highlighted in the \textit{Wessmann} case where William Trent’s testimony is found not relevant as it relates to past discrimination, rather than diversity. Query whether diversity would be an issue without a history of past discrimination whether de facto or de jure?

\textsuperscript{35} Note that the case of \textit{Podberesky v. Kirwan}, 38 F.3d 147 (4th Cir. 1994) is not included in this analysis as the context of Podberesky differs from other affirmative action cases in the field of education. Whereas most court cases dealing with affirmative action in education arise in the admissions context, Podberesky arises in the context of financial aid, specifically race-specific scholarships. While an offer of
A. Assessing the Social Science Evidence

This analysis pairs objective measures of social science research quality to the expert testimony presented in cases in which social science evidence is presented. A list of cases used in this analysis is available in the Appendix. These indicators are of independent interest as there is considerable heterogeneity in the use of social science research across cases. The purpose of this exercise is to facilitate comparisons of the social science evidence employed.

Proxies for data quality used are the institutional rank of the principal investigator’s employer, by Carnegie Classification;\textsuperscript{36} professorial rank;\textsuperscript{37} number 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 rendering it more likely that a student will attend a particular school, rather than enabling their ability to attend college at all. Contrast with Olivas (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. Even if I was inclined to include this case in my study, it would be dropped from the statistical analysis as the opinions of Fourth Circuit judges, in the area of affirmative action and education, are already represented in the dataset.

\textsuperscript{36} The Carnegie Classification of doctoral degree granting and master’s degree granting institutions is as follows:

\textbf{Doctoral/Research Universities—Extensive:} These institutions typically offer a wide range of baccalaureate programs, and they are committed to graduate education through the doctorate. During the period studied, they awarded 50 or more doctoral degrees per year across at least 15 disciplines.

\textbf{Doctoral/Research Universities—Intensive:} These institutions typically offer a wide range of baccalaureate programs, and they are committed to graduate education through the doctorate. During the period studied, they awarded at least ten doctoral degrees per year across three or more disciplines, or at least 20 doctoral degrees per year overall.

\textbf{Master's Colleges and Universities 1:} These institutions typically offer a wide range of baccalaureate programs, and they are committed to graduate education through the master's degree. During the period
articles published from 1987 through 2002; and, the number of times referenced by other publications as reported by the Social Sciences Citation Index, part of the Web of Science database. Cross-reference statistics are especially meaningful in the assessment of research quality as they speak to the ability of a professor’s work to draw interest from their peers, whether cited negatively or positively. Note that these factors are direct measures of academic prestige. Although it stands to reason that academia rewards quality work with higher prestige, which should bear out in these measures, future research is needed on the degree to which these proxies correlated with the quality of current work.

Note that in two instances, persons not currently affiliated with academia testified in competitive admissions trials. These persons were assigned the value of full professor in accordance with their previous standing in the academic world, as well as the tier level associated with their previous institution. In two other instances, persons unaffiliated with universities testified and were designated in the dataset as not ranked. This designation is not intended to belittle the testimony of non-academics, but in addition to

studied, they awarded 40 or more master's degrees per year across three or more disciplines.

**Master's Colleges and Universities II:** These institutions typically offer a wide range of baccalaureate programs, and they are committed to graduate education through the master's degree. During the period studied, they awarded 20 or more master's degrees per year (Carnegie Foundation, 2000).

37 Professorial rank refers to mostly full professors or associate professors; no assistant professors; one Professor Emeritus and two others left academia for other positions. Since the case of Wessmann, one expert, Janice Jackson, returned to school to complete her doctorate in educational leadership at Boston College and is currently an instructor there. While her professorial rank remains 0, based on coding 2 = full professor, 1=associate professor, 0=neither, her institutional rank was coded as Research Extensive Institution. The idea here is that as a selective institution Jackson would not have been accepted as a PhD candidate or student if her work potential was less than what would be expected at an institution of that caliber.
the lack of articles and hence cross-references, there is an effect in the dataset, of
decreasing the mean quality of expert testimony. As each of these individuals testified in
favor of the defense, error weighs towards mitigating the effects of social science
research on the side demonstrably stronger with respect to social science research.
However, the effect is small, and does not significantly impact differences in quality
proxies.

