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The Limited Influence of Social Science Evidence in Modern Desegregation Cases

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THE LIMITED INFLUENCE OF SOCIAL SCIENCE EVIDENCE IN MODERN DESEGREGATION CASES

JAMES E. RYAN*

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INTRODUCTION

In footnote eleven of the *Brown*¹ opinion, the Supreme Court famously cited social science evidence in support of the proposition

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

that segregated schools harmed African-American students.² This footnote ignited a debate over both the quality of the research cited and the extent to which it influenced the outcome of the case.³ While this tired debate continues today,⁴ surprisingly little attention has been devoted to the significance of social science evidence in contemporary desegregation cases. That is the focus of this Essay.

There are currently two main sets of “desegregation” cases being litigated. One involves attempts to dissolve desegregation decrees, and the central question is whether the school district has sufficiently eliminated the prior vestiges of discrimination to justify declaring the district unitary.⁵ The other involves challenges to voluntary integration plans, and the central question is whether the voluntary use of race to assign or admit students to grade schools satisfies a compelling state interest.⁶ As the papers for this Conference demonstrate, we are awash in social science evidence that is potentially relevant to both sets of cases, and this evidence is undoubtedly interesting and important to both scholars and policymakers. The main question I would like to address, however, is whether this evidence is all that important to courts, or, put differently, the extent to which social science evidence influences the outcomes of modern desegregation cases.

“Social science evidence” is a fairly amorphous term, so let me be clear about what I mean. By the use of this phrase I do not mean

2. *Id.* at 494 n.11.

3. See generally Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientists' Role*, 5 VILL. L. REV. 224 (1959–60) (supporting the use of social science evidence in desegregation cases); Stuart W. Cook, *Social Science and School Desegregation: Did We Mislead the Supreme Court?*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 420 (1979) (evaluating the validity of sources cited in *Brown* in light of subsequent research); Harold B. Gerard, *School Desegregation: The Social Science Role*, 38 AM. PSYCHOL. 869 (1983) (criticizing the science cited in *Brown*); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960) (criticizing Kenneth Clark's article).

4. See, e.g., Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 803–14 (2002) (describing and continuing the debate over footnote eleven).

5. See *Freeman v. Pitts*, 503 U.S. 467, 485–92 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 244–46 (1991).

6. See, e.g., *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 701 (4th Cir. 1999) (per curiam) (holding that the school board's race-based policy violated the Equal Protection Clause); *Wessmann v. Gittens*, 160 F.3d 790, 792 (1st Cir. 1998) (holding that the Boston School Board violated the Equal Protection Clause by making race a determining factor in admissions decisions at public examination schools); see also John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1768–81 (2000) (discussing legal challenges to voluntary integration plans).

to include all statements of fact about the current state of the world, which might be gathered by, say, demographers or other social scientists. Instead, I mean to refer to social science studies that generally seek to establish correlation or causation. Most specifically, I am interested in the mound of social science evidence regarding the actual benefits and costs of school desegregation, either in terms of academic achievement, improved social relations, or greater “life prospects.” It would underestimate the amount of attention social scientists have devoted to this topic to call it a cottage industry.⁷ I am interested in whether this research matters much to courts.

Let me start with a hopefully provocative and obviously bald answer, and then backtrack slightly by admitting a caveat. For reasons I will explain, it seems dubious that social science evidence plays an influential role in these cases. Put differently, and more pointedly, in my view, social science research will not prevent the dismantling of desegregation decrees or save voluntary integration plans. At the same time, however, I readily admit that there is no good way to determine directly the influence of social science evidence on court decisions. Court opinions are only partially helpful, insofar as they might discuss the social science evidence presented and comment on its strengths or weaknesses. But even when courts do discuss the evidence, which is not always the case, it is impossible to know whether the evidence influenced the outcome or whether the evidence is being cited to support an outcome reached for other reasons. (*Brown* itself, and the endless debate regarding the significance of footnote eleven, is the perfect cautionary tale here.) Conversely, even where court opinions *do not* discuss social science evidence, it is possible that social science research, at some point in time, influenced the judge’s views of the pertinent legal issue.

It might be possible to survey judges in an attempt to understand the factors that influenced their decisions. One might also conduct regression analyses in an effort to isolate the variable most likely to have influenced the outcome in these cases. These investigative techniques, however, are likely to turn up incomplete and unreliable data, as one could never be certain that the judges surveyed were being candid or that all of the relevant variables were considered in a regression analysis. Beyond this, one could gather anecdotal evidence from various trials that might shed partial light on the extent to which courts seemed interested in or persuaded by the

7. For a discussion of this body of research, see, e.g., James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 296–307 (1999).

presentation of social science evidence.⁸ But this evidence would also be incomplete and fairly unreliable.

It seems, then, that the only way to approach the question is indirectly, by considering the circumstances that would make social science evidence more or less influential in a particular case or context. Accordingly, my argument does not rest upon survey data or statistical analysis, but rather upon several observations and some hopefully reasonable speculations that together suggest the strong unlikelihood that social science evidence influences the outcome of modern desegregation cases.

To begin, it seems likely that the relevance and influence of social science evidence in any context will largely be a function of three related factors: (1) the legal standards applied; (2) the nature and strength of the social science evidence presented; and (3) the nature of the issues presented.

As for the first factor, the legal standards establish the questions that must be answered in order to resolve the case. The more empirically based the questions, the more relevant and important social science evidence becomes. The more normative, value-laden, or abstract the questions, the less relevant and important the social science evidence.⁹ Legal standards also dictate the burdens of proof and sometimes establish presumptions, which in turn affect the relative importance of social science evidence. Even where the questions asked *could* be answered or informed by social science evidence, the second factor—the relative quality, consistency, and overall strength of the social science evidence presented—will obviously affect the extent to which courts rely upon it. The more determinate the evidence, the more influential it might be; the more mixed and inconclusive it is, the less likely it is that courts will rely heavily upon it in reaching (as opposed to merely bolstering) a decision.

