



INTUITION OR PROOF: THE SOCIAL SCIENCE  
JUSTIFICATION FOR THE DIVERSITY  
RATIONALE IN *GRUTTER V. BOLLINGER*  
AND *GRATZ V. BOLLINGER*

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INTRODUCTION.....	762
I. THE MEANING OF DIVERSITY .....	765
A. <i>Diversity Defined</i> .....	765
B. <i>Numeric Diversity or Diversity Experience</i> .....	767
II. SOCIAL SCIENCE EVIDENCE ABOUT THE DIVERSITY RATIONALE	
PRESENTED TO THE COURTS .....	769
A. <i>Correlating Diversity with Positive Outcomes</i> .....	769
1. <i>The Gurin Report</i> .....	770
a. Gurin’s methodology .....	770
b. Gurin’s outcomes .....	773
2. <i>Other studies linking diversity experience to positive outcomes</i> ....	779
3. <i>Linking numeric diversity to diversity experiences</i> .....	781
4. <i>The Rothman study</i> .....	783
B. <i>Experimental Data Correlating Diversity with Complex Thinking</i> .....	785
C. <i>Perceptions of the Importance of Diversity</i> .....	787
1. <i>Favorable impressions of diversity at law school</i> .....	787
2. <i>Favorable impressions of diversity at undergraduate institutions</i> .	791
3. <i>Negative impressions of diversity</i> .....	792
D. <i>Conclusion on the Data</i> .....	793
III. THE USE OF EVIDENCE ABOUT THE DIVERSITY RATIONALE IN THE	
BRIEFS FILED DURING THE UNIVERSITY OF MICHIGAN CASES .....	796

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## IV. THE COURTS TACKLE THE SCIENCE BEHIND THE DIVERSITY

RATIONALE .....	801
CONCLUSION .....	806

## INTRODUCTION

In 1978, Justice Powell famously found that racial diversity can justify race-conscious admissions systems.<sup>1</sup> However, Justice Powell wrote alone, leaving the diversity rationale in a state of limbo for nearly three decades. In 2003, a slim majority of the Supreme Court agreed with Justice Powell, finding that an educational institution had a compelling interest in a diverse student body.<sup>2</sup>

To buttress the idea that “educational benefits . . . flow from an ethnically diverse student body,”<sup>3</sup> Justice Powell included a quote from a former Princeton graduate observing: “People do not learn very much when they are surrounded only by the likes of themselves.”<sup>4</sup> With this anecdotal support, the diversity rationale gained recognition in the Supreme Court.

Unlike many cognizable government interests, the idea that “[p]eople do not learn very much when they are surrounded only by the likes of themselves” is an inherently empirical claim. It does not invoke the broad language of rights, but rather, a supposed fact about the world: that educational outcomes are improved by the presence of diversity. Despite this, *Bakke* spawned little empirical work on the effects of racial diversity in higher education.<sup>5</sup> Not until the Fifth Circuit rejected the diversity rationale in *Hopwood v. Texas*<sup>6</sup> did the academic establishment mount a research campaign to demonstrate that racial diversity did indeed create educational benefits.

By the time of the University of Michigan cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*, affirmative action advocates had attached their hopes to a long line of cognitive psychology research finding an association between learning and the experience of novelty.<sup>7</sup> Essentially, psychologists had noted

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1. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-15 (1978) (Powell, J., announcing the judgment of the Court).

2. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

3. *Bakke*, 438 U.S. at 306 (Powell, J.).

4. *Id.* at 312 n.48.

5. See William C. Kidder, *Affirmative Action in Higher Education: Recent Development in Litigation, Admissions and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173, 221 (2001).

6. 78 F.3d 932, 944 (5th Cir. 1996).

7. The relationship between learning and difference has a lengthy historical pedigree. In the late 1800s, Harvard President Charles W. Eliot sought to attract students from all walks of life to provide “the wholesome influence that comes from observation of and contact with people different from themselves.” Neil L. Rudenstine, *Student Diversity and Higher Learning*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 31, 32 (Gary Orfield ed., 2001) (quoting Charles W. Eliot).

that when people interact in unfamiliar environments, with unfamiliar people, they more fully engage their cognitive faculties; people learn differently when they leave their comfort zones.<sup>8</sup>

In the two University of Michigan cases, proponents of affirmative action had their opportunity to present their research to the courts. The University's case relied most heavily on a lengthy expert report filed by Michigan Professor of Psychology and Women's Studies Patricia Gurin.<sup>9</sup> In addition, it cited an array of other studies bolstering the Gurin Report's claim that racial and ethnic diversity<sup>10</sup> leads to tangible educational benefits. In response, the National Association of Scholars (NAS) spearheaded an effort by plaintiffs' amici critiquing the methodology of the Gurin Report and presenting its own social science evidence to undercut the diversity rationale.<sup>11</sup>

But what did this slew of social science evidence really demonstrate? Did Gurin and other social scientists prove that racial diversity leads to positive student outcomes? Or, rather, does the evidence only serve to confirm the preexisting intuitions of those committed to affirmative action?

This Note examines some of the data placed before the Court and identifies its virtues and flaws. Clearly, much of the evidence provides powerful confirmation for those who already believe that affirmative action yields educational benefits. However, it may have less to offer affirmative action opponents in terms of proof. Further, it appears curious that the courts relied on this often thin social science to sustain an admissions policy under strict scrutiny.

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8. The Gurin Report draws on social and cognitive psychology to provide a theory that translates diversity into "deep and complex thinking." Expert Witness Report of Patricia Y. Gurin at 12, *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001) (No. 97-75321), 1998 WL 35140040 [hereinafter Gurin Report], *reprinted in* 5 MICH. J. RACE & L. 363 (1999) (appendices for the report are available at <http://www.vpcomm.umich.edu/admissions/legal/expert/gurinapd.html>). Gurin highlights evidence about scripted, automatic thinking, and evidence that "discontinuity," "incongruity," and "dissonance" can trigger more sophisticated thinking. *Id.* at 11-12. "[H]igher education will be especially influential when its social milieu is *different* from the home and community background, and when it is diverse enough and complex enough to encourage intellectual experimentation and recognition of varied future possibilities." *Id.* at 10 (citing the work of psychologist Erik Erikson).

9. *Id.* at 2.

10. For economy of language, this Note will use the term racial diversity in place of racial and ethnic diversity.

11. *See generally* Brief for Amicus Curiae Nat'l Ass'n of Scholars in Support of Petitioners, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 145515. This critique has been carried forward in a recent Note by Brian Lizotte. Brian N. Lizotte, Note, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625 (2006). However, unlike the NAS, Lizotte takes broad aim at social science generally, arguing that it can never justify policy in the face of exacting constitutional scrutiny. *Id.* at 658 ("Insofar as all social science research is at least partially invalid, it is dangerous to mix it with principled constitutional law."); *see also id.* at 631-32.

The tension underlying the University of Michigan cases resembles the controversy that swept both the nation and the legal academy following *Brown v. Board of Education*.<sup>12</sup> In reaching its decision in *Brown*, the Supreme Court cited social science evidence that segregated education hurts black children.<sup>13</sup> While *Brown* may have inevitably triggered a firestorm of opposition in the South,<sup>14</sup> the Court's use of social science sparked its own heated debate, even amongst those who supported desegregation.<sup>15</sup> Today, many remain uncomfortable with the Court's use of social science evidence in *Brown*.<sup>16</sup> Nonetheless, *Brown* has become a paragon of jurisprudence, widely heralded as a judicial triumph.<sup>17</sup>

Part I of this Note looks at two preliminary matters. First, it examines two ways that diversity has been measured in higher education. Second, it discusses the distinction often made in the literature between numeric diversity and diversity experiences.

Part II then turns to the social science itself. The most in-depth discussion focuses on the Gurin Report and its critiques. However, Part II also examines several other studies cited by the parties and amici and attempts to suggest what, in aggregate, they demonstrate.

Part III examines the way that both the parties and amici utilized social science. It notes that in much of their briefing, plaintiffs refrained from an all out attack on the social science presented by the University, instead relying on legal argumentation. However, the NAS consistently mounted a strenuous attack against the social science data.

Last, in Part IV, this Note examines the courts themselves. Most strikingly, this Note concludes that while many of the decisions in the University of

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12. 347 U.S. 483 (1954).

13. *Id.* at 494 n.11.

14. For a discussion of the South's resistance to *Brown*, see Melvin I. Urofsky, "Among the Most Humane Moments in All Our History": *Brown v. Board of Education* in *Historical Perspective*, in *BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT* 1, 32-38 (Clare Cushman & Melvin I. Urofsky eds., 2004).

15. See Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-68 (1955) (criticizing the social science cited by the Court); see also Jeffrey D. Hockett, *The Battle Over Brown's Legitimacy*, in *BLACK, WHITE, AND BROWN*, *supra* note 14, at 241, 249-50 (describing Ernest van den Haag and A. James Gregor's criticism of the social science).

16. Jack M. Balkin, *Rewriting Brown: A Guide to the Opinions*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 44, 50-53 (Jack M. Balkin ed., 2001). But see Sanjay Moday, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002) (arguing that social science did not have determinative force in the *Brown* opinion).

17. Before taking the bench, Judge J. Harvie Wilkinson noted that *Brown* was "among the most humane moments in all our history. It was, with the pardonable exception of a footnote [citing social science], a great political achievement, both in its uniting of the Court and in the steady way it addressed the nation." J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, at 39 (1979).

Michigan cases incorporated social science to either confirm or refute the diversity rationale, no court provided analysis of these data, or explained why it adopted its particular view of the evidence. The discussion of the Supreme Court decisions focuses primarily on *Grutter* because it contains the analysis of the diversity rationale. In *Gratz*, the Court relied on *Grutter*'s conclusion that diversity is a compelling state interest. However, the *Gratz* Court invalidated the University of Michigan's undergraduate admissions policy, finding that it emphasized minority status too much and thus failed to meet the narrow tailoring requirement of strict scrutiny.

In *Grutter*, the U.S. Supreme Court enshrined the diversity rationale into the canon of strict scrutiny, at least for the next twenty-five years.<sup>18</sup> This decision, which clearly passed judgment on the link between diversity and educational benefits, rests uncomfortably on the social science presented to the Court. In the end, one wonders whether the *Grutter* Court, like Justice Powell's opinion, truly relied on science, or the intuition that underlies the statement that "[p]eople do not learn very much when they are surrounded only by the likes of themselves."

## I. THE MEANING OF DIVERSITY

### A. Diversity Defined

The literature quantifies the racial diversity of a student body in two distinct ways.<sup>19</sup> Most studies base numeric diversity on the percentage enrollment of students of color.<sup>20</sup> Others rely on a heterogeneity index that takes into account the varying racial and ethnic groups that exist in a student body.<sup>21</sup> This basic distinction has profound implications for empirical analysis.

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18. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

19. Quantification is a particular problem in the debate over diversity, especially when it enters the courtroom. One reason for this is *Bakke*'s prohibition of quota systems. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-19 (1978) (Powell, J., announcing the judgment of the Court). After *Bakke*, litigants, and the courts, began associating any number attached to a diversity program with this forbidden mechanism. Indeed, even programs that had no concrete numeric target (like those employed by the University of Michigan at the time of *Grutter* and *Gratz*), but sought the enrollment of an inchoate "critical mass," faced labeling as a quota system. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001) (finding Michigan Law School admissions system a virtual quota system because it enrolled similar percentages of underrepresented minorities each year). During oral argument in *Grutter*, at least one Justice suggested that any numeric target might constitute a quota. Transcript of Oral Argument at 33, 40, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 1728613.

20. The Gurin Report, discussed in detail in Part III.A.1, *infra*, uses this unitary approach to diversity. See ROBERT LERNER & ALTHEA K. NAGAI, CTR. FOR EQUAL OPPORTUNITY, A CRITIQUE OF THE EXPERT REPORT OF PATRICIA GURIN IN *GRATZ V. BOLLINGER* 14 (2001), available at <http://www.ceousa.org/pdfs/Gurin1.pdf> (criticizing Gurin for failing to use "indices of dissimilarity, dispersion, or heterogeneity").

21. See Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on*

For instance, under the first method, a school with a student body 25% black and 75% white would have the same amount of “diversity” as a school with a student body 10% black, 5% Asian American, 5% Latina/o, 5% Native American, and 75% white. Under the second methodology, such schools would have dramatically different amounts of “diversity.”

These two methodologies also have different implications. The first, used in much of the literature available to the courts in the University of Michigan cases, suggests that the diversity rationale predominantly concerns itself with the experience of white students interacting with the unfamiliar. For instance, for matriculating first-year students at the University of Michigan, 90% of white students had lived in racially and ethnically segregated neighborhoods and attended segregated schools growing up. However, only 50% of black students grew up in similarly segregated situations.<sup>22</sup>

Despite this disparate experience with residential integration, one expert witness for the University of Michigan, Professor of History Thomas Sugrue, hypothesizes that neither black nor white matriculating students have been substantially exposed to one another. “Whites, particularly youth, are unlikely to have any sustained or serious contact with African Americans, Hispanics, or Native Americans.”<sup>23</sup> Black youth, on the other hand, are “unlikely to have any sustained contact with whites outside of their workplaces, with the exception of authority figures such as teachers, shopkeepers, and police officers.”<sup>24</sup> Even in Sugrue’s assessment, young blacks have been exposed to whites in some contexts. While Sugrue emphasizes the similar experiences of black and white youth with respect to each other, the two groups may be even more similar with respect to their exposure to other underrepresented minorities, such as Latinos or Native Americans.<sup>25</sup>

Since many white students have little experience with historically disadvantaged (and currently underrepresented) minorities, exposure to any

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*Campus*, in DIVERSITY CHALLENGED, *supra* note 7, at 175, 178. Neither of these methodologies (nor the diversity rationale generally) easily applies to people of mixed race. For a discussion of the complex relationship between multiracial identity and affirmative action, see Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 ASIAN PAC. AM. L.J. (forthcoming 2007).

22. See Patricia Gurin, Wood & Sherman: Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Critique by the National Association of Scholars of the Expert Witness Report of Patricia Gurin in *Gratz, et al. v. Bollinger, et al.* and *Grutter v. Bollinger, et al.* 5 (May 30, 2001), <http://www.vpcomm.umich.edu/admissions/research/gurin.html> [hereinafter Gurin, May 30 Response].

23. Expert Witness Report of Thomas J. Sugrue, *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001) (No. 97-75321); *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), *reprinted in* 5 MICH. J. RACE & L. 261, 266 (1999) [hereinafter Sugrue Report].

24. *Id.*

25. For a discussion of increasing racial isolation of grade school students, see ERICA FRANKENBERG & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS (2002).

student of color could provide equivalent benefit. However, many more students of color have grown up interacting with whites, at least in some capacity. The unitary measurement of diversity masks the fact that allowing underrepresented minorities to interact with other underrepresented minority groups may create its own benefits. While unitary categorization of students of color may make for easy mathematics, it calls into question the seriousness with which affirmative action advocates take the diversity rationale. If it is “diversity” we want, surely the two schools described above have succeeded to different degrees.

