# INTRODUCTION:
# EMPIRICAL REALITY AND CONSTITUTIONAL AUTHORITY

The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[1]

- Chief Justice John Roberts, *Parents Involved v. Seattle School District No. 1* (2007)

The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race…[2]

- Justice Sonia Sotomayor, *Schuette v. Coalition to Defend Affirmative Action* (2014)

*Fisher v. University of Texas* is the latest episode in an intensifying debate around race-conscious admissions in higher education.[3] Settled in July of 2014, the case concerned Abigail Noel Fisher, a white Texas native who was denied admission to the University of Texas-Austin ("UT") in 2008. Fisher subsequently sued the University, contending that the admission board's use of racial classifications in combination with other, race-neutral tactics was a violation of her equal protection rights under the Fourteenth Amendment. Despite heavy anticipation leading up to the Supreme Court's decision,[4] the final outcome of the case – to have *Fisher* remanded to the Fifth Circuit Court of Appeals for reconsideration, and ultimately settled in UT's favor with no change to policy – has incited punchy headlines from commentators as an event that was "in with a

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[1] *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, at 2768 (2007).

[2] *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, at 1676 (2014).

[3] *Fisher v. University of Texas*, 631 F.3d 213 (2011), *cert. granted,* 132 S. Ct. 1536 (Feb. 21, 2012).

[4] *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013).

bang, out with a fizzle."[5] Yet where some may dismiss *Fisher* as a minor contribution to the affirmative action debate, the tensions raised in court – between deference and scrutiny, empirical reality and constitutional authority – remain unresolved and promise significant influence in future reflections on law in society.

*Fisher* is the third major affirmation action case to be heard by the U.S. Supreme Court in just under forty years, drawing on a host of competing logics first introduced in *Regents of the University of California v. Bakke* in 1978 and later revisited in *Grutter v. Bollinger* in 2003.[6] In each instance, the justices have employed an equal protection analysis to consider the legality of race-conscious admissions in higher education. They have traversed the same legal terrain and grappled with the same slippery terminology to arrive at a model of diversity that accords with constitutional principle but is also responsive to the realities – both contemporary and historical – of race in the United States.

Navigating the dialogue (and often disconnect) between legal ideal and empirical reality has become a major force in courtroom deliberations, particularly with rise of legal realism. A counterpoint to the early traditions of legal formalism, the realist framework casts judicial decision-making not as a series of unbiased, mechanical deductions but as an "experiential" mode of

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[5] Elise Boddie, "Commentary on Fisher: In with a Bang, Out with a Fizzle," *SCOTUS Blog*, http://www.scotusblog.com/2013/06/fisher-v-university-of-texas-in-with-a-bang-out-with-a-fizzle/, 24 June 2013.

[6] *Regents of University of California v. Bakke,* 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

thought, with the capacity to be shaped and informed socially by political ideology, public opinion, and ultimately social science evidence.[7] Since the first application of social science research in an antidiscrimination case in *Brown v. Board of Education* (1954), there have been efforts to bridge legal decision-making with academic discourse.[8] This analytic shift is apparent in the evolution of legal reasoning across affirmative action rulings, from an issue of racial remediation to one of "diversity enhancement."[9]

The remedial logic treats affirmative action as a necessary tool to correct the racial disparities stemming from a history of state-led discrimination against African Americans. The diversity rationale, by contrast, has divorced itself from those historical considerations and emphasizes instead the broader educational benefits tied to a diverse student body. Popularized in *Bakke* and reaffirmed in *Grutter* and *Fisher*, the diversity rationale has been the prevailing defense of affirmative action policy, grounding its empirical claims about race relations in expert findings from social scientists. As summarized in Justice Sandra Day O'Connor's majority opinion in *Grutter*, diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" O'Connor went on to note the "numerous studies" which "show that student body diversity promotes learning

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[7] John Monahan and Laurens Walker, "Twenty-five Years of Social Science in Law," *Law and Human Behavior* 35(2011): 73.

[8] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[9] Russell K. Nieli, "Diversity's Discontents: The 'Contact Hypothesis' Exploded," *Academic Questions* 21(2008): 411.

outcomes, and 'better prepares students for an increasingly diverse workforce and society….'"[10]

With growing insight into the power of such studies to inform legal judgment, the affirmative action battle in higher education is a natural site to examine race relations today as well as the cross-disciplinary interactions between law and social research in crafting policy that is both constitutionally sound and empirically justified. Here, I will survey the legal strictures surrounding affirmative action in higher education across three cases: *Bakke*, *Grutter,* and *Fisher*. Detailing the rise of the diversity rationale, I will consider the competing logics that have guided and constrained judicial inquiry, as well as the social science evidence cited in support of those positions. To be sure, the marriage between law and social research is not an easy one, and I will examine the potential benefits and dangers arising from their collaboration in Chapter Two.

These sections will provide context for Chapter Three, where I will position a growing segment of sociological literature – the relationship between social capital and diversity – within the constitutional framework of affirmative action and assess whether existing "contact" literature on cross-racial trust and interaction should affirm the value of diversity as a "compelling state interest." While working within the constructs of the law, I will also test and extend its boundaries through a more nuanced review of the research cited in defense of diversity. Moving beyond the question whether diversity does or does not have

[10] *Grutter v. Bollinger*, 539 U.S. at 328.

compelling value – what I call the "correlation/causation" framework of diversity research – I will consider the "optimal conditions" of cross-racial engagement, a lens that challenges legal convention around diversity and delivers a richer commentary on its effects.[11] This approach, I hope, will enable a deepened understanding of diversity and its resonance across disciplinary barriers.

[11] Gordon Allport, *The Nature of Prejudice* (Cambridge, MA: Addison-Wesley, 1954).

# THE LEGAL CONTEXT OF AFFIRMATIVE ACTION: FROM *BAKKE* TO *FISHER*

> [A] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly a [B]lack student can usually bring something that a White person cannot offer.[12]
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> - Justice Lewis Powell, *Regents of University of California v. Bakke* (1978)

*The Regents of the University of California v. Bakke* revealed a deeply-divided Supreme Court, not only failing to render a majority opinion on the constitutionality of affirmative action in higher education but, to the contrary, generating six separate court opinions. At issue in *Bakke* was the "set-aside" admissions policy at the University of California-Davis School of Medicine ("UC-Davis"), which reserved sixteen of one hundred available class slots for minority[13] students.[14] Twice rejected by the University, white plaintiff Alan P. Bakke sued UC-Davis, challenging the policy as a violation of the Fourteenth Amendment's Equal Protection Clause on the grounds that it favored minority applicants with lower academic qualifications.[15]

The central issue in *Bakke* involved the distinction between illegal and legal forms of state-sanctioned racial discrimination – between the "invidious"

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[12] *Regents of University of California v. Bakke,* 438 U.S. 265, at 316 (1978).

[13] Under the UC-Davis plan, "minority" was defined as Black, Latino, Asian, and Native American applicants; *Bakke*, 438 U.S. at 274.

[14] Suzanne E. Eckes et al., "*Fisher v. University of Texas*: The Potential for Social Science Research in Race-Conscious Admissions," *West's Education Law Reporter* 288 (2013): 3.

[15] *Bakke*, 438 U.S. at 277.

system of racial segregation dismantled just twenty years prior in *Brown v. Board*,[16] and the "benign" race-conscious policies designed to remedy the effects of that system.[17] The Court arranged itself into two key factions. The "Brennan bloc" – composed of Justices Brennan, White, Marshall, and Blackmun[18] – approved of the UC-Davis policy as a system of "benign" classification necessary to "remedy disadvantages cast on minorities by past racial prejudice."[19] They resolved that some degree of race-consciousness was constitutionally permissible – and indeed, necessary – for equality under the law.[20] As the conservative counterpart to this position, the "Stevens bloc" included Chief Justice Burger and Justices Stevens, Rehnquist, and Stewart, who all contended that racial classifications were patently unlawful and, regardless of intent, violated Title VI of the Civil Rights Act of 1964.[21]

In a statement that would lay the rhetorical foundation for *Grutter* and *Fisher*, Justice Powell issued the deciding opinion of the Court to uphold affirmative action. Though formally siding with the Brennan bloc, Powell wrote only for himself and appeared to straddle a middle-ground between *Bakke*'s liberal and conservative camps. Powell ultimately upheld the legality of race-

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[16] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[17] Leland Ware, "Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases**,"** *Tulane Law Review* 78 (2004): 2100.

[18] Justices Blackmun, Marshall, and White also submitted their own opinions.

[19] *Bakke,* 438 U.S. at 325.

[20] *Id*. at 375-376.

[21] *Id*. at 408.

conscious admissions in higher education, but prefaced that such policies must first survive a "strict scrutiny" review – the "most exacting judicial examination."[22]

As summarized by legal scholar Leland Ware, there are three applicable standards of judicial review in equal protection cases: rational-basis, intermediate scrutiny, and strict scrutiny.[23] Rational-basis is the easiest to satisfy, requiring only a "rational relation between the means chosen by the government and the state objective." Intermediate scrutiny, by comparison, must be "substantially related to an important government objective."[24] Strict scrutiny is the most stringent standard of review, by which a policy of differential treatment must (a) serve a "compelling state interest," and (b) be "narrowly-tailored" to pursue that interest.[25] Negotiating the call for intermediate scrutiny in the Brennan bloc and rejection of race-consciousness in the Stevens bloc, Powell argued that racial classifications – neither inherently benign nor invidious – were still a sufficiently "suspect" form of individual review to warrant strict scrutiny.[26]

Complying with this standard, the University offered four goals under their admissions policy to satisfy the compelling interest criterion:

> (i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects

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[22] *Bakke,* 438 U.S. at 291.

[23] Ware, "Strict Scrutiny**,"** 2099.

[24] Eckes et al., "*Fisher v. University of Texas*," 2-3.

[25] Colin S. Diver, "From Equality to Diversity: The Detour from *Brown* to *Grutter*," *University of Illinois Law Review* (2004): 698.

[26] Ibid, 697-698.

> of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.[27]

Justice Powell responded to each argument in turn. According to Powell, the first and second interests, linked in their remedial aims, were too generalized to constitute a sufficient claim for state intervention. "Societal discrimination" was, in his words, "an amorphous concept of injury that may be ageless in its reach into the past."[28] Drawing a firm distinction between primary and K-12 educational systems, Powell argued that desegregation under *Brown* was a constitutionally permissible response to "the disabling effects of identified discrimination" in public education.[29] UC-Davis, by contrast, could offer no proof of prior discrimination against minority groups to justify affirmative action as a necessary remedy.[30] With regard to the third interest – to increase the number of physicians in underserved communities – Powell contended that such an outcome could not be definitively linked to racial preferences in higher education.[31]

Turning to the fourth and final interest, Justice Powell determined that "attain[ing]… a diverse student body" was in fact a "constitutionally permissible goal for an institution of higher education" – and one steeped in the lofty First Amendment rights of academic freedom. Powell elaborated:

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[27] *Bakke*, 438 U.S. at 305-306.

[28] *Id*. at 307.

[29] *Id*. at 307.

[30] *Id.* at 307.

[31] *Id.* at 310-311.

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body….
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> ….
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> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.[32]

From a platform of "beneficial educational pluralism," Justice Powell praised the "robust exchange of ideas" nurtured in a diverse student body as well as the academic freedoms which that diversity signified. A sharp departure from the remedial logic, Powell's diversity rationale was couched in a discourse not of race-specific remediation for the few, but of *color-blind enhancement for the whole*.[33]

While acknowledging diversity as a compelling interest, Powell rejected the University's "set-aside" admissions policy as too crude and mechanistic a system to meet the "narrowly-tailoring" standard of strict scrutiny. He did, however, approve the consideration of race as a "plus" factor in a holistic assessment of each applicant's profile.[34] As he clarified, "Ethnic diversity is only

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[32] *Bakke,* 438 U.S. at 312-313.

[33] *Id.* at 317.

