BROWN UNDONE?: THE FUTURE OF INTEGRATION IN SEATTLE AFTER PICS V. SEATTLE SCHOOL DISTRICT NO. 1

Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures

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I. INTRODUCTION

The Supreme Court continues to struggle with complex and uncertain social science evidence in constitutional cases. Ambivalence about the proper role such evidence should play in judicial decision making contributes to this struggle. Recent education cases illustrate key aspects of this struggle and also show the Court's inconsistent treatment of social science evidence.

In Grutter v. Bollinger and, more recently, Parents Involved in Community Schools v. Seattle School District No. 1, the Supreme Court addressed challenges to public school programs that sought to enhance equal educational opportunity by increasing student racial and ethnic diversity. The diversity programs in both cases shared the assumption

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1 Professor, Cornell Law School. Thanks to Dawn Chutkow and Nicole Heise, along with the participants in the Brown Undone? The Future of Integration in Seattle After PICS Symposium for comments on an earlier version of this Article. Cornell Law School research librarians provided invaluable assistance.


3. For the narrow purpose of this Article, I use the terms "race," "ethnic origin," and "ethnicity" interchangeably.
that increased student diversity generates desirable educational outcomes, including enhanced student achievement. Social science evidence was pressed into service to support this shared assumption and contributed to the University of Michigan Law School and the Seattle School District’s efforts to establish diversity as a compelling governmental interest.

A comparison of the Grutter and Parents Involved opinions, however, reveals that the Court treated similar social science evidence quite differently in the two cases, which were separated by only five years. One critical difference was that the Court’s opinion readily engaged with the social science evidence in Grutter; in contrast, the Court’s Parents Involved decision conveyed a desire to disengage from the social science evidence. The Court’s different treatment of the social science evidence in these two cases reflects long-standing yet persistently uneasy relations between constitutional law and social science. The lingering unease between law and social science descends partly from the Brown v. Board of Education opinion, specifically footnote 11. The increasingly bitter contest over the rightful ownership of Brown’s legacy, partly waged through the Grutter and Parents Involved litigation, stimulated sharp scholarly, public, and judicial rhetoric. That the Brown legacy includes a substantial contribution to an increasingly empiricized equal educational opportunity doctrine only deepens the irony surrounding the Court’s current ambivalence about social science evidence in the education context.

The full extent of what the Court decided in Grutter and Parents Involved remains in some dispute. What is far more certain is that both cases continue to stir deeply held passions that help frame public and legal debates about the Court and its role in affirmative action and school

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4. Although I am mindful that increased student diversity might generate an array of other desirable outcomes, this Article focuses only on student achievement.
10. Compare Ryan, supra note 6, with Wilkinson, supra note 8.
desegregation disputes. Amid these increasingly raucous debates, this Article expressly side steps the many questions (and controversies) about what the Court decided in those cases and seeks to escape from the frequently politically charged and volatile context of governmental uses of race. This Article instead focuses on how the Court reached its decisions in *Grutter* and *Parents Involved* and how the two decisions differ. In assessing the “how” questions this Article dwells exclusively on the Court’s treatment of the social science evidence brought before it and gives a particular emphasis to the quantitative social science. A better understanding of how the Court reached its decisions in *Grutter* and *Parents Involved* matters not only for legal scholars but also, and perhaps more importantly, for future litigants and those bound by the decisions.

Two distinct, though related, factors help account for the Court’s different treatment of similar social science evidence in *Grutter* and *Parents Involved*. First, the relevant constitutional doctrine is far from clear on how and to what degree public schools may act on a student’s race. Second, challenges flowing from uncertain law are compounded by social science uncertainty. Not only are many aspects of the education enterprise notoriously difficult to study, but empirical support for key assumptions relating to student diversity programs, such as those litigated in *Grutter* and *Parents Involved*, is not yet settled and will likely remain unsettled for the foreseeable future.

How the Court should handle the inherent social scientific complexity and uncertainty in constitutional cases as a normative matter is not obvious. What is obvious, however, is that such uncertainty places enormous stress on courts seeking to enlist social science evidence into the service of judicial decision-making. The persistently inconsistent relation between constitutional law and social science evidence poses especially nettlesome burdens on those charged with the responsibility to both pursue and deliver equal educational opportunity. Constitutional law and social science evidence co-exist awkwardly despite a relationship that benefits from an august pedigree, arcing back to the Court’s seminal *Brown* decision. Enduring questions include whether and how the Court should treat social science evidence when assessing the equal educational opportunity doctrine as well as challenges to it.

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The Court’s past treatment of social science evidence when interpreting the equal educational opportunity doctrine helps frame today’s questions, including those questions litigated in Grutter and Parents Involved. Part II of this Article briefly summarizes the historic context with a discussion of Brown and two other landmark cases that followed in its wake. Part III includes a brief description of how the Court digested the social science evidence pressed by litigants in Grutter and Parents Involved. Problems arising out of the contested social science evidence presented in Grutter and Parents Involved contribute to important challenges that await courts forced to confront similarly contested social science in the future. Part IV discusses the reasons behind the court’s inconsistent treatment of the use of social science evidence in Grutter and Parents Involved. Finally, Part V concludes by considering how courts might proceed in the face of such challenges.

II. A HISTORY OF UNEASE AND UNCERTAINTY

The problems and uncertainty that surround constitutional decision making and social science evidence pre-date the Grutter and Parents Involved decisions. Three seminal equal educational opportunity cases, Brown, San Antonio Independent School Dist. v. Rodriguez,12 and Regents of University of California v Bakke,13 illustrate that tensions between constitutional law and social science evidence arose decades before the Grutter and Parents Involved cases.

A. Brown and Footnote 11

In Brown, the Court endeavored to desegregate the nation’s public schools by striking down state-sanctioned school segregation.14 If the goal of desegregating (and, perhaps, integrating) America’s public schools was not difficult and controversial enough, the Court’s opinion in Brown inadvertently generated additional controversy. Anticipating (correctly) a hostile reaction to the Brown decision, Chief Justice Warren set out to write a brief (by legal opinion standards), uncomplicated legal opinion in a plain, non-accusatory tone.15 Warren astutely surmised that a brief opinion increased the probability that it would be reprinted in its

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14. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").
entirety by a larger number of the nation’s newspapers, thereby reaching a wider audience.\textsuperscript{16}

In an opinion noted for unusual brevity, a single sentence captured the Court’s core argument in \textit{Brown} that the Constitution prohibits school districts from assigning children to schools on the basis of race:

To separate [schoolchildren] 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.\textsuperscript{17}