Such a unitary approach also undermines the insistence of affirmative action advocates that diversity requires race-conscious admissions for underrepresented minorities. If, as some affirmative action critics claim, dispensing with racial preferences will merely reallocate students of color from black and Latina/o students to Asian American students,<sup>26</sup> then race-conscious admissions are unnecessary to reap the rewards quantified in studies of racial diversity. If, however, increased heterogeneity magnifies the benefits of diversity, then schools should tailor their race-conscious programs to attempt to maximize the number of different racial and ethnic groups represented in the student body.

None of the researchers discussed in this piece appear to believe that all students of color are essentially interchangeable. Nonetheless, many use unitary diversity metrics, thereby obscuring the effect of increased heterogeneity and symbolically lumping together all students that are not white.

#### B. Numeric Diversity or Diversity Experience

Diversity could directly impact learning independent of any interaction. The very sight of those of different races could broaden the mind. Indeed, in the University of Michigan cases, some opponents of affirmative action consistently tried to argue that the school had to prove that sheer numbers of minorities, absent cross-racial interaction, improved education.<sup>27</sup>

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26. While this argument has been suggested by critics of affirmative action, *see, e.g.*, Stephan Thernstrom, *Farewell to Preferences?*, PUB. INT., Winter 1998, at 34, 41 (arguing that the adoption of race-blind admissions policies at Boalt Hall “had no disparate impact on people of color in general” (internal quotation omitted)), the hypothesis is not generally borne out by the data, *see* William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom’s Rhetorical Acts*, 7 ASIAN L.J. 29, 39-40 (2000); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 15-16 (1997). Nonetheless, framing diversity as the raw number of students of color muddies the water, undermining efforts to create a critical mass of each underrepresented minority, rather than a critical mass of the “most qualified” racial grouping.

27. Critics contended that Gurin’s data would only be relevant if it could correlate numeric diversity with improved outcomes while controlling for diversity experiences. THOMAS E. WOOD & MALCOLM J. SHERMAN, NAT’L ASS’N OF SCHOLARS, RACE AND HIGHER



Perhaps it comes as no surprise that benefiting from diversity appears to require more than eye contact. In his acclaimed book on the college experience, *What Matters in College*, Alexander Astin compared a number of educational outcomes to numeric diversity while controlling for cross-racial interaction.<sup>28</sup> He found little correlation.

While the NAS trumpeted Astin's findings as a rout for affirmative action,<sup>29</sup> its adherents have argued that numeric diversity translates into benefits through a variety of mechanisms of interaction.<sup>30</sup> As Gurin argues, "Structural diversity is essential but, by itself, usually not sufficient to produce substantial benefits; in addition to being together on the same campus, students from diverse backgrounds must also learn about each other in the courses that they take and in informal interaction outside of the classroom."<sup>31</sup> In other words, it is diversity experiences, and not raw numeric diversity, that lead to positive outcomes.

Theory supports the view that numeric diversity itself is insufficient. For instance, reduction of negative stereotypes, a benefit often subsumed in the diversity rationale,<sup>32</sup> flows from cross-racial interactions whose participants are of equal status, have an opportunity to get to know one another, and pursue a common goal.<sup>33</sup> Other educational outcomes associated with diversity may also require interaction, rather than the mere presence of minorities. If so, few conclusions can be drawn from Astin's findings. While numeric diversity is essential because it provides opportunities for cross-racial interaction, only

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EDUCATION: WHY JUSTICE POWELL'S DIVERSITY RATIONALE FOR RACIAL PREFERENCES IN HIGHER EDUCATION MUST BE REJECTED 79, 81, 114 (2001) [hereinafter WOOD & SHERMAN REPORT]; Thomas E. Wood & Malcolm J. Sherman, *Response to Patricia Y. Gurin and to Ewart A.C. Thomas and Richard J. Shavelson* 5 (June 21, 2001), [http://www.nas.org/reports/grutter\\_appeal/grutter\\_appeal\\_appendix.pdf](http://www.nas.org/reports/grutter_appeal/grutter_appeal_appendix.pdf) [hereinafter Wood & Sherman, *Response*].

28. ALEXANDER W. ASTIN, *WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED* 362 (1993); see also WOOD & SHERMAN REPORT, *supra* note 27, at 82.

29. See WOOD & SHERMAN REPORT, *supra* note 27, at 58, 79; Wood & Sherman, *Response*, *supra* note 27, at 5; see also LERNER & NAGAI, *supra* note 20, at 36.

30. Indeed, Gurin suggests that Astin's findings are consistent with her model. "It is precisely after controlling for diversity experiences that effects of structural diversity . . . ought to disappear under my theory . . ." Gurin, May 30 Response, *supra* note 22, at 11.

31. Patricia Gurin, Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Continuing Critique by the National Association of Scholars of the Expert Witness Report of Patricia Gurin in *Gratz, et al. v Bollinger, et al.* and *Grutter v. Bollinger, et al.* (May 20, 2003), <http://www.umich.edu/~urel/admissions/research/pgurin-nas.html> [hereinafter Gurin, May 20 Response].

32. Scott R. Palmer, *A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education*, in DIVERSITY CHALLENGED, *supra* note 7, at 49, 60-61; see Gurin Report, *supra* note 8, at 18.

33. See generally James L. Werth & Charles G. Lord, *Previous Conceptions of the Typical Group Member and the Contact Hypothesis*, 13 BASIC & APPLIED SOC. PSYCHOL. 351 (1992).

through interaction, which universities can foster through programmatic strategies, do actual benefits accrue.<sup>34</sup>

## II. SOCIAL SCIENCE EVIDENCE ABOUT THE DIVERSITY RATIONALE PRESENTED TO THE COURTS

That diversity experience, rather than simple numeric diversity, may be the mechanism that confers educational benefits makes studying the question more difficult. Because the actions of educational institutions can drastically change the campus racial climate, and thus the amount of cross-racial interaction, modeling the impact of diversity is challenging. Ideally, evidence would demonstrate each causal step: that numeric diversity translates into increased cross-racial interaction and increased classroom diversity, and that cross-racial interaction and classroom diversity translate into beneficial educational outcomes. In the best case for affirmative action proponents, such studies would indicate strong benefits for all students. After all, race-conscious admissions have to survive strict scrutiny; insignificant or unevenly distributed benefits may not make the grade.

This Part examines several studies either submitted to courts or cited in the briefs of the parties or their amici. Three broad categories of studies are discussed: first, studies that attempt to examine this two-step chain of causation; second, one experimental study that attempts to measure the cognitive effect on white students of participating in a discussion with a member of a minority group; and third, several studies that look at faculty and student polling data. I discuss the Gurin Report in greatest depth because it is the most heavily cited and discussed study in both the briefing and court opinions.

### A. *Correlating Diversity with Positive Outcomes*

Several studies address the core issue in the University of Michigan cases: does racial diversity lead to positive outcomes for students? As discussed, this question presents two links in a causal chain. First, numeric diversity must (at least in some circumstances) lead to increased numbers of diversity experiences. Second, those diversity experiences must lead to positive outcomes.

The discussion of the data surrounding these issues is divided into three parts. This Part first discusses three studies linking diversity experiences with positive outcomes. Second, it discusses two studies linking numeric diversity to increased numbers of diversity experiences. Last, it discusses a study that cuts the other way—suggesting that increased numeric diversity can lead to negative student outcomes.

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34. See Gurin, May 30 Response, *supra* note 22, at 3.

### 1. *The Gurin Report*

The Gurin Report spawned significant controversy, attempting to establish a link between positive educational benefits and two types of diversity experiences—informal interactional diversity and classroom diversity.<sup>35</sup> Critics published two lengthy critiques, one by Thomas Wood and Malcolm Sherman (Wood and Sherman Report) at the behest of the NAS,<sup>36</sup> and a second by Robert Lerner and Althea Nagai (Lerner and Nagai Report).<sup>37</sup> Gurin self-consciously does not attempt to correlate her outcomes with numeric diversity, noting that the mere presence of minorities is insufficient.<sup>38</sup>

#### a. Gurin's methodology

Gurin analyzes three longitudinal datasets.<sup>39</sup> First, she examines a sample of national data produced by the Cooperative Institutional Research Program (CIRP data), which includes survey data for 9316 students at close to 200 colleges (these data are the focus of most her discussion, and most of the discussion below).<sup>40</sup> Second, she looks at data produced by the Michigan Student Study (MSS), which included 1321 students at the University of Michigan.<sup>41</sup> Lastly, she looks at students participating in the University of Michigan's Intergroup Relations, Community and Conflict Program (IGRCC),<sup>42</sup> a program designed to teach conflict resolution and foster appreciation for diversity.<sup>43</sup>

Across these datasets, Gurin analyzes the impact of both informal interactional diversity and classroom diversity on educational and democratic values. Gurin estimates classroom diversity based on the number of students who report having enrolled in an ethnic studies course,<sup>44</sup> and informal interactional diversity based on survey questions addressing both numbers of cross-racial friendships and more general cross-racial interactions.<sup>45</sup> These input variables are correlated with educational outcomes, including “growth in

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35. Gurin Report, *supra* note 8, at 6.

36. WOOD & SHERMAN REPORT, *supra* note 27, at 86-114.

37. LERNER & NAGAI, *supra* note 20.

38. *See* Gurin, May 20 Response, *supra* note 31.

39. Gurin Report, *supra* note 8, app. C.

40. *Id.* at 26.

41. *Id.*

42. *Id.*

43. Higher Educ. Ctr., Case Study: University of Michigan (Feb. 28, 2003), <http://www.edc.org/hec/casestudies/umich.html>.

44. Gurin Report, *supra* note 8, at 27. The MSS measures are also based on the inclusion of diversity issues in curricula. *Id.* Hypothetically, a student taking an all-white ethnic studies class would be considered to have experienced classroom diversity. *See* Lizotte, *supra* note 11, at 648.

45. Gurin Report, *supra* note 8, at 27-28.

active thinking processes,” “engagement and motivation,” and “intellectual and academic skills,”<sup>46</sup> and democratic outcomes, including “citizenship engagement,” “racial/cultural engagement” and “compatibility of differences,”<sup>47</sup> and the racial makeup of career and residential decisions.<sup>48</sup> Virtually all of Gurin’s metrics are based on self-assessments and self-reporting.<sup>49</sup>

Both the Wood and Sherman Report and Lerner and Nagai Report offer several critiques of Gurin’s methodology and dataset. The most persuasive critique addresses her assessment of classroom diversity.<sup>50</sup> By measuring classroom diversity based on enrollment in an ethnic studies class, Gurin inevitably conflates the impact of curriculum and diversity.<sup>51</sup> She attempts to deflect this criticism by presenting evidence that racially and ethnically diverse students tend to enroll in ethnic studies courses at the University of Michigan,<sup>52</sup> two-thirds of such classes are made up of between 20 to 80% students of color.<sup>53</sup> Her rebuttal, however, misses the point. While ethnic studies classes may indeed be among the most diverse classes offered, using them as a proxy for the presence of racial diversity in the classroom hopelessly entangles effects of racial and ethnic heterogeneity with effects of particular curricular materials.

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46. *Id.* at 28-29.

47. *Id.* at 29.

48. *Id.* at 30.

49. She does correlate diversity experiences with self-reported college grade point averages but does not find any significant effects. *Id.* at 38.

50. This critique also applies to Gurin’s informal interaction variable of attending a racial/cultural awareness workshop. *Id.* app. C. While her critics do not press her on this point, the outcomes associated with such workshops could result from the curriculum of the workshop.

51. LERNER & NAGAI, *supra* note 20, at 9-10; WOOD & SHERMAN REPORT, *supra* note 27, at 86; *see also* Lizotte, *supra* note 11, at 648. Wood and Sherman argue that the CIRP data should allow Gurin to demonstrate that attending a workshop or ethnic studies class at a campus with more numeric diversity increases outcomes and suggest that her failure to do so provides further evidence that she has not discovered a causal link. Wood & Sherman, *Response*, *supra* note 27, at 6. Unfortunately, this overly simplifies the analytic task facing Gurin. Ideally, she would demonstrate that identical workshops and classes with higher attendance rates of students of color lead to improved outcomes. However, no dataset that Gurin uses has information about the racial composition of classes or workshops, and, furthermore, each class and workshop may differentially promote the types of cross-racial interaction that Gurin’s theory lauds.

52. She also presents some anecdotal support. Gurin, May 30 Response, *supra* note 22, at 7 (“I know from my years of teaching experience that learning from peers and especially from diverse peers is vitally important in undergraduate classrooms.”); *see also* Expert Witness Report of Kent D. Syverud, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), *reprinted in* 5 MICH J. RACE & L. 451, 453 (1999) (“It has been my experience that racial diversity in the Socratic classroom strongly fosters the kind of thinking that the best lawyers need to be able to do.”).

53. Gurin, May 30 Response, *supra* note 22, at 6-7. Gurin suggests that ethnic studies classes at other universities have similar composition. *Id.* at 7 n.1.

This is of particular concern because other social scientists have argued that ethnic studies curricula have independent, positive educational benefits.<sup>54</sup>

Additionally, even if Gurin's data do, in part, capture the impact of students of color in the classroom, they only identify such impacts in ethnic studies classes and say nothing about the impact of racially diverse classrooms in other courses. To adequately get at the effect of diversity in classrooms generally, Gurin would need to look at a range of types of classes with varying degrees of diversity. Since benefits may accrue when a critical mass of students of a racial or ethnic group is reached, such a relationship may be nonlinear. In other words, the addition of minority students may result in few benefits until a critical mass is reached. Further, few additional benefits may accrue from diversity beyond that critical mass.

Critics also charge that Gurin improperly relies upon "soft" outcome variables based on self-reporting and self-assessment.<sup>55</sup> These criticisms take two forms: first, that self-reporting does not accurately capture a person's actual ability (and thus does not capture changes in that ability);<sup>56</sup> and second, that questions about race and diversity may have politically correct answers that lead to skewed responses.<sup>57</sup> Each of these criticisms is largely unfounded because Gurin's study examines relative, rather than absolute, effects. Gurin's critics do not muster any evidence that those with higher measures of diversity will consistently inflate their self-assessments compared to those with lower measures of diversity. Self-assessments may well produce noisy data.<sup>58</sup> However, as long as experience with diversity does not systematically induce respondents to give answers that deviate in a consistent direction, such noise should not undermine confidence in the results of Gurin's analysis.<sup>59</sup> Similarly, it is not clear that experience with diversity increases the pressure on students to answer questions in a politically correct fashion.<sup>60</sup> Finally, many of Gurin's

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54. See Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?*, 25 CHANGE, Mar.-Apr. 1993, at 44, 46-47.

55. WOOD & SHERMAN REPORT, *supra* note 27, at 81, 98; see LERNER & NAGAI, *supra* note 20, at 7; Lizotte, *supra* note 11, at 652-53.

56. LERNER & NAGAI, *supra* note 20, at 26.

57. *Id.* at 17.

58. In other words, if people are bad at accurate self-reflection, self-assessment will produce data that deviates from reality.

59. People's misperceptions about themselves could be either random or systematic. If each person has a randomly determined bias in self-assessment, Gurin's data will contain noise. This noise is incorporated into the p-values Gurin reports and is thus not problematic. Even systematic bias unrelated to the variables Gurin tests will not skew her results. If, for instance, everyone similarly overrates their own abilities, self-assessment will accurately reflect relative abilities. Gurin only runs into trouble if diversity experience directly biases people's self-perceptions about her educational and democratic outcomes.