[34] *Id.* at 312-313.

one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[35]

Interestingly, strict scrutiny was one of the key weapons used to dismantle segregationist policies during the *Brown* era, as race-restrictive ordinances failed to demonstrate a compelling interest in preserving segregated spaces.[36] Yet, in many ways, *Bakke*'s strict scrutiny framework signaled a departure from *Brown*'s promises, securing the demise of the remedial imperative – to combat "societal discrimination" – and endorsing the diversity rationale of "academic excellence."[37] By this model, diversity constitutes a compelling interest – but only to the extent that it fosters broader, society-wide benefits, including future professional and academic success for all students, and a reaffirmation of institutional freedoms. Powell's *Bakke* opinion introduced a precarious logic of color-blindness in "diversity enhancement" – a concept to become at once more entrenched and more muddled in *Grutter v. Bollinger* twenty-five years later.[38]

*Upholding the Diversity Rationale in Grutter*

Despite the rigor of Justice Powell's strict scrutiny approach, a number of ambiguities began to surface shortly after the *Bakke* ruling – chiefly, how long should an affirmative action plan last once implemented? Could colleges and

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[35] *Bakke,* 438 U.S. at 314.

[36] Ware, "Strict Scrutiny," 2098.

[37] Susannah W. Pollvogt, "Casting Shadows: *Fisher v. University of Texas at Austin* and the Misplaced Fear of 'Too Much' Diversity," *Maryland Law Review Endnotes* 72 (2013): 5.

[38] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

universities identify an end-goal in terms of student body composition, without resorting to unconstitutional quotas? Such questions pointed to a shaky foundation undergirding many of Powell's central claims and attracted pushback for several decades to follow.[39] These doubts were eventually addressed at the national-level in the *Grutter v. Bollinger* ruling, where *Bakke*'s key themes – compelling interest, narrow tailoring, and academic deference – were revisited, and Powell's diversity rationale was ultimately upheld.[40]

As with *Bakke*, the Supreme Court in *Grutter* considered the constitutionality of race-conscious admissions at the University of Michigan Law School after white applicant Barbara Grutter sued the University for an over-reliance on racial classifications in admission. Invoking the language of *Bakke*, the Sixth Circuit Court of Appeals ruled in favor of the University, determining that "the Law School has a compelling state interest in achieving a diverse student body." Furthermore, the school's policy – which viewed race as a "plus" factor within a holistic assessment of each application – was narrowly tailored to fit that interest.[41] In 2003, the U.S Supreme Court was petitioned to review the Sixth Circuit's decision for final consideration and, in a 5-4 ruling, voted to approve the Law School's affirmative action plan.

On the surface, the *Grutter* ruling amounts to little more than a reaffirmation of Powell's core contention: that the Equal Protection Clause permitted "a narrowly tailored use of race in admissions decisions to further a

[39] See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

[41] *Grutter v. Bollinger*, 288 F.3d 732 (6th Circ. 2002), at 742 and 749.

compelling interest in obtaining the educational benefits that flow from a diverse student body."[42] Yet while retaining the basic framework of *Bakke*, the *Grutter* Court also introduced new dimensions to the narrow-tailoring and compelling interest provisions, certain to complicate future treatments of diversity in the legal arena. Adding further nuance to the debate was Justice O'Connor's "sunset clause," which prophesized that in twenty-five years, race would no longer be a necessary consideration in higher education admissions – a statement which calls into question the underlying logic and aims of diversity as a compelling state interest.

Clarifying the demands of strict scrutiny, the *Grutter* Court argued that "[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system," nor can it "[make] an applicant's race the defining feature of his or her application."[43] In agreement with Justice Powell, the Court affirmed that race – as one expression of diversity among many – should be treated simply as "a 'plus' factor in the context of individualized consideration of each and every applicant."[44] Also, in an expansion on *Bakke's* narrow tailoring standard, the Court required that the University eliminate any "race-neutral alternatives" that

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[42] *Bakke*, 438 U.S. at 343.

[43] *Id.* at 334 and 337.

[44] *Id.* at 334.

might be comparably effective at achieving diversity before pursuing race-conscious measures.[45]

Despite adopting a more extensive definition of narrow tailoring, the majority opinion in *Grutter* showed considerable leniency toward institutional determinations of what optimal diversity would look like and how it should be achieved. This deferential attitude was apparent across both facets of strict scrutiny review.[46] To begin, the Court clarified that narrow tailoring required only "serious, good faith consideration of workable race-neutral alternatives" by the Law School – as opposed to the "exhaustion of every conceivable race-neutral alternative."[47]

More significant, however, was the Court's deference to the University in delineating the full nature and extent of diversity as an educational objective. Echoing Justice Powell's characterization of educational autonomy as a "special concern of the First Amendment,"[48] the *Grutter* Court endorsed not only the purported merits of diversity as a source of civic learning but also the capacity of universities to make that determination:

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.... Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the

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[45] The Supreme Court first mandated the consideration of race-neutral alternatives in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

[46] Paul Horwitz, "Fisher, Academic Freedom, and Distrust," *Loyola Law Review* 59 (2013): 496.

[47] *Grutter,* 539 U.S. at 339.

[48] *Bakke,* 438 U.S. at 312.

> expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.
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> We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.... Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'[49]

Deferring to the Law School's "complex educational judgments," the Supreme Court gave the University broad discretion in crafting a student body consistent with their educational mission – specifically, to assemble "a mix of students with varying backgrounds and experiences who will respect and learn from each other."[50] Determining the composition of that "mix" was therefore in the domain of educators, not the courts. This position clarified some of *Bakke*'s ambiguity by distinguishing between illegal quotas and a desired "critical mass" of minority students.[51] Rather than express student body diversity in purely numerical terms – an example of unconstitutional racial balancing, as in *Bakke* – "critical mass" would be defined in relation to "the educational benefits that diversity is designed to produce."[52]

Justice O'Connor recounts those benefits in the majority opinion: "… the Law School's admissions policy promotes 'cross-racial understanding,' helps to

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[49] *Grutter,* 539 U.S. at 328-329.

[50] *Id.* at 314.

[51] *Id.* at 333.

[52] *Id.* at 328.

break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[53] Achieving such benefits, the Court contended, would require some desired ratio of minority to non-minority students, since underrepresentation of minorities could fuel racial isolation, tokenism, and stereotyping – trends counteractive to the University's vision of "cross-racial understanding."[54] Critical mass was therefore a "permissible goal" in the eyes of the Court, and one dependent on the continued recognition of academic freedoms in higher education.[55]

In a final elaboration on Justice Powell's diversity rationale, the *Grutter* Court also concluded that race-conscious policies should be time-limited and periodically reevaluated, with Justice O'Connor even going so far as to anticipate that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[56] This provision has been harshly – and justifiably – criticized as undermining the basic framework of the diversity rationale, conflating the history-oriented aims of the remedial logic with *Bakke*'s "forward-looking" platform of diversity-enhancement.[57] To review, the diversity rationale argues that contact with people unlike oneself is an important source of educational enhancement, from geographical origin to ethno-racial background.

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[53] *Grutter,* 539 U.S. at 328.

[54] Vinay Harpalani, "Diversity Within Racial Groups and the Constitutionality of Race Conscious Admissions," *Seattle University School of Law Digital Commons* 15 (2012): 474-475; *Grutter,* 539 U.S. at 319.

[55] *Id.* at 335.

[56] *Id.* at 343.

[57] Pollvogt, "Casting Shadows," 7.

As Justice O'Connor observed: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[58]

O'Connor argues in the *Grutter* opinion that the plurality of viewpoints tied to a diverse student body should wane with time, and with it, the significance of race as an admissions criterion. Arguably, however, the core of Powell's diversity rationale was immune to such time considerations, finding constitutional support not in the nation's history of racial subordination, but in the immediate and widely-enjoyable benefits stemming from a diverse social environment – what we might paradoxically call the "color-blind" benefits of diversity. Such benefits should by nature not disappear with time, and O'Connor's claims to the contrary seem to point to an underlying remedial logic in the *Grutter* majority opinion.

Agreeing with *Bakke*'s ruling, the *Grutter* Court upheld the constitutionality of race-conscious admissions at the University of Michigan's Law School, ascribing instrumental value to diversity as an incubator for professional and academic success of students and democratic legitimacy more broadly. In a curious contradiction between argument and outcome, however, both the *Bakke* and *Grutter* opinions have conspicuously avoided endorsing

[58] *Grutter,* 539 U.S. at 333.

"racial diversity" *per se*. Legal scholar Colin Diver captures this point in his observations of the *Grutter* opinion:

> …[Justice O'Connor] is careful to avoid attaching the adjective 'racial' to the word 'diversity.' But it is plain from the surrounding context that racial diversity is what she is really considering….she quotes the University's claim that diversity promotes 'cross-racial understanding,'… She cites sociological studies of the impact of racial diversity on various educational and vocational outcomes. She quotes a brief submitted by military leaders that addresses quite explicitly the need for a 'racially diverse' officer corps. And, perhaps most tellingly, she states that the 'legitimacy' of our institutions requires that 'the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.'[59]

The discourse around affirmative plans today is at once meticulously race-conscious and stubbornly race-blind, complying with the non-remedial proscriptions of *Bakke* but upholding diversity policies with an eye to the purported benefits of interracial contact. A firm defender of the remedial logic and even the use of racial quotas, Justice Ruth Bader Ginsberg has dryly noted the Supreme Court's efforts to circumvent race-specific policy and language: "If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."[60] The fusion of race-neutral and race-conscious policy in the case of *University of Texas v. Fisher* has brought this paradox to the forefront.[61]

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[59] Diver, "From Equality to Diversity," 703; *Grutter,* 539 U.S. at 335.

[60] *Gratz*, 539 U.S. at 305.

[61] *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013).

*Refining Strict Scrutiny in Fisher*

*Fisher* was, in many ways, an extension of *Grutter*, renewing speculation over the value of diversity as a compelling interest in higher education. The contested admissions plan at the University of Texas-Austin was in fact modeled after the one approved at the University of Michigan Law School just ten years earlier. This policy involved a holistic assessment of academic qualifications, test scores, and what the University called the "Personal Achievement Index," which accounted for race and socioeconomic status as "special circumstance" considerations.[62] Again paralleling *Bakke* and *Grutter*, two white plaintiffs – Abigail Fisher and Rachel Michaelewicz – challenged the UT policy as a violation of their rights under Equal Protection Clause.[63]

New to the *Fisher* Court, however, was the conflict around "race-neutral alternatives" to affirmative action. In *Hopwood v. Texas* (1996), the Fifth Circuit Court overturned a race-conscious admissions plan at the University of Texas School of Law, concluding that *Bakke*'s precedent was not binding and that racial classifications were unconstitutional.[64] Just one year later, the University of Texas-Austin implemented the Texas Top Ten Percent Plan ("TPP") – a race-neutral effort to combat the decline in minority enrollment after *Hopwood*. Under

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[62] Pollvogt, "Casting Shadows," 8-9; *Fisher v. University of Texas at Austin*, 631 F.3d at 228.

[63] Eboni S. Nelson, "In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in *Fisher v. Texas*," *University of Richmond Law Review* 47 (2013): 115.

[64] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

the TPP, all Texas students graduating within the top ten percent of their high school would be guaranteed admission to the UT system.

The irony at the core of this supposedly "race-neutral" policy was its reliance on existing racial segregation across Texas high schools.[65] Justice Ginsberg later noted, "Only an ostrich could regard the supposedly neutral [ten-percent plan] as race-unconscious…. Texas's percentage plan was adopted with racially segregated neighborhoods and schools front and center stage."[66] The TPP was nonetheless effective, leading to substantial increases in minority representation at UT. Following the *Grutter* decision to uphold race-conscious admissions in 2003, the University reinstated its affirmative action policy while continuing to grant automatic admission under the percentage plan.