The Court advanced a psychological argument to buttress its conclusion of constitutional harm and referenced with favor a lower court finding that linked the practice of state-sanctioned segregation with psychological harms to non-white schoolchildren.\textsuperscript{18} It was at this juncture that the Court sought to push its psychological argument even further by supporting it with social science research. To do so, the Court noted that “this finding [of psychological harm] is amply supported by modern authority.”\textsuperscript{19} It is here that Warren dropped a footnote—the much-maligned footnote 11—which references a list of social science sources purporting to support the Court’s assertion of psychological harm suffered by non-white schoolchildren who were denied access to specific public schools.\textsuperscript{20}

The Court’s psychological harm finding referenced in \textit{Brown}’s footnote 11 featured research by Dr. Kenneth Clark. Not surprisingly, the reference to Dr. Clark’s work in the \textit{Brown} opinion directed considerable attention to his research. The particular study by Dr. Clark that the \textit{Brown} opinion cited involved asking a small number of African-American school children to identify the dolls that looked “nicer” among an array of white and black dolls. When the African-American schoolchildren identified the white dolls as “nicer,” Dr. Clark interpreted these findings as evidence of harm to the black schoolchildren’s self-esteem.\textsuperscript{21}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.} (quoting unreported findings of the lower court in Belton v. Gebhart, 87 A.2d 862, 865 (1952)). Other descriptions of related harms included “[l]essening of motivation, alienation of the child from the educational institution, distortion of personal relationships, and various forms of antisocial behavior.” Owen M. Fiss, \textit{Racial Imbalance in the Public Schools: The Constitutional Concepts}, 78 \textit{Harv. L. Rev.} 564, 569 (1965).

\textsuperscript{19} \textit{Brown}, 347 U.S. at 494.

\textsuperscript{20} \textit{Id.} at 495 n.11.

Critically, both Dr. Clark and, by reference, the Court identified state-sponsored school segregation as responsible (or the constitutional cause) for the psychological harm of inadequate self-esteem.\footnote{Id.}

Although Chief Justice Warren expressly set out to minimize controversy over the Brown decision (perhaps a naïve undertaking), criticism arrived almost instantly.\footnote{See, e.g., POWE, supra note 15, at 34–38 (describing various reactions to the Brown decision).} Amid the torrent of criticism, footnote 11, especially Dr. Clark’s research, attracted particular attention. From a technical social science perspective, Dr. Clark’s study did not stand up well to close examination. Observers characterize as “astounding” the fact that Dr. Clark’s studies contributed to the foundation for one of the Court’s most important decisions in the twentieth century.\footnote{Joseph P. Viteritti, A Truly Living Constitution: Why Educational Opportunity Trumps Strict Separation on the Voucher Question, 57 ANN. SURV. AM. L. 89, 94 (2000).} Critics advanced two broad attacks against footnote 11. One attack focused on the quality of the research cited.\footnote{See, e.g., Sanjay Mody, Note, Brown Footnote 11 in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy, 54 STAN. L. REV. 793, 803–14 (2002) (describing the enduring debate over footnote 11).} A second related attack questioned the extent to which footnote 11 influenced the outcome in Brown.\footnote{Id.} Debates on both criticisms persist.\footnote{Id. See generally James E. Ryan, The Limited Influence of Social Science Evidence in Modern Desegregation Cases, 81 N.C. L. REV. 1659 (2003).}

Technical aspects of the quality of Dr. Clark’s research drew substantial criticism. Commentators characterized Dr. Clark’s methodology as crude by the less sophisticated social science standards of the mid-1950s.\footnote{See POWE, supra note 15, at 42–43.} Many noted that Clark’s study of schoolchildren and dolls involved a small sample size and lacked anything resembling a control group.\footnote{Viteritti, supra note 24, at 94.} In addition, causation problems fueled criticisms of the Clark study because the Court’s use of Dr. Clark’s research rested on the integrity of a causal link between state-sponsored segregation and the plaintiffs’ harm. In finding this causal link, the Court construed the harm in terms of psychological harms flowing from state-enforced segregation policies.\footnote{Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).} One logical inference from the Court’s characterization of the plaintiffs’ harms was that such harms would not exist absent de jure school segregation. However, results from Dr. Clark’s study also included findings that African-American children attending schools in northern states (that is, states without de jure state-sponsored school seg-
regation) were even more likely to prefer white dolls than the African-American children attending state-segregated schools in the South. Consequently, this finding degraded the presumed causal link between state-sponsored segregation and the harms pressed in the Brown litigation.

In addition to raising technical questions involving footnote 11's underlying social science, critics also decried the footnote's implicit influence on the outcome in Brown. At a theoretical level, critics recoiled at the possibility that the legal integrity of the Brown decision rested upon the social scientific integrity of the evidence the Court cited. Further questions arose about the implications for Brown's precedential value if the underlying social science changed over time. Many also balked at the implicit suggestion, flowing from footnote 11, that more traditional constitutional values were insufficient to support the Court's decision to strike down state-enforced de jure school segregation. Most now argue that the Court need venture only as far as the Fourteenth Amendment's Equal Protection Clause to support the conclusion that state-sponsored school segregation is unconstitutional. Such an argument, though perfectly obvious today, was less obvious fifty years ago. Nevertheless, footnote 11 has not weathered the test of time well. Most leading constitutional scholars today (granted, with the considerable benefit of hindsight) eschew the particular evidentiary path taken by the Court in Brown.

32. Although the inclusion of social science evidence invited sustained criticism, at least one scholar suggests that, criticisms aside, the social scientific evidence probably played a minor role, at best, in the decision itself. See generally Dennis J. Hutchinson, Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958, 68 GEO. L.J. 1 (1979).
33. See, e.g., Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959) (criticizing the manner in which the Brown opinion uses Dr. Kenneth Clark's doll studies research); Mody, supra note 25, at 805 (quoting Professor Edmond Cahn: "I would not have the constitutional rights of [any Americans] rest on any such flimsy foundation as some of the scientific demonstrations in the records.").
35. See id. at 52 (arguing that many of today's constitutional scholars disagree with Chief Justice Warren's reliance on social science evidence). In an interesting thought experiment, in 2000, Professor Jack Balkin gathered eight other constitutional law scholars to re-write the Brown opinion. (The participants included: Professors Bruce Ackerman, Jack Balkin, Derrick Bell, Drew Days, III, John Hart Ely, Catherine MacKinnon, (now-Judge) Michael McConnell, Frank Michelman, and Cass Sunstein.) As Balkin notes, most declined to rely on empirical social science evidence as proof of the unconstitutionality of state-segregated public schools. Id. Although Professor Ely relied upon the notion of psychological harm, he did not cite to the sources identified in footnote 11. Id. Professor MacKinnon accepted the social science evidence relied upon in Brown, though she interpreted the evidence quite differently than did Chief Justice Warren on behalf of the Court. Id.
B. Rodriguez and the Complex Relation Between Local Property Values and Per Pupil Spending

Almost twenty years after the Brown decision, the Court was once again called upon to assess the constitutional dimensions of equal educational opportunities. Unlike the Brown case that featured race, the Rodriguez case confronted a constitutional challenge to intrastate per pupil spending variations that pivoted on the happenstance of geography and property tax bases. 36 The plaintiffs in Rodriguez advanced empirical support for an assumption critical to their constitutional claim: that low-income families were clustered in property-poor school districts noted partly by their comparatively lower per pupil spending.