I present the means and standard deviations of research quality proxies in Table 1.
Statistical differences in quality between plaintiff and defendant experts are minimal,
with respect to the quality of institution at which experts are employed. Each defense
expert is employed at a Research Extensive Institution while two plaintiff witnesses are
employed at Research Intensive Universities and one at a Master’s Comprehensive
institution. Thus although plaintiff and defense experts are equally productive in terms of
ascension through academic ranks and faculty productivity, defense experts are employed
at higher ranked institutions. Overall, however, there are no statistically significant
differences between plaintiffs and defendants with respect to these measures of
quality(t=-1.17, p<0.05). Neither is there a statistically significant difference between

\[38\] Note previous work using U.S. News & World Report rankings showed a small, statistically
significant difference between the institutions employing plaintiff and defense witnesses (Gafford
Muhammad, 2003). As such it should be noted that while there are some Harvard professors among the
ranks of plaintiff witnesses, more professors from high ranking institutions testify for the defense in these
cases, an overall total of sixteen, as compared to the four testifying for plaintiffs. The Carnegie
Classification, however, is a more stable indicator of institutional quality, grouping together institutions of
similar size and production of degrees. Overall there is a 53 percent correlation between Carnegie
classifications and U.S. News & World Report Rankings, the difference, albeit small, is statistically
significant (t = 2.08, p > 0.5)

\[39\] Note that all data presented in these cases is not included in the present analysis. This study is
limited to social science evidence presented by plaintiffs and defendants. This is not to discredit the
influence of interveners or amicus briefs, as both can be persuasive (although see Tauber, 1998 and Tauber,
1999, suggesting that the role of special interest groups such as the NAACP Legal Defense Fund in judicial
opinion-making is limited). However, the focus of the present study is the strategic use of social science
research by the main parties.
the numbers of experts testifying on behalf of plaintiffs versus than on the behalf of defendants. In fact, the number of experts testifying on each side of the case is highly correlated, 98.7 percent, with more variation between cases than within cases. As such, on average, there may be one less witness for plaintiffs in each case, but parties are generally well matched quantitatively. In total, thirteen experts testified on the behalf of plaintiffs whereas twenty presented evidence for the defense. On average, 2.6 experts gave testimony on the behalf of plaintiffs and four for defendants (See Table 1 above). At the maximum, five experts testified for plaintiffs in the Gratz and Grutter cases whereas six and eight experts testified for the defendants, respectively. In McLaughlin

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Note- t-tests based solely on cases involving social science data
*With 0 = not ranked and 2 = Full Professor
** From 1987 - 2002
*** Significant at p>0.05
the ratio of plaintiff to defendant experts was one to one, while the ratio in Parents and Wessmann was one to two and one to three, respectively.

To the extent that differences do exist, they should be of no surprise as noted by Michael E. Rosman, attorney for the Center for Individual Rights (CIR). In interview, Rosman asserted that "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. In fact, rather than any concerted effort on the part of the CIR to gather a team of experts for plaintiffs in competitive admissions trials, Rosman informs that the CIR treats cases individually and makes decisions with respect to the employment of experts for trial on a case-by-case basis. This raises the question of whether the presentation of social science evidence can be used as a proxy for the enthusiasm with which the defense makes its case. 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. Professor John Monahan of the University of Virginia, an expert in the area of social science and law also notes that many researchers in the anti-affirmative action camp currently are not affiliated with universities.

It may also be the case that pro-plaintiff substantive evidence, descriptive or hypothesis-driven, was not available at the time of trial, with many plaintiff experts
rebutting the testimony of defendants without the proffer of comparable research.\textsuperscript{40}

Judge Duggan in his opinion in \textit{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, that diversity in institutions of higher education is "good, important, and valuable" (2000).

While the type of data, whether descriptive or research-based, should not matter in terms of the weight it is accorded by judges, the fact that defendants tend to put on a more affirmative case than negative campaign may weigh in favor of defense victories.\textsuperscript{41}

The majority of evidence presented in these cases is, in fact, data driven. 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 1 above). This compares to plaintiffs' testimony in which only 46 percent of the evidence presented is original and speaks 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

\textsuperscript{40} Note that the Spring 2003 issues of the \textit{International Journal of Public Opinion Research} and \textit{The Public Interest} include articles finding an inverse relationship between the number of African American students on campus and student satisfaction with their educational experience, opinion of the quality of education received and the work ethic of their peers. Responses were similar for students, professors, and administrators alike. Besides the fact that responses were not disaggregated by race, these studies parallel findings in the K-12 desegregation context and speaks more to the method of integration, administrative accommodations to provide a supportive institutional climate for diversity, than to the quality of African American students (Rothman, Lipset, & Nevitte, 2003; Rothman, Lipset, & Nevitte, 2003).
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. Charles L. Gesbekter, a middle-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. Notably, Gesbekter's testimony was not mentioned in any of the judicial opinions. 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. In total, plaintiffs presented data-based expert testimony six times, as compared with fourteen such presentations by defendants.  