The third factor, the nature of the issues involved, is admittedly a bit vague and overlaps to a certain extent with the legal standards. What I mean to capture is the notion that if judges perceive an issue as involving moral or philosophical judgments, as opposed to pragmatic or instrumental ones, they are less likely to rely heavily on

8. See, e.g., MARK A. CHESLER ET AL., SOCIAL SCIENCE IN COURT: MOBILIZING EXPERTS IN THE SCHOOL DESEGREGATION CASES 203–34 (1988) (exploring how social science evidence altered judicial understanding of segregation cases).

9. See Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, LAW & CONTEMP. PROBS., Autumn 1978, at 57, 74–75.

social science evidence to resolve the issue, even if the legal standards allow for the consideration of such evidence and even if the evidence is fairly determinate. In addition, intuition and some empirical research suggest that ideology and personal preference will at least occasionally influence a judge's or justice's decision.¹⁰ Common sense suggests that the more familiar and politically salient an issue, the greater the potential for ideology and preference to play influential roles. When these two conditions are both present—an issue is politically salient and perceived in moral or philosophical terms—the likelihood that social science research will influence the outcome seems quite slim.¹¹

These three factors are interrelated in a number of ways. For example, the less room that legal standards provide for the consideration of social science evidence, the less influential it will be, regardless of its strength. At the same time, the more that social science evidence is mixed, the more likely it is that courts will rely on ideology and personal preference in reaching an outcome. Weak or contradictory social science evidence might also play a role in the creation of legal standards that avoid reliance on such evidence. Similarly, the more politically salient an issue, or the more a court believes that resolving the issue requires moral or philosophical judgments, the less likely it is that courts will create legal standards that make an outcome turn on the state of social science evidence, however determinate it might be.

In the two sets of desegregation cases currently being litigated, these three factors, alone and in combination, point against the proposition that social science evidence plays an influential role. The legal standards that courts use to decide the cases do not offer much room for social science evidence to influence the decisions. The questions that are asked do not easily or ultimately admit empirical

10. See *infra* notes 66–68 and accompanying text.

11. To illustrate, most racial classifications must satisfy a compelling state interest in order to be considered constitutional, as explained below. See *infra* Part II.A. Determining what counts as a compelling interest could be informed or determined by social science evidence regarding the costs and benefits of particular racial classifications. But it need not be, as demonstrated by the Court's conclusion that race may be used to remedy past discrimination. Determining what counts as a compelling interest does not foreclose or require the use of social science evidence. Thus, what will likely determine the influence of social science evidence on court decisions will be the extent to which courts are inclined to rely on such evidence, which will depend in part on whether courts think this is the sort of issue that ought to be decided by reference to social science data. This determination, in turn, will likely depend on whether the court sees the issue (what is a compelling interest?) in moral and philosophical terms and whether the court has preconceived views about the issue.

answers. Even where social science evidence could provide a partial answer, moreover, the evidence itself is more often than not conflicting or inconclusive. Finally, it seems fairly clear that judges, and especially Supreme Court Justices, view the central issues—such as when to terminate desegregation decrees or when to allow race to be used in government decisionmaking—in moral or philosophical terms. It seems equally reasonable to suppose that most federal judges have quite strong personal views on these issues. If these observations and arguments are correct, it follows that social science evidence probably has little influence on modern desegregation decisions. To be sure, one might be able to point to exceptional cases, where it seems plain that social science evidence influenced the outcome. But these exceptions should not, I think, detract from the central argument of this Essay, which is that the deck is strongly stacked against social scientists who wish to influence the outcome of contemporary desegregation cases.

If this is not sufficient to alienate or depress the social scientists (and perhaps some of the lawyers) in the crowd, I will go one step further and consider more recent, but less prevalent, programs and legal claims designed to achieve school integration. Specifically, I will examine the legality of socioeconomic integration plans, desegregation claims based on state education clauses, and challenges to school district lines based on the disparate impact regulations promulgated by the Department of Education pursuant to Title VI of the 1964 Civil Rights Act.¹² Although these programs and legal claims may offer some hope of achieving integration, and at least one of the claims allows some room for social science evidence to play an influential role, I will argue that the ability of social science evidence to influence the outcome of any relevant court decisions remains fairly limited.

This Essay has three Parts. The first Part will begin by describing the use of social science evidence in older desegregation cases in order to place in context the subsequent discussion of the Court's recent cases concerning the dismantling of desegregation decrees. Part Two will address cases concerning the constitutionality of voluntary integration plans, and Part Three examines alternative approaches and legal claims seeking to achieve some measure of racial and/or socioeconomic integration. I conclude with some

12. Civil Rights Act of 1964, Pub. L. No. 88-352, § 602, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. § 2000d (2000)).

suggested strategies for lawyers and social scientists interested in fostering racial and socioeconomic integration.

I. DISMANTLING DESEGREGATION DECREES

A. *The Legal Standards*

The legal standards established by the Court for the dissolution of desegregation decrees allow little room for social science evidence to influence, much less dictate, the outcome. In this regard, the standards are consistent with those used in earlier desegregation cases. Indeed, it is striking how the standards and presumptions developed throughout the entire course of desegregation litigation have allowed relatively little room for the consideration of social science evidence. To see this, and to set the stage for a discussion of the Court's most recent desegregation decisions, it is helpful to review the Court's early opinions. The place to begin, as always, is with *Brown* itself.