60. Political correctness may be a problem, however, for polls seeking information about student opinion about diversity and affirmative action, discussed *supra*. Such polls are not comparative, but attempt to report absolute values for student opinion. If students feel pressure to provide the politically correct response, polls may overstate support for

metrics do not in fact have politically correct answers. It is hard to imagine how a self-assessment of critical thinking skills would be shaped by political correctness.

Finally, Gurin's critics assail her democratic outcomes. Wood and Sherman argue that her democratic outcomes are not appropriate indices of educational experience.<sup>61</sup> Alternatively, Lerner and Nagai argue that Gurin's democratic outcomes are merely proxies for political liberalism.<sup>62</sup> While it is true that Gurin uses data about the willingness of respondents to engage in "programs to clean up the environment,"<sup>63</sup> the rest of her outcomes are less partisan, asking respondents about, *inter alia*, their interest in "[i]nfluencing the political structure," "[i]nfluencing social values," "[h]elping others in difficulty," and "[p]articipating in community action program [sic]."<sup>64</sup> While arguments that schools cannot properly aim at such outcomes could surely be the basis for a legislative challenge to affirmative action, no provision in the Constitution prevents educational institutions from attempting to instill democratic values in their students.<sup>65</sup>

#### b. Gurin's outcomes

Gurin reports that her data link improved educational and democratic outcomes to diversity experiences.<sup>66</sup> In each of her analyses, she adds three sets of control variables—student background characteristics, other diversity experience measures, and institutional characteristics (including numeric diversity).<sup>67</sup> She runs multivariate regressions, creating models to test for

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affirmative action.

61. See WOOD & SHERMAN REPORT, *supra* note 27, at 81 n.66 ("Many would question whether Gurin's 'democracy outcomes' are genuine academic outcomes.").

62. LERNER & NAGAI, *supra* note 20, at 17.

63. Gurin Report, *supra* note 8, app. D tbl.D1 (identifying four- and nine-year democracy outcomes).

64. *Id.*

65. Indeed, such an argument seems to run squarely into the doctrine of academic freedom. See, e.g., *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

66. Gurin's analysis is based on CIRP data collected four and nine years after the initial survey. She examines twenty-seven learning outcomes and twenty-two democratic outcomes. Gurin Report, *supra* note 8, at 35-41 & tbls.C1-4. This Note recategorizes Gurin's data slightly. In addition to educational and democracy outcomes, Gurin reports nine-year data for "living/working in a diverse society." This data is not independently discussed in the report itself. Two of the measures, preparation for graduate school and preparation for jobs, will be incorporated into the analysis of learning outcomes. The other "living/working in a diverse society" data, which appear to be metrics of diversity experience, such as whether people have racially diverse friends or whether they discussed "racial/ethnic issues" in the last year, will not be addressed in this Note.

67. Gurin Report, *supra* note 8, app. D. It is possible that some student background characteristics should not be controlled for. Students eager for cross-racial experience because of background characteristics will not have these experiences at an institution without numeric diversity. To the extent these experiences would enhance such a student's

correlations between, on the one hand, enrollment in an ethnic studies class and interactional diversity, and on the other, positive outcomes.<sup>68</sup> While the diversity experiences she quantifies explain only a small portion of the variation of her outcome measures—often only 2 to 3% of the observed variation—these small effects are consistently in a positive direction, especially for white students. Gurin defends these relatively small effects in several ways. First, she argues that policymakers generally consider effects of such sizes.<sup>69</sup> Second, Gurin argues that any single category of diversity experience is bound to have only a small impact.<sup>70</sup> Finally, Gurin argues that “[a] majority of important changes that occur during college are probably the cumulative result of a set of interrelated experiences sustained over an extended period of time.”<sup>71</sup> Thus, students may be profoundly impacted by the array of diversity experiences they encounter during their attendance at an academic institution.

For learning outcomes, Gurin finds that enrollment in an ethnic studies class positively correlates with improved educational outcomes for white students in 62% of models<sup>72</sup> and that informal interactional diversity positively correlates in nearly 69% of models.<sup>73</sup> For white students’ democracy outcomes, Gurin finds enrollment in an ethnic studies class positively correlates in nearly 99% of models,<sup>74</sup> and informal interactional diversity correlates positively in almost 91% of models.<sup>75</sup>

Interestingly, diversity experiences do not appear to impact self-reported undergraduate grade point average (UGPA), the one “hard” statistic Gurin incorporates into her analysis.<sup>76</sup> However, she points out that “grades, drop-out,

education, controls will under-report the impact of diversity.

68. *Id.* Each model uses one of her variables for informal interaction.

69. Gurin, May 30 Response, *supra* note 22, at 20 (“The size of these effects is commonly viewed in social science as highly consequential for policy, especially when outcomes and predictors are likely to be measured with substantial random error, as they typically are in studies of college impact.”).

70. *Id.* at 15 (“Any *one* effect of a single measure of diversity experience on a single measure of educational outcomes is bound to be small.”).

71. *Id.* at 16 (quoting ERNEST T. PASCARELLA & PATRICK T. TEREZINI, *HOW COLLEGE AFFECTS STUDENTS: FINDINGS AND INSIGHTS FROM TWENTY YEARS OF RESEARCH* 610 (1991)).

72. Gurin Report, *supra* note 8, app. D, tbl.D1. Unless otherwise noted, this Note only reports those results that remain significant after control variables are added.

73. *Id.* In one model, informal interactional diversity has a small, significant negative correlation with job preparation ( $r = -0.009$ ), which remains significant after the addition of control variables. *Id.* This is the only significant negative finding for white students and, while significant, only explains 0.008% of the variation in reported outcomes.

74. *Id.* tbl.D1.

75. *Id.*

76. For white students, no significant relationship exists between classroom diversity and self-reported UGPA in any model. Informal interactional diversity positively correlates with UGPA in two models ( $r = 0.098$  and  $0.068$ ), one of which remains significant after the addition of all control variables. However, informal interactional diversity also negatively correlates with UGPA in another of her models ( $r = -0.037$ ), although the significance does

admission to graduate school, and performance on standardized tests do not measure active, complex thinking or intellectual engagement . . . . Specific knowledge will fade over time. Engagement in learning and active thinking will not.”<sup>77</sup> Nonetheless, it is disturbing that diversity has so little impact on grades. While grades may not directly test intellectual engagement and active, complex thinking, these characteristics would intuitively seem to improve them. For instance, one would imagine that an intellectually engaged student would spend more time studying and thus improve their academic performance.

The data Gurin presents are not as rosy as she makes them out to be. While she demonstrates consistent (yet small) positive impacts for white students, diversity experiences appear to correlate negatively with some of her outcomes for students of color. As a preliminary matter, Gurin adopts a different threshold of significance for her analysis of black and Latina/o students than for white students—using a threshold of significance of  $p < 0.10$  for her minority data.<sup>78</sup> Gurin explains this differential analysis as being necessitated by the small number of black and Latina/o students in her sample.<sup>79</sup> However, a 10% threshold of statistical significance is sufficiently lenient to undermine confidence in her results.<sup>80</sup>

In particular, Gurin finds that enrollment in an ethnic studies class does little good for black students’ learning outcomes, negatively correlating with self-reported grade point average, critical thinking ability, and value placed on analytical and problem solving skills, and positively correlating only with graduate school preparation.<sup>81</sup> Gurin provides no explanation for these negative correlations between membership in a historically disadvantaged racial group

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not persist after the addition of control variables. *Id.*

77. Gurin, May 20 Response, *supra* note 31, at 8.

78. Gurin Report, *supra* note 8, app. D. Gurin provides no sample size of black and Latina/o students. The difference between a  $p < 0.05$  and  $p < 0.10$  is substantial.  $P < 0.05$  indicates that the results could have occurred by random chance in one of twenty times compared to one of ten times for  $p < 0.10$  (i.e., twice as likely to reject a null hypothesis when it is true).

79. Gurin Report, *supra* note 8, at 32 n.1.

80. This is of particular concern given the relative paucity of significant results Gurin finds for minority students. If data were entirely random, i.e., diversity had no impact on benefits, Gurin’s threshold would produce significant results 10% of the time. As discussed below, Gurin often finds correlations between diversity and her outcomes for minority students in 20-30% of her models, alarmingly close to the number of significant results one would expect to see given a random distribution.

81. Gurin Report, *supra* note 8, app. D tbl.D2. Classroom diversity has between a -0.141 and -0.151 correlation with UGPA under her various models and remains significant after all controls variables are added in three of her four models. It negatively correlates with analytical and problem solving skills in all four models, with correlations ranging from -0.133 to -0.138. It also negatively correlates with critical thinking in one model with a correlation of -0.029. Classroom diversity has a 0.162 correlation with listening abilities in the four-year outcomes (but the significance does not persist with control variables) and between a 0.224 and 0.233 correlation with graduate school preparation (which remains significant after control variables).



and taking an ethnic studies class. While this could result from curricular effects or exposure to racial diversity, it is also possible that some minority students take ethnic studies classes to escape white-dominated academic contexts that they find difficult. Thus, depressed UGPA may simply be a symptom of challenges facing minority students that might lead them to take ethnic studies classes.

Informal interaction diversity has a modestly positive effect on black students, positively correlating with learning outcomes in just 17% of models.<sup>82</sup> Democracy outcomes fare somewhat better, with enrollment in an ethnic studies class correlating positively in almost 14% of her models<sup>83</sup> and interactional diversity correlating positively in 28% of her models.<sup>84</sup>

Outcomes for Latina/o students are also mixed. For learning outcomes, enrolling in an ethnic studies course has positive correlations in about 26% of models,<sup>85</sup> and correlates positively with self-reported UGPA in all four models.<sup>86</sup> Informal interactional diversity has positive correlations with learning outcomes in 6% of models.<sup>87</sup> Informal international diversity also negatively correlates with one of the models for both creating artistic works and writing original works.<sup>88</sup> For democracy outcomes, enrollment in an ethnic studies course has positive correlations in 23% of models,<sup>89</sup> and informal interactional diversity has positive correlations in 20% of models.<sup>90</sup>

In addition to the disparate findings for white students and students of color, the Wood and Sherman Report identifies a second problem. Particular personal and political attitudes of individuals may lead to both increased experience with diversity and also lead to the educational and democratic outcomes Gurin detects.<sup>91</sup> In other words, a certain personal characteristic may

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* tbl.D3.

86. *Id.*

87. *Id.* Informal interactional diversity does positively correlate with UGPA in one model ( $r = 0.156$ ), but the significance disappears with the addition of control variables.

88. *Id.*

89. *Id.* Mysteriously, the version of Appendix D hosted on the University of Michigan website does not include data for five of the democracy outcomes for Latina/o students. *See id.*

90. *Id.*

91. WOOD & SHERMAN REPORT, *supra* note 27, at 98. Similarly, personal characteristics that make a student particularly open to cross-racial friendships or informal interactions could demonstrate a predilection for complex thinking. This problem is perhaps at its strongest when Gurin uses the CIRP data to correlate diversity experiences with post-college residential selection, concluding that those who experience more diversity also chose to live in more diverse communities. *See id.* at 108. Gurin's failure to control for geography is problematic. While pervasive residential segregation may suggest that students living in diverse neighborhoods are actively seeking out such contexts, *see, e.g.*, Sugrue Report, *supra* note 23, at 272-80, surely a student in New York City faces a higher raw probability of both

make it more likely for students to engage in cross-racial interaction and for them to experience improved outcomes, without the two being causally linked. For instance, during college, students might become increasingly interested in “promoting racial understanding,” one of Gurin’s democracy outcomes. This interest then leads them to engage in cross-racial interactions. Such a chain of events—i.e., in which diversity experiences do not cause positive outcomes but are a result of them, or where changes in an outcome variable and experience with diversity are both connected to the same personality trait but wholly independent—would lead to the correlations that Gurin finds, but without evidencing that diversity experiences result in benefits.

Teasing apart the difference between correlation and causation is always a challenge in social science.<sup>92</sup> Gurin attempts to refute this critique, in part, by noting that in her Michigan dataset, which corroborates the results of her CIRP analysis, she controls for many personal characteristics of students when they entered college.<sup>93</sup> While such controls help, they cannot address personal change during college itself. Indeed, such controls may obscure some important data. A person could, for instance, arrive at college predisposed to engage in cross-racial interaction, and then derive educational benefits from that interaction. Any benefits that accrue to such a student are a direct result of diversity; someone hungry for cross-racial interaction cannot have these experiences without numeric diversity. Thus, Gurin’s data may not include some educational benefits stemming from diversity—and thus supporting the diversity rationale.

Because of the character of Gurin’s data, which look at students in snapshots with considerable time lag, she must fall back on her theoretical model<sup>94</sup> to suggest the causal connection between diversity experience and outcome. In other words, Gurin may be able to determine that during college a student both engaged in diversity experiences and experienced some sort of cognitive improvement. However, her data lacks the resolution to determine which of these things happened first.

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having informal cross-racial interactions and living in a neighborhood of mixed race than a student at the University of Maine does.

92. One commentator argues that without controlled experimentation, no information about causation can be derived. Lizotte, *supra* note 11, at 654-55. This claim seems both too strong and underinclusive. Even randomized, controlled experiments of the type Lizotte lauds, *id.* at 654, can only provide a statistical inference of causal connections. If Lizotte will only be satisfied by certainty, no scientific investigation will do. Perhaps the law is willing to accept the risks associated with *de minimis* levels of uncertainty—after all, jurors are only charged with returning guilty verdicts beyond a reasonable doubt.

93. Patricia Gurin, Lerner & Nagai: Evidence for the Educational Benefits of Diversity in Higher Education: An Addendum (June 9, 2003), [http://www.umich.edu/~urel/admissions/research/gurin\\_add.html](http://www.umich.edu/~urel/admissions/research/gurin_add.html).

94. For discussion of support for her theoretical model, see *supra* notes 7-8 and accompanying text.

A final problem with Gurin's Report is that it only addresses one element in the causal chain that links increased numeric diversity (achieved through race-conscious admissions) with beneficial outcomes. Gurin provides no empirical evidence linking increased numerical diversity and diversity experience. Gurin attempts to deflect this criticism in three ways. First, she makes passing reference to other data that have linked numeric diversity to diversity experiences.<sup>95</sup> Second, she argues that institutional behavior translates numeric diversity into diversity experience, and it is thus not a directly testable link:

There is nothing automatic about the impact of percentage [sic] of minority students on a college campus. Having diverse students on the campus is necessary, but universities also have to make use of structural diversity. Universities have to create educational programs and to foster actual interaction with diverse peers for campus racial diversity to have an impact on students.<sup>96</sup>

Third, she appeals to intuition. She argues that her model does not suggest that increased numeric diversity will lead to an increased magnitude of positive outcomes, but only that numeric diversity will allow more students to engage in these experiences.<sup>97</sup>

However, it is not clear how these responses resolve the empirical challenge presented by her critics. The studies she cites are not sufficient to rebut her critics with empirics. Further, it may be true that her theory requires institutional behavior to translate numeric diversity into diversity experiences, and thus numeric diversity will not correlate directly to outcome. However, this too is testable, and she does not back it up empirically. Her third defense is even more of a non-starter. Whether numeric diversity allows an increasing number of students to have diversity experiences is something that she could test using the data she has.<sup>98</sup> Gurin's critics are not challenging her to

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95. Gurin mentions such data in one of her responses to her critics: "Chang, Astin, and Kim, using a different CIRP data set, substantiate that diversity experiences are more widespread where structural diversity is greater." Gurin, May 20 Response, *supra* note 31, at 3. However, she provides no citation to these articles. The Chang piece is likely the one discussed in Part II.A.3, demonstrating some connection between numeric diversity and cross-racial socialization and discussing racial issues. Chang's data provide some support for this link, and it seems odd that Gurin does not highlight the study more prominently. It is less clear which pieces by Kim and Astin she is referring to. Based on a review of all briefs submitted to the U.S. Supreme Court, no piece by either author supports this proposition.