B. Assessing Socio-Political Factors

I use political party affiliation to proxy the effect of political philosophy on judicial decision-making in competitive admissions trials. Although the political affiliation of politically active judges is available in the public domain, the affiliations of judges more discrete with respect to their personal politics, is not. In lieu, the party of

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41 See Kahn & Kenny (1999) who find that Americans, in the electoral setting, are less likely to mobilize in favor of negative campaigning.
42 This raises the issue of the degree of judicial reliance on expert testimony as an effect of the degree of confidence a judge has in the foundations of the expert's testimony. It is likely that the higher the perceived quality of an expert's testimony and the greater the nexus between an expert's testimony and discipline, the more likely a judge will cite that expert. This is a testable proposition that is likely to be the subject of a forthcoming paper, but is otherwise outside the scope of the present analysis.
43 By data-based I mean hypothesis driven results using the scientific method. As such, I do not include the four defendant testimonies based on descriptive statistics in the data-based tabulation.
44 See Rowland and Carp (1996), which employs a private database including federal district court judges appointed through 1987. There are National Science Foundation-sponsored databases which include the background characteristics and decisions of Supreme Court Justices and judges of the federal
the President appointing the judge will be used. This information is readily ascertainable in *Who's Who in American Law* for federal judges. Although executive politics and judicial philosophy are not perfectly aligned, on average judges tend towards ideologies aligned with their appointer.\textsuperscript{45}

For purposes of this study, the use of party affiliation should be a valid proxy for political philosophy with respect to affirmative action policies as members of the Republican Party as well as Republican-affiliated organizations have pushed for the elimination of affirmative action in employment and admissions for several decades, whereas Democrats tend to be more supportive of affirmative action policies. This is not to say that “Republican” and “Democratic” labels directly correspond to conservative and liberal positioning on the question of affirmative action. Carp and Stidham report that with respect to affirmative action, 72 percent of Democratic federal district judges rule in a politically liberal manner, as compared to 49 percent of Republicans (2001, p.134). Carp and Stidham also report that Courts of Appeals are less liberal than district courts. My view is that the gap in the rendering of liberal decisions may shrink, but not squelch, and will transfer to the competitive admissions context. As such, I predict more plaintiffs’ victories in cases over which Republican-appointees preside. I expect the converse to be true with respect to Democratic-appointees.

As the behavioral model of judicial decision-making includes a measure of previous decisions of a comparable nature, it was my original intention to use past Title
\textsuperscript{appellate court available online at www.wmich.edu/nsf-coa/}. However, these databases include judicial appointees from 1925-1996, excluding several of the judges judging competitive admissions decisions. \textsuperscript{45} Carp and Rowland (1983), using a sample of 26,372 judges appointed between 1933 and 1977, 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
VII decisions by the judges in the above cases to proxy judicial predispositions in race-based cases. However, after examining the decisions of nearly one-quarter of the judges used in this analysis, I found that nearly 90 percent of racial employment cases end in defendant, institutional victories. For circuit courts, such a high percentage is not unreasonable as the standard to reverse a lower court’s decision is “clearly erroneous.” Yet, the distribution among district court judges was also skewed. This is most likely due to administrative procedures through the Equal Employment Opportunity Commission, required in employment cases, resulting in the resolution of many suits before trial. In addition the burden of proof required for plaintiffs to succeed on the merits is high. Hence, this factor was excluded from the present analysis.

The next variable in the equation is judge’s race. Although there are several sociological factors related to judicial decision-making, including the judge’s religion, socioeconomic status, and geography (Carp and Stidham, 2001), at the forefront of the competitive admissions issue is race and the constitutional appropriateness of the race factor in admissions considerations. As this issue historically is framed in terms of black and white (Hollinger, 1998) and the Who’s Who biographical database flags self-identified judges of African American heritage with 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.

The effect of coding in this manner suppresses the effect of race, for judges who do not identify themselves as black, as well as judges who are neither black nor white. In particular, demographic information Hispanics is not available through Who’s Who. This

Republicans appointed by Democrats vote liberally, and 46 percent of Democrats appointed by Democrats vote liberally.
is not to suggest that African American and judges rule alike or in any other particular manner. In fact, contrary to the hypotheses of Steffensmeier and Britt (2001), black judges are actually tougher on crime, as evinced by higher incarceration rates, than their white counterparts. A similar reversal of hypotheses could have occurred in the present study, with minority judges feeling pressured to render more conservative opinions in order to maintain their reputations as objective jurists. When cross-referencing the names of judges in this sample with The Directory of Minority Judges of the United States (1997), however, only the names of the African-American judges as self-identified in Who’s Who therein were contained.

As gender is also a factor in one’s support for affirmative action, it too is included in the present analysis. Gender is coded on the basis of male/ female using Who’s Who to confirm male or female status.