Variations in property values across school districts (in Texas and elsewhere) generated variations in local property revenue streams. These revenue stream variations directly contributed to per pupil spending differences. The plaintiffs in Rodriguez asked the district court to assess whether the sometimes substantial per pupil spending differences across districts within the state and generated by Texas’ local property tax-based school finance system violated the federal Equal Protection Clause. The district court panel construed education as a fundamental right and wealth as a suspect classification and, as a consequence, applied strict judicial scrutiny. 37 The court accepted the plaintiffs’ assertion that low-income families were clustered in low-wealth schools. 38 The district court concluded that variations in per pupil spending between the Alamo Heights and Edgewood schools, flowing from the happenstance of geography, violated the Equal Protection Clause. 39

Not surprisingly, the San Antonio School District quickly appealed the adverse district court decision to the U.S. Supreme Court. The Court, after declaring that education was not a fundamental right 40 and that wealth was not a suspect classification, 41 applied a rational relation test and concluded that it “could not say that such (per pupil funding) disparities are the product of a system that is so irrational as to be invidiously

36. Whether Rodriguez would have been better framed as a race rather than a resources case endures as an interesting question. For a discussion, see Goodwin Liu, The Parted Paths of School Desegregation and School Finance Litigation, 24 LAW & INEQ. 81 (2006).
38. Id. at 282 and n.3.
39. Id. at 285. The district court also identified various violations of the Texas Constitution and Education Code that contributed to plaintiffs’ harm.
40. Rodriguez, 411 U.S. at 35.
41. Id. at 18–25.
discriminatory." Thus, the Court felt that the Equal Protection Clause tolerated the per pupil funding differences in Texas.

Similar to the Brown opinion, social science evidence informed the Court’s analysis in Rodriguez. The plaintiffs’ central claim in Rodriguez was that low-income families were clustered in property-poor school districts and that this geographic clustering interacted with the Texas school finance system in a manner that discriminated against low-income students in terms of lower per pupil spending. The plaintiffs’ claim, however, necessarily assumed a relation between low-income households and low school district wealth. This was an assumption that the district court accepted. Indeed, accepting the plaintiffs’ assumption facilitated the district court’s conclusion that the Texas school finance law violated the Constitution.

In reversing the lower court ruling, the Supreme Court relied upon a social science study that tested the assumed relation between family wealth and school district wealth. The study analyzed data from the 130 largest towns in Connecticut, which accounted for 95 percent of the state population and 96 percent of the state’s total property value. These data were used to assess the relation between individual and school district wealth.

The Connecticut study used partial correlations analysis of the various combinations of family and school district wealth to uncover several interesting findings. First, when poverty was construed to mean “percent of population living below the poverty line,” no statistically significant correlation existed between families in poverty and total district per pupil spending. Second, when district wealth was construed more narrowly and only in terms of residential property value, a statistically significant relation emerged between school district wealth and family poverty. Third, when district wealth was defined in terms of business wealth, a positive correlation emerged with family poverty. In other words, poor families tended to cluster in wealthier areas, but only where wealth was construed in terms of commercial and industrial property value. The study found that, at best, the statistical relation be-

42. Id. at 55.
44. Id. at 285.
47. Id. at 1327.
48. Id. at 1328.
49. Id.
between families living in poverty and school district wealth was ambiguous. Thus, the study concluded that "the popular belief that the 'poor' [families] live in 'poor' [school] districts is clearly mistaken." The conclusion undermined a key plaintiff argument advanced by the plaintiffs in *Rodriguez* and accepted by the trial court: that low-income households were clustered in low-wealth school districts.

Although the Connecticut study’s methodology might be viewed as unsophisticated by today’s standards, it was acceptable at the time the work was published in 1972. In terms of its probative value to the *Rodriguez* case, however, the study possessed important limitations. Notably, the study used cross-sectional data from one year (1970) and from one state (Connecticut) while the *Rodriguez* case involved facts and litigants from another state, the state of Texas. Whether findings from Connecticut could properly be generalized to Texas (or any other state) remained unclear. Indeed, the Court recognized this uncertainty when it wondered whether the statistical findings in Connecticut "would be discovered in Texas."

A separate question involved what the Court should do about the uncertainty surrounding the potential applicability of data drawn from Connecticut to a dispute in Texas. Although general social science norms counsel against drawing inferences across states absent persuasive evidence that the two states are similar in salient respects, the Court indulged just such an inference. The analytic move, while subtle, is critical. Building off the 1970 empirical study of Connecticut school districts, the Court accepted as a general proposition that poor families did not cluster in low-wealth school districts. Despite Justice Marshall’s vigorous dissent, the Court applied the findings from the Connecticut study to support an assumption that poor families did not cluster in low-wealth districts in Texas as well. Given this assumption, the Court implicitly took the position that it was incumbent upon the plaintiffs in *Rodriguez* the establish the opposite position, that poor families in Texas did, in fact, cluster in poor school districts, such as Edgewood. Because the plaintiffs in *Rodriguez* did not do so, the Court rejected an assumption critical to their case.

50. *Id.* at 1327.
52. *Id.* (concluding there was no reason to assume that poor families in Texas cluster in poor spending school districts).
53. *Id.* at 94–95 (Marshall, J., dissenting).
54. *Id.* at 23 (concluding there was no reason to assume that poor families in Texas cluster in poor spending school districts).
Criticism of the majority's use of social science evidence in *Rodriguez* was not hard to find.\textsuperscript{55} Unlike the unanimous *Brown* decision, the Court in *Rodriguez* split 5-4. That such a decision provoked dissenting opinions is unremarkable; that the dissents included a sophisticated social scientific critique is unusual.