1. Early Desegregation Cases

Brown was the first and only desegregation decision by the United States Supreme Court that at least appeared to rest on social science evidence regarding the harm that segregated schools inflicted on black students. Notwithstanding some lingering debate, it seems very unlikely that the evidence cited in footnote eleven actually influenced the outcome in *Brown*. First, it was just a footnote, after all, to paraphrase Chief Justice Warren's response to the attention the note received.¹³ More than this, it is difficult to reconcile the notion that social science evidence was determinative in *Brown* with the fact that the Court relied on its decision in *Brown*, and nothing more, to outlaw segregated golf courses,¹⁴ buses,¹⁵ and beaches.¹⁶ If social science evidence establishing the harm of segregated schools actually played a role in the outcome of *Brown*, it is difficult to understand how the Court could have struck down segregation in other contexts solely on the basis of *Brown*. Finally, accounts of those who drafted the opinion, as well as an understanding of the political history surrounding the decision, strongly suggest that the evidence was cited

13. RICHARD KLUGER, *SIMPLE JUSTICE* 706 (1975) ("Then [Warren] added, by way of stressing that the sociology was merely supportive and not the substance of the holding, 'It was only a note, after all.'").

14. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam).

15. *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam).

16. *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam).

to bolster and obfuscate what was at the time a fairly controversial normative conclusion that segregation—like the decision to allow it in *Plessy v. Ferguson*¹⁷—was morally wrong.¹⁸

The Court temporarily disappeared from the desegregation field after *Brown I* and the “all deliberate speed” decision the next year in *Brown II*.¹⁹ When the Court returned to the field in the late 1960s, however, it issued three opinions—*Green*,²⁰ *Swann*,²¹ and *Keyes*²²—that established aggressive remedial standards for desegregation cases. In so doing, it created presumptions that precluded much reliance on social science data regarding the causes of current segregation. *Green* and *Swann* established the presumption that any present segregation was the result of prior acts of segregation,²³ and *Keyes* established the presumption that intentional acts of segregation in one part of a school district caused segregation throughout the district.²⁴ These presumptions, in turn, were practically irrebuttable, as they required defendants to prove a negative: that current segregation or segregation in one part of a district was *not* caused by prior acts of segregation or segregation elsewhere in a district. These remedial standards also gave little consideration to whether minority students were actually better off in integrated schools. The Court’s remedial mandate required school districts to achieve the maximum extent of desegregation practicable, period.²⁵ Whether black students in a particular district might be better off socially and academically were they to remain in neighborhood schools was simply irrelevant in this equation.²⁶

In *Milliken I*,²⁷ decided in 1974, the Court severely restricted the potential for interdistrict remedies and dealt a crushing blow to urban desegregation.²⁸ Cross-district busing could only be ordered if there were proof of an interdistrict violation, such as an intentional redrawing of district lines, or if intentional segregation in one district had segregative effects in another. Given the already pervasive

17. 163 U.S. 537 (1896).

18. See Mody, *supra* note 4, at 811–28.

19. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

20. *Green v. Bd. of Educ.*, 391 U.S. 430 (1968).

21. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

22. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

23. *Swann*, 402 U.S. at 26; *Green*, 391 U.S. at 437–39.

24. *Keyes*, 413 U.S. at 208.

25. *Swann*, 402 U.S. at 15.

26. *Cf., e.g., Gerard, supra* note 3, at 872–75 (questioning the benefits of school desegregation for minority students).

27. *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*).

28. *Id.* at 741–45.

residential segregation that plagued most metropolitan areas, gerrymandering district lines was hardly necessary. States could leave in place existing school district lines, which outside of the South were usually coterminous with municipal boundaries, and residential segregation between cities and suburbs would take care of the rest.

The legal standard created in *Milliken I* was obviously quite formal and blind to the demographic realities of most metropolitan areas. The standard, for example, made it legally irrelevant that a desegregation plan limited to a predominantly minority school district would obviously not result in much integration. In addition, the standard allowed for no consideration of the benefits of metropolitan-wide school desegregation. Plaintiffs could not obtain interdistrict relief, for example, by demonstrating that an interdistrict plan would bring greater benefits to all involved than would a plan limited to a single district. To be sure, the *Milliken I* Court's construction of such a formal standard could have been influenced by a hunch that the costs of interdistrict busing outweighed its benefits, but there is little hint in the opinion (and little reason to believe) that the Court relied much on social science research to inform its view on this issue.²⁹

Several years later, in *Milliken II*,³⁰ the Court sought to cushion the blow of *Milliken I* by allowing remedial and compensatory education programs to be part of a desegregation remedy.³¹ The opinion in *Milliken II* typified the Court's approach to proof in these cases, which at times bordered on self-parody. The Court proclaimed, as it did in every desegregation decision from *Swann* forward, that the remedy must be tailored to the constitutional violation and that it must return plaintiffs to the position that they would have occupied had their constitutional rights been respected in the first place.³² The uninitiated might have believed from this that plaintiffs would have to demonstrate with some precision that prior acts of segregation caused current educational disparities. However, those who had seen this principle in action in earlier cases, ranging from *Green* and *Swann* (where all-out desegregation was ordered on the basis of this principle) to *Milliken I* (where all-out desegregation was denied on the basis of this principle) would have known better.

29. There is also good reason to believe that the intense popular and political opposition to interdistrict busing influenced the Court's decision. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *YALE L.J.* 2043, 2052-56 (2002).

30. *Milliken v. Bradley*, 433 U.S. 267, 280-88 (1977) (*Milliken II*).

31. *Id.* at 280-88.

32. *Id.* at 280-81.

