The Promise and Pitfalls of Empiricism in Educational Equality

Lia Epperson
THE PROMISE AND PITFALLS OF EMPIRICISM IN EDUCATIONAL EQUALITY JURISPRUDENCE

Lia Epperson*

"History, despite its wrenching pain
Cannot be unlived, but if faced
With courage, need not be lived again."¹

INTRODUCTION

For the last half century, there has been growing national support for racial equality and the benefits that flow from racial diversity in education, employment, and a host of other areas. In the court of public opinion, surveys point to a rising consensus regarding the benefits of racially diverse environments.² In addition, there is more empirical evidence supporting race-conscious policies that aim to decrease racial isolation and enhance student diversity in education than at any time in history.³ In 2003, for instance, the Supreme Court solidly upheld the constitutionality of carefully tailored, race-conscious admissions policies to further the compelling government interest of enhancing student body diversity.⁴ In evaluating the constitutionality of such policies, the

---


Court received more amicus curiae briefs than it had received in any one case in recent history. Many of these briefs relied heavily on empirical evidence that racially diverse educational environments yielded significant short- and long-term academic, political, and social benefits for students of all races. Drawing on this empirical evidence, the Court opined that there is a “unique experience of being a racial minority in a society, like our own, in which race... still matters.”

The multitude of amicus briefs filed supporting the constitutionality of race-conscious policies in education underscores how profoundly rooted the ideals of diversity and racial equality have become.

Yet, recent Supreme Court jurisprudence reflects a fraught relationship between constitutional doctrine, student diversity, and educational opportunity. Constitutional doctrine has been insufficient in solving the dueling principles of color-blindness and color-consciousness in addressing racial inequality in education. While there appears to be national consensus that racial inequality in education is intolerable and should be addressed, jurisprudence reflects some anxiety with a solution that allocates educational benefits based in part on individualized racial classifications. Four years after upholding race-conscious policies in higher education, an increasingly conservative Court accorded little weight to the many briefs filed in support of voluntary racial integration plans in elementary and secondary schools. This year, the Court heard the first federal challenge to an affirmative action policy in higher education in a decade. The Court’s decision to hear this latest challenge is another reminder that, in the domain of race and education policy, constitutional doctrine remains a muddled and complex terrain.

It is at this crossroads of existing judicial discomfort with some race-conscious tools and broad national support for diversity and racial equality that empiricism in educational equality cases rests. Social science evidence has been used as a major tool in the litigation arsenal on both sides of the debate. This is a well-established practice. Indeed, the Supreme Court famously cited extralegal sources in shaping constitutional doctrine on racial equality in its landmark decision in *Brown v. Board of Education.*

While the Court’s reliance on such sources did not begin with *Brown*’s now-famous use of social science evidence to support a call for racial integration, *Brown* marked a defining moment in which

5. Id. at 333.
7. 347 U.S. 483 (1954); see infra Part I.
8. *Brown,* 347 U.S. at 494–95 n.11 (citing social science sources). See generally *Kenneth B. Clark, Prejudice and Your Child* (2d ed. 1963). Prior to the *Brown* ruling, the Supreme Court looked to biological studies like eugenics...
social science evidence became a viable avenue to help further progressive causes in the courts. Scholars have marked this case as a catalyst in American jurisprudence, noting that empirical evidence could be a powerful force for reform.

This is particularly evident in cases advocating racial equality in educational opportunity. In this arena, Brown ushered in a decades-long practice of rigorous study of the short- and long-term effects of student body diversity on educational outcomes in elementary, secondary, and higher education. Such research became a substantial component of school desegregation cases as well as recent jurisprudence endorsing affirmative action in higher education in Grutter v. Bollinger.

This new body of research used in race and education cases, however, came with some costs. The Brown Court's reliance on social science evidence received significant and well-documented criticism from scholars and advocates. While, in theory, social science may be used to help elucidate a constitutional middle ground in cases regarding racial inequality, a majority of the current Court has seemed reluctant to find such a middle ground, particularly when only two of the Justices who upheld the constitutionality of affirmative action in higher education less than a decade ago remain on the Supreme Court. The Court's divergent responses to the introduction of empirical evidence in recent cases highlights a fundamental question as to how to use such evidence within the confines of constitutional doctrine and equal protection analysis. On
a constitutional level, such empirical evidence, recognized by the Supreme Court, may clarify a murky terrain with respect to racial equality in education. Even more expansively, research on the relationship between student-body diversity and educational outcomes can matter greatly in the court of public opinion, which may in turn affect broader education policy. In some respects, the greatest potential impact of such empirical evidence may occur prior to the filing of any legal action. It is at this early date that the evidence has time to seep into the public consciousness and spur public policy.

This Essay proceeds in five Parts. In Part I, I examine the redemptive potential of the Brown Court's reliance on social science evidence to dismantle racial apartheid. The case heralded a new movement that looked to social science evidence to further progressive causes and, in particular, equal educational opportunity. In Part II, I examine the hidden costs of the burgeoning use of social science evidence in race and education jurisprudence. Such costs include the uncertainty of sociological methodology, the confines of constitutional doctrine, and the contentious nature of racial jurisprudence, which limits the ability of social science evidence to gain ground as a method of resolving constitutional uncertainty. In Part III, I show the tremendous growth in the research touting the benefits of diversity and racial integration that may have shaped broad national support for the ideal of racial diversity and equality today. Part IV examines the unique way in which the Supreme Court has handled such empirical evidence in its two most recent pronouncements on race and education policy in Grutter v. Bollinger and Parents Involved in Community Schools v. Seattle School District. These cases each illustrate in different ways the promise and the pitfalls of the Court's reliance on empiricism. This Part also identifies the potential issues with which the Court is faced in the most recent race and higher education case, Fisher v. University of Texas. The yet-to-be-decided Fisher case offers a glimpse into the challenge of how to situate social science evidence in this area of judicial decision making. With an outpouring of amicus briefs in support of the University of Texas's admissions policy and a very


16. See infra Part II; see also Jack Greenberg, Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in Litigation, 54 MICH. L. REV. 953, 968–69 (1956).