Justice Marshall, in his dissent, quickly delved into problems with the majority opinion's use of the Connecticut study. Marshall noted that the district court accepted the social science evidence offered in support of the proposition that, in Texas, "poor people live in property-poor [school] districts."\textsuperscript{56} According to Marshall, "the Court rejects the District Court's finding of a correlation between poor people and poor districts with the assertion that 'there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts' in Texas."\textsuperscript{57}

Marshall advanced three criticisms of the majority's reliance on the Connecticut study. First, Marshall pointedly noted that the Court "offers absolutely no data—which it cannot on this record—concerning the [geographic] distribution of poor people in Texas."\textsuperscript{58} Second, Marshall called into question, as previously discussed, the applicability of results from a study of Connecticut households to Texas households, especially given the structural, economic, and physical differences between the two states. Marshall noted that, among other factors, "common sense" suggested the relevance of the results from the Connecticut study as applied to the Texas plaintiffs was "doubtful at best."\textsuperscript{59}

Interestingly, Marshall's third critique of the majority's use of the Connecticut study was law-based and moored in legal procedure. Specifically, Marshall emphasized that the plaintiffs' empirical evidence supporting the proposition that, in Texas, "poor people live in property-poor [school] districts" was unchallenged by the defendants at trial and was accepted by the district court.\textsuperscript{60} Marshall complained that the majority opinion conveyed a willingness to "permit appellants [defendants] to litigate the correctness of those data for the first time before this tribunal [the Supreme Court] where effective response by appellees [plaintiffs] is

\footnotesize{\textsuperscript{55} Indeed, one need look no further than the dissenting opinions the *Rodriguez* decision prompted. See, e.g., id. at 94–95 (Marshall, J., dissenting).

\textsuperscript{56} Id. at 94 (Marshall, J., dissenting).

\textsuperscript{57} Id. at 95 n.56.

\textsuperscript{58} Id.

\textsuperscript{59} Id.

\textsuperscript{60} Id. at 95.}
impossible." Marshall closed his critique with the observation that such a move was "both unfair and judicially unsound."

Marshall’s multi-faceted critique of the Court’s use of the social science evidence in Rodriguez raises important questions. Justice Marshall expressly questioned the generalizability of the Connecticut study to the contested facts in Rodriguez. This critique laid bare an issue upon which even the majority recognized it was vulnerable, especially in light of general social scientific norms. Rather than adopt a prudent, cautious course, which is the traditional course pursued by social scientists, the majority instead imposed an ex post burden upon the plaintiffs to disprove the Connecticut study’s applicability to Texas. When the plaintiffs failed to meet such a burden, the majority went on to conclude that there was no empirical basis to assume that the poorest families concentrate in the poorest school districts. The majority’s response to the generalizability critique, such as it was, involved little more than burden placement switch. Such a burden placement, however, is inconsistent with standard social science protocol.

Some empirical support existed for the plaintiffs’ contention that poor families in Texas concentrated in poor school districts, a contention critical to their claim of unequal treatment. Indeed, the district court relied upon findings from a study presented in an affidavit submitted by a social scientist. The study involved a sample of 100 Texas school districts and found a correlation between the amount of a district’s taxable wealth and per pupil spending. The majority opinion, however, dismissed these findings by referring to questions surrounding the study’s methodology as well as the findings’ germaness to the constitutional question presented. Thus, the Court created an empirical vacuum by dismissing the empirical evidence relied upon by the district court. Having created an empirical vacuum, the majority then quickly filled it by substituting the Connecticut study that was not published until long after the litigation commenced.

The majority’s move to replace empirical findings from the Texas study, which were favorable to the plaintiffs, with findings from the

61. Id.
62. Id.
63. The majority admits “whether a similar pattern would be discovered in Texas is not known....” Id. at 23.
64. Id.
67. Id. at 15 n.38 (noting that the Texas study’s methodology “has been questioned”).
68. Id. at 27 (noting that even if the Texas study framed relevant questions, “no factual basis exists upon which to found a claim of comparative wealth discrimination”).
Connecticut study, which were favorable to the defendant, provided the foundation for Justice Marshall’s procedural objection. Justice Marshall noted that the procedural unfairness of the majority essentially substituted its preferred empirical evidence sua sponte.\(^69\) By doing so, the majority ensured that the plaintiffs could not meet the burden that the majority had assigned to them.

A substantial time lag separated when the Rodriguez case was argued to the district court in 1968 and when the district court announced its decision in 1971. This added an additional complicating wrinkle to the social science dimension of the case. It is easy to criticize the Court for its decision to incorporate into the opinion social science evidence that was not raised at trial. However, the social science evidence that the majority preferred did not exist in 1968 when the lawsuit was filed. The Connecticut study emerged in 1972, just in time for the Justices to consider it before the Court announced the Rodriguez opinion in 1973. Setting aside important questions about the Connecticut study’s probative value, independent questions arise about whether the Court should have ignored evidence that emerged after trial.

Structural time lags incident to the litigation process are inevitable, and they pose a particular burden on courts inclined to use empirical evidence. Legal and procedural concerns, as Justice Marshall noted in his dissent, argue against the majority referencing results from the Connecticut study because those results did not exist when the trial began. From a social science perspective, however, it would be odd to advance a critique against more refined knowledge just because it is comparatively new. Assessments of the integrity of social science results pivot on the results themselves rather than the results’ age. The different way courts of law and social scientists accommodate time lags illustrate one way courts are comparatively less well-equipped to accommodate social science evidence.

**C. Bakke, Diversity, and Compelling Interests**

Although as an affirmative action case Bakke was especially germane to the Grutter and Parents Involved decisions, from a social science perspective Bakke offers comparatively little. In Bakke, the Court permitted the University of California’s use of race in its admissions program.\(^70\) Justice Powell, writing alone, concluded that a desire for racial diversity in higher education justified a race-conscious admissions

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69. *Id.* at 95.
system. Whether diversity interests constituted a compelling governmental interest as it relates to higher education, was not clarified until twenty-five years later in Grutter. Justice Powell moored his diversity rationale in a straightforward assumption: “educational benefits . . . flow from an ethnically diverse student body.”

Justice Powell argued that the benefits of integrated education accrue to all students and that some affirmative action to increase diversity was therefore appropriate. The goal of “a diverse student body,” he said, “clearly is a constitutionally permissible goal for an institution of higher education. . . . [I]t is not too much to say that ‘the nation’s future depends upon leaders trained through wide exposure to’ the ideas and mores of students as diverse as this Nation of many peoples.” Of course, even to Justice Powell diversity was not “a magical phrase that a university could incant whenever it found itself in trouble.” Indeed, despite Justice Powell’s support for affirmative action programs in general, he agreed with the lower court’s injunction directing Allan Bakke’s admission to the University of California, Davis Medical School.

Justice Powell’s opinion emphasized the critical point that diversity may enable an educational affirmative action program to pass constitutional muster because democratic and dialogic educational benefits accrue to all students. To illustrate and evidence his point, Justice Powell attached an appendix to his opinion that detailed the Harvard College Admissions Program. Harvard administrators (and, of course, many others) believe that “diversity adds an essential ingredient to the educational process” and, as a consequence, this belief informs Harvard’s admissions program.