96. Gurin, May 30 Response, *supra* note 22, at 4-5.

97. *Id.* at 12. She does suggest one mechanism by which numeric diversity can lead to diversity experiences: increasing the number of students of color will increase the probability of multiracial small classes. Such classes may provide opportunities for students to have diversity experiences. *Id.* at 13.

98. In the CIRP dataset, Gurin has information about the numeric diversity at each school (she actually controls for this). She could correlate these numeric diversity numbers with her diversity experiences. This does not, of course, get at what must be her central defense: that institutions need to implement programs to translate numeric diversity into diversity experience. However, such correlations would have been helpful to her argument.

demonstrate that increased diversity leads to higher magnitude outcomes; instead, they are asking for proof that numeric diversity has the benefits that Gurin implicitly suggests.

While her appeal to intuition may be empirically testable, it may, nonetheless be her strongest response. The idea that increased numbers of students of color will increase the number of people that interact with students of color is appealing to supporters of affirmative action.<sup>99</sup> However, such an appeal is not conclusive. As Wood and Sherman suggest, it may be that “[Gurin’s] statistical evidence will be compelling only to those who were convinced of the educational value of diversity before any statistical evidence was introduced.”<sup>100</sup>

## 2. Other studies linking diversity experience to positive outcomes

Two other studies analyze CIRP data to examine the relationship between diversity and democratic and learning outcomes.<sup>101</sup> Both analyze the impact of diversity experiences.<sup>102</sup>

Mitchell Chang compares student surveys in 1985 and 1989 at 392 four-year colleges using a heterogeneity index to measure diversity.<sup>103</sup> He examines the relationship between two metrics of diversity experience (cross-racial socialization and discussion of racial issues) and four outcomes (retention rates, reported satisfaction with college, intellectual self-confidence, and social self-confidence).<sup>104</sup> In all of his analyses, Chang adds control variables for student and institutional characteristics and intermediate outcomes.<sup>105</sup>

99. One could argue just the reverse: as minority enrollment increases, so too does the danger that an institution will be characterized by self-segregation.

100. Wood & Sherman, *Response*, *supra* note 27, at 2.

101. Yet another study in *Diversity Challenged* examines the relationship between numeric diversity (measured as black student enrollment) and post-college wages, finding positive effects for white and black men and black women, but not for white women. Kermit Daniel et al., *Racial Differences in the Effects of College Quality and Student Body Diversity on Wages*, in *DIVERSITY CHALLENGED*, *supra* note 7, at 221, 228. While this wage premium may provide ancillary support for the diversity rationale, it does not directly evidence educational differences and is thus not explored in more detail in this Note.

102. Chang, *supra* note 21; Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in *DIVERSITY CHALLENGED*, *supra* note 7, at 187, 191. Chang’s results were also reported in the *Journal of College Student Development*. Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population*, 40 J.C. STUDENT DEV. 377 [hereinafter Chang II]. This Note’s discussion of the study will rely primarily on the chapter in *Diversity Challenged*, but will augment it with discussion from the journal article where it adds additional insight.

103. Chang, *supra* note 21, at 177-78. The CIRP data Chang uses includes surveys from 192,453 first-time students at 365 institutions in 1985 and follow-up surveys from 18,188 students at 392 four-year colleges in 1989, adjusted to reflect non-response. *Id.* For a discussion of heterogeneity index methodology, see *supra* Part I.A.

104. *Id.* at 181. Chang also examines the link between numeric diversity and these two

Chang finds that cross-racial socialization correlates with all four of his outcomes, but that the significance of the relationship only persists for general satisfaction with college and social self-confidence after all control variables are added.<sup>106</sup> Discussing issues of race also significantly correlates with all four outcomes, but the significance only persists for intellectual self-confidence after controls are added.<sup>107</sup> Because Chang controls for some diversity experiences in analyzing each of his inputs, he hypothesizes that each has an indirect impact<sup>108</sup> on all four of his output variables.<sup>109</sup>

Like Gurin's ethnic studies class metric, Chang's "discussion of racial issues" metric may conflate content with diversity. Since such discussions can occur between members of the same race, it is not clear whether it is cross-racial conversation or the subject matter of discussion that is driving these results. However, a second part of Chang's analysis, discussed in more detail below, finds that increased numeric diversity leads to higher reported discussions of racial issues<sup>110</sup>—a student is more likely to discuss issues of race at schools with more students of color (even if such discussions are not necessarily cross-racial themselves). Thus, unlike Gurin, Chang does provide a link that connects this type of experience to increased numeric diversity. This difference is important: while schools may be able to foster discussions of racial issues without increasing numeric diversity, he has at least demonstrated that increasing numeric diversity is one way of achieving these outcomes.

The second study, conducted by Sylvia Hurtado, analyzes a random sample of approximately 4250 students at 309 four-year undergraduate institutions.<sup>111</sup> Hurtado correlates studying with someone of a different race with seven democracy/civic outcomes, five job-related outcomes, and eight learning

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diversity experiences. This portion of his analysis will be discussed at Part II.A.3, *infra*.

105. See *supra* note 67 for discussion of controlling for student background characteristics.

106. Chang, *supra* note 21, at 183 tbl.4 (r = 0.05 after controls for college satisfaction; r = 0.04 after controls for social self-confidence).

107. *Id.*

108. Alexander Astin describes indirect impacts as occurring "when the effect of a particular environmental variable can be completely explained in terms of other 'mediating' variables." ASTIN, *supra* note 28, at 313. Chang concludes that discussing racial issues has a direct impact on intellectual self-confidence (r = 0.05 after controls) and indirectly impacts college retention (r = 0.07 before controls), college satisfaction (r = 0.11 before controls), and social self-concept (r = 0.05 before controls). Chang, *supra* note 21, at 182-83.

109. Chang II, *supra* note 102, at 389, 391.

110. See *supra* notes 97-98 and accompanying text.

111. Hurtado, *supra* note 102, at 192. Hurtado also examines the relationship between taking an ethnic or women's studies course and having faculty of different races and genders and student outcomes, as well as the various types of teaching styles associated with different races and genders. *Id.* at 193-99. However, Hurtado does not exclusively discuss the impact of student diversity, but rather frames her analysis as also exploring curricular and faculty diversity. *Id.* at 198-99.

outcomes.<sup>112</sup> She compares student survey results between 1990 and 1991. Strikingly, she finds that students who reported studying with students of a different race in 1990 reported growth in all of her outcome measures in 1991.<sup>113</sup> For the two most strongly correlated learning outcomes, critical thinking and problem solving skills, studying with someone of a different race explains 1% and 0.6% of the observed variation.<sup>114</sup> Studying with someone of a different race correlates even more strongly with civic outcomes, explaining more than 1% of the variance of four outcomes.<sup>115</sup> These results are stronger than those resulting from enrollment in ethnic and women studies classes, two other input variables she studies, suggesting that “the opportunity to interact with a diverse group of peers is just as, if not more, important to the development of critical skills as is exposure to a curriculum that makes diversity its explicit focus.”<sup>116</sup>

While Hurtado’s results are impressive, it should be noted that she uses a smaller set of control variables in her study, controlling for academic self-concept, high school GPA, hours of study, and college selectivity.<sup>117</sup> How this impacts her results, which have strikingly strong correlations given her relatively small sample size (4253 compared to Gurin’s 9316),<sup>118</sup> is unknown. Hurtado’s results are also of small magnitude, explaining at most 1% of the variation in learning outcomes, and at most 3% of the variation in civic outcomes.<sup>119</sup> Hurtado also provides no empirical evidence that numeric diversity will lead to increased numbers of students studying with students of other races.

### 3. *Linking numeric diversity to diversity experiences*

Increased numeric diversity must lead to increased diversity experiences for the Gurin, Hurtado, and Chang studies to support race-conscious admissions. While Gurin and others argue that institutional policies have a role

112. *Id.* at 197 tbl.3.

113. *Id.* Her results range in significance from  $p < 0.001$  (for six civic outcomes, all five job-related outcomes, and four learning outcomes), to  $p < 0.01$  (for four learning outcomes), to  $p < 0.05$  (for one civic outcome—religious belief and conviction).

114. *Id.* The explained variance is calculated by squaring reported correlations.

115. *Id.* The four outcomes are: acceptance of people of different races/cultures (explained variance of 3.24%), cultural awareness (explained variance of 2.56%), tolerance of people with different beliefs (explained variance of 1.96%), and leadership abilities (explained variance of 1.69%).

116. *Id.* at 198.

117. *Id.* at 197 tbl.3. Gurin controlled for a broad range of individual and institutional characteristics.

118. Recall that Gurin uses thresholds of significance of 0.05 and 0.1, while Hurtado finds effects at the 0.001 level for certain outcomes. *Id.* at 197. Generally, increased sample size leads to increased confidence in correlations, not the reverse.

119. *Id.*

to play in facilitating this transformation, affirmative action proponents still must demonstrate their empirical claim.

Two studies cited in briefs in the University of Michigan cases do indicate some correlation between numeric diversity and certain diversity experiences. In the Chang study discussed above, the author also correlates student racial heterogeneity with his two metrics of diversity experience—cross-racial socializing and discussing racial issues—and uncovers a modest significant relationship between these variables.<sup>120</sup> However, these correlations are perhaps weaker than we would hope in establishing the first link in a two-stage causal story. Increased numeric diversity explains just under 1.5% of the detected variation in cross-racial socialization and less than 0.05% of the variation detected in discussing racial issues.<sup>121</sup>

In their much-cited book, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, William Bowen and Derek Bok also provide some evidence linking numeric diversity and diversity experiences.<sup>122</sup> Bowen and Bok analyze data from the “College and Beyond” database, which includes 93,660 students at thirty-four selective colleges and universities. They analyzed the responses of students who matriculated to their respective institutions in the falls of 1951, 1976, and 1989.<sup>123</sup> Because the College and Beyond database has restricted access and has not been made available to some who would like to reanalyze the conclusions made in *Shape of the River*,<sup>124</sup> its conclusions have not been through the rigors of peer analysis.

Among the metrics they study, Bowen and Bok examine the number of white students reporting that they know two or more black students “well.”<sup>125</sup> They report a correlation between this figure and the percentage of the student body that is black, noting that 60% of white students at schools with more than 5% black enrollment report knowing two or more black students well, as compared to 49% of white students at schools with less than 5% black enrollment.<sup>126</sup> However, Bowen and Bok properly note that their limited

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120. Chang, *supra* note 21, at 181 tbl.2.

121. *Id.* This is only the variance directly caused by the input variables (after all controls have been added). Additional, indirect effects may be attributable to these diversity experiences. However, the raw correlations (without any control variables added) indicate that cross-racial socialization explains just 2.5% of the variance and discussing racial issues explains just 0.64%.

122. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 234-36 (1998).

123. *Id.* at 291-314 app. A.

124. See Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1589-90 (1999).

125. BOWEN & BOK, *supra* note 122, at 231-35.

126. *Id.* at 234.

sample of institutions<sup>127</sup> undermines confidence in this finding. Nonetheless, other data they present on the relationship between enrollment of Native American students and the knowing-two-or-more-well metric provide some additional insight. Native American students enroll in much smaller numbers than black students at the schools Bowen and Bok analyze and only 5% of white students report knowing two or more Native American students well.<sup>128</sup>

The findings of Chang and Bowen and Bok provide modest support for the intuitively appealing idea that increased numeric diversity will lead to increased diversity experiences. Wood and Sherman, however, provide a counter argument: “[I]t can be shown mathematically that if variables A and B are positively correlated, and variables B and C are positively correlated, it is possible that A and C are negatively correlated,”<sup>129</sup> especially where correlations are weak.

While Wood and Sherman may be correct on the math, they provide no counter to the intuitive story. With no theory to explain why numeric diversity would degrade outcomes despite diversity experiences improving them, their mathematics is little more than rhetoric. The Chang and Bowen and Bok data may not be conclusive, but they do provide some comfort. Ex ante, many would anticipate that increasing the number of students of color at a university would increase the amount of cross-racial interaction. The data available suggest that this is at least modestly so.

#### 4. *The Rothman study*

Those skeptical of the evidence that diversity leads to positive outcomes often suggest that direct investigation of attitudes about diversity is skewed because questions often have only one socially acceptable response. To avoid this problem, Rothman, Lipset, and Nevitte conducted a telephone survey asking questions about respondents’ attitudes toward their educational institutions without framing the questions in terms of diversity.<sup>130</sup> Their

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127. *Id.* Their graph comparing these two metrics includes only seventeen data points, suggesting that the analysis was run on only seventeen schools. *Id.* at 235 fig.8.4. As further discussed below, when analyzing institutional characteristics such as numeric diversity, the proper statistical methodology is to use the aggregate statistics of each institution as a data point, rather than to treat each student as an independent data point.

128. *Id.* at 233 tbl.8.3, 235.

129. WOOD & SHERMAN REPORT, *supra* note 27, at 82; *see also* Brief for Amicus Curiae Nat’l Ass’n of Scholars in Support of Petitioners, *supra* note 11, at 12 (citing mathematical critique in Wood and Sherman as refutation of Gurin’s results).

130. Rothman, Lipset, and Nevitte reported the results of their study in two different articles appearing in 2003. Stanley Rothman et al., *Does Enrollment Diversity Improve University Education?*, 15 INT’L J. PUB. OPINION RES. 8 (2003) [hereinafter Rothman, *Does Enrollment Diversity Improve University Education?*]; Stanley Rothman et al., *Racial Diversity Reconsidered*, PUB. INT., Spring 2003, at 25, 30 [hereinafter Rothman, *Racial Diversity Reconsidered*].



telephone poll included 1643 students, 1632 faculty, and 808 administrators at 140 U.S. universities and colleges.<sup>131</sup> Their survey asked respondents about their general satisfaction and their perception of quality of education, student work ethic, and level of preparedness of the students upon entering.<sup>132</sup> The study found negative correlations between black enrollment and general satisfaction and perceptions of work ethic and quality of education.<sup>133</sup> For students, black enrollment was significantly negatively correlated with satisfaction with the college experience ( $r = -0.08$ ), perceptions of the quality of quality of education ( $r = -0.14$ ), and student work effort ( $r = -0.09$ ).<sup>134</sup> Similar results were reported for faculty and administrator respondents.<sup>135</sup> While the most generous reading of these data suggests that black enrollment explains only 0.5% of the variation in general satisfaction and perception of work effort and 2% of the variance for perception of educational quality, these findings are of a similar magnitude to those presented by Gurin and other affirmative action proponents.