19. More than seventy amicus briefs were filed in support of the University of Texas's admissions policy enhancing student body diversity, including briefs from major corporations; former military leaders; more than one hundred colleges and universities; and more than four hundred social scientists, religious
small number of amici in support of the challenger, the Court will be faced with the task of determining how to interpret the evidence. History has shown us that this task is no simple charge. Finally, Part V outlines some of the normative implications of the Court's use of empiricism in affirmative action cases.

The analysis shows that the question is not whether courts will use social science evidence in cases pertaining to equal educational opportunity but rather how they will use it. Today, the overwhelming public opinion seems to be in support of broad definitions of racial equality and diversity. Yet, a persistent lack of consensus remains as to how such a belief system can or should influence constitutional doctrine on racial equality. The extent to which courts choose to recognize the rise in empirical evidence may well steer them to greater resolution between competing principles of color-blindness and color-consciousness in addressing racial inequality in education.

I. THE PROMISE OF BROWN IN ADVANCING LAW AND SOCIAL SCIENCE

By the time the Brown case made its way to the nation's highest Court, litigators had begun including more outside analysis and social science evidence in briefs to buttress their cases that racially segregated education was innately harmful. Brown v. Board of Education's famous Footnote Eleven marked a turning point in judicial consideration of social science evidence to support constitutional decision making with respect to racial equality. The Court cited to seven research studies to support its finding that racially segregated schooling was inherently unequal and violated the Fourteenth Amendment's Equal Protection Clause. The most famous of the studies, conducted by psychologist Kenneth Clark, examined white and African American children's responses to white and black dolls to determine whether racial segregation negatively impacted African American children's self-esteem. While, prior to the Brown litigation, advocates submitted social science evidence to support racial segregation and stereotyping, Brown signaled the use of social science evidence to dismantle a system of racial organizations, diverse student organizations, and labor unions; as well as Latino organizations and civil-rights organizations, including Asian-American organizations and the NAACP Legal Defense Fund on behalf of the UT Black Student Alliance. See The Office of the Vice President for Legal Affairs, Univ. of Tex. at Austin, Fisher v. Texas: Briefs in Support of Respondent, UNIV. TEX. AUSTIN, http://www.utexas.edu/vplirla/Fisher-V-Texas.html#Briefs in Support of Respondent, (last updated Nov. 16, 2012) (providing links to the full text of each amicus brief).

21. See generally CLARK, supra note 8.
hierarchy and subordination. The decision proved catalytic to the rigorous study of the educational, social, and democratic benefits of student diversity and racial integration.

A. The Precursor to Brown: Briggs v. Elliott

Brown itself was a consolidation of four cases challenging the constitutionality of segregated schooling.23 The famous doll study of the Brown case originated from one of the consolidated cases, the Briggs v. Elliott24 litigation in Clarendon County, South Carolina. Briggs provides an early glimpse of regional jurists' resistance to empirical evidence, as well as the lone dissenting voice in the lower court decisions maintaining segregated education.

Under its constitution, the State of South Carolina mandated segregation in its schools.25 Briggs arose from Clarendon County’s denial of black parents' request for public funds for transportation for black children who lived up to ten miles from school.26 Clarendon County already funded such transportation for rural white children to attend schools.27 Until this point, black parents had independently funded and operated a private transportation system that ultimately proved too costly.28 Social psychologist Kenneth Clark conducted his famous doll study on children in a number of areas in the country, including Clarendon County.29 Disregarding the Clark study, the lower court in Briggs held that the state constitution required segregation.30 Questioning the

25. South Carolina's constitution read, in pertinent part: "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race." S.C. CONST. art. 11, § 7 (repealed 1973).
27. Id.
30. Briggs, 98 F. Supp. at 535–36 (majority opinion). The court noted: "There is testimony to the effect that mixed schools will give better education and a better understanding of the community in which the child is to live than segregated schools. There is testimony, on the other hand, that mixed schools will result in racial friction and tension and that the only practical way of conducting public education in South Carolina is with segregated schools. The questions thus presented are not questions of constitutional right but of legislative policy, which must be formulated, not in vacuo or with doctrinaire
relevance of such evidence describing the harms of segregation, the majority opinion found that operating segregated schools did not violate the Fourteenth Amendment and that "this conclusion is supported by overwhelming authority which we are not at liberty to disregard on the basis of theories advanced by a few educators and sociologists."  

The lone dissenter on the district court, Judge J. Waties Waring, discussed the expert testimony and evidence on the harms of segregation, noticing the dearth of any opposing evidence offered by the state: "In the instant case, the plaintiffs produced a large number of witnesses. It is significant that the defendants brought but two. These last two were not trained educators." Judge Waring was the lone jurist prior to the Supreme Court ruling in Brown who took note of the empirical evidence detailing segregation's harm on all children, regardless of their race. Waring noted that "[f]rom their testimony, it was clearly apparent, as it should be to any thoughtful person, irrespective of having such disregard of existing conditions, but in realistic approach to the situations to which it is to be applied . . . . The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators."

Id. at 537.
31. Id. at 546 (Waring, J., dissenting).
32. Waring spoke at length regarding expert testimony: "[P]laintiffs brought many witnesses, some of them of national reputation in various educational fields. . . . [T]hey who had made studies of education and its effect upon children . . . unequivocally testified that . . . the mere fact of segregation, itself, had a deleterious and warping effect upon the minds of children. These witnesses testified as to their study and researches and their actual tests with children of varying ages and they showed that the humiliation and disgrace of being set aside and segregated as unfit to associate with others of different color had an evil and ineradicable effect upon the mental processes of our young which would remain with them and deform their view on life until and throughout their maturity. This applies to white as well as Negro children. These witnesses testified from actual study and tests in various parts of the country, including tests in the actual Clarendon School district under consideration. They showed beyond a doubt that the evils of segregation and color prejudice come from early training. And from their testimony as well as from common experience and knowledge and from our own reasoning, we must unavoidably come to the conclusion that racial prejudice is something that is acquired and that that acquiring is in early childhood . . . . This case presents the matter clearly for adjudication and I am of the opinion that all of the legal guideposts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education adopted and practiced in the State of South Carolina must go and must go now."