Anchoring their argument in the apparent efficacy of the TPP as a race-neutral alternative to affirmative action, the *Fisher* prosecution contended that UT's renewed use of racial classifications after *Grutter* was unnecessary and unconstitutional:

> While the University has confined its explicit use of race to the elements of a program approved by the Supreme Court in *Grutter v. Bollinger*, UT's program acts upon a university applicant pool shaped by a legislatively mandated parallel diversity initiative that guarantees admission to Texas students in the top ten percent of their high school class. The ever-increasing number of minorities gaining admission under this Top Ten

[65] Stephan Menendian and john a. powell, "*Fisher v. Texas*: The Limits of Exhaustion and the Future of Race-conscious Admissions," *University of Michigan Journal of Law Reform* 47 (2014): 899.

[66] *Fisher*, 133 S.Ct. at 2433.

> Percent Law casts a shadow on the horizon to the otherwise-plain legality of the *Grutter*-like admissions program….[67]

The plaintiffs based their argument on *Grutter*'s "race-neutral alternatives" provision in the narrow tailoring requirement: if the TTP could achieve comparable levels of diversity through race-neutral means, then race was an unjustified criterion in higher education admissions. As Pollvogt argues, this argument was fueled by the misguided logic that the concurrent use of race-neutral and race-conscious policies could result in "too much diversity."[68] Once again, the idea that the educational benefits of diversity should be limited in time or extent called into question the underlying logic of the diversity rationale.

The question of constitutionality fell to deference once again and to the concept of "critical mass." Recalling *Grutter*, "critical mass" would be defined not in reference to any numerical standard of minority students, but by "the educational benefits that diversity is designed to produce."[69] Therefore, the real question at issue in *Fisher* was whether UT's current demographic composition – regardless of changes under the TPP – was creating the diversity-related "benefits" that administrators were seeking.

In a brief submitted by UT, respondents argued that the minority presence in undergraduate classes still fell short of achieving such benefits. As Eboni Nelson summarizes,

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[67] *Fisher*, 631 F.3d at 216–217.

[68] Pollvogt, "Casting Shadows," 10.

[69] *Grutter,* 539 U.S. at 329-330.

> Notwithstanding the operation of the Ten Percent Plan, UT continued to experience a lack of meaningful racial diversity in most of its undergraduate courses. For instance, in 2002, eighty-nine percent of classes enrolling ten to twenty-four students had only one or zero African American students. Forty-six percent of those classes 'had one or zero Asian American students, and 43% had one or zero Hispanic students.' Considering that an important goal of UT's academic mission is to create diverse classroom environments in which students from different cultural, economic, and racial backgrounds can engage in robust, thought-provoking discussions, the homogeneity of UT's smaller enrollment courses significantly impeded its ability to achieve this goal.[70]

The limited representation of minority students across UT programs prevented "varied interactions on a more widespread basis."[71] Moreover, the University contended, the TPP's automatic admission standard would preclude "the sort of holistic, individualized review of applicants that *Grutter* endorses."[72] Reviewing this evidence and the arguments put forward, the Fifth Circuit ultimately deferred to the University and ruled to uphold UT's affirmative action plan. The Supreme Court revisited *Fisher* on appeal in 2012, and after being remanded to the Fifth Circuit for reconsideration, UT's policy survived strict scrutiny once again.

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[70] Nelson, "In Defense of Deference," 113.

[71] *Fisher*, 631 F.3d at 240-241.

[72] Nelson, "In Defense of Deference," 116; *Fisher*, 631 F.3d at 240.

## CONTEXTUALIZING THE CONTACT LITERATURE: SOCIAL SCIENCE AND THE LAW

The legal foundation underpinning *Bakke, Fisher*, and *Grutter* is tenuous at best. In the absence of a traceable link between institutional discrimination and existing racial disparities, the remedial logic has been foreclosed as an acceptable basis for race-conscious admissions in higher education. Finding constitutional support where the remedial logic could not, the diversity rationale emphasizes the instrumental benefits tied to a diverse learning environment, from critical thinking to improved leadership ability. Yet beyond this veneer of "color-blindness" are fragments of an underlying remedial rationale of race-consciousness – apparent in the logical inconsistencies of Justice O'Connor's "sunset provision" in 2003 and the evolution of the "critical mass" standard across *Grutter* and *Fisher*.

The term "diversity" is itself a slippery metric, at times communicating little more than "a vague sense of variety."[73] In his dissent to the *Grutter* ruling, Justice Clarence Thomas criticized diversity as "more a fashionable catchphrase than it is a useful term" – something which denotes an "aesthetic" or "a certain appearance, from the shape of the desks and tables in…classrooms to the color of the students sitting in them."[74] The inherent tensions of the diversity rationale, coupled with increased scrutiny around narrow tailoring, suggest an uneasy future

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[73] Colin S. Diver, "From Equality to Diversity: The Detour from *Brown* to *Grutter*," *University of Illinois Law Review* (2004): 699.

[74] *Grutter v. Bollinger*, 539 U.S. 306, at 354 (2003).

for affirmative action. This uncertainty, I would argue, should prompt a reevaluation of the justifications put forward in the court's appraisal of diversity, as well as the scholarly evidence cited in its defense.

Already a source of entrenched political polarization, the legal history of race-conscious admissions has tapped into a deeper undercurrent of tension between judicial rhetoric and social reality. Since the early twentieth century, social science literature has asserted a growing presence in legal deliberations, entering the courtroom through expert testimony at the trial-level and in *amicus curiae* briefs in appellate court.[75] This trend has been particularly apparent on the affirmative action front, where legal inquiry into the value of diversity as a compelling interest – that is, as a source of broad educational benefits – has demanded empirical support. In *Fisher* alone, more than ninety amicus briefs were submitted to the court, seventeen in support of the petitioners and seventy-four in defense of UT.[76]

The entry of social science into the legal arena has invited reflection over the possible benefits and shortcomings of such a relationship, as well as the extent to which empirical research actually influences legal outcomes (see Merritt 1998, Ryan 2003). In the pages that follow, I will examine these cross-disciplinary dynamics and consider how they operate within the equal protection context of

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[75] Literally meaning "friend of the court," *amicus curiae* briefs are submitted by a third party, often with expert knowledge on a topic pertaining to the case.

[76] Suzanne E. Eckes, David Nguyen, and Jessica Ulm, "*Fisher v. University of Texas*: The Potential for Social Science Research in Race-Conscious Admissions," *West's Education Law Reporter* 288 (2013): 9-10.

affirmative action. Recognizing the limitations of social science evidence in law, this chapter will prepare the reader for an extended survey of empirical studies on diversity and social connectedness, and the potential value of that research as a defense for the diversity rationale. Engaging a nuanced, rather than dichotomized, portrait of social science evidence, this analysis departs from the sparse "correlation-causation" framework so characteristic of legal disputes today and attempts to impute a more substantive, contextualized meaning to diversity as a "compelling interest."[77]

*Social Science and the Law: Uneasy Allies*

Early legal realist thinkers of the mid-twentieth century described judicial decision-making as a practice vulnerable to the influences of the outside world (see Cardozo 1921, Llewellyn 1962). By this logic, extralegal factors such as public opinion, political climate, and individual ideology have the capacity to shape and orient legal judgment. Social science evidence, however, could be enlisted to discipline the caprices of human thought through the display of "definite, tangible, and observable facts."[78] The legal setting thus became a platform for cultivating rational argument, rooted in the nexus between empirical research, judicial decision-making, and social policy.

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[77] James E. Ryan, "What Role Should Courts Play in Influencing Educational Policy?: The Limited Influence of Social Science Evidence in Modern Desegregation Cases," *North Carolina Law Review* 81 (2003): 1660-1661.

[78] Patricia Ewick et al., "Legacies of Legal Realism: Social Science, Social Policy, and the Law," in *Social Science, Social Policy, and the Law*, ed. Patricia Ewick et al. (New York: Russell Sage Foundation, 1999): 4.

Despite the ambitions of legal realism, communicating across disciplines is no simple task, particularly when it involves two such divergent vocabularies as social science research – often expressed in tentative and nuanced terms – and the stark, adversarial format of legal practice.[79] Since the first significant use of social science evidence in *Brown v. Board of Education* (1954), affirmative action hearings have become a key site at which to observe the collaboration and possible discord between sociological research and the law.[80] As legal scholar James Ryan summarizes, the outcomes of these interactions – lucrative or limited – are determined varyingly by the legal standards at issue, the quality of evidence under review, and the nature of the case overall.[81]

Legal standards guide the content and direction of court arguments leading into a decision, referring simply to "the questions that must be answered in order to resolve the case."[82] Presumably, Ryan argues, social science research is more responsive to "empirically-based" questions, than it is to "normative, value-laden, or abstract" questions. Within the strict scrutiny framework of affirmative action, these standards again refer to (a) whether the admissions plan in question serves a

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[79] Jonathan Yovel and Elizabeth Mertz, "The Role of Social Science in Legal Decisions," in *The Blackwell Companion to Law and Society*, ed. Austin Sarat (Malden, MA: Blackwell Publishing Ltd., 2004): 416.

[80] *Brown v. Board of Education,* 347 U.S. 483 (1954).

[81] James E. Ryan, "What Role Should Courts Play in Influencing Educational Policy?: The Limited Influence of Social Science Evidence in Modern Desegregation Cases," *North Carolina Law Review* 81 (2003): 1662.

[82] Ibid, 1662.

compelling interest and (b) whether the plan is narrowly tailored to pursue that interest.

The quality of research itself – that is, the "consistency, and overall strength of the social science evidence presented" – is a more straightforward predictor of evidentiary relevance.[83] The degree of scholarly consensus around a finding will naturally influence the authority of that literature in the courtroom. When a particular field of research contains ambiguity or disagreement, it is far less likely to have a legitimate bearing on the outcome of the case, no matter its connection to the legal standards in question. The quality of diversity research under review in affirmative action deliberations is a topic I will revisit in Chapter Three.

The final factor determining the efficacy of social science evidence in the courts is the "nature of the case" – a somewhat amorphous indicator that Ryan unpacks:

> What I mean to capture is the notion that if judges perceive an issue as involving moral or philosophical judgments, as opposed to pragmatic or instrumental ones, they are less likely to rely heavily on social science evidence to resolve the issue, even if the legal standards allow for the consideration of such evidence and even if the evidence is fairly determinate…. When these two conditions are both present – an issue is politically salient and perceived in moral or philosophical terms – the likelihood that social science research will influence the outcome seems quite slim.[84]

To the extent that race occupies such a socially- and politically-charged place in American history, it seems unlikely that diversity would be evaluated in empirical

[83] Ryan, "What Role Should Courts Play in Influencing Educational Policy?," 1662.

[84] Ibid, 1662-1663.

terms alone – as a concept divorced from the "moral and philosophical judgments" engendered through centuries of racial intolerance. Moreover, while court opinions may cite social science to support their ruling, whether that evidence influenced the decision itself or was simply used to "bolster" a predetermined outcome is unknowable. [85]

Where, then, does this leave social science research in the context of affirmative action disputes? How does one approximate the influence of evidence in the courts, when judicial decision-making becomes such an entangled mix of morality, legality, and empiricism? Before pursuing these questions, I will first consider the constraints imposed by Ryan's factors – the legal standards, the quality of evidence, and the nature of the case – through a parallel set of antidiscrimination cases: the desegregation rulings of the post-*Brown* period. This case study will expose some of the expected tensions between empirical reality and legal doctrine, as an instance in which evidence was ultimately sidelined in favor of constitutional authority.

*The Post-Brown Period: Desegregation in Theory but Not in Practice*

On May 17, 1954, Chief Justice Earl Warren announced the unanimous decision of the Supreme Court in *Brown v. Board of Education*, stating that,

> To separate [blacks] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[86]

[85] Ryan, "What Role Should Courts Play in Influencing Educational Policy?," 1661.

[86] *Brown*, 347 U.S. at 494.