Implicit in Justice Powell’s opinion are many claims, which are, at bottom, empirical. A footnote anchored Justice Powell’s assumption about educational benefits. It asserted that “People do not learn very much when they are surrounded only by the likes of themselves.” To support his proposition, Justice Powell offered only that “[O]ur tradition and experience lend support to the view that the contribution of diversity is substantial.” According to at least one commentator, Powell drew

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71. Id. at 311–15.
73. Bakke, 438 U.S. at 306.
74. Id. at 323 (Appendix to opinion of Powell, J.).
75. Id. at 311–13 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
77. Bakke, 438 U.S. at 320.
78. Id. at 322-23 (Appendix to opinion of Powell, J.).
79. Id. at 312 n.48.
80. Id. at 313.
only on this anecdote to support what is now commonly known as the "diversity rationale" for affirmative action in education.\textsuperscript{81} However, at the time of \textit{Bakke}, precious little empirical work addressed the underlying claim about educational benefits. Moreover, the \textit{Bakke} decision itself, along with Justice Powell's analysis, "spawned little empirical work on the effects of racial diversity in higher education."\textsuperscript{82} The reluctance of scholars to take up the arduous and politically-charged research on the possible effects of racial diversity in higher education\textsuperscript{83} influenced the Court's subsequent treatment of the related legal issues.

\textbf{III. GRUTTER AND PARENTS INVOLVED}

The Court's past treatment of social science research bearing on the equal educational opportunity doctrine in \textit{Brown, Rodriguez, and Bakke} influenced the Court's treatment of the social science evidence advanced by the litigants in \textit{Grutter and Parents Involved}. Although the \textit{Grutter} and \textit{Parents Involved} cases differed in many respects, including that the former involved law school affirmative action and the latter voluntary K–12 school integration, both cases involved the use of student race by the state in an effort to enhance diversity. Both cases also involved the Court confronting social science evidence concerning the relation between student diversity and educational outcomes. Critical, however, are the different ways the Court treated similar social science evidence in decisions separated by only five years.

\textbf{A. Grutter}

In \textit{Grutter}, the Supreme Court concluded that the University of Michigan Law School's Admissions Office could use student race as a factor for admissions so long as it did so with the utmost care.\textsuperscript{84} The Supreme Court's opinion rested, to some degree, on empirical evidence, generated and presented by the University of Michigan and \textit{amici curiae}, supporting the argument that "the educational benefits that diversity is designed to produce . . . are substantial."\textsuperscript{85} A sharply-divided Court agreed with the University of Michigan's position that substantial benefits flow from diversity and that these benefits contribute to a compelling


\textsuperscript{82} Id. (citing William C. Kidder, \textit{Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research}, 12 BERKELEY LA RAZA L.J. 173, 221 (2001)).

\textsuperscript{83} In addition to some researchers' possible aversion to the issue, problems with access to necessary data surely contribute to the relative paucity of empirical work in this field.


\textsuperscript{85} Id. at 330.
interest. The Court’s analysis in *Grutter* revealed an unusually
differtial bow to the law school’s expertise in assessing such benefits.\(^{86}\)
Furthermore, the Court accepted the law school’s assertion that the desire
to achieve a more diverse student body was “at the heart” of its proper
institutional mission, partly based on the asserted educational benefits
flowing from diversity.\(^{87}\) The Court also expressly presumed that the
law school was acting in good faith to accomplish that mission.\(^{88}\)

A review of the competing empirical research claims entered into
evidence in *Grutter*, however, illustrates the degree of social science un-
certainty that surrounded the relation between student diversity and edu-
cational achievement. Although several studies were admitted into evi-
dence in the *Grutter* case, the Gurin Report,\(^{89}\) prepared by Professor
Patricia Gurin of the Psychology and Women’s Studies departments at
the University of Michigan, took center stage in the Court’s opinion.
The Gurin Report prompted responses from many social scientists, in-
cluding Thomas Wood and Malcolm Sherman\(^{90}\) as well as Robert Lerner
and Althea Nagai.\(^{91}\)

The Gurin Report presented findings from a study launched by
the University of Michigan in anticipation of the *Grutter* litigation. The re-
port supported favorable conclusions about diversity’s influence on edu-
cational and “democracy” outcomes.\(^{92}\) According to Gurin, students ex-
posed to the greatest amount of diversity in classrooms possessed the
“greatest engagement in active thinking processes, growth in intellectual
engagement and motivation, and growth in intellectual and academic
skills.”\(^{93}\)

Critics of the Gurin Report advanced a multi-pronged attack on its
findings. The first prong involved problems with the Gurin Report itself.
Critics pointed to a number of methodological and theoretical problems

\(^{86}\) Id. at 328–29.

\(^{87}\) Id.

\(^{88}\) Id. at 329.


\(^{92}\) Gurin Report, supra note 89, at 365–66.

\(^{93}\) Id. at 365.
with the findings presented in the Gurin Report and relied upon by the Court in *Grutter*. For example, critics noted that challenges to defining the term “diversity” in a manner amenable to empirical analyses are legion.94 According to one critic, as a term “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.”95 Even if diversity was construed crudely in terms of a school’s racial composition, such an operationalization reduced diversity to little more than skin pigmentation.96 The approach Gurin adopted in her expert report, however, possessed important additional limitations. Gurin construed “classroom diversity” as a bivariate variable signaling “1” anytime a student enrolled in an ethnic studies class97 or based on student self-reports of whether he or she had ever taken a class that significantly influenced their views on racial diversity or multiculturalism.98 Critics complained that Gurin’s approach toward construing diversity was “not only misleading, but potentially offensive in their assumptions.”99

Another attack on the Gurin Report dwelled on contrary social science evidence from other competing studies. Specifically, “many” studies found that increased student diversity does not correlate with educational outcomes.100 Other research found that student diversity had no effect, positive or negative, on college students’ academic performance.101 Similarly, researchers comparing college achievement levels for students attending historically black and predominately white colleges found no significant differences.102 Another research team, also using the same historically black, predominately white college data set, found that students attending historically black colleges scored higher on a writing skills test than their predominately white college-attending counterparts.103

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95. Id. at 490.
97. See Gurin Report, supra note 89, at 382.
98. Id.
100. Id. at 636.
These attacks and others diluted the Gurin Report’s probative value. Questions about the social scientific base for a key university assertion—that student diversity generates educational benefits—did not pass unremarked by litigants. The plaintiffs argued that the university’s reliance on the Gurin Report was misplaced because “[t]he methodology and conclusions of the University of Michigan professor Patricia Gurin have been devastated both in arguments to the district court and in searching critiques conducted by others.”104 Problems with the Gurin Report posed consequences for the University of Michigan’s legal position. Specifically, the plaintiffs argued (albeit unsuccessfully) that the university failed in its burden to identify educational benefits uniquely attributable to student racial diversity in part due to flaws with and limitations to the Gurin Report.105

Notwithstanding important questions about the Gurin Report and despite plaintiff’s objections, the majority of the Justices were persuaded by the empirical support for educational benefits attributable to student diversity. The Court concluded that such benefits are “substantial” and relied on “numerous studies [that] show that student body diversity promotes learning outcomes.”106 Though it is not entirely clear, the Court presumably relied on the Gurin Report.107 In dissent, Justice Thomas argued that the Court failed to account for evidence (conflicting with the findings in the Gurin Report) which suggested that increased diversity works to the disadvantage of some black students.108

B. Parents Involved

More recently, in Parents Involved, the Court rejected the Seattle School District’s use of race in student assignments.109 Although a few years earlier in Grutter the Court directly engaged with the empirical support for educational benefits flowing from student diversity, in Parents Involved the Court appeared to disengage from the relevant empirical literature and social science debate. Indeed, the Court ex-


105. Id.


107. See, e.g., Pidot, supra note 81, at 804 (noting that the Court’s language “suggests a reliance on the Gurin Study”).