Id. at 547–48.
expert testimony, that segregation in education can never produce equality and that it is an evil that must be eradicated.\textsuperscript{34} After a lengthy discussion, Waring concluded that "segregation is per se inequality."\textsuperscript{35} Reviled and physically harassed, it is clear that Waring and his dissenting opinion stood apart from most of his colleagues and community at the time of the ruling.\textsuperscript{36}

In the example of Briggs, the district court in South Carolina followed the ideology of the region. Segregation was so deeply ingrained in the culture of the state, it seemed inconceivable to the majority of the court to reach a different conclusion. Judge Waring was also the lone dissenter of the more than twelve jurists hearing the four cases that would ultimately be consolidated into the Brown decision in the Supreme Court.\textsuperscript{37} It was not until the cases reached the national platform that a majority of jurists weighed in on the social science evidence and discussed segregation's deleterious impact on children.

B. The Brown Decision and Its Empirical Legacy

The legal team responsible for the strategy in Brown and its accompanying cases, the NAACP Legal Defense Fund, was not unanimous in the decision to utilize social science evidence to buttress its legal arguments. Indeed, Thurgood Marshall and some members of the legal team questioned the wisdom of resting such a critical case on uncertain psychological data.\textsuperscript{38} As such, the briefs in the case did not reference the social science research. Rather, the team followed the same amici strategy used a few years earlier when they challenged the constitutionality of segregated law schools in Texas in Sweatt v. Painter.\textsuperscript{39} In that case, law professors filed an amicus brief.\textsuperscript{40} In Brown, the lawyers included Clark's findings in

\begin{thebibliography}{10}
\bibitem{34} Id.
\bibitem{35} Id. at 548.
\bibitem{36} Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution 122 (1994); see also De Laine Gona, supra note 28, at 150. The dissenting opinion was Judge Waring's final opinion before retiring. Id. at 151.
\bibitem{38} See Kluger, supra note 11, at 321, 356.
\bibitem{39} 339 U.S. 629 (1950).
\bibitem{40} In Sweatt v. Painter, the plaintiffs provided testimony of Robert Redfield, a law professor at the University of Chicago, who discussed evidence that there were no differences between negroes and whites in intellectual capacity or inability to learn. Brief on Behalf of American Jewish Committee and B'Nai B'Rith (Anti-Defamation League) as Amici Curiae at 36, Sweatt, 339 U.S. 629 (No. 44), 1950 WL 78684, at *35. NAACP Legal Defense Fund lawyers in the Briggs case read Redfield's testimony into the record. Greenberg, supra note 36, at 125.
\end{thebibliography}
an appendix, which was signed by leading researchers.\textsuperscript{41}

Thurgood Marshall did, however, detail a bevy of expert testimony during oral argument to illustrate the harms of segregation. Researchers detailed the deprivation of equal status in their communities, a loss of self-respect, a denial of the full opportunity for democratic social development, and a feeling of being stamped with the badge of inferiority.\textsuperscript{42} While it is unlikely that the social science evidence alone served as a basis for the Court's ultimate decision, Marshall and his colleagues nonetheless provided the Court with authority on which to base the moral judgment they felt compelled to make. The Court denounced the segregation doctrine espoused by the \textit{Plessy} Court: "To separate [children] 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{43} In addition, the Court explicitly referenced "modern authority" on psychological harms of segregation as a basis for its finding.\textsuperscript{44} In doing so, it distanced itself from the \textit{Plessy} Court's findings to the contrary on the lack of psychological harm of racial segregation.\textsuperscript{45}

One could fill a library with volumes written on the subject of Brown's legacy. Here, I seek to highlight a specific piece of this legacy. Brown signaled a watershed moment when scholars and advocates saw the potential use of social science evidence to further progressive causes in the courts. The short footnote that cited to the now-famous work of social psychologist Kenneth Clark proved that racial segregation wrought a terrible psychological harm. Scholars have noted that the decision demonstrated how legal actors make decisions based in part on their ideological beliefs; that legal reasoning has some relationship to political and policy arguments; that jurists may look to norms outside of the law to decide cases; and that jurists, legal scholars, and legal advocates should make the law responsive to societal changes.\textsuperscript{46}

Relatedly, because law is a professional field that focuses on the art of oral persuasion, it takes the insights of social science disciplines and turns them to further the arguments of litigators.\textsuperscript{47} Brown stood for the principle that litigators advancing social justice

\begin{thebibliography}{9}
\setlength{\itemsep}{0pt}
\bibitem{kluger41}KLUGER, \textit{supra} note 11, at 555–57.
\bibitem{greenberg42}GREENBERG, \textit{supra} note 36, at 124.
\bibitem{id44}Id.
\bibitem{id45}Id. ("Whatever may have been the extent of psychological knowledge at the time of [\textit{Plessy v. Ferguson}], this finding is amply supported by modern authority.").
\bibitem{id47}Id.
\end{thebibliography}
can look to social science authority as a tool in their civil-rights arsenal.\(^{48}\) Thus, \textit{Brown} proved catalytic to the rigorous study of the educational, social, and democratic benefits of student diversity and racial integration.\(^{49}\) More broadly, \textit{Brown} helped legitimize the practice of submitting amicus briefs to the Court that augmented parties' legal analysis with extralegal sources. One study found that from the mid-1940s to 2000, the number of amicus briefs filed annually in the Supreme Court increased by 800%.\(^{50}\)

Perhaps most importantly, this blooming field of empiricism took on a new character as well. By establishing that racial segregation in education was harmful, research could turn from the normative study of \textit{whether} state-mandated racial segregation and subjugation was harmful to a descriptive study of exactly \textit{why} integration and diversity are laudable goals. Social science research could shift to examining the implementation of the integrative ideal. Such research shifted from abstract studies to more realistic understandings of sociology.\(^{51}\)

Accordingly, on its face, \textit{Brown} represents a victory for the positive uses of empirical evidence in jurisprudence at the intersection of race and education. But it is also an example of the Justices' use of nonlegal authority to justify their normative judgments. While the pre-\textit{Brown} Court relied on nonlegal sources such as eugenics and Social Darwinism to further entrench white supremacy in the prior century,\(^{52}\) evidence in the wake of \textit{Brown} overwhelming supported efforts to dismantle racial segregation and hierarchy, particularly in the domain of education.