Table 2 contains descriptive statistics for the judges under review. Of the 38 judges deciding contemporary competitive admissions cases, 23 are Republican appointees, 60.5 percent, as compared to 15 appointments by Democrats, 39.5 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 (ABA, 2001). Thus, African American judges are slightly over-represented. Republican judges are also over-represented, which makes sense considering that disputes over competitive admissions are more likely to
Table 2

Descriptive Statistics: Judges' Race and Political Philosophy, Percentage

<table>
<thead>
<tr>
<th>Political Philosophy</th>
<th>Race</th>
<th>Gender</th>
</tr>
</thead>
<tbody>
<tr>
<td>Republican</td>
<td>White/</td>
<td>Male</td>
</tr>
<tr>
<td></td>
<td>Not Indicated</td>
<td></td>
</tr>
<tr>
<td>60.5</td>
<td>92.1</td>
<td>86.8</td>
</tr>
<tr>
<td>Democrat</td>
<td>African American</td>
<td></td>
</tr>
<tr>
<td>39.5</td>
<td>7.9</td>
<td>13.2</td>
</tr>
</tbody>
</table>

Note: N=38

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. Forty-four percent (44%) were Reagan or Bush, Sr. appointees. The remaining judges (2%) are from previous administrations (Hoffman, 2000).

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 (ABA, 1998). Nationally, there are two of the nine Supreme Court Justices who are 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 (ABA, 2003).

Taking a look at the number of plaintiff and defendant victories in Table 3, I find that more than half of the cases end in plaintiff wins, with sixty percent (60.5%) of the judges ruling in favor of plaintiffs. This leaves nearly forty-five percent (44.7%) of case wins for defendants, determined by about forty percent (39.5%) of judges. The difference between outcomes at the case and the judicial levels is not statistically significant, with a correlation of 57 percent (57.3%), (t=−0.7, p<0.05). Thus, on the balance, plaintiff challenges to race-conscious admissions policies have been successful.
In addition to the overall win-loss record of plaintiffs and defendants, it is interesting to note the variation in outcomes by factors such as race, gender, and political philosophy. Also notable is the lack of variation by the presence or absence of social science research.

Beginning with the issue of the data, there is no statistically significant difference in judicial rulings by the presence or absence of data. Moreover, the correlation between judicial rulings and social science research is not significant (24.8%, p<0.05). Without a correlative predicate, there is no reason to believe that social science research influences the outcomes of race-conscious admissions cases. There is however a low correlation

Table 3

Pro-Plaintiff and Pro-Defendant Decisions by Factors, Percentage of Total Number of Cases, (N=38)

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff Victories</th>
<th>Defendant Victories</th>
<th>Difference (t-test)</th>
</tr>
</thead>
<tbody>
<tr>
<td>By Case Outcome</td>
<td>55.3</td>
<td>44.7</td>
<td></td>
</tr>
<tr>
<td>By Individual Judicial Ruling</td>
<td>60.5</td>
<td>39.5</td>
<td></td>
</tr>
<tr>
<td>By Political Party*</td>
<td></td>
<td></td>
<td>4.05**</td>
</tr>
<tr>
<td>Republican</td>
<td>50.0</td>
<td>10.5</td>
<td></td>
</tr>
<tr>
<td>Democrat</td>
<td>10.5</td>
<td>28.9</td>
<td></td>
</tr>
<tr>
<td>By Judge’s Race*</td>
<td></td>
<td></td>
<td>2.33**</td>
</tr>
<tr>
<td>White/ Not Indicated</td>
<td>60.5</td>
<td>31.6</td>
<td></td>
</tr>
<tr>
<td>African-American</td>
<td>0</td>
<td>7.9</td>
<td></td>
</tr>
<tr>
<td>By Judge’s Gender</td>
<td></td>
<td></td>
<td>2.05**</td>
</tr>
<tr>
<td>Male</td>
<td>57.9</td>
<td>28.9</td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>2.6</td>
<td>10.5</td>
<td></td>
</tr>
<tr>
<td>By Social Science Data*</td>
<td></td>
<td></td>
<td>1.54</td>
</tr>
<tr>
<td>Data</td>
<td>12.7</td>
<td>14.3</td>
<td></td>
</tr>
<tr>
<td>No Data</td>
<td>41.2</td>
<td>31.7</td>
<td></td>
</tr>
</tbody>
</table>

Note – Percentages may not add up to 100% due to rounding error.
*Evaluated at the Judicial Ruling Level
** Significant at p>0.05
between judicial assessment of diversity as a compelling state interest and the presence of social science research (37.3%, p>0.02), with eleven judges specifically endorsing diversity, eight of whom ruled in favor of affirmative action policies. However, when considering occasions in which judges deferred to the Supreme Court or otherwise did not make a specific ruling for or against diversity (N=18), only three resulted in defense wins, with data present in none of the three.