However, the survey has one serious problem for its application to the affirmative action debate. Only the most selective colleges in the country use race-conscious admissions programs, and such schools only account for approximately 4% of the annual number of black baccalaureate degrees.<sup>136</sup> The other 96% of black undergraduates receive their degrees from one of the more than 2500 other four-year colleges in the United States.<sup>137</sup> Because of the study's school selection process, a random selection based on the size of the institution, it is likely that the survey results are dominated by schools that have no race-conscious admissions. Thus, the majority of respondents may not have attended schools that utilize race-conscious admissions. Even if the results of the studies are otherwise accurate, the greater number of respondents at less selective colleges could conceal positive experiences at schools like the University of Michigan.

Furthermore, while the Rothman study does attempt to control for a number of institutional variables, such as faculty-student ratio, number of

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131. Rothman, *Racial Diversity Reconsidered*, *supra* note 130, at 30-31.

132. *Id.* at 33.

133. Rothman, *Does Enrollment Diversity Improve University Education?*, *supra* note 130, at 17 (excluding data from historically black colleges).

134. *Id.*

135. Rothman, *Racial Diversity Reconsidered*, *supra* note 130, at 36.

136. See RUSSEL NIELI, *THE CHANGING SHAPE OF THE RIVER: AFFIRMATIVE ACTION AND RECENT SOCIAL SCIENCE RESEARCH* 4 (2004). Indeed, in responding to the Rothman Study, Stephen Raudenbush points out that schools employing affirmative action programs do not enroll more than 12-15% black students. However, the study includes schools that had up to 43% black enrollment. Stephen Raudenbush, *Study on Effects of Diversity Reaches Wrong Conclusion 2* (Mar. 20, 2003), available at <http://www.umich.edu/~urel/admissions/research/rebut-raudenbush.html>.

137. NIELI, *supra* note 136, at 4.

programs offered, and percentage of students living on campus,<sup>138</sup> it does not include any metric that directly looks at institutional financial resources. Surveyed schools with high minority populations could have relatively fewer resources. If so, this could be driving the effects that the Rothman study detects. While the study does find that negative effects persist after controlling for selectivity,<sup>139</sup> it remains unclear the extent to which the experience of competitive schools using race-conscious admissions programs is captured.

Professor Raudenbush at the University of Michigan levels another critique against the Rothman study. He argues that as a non-longitudinal study, comparing survey data across schools at a single point in time, it cannot support any general finding that changes in black enrollment lead to changed outcomes.<sup>140</sup> In conjunction with the failure to analyze elite schools using race-conscious admissions, this problem suggests that the correlations detected are not relevant to the University of Michigan cases.<sup>141</sup>

All told, the Rothman study does not convincingly suggest that numeric diversity causes negative outcomes at the suite of schools engaged in race-conscious admissions programs. However, as we have seen, the evidence that links such race-conscious admissions programs to positive student benefits is incomplete as well. While the Chang and the Bowen and Bok studies did establish some modest correlation between numeric diversity and diversity experiences, and Gurin, Chang, and Hurtado presented evidence of some modest correlation between diversity experiences and student benefits, such data are not conclusive.

### B. Experimental Data Correlating Diversity with Complex Thinking

Anthony Antonio and his colleagues conducted an experimental study testing critical thinking after participation in small discussion groups with varying levels of racial diversity.<sup>142</sup> Their experiment included 357 college students at three universities.<sup>143</sup> Participants were broken into single sex groups

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138. Rothman, *Does Enrollment Diversity Improve University Education?*, *supra* note 130, at 20.

139. *Id.* at 18.

140. Raudenbush, *supra* note 136, at 1.

141. Rothman clearly does not agree with this assessment. He concludes that, “our findings suggest that not all forms of diversity are created equal. The increased presence of black and Hispanic students has not led to the expected improvements.” Rothman, *Racial Diversity Reconsidered*, *supra* note 130, at 38.

142. Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOL. SCI. 507 (2004), available at <http://www.stanford.edu/~aantonio/psychsci.pdf>. While these results were not published prior to the Sixth Circuit’s decision in *Grutter and Gratz*, the study was cited in briefing for the U.S. Supreme Court. Brief of the Am. Educ. Research Ass’n et al. as Amici Curiae in Support of Respondents at 11, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 402134.

143. Antonio et al., *supra* note 142, at 507.

that included three white participants and one research collaborator that was either white or black.<sup>144</sup> Participants received a written prompt about either the death penalty or child labor and wrote an essay about this topic, while sitting with their assigned group, both before and after the discussion. Finally, participants were asked to write an essay about the opposite topic without any discussion.

The experiment's findings suggest that race does influence the perceived dynamics of a discussion and may modestly improve critical thinking of white students.<sup>145</sup> White students perceived black collaborators as offering more novel perspectives on the issues discussed than white collaborators following the same script.<sup>146</sup> The authors also found that the presence of a black collaborator lead to a marginally significant increase in complex thinking for white students' pre-discussion essays. An interaction effect of race and issue was also evident for the final essay on the undiscussed topic.<sup>147</sup> However, no significant effect was found on complex thinking in the first post-discussion essay<sup>148</sup>—in other words, white students were more likely to engage in complex thinking when they knew that they had been put in a group with a black discussant, but had not actually spoken to her, than after having a discussion that included the person of color. Experimenters also collected self-reported data from participants on the extent of their cross-racial contact and found that increased cross-racial contact leads to higher levels of complex thinking.<sup>149</sup>

The results of the Antonio study are mixed for advocates of the diversity rationale. The impact of racial diversity in a discussion group appears to have only marginal significance on complex thinking for white participants—the diversity experience did not result in improved cognition. However, the Antonio methodology included a potentially conflating factor. After writing an essay and having a discussion about a topic, it is imaginable that participants experienced fatigue. As participants became less intellectually engaged with a topic they had repeatedly been asked to address, the awareness of the diversity in their discussion group may have given way to boredom, eliminating any gains. Thus, the second essays may have demonstrated less variation in complex thinking because participants were no longer seriously engaging the material.

The finding that participants who reported more cross-racial interaction outside of the experiment had improved cognition does provide modest support for the diversity rationale.

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144. *Id.* at 508.

145. *Id.* at 509.

146. *Id.*

147. *Id.* For the effect of race on pre-discussion essays,  $p = 0.09$ ; for the interaction effect of race and issue,  $p = 0.049$ . *Id.*

148. *Id.*

149. *Id.*

The fact that white students perceived black discussants as making more novel contributions than white discussants using the same script is equivocal. On the one hand, it could suggest that white students may overemphasize the contributions of minority students without engaging in increased critical thinking. This would mean that in surveys (such as those discussed below), white students might report that black students contribute novel perspectives even when they say the same thing as white students. However, this result could also evidence the anti-stereotyping role that the presence of diversity can have. White students who have had little exposure to black students participating in small discussions may perceive increased novelty because their stereotypic image of blacks is being challenged by the small-group interaction.

### *C. Perceptions of the Importance of Diversity*

Several studies examine the importance that students and faculty themselves place on racial diversity. Such studies are particularly susceptible to the criticism that question formulation will unduly impact outcomes because they do not generate comparative results: survey responses are used to directly indicate the importance of diversity rather than to compare the effects of particular experiences. Nonetheless, the parties and amici widely cited such data to the courts in the University of Michigan case.<sup>150</sup> The attitude seemed to be that students and faculty would best know what was good for education.

#### *1. Favorable impressions of diversity at law school*

Three studies specifically looked at the opinions of law school students about diversity. David Chambers and Gary Orfield each surveyed law school students and alumni. Richard White surveyed law professors.

David Chambers and his colleagues surveyed University of Michigan Law School graduates from the 1970s, 1980s, and 1990s, examining both the career success of alumni and their opinions about the role that diversity played in their education. Contrary to the Gurin data, which suggest that white students may benefit most from experience with diversity during their education, the Chambers study found that minority (and female) students placed greater emphasis on the importance of racial diversity in their education.<sup>151</sup> However, the racial and gender gap regarding perceptions about the importance of diversity decreased in every subsequent decade, and in the 1990 data, 48.6% of white males (up from 20.3% in the 1970s) thought that ethnic diversity played

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150. See, e.g., Brief for Respondents at 47 nn.76-77, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236; Brief for Amicus Curiae Nat'l Ass'n of Scholars in Support of Petitioners, *supra* note 11, at 4-11.

151. David L. Chambers et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 413 (2000).

an important role in their legal education.<sup>152</sup> The authors theorized that this closing gap could result from either white male students growing to appreciate diversity more as increasing numbers of students of color attended the Law School,<sup>153</sup> or that, during the 1990s, white males lost their majority status at the Law School as increasing numbers of racial minorities and female students made them a minority group for the first time.<sup>154</sup>

The Chambers study attempts to bolster its findings with the assertion that “the increased educational value that the law school’s most numerous group, white males, see in diversity cannot be dismissed as simply reflecting differences in the ‘politically correct’ response to questions about the value of diversity.”<sup>155</sup> However, the authors offer no empirical data to bolster this claim. Even if responses are not driven by the “politically correct” response, they may be driven by the personally correct response: if increased numbers of students of color lead to increased numbers of white males having close cross-racial friendships, personal loyalty may partially account for this change in attitude.<sup>156</sup>

More fundamentally, because of the politicization of affirmative action programs during the 1990s (and surely law students were aware of the Court’s affirmative action cases), responses about the importance of racial diversity may simply reflect the political ideology of respondents, rather than their honest assessment of the value it has added to their education. The fact that other studies, such as Gurin’s, find only small variations in educational outcomes heightens this concern. While the small-magnitude effects Gurin detected may be significant from a policy perspective, it seems unlikely that experiences increasing complex thinking by a few percentage points are going to be easily detectable by students.

Gary Orfield and Dean Whitla analyzed Gallup poll data from 1820 current students at the University of Michigan Law School and Harvard Law School.<sup>157</sup> At a general level, 89% of Harvard students and 91% of Michigan

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152. *Id.* at 414 & tbl.5B.

153. *Id.* at 416 (noting that Michigan had 7.6% minorities in the 1970s, 10.2% in the 1980s, and 15.4% in the first seven years of the 1990s).

154. *Id.* at 417.

155. *Id.*

156. Indeed, Chambers finds that white students report having three or more “close friends” of another racial or ethnic background. *Id.* at 418.

157. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *DIVERSITY CHALLENGED*, *supra* note 7, at 154. The Gallup Poll data had a response rate of 81% for students at the two schools. *Id.* Orfield and Whitla do not report the dates of the Gallup Poll, noting only that they conducted a preliminary survey during the spring of 1998. *Id.* at 152. If the Gallup Poll was conducted much later, after the filing of *Grutter*, the increased salience of affirmative action at the University of Michigan may have impacted the results they report—which could explain the fact that respondents from the University of Michigan felt more favorably about diversity than those at Harvard.

students said that racial diversity positively impacted their education.<sup>158</sup> Students also affirmed that diversity impacted their classroom<sup>159</sup> and out-of-class<sup>160</sup> experiences more specifically. At both schools, respondents expressed considerable support for race-conscious admissions, with 45% of students thinking that their law school's existing admissions process did not sufficiently address the need for racial diversity and an additional 36% supporting the existing program.<sup>161</sup>

In addition to asking respondents about their perceptions of the role of diversity and their attitudes about existing admissions programs, Orfield and Whitla analyzed data Gallup collected on the experience of respondents with racial diversity. They found that about 40% of respondents had little or no cross-racial contact growing up. About the same number had significant cross-racial contact.<sup>162</sup> They also asked about the number of cross-racial friendships that respondents currently had. The answers were considerably skewed by race with over 90% of white students, 37% of black students, 29% of Latina/o students, and 53% of Asian students reporting that they had three or more close friends of a different race.<sup>163</sup>

Responses to the close friends question in particular raise concern about the validity of the polling results. A simple calculation using some admittedly rough assumptions is suggestive. If we assume that all reported close friendships were with other law students, that every white law student reporting having three or more cross-racial friendships had exactly three, and that every cross-racial friendship contained one white student and one student of color, then we find that every student of color having more than three cross-racial friends must have had more than nineteen close friendships with white law students.<sup>164</sup> While each of these assumptions is undoubtedly wrong, the magnitude of the discrepancy between the reported cross-racial friendships suggests that respondents of different races may be reacting differently to the questions posed.

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158. *Id.* at 160.

159. For example, by enhancing the way that problems were thought about in class. *Id.* at 160 tbl.11 (students selecting a response that racial diversity enhances classroom discussions: 63.1% at Harvard and 66.4% at Michigan).

160. For example, by enhancing informal exchanges. *Id.* at 160 tbl.10 (students selecting a response that racial diversity enhances informal discussion: 68.1% at Harvard and 73.9% at Michigan).

161. *Id.* at 168.

162. *Id.* at 155 tbl.2 (comparing the highest two answer ratings to the lowest two answer ratings). The racial breakdown of these data is striking. Fifty percent of white respondents rated the amount of cross-racial contact they had had as a one or a two (little to no contact), while only 6% of black respondents answered with those numbers. *Id.* at 156.

163. *Id.* at 157 tbl.5.

164. This calculation is based on the number of participants of each race, *id.* at 155 tbl.1, and the percentage of respondents of each race reporting varying numbers of cross-racial friendships. *Id.* at 157 tbl.5.

One explanation (a favorite of the anti-affirmative action camp) is that white students face pressure to provide politically correct answers to questions about race.<sup>165</sup> Thus, when asked about cross-racial relationships, white students consciously conform their answers to those that send the socially acceptable message. In this case, white students may feel greater social pressure than students of color to answer questions in ways that maximize the appearance that they value racial equality. A related possibility, and one that may be more challenging to disentangle, is that a similar process occurs at the unconscious level. People's values about issues like race can shape their perceptions.<sup>166</sup> Thus, a value commitment to racial equality could lead white students to misperceive the closeness of cross-racial friendships to allow them to validate their own self-image.

While other possibilities may explain this divergent result in reported cross-racial friendships, the data suggest caution in accepting the survey results at face value. While Orfield and Whitla suggest that "the plurality of students believe that not enough has been done to realize this [diversity's] potential fully,"<sup>167</sup> further research would be necessary to ensure that respondents accurately depicted the realities of their law school experiences.

Richard White focused his study on law school faculty, and similarly found high degrees of support for the value of diversity in legal education.<sup>168</sup> He sent surveys to a random sample of 1000 law school faculty and received 558 completed surveys.<sup>169</sup> Respondents were asked to rank, from one to five, the importance of diversity at their institutions. Seventy-four percent gave a diverse student body an importance rating of a four or five.<sup>170</sup> Faculty members were more mixed in their responses to questions about the impact of diversity in the classroom. Forty-four percent believed that diversity raised new issues and perspectives, 58% believed it increased the range of experiences shared, and 55% believed that students of color themselves raised unique issues or perspectives.<sup>171</sup> Conversely, few members of the faculty believed that racial

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165. See Rothman, *Racial Diversity Reconsidered*, *supra* note 130, at 30 (arguing that results of many surveys asking about diversity cannot be trusted because "students are taught that diversity is valuable, asked whether diversity is valuable, and then their positive replies are seen as proof of diversity's value").

166. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Thus, when presented with explicitly racialized situations, many will subconsciously conform their actions to their self-perception as non-racists to avoid cognitive dissonance.

167. Orfield & Whitla, *supra* note 157, at 172.

168. Richard A. White, Preliminary Report: Law School Faculty Views on Diversity in the Classroom and the Law School Community 15 (May 2000), available at <http://www.aals.org/statistics/diverse3.pdf>.

169. *Id.* at 1. He also notes that his response rate was skewed by gender: 63% of women faculty responded while only 51% percent of male faculty responded. *Id.*

170. *Id.* at 3 tbl.3A.

171. *Id.* at 4 tbl.4A.

diversity had decreased either the quality of the law school (8% agreeing or strongly agreeing) or its students (11% agreeing or strongly agreeing).<sup>172</sup> Faculty also reported that they believed that diversity had many benefits for students, with the highest percentage, 72%, giving a four or five rating to diversity's effect on the issues that white students consider.<sup>173</sup>

## 2. Favorable impressions of diversity at undergraduate institutions

Bowen and Bok similarly analyzed survey data to examine student perceptions about diversity.<sup>174</sup> They asked students in their 1976 and 1989 cohort to assess both the priority that their respective institutions placed on diversity and what priority they would desire.<sup>175</sup> The average white 1976 matriculant rated, on a scale of one to five, his or her educational institution's current priority for diversity a 3.7 and desired a priority of 3.9.<sup>176</sup> The average white 1989 matriculant rated the current priority for diversity a 3.8 and desired a priority of 4.2.<sup>177</sup>

Black students rated their institutions' current prioritization of diversity lower and their desired prioritization higher than white students. The average 1976 black matriculant rated his or her educational institution's commitment to diversity a 3.0 and desired a priority of 4.8.<sup>178</sup> The average 1989 black matriculant rated the current priority for diversity a 3.4 and a desired priority of 4.8.<sup>179</sup> Bowen and Bok also demonstrated that neither students with lower SAT scores nor those who were not accepted at their first-choice school were less likely to favor "a great deal" of emphasis on racial diversity.<sup>180</sup>

Bowen and Bok suggest that these data reflect broad support for race-conscious admissions.<sup>181</sup> However, students reported their impressions (and desires) about their institutions' overall prioritization of diversity, not necessarily its prioritization in the admissions process.<sup>182</sup> Respondents answered the question, "Please indicate how much emphasis you believe your undergraduate school *currently* places on . . . [a] racially/ethnically diverse

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172. *Id.* at 5 tbl.5A.

173. *Id.* at 6 tbl.7A.

174. BOWEN & BOK, *supra* note 122, at 241-55.

175. *Id.* at 243, 247.

176. *Id.* at 242 fig.8.5.

177. *Id.* at 444 app. tbl.D.8.4.

178. *Id.* at 246 fig.8.6.

179. *Id.* at 444 app. tbl.D.8.4.

180. *Id.* at 250-51 figs.8.7, 8.8. Indeed, white students with lower SAT scores were slightly more likely to favor a great deal of emphasis on racial diversity than those with higher SAT scores. *Id.* at 250 fig.8.7.

181. *See id.* at 252.

182. Bowen and Bok provide samples of their questionnaires in Appendix A. *Id.* at 315-35.



student body.”<sup>183</sup> While this is suggestive of the admissions process, the fact that this question was juxtaposed with rating the priority the schools placed on such things as “[f]aculty research,” “commitment to intellectual freedom,” and “[a]lumni/alumnae concerns,”<sup>184</sup> may have led respondents to consider diversity programs that their colleges and universities have in place to promote diversity experiences rather than to increase numeric diversity.<sup>185</sup>

### 3. *Negative impressions of diversity*

In their critique of the Gurin Report, Wood and Sherman compile polling data showing that students and faculty do not all favor race-conscious admissions programs.<sup>186</sup> These data come from a number of sources, including the Carnegie Foundation’s faculty opinion polls from 1975 and 1989, CIRP data reported by Alexander Astin, two Roper Center polls, and a Zogby poll conducted for the Foundation for Academic Standards and Traditions.<sup>187</sup>

Wood and Sherman report that in 1975, “74% of faculty either disagreed with reservations or strongly disagreed” with relaxing “normal academic standards” to admit more minority students.<sup>188</sup> In 1989, more than half of undergraduate students, and almost half of graduate students, staff, and faculty at the University of California at Los Angeles thought that the campus climate would improve if the university abandoned race-conscious admissions.<sup>189</sup> A more comprehensive survey of faculty at University of California schools conducted for the California Association of Scholars found that only 31% of faculty supported using racial, ethnic, and gender preferences in hiring, promotion, and admissions rather than “promot[ing] equal opportunities . . . without regard to an individual’s race, sex, or ethnicity.”<sup>190</sup> The NAS sponsored a similar survey of 800 faculty members at public and private four-year colleges nationwide. They found that 56% of faculty members believed that their institutions “should not grant preference to one applicant over another for admission on the basis of race, sex or ethnicity.”<sup>191</sup> A survey conducted for another anti-affirmative action group found that 86% of students thought that

183. *Id.* at 322.

184. *Id.*

185. Indeed, only one other possible priority, “intercollegiate athletics,” could conceivably be asking respondents to consider the admissions process. *Id.*

186. WOOD & SHERMAN REPORT, *supra* note 27, at 37-48.

187. *Id.*

188. *Id.* at 37 (citing the Carnegie Foundation for the Advancement of Teaching 1975 Faculty Poll).

189. *Id.* at 39 (citing ALEXANDER W. ASTIN ET AL., THE UCLA CAMPUS CLIMATE FOR DIVERSITY: FINDINGS FROM A CAMPUSWIDE SURVEY CONDUCTED FOR THE CHANCELLOR’S COUNCIL ON DIVERSITY (1991)).

190. *Id.* at 42.

191. *Id.* at 43-44. Sixty percent of faculty familiar with their institutions’ admissions policies reported the use of such preferences. *Id.* at 44.

“fairness in meeting academic standards” was more important than “achieving ethnic diversity” in admissions decisions; 77% said that minorities should not get a preference in admission.<sup>192</sup> Similarly, a survey found that University of Connecticut faculty opposed “racial preferences in admissions” by a margin of 47% to 35%.<sup>193</sup>

These results stand in contrast to those reported by race-conscious admissions proponents. Language appears to be one principal distinction between the polling methodologies. NAS-sponsored polls juxtaposed fairness with preferences, while other polls asked about the importance of diversity. While some have rejected the findings of the NAS out of hand,<sup>194</sup> the wide divergence between reported opinions about race-conscious admissions suggests that many students and faculty have complex feelings about this politically charged issue—feelings that may lead to different responses depending on how questions are phrased.

While survey data have been widely used to argue for (or against) race-conscious admissions, it is not clear that they have direct application to the diversity rationale. Advocates on both sides may suggest that it is the students and faculty that know the on-the-ground realities of their educational institutions best. However, by framing questions in the highly politicized terms of race-conscious admissions and the importance of diversity to education, rather than trying to independently assess outcomes, researchers run the risk of conflating actual perceptions with political and value commitments. More fundamentally, given the difficulty that social scientists have quantifying the impacts of racial diversity, it seems implausible to believe that students and professors can accurately assess its impacts.

#### D. Conclusion on the Data

Parties to the University of Michigan cases presented courts with an array of empirical evidence about the diversity rationale. Social scientists attempted to link diversity experiences with positive student outcomes. Others went a step further and tried to establish a link between numeric diversity and diversity experiences. One experimental study attempted to link the race of a discussion participant with the perceived novelty of their statements and complex thinking amongst other participants. Others examined the opinions of students and faculty about the importance of diversity to their educational experiences and how they felt about their own institutions’ race-conscious admissions programs. One commentator identified a negative correlation between numeric diversity and general satisfaction, perception of quality of education, and perception of student work ethic.

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192. *Id.* at 45.

193. *See id.* at 47.

194. *Id.*

Despite all of these data, no clear picture emerges. Virtually all of the studies have some degree of methodological flaw, and, at best, correlations exist between certain types of experiences (which may or may not be correlated with numeric diversity) and certain positive outcomes. Even these correlations, however, explain little of the variance in outcomes.

In aggregate, little data demonstrate a link between diversity and positive outcomes for students of color. Gurin's findings are mixed at best, and use a low threshold of significance. Other studies did not distinguish outcomes for white students and students of color. Critics of affirmative action seized upon the discrepancy in Gurin's findings to argue that race-conscious admissions programs may have negative impacts on their supposed beneficiaries.<sup>195</sup> However, Gurin's data on minorities are hardly conclusive. Based on her threshold of significance, we would expect that random data would produce a finding of significance one in ten times. The inconsistent direction of her findings may suggest that some of the results for minority students are artifacts.

A cautionary note in assessing this nationwide data is found in Mitchell Chang's doctoral thesis, which found that increased numeric diversity decreased satisfaction reported by students of color unless colleges or universities created "opportunities to interact in meaningful ways cross-racially."<sup>196</sup> If this is indeed the case, assessing the impact of diversity on the educational outcomes of minority students could require a detailed understanding of the way that each college or university has promulgated diversity programs on their campuses.

However, these mixed findings for minorities are especially troubling in light of other studies that compare educational outcomes for black students at historically black colleges (HBCs) and those at predominantly white institutions (PWIs). Lamont Flowers and Ernest Pascarella found that black students at HBCs had improved reading comprehension scores and self-reported gains in understanding humanities, science, and the arts over their counterparts at PWIs.<sup>197</sup> Similarly, Walter Allen found that students "who attended historically Black universities reported better academic performance, greater social involvement, and higher occupational aspirations than Black students who attended predominantly White institutions."<sup>198</sup>

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195. See LERNER & NAGAI, *supra* note 20, at 37-38.

196. Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 126, 133 (Mitchell J. Chang et al. eds., 2003) (describing Mitchell J. Chang, *Racial Diversity in Higher Education: Does a Racially Mixed Student Population Affect Educational Outcomes?* (1996) (unpublished Ph.D. dissertation, UCLA)).

197. Lamont Flowers & Ernest T. Pascarella, *Cognitive Effects of College Racial Composition on African American Students After 3 Years of College*, 40 J.C. STUDENT DEV. 669, 673 (1999). The effect of attending a HBC was considerably larger than any effect linked to diversity experiences (0.33 of a standard deviation). *Id.* at 674.

198. Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*,

Both of these studies include a potentially serious problem: because they consider only a small number of schools, the reported correlations may be exaggerated.<sup>199</sup> Flowers and Pascarella examine eighteen institutions, including data from students at only two HBCs and sixteen PWIs; the Allen study compares data at only six PWIs and eight HBCs. To illustrate, a biologist using their methodology would compare hundreds of leaves on two oak trees to hundreds of leaves on sixteen maple trees to determine whether maple trees produce larger leaves than oak trees. The sample size of such a study is eighteen, not hundreds. Flower and Pascarella and Allen could have generated aggregate statistics for each institution. This would properly account for the fact that few institutional arrangements are being considered. Alternately, they could have utilized a multilevel model or clustering statistical techniques to account for the fact that students are divided among only a small number of institutional arrangements. While the Flowers and Pascarella and Allen pieces do raise alarming questions about the impact of diversity on students of color, statistical problems may undermine the significance of their findings.

Nonetheless, the data from Flowers and Pascarella and Allen caution that diversity for students of color may be a mixed blessing.<sup>200</sup> If this is indeed the case, affirmative action stands on an odd footing: racial preferences for underrepresented minorities are justified, not for their direct educational benefits to those underrepresented minorities, but because of the benefits that primarily accrue to white students. Some commentators trumpet the fact that white students benefit most under the diversity rationale,<sup>201</sup> but surely neither the schools nor the courts conceive of race-conscious admissions in this way. Imagine a program that used racial classifications to provide benefits to white students without any appreciable benefit (and possible expense) to students of color.<sup>202</sup> It is hard to imagine that such a program would withstand strict scrutiny.

This suggests several possibilities. First, the courts in the University of Michigan cases could believe, with minimal factual support, that racial diversity benefits the educational experience of all students. Second, the courts could believe that the credentialing benefit of attending a selective university or college gives students of color a net advantage from race-conscious admissions sufficient to make up for the fact that diversity primarily benefits white

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62 HARV. EDUC. REV. 26, 39 (1992).

199. See Brent R. Moulton, *An Illustration of a Pitfall in Estimating the Effects of Aggregate Variables on Micro Units*, 72 REV. ECON. & STAT. 334 (1990) (discussing internal correlations inflating findings of statistical significance); see also JOHN NETER ET AL., APPLIED LINEAR STATISTICAL MODELS 1121-54 (4th ed. 1996) (discussing statistical methodology for nested designs, subsampling, and partially nested designs).

200. The Gurin Report, like many of the other studies discussed, excluded data from HBCs from its analysis. Gurin Report, *supra* note 8, app. C.

201. Milem, *supra* note 196, at 131-32.

202. Of course, any particular applicant has the option to turn down an offer of admission.

students. Third, the courts could believe non-cognizable factors, such as remedying societal discrimination, provide ancillary (but unspoken) justifications for race-conscious admissions.

### III. THE USE OF EVIDENCE ABOUT THE DIVERSITY RATIONALE IN THE BRIEFS FILED DURING THE UNIVERSITY OF MICHIGAN CASES

The University of Michigan cases engendered significant interest, resulting in the filing of ninety-four amicus briefs in the U.S. Supreme Court.<sup>203</sup> In terms of sheer numbers, the University of Michigan received far greater support than the plaintiffs,<sup>204</sup> with seventy-five amicus briefs filed on its behalf. Thirteen amicus briefs were filed on behalf of the plaintiffs, and six amici filed briefs on behalf of neither party. Most amici filed their briefs with specific reference to *Grutter*.<sup>205</sup> Only seven amici filed briefs in both cases.<sup>206</sup> However, the operative issues discussed in the briefs filed in both cases were largely the same: addressing the central question of whether race-conscious admissions should be permitted under the Equal Protection Clause when an educational institution is not trying to remedy harms created by its own discriminatory actions.<sup>207</sup>

In total, these amicus briefs cite over 450 secondary sources.<sup>208</sup> The parties' merits briefs alone cite 110 sources.<sup>209</sup> The University of Michigan briefs cite ninety-one sources, while the plaintiffs cite only twenty.<sup>210</sup> More tellingly, the University of Michigan cites secondary sources much more heavily. On the average brief page, defendants cite 0.575 secondary sources,

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203. These numbers were derived from a Westlaw search of SCT-Briefs. The figures do not include procedural briefs filed by would-be amici.

204. Because this Note discusses parties throughout the litigation, it refers to them by their original designations—i.e., plaintiffs and defendants—rather than their designations on appeal.

205. In *Grutter*, amici filed sixty-seven briefs for defendants, nine briefs for plaintiffs, and six briefs for neither party. In *Gratz*, amici filed eight briefs for defendants and four briefs for plaintiffs.