\(^{52}\) See, \textit{e.g.}, ANGELO N. ANCHETA, \textit{SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW} 28–37 (2006).
II. THE PITFALLS OF BROWN’S USE OF SOCIAL SCIENCE EVIDENCE

In the wake of Brown, courts continued to seek constitutional clarity on the relationship between racial integration and educational opportunity. This journey included both legal analysis and continued exploration of empirical evidence and social science principles. Some scholars have argued that the racial equality cases that followed Brown reinterpreted the decision away from social science evidence and toward legal principles. Decisions like McLaughlin v. Florida, which struck down the State of Florida’s ban on interracial cohabitation, for example, focused on antisubordination principles and the dismantling of white supremacy. Relatedly, in Loving v. Virginia, the Supreme Court cited to the harms of racial classifications designed to perpetuate such supremacy. School desegregation cases like Swann v. Charlotte-Mecklenburg Board of Education included social science, but such research played a decidedly less overt role in the Court’s ruling. The Swann Court assumed a connection between past school segregation and present residential segregation but did not look to social science evidence to prove that point. Similarly, the Supreme Court’s decision a few years later in Milliken v. Bradley presumed that a history of segregation disadvantaged minority students academically, and thus allowed for compensatory relief.

Unfortunately, jurisprudential reliance on social science evidence did not develop as robustly as some Brown advocates may have anticipated. While there have been numerous criticisms of the basis for the Court’s unanimous opinion, the early criticisms of Brown inform the current difficulty that the Court has in determining whether and how to weigh voluminous social science evidence on the benefits of student body diversity. Criticisms include the uncertainty of sociological methodology, the limitations of constitutional doctrine, and the existence of a small amount of

56. Id. at 192–94.
57. 388 U.S. 1 (1967).
58. Id. at 9–11.
60. Id. at 29–30.
62. Id. at 281–90.
63. Greenberg, supra note 16, at 965 & n.54.
64. See generally KLUGER, supra note 11; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008); Balkin, supra note 13.
competing data, as well as the contentious nature of racial jurisprudence and Justices' disparate views on race-conscious policies that limit the ability of social science evidence to gain ground as a method of resolving constitutional uncertainty.

First, the Brown decision came under fire for relying on social science evidence that, for some, seemed too weak a hook on which to hang the constitutional rights of African Americans. Some have argued that the decision should have adhered more closely to legal principles rather than social science evidence. While such empirical evidence may be useful in crafting policy, one could argue that evaluating such evidence is outside the realm of expertise of the judiciary. To rely too heavily on such evidence in lieu of established constitutional principles weakens the Court's legitimacy. Indeed, questions on the proper role of courts in a democratic society still plague the legal landscape today, particularly in the current affirmative action debate.

Moreover, the legal standard required to uphold a racial classification under the Equal Protection Clause of the Fourteenth Amendment arguably diminishes the potential gravitas that social science evidence may bring. Under the constitutional standard, any use of race by a state actor must be narrowly tailored to satisfy a compelling government interest. Empirical evidence can demonstrate the significant benefits of race-conscious educational policies. Such evidence demonstrates the academic benefits of integrated classrooms and the ways in which racial integration can have long-term democratic benefits for society as a whole. Yet, jurists must determine whether such evidence is sufficiently powerful that it satisfies the legal standard required. The normative judgment to weigh the relative burdens and benefits rests solely with the Supreme Court. Thus, while evidence by social scientists may be important, it may not necessarily be legally compelling.

Further, while many legal advocates and scholars assumed that the development of neutral social science evidence would always be for the moral good, not all evidence presented in such cases favors racial integration policies. While the weight of evidence falls on the side of favoring integration, cases challenging affirmative action in

68. Moran, supra note 9, at 522 (noting that the Law and Society movement was doomed at its inception due to the paradox that assumed a "value free approach to building an intellectual movement").
higher education and voluntary integration in elementary and secondary schools often feature dueling experts. Those in favor of integration demonstrate through empirical evidence the benefits of such plans, while the challengers hire experts who attempt to show the relatively minor benefits of using such plans. The choice to rely on dubious social science to thwart desegregation and affirmative action efforts hearkens back to a history we would like to forget. This choice bears resemblance to the use of extralegal sources used by jurists more than a century ago to provide authority for maintaining racial segregation and white supremacy. In the wake of Brown, such dueling experts may limit the emphasis jurists place on social science evidence. Depending on the normative judgments of Justices, they may rely on whatever authority is available.

Finally, constitutional debates on racial equality have proven to be a truly contentious battleground. In such an arena, debates in moral absolutes have made the use of practical social science evidence in finding a middle ground more difficult than advocates of the Brown strategy could have anticipated. Formalists advocate for color-blindness as the guiding principle, whereas civil rights advocates argue in favor of color-conscious remedies for pervasive and pernicious effects of racism. Other divisive areas of constitutional doctrine, such as abortion jurisprudence, have utilized nonlegal sources to create doctrine somewhere between two opposing camps. Yet, constitutional doctrine has thus far been insufficient to address the dueling principles of color-blindness and color-consciousness. The Roberts Court in particular has shown reluctance to find a constitutional middle ground in cases regarding racial equality. While, theoretically, social science may be used to craft such a middle ground, it has often been used in a polarizing fashion.

69. See infra Part V (comparing reliance on social science evidence by the Grutter Court upholding affirmative action and the Parents Involved Court striking down voluntary integration).