Looking at race, there is a statistically significant difference in the outcome of cases by judge’s race, (t=2.33, p>0.03). Each of the three African-American judges in this dataset decided in favor of educational institutions. This pattern of ruling is consistent with the pro-affirmative action stance of many traditional black leaders, including Kwesi Mfume and Julian Bond of the NAACP. This is not to say that all African-Americans view affirmative action in the same light. Most notably Justice Clarence Thomas in his opinion in Adarand states that "government sponsored discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice" (1995, p. 297). Thomas does not stand as the lone African-American with views contrary to the NAACP. In a 1997 election debate, former State Delegate of the 58th District of Virginia, Paul Harris, illustrated his belief for a progressive abandonment of race-based affirmative action. According to Harris,

\[ \text{I think, as a country, we need to move away from the racial hostility that currently permeates the American public, and I can see no justification for allowing a preference to, for example, the son or grandson of Doug Wilder or Jesse} \]

\[ \text{---} \]

\[ ^{46} \text{Previous analysis including the Washington State Supreme Court decision of DeFunis v. Odegard, predecessor to Bakke, and the California and United States Supreme Courts' decisions in Bakke yielded two additional African American judges who also ruled pro-defendant.} \]

\[ ^{47} \text{The NAACP's political positioning is detailed at www.naACP.org.} \]
Jackson over a hard working kid from Belmont or Appalachia.\textsuperscript{48}

As such, race should not be seen as a dispositive factor in competitive admissions trials.\textsuperscript{49}

There is also significant variation in the number of plaintiff and defendant victories by gender. Men are about twice as likely to rule in favor of plaintiffs, while four of the five women judges ruled in favor of race-conscious admissions. The odd woman out, Judge Alice Batchelder, is a Republican appointee. The issue then is whether the influence of gender can be disaggregated from the influence of political philosophy.

There may be reason to suspect that older women, even if politically conservative, may be more inclined to support race-conscious admissions policies than their younger counterparts. Currently, women in law school comprise 49 percent of the population. First-Year enrollment rates of women in law school over the years of 1980 to 2000 depicts a 15 percent growth rate from an initial 35 percent enrollment in 1980 to 50 percent enrollment in 2000. Additionally, as of current, women represent 32.8 percent of law school faculty. Of the population of women law faculty, 25.1 percent are tenured faculty, 35 percent work full-time faculty, and nearly one-third (30.4\%) are part-time. At the administrative level, women in law school represent 16.1 percent of all deans and 39.9 percent as associate or vice deans (ABA, 2003).

Historical figures are considerably more stark. Hence, older women, like Justice O’Connor, have a personal understanding of what it means to have a critical mass, as

\textsuperscript{48} Paul Harris’ debate with Bruce Kirtley September 13, 1997 is detailed at http://www.cstone.net/~kirt1997/DebatePage1.htm. Note that Paul Harris won that election, but vacated the position to join the Bush Administration in 2001.
well as what it means when a critical mass is lacking. Alice Batchelder was an early elementary school student during O’Connor’s law school years, and attended Akron University Law School in the 1970s, when the numbers of women in law school were beginning to significantly increase. As such, time may be an influential factor in the differential assessment of race-conscious admissions by these two female Republican appointees.

This leads us to a discussion of the influence of judicial political philosophy. Judicial political philosophy is the single most influential factor on judicial rulings in this dataset. Nearly 83 percent (N=19) of Republican appointees ruled in favor of plaintiffs as compared to 73 percent (N=11) of Democratic appointees ruling in favor of defendants. In all, 50 percent of judicial rulings ended in plaintiff victories yielded by Republican appointees, with Republicans five times more likely to rule in favor of plaintiffs. Given the smaller number of Democratic appointees hearing these cases, judges appointed by Democrats rendered defense victories in 28.9 percent of cases. Democratic-appointees, while only slightly less uniform in their Republican-appointee counterparts, were about three times as likely to rule in favor of defendants. Thus, as judges tend to rule in the direction of their appointer’s political party, the smaller number of defendant victories is most likely a function of the overrepresentation of Republican appointees in this dataset.

Still, 18 percent of Republican and Democratic appointees (N=7) cross political philosophy lines in their rulings, as shown in Table 4. This small degree of philosophical deviance concurs with findings by Carp and Rowland that in the area of racial

\[49\] In fact, it would be interesting to see the degree of liberalism in the voting behavior of African-American judges.
Table 4

Interactions Between Party Affiliation and Data by Judicial Ruling, Percentage Total Number of Cases

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff Wins</th>
<th>Defendant Wins</th>
</tr>
</thead>
<tbody>
<tr>
<td>Republican</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Data</td>
<td>15.8</td>
<td>2.6</td>
</tr>
<tr>
<td>No Data</td>
<td>34.2</td>
<td>5.3</td>
</tr>
<tr>
<td>Democrat</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Data</td>
<td>5.3</td>
<td>21.1</td>
</tr>
<tr>
<td>No Data</td>
<td>5.3</td>
<td>10.5</td>
</tr>
</tbody>
</table>