In what came to be known as "the most controversial footnote in American constitutional law," Warren supported his ruling with evidence from the 1940's Clark doll studies, which had concluded that segregated black children demonstrated a damaged self-esteem in their preference for white over black dolls.[87] Depriving black students of their equal protection rights under the Fourteenth Amendment, public segregation was declared unconstitutional. Footnote 11 has since generated a polarizing debate over the citation's actual influence in the ruling, as well as the appropriateness of including it in the first place.[88]

A watershed moment in U.S. legal history, the *Brown* decision transformed the legal role of social science evidence from resolving small-scale, adjudicative disputes to potentially restructuring the law as a whole.[89] *Brown* thus marked the first major intervention of social science evidence into the legislative arena and, more momentously, was the first federal effort to dismantle *de jure* segregation in the United States. Despite its ambitions, *Brown* would still not see substantive change in the racial composition of schools for over a decade, due to both the lack of policy direction in the initial ruling and a staunch resistance mounted by southern school districts. In a series of decisions issued between 1968

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[87] Paul L. Rosen, "History and State of the Art of Applied Social Research in the Courts," in *Use/Nonuse/Misuse of Applied Social Research in the Courts*, ed. Michael J. Saks and Charles H. Baron (Abt Books: Cambridge, MA. 1980): 9; *Brown*, 347 U.S. at 495 n.11.

[88] Brett Waldron, "Legal Rhetoric and Social Science: A Hypothesis for Why Doctrine Matters in Judicial Decision-making," *Pace International Law Review Online Companion* 371 (2013): 402-403.

[89] Rachel F. Moran, "What Counts As Knowledge? A Reflection on Race, Social Science, and the Law," *Law & Society Review* 44 (2010): 533.

and 1973, the courts began to apply greater pressure on remaining districts to desegregate.

With *Green v. County School Board of New Kent County* (1968), the Court struck down optional enrollment plans and mandated that segregation in schools be dismantled "root and branch," with respect to clearly defined measures of integration – so-called "*Green* factors."[90] In 1971, *Swann v. Charlotte-Mecklenburg Board of Education* extended this approach even further by approving the use of racial quotas, bussing, and redrawn attendance zones to achieve integration.[91] By their very aggression, however, *Green* and *Swann* also bound the Court to a set of rigid precedents, which sharply limited the future influence and relevance of empirical research on student outcomes under these plans.

The clash between precedent and demographic reality came to the foreground in the metropolitan North during the early 1970's. *Brown* had been crafted as a direct response to a formal system of *de jure* segregation in the South, where state-enforced discrimination and city-district boundary alignment made district-level integration a both lawful and feasible goal. Northern cities, by contrast, were typically fractured into racially isolated pockets within the larger metropolitan area, making meaningful integration at the district-level nearly impossible. Moreover, while southern districts had a long history of state-led segregation to illustrate discriminatory action, northern districts were required to

[90] *Green v. County School Board of New Kent County*, 391 U.S. 430, 438 (1968).

[91] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S.1 (1971).

prove such intent – a challenge when segregated schools are the product not of state policy, but of the more subtle forms of *de facto* exclusion in discriminative housing practices and white flight to the suburbs.[92]

*Milliken v. Bradley* (1974) considered a proposal for desegregation in one of the most racially segmented cities in the nation: Detroit. Like so many cities incurring the effects of post-World War II suburbanization, Detroit had a densely populated black inner city lined by a periphery of white suburbs. Despite ample evidence to demonstrate the uneven distribution of race and wealth across city, the Court ruled that an interdistrict remedy would be beyond the scope of the case and place an undue burden on municipal resources.[93] The legal standards at issue – whether integration had been achieved to the extent possible at the district-level – excluded any empirical consideration of how students were being affected by the existing system, both socially and academically.[94] Instead, the task of the courts was to determine whether such plans complied with *Brown* and its entailing restrictions around implementation.

*Milliken* thus issued a defining precedent for the treatment of desegregation cases in the metropolitan North, where the absence of a traceable

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[92] Erwin Chemerinsky, "The Segregation and Resegregation of American Public Education: The Court's Role," *North Carolina Law Review* 81 (2003): 1610.

[93] This decision reflected a growing conservatism in the high court. Following his election in 1968, President Nixon pursued a political strategy of appeasement, aiming to curry favor with the South through more conservative appointments to the Supreme Court and, as a result, a narrower vision of constitutional violation. Three new justices had been appointed, as well as a new chief justice – Warren E. Burger. All voted in the majority to deny cross-district integration in the case of *Milliken* (Clotfelter 2004).

[94] Ryan, "What Role Should Courts Play in Influencing Educational Policy?," 1666.

pathway between state policy and segregated neighborhood schools consigned urban areas to a trend of mounting interdistrict disparities and deprived inner-city spaces. Bound to a set of uncompromising legal standards, this approach neglected one of the major, systemic features of urban inequality today: the link between residential segregation and grossly underfunded, racially isolated public schools. Blind to the demographic realities of metropolitan America, these and later decisions entrenched the antidiscrimination cause within the constraints of our legal doctrine.

In what Leland Ware has termed the "resegregation trilogy" of the 1990's, three court decisions – *Board of Education of Oklahoma v. Dowell*, *Freeman v. Pitts*, and *Missouri v. Jenkins* – undertook a new set of legal standards in relation to racial discrimination, considering not the scope of integration plans, but rather when such mandates should be lifted.[95] Steeped in constitutional rhetoric, these rulings endorsed a return to local control as the foremost goal in all desegregation cases – a mindset which sanctions segregated schooling, so long as funding remains equitable to the extent possible and discriminatory practices, as the law defines it, are not at work.[96]

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[95] Leland Ware, "Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases**,"** *Tulane Law Review* 78 (2004): 63; *Board of Education v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 70 (1995).

[96] Gary Orfield and Susan E. Eaton, "Plessy Parallels," in *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*, ed. Gary Orfield and Susan E. Eaton (New York, NY: New Press, 1996), 50.

*Dowell* (1991) clarified the language surrounding "unitary status" as a basis for dismissal, conditional upon a district's demonstration of "good faith" in complying with the mandate and eliminating "the vestiges of discrimination… to the extent practicable."[97] The second decision, *Freeman* (1992), enabled local districts to withdraw from desegregation orders gradually in a piecemeal approach.[98] Lastly, and perhaps most damagingly, *Jenkins* (1995) limited the scope of both federal oversight and the remedial funding introduced under *Milliken II*.[99] Defined in terms of what was both "practicable" and most conducive to a return to local control, these cases dismissed any empirical benchmark for what optimal integration would look like or what benefits – educational or social – desegregation could achieve.

In one recent study, Reardon *et al*. determined that over half of the districts once under court order have been released from oversight, and mainly over the past twenty years.[100] Though most pronounced in the South, the overall effect has been a steady rise in black-white segregation levels in neighborhood schools across the nation.[101] Accepting segregated neighborhoods and schools as an inevitable reality, the courts have withdrawn support from empirically-backed solutions, such as interdistrict desegregation, in defense of our legal doctrine and

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[97] *Dowell*, 498 U.S. at 249-250.

[98] *Pitts*, 503 U.S. at 490-491.

[99] Reardon et al., "*Brown* Fades," 879.

[100] Ibid, 877.

[101] Ibid, 903.

its accompanying precepts of local control, federal restraint, and individual choice. The legal mechanics of desegregation have thus followed a narrowly formalist approach to social reform, one that has rendered demographic evidence "immaterial" and irrelevant.[102]

Apart from the legal standards applied, the quality of social science evidence and the nature of desegregation cases have also limited the influence of relevant findings. What evidence has been submitted to the courts, often concerning the potential costs or benefits of desegregation, is widely contested – with some scholars arguing for the educational and social benefits of integration, and others denying them entirely. Moreover, the deeply politicalized nature of race in the United States has made desegregation more vulnerable to the selective use of findings, both by judges and by researchers themselves.[103]

Higher education is an altogether different setting from the grade-school context, warranting a distinct set of legal standards and, as we have seen, the added consideration of academic freedom. Even so, the desegregation battle offers a helpful format through which to explore potential ruptures in communication between social science evidence and legal disputes – a tension common to many cases attempting to engage academic research. The affirmative action debate, and antidiscrimination cases more broadly, have attracted rich cross-currents of legal, public, and social scientific discourse, enabling the

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[102] Moran, "What Counts As Knowledge?," 527.

[103] Ryan, "What Role Should Courts Play in Influencing Educational Policy?," 1675-1677.

possibility for both collaboration and collision between fundamentally different ways of observing the world and addressing the problems – disparities, exclusions, and hierarchies – within it.

*Communicative Misfire*

An attorney who treats a client like a hypothesis would be disbarred; a Ph.D. who advocates a hypothesis like a client would be ignored.[104]

- Lee Epstein and Gary King, "The Rules of Inference"

The divergent institutional histories and occupational aims of the law and the social sciences point to the possibility of what legal scholars Elizabeth Mertz and Jonathan Yovel call communicative "misfires."[105] One lens through which to consider this effect is "political-institutional," referring to the normative barriers that divide social science from law across standards and practices.[106] To review the basic tenets of legal realism, social science research has been incorporated into judicial proceedings as a weapon against individual assumption and prejudice, and in service to "practical rationality."[107] However, as demonstrated in the strained history between urban demography and legal mandate under desegregation, the meaning of "rationality" can vary widely across institutional contexts.

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[104] Lee Epstein and Gary King, "The Rules of Inference," *The University of Chicago Law Review* 69 (2002): 9.

[105] Yovel and Mertz, "The Role of Social Science in Legal Decisions," 421.

[106] Ibid, 412; Michael Heise, "Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures," *Seattle University Law Review* 31 (2008): 883.

[107] Yovel and Mertz, "The Role of Social Science in Legal Decisions," 412.

This discord highlights the basic tension between institutional vocabularies, capacities, and aims (i.e. the *political-institutional* source of conflict). Mertz and Yovel elaborate on this oppositional framework:

> The aim of social science is increased understanding, which draws researchers into ever more circumscribed conclusions and a form of epistemological modesty (wherein knowledge is inevitably partial and hedged). The aim of legal knowledge is to provide a 'good enough' foundation for acting in the world – for making decisions based in at least some pretense of certainty; social power and engagement are thus necessary concomitants of legal forms of knowing (resulting in the opposite of epistemological modesty).[108]

Social science researchers are open to the prospect of conflicting findings and, to that extent, relish the expected nuance of scientific study. Legal practice, meanwhile, is chiefly concerned with the immediate and unambiguous outcomes of a case, seeking evidence only to support a winning argument.[109]

The format of legal disputes is openly adversarial – a context ill-suited to a thorough review of social science evidence, with all its caveats, addendums, and hopeful uncertainties. As Heise notes, social scientists also subscribe to a relatively high standard of proof, requiring that the likelihood that a given outcome is explained by random chance not exceed five percent ($p<0.05$). Judicial interpretations of evidence tend to instead observe a "preponderance" threshold, which evaluates an outcome by whether it is "more likely than not" to occur.[110]

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[108] Yovel and Mertz, "The Role of Social Science in Legal Decisions," 412.

[109] Ibid, 412.

[110] Heise, "Judicial Decision-Making," 883.

Differing institutional standards are matched by differing institutional capacities. Judges may lack the necessary expertise to discern between legitimate and dubious findings, no matter the apparent credibility or relevance of the research to the case.[111] The presumed neutrality of social scientific findings threatens to reduce the courts to "passive, lay consumers of scientific data," in which research is uncritically accepted as rational fact.[112]

Communicative misfires are further compounded by inconsistencies in the law itself.[113] The more ambiguity a legal argument contains, the less likely that social science evidence will be able to yield any targeted, concrete support for a ruling. The definition of diversity, for instance, has achieved little consensus in the courts beyond signaling a *variety of viewpoints*, of which "racial or ethnic origin is but a single though important element."[114] Diversity's meaning is as broad and varying as the educational benefits it is purported to produce, from democratic legitimacy to future professional success.[115] To borrow an insight from John H. Bunzel, "Diversity has become a universal good presumed to be so self-evident that it need never be defined or can conveniently be redefined according to the occasion."[116]

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[111] Heise, "Judicial Decision-Making," 884.

[112] Yovel and Mertz, "The Role of Social Science in Legal Decisions," 412.