70. Greenberg, supra note 16, at 967–68.


73. Moreover, constitutional doctrine has ineffectively grappled with the true factual complexities inherent in cases at the intersection of race and educational opportunity. Take the example of City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In his dissenting opinion, Justice Marshall argued that the challenged affirmative-action-in-public-contracting policy should be upheld on intermediate scrutiny grounds. Id. at 535 (Marshall, J., dissenting). While this may be a superior method of constitutional measurement, the Richmond policy possessed a fatal flaw with which proponents of affirmative action failed to engage. The policy provided a preference for a host of...
Due to these challenges, jurists have not engaged the abundance of social science evidence supporting student diversity and racial integration to the extent that *Brown* presaged. In addition, due in part to the contentious nature of these debates and the Supreme Court’s changing ideological composition, the Court may be less willing to engage with this evidence. Much like Fox News’s depiction of “fair and balanced” news coverage, here there is a “Foxification” of the presentation of social science evidence; while there is overwhelming evidence in favor of policies designed to decrease racial isolation and improve educational outcomes, it receives proportionally less attention than the few voices in opposition to policies fostering racial inclusion and student diversity.74 If the reality of *Brown* is that Justices can look to outside sources to support their own normative judgments, then the changing ideology of the Court suggests that a majority of Justices may be more likely to ignore empirical evidence supporting policies that foster racial integration in favor of any authority that supports the theory that individualized racial classifications are always wrong.

### III. Evidence in the Current Debate on Racial Diversity in Education

In the more than half century since the Supreme Court’s reference to evidence on the harms of racial segregation in *Brown*, social science evidence detailing the relationship between racial integration and education has grown exponentially. Much of this research has focused on the substantial short- and long-term benefits of racially integrated elementary and secondary schools. Yet, the data also focus on the robust relationship between student-body diversity in higher education and its academic, social, and democratic benefits.

In the realm of K-12 education, research detailed the academic effects of desegregation policies on increasing educational outcomes for racial minorities, such as improving test scores in math and science,75 raising graduation rates,76 and increasing college

---

74. See infra Part V.

75. See, e.g., NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF BLACKS 50–53 (2003) (finding that desegregation, the war on poverty programs, and affirmative-action policies that increased African American educational opportunities led to closing of the racial achievement gap).

In addition, studies found significant “democracy benefits” to desegregated schools. These include access to higher status networks and institutions that may provide long-term opportunities.76

Social science evidence has found that the so-called “democracy” benefits of racially diverse educational environments apply to students of all races.79 Students benefit from racially diverse environments, as they help dissolve racial stereotypes and facilitate a greater understanding of people of different races.80 Students in racially diverse educational institutions are more likely to be more civically engaged and to socialize across racial and ethnic lines.81 In addition, students are more likely to be more politically engaged.82 Much of this research looks specifically to the effect of racially diverse higher education.83 Peer-reviewed social science evidence confirms that graduation rates for underrepresented minorities improve when affirmative action policies give them greater access to selective colleges and universities.84

(detailing increased graduation rates for African Americans in the wake of desegregation policies).


79. See, e.g., Patricia Gurin et al., The Benefits of Diversity in Education for Democratic Citizenship, 60 J. SOC. ISSUES 17, 20–26 (2004) (conducting a study at the University of Michigan of a curricular program of students from racially diverse backgrounds and finding that the “presence of diverse others” contributed significantly to the students' motivation to take the perspective of others and commitment to civic participation during and after college).


82. See generally BOWEN & BOK, supra note 3; NAT'L ACAD. OF EDUC., supra note 3; Schofield, supra note 3.


84. See, e.g., WILLIAM G. BOWEN ET AL., CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES 106–08, 208–16 (2009) (finding a positive graduation rate effect at more selective institutions,
IV. RECENT USES OF EMPIRICISM IN RACE AND EDUCATION JURISPRUDENCE

In the Supreme Court's most recent pronouncements on race and education, the Court has engaged inconsistently with the abundance of empirical evidence regarding student diversity and educational outcomes. There is an interesting phenomenon taking place in the recent uses of empiricism in race and education jurisprudence. The overwhelming body of social science evidence introduced in such cases is brought to show the compelling state interest in enhancing student body diversity and decreasing racial isolation and the positive effects such policies have on educational, democratic, and social outcomes. It largely supports focused efforts to maximize racial inclusion in elementary, secondary, and higher education. Due to the aforementioned pitfalls, however, jurists have not always fully embraced such evidence. At the same time, less robust empirical evidence opposing race-conscious policies seems to be gaining greater attention. As the Court continues its ideological march to the right, such research may gain a greater foothold both in the court of public opinion and with some jurists. The Court's 2003 Grutter v. Bollinger decision, relying on empirical evidence to endorse carefully tailored affirmative action policies in higher education, provides a thought-provoking contrast to the Court's refusal to weigh similar evidence in its decision striking down voluntary integration plans five years later.

A. Grutter v. Bollinger

In Grutter v. Bollinger and its companion case, Gratz v. Bollinger, the Court held that race-conscious university admissions policies to promote student body diversity may be constitutionally permissible if used modestly and flexibly. In each case, white students challenged the university's use of race-conscious admissions policies. They argued the policies violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, which bars discrimination by any federally funded entity. The Grutter Court received more than particularly for African Americans and Latino students); Kalena E. Cortes, Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan, 29 ECON. EDUC. REV. 1110, 1119 (2010). See generally sources cited supra note 82.
85. 539 U.S. 244 (2003).
86. Id. at 271-73; Grutter v. Bollinger, 539 U.S. 306, 309 (2003). In the Michigan cases, the Supreme Court reinforced its view that those federal statutes applicable to private universities embrace the same standards as the constitutional principles that apply to public universities. Gratz, 539 U.S. at 287. As such, the Court's ruling in the cases applies to both public and private universities.
87. Gratz, 539 U.S. at 244; Grutter, 539 U.S. at 306.
eighty amicus briefs, representing the largest number of amicus briefs filed for a single case in United States Supreme Court history. This reflects a practice that began in *Sweatt v. Painter* and *Briggs v. Elliott* of using amici to support efforts to dismantle racial segregation. More than three-quarters of the amicus briefs filed in *Grutter* supported the university's use of affirmative action. The large number of amicus briefs that substantially cite to social science evidence shows how deeply entrenched the ideals of diversity and racial equality have become in education. Briefs discussed the importance of racial diversity for the needs of an increasingly diverse global marketplace and for our national security. Such benefits include better "cross-racial understanding," disintegration of "racial stereotypes," and facilitating a "better understanding of persons of different races." Indeed, the Court held that such benefits are integral to sustaining our democracy and cultivating the next generation of leaders who are capable of navigating a racially and ethnically diverse landscape. Based on this evidence, the Court concluded that "[t]he Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici." In addition, the Court deferred substantially to the University of Michigan Law School's expertise in culling together a diverse student body.