Note - 0.1% rounding error

discrimination, judges are more likely to rule along party lines than in any other area of law (1983). The philosophical crossovers in the present study are split relatively evenly across party lines, as well as across cases with and without data. The four cases where Republican appointees ruled in favor of defendants in the absence of data and Democratic appointees ruled in favor of plaintiffs when data was introduced are anomalies within the general behavioral model of judicial decision-making. The two cases where Democratic appointees ruled in favor of plaintiffs in the absence of data is a result more consistent with judicial decision given that more of the data presented in these cases is produced modeling, as one would expect that the presence of more data to bear on the issue of competitive admissions would lead to more defendant victories. This is especially true on the behalf of the defense as defendants are the first, in these cases, to seek the aid of experts and are more likely to be able to employ the aid of experts at higher ranking,
Research Extensive Institutions. The converse should also be true: in cases where no data is presented, judges should be more apt to vote in favor of plaintiffs. By way of illustration, Judge B. Avant Edenfield, who decided the University of Georgia district court cases, articulates this situation best. As noted in the previous chapter, no experts presented social science evidence in the University of Georgia cases. Instead, Professor Charles Knapp, past president of the university, anecdotally testified the benefits of a diverse student body. Edenfield, a Democratic appointee, notes:

[although the court recognizes the theoretical benefits of an educational setting which is open to a diverse collection of viewpoints, it is not convinced that these benefits – furthered here only in an abstract sense – justify outright discriminatory admission practices which cause concrete constitutional injuries (Wooden, 1999, p. 1380).

Social science evidence, however, seems influential in about 8 percent (N=3) of cases (See Table 4). By influential, I mean that there is an inverse relationship between the judge’s philosophical predisposition and his or her decision (Spaeth and Segal, 1999). In this dataset, only one Republican-appointee ruled in favor of defendants when social science data was employed. Judge Patrick J. Duggan who, ruling in the Gratz district court decision, emphatically asserted that “based upon the record before it, that a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education constitutes a compelling governmental interest” (2000, p. 824).

B. Weighing the Relative Impact of Social Science and Socio-politics

Given the descriptive evidence above, is there any reason to believe that social science research has any influence on the outcomes of race-conscious admissions cases?
To answer this question, I use logistic regression analysis as a method of ascertaining the relative effect of social science evidence, its quality and quantity, on case outcomes.

As an initial step, I ran independent t-tests on the differences in case outcomes by data quality for the five cases in which scientific evidence is presented. I used the affirmative action in higher education admissions cases in conjunction with the voluntary desegregation in primary and secondary education cases, as presented in the Appendix. Overall, there is no statistically significant difference in case outcomes on the basis of the quality or quantity of data. Contrary to previous research, this outcome does not vary by the party proffering the data (Gafford Muhammad, 2003).  

I employ binomial logistic regression analysis to assess the relative effect of social science evidence on judicial decision-making in competitive admissions trials and the degree to which other factors, such as judicial political philosophy and race, are more influential. Logit analysis is appropriate for this type of inquiry as the outcome variable used in this analysis is dichotomous. Logit estimations of the maximum likelihood of an event’s probability correct for the non-linearity, non-normal distribution of errors, and heteroscedasticity generated by general regression models using categorical outcome measures (Pedhazur, 1997).

A few preliminary matters need to be addressed before proceeding with the logit model. I discard nine court decisions for reasons of finality, independence, and alternative grounds for resolving the case. The exclusion of these decisions does not, however, resolve all issues regarding the independence of observations. There also are

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50 The flaw of previous work lies in the utilization of the judicial ruling measure as an outcome variable in a dataset set up on the basis of individual experts. While together the experts may have had an influence on the outcome of an entire case, it is at best difficult to parse whether a particular expert’s testimony had an influence on a particular judges using statistical techniques.
three layers of variable clustering that must be considered. First, judges at the district and circuit court level are analyzing the same set of facts. Second, judges at the circuit court level are analyzing the same set of facts in consultation with each other. Third, researchers testified at multiple trials. Given the ambiguity of Fourteenth Amendment law at this juncture, judges are relatively free to interpret the law according to their own predispositions. However, judges reviewing cases at different levels, district and appellate, are constrained by the same set of facts. Upper level courts are usually bound to findings of fact from courts below as the trial court has the advantage of actually hearing testimony and watching the disposition of witnesses. But upper level courts are never bound to findings of law from the court below and in these cases the essence of the dispute is not the facts, but the law. As such, there is more, albeit imperfect, independence of observations in these cases than in other judicial contexts, such as employment discrimination law where cases are handled in a relatively uniform fashion according to statutory mandates. I mediate clustering effects by computing the Huber-White standard error, which captures the relationship among errors in groups of observations, and compare results with and without clustering controls.