The Court did not disappoint the cynics. Citing expert testimony that contained such gems as “[w]e think [that guidance counseling] certainly does have a relationship in the desegregation effort[;] we think it deserves special emphasis,” and opining in classic armchair fashion about the impact of segregation on the “speech habits” of minority students, the Court approved the inclusion of state-funded remedial education programs in desegregation decrees.³³ The Court repeatedly admonished those who were listening that “it must always be shown that the constitutional violation caused the condition for which remedial programs are mandated.”³⁴ Those who were *watching*, however, would have noticed that the Court essentially presumed a causal link between prior acts of segregation and current educational disparities, and in so doing suggested that lower courts could and should follow suit. This is not to say, of course, that social science evidence would have failed to establish a causal link between prior segregation and a current need for remedial education. My point is that demonstrating such a link with rigor hardly seemed necessary in light of the Court’s approach.

By the late 1970s, the basic legal framework for implementing desegregation decrees was thus established, and social science research relating to the causes of current segregation or the harms and benefits of forced busing was at best tangentially useful to the task of implementation. A lingering question remained, however, and that was simply: When should this end—at what point should desegregation decrees be lifted? After remaining silent in the 1980s, the Court decided three cases in the early 1990s that confronted this question directly. Just as the standards for implementing desegregation decrees offered little room for social science evidence to influence decisions, the standards for dissolving such decrees also cabin the relevance and influence of social science research.

2. Contemporary Desegregation Decisions

In *Dowell*³⁵ and *Freeman*,³⁶ decided in 1991 and 1992, respectively, the Court established standards to determine when desegregation decrees could be completely or partially lifted.³⁷ In *Dowell*, the Court held that school districts should be declared unitary and court supervision should end when it could be shown that

33. *Id.* at 274, 287–88.

34. *Id.* at 286 n. 17.

35. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

36. *Freeman v. Pitts*, 503 U.S. 467 (1992).

37. *Id.* at 485–92; *Dowell*, 498 U.S. at 249–50.

the district “had complied in good faith with the desegregation decree since it was entered, and [that] the vestiges of past discrimination had been eliminated to the extent practicable.”³⁸ To determine whether the vestiges have been eliminated, the Court instructed lower courts to consider not only student assignment but also the other so called *Green* factors: “faculty, staff, transportation, extracurricular activities and facilities.”³⁹ In *Freeman*, the Court held that district courts could relinquish partial control over school districts if they are satisfied that the school district has fulfilled its obligations with respect to one or more of the *Green* factors.⁴⁰ The standards for determining partial unitary status are essentially identical to those articulated in *Dowell*. Courts should determine, with regard to one or more of the *Green* factors, whether the district has acted in “good faith . . . and . . . whether the vestiges of past discrimination have been eliminated to the extent practicable.”⁴¹

In *Jenkins*,⁴² decided in 1995, the Court addressed when *Milliken II* remedies, relating to compensatory and remedial education programs, should cease.⁴³ The Court held that the same standards articulated in *Dowell* and *Freeman* should apply, and it added that lower courts should seek to remedy only “the incremental effect that segregation has had on minority student achievement.”⁴⁴ Thus, “[t]he basic task of the District Court is to decide whether the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable.”⁴⁵

All three decisions send unmistakable signals that district courts should begin winding up the process of desegregation. In each opinion, the Court stressed the importance of returning schools to local control, emphasizing that this is the ultimate objective of any desegregation suit. Indeed, the Court suggested in *Freeman* that schools should be returned to “the control of local authorities at the earliest practicable date.”⁴⁶ The Court also emphasized that the

38. *Dowell*, 498 U.S. at 249–50.

39. *Id.* at 250.

40. *Freeman*, 503 U.S. at 490–91.

41. *Id.* at 491–92. The Court in *Freeman* also held that district courts should retain supervision over one *Green* factor if doing so is necessary to achieve compliance with regard to another factor, but it is hard to understand when this situation would arise. *Id.* It does not, in any event, seem to play a role in lower court decisions.

42. *Missouri v. Jenkins*, 515 U.S. 70 (1995).

43. *Id.* at 101.

44. *Id.*

45. *Id.*

46. *Freeman*, 503 U.S. at 490; see also *Jenkins*, 515 U.S. at 102 (stating that local control is important); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (same).

passage of time, combined with good faith efforts on the part of school districts, made court control less justifiable. In *Freeman*, for example, the Court reasoned that the passage of time made it less plausible to attribute current racial imbalances among schools to prior acts of de jure segregation.⁴⁷ Finally, the Court stressed that forces beyond the control of the school district might be primarily responsible for current conditions in schools. In *Jenkins*, the Court stressed that “numerous external factors beyond the control of [the school district and the state] affect minority student achievement.”⁴⁸ Similarly, in *Freeman*, the Court suggested that demographic changes independent of prior acts of de jure segregation might be the primary cause of current racial imbalance in the schools.⁴⁹

What does all of this portend for the usefulness of social science evidence in cases involving the question of whether desegregation decrees should be partially or completely lifted? As I read the three Supreme Court decisions, as well as lower court cases applying these precedents, there is very little room for social science research to influence a unitary status determination.

To begin, it is important to notice what is *not* factored into the decision as to whether decrees should be dissolved. There is no consideration of whether black or white students are currently benefiting from the desegregation plan at issue. Studies about the benefits of integrated education are thus formally irrelevant to the determination of unitary status. In addition, there is little consideration of the impact that lifting the decree will have on students. It is irrelevant that schools might become resegregated once decrees are lifted and districts reinstitute neighborhood school policies, and it is irrelevant that minority students might suffer if remedial programs are discontinued.⁵⁰ Right from the start, then, the bulk of social science studies concerning the costs and benefits of racially integrated schools are relegated to the sidelines of the unitary status inquiry. It is difficult to overstate the importance of this point: the plain truth is that most of the research presented at this Conference—regarding either the resegregation of schools if decrees

47. *Freeman*, 503 U.S. at 496.

48. *Jenkins*, 515 U.S. at 102.