[113] Heise, "Judicial Decision-Making," 885.

[114] *Bakke*, 438 U.S. at 315.

[115] *Grutter*, 539 U.S. at 330 and 332.

[116] John H. Bunzel, "The Diversity Dialogues in Higher Education," *Fordham Urban Law Journal* 29 (2001): 490.

Up to this point, I have considered the normative and technical discrepancies that alienate social science from the law. Yet it is also important to consider whether such research even *should* enter into judicial decision-making – or whether the fundamental differences between legal and scientific truth should caution us against any effort to unite the two. This epistemological juncture returns to some of the basic oppositions between legal formalism and legal realism.

*Brown* turned away from the mechanical precepts of legal formalism and toward "responsive law," in a spirit that urged legal actors and institutions to "give up the insular safety of autonomous law and become more dynamic instruments of social ordering and social change."[117] Since then, amicus brief participation has increased dramatically: from 1946 to 1955, close to 18 percent of court opinions cited amicus briefs – a figure that rose to around 37 percent between 1986 and 1995.[118] Despite the growing entry of social science evidence into legal inquiry, formalist sensibilities often resurface (e.g., desegregation) and exacerbate the tension between law and empiricism as fundamentally different "ways of knowing."[119]

Under formalism, the capacities and obligations of the law are defined with respect to precedent and the assumptions of our legal doctrine – an inward-

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[117] Philippe Nonet and Philip Selznick, *Law and Society in Transition Toward Responsive Law* (New Brunswick: Transaction Publisher, 2001), 74.

[118] Joseph D. Kearney and Thomas W. Merrill, "The Influence of Amicus Briefs on the Supreme Court," *University of Pennsylvania Law Review* 148 (2000): 759-760.

[119] Moran, "What Counts As Knowledge?," 537.

looking system removed from the empirical truths of social science research. As Gilmore summarizes,

> [Formalism] seems to start from the assumption that the law is a closed, logical system. Judges do not make the law; they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor corrections can be made, but the truth, once arrived at, is immutable and eternal.[120]

By a strictly formalist logic, antidiscrimination cases are judged according to the standards of the Fourteenth Amendment's Equal Protection Clause. Constitutional imperatives around color-blindness, discriminatory intent, and racial quotas inhibit the consideration of extralegal realities, regardless of their empirical validity.

Social science and the law are not static fixtures. Though the law may be characterized as "immutable and eternal," its implementation is also deeply political. Legal formalism and realism are, in some sense, proxies for party membership – where conservatives have historically observed a narrow reading of constitutional text and liberal democrats a broader, contextually responsive one. Republican appointments to the Supreme Court under the Nixon administration arguably played a key role in judicial responses to desegregation during the post-*Brown* era and their ultimate resistance to interdistrict solutions. Similarly, the

[120] Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977), 62.

*Fisher*'s Court's increased attention to narrow tailoring should be viewed conjointly with the conservatism of the Supreme Court during its 2012 term.[121]

Social science evidence, too, is historically responsive. Scientific practice adjusts with changes to current knowledge and methodology in the field, such that today's legitimate findings may be tomorrow's "junk" science.[122] This forward progression represents an uneasy counterpoint to the ahistorical posture of the Constitutional formalism. Following the *Brown* ruling, law professor Edmond Cahn criticized the court's use of empirical research for undermining the moral assurances of the Fourteenth Amendment. While supporting the outcome of the case, Cahn argued that the inherent obligations of the Constitution – to protect and ensure individual rights – should not be tied to the "flimsy foundation" of whatever we call "science." Such a precedent, he contended, challenged the basic nature of our constitutional rights, in a manner that would have those freedoms "rise, fall, or change along with the latest fashions of psychological literature."[123]

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[121] john a. powell and Stephen Menendian on the political composition of the Supreme Court at the time of *Fisher*: "Five conservative Justices controlled the Court in its 2012 term, with *Grutter*-dissenter Justice Anthony Kennedy holding the decisive vote. Justice Alito, viewed by many as hostile to affirmative action, replaced Justice O'Connor, the author of the Court's *Grutter* decision. Furthermore, the recusal of Justice Elena Kagan because of her prior involvement in the case as Solicitor General hampered the Court's liberal wing. Justice Kagan holds the seat previously held by Justice John Paul Stevens, a member of the Grutter majority (Menendian and john a. powell 2014: 901)."

[122] Yovel and Mertz, "The Role of Social Science in Legal Decisions," 410.

[123] Edmond Cahn, "Jurisprudence," *New York University Law Review* (1955): 157-158.

*Restoring Race-Consciousness through Social Science Evidence*

Cahn's critique taps into the core frustrations – and indeed, the dangers – of attempting to incorporate social science evidence into legal resolution. A source of both internal conflict and radical potential, the relationship between social science and the law has major implications in policy design. Two movements – the Law and Society movement and New Legal Realism – have even launched empirical studies of legal actors and institutions, to better understand the forces behind legal decision-making and identify sites for potential reform (See Ewick et al. 1999).

Nonetheless, technical and epistemological divisions across institutional norms, standards, and practices continue to represent barriers to translation. Because judicial decision-making takes place behind closed doors, it is also difficult to approximate the influence that such research has on rulings. Despite these admitted tensions, one should not underestimate the productive value of such an opposition. By its very autonomy, I would argue, social science research is positioned to offer a richer critique than could be generated from within the legal arena alone. As Yovel and Mertz observe, there is a powerful "tug-and-pull" across institutional frames that can both limit and enhance social science's influence:

> …if social science is truly to provide trenchant criticism, it must stand outside the frames provided by law and policy discourses. There is a 'pull' to these frames, and it is tempting to simply offer small amendments, or ways of tinkering with existing systems, rather than to stand outside and question the framework as a whole. At the same time, the risk of standing totally outside of existing frameworks is that the critique will not be heard;

> discourse from a completely different frame can be very difficult – if not impossible – to absorb….[124]

In the pages that follow, I will attempt to bridge these "frames" through the lens of affirmative action litigation. Susan Haack has characterized the relationship between the law and social science as one in which "the legal system…asks more of science than science can give, and often gets less from science than science could give."[125] As I will argue, however, the chief source of this disconnect is the rigid "correlation-causation" paradigm of legal disputes – a framework that strips social science of its nuanced content for the ease of legal argumentation. Filtered through the interests and abilities of legal actors, this format reconfigures the meaning of social science evidence from a continuum into a dichotomy.[126]

In order to navigate the self-referential framework of legal procedure, social science must demonstrate both an independence from and working familiarity with the mechanisms of the law. It must, in other words, reclaim its depth and nuance in a way compatible with legal strictures. To that end, I will move beyond the outcome-focused terrain of legal battles and reevaluate the affirmative action debate through a more substantive empirical lens. With attention to the local texture of diversity on college campuses, I will examine not *whether* diversity improves intergroup relations among students of different races,

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[124] Yovel and Mertz, "The Role of Social Science in Legal Decisions," 428.

[125] Susan Haack, "Trials & Tribulations: Science in the Courts," *Daedalus* 132 (2003): 57.

[126] Yovel and Mertz, "The Role of Social Science in Legal Decisions," 413.

but *under what conditions*. To be sure, diversity alone cannot be an assumed source of educational benefits; those benefits must be nurtured through the support of institutional efforts, student engagement, and a sustained attention to the narrative of race in the United States, in a way that links past legacies with present effects.[127]

This analysis has several dimensions. To begin, I hope to resolve some of the apparent incompatibilities between the law and social science by expanding the body of research relevant to affirmative action litigation. In order to fully realize the educational potential of diversity, our institutions must look beyond the simple linear relationship between diversity and its purported civic, social, and intellectual benefits. While compositional diversity may satisfy the constitutional criterion of "compelling interest," minority representation in numbers alone is not sufficient. Renewed attention to the local and circumstantial character of campus climate will both serve legal discourse and, more fundamentally, guide educational practice.

In a departure from the "winks, nods, and disguises" that have come to dominate contemporary legal discourse on race, I also hope to restore race-consciousness to the affirmative action discussion.[128] By incorporating racial diversity as a feature of their educational mission, colleges and universities can promote diversity in a way that both complements our legal doctrine and is

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[127] Mitchell J. Chang et al., "Beyond Magical Thinking: Doing the Real Work of Diversifying Our Institutions." *About Campus* 10 (2005): 11.

[128] *Gratz*, 539 U.S. at 305.

responsive to empirical realities in higher education. With this in mind, I will look specifically at the inter-relational benefits stemming from a diverse student body, such as improved intergroup trust and interaction, and – to borrow a piece of constitutional phrasing – "cross-racial understanding."[129]

Reconciling social science evidence with legal procedure will, I hope, promote some stability in the future of affirmative action policy. While recognizing the internal contradictions of the diversity rationale, my aim is not to propose a restructuring of our legal doctrine. Instead, I will work within existing constraints – strict scrutiny, deference, and critical mass – to consider how increased attention to the "optimal conditions" for intergroup contact is compatible with the continuation of affirmative action in higher education. Deference to institutional definitions of diversity as a "compelling interest" both accords with legal precedent and provides intermediary support for the transmission of social science evidence into the legal arena. The following analysis bolsters the diversity rationale in a way that is, first, race-conscious and, secondly, is more attentive to the nuance of social science research as it relates to affirmative action rulings.

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[129] *Grutter,* 539 U.S. at 328.

## A DEFENSE FOR DIVERSITY:
## THE OPTIMAL CONDITIONS OF INTERGROUP CONTACT

The collaborative history between the law and social science in affirmative action cases has come a long way since *Bakke* in 1978, when Justice Powell grounded his "diversity rationale" in the observation that, "Our tradition and experience lend support to the view that the contribution of diversity is substantial."[130] The democratic underpinnings of Powell's argument resonated with educators as an appeal to pluralism and open access. Despite its sparse empirical backing, the *Bakke* opinion remains the key defense against challenges to affirmative action today. Since *Grutter* in 2003, the task of researchers has been to bolster or refute the diversity rationale, transporting it from the realm of "tradition and experience" to empirical evidence.

Amicus briefs in the *Fisher* case drew varying angles of support from educators, administrators, researchers, and legal experts.[131] Among these contributions, two briefs – one written on behalf of Fisher, the other for UT – stand out as an illustration of the unresolved tensions within academic research on diversity, and the interpretive challenges that those tensions present in the

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[130] *Regents of University of California v. Bakke,* 438 U.S. 265, at 313 (1978).

[131] Seventeen amicus briefs were filed in support of the petitioner, Abigail Fisher, and seventy-four in defense of the University of Texas in Austin; two briefs were submitted on behalf of neither party; Suzanne E. Eckes, David Nguyen, and Jessica Ulm, "*Fisher v. University of Texas*: The Potential for Social Science Research in Race-Conscious Admissions," *West's Education Law Reporter* 288 (2013): 9-10.

courtroom. The first document – authored by Abigail and Stephan Thernstrom et al. (i.e. the "Thernstrom brief") – was written in support of Fisher. The second brief was a direct rebuttal from social scientist Robert Putnam, whose research on intergroup relations was cited extensively by the Thernstroms as a reason for dismantling race-conscious admissions.

Arguing against the treatment of diversity as a "compelling state interest," the Thernstrom brief targeted the "cross-racial understanding" piece of Powell's list of diversity-related benefits.[132] Rather than acting as a source of interracial trust and engagement, the Thernstroms contended, diversity inhibits intergroup contact by fostering an environment of group preference that reinforces stereotypes and encourages self-segregation among students.[133] To support this point, the authors incorporated research from Dr. Putnam's 2007 study on the relationship between social capital – what Putnam defines as "social networks and the norms of reciprocity and trustworthiness that arise from them"[134] – and racial-ethnic diversity.[135] Specifically of interest to the Thernstroms was Putnam's conclusion that, in the short- to medium-term, diversity seemed to undermine positive intergroup contact, corresponding to lower levels of cross-racial trust and

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[132] *Grutter v. Bollinger*, 539 U.S. 306, at 328 (2003).