An additional issue of concern with respect to model functioning is the small number of observations involved in this particular set of data. Although these cases represent, to the best of my knowledge, the set of reverse discrimination in higher education and voluntary desegregation cases through July 2002, with noted exceptions listed in footnotes above, the total number of cases is sixteen. The total number of judges, the primary unit of analysis, is 38. The set of cases independent by judge, by court case and expert witnesses is even smaller. The value of this statistical exercise,
however, lies in its ability to provide a framework for analyzing the intersection of social science and law. As such, this framework can be applied to other contexts, such as school desegregation, finance and special education litigation where there has been more litigious activity. This framework can also be applied to the recently emerging litigation surrounding programs of school choice. Such an analysis of the effect of social science evidence in litigation can help both social science experts and attorneys more finely tune their research and arguments for maximum persuasiveness.

A linear expression of the logit model estimated is:

\[ Y_1 = \alpha + \beta_1 \text{Party} + \beta_2 \text{Race} + \beta_3 \text{Gender} + \beta_4 \text{Data} + \varepsilon, \]

where \( Y \) is a defendant victory measured as the case outcome and judicial ruling levels, \( \beta_1 \) is the political party of the president or governor appointing the judge deciding the case, \( \beta_2 \) is an indicator of whether a judge is African American, \( \beta_3 \) indicates judges’ gender, and \( \beta_4 \) measures whether social science data was presented in the case.\(^{51}\)

Preliminary evaluation revealed no significant interaction between variables; hence, estimates for interactions between variables are not included. As the presence of social science research fails to register a statistically significant charge, it is unlikely that the quality of research presented matters. Therefore, I do not make separate logit estimations accounting for variances in data quality.

As hypothesized, political philosophy is a greater predictor of judicial rulings than social science research, with the logit estimates of the former registering statistically significant and the latter not. Thus, the log-odds of a defendant win are more dependent on the philosophical leanings of the judge (e.g., Model A: \( \text{OR}_{\text{Party}} = 15.41 \)), than on the
Logit Estimates Defendant Wins by Judicial Ruling

<table>
<thead>
<tr>
<th></th>
<th>Model A</th>
<th>Model B</th>
<th>Model C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party</td>
<td>2.75*</td>
<td>2.78*</td>
<td>2.94*</td>
</tr>
<tr>
<td></td>
<td>(0.88)</td>
<td>(0.86)</td>
<td>(0.85)</td>
</tr>
<tr>
<td>Gender</td>
<td>1.35</td>
<td>1.43</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>(1.42)</td>
<td>(1.4)</td>
<td>-</td>
</tr>
<tr>
<td>Data</td>
<td>0.23</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>(0.9)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Race</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

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 of dep. var. = 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 of dep. var. = 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 of dep. var. = 0.39

presence of social science research (e.g., Model A: OR\textsuperscript{Data} = 1.25). Note that the race term drops for reasons of collinearity as each black judge in this dataset was appointed by a Democratic president.\textsuperscript{52} In addition, each of these judges (N=3) ruled in favor of affirmative action.\textsuperscript{53} Among women judges, rulings were also along party lines, with the one Republican-appointed woman ruling for plaintiffs, the others (N=4), Democratic appointees, ruling for defendants. Hence, the controlling factor for women, and perhaps for African-American judges as well seems to be political philosophy. Thus, when I alter the above model slightly, removing data in Model B, then gender in Model C, I find that

\textsuperscript{51} Logit models, by definition, employ non-linear probability estimations. A linear equation is included in the text for reasons of simplicity.

\textsuperscript{52} As such, the estimates of political philosophy, data, data quality and quantity as presented in Table 8 are calculated without the race term.

\textsuperscript{53} Black judges in earlier competitive admissions decisions (N=2), Bakke v. Board of Regents (1978) and DeFantis v. Odegard (1973, 1974) also ruled in favor of affirmative action. In the latter case, Charles T. Wright of the California Supreme Court, was appointed by a Republican.
there is little change in parameter estimates or the predictive power of the model.\textsuperscript{54} In other words, no specified factor but political philosophy seems to have a significant association with judicial rulings in race-conscious admissions court cases. In each model, the predictive power remains at 81.6 percent overall, with an 80 percent accuracy in predicting defendant wins, 82.6 accuracy in predicting plaintiff wins.

Given the finding that there is a small statistically significant correlation between judicial assessment of diversity as a compelling interest and the presence of data, I ran a separate model with the above factors using the assessment of diversity as an outcome measure. This model registers as mis-specified with a low chi-square ($\chi^2 = 5.52$) and no statistically significant factors.

Going back to my base model, I found that when calculating the Huber-White standard errors associated with the clusters around each court case, the party proxy for political philosophy runs collinear with case.\textsuperscript{55} To get around this result, the models were re-run using case outcomes, rather than individual judicial rulings, as the dependent variable. In this equation, Huber-White standard errors were calculated. Subsequently, I filtered out circuit court cases to alleviate the clustering concern altogether. Results for each of these model variations are statistically insignificant.