49. *Freeman*, 503 U.S. at 494–96.

50. For example, in Oklahoma City, there was no doubt that the schools would become resegregated once the decree was lifted, yet this fact did not preclude a finding of unitary status. See *Dowell v. Bd. of Educ.*, 778 F. Supp. 1144, 1160–66 (W.D. Okla. 1991).

are dismantled or the benefits of continuing desegregation plans⁵¹—is simply irrelevant to the legal standards that govern unitary status determinations.

Consider, next, the questions that *are* asked. Social science evidence is hardly necessary to determine whether a district has acted in good faith. If the district can show that it complied with court orders and did not actively seek to thwart the effect of those orders, it should be able to satisfy this prong of the inquiry.⁵² Social science evidence could in theory help determine whether the vestiges of prior discrimination have been eliminated to the extent practicable. Under this prong of the unitary status inquiry, districts must prove that current conditions, particularly those related to racial imbalance, are not traceable to prior acts of segregation. At first blush, it might appear both that school districts retain a heavy burden and that social science research about the causes of current conditions could play an influential role in this determination.

A closer look demonstrates otherwise. To begin, it is important to understand how this burden of proof actually operates. Initially, it appears that the presumption established in *Green* and *Swann* still holds, meaning that all current conditions of racial imbalance are presumed to be the result of prior acts of segregation, unless the school district can demonstrate otherwise. The Court, however, shifted this presumption, subtly but importantly, in *Freeman*. It did so by emphasizing that demographic changes that occur after a court has implemented a desegregation decree can suffice to sever the link between prior acts of segregation and current levels of racial imbalance.⁵³ Importantly, the school district need not disprove that

51. See generally Charles T. Clotfelter, Helen F. Ladd & Jacob L. Vigdor, *Segregation and Resegregation in North Carolina's Public School Classrooms*, 81 N.C. L. REV. 1463 (2003) (finding marked increases in classroom segregation); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513 (2003) (concluding that resegregation following a "unitary status" finding threatens the significant educational benefits desegregation has thus far produced); Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Segregation in the South, 1990-2000*, 81 N.C. L. REV. 1563 (2003) (noting an increase in school segregation despite substantial declines in residential segregation).

52. See, e.g., NAACP, Jacksonville Branch v. Duval County Sch., 273 F.3d 960, 974-76 (11th Cir. 2001) (finding good faith in the school board's fulfillment of obligations); Manning v. Sch. Bd., 244 F.3d 927, 945-47 (11th Cir. 2001) (finding good faith by looking at the school board's policies); Dowell v. Bd. of Educ., 8 F.3d 1501, 1511-12 (10th Cir. 1993) (finding good faith compliance).

53. *Freeman*, 503 U.S. at 495-96 ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.").

the demographic changes themselves are traceable to prior acts of segregation.

In practical terms, this has meant that school districts can rebut the presumption that current racial imbalances are a vestige of prior discrimination simply by introducing demographic data that describe residential changes that have occurred since the initial desegregation decree was implemented.⁵⁴ Thus, in *Freeman*, the Court suggested that the school district could sever the link between prior and present segregation by showing that the desegregation decree was designed to achieve integration but was quickly rendered ineffective by changes in residential patterns.⁵⁵ Once such a showing is made, the burden effectively shifts back to the party seeking to resist a finding of unitary status, who must prove that the changed residential patterns themselves are the product of prior acts of segregation.⁵⁶

It is theoretically possible that a sophisticated social science study might be able to establish a connection between current patterns of residential segregation and prior acts of school segregation. In reality, however, this is probably impossible to do with any degree of precision or certainty. The causes of current residential segregation are many and tangled.⁵⁷ Separating out the various causal strands and identifying prior acts of school segregation as a determinant factor is likely beyond the capabilities of social science research.

Jenkins adds to the difficulties facing those interested in maintaining desegregation decrees, as it also shifts the traditional presumption about causation. Professor Wendy Parker astutely identified this shift in a recent article, where she described how the

54. See, e.g., *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 322–23 (4th Cir. 2001) (en banc) (“Long periods of almost perfect compliance with the court’s racial balance guidelines, coupled with some imbalance in the wake of massive demographic shifts, strongly supports the district court’s finding that the present levels of imbalance are in no way connected with the de jure segregation once practiced in CMS.”), *reconsideration denied en banc*, 274 F.3d (4th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002); *accord NAACP*, 273 F.3d at 967–73 (citing racial imbalances caused by demographic factors); *Manning*, 244 F.3d at 943–44 (stating that demographic shifts caused racial imbalances); *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 226–28 (5th Cir. 1983) (finding that current segregation was caused by housing patterns).

55. *Freeman*, 503 U.S. at 495–96.

56. See, e.g., *NAACP*, 273 F.3d at 971–72 (finding that school board policy did not contribute to the reemergence of segregated schools); *Manning*, 244 F.3d at 944–45 (finding that current racial imbalances were not caused by prior school segregation policies).