[133] Brief of Abigail Thernstrom et al. as Amici Curiae in Support of Petitioners, *Abigail Fisher v. University of Texas* 631 F. 3d 213, 5th Circuit, at 32 (2011).

[134] Robert D. Putnam, "Thinking about Social Change in America," in Bowling Alone: The Collapse and Revival of American Community, ed. Robert Putnam (New York: Simon & Schuster, 2000): 19.

[135] Robert D. Putnam, "*E Pluribus Unum*: Diversity and Community in the Twenty-first Century: The 2006 Johan Skytte Prize Lecture," *Scandinavian Political Studies* 30 (2007).

interaction.[136] Citing this finding, the brief concluded: "The more numerous the members of the outsider group present, and the more contact people have with them, the greater the level of intergroup distrust."[137]

In an adversarial format that mirrored the *Fisher* litigation, Dr. Putnam responded to the Thernstrom report through his own amicus brief, taking pains to clarify the scope of his findings and reaffirm the value of diversity as a compelling interest. Putnam claimed that the Thernstroms had "twisted" his research by excluding the fuller context of his conclusions on social capital and diversity.[138] Pointing to the cross-sectional design of his original study, Putnam argued that he was constrained from offering any conclusive insight on the long-term effects of diversity. He did, however, cite historical and anecdotal examples (e.g., the U.S. military, his experience as a professor) to illustrate the long-term potential of diverse environments to overcome short-term depletions of social capital and generate "a more encompassing sense of 'we.'"[139] Race-conscious policies like the UT plan, Putnam added, are integral to this effort and, with time, can create the necessary conditions to ameliorate intergroup tensions and promote "a novel 'one' out of a diverse 'many.'"[140]

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[136] Brief of Abigail Thernstrom et al., at 11.

[137] Ibid, 13.

[138] Brief of Robert D. Putnam as Amicus Curiae in Support of Respondents, *Abigail Fisher v. University of Texas*, 631 F. 3d 213, 5th Circuit, at 2 (2011).

[139] Ibid, 6.

[140] Ibid,14 and 16.

The Thernstrom-Putnam dialogue captures several areas of disconnect between social science evidence and legal procedure. The polarized structure of this debate – whether diversity does or does not improve cross-racial understanding – accommodates the adversarial design of legal practice and, as a result, precludes a more nuanced review of diversity's effects. Such a dichotomized format lends itself to the selective use of findings, both by researchers (i.e. the Thernstroms vis-à-vis Putnam) and by the judges themselves. When faced with two sets of seemingly irreconcilable evidence, legal actors are likely to appropriate whatever findings serve their argument – or even dismiss the research altogether, when inconsistencies undercut its apparent usefulness to the court.[141]

Putnam's brief tried to resolve these contradictions to a point, recognizing the need for a broader, longitudinal lens that attends to the long-term and circumstantial dynamics of diversity on college campuses. The question of *if* diversity improves intergroup relations is one steeped in externalities of campus conditions and sustained effort – a factor omitted from the Thernstrom brief. Even so, Putnam's speculations about diversity's long-term impact amount to just that – speculation. Echoing the First Amendment language of *Bakke* and *Grutter*, Putnam left the work of understanding and fostering the campus conditions

[141] Michael Heise, "Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures," *Seattle University Law Review* 31 (2008): 885.

needed for positive, intergroup contact to educators and administrators. This attitude of deference is apparent in the closing lines of his brief:

> …policies that seek a broad diversity, including racial and ethnic diversity, in educational institutions, such as those in use at UT, hold great promise in overcoming any potential short-run negative effects of diversity identified in the Thernstrom *amici* brief. A nation that is inevitably and increasingly diverse benefits from policies that promote social solidarity and trust through shared experiences and creation of a more inclusive social identity. This is the important lesson from Dr. Putnam's work, "namely to create a novel 'one' out of a diverse 'many.'"[142]

The tensions arising from the Thernstrom-Putnam briefs point to several conclusions about the future role of social science research in affirmative action disputes. First and foremost, the full realization of diversity's benefits – however broad and amorphous those benefits may seem – is contingent on factors beyond simply assembling students from diverse backgrounds.

There is ample evidence to suggest that diversity is a forceful dynamic in the educational experiences of college students, and that its influence is, on the whole, positive, corresponding to improvements in critical thinking ability, leadership and professional development, self-confidence, and cross-racial engagement.[143] Yet whether diversity does or does not foster educational and social growth is a notion inextricably linked to questions of *how*. How can colleges and universities craft what sociologist Gordon Allport called the "optimal conditions" of intergroup contact, in a manner that not only satisfies legal purpose

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[142] Brief of Robert D. Putnam, at 16; Robert D. Putnam, "*E Pluribus Unum*," 165.

[143] The Civil Rights Project, "The Research Basis for Affirmative Action: A Statement by Leading Researchers," 10 July 2013, retrieved from http://civilrightsproject.ucla.edu/legal-developments/legal-briefs/placeholder-statement-of-social-scientists-on-research-literature-for affirmative-action/.

but guides educational practice?[144] Narrowing the constraints of relevant research to the correlation-causation framework – to the starkly defined "benefits and costs" associated with diversity – both neglects the empirical realities of race in the U.S. and limits the capacity of social science research to attend to these realities in a more substantive way.[145]

As detailed in Chapter Two, technical and epistemological differences position the law and social sciences as fundamentally different and, at times, oppositional lenses for observing the social world and responding to problems within it. With varying degrees of formalism, the courts observe the strictures of our legal doctrine and engage research only to the extent that it supplies a "'good enough' foundation" for addressing the legal standards at issue – in the case of affirmative action, the "compelling interest" and "narrow tailoring" criteria of strict scrutiny.[146] As I will argue here, however, a deeper, more localized attention to the conditions under which diversity succeeds can navigate some the apparent divergences between the law and empiricism. A well-established fixture of affirmative action litigation today, deference is an agent through which race-consciousness can become both empirically-informed – guiding institutional

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[144] Gordon Allport, *The Nature of Prejudice* (Cambridge, MA: Addison-Wesley, 1954).

[145] James E. Ryan, "What Role Should Courts Play in Influencing Educational Policy?: The Limited Influence of Social Science Evidence in Modern Desegregation Cases," *North Carolina Law Review* 81 (2003): 1661.

[146] Jonathan Yovel and Elizabeth Mertz, "The Role of Social Science in Legal Decisions," in *The Blackwell Companion to Law and Society*, ed. Austin Sarat (Malden, MA: Blackwell Publishing Ltd., 2004), 412.

practice – and constitutionally viable, promising some stability in the future of affirmative action in higher education.

*Transformation in Higher Education*

Legal scholar Mark Kende has characterized Justice Powell's diversity rationale in *Bakke* as a "super-precedent," a ruling that has demonstrated "stunning vitality" over the years, despite its "original fragility."[147] Having rejected the remedial logic proposed by the Brennan bloc, Powell pointed to the educational value of a diverse living environment, as a context "conducive to speculation, experiment and creation – so essential to the quality of higher education."[148] Of the fifty-eight amicus briefs read by the Court, Justice Powell cited only one – the so-called "Ivy brief," which had been jointly submitted by Columbia, Harvard, Stanford, and the University of Pennsylvania.[149] Perhaps for this reason, the opinion garnered broad support from colleges and universities across the nation, speaking to democratic intuitions so engrained in the ethos of higher education. [150]

When surrounded by people unlike themselves, Powell argued, students are "stimulated… to reexamine even their most deeply-held assumptions about

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[147] Mark Kende, "Is *Bakke* Now a 'Super-Precedent' and Does It Matter? The U.S. Supreme Court's Updated Constitutional Approach to Affirmative Action in *Fisher*," *University of Pennsylvania Journal of Constitutional Law Heightened Scrutiny* 16 (2013): 16-17.

[148] *Bakke,* 438 U.S. at 312.

[149] Chang et al., "Beyond Magical Thinking," 11.

[150] Ibid, 9-11.

themselves and their world." On this basis, he concluded, "There is *some relationship* between numbers [of minority students on campus] and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted (emphasis added)."[151] Citing former president of Harvard University William Bowen, Powell conceded at the same time that "it is hard to know how, and when and even if, this informal 'learning through diversity' actually occurs."[152] Apparent in Powell's opinion is the self-referential tendency of legal thought. While the *Bakke* decision may satisfy legal procedure in its appeal to constitutional ideals and precedent, it has left glaring empirical holes in how such mandates realistically unfold on college campuses.

Mitchell Chang has referred to this process as "magical thinking" – an "unrealistic explanation of cause and effect" that removes the legal barrier to race-conscious admissions in higher education, but gives no attention to *how* its benefits accrue.[153] In other words, as Chang observes, "…the educational benefits of diversity seem to [Powell] to just magically and organically occur if the right ingredients and environment are present."[154] This mode of thought is reflected across both Powell's uncertainty around the source of diversity's educational value – which he tentatively suggests emerges through "unplanned, casual

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[151] *Bakke,* 438 U.S. at 324.

[152] *Id.* at 312 n. 48.

[153] Mitchell J. Chang, "Reconsidering the Diversity Rationale," *Liberal Education* 91 (2005): 3.

[154] Chang et al., "Beyond Magical Thinking," 13.

encounters" – and his neglect toward the role of institutions in enhancing that value.[155]

The *Grutter* ruling addressed some of this ambiguity by introducing a richer empirical context to the diversity question, substantiating and refining Powell's benefits through amicus briefs. Justice O'Connor underscored this shift at one point in the majority opinion, when she argued, "These benefits are *not theoretical but real,* as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints (emphasis added)."[156] Yet while giving more substance to diversity as a compelling interest, the *Grutter* opinion continued to entertain "magical thinking" about the realization of its benefits. Invoking First Amendment protections for colleges and universities, the Court implicitly abdicated any responsibility for securing diversity's educational outcomes. In this line of thinking, minority enrollment alone constitutes a natural source of educational growth, or at least a process whose deeper conditions have no immediate legal relevance.

This tangled logic invited pushback in the *Grutter* dissent, where Justice Clarence Thomas contended,

> …attaining 'diversity,' whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational 'benefits' *not*

[155] *Bakke,* 438 U.S. at 313.

[156] *Grutter,* 539 U.S. at 330.

> simply the forbidden interest in 'racial balancing,' *ante,* at 17, that the majority expressly rejects? (emphasis in original)[157]

Justice Thomas broached a major inconsistency in the affirmative action narrative. As outlined in Chapter One, the *Grutter* and *Fisher* courts have been careful to define the "critical mass" standard of minority enrollment not by any numerical goal, but with reference to "the educational benefits that diversity is designed to produce."[158] The diversity rationale thus seems to teeter on a precarious logic, where the educative potential of diversity justifies race-conscious policy, but the actual enactment of those benefits lies outside of the Court's purview.

For reasons already discussed, it is difficult to approximate the full scope of motivations behind judicial decision-making. Even so, Chang is right to observe that the incongruence of the diversity rationale is likely not so much an oversight, as it is a constitutional exercise of First Amendment protections.[159] Enshrined in the *Grutter* ruling, colleges and universities "occupy a special niche in our constitutional tradition" and, as such, have a major – and legally recognized – role in pursuing the benefits of diversity.[160] Given the conditional nature of racial climate across campuses, I would argue this more localized approach is the most legally stable and practically effective trajectory for affirmative action policy today. If, however, race-conscious admissions are to produce the

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[157] *Grutter,* 539 U.S. at 355.

[158] *Id.* at 328.

[159] Chang et al., "Beyond Magical Thinking," 14.