A majority of the Justices were moved by the evidence presented detailing the relationship between student diversity and educational and democratic outcomes, or ways in which diversity helps prepare students to be better citizens in a democracy. Yet, the *Grutter* plaintiffs also provided social science evidence to rebut claims that increased student body diversity enhances academic, intellectual, and democratic engagement. Only Justice Thomas raised the competing empirical evidence suggesting that affirmative

---


91. Id. at 324.

92. Id. at 330–33 (detailing findings of amici).

93. Id. at 328–29.


action policies may actually harm African American students.\textsuperscript{96} While one may think this suggests longevity for the Court's decision in \textit{Grutter}, only two of the original five Justices in the \textit{Grutter} majority remain on the bench today. Among the dissenting Justices in \textit{Grutter}, the ideal of color-blindness continues to gain ground.

\textbf{B. Parents Involved in Community Schools v. Seattle School District No. 1}

In 2007, the Supreme Court struck down two racial integration plans\textsuperscript{97} voluntarily\textsuperscript{98} adopted by school districts in Seattle, Washington and in Jefferson County, Kentucky,\textsuperscript{99} a decision that academic commentators and legal practitioners widely believe has limited constitutional remedies for racial segregation in schools. The Court determined that the policies at issue did not satisfy the strict scrutiny requirement of the Fourteenth Amendment's Equal Protection Clause.\textsuperscript{100} Social science research figured prominently in the amicus briefs submitted by both the petitioners and the respondents in the case.\textsuperscript{101} Of the sixty-four amicus briefs filed in the case, nearly half significantly focused on social science research.\textsuperscript{102} Of those briefs, there were \textit{nearly five times} as many filed in support of the respondents, who defended the constitutionality of the diversity policies, as were filed in opposition to the policies.\textsuperscript{103} Research focused on the relationship between racial composition and educational outcomes. Specifically, research examined whether racially diverse student bodies constituted a

\begin{itemize}
  \item \textsuperscript{96} \textit{Grutter}, 539 U.S. at 364 (Thomas, J., dissenting). Justice Clarence Thomas was the only Justice in \textit{Grutter} to question the emphasis that elite law schools place on LSAT scores. Evidence submitted by one amicus brief detailed the deleterious effects of the test. \textit{See id.} at 367–71; Brief of the Soc'y of Am. Law Teachers as Amicus Curiae in Support of Respondents at 16, \textit{Grutter}, 539 U.S. 306 (No. 02–241), 2003 WL 399060, at *16. Thomas questioned the reliance on a racially discriminatory test and its imperfect suggestion that law school admissions are merit based. This may be an area for future research to affect the Court's opinion. Indeed, in the decade since this decision, affirmative action critic Richard Sander has focused on test scores to challenge the benefits of affirmative action policies. \textit{See} Richard H. Sander, \textit{A Systemic Analysis of Affirmative Action in American Law Schools}, 57 STAN. L. REV. 367, 410–18 (2004).
  \item \textsuperscript{97} \textit{See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1}, 551 U.S. 701, 734–35 (2007) (plurality opinion); \textit{id.} at 783–84 (Kennedy, J., concurring in part and concurring in the judgment).
  \item \textsuperscript{98} I use the term "voluntarily" to distinguish integration plans that school boards adopted by choice from those plans that school boards adopted pursuant to a court order to eliminate the vestiges of state-mandated segregation.
  \item \textsuperscript{99} \textit{Parents Involved}, 551 U.S. at 707.
  \item \textsuperscript{100} \textit{Id.}
  \item \textsuperscript{101} NAT'L ACAD. OF EDUC., \textit{supra} note 49, at 6 (summarizing the social science evidence in the sixty-four amicus briefs submitted in \textit{Parents Involved}).
  \item \textsuperscript{102} \textit{Id.}
  \item \textsuperscript{103} \textit{Id.} at 47–48.
\end{itemize}
compelling state interest and, if so, whether the policies at issue were sufficiently narrowly tailored to satisfy that interest. The briefs filed in support of respondents included those filed by the American Educational Research Association ("AERA"), the American Psychological Association ("APA"), and 553 preeminent social scientists.

Interestingly, in his opinion striking down the voluntary integration policies at issue, Chief Justice Roberts made clear his belief that race-conscious policies should never be used. In an opinion furthering this ideology, Roberts hearkened back to the lower court's dismissal of social science evidence in *Briggs* and chose not to engage with the overwhelming social science evidence offered by amici. Roberts turned the *Brown* logic on its head, suggesting that the Court had an obligation to strike down any race-conscious policy: "[I]t was not the inequality of the facilities but the fact of legally separating children based on race on which the Court relied to find a constitutional violation." While this statement is true, arguably the most famous excerpt of Chief Justice Warren's opinion in *Brown* details the psychological damage wrought by a system of governmentally sponsored racial hierarchy and segregation, the very ills the policies in *Parents Involved* were designed to address.

Yet, in *Parents Involved*, the Roberts plurality looked to *Brown* to support its finding that school districts lacked constitutional power to craft the voluntary racial integration policies at issue. Roberts noted that, "[w]hen it comes to using race to assign children to schools, history will be heard." In addition, Roberts found that "full compliance [with *Brown* requires school districts] to achieve a system of determining admission to the public schools on a nonracial basis." While the majority of evidence from the time of

---


108. Id. at 761–68.

109. Id. at 705.

110. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [African American children] 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.").