57. For further discussion of this point and citations to the literature, see Ryan, *supra* note 7, at 276–80.

Court in *Jenkins* resurrected the “incremental effect” standard that it had toyed with briefly in the 1970s but then discarded.⁵⁸ Prior to *Jenkins*, school districts were typically presumed responsible for current conditions, including disparities in achievement, unless they could show that prior acts of segregation did not play a causal role. In *Jenkins*, however, the Court stated that district courts must identify “the incremental effect that segregation has had on minority student achievement.”⁵⁹ The Court said nothing about the burden of proof, but notice the effect of this requirement. Gone is the presumption that all disparities in achievement are the result of prior segregation; courts now are charged with identifying the causes of those disparities and apportioning responsibility accordingly. As Professor Parker suggests, this seems to require that plaintiffs, not the school district, establish the incremental effect of prior segregation on current levels of achievement.⁶⁰ Such a showing will be difficult, if not impossible, to make, as the factors that affect achievement are numerous and hard to isolate, making it quite difficult to apportion responsibility and thereby identify incremental effects. Indeed, the Court in *Jenkins* recognized as much, stating that “numerous external factors beyond the control of [the school district and the state] affect minority student achievement.”⁶¹

Even were social science research helpful in establishing causal links between prior acts of segregation and current conditions—be they racial imbalance in schools or achievement disparities—the Court’s three opinions strongly indicate that other factors should ultimately determine when decrees are lifted. Most importantly, the opinions emphasize that district courts should consider the importance of local control when deciding whether to lift desegregation decrees.⁶² Relatedly, the opinions also suggest that court control has lasted quite long and that at some point, regardless of the evidence about causation and current conditions, local control should be restored. Indeed, this seems to be the primary point of including the caveat that vestiges of discrimination should be

58. Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1172 (2000).

59. *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995).

60. Parker, *supra* note 58, at 1173.

61. *Jenkins*, 515 U.S. at 102.

62. *Id.* at 99; *Freeman v. Pitts*, 503 U.S. 467, 489 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1990).

eliminated “to the extent practicable,” which invites courts to conclude simply that enough has been enough.⁶³

Social science research, of course, cannot tell a court how to value local control, nor can it specify the appropriate duration of desegregation decrees. These determinations require value judgments about federalism and the proper role of federal courts. A close reading of all three opinions together suggests that, ultimately, these value judgments should dictate the outcome of unitary status cases. In theory, social science evidence about the benefits of integration or about the causes of current conditions could indirectly influence the decisions, insofar as it might shape a judge’s or Justice’s values or beliefs about the proper role of courts and the wisdom of continuing court oversight of school districts. The available social science research, however, does not seem up to this task, as the next section describes.

B. *The Nature and Strength of the Social Science Evidence*

There are two types of social science studies that could play a role in unitary status cases. Studies about the current causes of racial imbalance or racial disparities in achievement are certainly relevant to the determination of whether the vestiges of prior discrimination have been eliminated to the extent practicable. For reasons already explained, however, these studies are likely to be of limited use, at best. I may be underestimating the capacity of social science, but it seems plain that linking prior acts of school segregation either to current racial imbalances or educational disparities simply cannot be done with much precision. As a result, whoever bears the ultimate burden of proof on these issues will likely lose.

The second set of studies, which addresses the costs and benefits of school desegregation, is notoriously mixed and hotly debated. There appears to be something of a scholarly consensus that desegregation does benefit minority students academically, at least somewhat, and that it does not harm white students. There is also

63. See, e.g., *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 760 (3rd Cir. 1996) (“Given the Court’s recent assertion that federal supervision of local school districts ‘was intended as a temporary measure to remedy past discrimination,’ we underscore that the phrase ‘to the extent practicable’ implies a reasonable limit on the duration of that federal supervision.”) (internal citation omitted); *accord* *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 318 (4th Cir.) (en banc) (citing *Coalition*, 90 F.3d at 760) (stating that “to the extent practicable” implies a reasonable limit of duration), *reconsideration denied en banc*, 274 F.3d (4th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002); *Manning v. Sch. Bd.*, 244 F.3d 927, 943 n.29 (11th Cir. 2001) (citing *Coalition*, 90 F.3d at 760) (same).

some consensus that integration, under certain conditions, improves social relations and can enhance opportunities for minorities seeking higher education and well paid employment. At the same time, however, there are skeptics and naysayers among social scientists who seek to refute the proposition that desegregation produces academic improvement, better social relations, or better opportunities beyond grade school.⁶⁴

Perhaps even more importantly, the research appears politicized.⁶⁵ To be blunt, a number of social scientists studying desegregation seem precommitted to particular findings. One can often predict the conclusions of a report based on the identity of the author. This is not to suggest that it is impossible to assess whether one report is more trustworthy than another, but reports authored by social scientists who consistently adhere to divergent positions will likely breed skepticism among courts about the usefulness of social science evidence.

This is speculative, to be sure, but I suspect that some of the skepticism can be traced to the effect that legal realism and its more modern progeny continue to have on contemporary lawyers and judges. To oversimplify, law is no longer considered a science, nor do lawyers and judges generally believe that law is to be found by courts rather than made by them. It is widely accepted that personal opinions and ideology play an influential role in judicial outcomes, perhaps especially in the arena of constitutional law.⁶⁶ In this view, constitutional or statutory text, or court precedent, exerts a fairly minimal constraint on judges or Justices interested in reaching a result that accords with their personal preferences, however formed. Such a view of lawmaking among courts inevitably breeds a certain amount of skepticism, much of it healthy, about claims to objectivity and neutrality. Indeed, law students for decades have been taught to pay less attention to what a court says than to what is “really” going

64. For a discussion of the social science evidence, see Ryan, *supra* note 7, at 297–307.

65. I am obviously not the first to notice this. For an earlier and harsher assessment, see Jeffrey Prager et al., *The Desegregation Situation*, in *SCHOOL DESEGREGATION RESEARCH: NEW DIRECTIONS IN SITUATIONAL ANALYSIS* 3, 5 (Jeffrey Prager et al. eds., 1986) (“School desegregation research has lost credibility. Where scientific studies have typically played a pivotal role in American society to forge consensus by transcending ideological divisions, here they entered into the political fray and lost their ability to arbitrate.”).