[160] *Grutter,* 539 U.S. at 330; Mitchell J. Chang et al., "Beyond Magical Thinking,"14.

educational gains promised by Justice Powell in 1978, institutions must resist their own brand of "magical thinking" through a concerted attention to the realities of race in higher education; they must, in other words, bridge legal mandate with educational practice through the use of social science research.[161]

Within the context of the courts, the stark correlation-causation format of social science research in affirmative action litigation is a natural, and perhaps even necessary, paradigm for evaluating the legal value of diversity in higher education. Responding to dichotomous legal standards – *if* diversity does or does not constitute a compelling interest – research is condensed for legal purpose, and with equally polarized results (e.g., the Thernstrom-Putnam dialogue). This speaks to the basic epistemological divisions between empirical research and the law. Expanding the terrain of legal truth into "*what actually works*," empirical inquiries into the value of diversity must be reoriented away from "if" and toward "what," toward the "breadth and depth of diversity as practiced on college campuses."[162] Chang et al. (2006) capture this tension well:

> It is becoming increasingly clear that the effects of diversity are conditional, which explains in part why there is still ongoing controversy regarding the body of research informing the benefits of diversity…. In order to understand if diversity matters, we need to also understand what makes diversity work or fall short. There is still a pressing need for more quality research because the *if* question is not yet fully resolved in the courts, and the *what* question has serious implications for institutional

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[161] *Grutter,* 539 U.S. at 330; Mitchell J. Chang et al., "Beyond Magical Thinking," 14.

[162] Mitchell J. Chang, "Preservation or Transformation: Where's the Real Educational Discourse on Diversity?," *The Review of Higher Education* 25 (2002): 126-128.

> practice, which subsequently contributes to how the educational relevance of diversity will invariably be judged (emphasis in original).[163]

Only with substantive attention to the complex of structural, historical, and interactional factors underpinning diversity outcomes can empirical reality began to mirror the legal ideal put forward in Justice Powell's diversity rationale.

Our legal system may not be institutionally equipped to analyze the more localized nuance of diversity research, but colleges and universities certainly are. The *Fisher* ruling has granted substantial deference to institutions to pursue diversity as part of their educational mission.[164] At the same time, the courts have doubled down on narrow tailoring efforts, mandating that, "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."[165]

Despite increased scrutiny around race-neutral alternatives to affirmative action, institutions can defend themselves against future challenges to race-conscious admissions through a more focused attention to the racial elements of the diversity rationale – the goals of "lessening of racial isolation and stereotypes," "promoting cross-racial understanding," and "enabling [students] to better understand persons of different races."[166] As I will later argue, the

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[163] Mitchell J. Chang et al., "The Educational Benefits of Sustaining Cross-Racial Interaction among Undergraduates," *The Journal of Higher Education* 77 (2006): 452.

[164] *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, at 2419 (2013).

[165] *Id.* at 2420.

[166] *Grutter,* 539 U.S. at 330.

deliberate institutionalization of race-consciousness in educational values and campus initiatives to pursue these goals – moving away from the "winks, nods and disguises" of racial proxies – reduces the capacity of any race-neutral alternative to achieve the same outcomes (see Harpalani forthcoming 2015).[167]

Without discounting the total breadth of benefits tied to diversity, the remainder of the chapter will consider this subset of race-related benefits through the lens of contact research on intergroup relations in higher education. "Critical mass" is a measure of racial climate and therefore must be nurtured through local conditions of institutional support, student engagement, and an ongoing attentiveness to racial legacy in the U.S. Against a growing injunction in education research today for "sustained attention" to diversity, this project does not allow for an exhaustive review of relevant literature.[168] Instead, I hope to highlight several of the key theoretical frameworks for understanding the "optimal conditions" of racial diversity – paradigms that have the potential to inform educational practice and empower institutions as legal agents in their own right.[169]

*The Contact Literature: Revising Allport's "Optimal Conditions"*

Gordon Allport's "intergroup contact theory" is widely credited for supplying the foundation of contact literature today, creating an extensive body of research on the factors underpinning attitudes and interactions across groups. In

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[167] *Gratz*, 539 U.S. at 305.

[168] Mitchell J. Chang and Nida Denson, "Racial Diversity Matters: The Impact of Diversity-related Student Engagement and Institutional Context," *American Educational Research Journal 46* (2009): 323.

his 1954 treatise *The Nature of Prejudice*, Allport complicated traditional conceptions of in-group/out-group bias by outlining a narrow set of "optimal conditions" for positive intergroup contact.[170] Replicable across contexts, these basic conditions included: equal group status within the situation, shared goals, intergroup cooperation, and institutional support from authorities, law, or custom.[171] Without such conditions in place, Allport argued, intergroup contact would not reduce bias and might even exacerbate feelings of group prejudice.[172]

Allport's list of "optimal conditions" has since been extended to include a range of other qualifiers – a trend that has both stretched and diluted the empirical value of contact literature, threatening to reduce it to what Thomas Pettigrew has called "an open-ended laundry list of conditions… ever expandable and thus eluding falsification."[173] The task of limiting our attention to the university setting, where there is a broad differential of diversity outcomes across institutional contexts, seems to extend this list even further. The campus environment operates as a dynamic space of institutional, historical, and micro-level forces, not easily understood with "ready-made 'cookbook' strategies."[174] For that reason, educational policy for improving racial climate is more

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[170] Gordon Allport, *The Nature of Prejudice* (Cambridge, MA: Addison-Wesley, 1954).

[171] Thomas F. Pettigrew, "Intergroup Contact Theory," *Annual Review of Psychology* 49 (1998): 66.

[172] Chang, "The Educational Benefits of Sustaining Cross-Racial Interaction," 433.

[173] Pettigrew, "Intergroup Contact Theory," 69.

[174] Chang, "The Educational Benefits of Sustaining Cross-Racial Interaction," 434.

appropriately pursued at multiple levels of analysis, spanning all facets of the institutional context and with attention to the distinctiveness of local conditions.

While resisting generalization, some level of conceptual organization is necessary to understand the full breadth of contact literature in higher education. According to Sylvia Hurtado et al., the racial climate of the campus context consists of four interconnected dimensions: structural diversity (numerical representation of minority groups), historical legacies of inclusion/exclusion, the psychological climate expressed through perceptions and attitudes, and the behavioral climate of interaction patterns among students.[175] In order to realize the cross-racial benefits of Justice Powell's diversity rationale, colleges and universities must attend to each of these aspects with equal force and sensitivity.

The dynamic relationship across these dimensions amounts to an unquantifiable "atmosphere," complicating empirical efforts to identify any one uniform set of "optimal conditions." Such nuance, however, should not diminish the perceived value of diversity research in structuring educational policy; on the contrary, it should incite even more critical attention to the aggregate of factors – institutional, individual, and historical – behind diversity outcomes and how these factors are configured in the local setting.

Structural diversity is an important – and indeed, necessary – precondition for the benefits of diversity to develop. This basic goal of minority representation has been the focus of affirmative action litigation and related "critical mass"

[175] Sylvia Hurtado et al., "Enhancing Campus Climates for Racial/Ethnic Diversity: Educational Policy and Practice," *Review of Higher Education* 21 (1998): 282.

disputes – a discourse rooted in the basic presupposition that one cannot enjoy the benefits of diversity without first being surrounded by a diverse selection of peers. Past studies have linked structural diversity to a variety of developmental gains across interracial attitudes, civic involvement, and complex thinking (e.g., Bowen & Bok 1998; Chang 1999; Hurtado 2001).[176] This body of research has been cited to bolster affirmative rulings and demonstrate the value of minority enrollment as a potential end in itself.

There is growing consensus, however, that structural diversity alone does not guarantee educational benefits and can, in some instances, fuel intergroup distrust and unease (e.g., Hurtado 1992; Rothman, Lipset, & Nevitte 2002).[177] Minority enrollment may be the *sine qua non* of diversity's benefits, but its larger efficacy in producing cross-racial trust and engagement is grounded in deeper structural and interactional conditions. *Interaction diversity*, defined by Denson and Chang as "informal student-student cross-racial contact," and structured efforts towards cross-racial engagement in *curricular/co-curricular diversity* offer more refined predictors of diversity's social benefits.[178] Recalling Allport's stipulation of institutional support for positive intergroup contact, recent studies

[176] Chang, "The Educational Benefits of Sustaining Cross-Racial Interaction," 431.

[177] Hurtado et al., "Enhancing Campus Climates for Racial/Ethnic Diversity," 287.

[178] Chang and Denson, "Racial Diversity Matters," 323.

have demonstrated how the value of diversity seems to depend on more substantive forms of racial engagement and intervention.[179]

Several scholars have arrived at a firm linkage between individual levels of cross-racial interaction and diversity-related curricular engagement, and educational outcomes such as improved intergroup attitudes, cultural awareness, social justice commitments, intergroup attitudes, and civic involvement.[180] Denson and Chang's 2009 study observed a significant, positive relationship between frequencies of cross-racial contact – *studied, dined, dated, interacted*, or *socialized* with someone of a different racial-ethnic group – and broader trends of cross-racial tolerance and engagement.[181] This relationship also held for individual engagement in curricular and co-curricular forms of diversity: participation in race-related workshops, dialogues, and/or ethnic studies courses or organizations corresponded to higher levels of "self-change" with regard to both academic skills and racial-cultural engagement.[182]

Moving beyond individual-level variables, Denson and Chang (2009) also tested the impact of institution-level interaction patterns on diversity outcomes – and with powerful results. Using hierarchical linear modeling, they observed a "compositional effect," in which aggregate levels of student cross-racial interaction and curricular engagement appeared to have "measurable positive effects on all students irrespective of a student's own frequency of engagement

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[179] Mitchell J. Chang et al., "Cross-Racial Interaction among Undergraduates: Some Consequences, Causes, and Patterns," *Research in Higher Education* 45 (2004): 530-531.

[182] Chang and Denson, "Racial Diversity Matters," 343.

with diversity."[183] While it is difficult to parse this finding into discrete programmatic initiatives or institutional qualities, this research imparts some substance to "racial climate," using aggregate student engagement as a proxy for the surrounding atmosphere.[184] Future research might attempt to trace these normative effects to more targeted sources, such as institutional rhetoric around race, race-related curricular and co-curricular offerings, and broader norms, traditions, and rituals fostered on campus.

For now, these "compositional effects" have little practical relevance beyond encouraging local reflection on the possible forces around campus climate. With similar attention to the organizational structure that promotes positive cross-racial contact, others have pursued this question with an eye to the more standardized features of the university setting – differences *across* institutions that have a demonstrated impact on cross-racial engagement. In their 2004 study, Chang et al. identified several features closely linked to composite measures of cross-racial contact on campuses and related civic, social, and intellectual benefits.

Structural diversity was the first and most obvious predictor of cross-racial interaction. Also expectedly, they found that higher proportions of students living and working on campus correlated with higher levels of cross-racial contact. Complicating these findings, however, was their observation that the most

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[183] Chang, "The Educational Benefits of Sustaining Cross-Racial Interaction among Undergraduates," 455; Chang and Denson, "Racial Diversity Matters," 344.

[184] Ibid, 346.

structurally diverse institutions corresponded to a larger enrollment size and larger proportion of students living and working off-campus – conditions that typically limit the likelihood of cross-racial interaction.[185]

Umbach and Kuh (2006) considered sources of institutional variation in cross-racial enrichment but narrowed their focus to the liberal arts setting. Despite being characteristically less diverse and more rural, liberal arts colleges have tended to produce students who report more engagement in diversity-related initiatives and higher gains in cross-racial understanding, than larger doctoral universities.[186] Such findings illustrate how "diversity contexts" extend beyond simple minority enrollment to a host of other interaction- and curricular-based strategies like intergroup dialogues, racial-ethnic houses and student organizations, and a clearly articulated vision of inclusion and support.[187]

Together, these studies should motivate a radical rethinking of organizational structures and how the effects of those structures can be mitigated or enhanced to optimize diversity's benefits. Structural diversity is not an assumed source of positive intergroup contact, nor is the normative context of values, traditions, and culture a purely secondary player in facilitating cross-racial interaction. The cross-cutting dynamics between structural, interactional, and curricular forms of diversity reaffirm the distinctly "local" character of

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[185] Chang et al., "Cross-racial Interaction among Undergraduates," 540.

[186] Paul D. Umbach and George D. Kuh, "Student Experiences with Diversity at Liberal Arts Colleges: Another Claim for Distinctiveness," *Journal of Higher Education* 77 (2006): 183.