108. Grutter, 539 U.S. at 364 (Thomas, J., dissenting).

pressly sidestepped (and, perhaps, stepped back from) the debate by noting only that the parties and their amici dispute whether racial diversity in schools "in fact has a marked impact on [student] test scores and other objective yardsticks or achieves intangible socialization benefits." 110

Despite its best efforts to avoid engaging with the debate over the relation between student diversity and educational benefits, the Court in Parents Involved did not escape cleanly. Indeed, having announced its desire to avoid the empirical debate regarding diversity and achievement, the Court then proceeded to criticize the school districts for failing to offer evidence supporting their assertion that educational benefits arise when a school's racial composition more closely reflects the racial composition of the district. 111 The Court described the district's failure to work "forward from some demonstration of the level of diversity that provides the purported [educational] benefits" as a "fatal flaw." 112 Presumably, such evidence would be empirical.

Justice Thomas' concurrence and Justice Breyer's dissent illustrate that individual Justices did not recoil from the social science relied upon by the litigants and numerous amici. 113 Although both Thomas and Breyer referenced the same empirical research and literature, they did so to achieve radically different legal points.

Justice Thomas' concurring opinion exploited the uncertainty surrounding the relation between student diversity and educational outcomes to undermine legal support for the proposition that increased student diversity constitutes a compelling governmental interest. In Justice Thomas' view, the critical proposition is "hotly disputed among social scientists" 114 and the relevant social science is "inconclusive." 115 To demonstrate this point, Justice Thomas cited to a wide array of conclusions found in the research literature. 116 Finally, Justice Thomas

110. Id. at 2755.
111. Id. at 2756.
112. Id. at 2757.
113. Notable social science evidence presented by amici includes the Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2927079 (arguing that social science research supports the districts' use of race); Brief of David J. Armor, Abigail Themstrom, & Stephan Themstrom as Amici Curiae in Support of Petitioners, Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2453607 (arguing that the social science research does not support the districts' use of race).
114. Parents Involved, 127 S. Ct. at 2776.
115. Id. at 2777.
116. For research finding benefits to black students attributable to increased student racial diversity, see, e.g., Robert L. Crain & Rita E. Mahard, Desegregation and the Black Achievement: A Review of the Research, 42 L. & CONTEMP. PROBS. 17, 48 (1978). For research finding no such benefits, see, e.g., David J. Armor & Christine H. Rossell, Desegregation and Resegregation in the Public Schools, in BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN
referenced data from the Seattle School District that appeared to undercut the district’s own legal assertions.\(^{117}\)

In contrast, in his dissent, Justice Breyer set out to leverage the same social science uncertainty in a manner that favored the Seattle School District’s decision to use student race in school admissions. To support his conclusion that a compelling governmental interest existed, Justice Breyer noted “historical and remedial,”\(^{118}\) as well as “educational”\(^{119}\) elements. As to the latter, Breyer cited to empirical research supporting the assertion that increased student diversity correlated with “positive academic gains.”\(^{120}\) Indeed, Breyer characterized the research support for the assertion as “well established.”\(^{121}\)

At this point, however, Justice Breyer’s dissent took a somewhat unusual tack by altering course slightly. Specifically, having previously characterized the relation between diversity and student academic gains as “well established,” Breyer went on to acknowledge that “[o]ther studies reach different conclusions.”\(^{122}\) Noting the conflicting studies cited in Justice Thomas’ concurring opinion, Justice Breyer carefully recast his characterization of the relevant empirical support as “well established and strong enough to permit a democratically elected school board reasonably to determine that this interest [student diversity] is a compelling one.”\(^{123}\)

Justice Breyer’s subtle move warrants close attention. After bowing to the reality that social science support for diversity programs is, at the very least, contested, Breyer’s next move was to shift the relevant reference point for the Court’s assessment of such evidence. Justice Breyer implied that rather than assess whether the social science evidence persuasively supported the asserted relation between student diversity and achievement, the Court need only persuade itself that the existing social science evidence—even though contested—was plausible enough to support a good-faith belief by the school district the educational benefits arise from increased diversity. At that point, federalism

\(\text{AMA} 239, 251\) (Abigail Thernstrom & Stephen Thernstrom eds. 2002). For somewhat ambiguous research, see, e.g., Ronald D. Henderson et al., \textit{High Quality Schooling for African American Students, in Beyond De segregation: The Politics of Quality Education in African American Schooling} (Mwalimu J. Shujaa ed. 1996).

\(^{117}\) \textit{Id.} at 2820 (Breyer, J., dissenting).

\(^{118}\) \textit{Id.} at 2820 (Breyer, J., dissenting).

\(^{119}\) \textit{Id.}

\(^{120}\) \textit{Id.}

\(^{121}\) \textit{Id.} at 2821. \textit{The Appendix to Breyer’s dissenting opinion reprints an array of descriptive empirical support. Id. at 2837–42.}

\(^{122}\) \textit{Id.} at 2821.

\(^{123}\) \textit{Id.}
and institutional competence concerns perform the remaining analytic work necessary to reach a legal outcome favorable to the school district.

IV. EXPLANATIONS FOR THE COURT’S INCONSISTENT TREATMENT OF SOCIAL SCIENCE EVIDENCE

What might account for the Court’s inconsistent use of similar social science data in connection with the proposition that student diversity generates educational benefits in the Grutter and Parents Involved opinions? After all, clearly no sea change took place in the social science literature during the relatively small number of years that separate these two cases. More likely is that the Court’s inconsistent treatment of the empirical evidence reflects judicial ambivalence about how courts should engage social science evidence. Two factors fuel this ambivalence. First, a general lingering unease surrounds the use of social science evidence as support for legal conclusions in judicial opinions, especially those involving core constitutional decisions. Second, in the education context in particular, uncertain constitutional doctrine and ambiguous social science interact in a manner that fuels additional judicial ambivalence about the utility of social science evidence.