206. For defendants, these included the Lawyers' Committee for Civil Rights Under Law et al., the American Educational Research Association et al., the Bay Mills Indian Community et al., and the Latino Organizations. For plaintiffs, these included the United States Government, the NAS, and the Pacific Legal Foundation.

207. Indeed, the briefs by the NAS explicitly reference each other. The *Grutter* brief does not address the University of Michigan's expert testimony, cross-referencing the *Gratz* brief. Brief for Amicus Curiae Nat'l Ass'n of Scholars in Support of Petitioners, *supra* note 11, at 2.

208. This figure includes law review articles, books, and other scholarly works, but not statistical reports from government agencies, newspaper articles, presidential speeches or papers, university or government websites, or historical documents such as the Declaration of Independence or Gettysburg Address.

209. See *supra* note 208 for inclusions.

210. Both parties cited *The Shape of the River*. See NIELI, *supra* note 136.

while plaintiffs cite only 0.162 secondary sources.<sup>211</sup> Differently quantified, the University of Michigan cites a secondary source on 27.5% of pages, while the plaintiffs cite a secondary source on only 6.6% of pages.<sup>212</sup> Amici followed suit. The parties supporting the defendants cited almost ten secondary sources per brief,<sup>213</sup> while the parties supporting the plaintiffs cited less than three secondary sources per brief.<sup>214</sup>

These statistics are inexact measures of the use each party made of social science data in the context of the diversity rationale for three reasons. First, the parties did not universally cite the expert reports by name, preferring to cite the excerpt of record.<sup>215</sup> Second, some of the secondary literature relied upon contains legal commentary and scholarship that does not have an empirical orientation.<sup>216</sup> Lastly, much of the social science evidence presented to the Court addresses matters other than the question addressed in this Note.<sup>217</sup>

However, limiting the examination to those sources discussed here does not reduce the consistency of this finding. Looking at all amicus briefs filed in *Grutter* and *Gratz*, *The Shape of the River* is the most widely cited piece, cited by thirty amici for the defendants on a total of sixty-nine pages and by four amici for the plaintiffs on a total of seven pages. The Gurin Report is the next

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211. This calculation was based on looking at tables of authority, calculating number of pages each article was cited on, summing all articles, and dividing by the number of pages of briefs.

212. This calculation was based on determining all pages that contain a citation to a secondary source based on the tables of authority and dividing by total number of pages of briefs.

213. This calculation was based on summing all sources cited by amici and dividing by the number of briefs filed in support of the University (sixty-seven briefs). However, the secondary sources selected for inclusion were not the full set examined for the parties' briefs. Rather, only sources that were either in social science journals, or whose title suggested the inclusion of empirical evidence, were included.

214. See note 213 for discussion of this calculation. Fifteen amicus briefs were filed on behalf of the plaintiffs in *Grutter*. Six amici, including two energy companies, the Anti-Defamation League, the Equal Employment Advisory Council, the Criminal Justice Legal Foundation, and the Massachusetts School of Law, filed briefs on behalf of neither party. These briefs cited secondary sources slightly less than those filed on behalf of plaintiffs, with the average brief citing just over two sources.

215. See, e.g., Brief for Respondents at 27, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 402237 (citing to the Joint Appendix pages 1656-59 and 1736-40 for the proposition that "[e]xposing students at a critical period of personal development to situations in which they cannot predict viewpoint or behavior based on race actually undermines and deters stereotypical thinking" as discussed in the Gurin Report).

216. See, e.g., Brief for the Petitioners at 15, 34, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 164186 (citing ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).

217. Indeed, *The Shape of the River* is by far the most cited secondary source in the litigation. While *The Shape of the River* does contain some data useful for assessing the diversity rationale, it primarily studies the academic and career success of students of color at selective institutions and does not examine the relationship of these outcomes to diversity per se.

most heavily cited work, cited prominently in the briefs of both plaintiff and defendant amici. Twenty defendant amici cite the report on a total of forty-six pages. While only four plaintiff amici cite the Gurin Report, they cite it on a total of forty-five pages.<sup>218</sup> Other secondary sources examined in this Note are discussed to a lesser degree.<sup>219</sup>

Part of this discrepancy may have come from a schism among those supporting the plaintiffs. At the Supreme Court, the plaintiffs relied primarily on legal argumentation, rather than trying to undermine the factual support for a link between racial diversity and positive outcomes. At oral argument, for instance, the lawyer for the plaintiffs did not challenge the connection between race-conscious admissions and the types of educational and democratic outcomes studied by Gurin. Instead, he argued that “a mere social benefit . . . doesn’t rise to the level of compelling interest.”<sup>220</sup>

In their briefing, the plaintiffs similarly made little effort to challenge the factual basis of the diversity rationale. In their opening brief in *Gratz*, they suggested that the mere existence of educational benefits does not satisfy strict scrutiny.<sup>221</sup> In their reply brief, plaintiffs argued that “[t]he scope of individual rights guaranteed by the Constitution should not be a matter to be decided in academic conferences and scholarly journals.”<sup>222</sup> The brief did note that “[i]t is far from the case, moreover, that there is any consensus in the social science community about the empirical claims made for diversity.”<sup>223</sup> In their *Grutter* brief, plaintiffs did spend one paragraph discussing the Gurin Report, noting that “[a]stoundingly, Gurin did not even attempt to correlate the racial and

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218. The bulk of these citations occur in two amicus briefs filed in *Gratz*, one by the NAS (citing the Gurin Report on twenty-four pages), *see* Brief for Amicus Curiae Nat’l Ass’n of Scholars in Support of Petitioners, *supra* note 11, and one filed pro se by Duane C. Ellison (citing the Gurin Report on fifteen pages), *see* Brief Amicus Curiae of Duane C. Ellison, Pro se, in Support of Petitioner, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 367212.

219. Other secondary sources are cited as follows: Chambers study—ten briefs for defendants (thirty-eight pages—one brief accounts for twenty-four of the pages); Wood and Sherman Report and Lerner and Nagai Report—four briefs for plaintiffs (nine pages and eleven pages, respectively), one brief for defendants (one page); Hurtado Study—five briefs for defendants (seven pages); Chang Study—four briefs for defendants (four pages); Rothman Study—three briefs for plaintiffs (five pages); Orfield and Whitla Study—fourteen briefs for defendants (twenty-five pages); White Report and Allen Study—two briefs for defendants (four pages and two pages, respectively); Flowers and Pascarella Study—one brief for plaintiffs (two pages); Antonio Study—two briefs for defendants (two pages).

220. Transcript of Oral Argument at 18, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 1728816.

221. Brief for the Petitioners, *supra* note 216, at 40-41. In making this argument, plaintiffs suggest that any effort to remedy societal discrimination might produce educational benefits. However, the government cannot constitutionally justify racial classifications based on such an interest. *Id.*

222. Petitioner’s Reply Brief at 6, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 1610798 (2003).

223. *Id.*

ethnic diversity with the claimed educational benefits.”<sup>224</sup> These arguments are dwarfed by the plaintiffs’ larger argument that educational benefits, no matter how significant, cannot satisfy strict scrutiny. By de-emphasizing the social science, plaintiffs sought to engage the Court in pure legal analysis. This allowed them to frame their argument cleanly; rather than turning to statistics, they encouraged the Court to turn to constitutional principles. Given the antipathy of legal scholars to the use of social science evidence in *Brown v. Board of Education*,<sup>225</sup> plaintiffs may have expected the Court to shy away from relying on evidence about the benefits of diversity.

This emphasis on law, rather than fact, ran through much of the plaintiffs’ briefing. In the district court decision in *Gratz*, the court described plaintiffs’ oral testimony as indicating a “willingness to assume, for purposes of these [summary judgment] motions, that diversity in institutions of higher education is ‘good, important, and valuable.’”<sup>226</sup> However, the plaintiffs did argue more forcefully at the Sixth Circuit. They began similarly, arguing that the court need not reach any question of fact with regard to the diversity rationale. Plaintiffs compared the diversity rationale to remedying societal discrimination and providing role models to children. “But it is beyond dispute that those objectives cannot, as a matter of law, support racial preferences. So too, whatever value diversity may have, it cannot rise to a compelling interest.”<sup>227</sup> However, plaintiffs went on to argue that the University had not demonstrated that diversity creates benefits and argued that “[t]he methodology and conclusions of University of Michigan professor Patricia Gurin have been devastated both in arguments to the district court [citation] and in searching critiques conducted by others.”<sup>228</sup>

Unlike the plaintiffs, their amici, especially the NAS, attempted to refute the evidence supporting the diversity rationale at every turn.<sup>229</sup> Indeed, in its *Gratz* amicus brief filed in the Supreme Court, the NAS discussed the Gurin study on twenty-four pages, and included Gurin’s name in eight of the nine headings listed for its argument section.<sup>230</sup> The brief reiterated the critique of the Gurin study offered in the Wood and Sherman Report that the NAS had

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224. Brief for the Petitioner at 33-34, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 164185.

225. See *supra* notes 14-17 and accompanying text.

226. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 823 (E.D. Mich. 2000).

227. Final Brief of Appellee at 26-27, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (Nos. 01-1447, 01-1516), available at [http://www.cir-usa.org/legal\\_docs/grutter\\_v\\_bollinger\\_6thcir\\_finalbrf.pdf](http://www.cir-usa.org/legal_docs/grutter_v_bollinger_6thcir_finalbrf.pdf).

228. *Id.* at 28 (citing Wood and Sherman critique and NAS amicus brief).

229. See, e.g., Brief for Amicus Curiae Nat’l Ass’n of Scholars in Support of Petitioners, *supra* note 11; Brief for Amicus Curiae Nat’l Ass’n of Scholars in Support of Affirmance, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (Nos. 01-1447, 01-1516), 2001 WL 34624925.

230. Brief for Amicus Curiae Nat’l Ass’n of Scholars in Support of Petitioners, *supra* note 11, at i-ii.



commissioned—i.e., that Gurin fails to link numeric diversity to positive outcomes,<sup>231</sup> that diversity experiences are irrelevant to the cases,<sup>232</sup> that Gurin uses subjective metrics to assess outcomes,<sup>233</sup> and that her effect sizes are too small to be useful.<sup>234</sup> By confronting defendants' social science evidence head on, the NAS provided plaintiffs with the ability to stick tightly to their constitutional arguments. Plaintiffs could afford to argue that social science was irrelevant because the NAS had elsewhere heavily criticized the methodology of the various studies.

Unlike the plaintiffs, the University of Michigan consistently relied on the social science to justify the diversity rationale. This should come as no surprise given the strict scrutiny posture of the case, which required defendants to bear a heavy burden for justifying their use of a racial classification. While the University did not dwell on social science, it used it to bolster the argument that Justice Powell's decision in *Bakke* properly identified diversity as a compelling interest: "This Court's recognition that diversity generates important educational benefits is reinforced by a remarkably uniform and non-ideological consensus among the country's leaders, educators, and social scientists."<sup>235</sup> The brief also went to great pains to distinguish between viewpoint diversity and racial diversity, and to explain how, in the University's view, racial diversity has its own importance separate from viewpoint.<sup>236</sup> Defendants shouldered a heavy burden in attempting to survive strict scrutiny. However, they also appeared to have remembered the lessons of *Brown*. Rather than relying on social science as proof, they sought to transform it into a confirmation of Justice Powell's position in *Bakke*.

Defendants may also have hoped that their social science evidence would paint a complex picture in which the University attempted to balance its myriad objectives with the needs of its applicants. Such a narrative could encourage the Court to defer to the judgment of the school. This complex vision of the intersection of race and admissions stood in stark contrast to plaintiffs' simplistic assessment that any consideration of the benefits of diversity in making admissions decisions was constitutionally impermissible.

Parties and their amici heavily relied on social science in litigating the University of Michigan cases. Defendants' relatively greater reliance is at least partially explained by the fact that they carried the burden of justifying their race-conscious admissions practice under the exacting standards of strict scrutiny. Additionally, the plaintiffs appear, at least during the Supreme Court

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231. *Id.* at 6-13.

232. *Id.* at 10.

233. *Id.* at 14-16.

234. *Id.* at 18-19.

235. Brief for Respondents, *supra* note 215, at 24.

236. *Id.* at 27 ("Exposing students at a critical period of personal development to situations in which they cannot predict viewpoint or behavior based on race actually undermines and deters stereotypical thinking.").

phase of the litigation, to have been divided (or at least to have pursued a divided strategy) about whether to forcefully litigate the factual matter that has been the focus of this Note. Perhaps recognizing the inherent uncertainties of relying on scientific explanations for complex social phenomena, plaintiffs hoped to circumvent the discussion altogether by arguing that no amount of beneficial outcomes could sustain a race-conscious admissions program. Thus, while the marked difference in utilizing secondary sources in general, and addressing the social science discussed in this Note in particular, is striking, it also appears to have stemmed from contrary legal strategies.

#### IV. THE COURTS TACKLE THE SCIENCE BEHIND THE DIVERSITY RATIONALE

The arduous path of the University of Michigan cases through the federal court system provided two district courts,<sup>237</sup> an en banc panel of the Sixth Circuit Court of Appeals,<sup>238</sup> and the United States Supreme Court<sup>239</sup> with the opportunity to consider the social science data mustered by the various parties about the educational benefits of racial diversity. Interestingly, even judges who split on whether diversity could constitute a compelling interest often agreed on the educational benefits that flow from it. Given the tenuous nature of much of the social science data, it is odd that so many judges felt that the University had conclusively demonstrated that racial diversity leads to positive educational outcomes.

Judge Duggan rendered the first opinion on the merits of the University of Michigan's defense in *Gratz*, on December 13, 2000. Judge Duggan found that "[t]he University Defendants have presented this Court with solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body."<sup>240</sup> In the following three paragraphs, Judge Duggan quoted extensively from the Gurin Report. Judge Duggan then turned to the critique offered by the NAS. He noted NAS's objection to Gurin's methodology, in particular its argument that the diversity experiences she tested do not equate with numeric diversity.<sup>241</sup> However, after noting this critique, Judge Duggan concluded that "[t]his Court is persuaded, based upon the record

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237. *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000); *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

238. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). The Sixth Circuit consolidated the two University of Michigan cases and heard the appeal en banc in the first instance. *Gratz v. Bollinger*, 277 F.3d 803, 803 (6th Cir. 2001).

239. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). In *Grutter*, the Court found that the diversity rationale was a compelling state interest and that Michigan Law School's admissions policy was narrowly tailored to that interest. In *Gratz*, the Court relied on the compelling interest analysis in *Grutter* and then determined that the University of Michigan's undergraduate admissions policy was not narrowly tailored.

240. *Gratz*, 122 F. Supp. 2d at 822.