[187] Chang and Denson, "Racial Diversity Matters," 328.

institutional contexts – one that does not easily lend itself to Allport's static set of "optimal conditions."

Powell's diversity rationale points to the "variety of perspectives" that undergirds student learning and growth; as demonstrated here, those benefits are intimately linked to the macro-level features of institutional context.[188] Refining the psychological and behavioral dimensions of Hurtado's "racial climate" model, another critical lens to consider is the micro-level, identity-based outcomes of intergroup contact. There exists a growing literature on the mechanisms of group psychology in cross-racial contact – a perspective which promises unique insight into the formation of superordinate group identities and preservation of racial-ethnic background through campus initiatives. Gurin and Nagda have advanced several, well-established theories in social psychology for understanding intergroup contact, and each with distinct "programmatic assumptions" around diversity-related curricular and co-curricular offerings on college campuses.[189]

Within the field of social psychology, there are three major axes along which diversity initiatives differ: (a) "salience of racial/ethnic group identity;" (b) "power, privilege, and inequality as a context for intergroup relationships;" and (c) "the outcomes of intergroup harmony, understanding, and collaboration."[190] The shared task of these initiatives is to delineate the boundaries of group identity

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[188] *Bakke*, 438 U.S. at 315.

[189] Patricia Gurin and Biren R. Nagda, "Getting to the What, How, and Why of Diversity on Campus," *Educational Researcher* 35 (2006): 20.

[190] Ibid, 20.

– facilitating, in Putnam's terminology, intergroup bridging and/or intragroup bonding.[191] Adhering to the framework put forward by Gurin and Nadga, the key theories underpinning such policies include decategorization, recategorization, and the dual identity model. The intergroup dialogue format, they argue, incorporates features from each of these models and thus mitigates some of the apparent tensions between *intragroup solidarity* and *intergroup harmony*.[192]

Decategorization aims to dissolve "in-group/out-group" boundaries, to the extent possible, by deemphasizing group identities and evaluating social difference purely at the level of the individual. In the campus setting, such a model might take the form of individual (rather than group-based) counseling sessions or randomized housing assignments. Categorical groupings by race or otherwise are disbanded, at least within the immediate context, and reconceptualized as individual subjects.[193] According to some thinkers (e.g., Brewer and Miller 1984), decategorization enables the beginning stages of intergroup harmony by casting off "the us vs. them" dichotomy of group differentiation.

Recategorization builds on this effort toward intergroup harmony by enacting a new collective identity across groups. Alternatively defined by Gaertner and Dovidio as the "common in-group identity model," recategorization is rooted in the "in-group positivity bias" – the notion that certain status-related

[191] Putnam, "Thinking about Social Change in America," 22.

[192] Gurin and Nagda, "Getting to the What, How, and Why of Diversity on Campus," 20.

[193] Ibid, 20.

benefits are accorded to individuals with in-group membership.[194] Recalling pieces of Allport's optimal conditions, former out-group members can be integrated into that membership – into the so-called "superordinate identity" – through common goals and activities, shared reward for cooperative behavior, physical integration, and the creation of new group symbols.[195] According to a large-scale study from Gaertner and Dovidio, the culmination of these conditions significantly reduces intergroup bias and prejudice.[196] Within the campus context, living-learning communities and intramural sports illustrate this function, activating new, common in-group characteristics, while correspondingly deemphasizing – or more specifically, deracializing – former group boundaries.[197]

Across both decategorization and recategorization, the salience of racial-ethnic group identities is diminished and the larger context of intergroup power relations sidelined – with the chief goal of improved intergroup cohesion. Activities geared toward enhancing intragroup solidarity, by contrast, show a conscious attention to racial-ethnic identity and the broader systemic context that underlies racial-ethnic difference. Through a process of cross-group comparison, group members derive "positive psychological distinctiveness" or, in the context of perceived group inequalities, *solidarity* – "a strengthening of group ties based

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[194] Gurin and Nagda, "Getting to the What, How, and Why of Diversity on Campus," 21.

[195] Shana Levin et al., "Ethnic and University Identities across the College Years: A Common In-Group Identity Perspective**,"** *Journal of Social Issues* 65 (2009): 290.

[196] Samuel L. Gaertner and John F. Dovidio, *Reducing Intergroup Bias: The Common Ingroup Identity Model*. Ann Arbor, MI: Sheridan Books, 2000.

[197] Gurin and Nagda, "Getting to the What, How, and Why of Diversity on Campus," 21.

on an understanding of how groups are affected by systems of power and inequality."[198] Tapping into a repository of "social psychological resources for collective action," such membership recasts negative stereotypes as positive. From this angle, cultural houses, racially-and ethnically-focused student organizations, and even ethnic and women's studies courses function as "separate spaces for in-group interaction and solidarity" on dominantly white campuses.[199]

Despite the apparent discord between the intergroup harmony and intragroup solidarity models – each with diverging emphases on racial-ethnic group salience and attention to historical context – several outlooks in social psychology have reconfigured assumptions of intragroup bonding and intergroup bridging as mutually exclusive. As part of their "dual identity model," Gaertner and Dovidio contend that group members are capable of both nurturing in-group ties and breaching out-group boundaries, and that imposing a single superordinate identity to the neglect of original racial-ethnic or cultural background can in fact exacerbate intergroup tensions.[200] Built into this model, intergroup dialogues have become a popular tool on college campuses for communicating social difference – both individually and at the group-level – and have thus challenged the presumed binary between intergroup bridging and intragroup bonding,

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[198] Gurin and Nagda, "Getting to the What, How, and Why of Diversity on Campus," 21.

[199] Ibid, 21.

[200] Samuel L. Gaertner and John F. Dovidio. "Progress, Problems, and Promise," in *Reducing Intergroup Bias: The Common Ingroup Identity Model*, ed. Gaertner and Dovidio (Ann Arbor, MI: Sheridan Books, 2000), 166.

Intergroup dialogues generally take place over ten- to twelve-week periods with the support of trained facilitators. While structured as conversations between distinct identity groups (e.g., black and white, LGBTQ and heterosexual), dialogues incorporate personalized testimonials, which are couched within group identity but invite individual commentary and story-sharing.[201] Enhancing the salience of group identity (i.e. intragroup solidarity), the dialogue format also fosters a larger "superordinate identity," delineated by a shared commitment to social justice and improved intergroup understanding.

As Gurin and Nagda observe, this collective identity "does not relinquish the particular social group identities" but is instead "framed as an expression of the separate identities."[202] Affective bonds – or more appropriately, bridges – are developed across groups through this common-task orientation, and while the outcome may not necessarily be intergroup *harmony*, several studies have noted outcomes of improved intergroup understanding and collaboration (Nagda & Zuniga 2003), as well as a deeper awareness of the historical-structural forces surrounding group-based inequalities (Lopez et al. 1998).

*Towards Race-Consciousness*

Research outlets for understanding intergroup relations are as multiple and expansive as the educational benefits that Powell first introduced in his 1978 *Bakke* opinion. Despite obvious differences in methodological approach and

[201] Gurin and Nagda, "Getting to the What, How, and Why of Diversity on Campus," 22.
[202] Ibid, 22.

theoretical focus, these perspectives share in a vision of diversity that extends beyond minority representation to include psychological and behavioral dimensions, captured in the dual impact of macro-level organizational structures and micro-level interactions on campus racial climate. By the same logic, Bennett Capers defines diversity's legal counterpart "critical mass" as something that "is not solely numerical" but rather "implies a climate where one is neither conspicuous nor on display, where one does not feel the opprobrium of being a token, nor the burden of being the designated representative for an entire group."[203]

While there is substantial evidence to suggest a relationship between minority representation and self-change in students, the more pressing question of *how* that process unfolds must be pursued at the local-level, where colleges and universities can give due consideration to the interconnected dynamics of history, biography, and institutional structures. To conclude, I will take a moment to consider how such local reflections on race can be become an incorporated feature of an institution's educational model – an approach that bolsters the diversity rationale through the legal protections of deference and a broadly-defined compelling interest in diversity. By emphasizing and empirically demonstrating the race-specific benefits of diversity, colleges and universities can restore the linkage between race-conscious means and race-conscious ends, and thus

[203] Bennett Capers, "Flags," *Howard Law Journal* 48 (2004): 122-123.

strengthen affirmative action policy against narrow tailoring inquiries into race-neutral alternatives.[204]

[204] Vinay Harpalani, "Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions after *Fisher*," *Seton Hall Law Review* 45 (forthcoming 2015): 57.

# CONCLUSION:
# RESTORING RACE-CONSCIOUSNESS

*Fisher v. University of Texas* did not prompt any major legislative changes to affirmative action policy in higher education. Building on the legal narrative introduced under *Bakke* and reaffirmed in *Grutter*, the *Fisher* court concluded that diversity continues to demonstrate a compelling interest – and one that is broadly defined across the civic, social, and intellectual facets of a student's educational growth. Social science research has plainly demonstrated the educational potential of diversity, and through deeper attention to the local conditions that ease intergroup contact, institutions can unite legal ideal with empirical practice.

Yet, as shown in Chapter Two, the diversity rationale is also fraught with internal tension and contradiction, and will likely be the target of strict scrutiny attacks in the years to come. While granting deference to universities in articulating the value of diversity as an educational goal, the *Fisher* court clarified that the means of pursuing that goal must be narrowly tailored, requiring "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."[205] Protected by first amendment freedoms and enjoying the flexibility of a broadly-defined compelling interest, universities have the power to incorporate race-consciousness into their educational mission,

[205] *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, at 2420 (2013).

so long as there is a "reasonable, principled explanation for the [university's] academic decision."[206]

Such explanations have been consistently featured throughout the affirmative action narrative, including "lessening of racial isolation and stereotypes," "promoting cross-racial understanding," and "enabling [students] to better understand persons of different races."[207] By more directly focusing on these race-conscious features of the diversity rationale – and their corresponding race-conscious initiatives on campuses – institutions can fortify themselves against future strict scrutiny challenges. Illustrated in the optimal conditions research of Chapter Three, race-conscious efforts – initiatives, activities, and policy design – are a necessary extension of race-conscious admissions and thus operate as a powerful defense against the encroachment of race-neutral alternatives.

While structural diversity (i.e. minority enrollment) remains the natural centerpiece of affirmative action litigation, institutional attention to and engagement with race-consciousness through diversity-related initiatives will transport diversity from the superficial "aesthetics" discussed in Justice Thomas' *Grutter* dissent, to substantive change – or rather, to a fuller realization of

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[206] *Fisher*, 133 S. Ct. at 2419.

[207] *Grutter v. Bollinger*, 539 U.S. 306, at 330 (2003).

Powell's benefits.[208] In his analysis of the *Fisher* case, Vinay Harpalani captures the legal value of these so-called "race-conscious spaces":[209]

> By highlighting race-conscious spaces as venues for the educational benefits of diversity, along with their established role as support centers for minority students, universities can more thoroughly demonstrate the benefits of race-conscious dialogue itself – not just for minority students but for all students. This would also augment the defense of race-conscious admissions policies, as it would very tangibly illustrate their educational benefits and signal the salience of race in universities' educational missions….[210]

The Court's resistance to characterizing affirmative action as a strictly *race-conscious* enterprise is, arguably, the Achilles heel of modern legal defenses for affirmative action. Given the abandonment of the remedial logic, the surest path to stabilizing affirmative action in higher education is to more explicitly link "race-conscious goals with race-conscious means."[211] Intergroup dialogues, diversity-related curricular and co-curricular offerings, and ethnic student organizations have demonstrated that the compelling value of diversity can both serve legal purpose and, through research, guide educational practice.

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[208] *Grutter*, 539 U.S. at 354.

[209] Vinay Harpalani, "Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions after *Fisher*," *Seton Hall Law Review* 45 (forthcoming 2015): 66.

[210] Harpalani, "Narrowly Tailored but Broadly Compelling," 70-71.

[211] Ibid, 57.

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