66. See, e.g., Michael J. Klarman, *Bush v. Gore Through a Historical Lens*, 89 CAL. L. REV. 1721, 1724–25 (2001) (arguing that partisan politics influenced the Justices’ decision).

on in a case—meaning what really motivated a court to decide a case in a particular way.⁶⁷

I suspect this view of the law colors a judge's view of social science studies, especially where those studies conflict and authors consistently fall into one camp or another. Whether appropriate or not, judges and lawyers may apply their skepticism about how law is made to their view about how social science research is conducted. That is, they may take the view that social science data, just like legal texts and precedents, are manipulable and can usually support whatever conclusion a particular author desires. Such skepticism, of course, can only be reinforced by the battles among experts that play out in courtrooms every day, where social scientists, doctors, engineers, and other expert witnesses routinely reach diametrically opposed conclusions based on similar data.⁶⁸

To be sure, social scientists and other experts themselves may be able to sort out who has the better claim in any given dispute, based on their familiarity with the data and the methodologies employed.⁶⁹ Judges, however, are going to be relatively disadvantaged in this regard, unless they have specialized training in the methodologies at issue. Just as a nonlawyer will often have a difficult time assessing whether the majority or dissent in a particular case was truer to the

67. For a helpful overview of legal realism and its effects on legal thinking, see Yudof, *supra* note 9, at 63–68. For a classic example of the skeptical outlook described above, see generally Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

68. For a good example, consider Chief Judge Posner's discussion of experts in trademark disputes in *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 415 (7th Cir. 1994). Posner suggests that the “battle of experts” in trademark disputes “is frequently unedifying” in part because “[m]any experts are willing for a generous (and sometimes for a modest) fee to bend their science in the direction from which their fee is coming.” *Id.*; see also J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:196, at 32-329 (4th ed. 2002) (discussing some judicial skepticism regarding survey evidence in trademark cases and suggesting that the skepticism is caused in part by “parties and their attorneys who, in a desperate search for *some kind* of evidence, offer, with a straight face, a haphazard, self-serving ‘survey’”).

69. Because of various biases, however, social scientists may have some difficulty here as well. See, e.g., Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effect of Prior Theories on Subsequently Considered Evidence*, 37 J. OF PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979) (noting that professional reviewers' publication recommendations varied with their personal beliefs regarding the findings of the studies under review); Timothy D. Wilson et al., *Scientists' Evaluations of Research: The Biasing Effects of the Importance of the Topic*, 4 PSYCHOL. SCI. 322, 322 (1993) (finding that medical researchers were more likely to overlook methodological flaws in studies about important topics, such as heart disease, and less likely to overlook them in studies about less important topics, such as heartburn).

text or precedent involved, judges will have a difficult time assessing whether one social scientist or another has rendered a more methodologically sound report.⁷⁰

This is not to say that judges or Justices are incapable of sifting through competing claims and correctly deciding that the evidence, though disputed, is actually conclusive on a particular point. For this to occur, however, members of the judiciary would have to be motivated to allow social science evidence to influence the outcome directly or at least to inform their views of the issues involved. The nature of the issues involved in desegregation cases, however, makes this unlikely.

C. *The Nature of the Issues Involved*

There is a raging debate among political scientists over the extent to which law matters. Some, like Spaeth and Segal, argue that law—the text of constitutions and statutes or precedent—matters very little compared to the political ideology of the individual judges or Justices.⁷¹ They have sought to document this hypothesis by studying voting patterns among Justices, which they believe establish that ideology and preference dwarf other factors in terms of influencing the decisions of the Justices. Critics have challenged Spaeth and Segal's methodology, arguing that it rests on too crude a view of the "law" and fails to capture the extent to which different voting patterns may rest less on different ideologies than on disagreements about the law or about the facts and the proper inferences to draw from those facts.⁷² Despite the lingering disagreement, it seems fair to say that neither social scientists nor law professors would argue that personal preference and ideology never influence the outcome of a case. The disagreement concerns the magnitude of and occasions for this influence—not its existence.

My colleague, Mike Klarman, has suggested, from the perspective of a legal historian, that the influence of law and personal

70. See *Indianapolis Colts*, 34 F.3d at 415 ("The judicial constraints on tendentious expert testimony are inherently weak because judges . . . lack training or experience in the relevant fields of expert knowledge.").

71. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 354–55 (1993); HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* 287 (1999). For an informative review of Spaeth and Segal's latest book, which also provides a good overview of the debate among political scientists, see Howard Gillman, *What's Law Got To Do With It? Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 *LAW & SOC. INQUIRY* 465 (2001).

72. See Gillman, *supra* note 71, at 483–85.

preference will vary from issue to issue and case to case. He proposes thinking of a matrix, with law on one axis and politics—meaning a combination of the judge's values, social mores, and external political pressure—on the other.⁷³ To oversimplify, where the law is unclear and political pressure is strong, politics and ideology will dominate the outcome. Where the law is relatively clear and political pressure is weak, the law will dominate.⁷⁴

Professor Klarman's approach offers a useful way to think about the influence of social science evidence on the outcome of court decisions. In theory, social science evidence can influence the outcome of a court decision if the relevant legal standards allow some consideration of such evidence or if the evidence indirectly influences a court's view of the issues involved. Whether social science evidence actually *will* exert some influence, however, depends in part on the nature of the issue involved and the strength of the evidence. Think again of Klarman's matrix, but substitute social science evidence for the law on one axis, with politics remaining as the other axis. The more that a judge or Justice has strong political or ideological views on a particular issue, and the less determinate the social science research, the less likely it is that social science evidence will play an influential role. Put differently, the stronger the political or ideological views, the stronger the social science evidence will have to be to convince whoever holds those views to change his or her mind.

It is difficult to measure whether judges or Justices have strong ideological or political views about desegregation. The best evidence is usually in the opinions themselves, but relying only on the opinions is circular. Moreover, it is simply impossible to know exactly what influenced particular decisions, which is the major difficulty with the approach taken by political scientists like Spaeth and Segal. Even if one establishes correlations, for example, between outcomes and a Justice's party affiliation, this does not reveal much about the influence of other factors.