241. *Id.* at 824.

before it, that a racially and ethnically diverse student body produces significant educational benefits.”<sup>242</sup> Based on this rather sparse statement and his review of *Bakke*, Judge Duggan upheld the University’s use of race-conscious admissions procedures to enroll its undergraduate classes.<sup>243</sup>

In *Grutter*, Judge Friedman held that Michigan Law School’s race-conscious admissions process was unconstitutional because it constituted an impermissible quota system<sup>244</sup> and because diversity was not a compelling state interest.<sup>245</sup> Judge Friedman initially appeared to conflate viewpoint diversity and racial diversity,<sup>246</sup> noting that the University’s witnesses largely “conceded that these viewpoints might equally have been expressed by non-minority students.”<sup>247</sup> He then identified a second justification for diversity: that it breaks down stereotypes and promotes “cross-racial understanding.”<sup>248</sup> The opinion cited the Gurin Report, stating that “[t]he court does not doubt that racial diversity in the law school population may provide these educational and societal benefits.”<sup>249</sup> Nonetheless, Judge Friedman did not find this to be a sufficient justification for race-conscious admissions.

While Judge Friedman’s opinion treated the social science data more skeptically than Judge Duggan’s opinion—note that he found that diversity “may” provide benefits, and he misconstrued the defendants’ argument that students of color will have perspectives informed by race, even if they are substantively similar to those of white students—its similarity to Judge Duggan’s opinion with respect to the treatment of social science is noteworthy. Plaintiffs may not have hotly contested the point. However, neither decision found the social science submitted to the court irrelevant because of a concession by the plaintiffs. Indeed, while neither judge provided an analysis of why he viewed the social science in a particular way, both assumed that it was relevant to their respective decisions.

The judges in the Sixth Circuit were more clearly divided in their opinion of the social science. Oddly, the majority opinion did not refer to the data at all, instead relying on Justice Powell’s *Bakke* concurrence as dispositive.<sup>250</sup> The

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242. *Id.*

243. *Id.* at 836.

244. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001).

245. *Id.* at 850.

246. *Id.* at 849 (“The defendants walk a fine line in simultaneously arguing that one’s viewpoints are not determined by one’s race but that certain viewpoints might not be voiced if students of particular races are not admitted in significant numbers.”). This portion of Judge Friedman’s opinion led one commentator to note that “Friedman minimized the Defendant’s evidence on this issue [of diversity] by tersely opining about the difference between racial diversity and viewpoint diversity.” Kidder, *supra* note 5, at 179.

247. *Grutter*, 137 F. Supp. 2d at 849-50.

248. *Id.* at 850.

249. *Id.* Note that Judge Friedman did not even bother addressing the critique of the Gurin Report raised by the NAS.

250. *Grutter v. Bollinger*, 288 F.3d 732, 738-39 (6th Cir. 2002).

concurring opinion of Judge Clay, however, discussed the social science data at length, under the heading “The Evidence Supports Diversity as a Compelling Governmental Interest.”<sup>251</sup> Judge Clay found that a “wealth of legal scholarship—including a study involving students at the University of Michigan . . . document[s] through empirical evidence, the positive impact of diversity in education.”<sup>252</sup> Judge Clay then quoted heavily from the Gurin Report’s “Summary and Conclusions” section.<sup>253</sup> Judge Clay concluded that “[i]n light of Gurin’s study and, perhaps more importantly, the data and empirical evidence backing her findings on the value of a diverse student body, those who like the dissent are skeptical of characterizing diversity as a compelling governmental interest . . . find themselves standing on ill footings.”<sup>254</sup> Despite his strongly worded approval of the Gurin study, nowhere did Judge Clay address the critiques offered by the NAS, nor did the judge suggest why Gurin’s data successfully demonstrated the impact of racial diversity on outcomes despite examining only diversity experiences and providing no evidence that such experiences are made more likely by numeric diversity.

Judge Boggs’ dissent, on the other hand, found that “[t]he Gurin report is questionable science, was created expressly for litigation, and its conclusions do not even support the Law School’s case.”<sup>255</sup> Judge Boggs was unpersuaded for three reasons. First, he objected to the fact that the Gurin Report did not quantify the amount of diversity necessary to attain positive outcomes. Second, he, like the NAS, argued that self-reported data are inherently unpersuasive and subjective. Third, he noted that the Gurin Report never linked numeric diversity with positive outcomes, but constrained its analysis to diversity experiences.<sup>256</sup> Judge Boggs even raised the argument that the work of Alexander Astin had essentially refuted Gurin’s empirical claims.<sup>257</sup> Rather than relying on empirical data, Judge Boggs relied on hypotheticals, arguing that the flaws in the diversity rationale are made apparent by the fact that a privileged black applicant would still receive preferential admissions.<sup>258</sup>

Interestingly, neither Clay’s concurrence nor Boggs’s dissent discussed any social science data brought to the court’s attention through the briefs of parties

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251. *Id.* at 759 (Clay, J., concurring).

252. *Id.*

253. *Id.* at 760-61 (quoting Gurin Report, *supra* note 8, at 3).

254. *Id.* at 761-62.

255. *Id.* at 803 (Boggs, J., dissenting).

256. *Id.* at 804-05.

257. *Id.* at 805 n.36. Recall that Astin controlled for the diversity experiences that Gurin believes mediate positive educational outcomes.

258. *Id.* at 790-91. It seems odd that Judge Boggs fixated on his hypothetical student from “Grosse Pointe” given the fact that defendants argued explicitly that such students would add to diversity by bringing the experiences of an affluent minority.

and amici other than the Gurin Report. It seems that an empirical question devolved to a poll of judges considering only a fraction of the data available.

Members of the Supreme Court also disagreed vehemently on the University of Michigan cases, eventually deciding the two in opposite directions. In *Grutter*, a deeply divided Court held that the diversity rationale was a compelling state interest and that the Michigan Law School narrowly tailored its admissions program to that interest.<sup>259</sup> In *Gratz*, the Court found that the University of Michigan's undergraduate race-conscious admissions process was not narrowly tailored to the diversity rationale, and was thus invalid.<sup>260</sup>

The Court walks a fine line in differentiating these two cases; perhaps indicating its discomfort. However, because this discomfort manifests itself in terms of the narrow tailoring analysis, it does not undermine the determination that diversity is a compelling state interest. While the Court will tolerate efforts to increase racial diversity at educational institutions, it believes that diversity can be attained without too much emphasis on race.

The *Grutter* Court relied, in part, on social science evidence to find that diversity is a compelling governmental interest. It found that the educational benefits of diversity "are substantial,"<sup>261</sup> relying on expert reports and "numerous studies [that] show that student body diversity promotes learning outcomes."<sup>262</sup> Interestingly, unlike the lower courts, the Supreme Court did not purport to rely on the plaintiffs' willingness to assume that diversity can confer educational benefits,<sup>263</sup> instead finding that such benefits "are not theoretical but real."<sup>264</sup> However, it is not entirely clear what benefits the Court believed had been conclusively demonstrated. On the one hand, the Court's language made reference to "educational" benefits and referred to "expert reports" which seems to suggest a reliance on the Gurin study. On the other hand, the Court also relied on the fact that business amici argued that "the skills needed in

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259. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). Six decisions were filed in the case, with most portions of the majority opinion securing only five votes. In addition, Justice Ginsburg filed a concurring opinion. Justices Scalia and Thomas filed opinions concurring in part and dissenting in part. Chief Justice Rehnquist filed a dissenting opinion, joined by three other justices. Lastly, Justice Kennedy filed a dissenting opinion.

260. *Gratz v. Bollinger*, 539 U.S. 244, 275-76 (2003). The majority decision secured only five votes. However, Justice Breyer filed an opinion concurring in the judgment, providing a sixth vote for reversal of the Sixth Circuit's grant of summary judgment to the University. In addition, Justices O'Connor and Thomas filed concurring opinions. Justices Stevens, Souter, and Ginsburg each filed dissenting opinions.

261. *Grutter*, 539 U.S. at 330.

262. *Id.*

263. As discussed *infra*, the plaintiffs did not concede these benefits for purposes of defendants' motion for summary judgment, but, at least in their Sixth Circuit briefs, explicitly noted that they presumed the existence of such benefits only for purposes of their motion for summary judgment. Reply Brief at 8 n.8, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 02-241), 2002 WL 32101132.

264. *Grutter*, 539 U.S. at 330.

today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."<sup>265</sup> The Court also found that "diminishing the force of stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."<sup>266</sup> However, in making these second two points, the Court did not identify any particular data to support its conclusions.

Of the two dissents, only Justice Thomas directly addressed the diversity rationale,<sup>267</sup> suggesting that "even if the Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination."<sup>268</sup> However, Justice Thomas tackled the reliance of the Court on social science more directly as well, noting that "[t]he Court never acknowledges . . . the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students."<sup>269</sup> Interestingly, Justice Thomas seized on the Flowers and Pascarella and Allen studies—which were each cited in only one brief (and the Allen study only by an amicus for the defendants)—to support this claim. Justice Thomas also cited the Rothman Study as evidence contradicting that which the majority implicitly relied on.<sup>270</sup>

Like the dueling opinions issued by the Sixth Circuit, neither the majority nor Justice Thomas's dissent in *Grutter* explained why certain social science evidence was convincing. They also did little to meaningfully analyze the data or refute the science contrary to their respective positions. In part, this stems from the fact that the Court appears to have decided that diversity is a compelling governmental interest as a matter of law. However, it seems odd that such a question of law could depend on empirical reality. Additionally, while it might make sense that the Court would resolve whether educational benefits could justify race-conscious admissions, it seems peculiar that the Court could also resolve the factual question—do such benefits flow from the University of Michigan's race-conscious admissions program? It would have seemed logical if the Court had remanded the scientific question, especially since the district court in *Grutter* granted summary judgment to the plaintiffs based on their legal claims. While the plaintiffs raised this very point in their Sixth Circuit brief,<sup>271</sup> none of the Supreme Court opinions suggested that a remand was necessary.

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265. *Id.*

266. *Id.* at 333.

267. The dissent by Chief Justice Rehnquist held the Law School's race-conscious admissions system to be a "naked effort to achieve racial balancing," and thus not "narrowly tailored to the interest it asserts." *Id.* at 379 (Rehnquist, C.J., dissenting).

268. *Id.* at 361 (Thomas, J., dissenting).

269. *Id.* at 364.

270. *Id.*

271. Final Brief of Appellee, *supra* note 227, at 27 ("If . . . the question of whether diversity is a compelling interest is not a question of law, then the question cannot be

This result essentially leaves the science underpinning the diversity rationale ensconced in law, with little critical discussion of its validity. One wonders whether the Justices relied primarily on their intuitions, and only used the social science to justify the outcome that their respective intuitions required.<sup>272</sup> If so, this seems an unusual way for a court to handle empirical evidence. The data presented by the University of Michigan, as error filled as it is, may suggest that race-conscious admissions can have positive benefits. However, the studies available to the Court were hardly conclusive. Given this half-hearted reliance on science, one wonders whether new empirical studies disproving the positive benefits of racial diversity would lead the Court to reconsider its judgment. This raises an interesting question: does stare decisis obligate future courts to abide by decisions based on social science subsequently cast into doubt?

#### CONCLUSION

The diversity rationale is empirical by nature. Elevating it to the level of constitutional doctrine poses significant problems. Social science is ever-changing. To rely on such ephemera to determine the scope of people's claim to equal protection under the law is troubling. If the social science of tomorrow somehow disproves the diversity rationale, will Barbara Grutter suddenly have suffered a constitutional injury?

This Note has attempted to present an objective assessment of the social science data connecting diversity to positive educational outcomes presented to the courts in the University of Michigan cases. Many pages of briefs and expert reports were dedicated to this empirical question. At the surface of the controversy, this was often treated as a question of law: is racial diversity a compelling state interest? However, this legal controversy is undeniably a question of empirics as well. The diversity rationale has no substance absent a factual connection between racial diversity and student outcomes.

In a sense, Justice Powell recognized the factual predicate of the diversity rationale when he quoted the Princeton student's statement that "[p]eople do not learn very much when they are surrounded only by the likes of themselves."<sup>273</sup> By finding that racial diversity could be a compelling state interest, Justice Powell memorialized these words in law.

Justice Powell did not confront the relationship between empirics and constitutional scrutiny for the first time. Decades before, in *Brown v. Board of Education*, the Supreme Court incorporated the empirical claim that segregated

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decided for either side on motions for summary judgment.").

272. One commentator suggests that, in the Michigan cases, social science "is being used as a cover to lend an appearance of objectivity to a decision made on normative grounds, to dart political controversy." Lizotte, *supra* note 11, at 667-68.

273. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 n.48 (1978) (Powell, J., announcing the judgment of the Court).

education negatively impacted black children into its analysis. At that time, Edmond Cahn, a strong supporter of desegregation, denounced “flimsy” social science as a foundation for constitutional rights.<sup>274</sup> Cahn made the keen observation that “[w]hen a scientist is engaged in demonstrating a fact of common knowledge . . . it is not easy to pass a fair judgment on the validity of his proof.”<sup>275</sup> Thus, by slight of hand, the Court in *Brown* may have transformed common intuition into scientific fact.

Almost three decades later, one wonders if the Court did much the same thing in *Grutter*. For those who support affirmative action, the sheer bulk of information that (in one way or another) connects diversity to educational benefits may confirm existing value commitments. But no study presented to the courts, either singly or in aggregate, conclusively demonstrates each link in the staged story that affirmative action advocates tell—that numeric diversity is an essential ingredient to diversity experiences, which can in turn bring about a panoply of benefits to students.

Making matters worse, the studies before the courts have even less to say about the benefits of diversity to students of color. After all, affirmative action programs are designed to help underrepresented minorities. For the legal foundation of race-conscious admissions to rest on the benefits that minority students may confer on white students suggests that something has gone awry. Of course, other evidence before the courts (not discussed in this Note) details the long-term success of beneficiaries of affirmative action, demonstrating that students of color graduating from top schools lead successful lives.<sup>276</sup> Other research also indicates that a nationwide imposition of race-neutral admissions practices would drastically reduce the number of underrepresented minorities attending our nation’s most selective schools.<sup>277</sup> However, none of these data address the diversity rationale: the success of minority alumnae is not attributed to their exposure to diversity. Instead, it is the access that these students of color have to a top-tier, prestigious education that confers these benefits.

Perhaps it is this tension between the legally cognizable justification for affirmative action—educational benefits from diversity—and the fact that many minority groups remain burdened with the vestiges of historical oppression, something that the government cannot constitutionally address using racial classifications, that led Justice O’Connor to suggest that “[t]he Court expects that 25 years from now, the use of racial preferences will no longer be

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274. Cahn, *supra* note 15, at 157-58.

275. *Id.* at 161.

276. *See, e.g.*, BOWEN & BOK, *supra* note 122; Chambers, *supra* note 151; Daniel et al., *supra* note 101.

277. *See, e.g.*, Kidder, *supra* note 26; John F. Kain & Daniel M. O’Brien, Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates (Tex. Sch. Project, Univ. of Tex., Working Paper No. 26, 2005), available at <http://www.utdallas.edu/research/tsp/pdfpapers/paper26.pdf>; Wightman, *supra* note 26.



necessary to further the interest approved today.”<sup>278</sup> If the educational benefits of diversity suffice, there is no reason to think that race-conscious admissions should not continue indefinitely, or at least until schools can enroll critical masses of every minority without considering race. If, however, part of the Court’s acceptance of the diversity rationale was an acknowledgment that societal discrimination continues to oppress certain groups, a twenty-five year sunset is an aspirational statement about our nation’s future.

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278. *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003).