A. General Judicial Ambivalence About the Role of Social Science in Constitutional Decision Making

Reliance on social science evidence in judicial decisions, especially in constitutional cases, continues to make many scholars and courts uneasy. Critical differences separate legal and social science cultures, norms, standards, and practices and contribute to this unease. In the legal (civil) context, as a general rule courts require evidence to exceed the “preponderance” (or “more likely than not”) threshold. In contrast, most social science disciplines impose a comparatively higher standard of proof. For example, social science convention suggests that “statistical significance,” a term of art among social scientists, requires that evidence that an observed result might be explained by random chance be less than five percent (or that p < .05).

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126. On the role of statistics in establishing a prima facie case in discrimination litigation, see generally Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); David Baldus & James W.L. Cole,
Not only do standards vary between legal and social science contexts, but standards within social science disciplines vary over time as well. Additional difficulties arise from evolving data quality and data availability. Consequently, what is viewed as “state of the art” social science today might be deemed hopelessly flawed tomorrow. This observation is not meant to cast any undue aspersions on prior social science work. After all, current and future social science advances build and expand on past work. That more, newer, and sometimes better data emerge and that statistical techniques and computational power continue to improve over time is an inherent strength and not a sign of structural weakness for the social sciences.

Even if social science was stable in terms of its findings, norms, and standards, institutional capacity challenges also lurk. Courts of law are, in one sense, forums designed to resolve legal disputes rather than to assess social science research. Litigation’s inherently adversarial context is ill-designed for a careful review of potentially conflicting research findings.127 Also, many Justices lack the background and formal training in such fields as economics, political science, psychology, and sociology. As such, the Justices might not be equipped to distinguish between methodologically sound and suspect research.128

Finally, even if one sets aside technical and institutional qualms flowing from the Court’s use of empirical social science evidence, some criticize the Court for turning to such evidence in constitutional cases, especially those involving the equal protection clause.129 One core concern is that by relying on social science evidence to decide equal protection cases, the Court risks “demeaning” the moral principles embodied in the Fourteenth Amendment.130 Indeed, leading constitutional law scholars today basically avoid the particular path taken by the Court in Brown.131

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129. See supra note 33 and accompanying text.

130. See supra note 33 and accompanying text; Lizotte, supra note 96, at 630; Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421, 426 (1960); Edmund Cahn, Jurisprudence, 30 N.Y.U. L. REV. 150, 167 (1955).

B. Uncertain Law and Uncertain Social Science

Even if as a general matter Justices welcomed and, indeed, sought out, social science evidence for their judicial opinions, uncertain law and social science in the education context complicate efforts to incorporate relevant empirical evidence. Examples of legal uncertainty include questions about what amount of proof is required to demonstrate student diversity’s educational benefits as well as the inefficacy of alternative race-neutral measures. Uncertain or ambiguous social science muddies the water even further. The research literature on the relation between student diversity and academic achievement, for example, remains unsettled. Either one of these sources of uncertainty raises serious problems. The interaction of both sources dramatically increases the degree of difficulty for Justices inclined to draw on social science evidence.

1. Legal Uncertainty

Neither Grutter nor Parents Involved supplied much firm legal guidance for public school districts contemplating student diversity policies that necessarily venture into an already murky area of constitutional law. After Grutter and Parents Involved, it is reasonably clear that a majority of Justices construe student diversity as compelling in the higher education setting as well as a remedy for past discrimination.132 Also reasonably certain is that the student diversity programs in Parents Involved (operating in Louisville and Seattle) were not narrowly tailored in a constitutional sense.133 Aside from these two points, however, a host of other key legal questions remain unanswered. Decidedly unclear, for example, is whether a majority of the current Justices construe student diversity in the K–12 setting as compelling, in large part because Justice Kennedy’s crucial swing opinion, a model of opacity,134 did not expressly commit. What Justice Kennedy wrote provides mere hints. For example, Kennedy suggested that pursuing a diverse student body, “one aspect of which is its racial composition”135 might be compelling. In the

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132. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752–53 (2007); see id. at 2792 (Kennedy, J., concurring); see also Ryan, supra note 6, at 135–36.

133. Parents Involved, 127 S. Ct. at 2760.

134. See Ryan, supra note 6, at 148 (describing Justice Kennedy’s opinion as “unclear”).

135. Parents Involved, 127 S. Ct. at 2792 (Kennedy, J., concurring).
same opinion, however, Kennedy noted that “avoiding racial isolation” may also constitute a compelling governmental interest. What he meant by this in any practical sense, however, remains anyone’s guess.

Assuming, for the sake of argument, that student diversity in the K–12 setting constitutes a compelling governmental interest, questions of proof persist for public schools that desire to use student race because of the narrowly tailored requirement. For example, it is not clear what a school district needs to do to support a conclusion that non-racial alternatives are unable to deliver desired levels of student diversity. What we know from Grutter (again, assuming that the higher education sector informs analyses in the K–12 education sector) is that narrowly tailoring involves an “individualized, holistic” treatment of students. As to what narrowly tailoring means in the K–12 setting, all we know from Kennedy’s opinion is that what a narrowly tailored program will look like will be “informed” by Grutter, but that the specific criteria “relevant to student placement [and admission] would differ.” As Professor James Ryan aptly noted, what this means for public school districts inclined to consider student diversity programs is “left to the imagination.”

2. Social Scientific Uncertainty

Even if one were to momentarily blink at reality and simply assume that the constitutional law governing public K–12 schools’ race-conscious student diversity policies was clear, predictable, and stable, social science uncertainty relating to assumptions critical to student diversity policies generates an additional set of distinct challenges.

The belief that a diverse student enrollment generated positive student outcomes resided at the core of the University of Michigan’s defense of its use of race in student admissions. Indeed, this belief is echoed by an abundance of educator commentary on the pedagogical value flowing from a racially diverse student body. A similar belief that a more racially integrated K–12 school environment would generate

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136. Id. at 2797.
138. Parents Involved, 127 S. Ct. at 2793 (Kennedy, J., concurring).
139. Ryan, supra note 6, at 136.
140. I am mindful that undergraduate and law school admissions at the University of Michigan differed in important ways. The social science rationale for the University’s race-conscious admissions’ programs, however, did not materially differ. Indeed, in both cases the University relied heavily on the Grutter Report.
educational benefits was found at the core of the Parents Involved litigation. This Article does not question whether people of good will reasonably believe that educational benefits flow from student diversity. Rather, this Article only sets out to assess the empirical support—the evidentiary foundation—for such a belief.