111. *Parents Involved*, 551 U.S. at 746.

112. Id. at 746–47 (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300–01 (1955)).
Brown until the Supreme Court's 2007 decision in Parents Involved detailed the benefits of racial integration on academic achievement and democratic citizenship. Roberts chose to hearken back to Brown to introduce the notion that any focus on race in furthering student diversity actually causes harm. Though a vocal judicial minority actively engaged with the overwhelming social science evidence, the dominant majority in Parents Involved disfavored the evidence.

While Roberts largely chose to ignore the social science evidence offered by amici in support of the school districts' integration policies, Justice Breyer's dissent spent substantial time discussing the evidence. Breyer cited social science evidence to support a finding that furthering student diversity and decreasing racial isolation constitute compelling state interests. Thus, the majority of the Court's differing treatment of social science evidence in Grutter and Parents Involved highlights the impact that reliance on such evidence may have on a case's outcome. This has significant implications for the Court's next examination of race and educational policy.

C. Fisher v. University of Texas: The New Frontier

Similar to Grutter and Parents Involved, Fisher v. University of Texas offers a glimpse into the challenge of how to situate social science evidence in judicial decision making. With an outpouring of amicus briefs in support of the University of Texas's admissions policy and a comparatively miniscule number of amici in support of the challenger, the Court will be faced with the task of how to interpret the evidence. History has shown us that this is no simple order.

The case represents a similar trend to Grutter and Parents Involved in the submission of amicus briefs with substantial social science evidence. In Fisher, seventy-three amicus briefs were filed in support of the University of Texas's affirmative-action policy, while only eighteen amicus briefs were filed in support of the petitioner. Supporters of the Texas policy included major corporations; former military leaders; more than one hundred colleges and universities; and more than four hundred social scientists, religious organizations, diverse student organizations, labor unions, and civil-rights organizations.

113. See NAT'L ACAD. OF EDUC., supra note 49, at 3.
114. See Parents Involved, 551 U.S. at 838–41 (Breyer, J., dissenting).
115. See id. at 838–40, 869–76 (reprinting substantial empirical support).
116. See id. at 838–41, 846.
117. See supra note 19.
118. See supra note 19.
119. See supra note 19.
Critics of affirmative action who support the *Fisher* plaintiff's challenge raise an argument similar to Chief Justice Roberts's argument in the *Parents Involved* case. They subvert the *Brown* Court's finding on the psychological harm of racial segregation by suggesting there is a stigmatic harm resulting from affirmative action.\(^{120}\) In addition, they have proffered two related, fallacious arguments. Critics argue that race-conscious admissions policies are the overwhelming cause of all racial and ethnic differences in standardized test scores and that such policies cause an "academic mismatch."\(^{121}\) Of the briefs filed in support of the petitioners that rely on social science evidence, most cite to a single study conducted by UCLA law professor Richard Sander.\(^{122}\) Sander's study raises the claim of "academic mismatch."\(^{123}\) He argues that affirmative-action policies actually harm the intended beneficiaries by granting them access to elite academic environments for which they are unprepared and therefore in which they do not succeed.\(^ {124}\) While


\(^{122}\) Rachel Godsil, *Affirmative Action and the Unprepared Minority Myth*, L.A. TIMES (Oct. 9, 2012), http://articles.latimes.com/2012/oct/09/news/la-ol-affirmative-action-godsil-blowack-20121010 ("Scholars who have examined the research—virtually all of it by Sander himself—have found it deeply flawed. It contradicts the mountain of evidence that minority students who attend selective law schools and colleges tend to be more likely to graduate and to have higher earnings than those who attend less selective schools.").


\(^{124}\) *Sander*, supra note 123, at 425–30. Sander found that in elite law schools, 51.6% of African American law students had first year GPAs in the bottom 10% of their class, while only 5.6% of white students fell into this category. *Id.* at 427. Sander contends that such results are due almost
the majority of the social science evidence proffered by amici in opposition to Texas's affirmative-action plan hearkens back to this singular study, the evidence has received significant attention in the media.\textsuperscript{125}

For example, three commissioners on the United States Civil Rights Commission submitted a brief in support of the petitioners that links to Sander's mismatch theory.\textsuperscript{126} The commissioners advocated against the use of race-conscious policies, which they believed would harm racial minorities. The lower grades caused by Sander's "academic mismatch" theory decrease the self-confidence of minority students.\textsuperscript{127}

The notable consideration granted to a singular empirical voice opposing the use of race-conscious admissions policies highlights the particularly fractious nature of the social science debate and illustrates the true challenges in finding a compromise in the debates over constitutional middle ground in such cases. Contrary to Sander's theory, voluminous data culled over decades demonstrate the positive effect of such policies.\textsuperscript{128} Peer-reviewed social science research confirms that graduation rates for underrepresented minorities improve when affirmative-action policies give them greater access to selective colleges and universities.\textsuperscript{129} Moreover, it is worth noting that the Court in \textit{Grutter} never stated that educational benefits flowing from diversity must include a benefit to minority applicants alone to satisfy the strict-scrutiny requirement.

\section*{V. NORMATIVE IMPLICATIONS}

How the Court ultimately uses the social science evidence presented in \textit{Fisher} and in the future may depend on factors beyond a simple weighing of experts. In principle, one of the best uses of

\begin{flushleft}


\textsuperscript{127} \textit{Id.} at 8–9, 2011 WL 5007903, at *8–9.


\textsuperscript{129} \textit{Id.}; see, e.g., sources cited supra note 82.
\end{flushleft}
Empirical evidence in this arena is to help clarify constitutional theory by illuminating whether and how diversity and decreasing racial isolation are compelling state interests under the equal protection standard. Regardless of one's views with respect to the constitutionality of race-conscious programs in education, a lack of constitutional clarity in the field hampers the ability of institutions to move forward in crafting policy. As I have argued elsewhere, Supreme Court jurisprudence and subsequent federal and state political action reflect some indecision in matters of race, equality, and education. Existing empirical evidence provides a valuable tool for elucidating doctrine and paving the way for clear action.