Nevertheless, there is an important observation that can be gleaned with respect to the relative magnitude and direction of the effect of each of these variables on judicial rulings. Decision-making follows political philosophy, which closely tracks the partisan affiliation of judicial appointees. This finding holds for both African-American and

\textsuperscript{54} Although by taking gender out of the model, there is a loss in chi square slightly greater than one ($\Delta \chi^2 = 1.18$), which is probably outweighed by the gain in parsimony.

\textsuperscript{55} This result is apparent in each district court decision not adjudicated by a circuit court.
women judges. This parallel is to the extent that the percentage of plaintiffs and defendant wins mirrors the percentage of Republican- and Democratic-appointed judges, notwithstanding a cross-over rate of 7.9 percent for Republicans and 10.5 percent for Democrats. The introduction of social science evidence, however, is of limited impact as compared to socio-political factors.

IV. Conclusion

In sum, the questionable legality of race-conscious policies in the pursuit of diversity, political salience of affirmative action, and novelty of diversity research make ripe a context for judicial decisions departing from norm enforcement. Under such conditions, judges tend to make law reflective of their personal political philosophies. In an effort to inform judicial assessment of a compelling interest in diversity, defendants in several cases have presented research exploring the educational, economic, and social value of diversity.

To explore the question of whether efforts on the part of defendants influenced judicial decisions, I catalogued 28 competitive admissions decisions. These decisions include both higher education and K-12; account for the presence of social science research, the quality of research (by proxy) and quantity of research (by number of experts testifying), and judicial philosophy as proxied by the political party of the judge’s appointer, judge’s race, and gender. Bivariate analysis reveals no statistically significant differences between plaintiff and defense victories varying by the quantity of social science evidence employed in the case. In addition the correlation between the offering
of data in case outcomes is not significant, although data may be influential in judicial assessment of diversity as a compelling governmental interest.

In using logit regression analysis to evaluate the relative weight of judicial political philosophy and social science research in predicting defense wins, judicial political philosophy significantly outweighs. This does not, however, suggest that the employment of social science in competitive admissions trials is without purpose. Instead, it is more likely that social science is more influential on the margin than in the aggregate. As such, judges with strong views on affirmative action are unlikely to be swayed by the presentation of data. On the other hand, there is a small minority of judges open to being influenced by the research presented. It is for this cadre of judges that social science research is most useful in the decision making process.

With respect to the Supreme Court’s decisions in the Gratz and Grutter v. Bollinger cases, political philosophy as proxied by the party of the justices’ appointers will tell only part of the story. Seven of the nine justices currently on the bench are Republican-appointees, which, according to the model presented, ensures plaintiffs’ wins in both cases. Of those seven, two, Justices Stevens and Souter have revealed liberal voting records on Civil Rights issues, which suggests a decision of five to four in favor of plaintiffs. However, given Justice O’Connor’s concurrence in the Wygant decision, O’Connor can be considered marginal in this context. Yet, none of O’Connor’s questions during oral arguments regard the educational benefits of diversity, although she was able to reconcile the sociological concept of critical mass within the context of women in law school. In general, O’Connor’s questions were focused on the narrow tailoring inquiry; thus, her stance on diversity as a compelling governmental interest was ambiguous until
she announced her decision in *Grutter*. In *Grutter*, O’Connor specifically endorsed diversity as a compelling interest as proffered by her mentor, 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 amassed on the benefits of diversity. 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. Thus 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.

The small number of observations and resultant lack of statistically significant charge afforded social science research, however, is of concern in the models presented. A true test of these models requires the analysis of other areas of education law more heavily litigated, such as school desegregation, finance and special education. In these areas, because of the lesser political salience, I would expect to see the influence of social science research as statistically significant, with a smaller association between political philosophy and judicial decisions.

What can be taken from the present exercise, however, is a method for analyzing social science evidence across legal cases sharing a common inquiry. As such, this method of study may prove valuable to attorneys and social scientists preparing for trials concerning competing social rights of the American public. In particular, considering the case-specific nature of the narrow tailoring inquiry and the decline in the number of civil
rights cases the Supreme Court reviews, an understanding of the political philosophy of district and circuit court judges is helpful in framing admissions policies.
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Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999).
Wessmann v. Gittens, 160 F.3d 790 (1st Cir.1998).

Articles and Books


## APPENDIX

Table of Cases – Contemporary Competitive Admissions District and Circuit Court Opinions

### Higher Education Cases

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### Elementary & Secondary Education Cases

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Key: D.Ct. = District Court, Cir. = Circuit Court, S.Ct. = Supreme Court, P=Plaintiff Win, D=Defendant Win, Y=Yes, N=No.