The social science literature, some of which was pressed into service by litigants and amici in their briefs and, more importantly, the Justices in their opinions, has not yet achieved a firm, stable consensus about whether educational benefits flow from and are uniquely attributable to greater student diversity. Conclusive evidence on such benefits, in either direction, does not yet exist. Indeed, prominent supporters of diversity programs acknowledge as much when they note that the empirical evidence supporting the critical proposition that increased school integration increases student academic achievement is mixed.142 Commenting on the Grutter decision, Professor James Ryan noted that the evidence on the influence of student diversity on educational outcomes is “neither pellucid nor beyond challenge.”143 Indeed, Ryan remarked, “there is a cottage industry of conflicting studies regarding the short- and long-term benefits of racial integration.”144 Other reviews of the empirical evidence received by the courts, including but not limited to the Gurin Report in Grutter, echo Ryan’s observation and conclude that existing social science research conveys “no clear picture” about purported benefits attributable to student diversity.145 This lingering uncertainty, the absence of a “clear picture,” places enormous stress on courts seeking to enlist empirical evidence into the service of judicial decision-making.

Many factors contribute to the conflicting social science evidence about the relation between student diversity and achievement. Efforts to identify and isolate the potential independent influence of specific variables (especially variables relating to student diversity) on educational outcomes, such as those involved in the Grutter and Parents Involved litigation, undertake one of the most complicated research questions available. Exactly what causes some students to perform well and others to perform poorly is endlessly debated in a literature that devotes far more attention to the elementary and secondary school students than their higher education counterparts. Amid a vigorous debate, a consensus ex-

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142. See, e.g., James E. Ryan, Voluntary Integration: Asking the Right Questions, 67 OHIO ST. L.J. 327, 337 (2006); Ryan, supra, note 6, at 143 n.84. But cf., Liu, supra note 141, at 437 (“Virtually all empirical evidence currently available, though limited, tends to support the diversity rationale.”).


144. Id.

145. Pidot, supra note 81, at 793–94.
ists that a student's own socioeconomic status, as well as the socioeconomic status of the student's peers, greatly affects the student's academic achievement and social behavior. Additionally, in the elementary and secondary school contexts, there is some agreement that good teachers, strong principals, small schools and class size, and parental involvement can improve achievement, but the significance of even these variables remains subject to vigorous debate.

Aside from a few general points of emerging consensus on the issue of what factors influence student academic achievement, a precise understanding of student diversity's unique contribution eludes researchers. Put simply, if the Court sought to engage with one of the most contested and complex social science research questions available, it is difficult to identify a stronger candidate than the influence of student diversity on educational achievement. Direct proof of the contribution, if any, is in scarce supply. Three methodological hurdles confront researchers seeking to assess the influence of student diversity on academic achievement. One hurdle involves separating the influence of student diversity from the array of complex and interacting factors known to influence student academic achievement. A second hurdle involves controlling for the background assets that every student brings with them into schools every day. Third, even if some relation between student diversity and achievement emerged, researchers would also need to assess whether the relation remained stable over time.

Amid all of this legal and social scientific uncertainty, however, a few pockets of clarity exist on the litigation front. One sure bet, for example, is the inevitability of future litigation. Indeed, of Justice Kennedy's obscure concurring opinion in Parents Involved all but assures further litigation. Equally inevitable is that the specter of litigation will deflect many risk adverse public school districts away from even considering constitutionally risky student placement policies that implicate race. Finally, school districts that desire to implement race-specific student placement policies notwithstanding the Parents Involved decision will likely need to develop a more precise definition of "diversity" as


147. For a further discussion of research on this point, see KAHLENBERG, supra note 146, at 86–90.

148. See Liu, supra note 141, at 436 (noting that the influence of student diversity on academic achievement is "not susceptible to direct proof").
well as a clearer articulation of and support for the purported educational benefits generated by increased student racial diversity.

V. CONCLUSION

Persisting questions surrounding whether and how the Court should treat social science evidence when assessing the equal educational opportunity doctrine pose serious practical problems for public schools seeking to implement race-conscious policies designed to enhance student diversity. To the extent that the Court seeks to avail itself of social science evidence in future opinions how should the Court proceed if the underlying empirical evidence is mixed? Does the availability of social science evidence deflect the Court away from mooring its rationales in core constitutional principles that resist firm empirical casting? Setting aside important jurisprudential concerns, today’s Court appears unlikely to reverse its present direction; as such, we can expect to see the strained relation between judicial decision making and social science evidence persist.

At a more practical level, the structure of Justice Breyer’s dissent in Parents Involved identifies one critical technical question that warrants quick judicial resolution. The question involves the appropriate point of reference from which the Court should assess social science evidence on the relation between student diversity and educational benefits. Specifically, must the social science evidence persuasively support the proposition that educational benefits arise to satisfactorily support a legal conclusion that student diversity constitutes a compelling governmental interest? Or, in contrast, must the evidence merely support a school district’s good faith belief that educational benefits arise?

Although an answer to this reference point question is not obvious, the legal consequences are considerable. From an evidentiary standpoint, the two different reference points dramatically differ. Given the state of social science research, a resolution of the reference point question poses obvious substantive implications. One can easily imagine the Court concluding, as a procedural matter, that the government must present persuasive social science evidence to satisfy the evidentiary burden necessary to establish a compelling governmental interest and least restrictive means prongs triggered by strict scrutiny. If school districts are held to such a standard it is doubtful whether race-specific student assignment policies will survive judicial review. Simply put, the current social science research does not yet appear robust enough to meet that

149. For a quite recent example, see Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5439) (Stevens, J., concurring); id., (Scalia, J., concurring).
burden. On the other hand, if the Court concludes that school districts need only to present credible social science evidence that would support its good faith belief that educational benefits arise from and are attributable to student diversity, current social science research, while not conclusive, is far more likely to assist school districts in satisfying this burden.

The *Brown* opinion helped propel the modern public drive toward a more equitable distribution of educational opportunity. The caustic language contained in the various opinions in *Parents Involved* and the related disputes over *Brown*’s meaning illustrate that the Justices feel *Brown*’s legacy is worth a fight. To some, including the defendants in *Parents Involved*, the ability of public K–12 schools to use student race is critical to making educational opportunity more equal in the twenty-first century. Questions about whether and, if so, how public schools can use student race are directly back to the *Brown* opinion, specifically, to footnote 11. That the seeds of today’s contentious questions about efforts to enhance equal educational opportunity relate back to *Brown* only deepen the irony surrounding *Parents Involved*. Although *Parents Involved* reveals sharp differences among the Justices about *Brown*’s meaning and legacy, one of *Brown*’s legacies emerges with clarity. Sparked by *Brown* and refined in periodic cases over time ever since, disputes over how the Court should consider social science evidence, even in equal educational opportunity cases, have largely displaced disputes over whether the Court should deploy such evidence. If my claim is correct, disputes about social science evidence’s role in constitutional cases are far from over.

150. See Heise, *supra* note 9, at 314–15