Yet, the potential impact of empirical evidence may depend largely on factors outside traditional constitutional decision making. These include the Justices' own normative views on race-conscious education policies, which may be influenced by the tenor of national opinion on such policies. Beyond the courts, empirical evidence may have an even broader impact in shaping public opinion and federal political action.

A. Judicial Ideology and the Impact of Public Opinion

While Brown is famous for its reliance on social science evidence, it is also widely believed that the Court utilized empirical evidence simply as a justification for the normative moral judgment of the jurists that segregation was a terrible evil. In the realm of school-desegregation jurisprudence, social science evidence has played a significant, though not primary, role. Constitutional scholars such as Professors Jack Balkin and Mark Tushnet have long argued that the Supreme Court is part of the "national political coalition" and that Justices tend to vote with the national majority. However, national public opinion and the opinion of national elites do not always cleave. When this is the case, there is

130. See Epperson, supra note 72, at 261.
132. Id.
133. Balkin, supra note 66, at 1538.
134. Mark Tushnet, Taking the Constitution Away from the Courts 144 (1999). Indeed, even after the Supreme Court ruled in Brown in 1954, thereby reversing the lower court ruling in Briggs, the District Court for the Eastern District of South Carolina issued a per curiam opinion acknowledging that Brown overturned the lower court decision but did not actually mandate integration:

"Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution . . . does not require integration; it merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation."

a question as to how Justices rule. Balkin argues that the Court rules according to the ideology of its own base, which is composed of national elites.\textsuperscript{135}

National support for the broad ideals of racial equality and diversity is more robust today than at any point in history. There is broad consensus that racial inequality in education is unacceptable and should be addressed. Yet, our constitutional doctrine reflects a discomfort with using color-conscious tools that may be most effective in realizing the ideal of racial equality. Much like constitutional doctrine, national opinion regarding the use of race-conscious policies to further educational equality is anything but clear. While the existing constitutional framework gives universities significant latitude in creating policies to further diversity, a lack of detailed information on successful policies tied with strong advocacy in opposition to race-conscious policy making has decreased the potential breadth and impact of diversity measures.\textsuperscript{136} Moreover, it means that public opinion regarding such measures remains complicated.

In an area like affirmative action, there are many ways such empirical evidence may be used. While the overwhelming evidence supports the carefully tailored use of race-conscious policies to increase educational opportunity, the current composition of the Court suggests that at least a plurality has displayed an aversion to policies that require individualized considerations of race. Though expansive, peer-reviewed social science literature now touts the benefits of diversity, there is a pervasive belief that some judicial antipathy to extensive civil rights enforcement may ultimately outweigh sophisticated distinctions on the constitutional use of race-conscious policies in education.

B. Beyond the Courts: Shaping Opinion and Policy

In addition, regardless of how explicitly jurists rely on social science evidence in making determinations with respect to constitutional doctrine in race and education cases, such research on the relationship between student-body diversity and educational outcomes can matter greatly in the court of public opinion. Here, such evidence may have its largest impact. Studies have indicated that public support of affirmative action policies increases with a corresponding increase in the information available.\textsuperscript{137} Due to the limited effect of amicus briefs in swaying the hearts and minds of judges, lawyers advocating for social justice have also looked to affecting public consciousness prior to these decisions.

\textsuperscript{135} Balkin, supra note 66, at 1539.
\textsuperscript{136} Id. at 1539–40.
Ultimately, this trend may help shape judicial decision making as well, as judges are influenced by real world events.\textsuperscript{138} To this end, the timing of the research and the dissemination of the evidence are critical. Such evidence has the potential to have a greater impact the earlier courts understand how such policies affect educational equity.\textsuperscript{139} Thus, the greatest potential impact of such social science evidence may be before an action is ever filed.\textsuperscript{140} It is more likely to change hearts and minds if it has time to permeate the public consciousness.

Finally, the use of social science research may have an even broader impact via other branches of government, particularly the federal political branches. Whereas, in \textit{Brown}, qualitative research conducted on a small scale proved catalytic to the courts, in more recent years, federal legislation has emphasized large-scale quantitative research in education policy. The accountability and assessment measures using scientific research in the No Child Left Behind Act provide a good example of this.\textsuperscript{141} In addition, administrative agencies may shape policy based on research that tracks relationships between student diversity and educational achievement. The United States Department of Education’s Office for Civil Rights has increased its research into connections between student diversity and educational outcomes.\textsuperscript{142} If federal political branches continue to grapple with such research, there may be an increase in focused policies designed to maximize racial inclusion in education.

\textbf{CONCLUSION}

For some time, the constitutional landscape of race, equality, and education has proved insufficiently nuanced to address persistent racial inequalities and the corresponding benefits of fostering racial diversity. While the Court has limited the power of public educational institutions to craft race-conscious policies aimed at fostering diversity and decreasing pernicious racial isolation,

\begin{itemize}
  \item \textsuperscript{138} See, \textit{e.g.}, Richard A. Posner, \textit{How Judges Think} 369–70 (2008).
  \item \textsuperscript{139} The school-desegregation context provides a pertinent example. In 1992, the Supreme Court identified the factors that comprised a successful desegregation plan in its ruling in \textit{Freeman v. Pitts}, 503 U.S. 467, 491 (1992). However, such evidence of the components of a successful desegregation plan would have been more helpful if introduced earlier. By that time, courts were steadily dismantling such plans. Id. at 498–99.
  \item \textsuperscript{140} Moran, \textit{supra} note 9, at 521.
\end{itemize}
social science evidence and broad support for the positive educational and democratic outcomes that such policies engender continue to grow. Given the power of precedent and the rich body of empirical evidence at the Court's disposal supporting such policies, courts may choose to clarify constitutional doctrine in this area to maximize equal educational opportunity. History teaches us that there are significant ways such evidence can facilitate finding constitutional consensus and public understanding of the relationship between racial diversity and educational opportunity.