Notwithstanding this large caveat, it does not seem a stretch to suggest that judges and Justices are likely to have strong views about school desegregation. School desegregation is a well known legal and political issue, which still generates passionate debate in the public arena, and it was the occasion of one of the Court's most famous

73. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT, RACE, AND THE CONSTITUTION (forthcoming 2003) (manuscript at 3–4, on file with the North Carolina Law Review).

74. *Id.*

opinions in the twentieth century. Desegregation decrees also raise important questions about the legitimacy of judicial interference in state and local affairs and the proper boundaries of court intervention. It seems unlikely that a judge or Justice would fail to have a fairly strong opinion on such issues.

If this supposition is correct, the burden on social scientists is formidable: the evidence they present must be strong enough to influence a judge or Justice who is already predisposed to a particular course of action. Put differently, the evidence must be strong enough not simply to help a judge or Justice make up her mind but to change her mind. Whatever else might be said about the relative strengths or weaknesses of social science research on the causes of current desegregation or the benefits of integration, I doubt anyone would claim that it is sufficiently determinate to alter the views of someone with strong preconceptions about when desegregation decrees should be lifted.

There is an additional aspect at play here, which again has to do with the nature of the issues involved. My suspicion is that most judges or Justices do not ultimately believe that the questions presented in desegregation cases need to or should be answered with reference to social science evidence about the current causes of desegregation or the costs and benefits of school integration.⁷⁵ The legal standards established for governing these cases, which allow for little direct consideration of such evidence, suggest as much. Moreover, that these cases touch on questions about judicial legitimacy, a topic which judges will naturally feel lies within their area of expertise, makes it even less likely that courts will turn to social science evidence to inform them about the propriety of their continued involvement. Finally, that these cases involve a general issue—public education—with which judges will have some familiarity and experience, also makes it unlikely that they will feel the need to turn to social science evidence to inform their views. When one considers that the evidence itself is mixed and disputed, the possibility that it actually exerts either a direct or indirect influence on the outcome of cases seems exceedingly slight.

To bolster this point, consider two additional pieces of evidence. The first comes, ironically enough, from social and cognitive

75. This normative question was hotly debated after *Brown* and the Court's citation to social science evidence. For an argument against relying on social science evidence to answer questions about school desegregation (or constitutional rights generally), see Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 151, 166–68 (1995). For a response, see Clark, *supra* note 3, at 227–35.

psychology and the second from a different area of law—trademark disputes. Social and cognitive psychologists have compiled a good deal of research to demonstrate the ubiquity of confirmation or assimilation bias, which is the tendency of people “to interpret subsequent evidence so as to maintain their initial beliefs.”⁷⁶ Individuals affected by this bias will “dismiss and discount empirical evidence that contradicts their initial views but will derive support from evidence, of no greater probativeness, that seems consistent with their views.”⁷⁷ Additional studies also suggest that mixed or inconclusive social science evidence will actually increase belief polarization, making a person more convinced than before of the correctness of her views.⁷⁸ It stands to reason that the stronger the initial beliefs or views, the less likely it is that social science evidence will change those views, especially if the evidence—as it is in the context of desegregation—is mixed or inconclusive. It also stands to reason that judges are not immune from confirmation or assimilation bias.⁷⁹

The second bit of evidence is a counterexample from a context far removed from the politically charged one of desegregation: trademark disputes.⁸⁰ In trademark infringement cases, the plaintiff must show that the alleged infringer’s product will cause consumer

76. Lord et al., *supra* note 69, at 2099. For discussion of and citations to more recent studies, which reach similar conclusions, see, e.g., Jon D. Hansen & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 647–50 (1999); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CAL. L. REV. 1053, 1093–94 (2000); Christopher H. Schroeder, *Deliberative Democracy’s Attempt to Turn Politics Into Law*, LAW & CONTEMP. PROB. Summer 2002, at 95, 121–23.

77. Lord et al., *supra* note 69, at 2099.

78. *Id.*; see also Hansen & Kysar, *supra* note 76, at 647–48 (citing an experiment that tested the stubbornness of people’s views on capital punishment).

79. To give one pertinent example, in his concurrence in *Missouri v. Jenkins*, 515 U.S. 70 (1995), Justice Thomas argued against continuing remedial programs in Kansas City, and he cited to studies which he believed demonstrated that “there simply is *no* conclusive evidence that desegregation . . . has sparked a permanent jump in the achievement scores of black children.” *Id.* at 120 n.2 (Thomas, J., concurring) (emphasis added). As he conceded in the same passage, however, there is evidence that the gap between white and black test scores narrowed in the last two decades, but he suggested—citing one social science study in support—that this resulted “more from gains in the socioeconomic status of black families than from desegregation.” *Id.* Not only is the evidence about the achievement gains associated with desegregation more mixed than Justice Thomas describes, see Ryan, *supra* note 7, at 296–307, but the idea that socioeconomic gains are responsible for improved achievement ignores the possibility that desegregation itself played a role in improving the socioeconomic status of black families. Justice Thomas appears to have interpreted existing evidence to confirm his view that remedial programs and desegregation should soon cease.

80. Thanks to Larry Walker for suggesting this comparison.

confusion.⁸¹ The preferred method of demonstrating confusion is the production of consumer surveys.⁸² Although the surveys themselves are of varying quality and some judges remain somewhat skeptical of their use,⁸³ courts nonetheless rely heavily on them. Indeed, some courts have begun to draw adverse inferences from the absence of survey data,⁸⁴ which reveals the degree of reliance placed on these studies and obviously encourages parties to produce them.

Suffice it to say that trademark disputes, which involve questions like whether Domino's Pizza infringed on the Domino Sugar trademark⁸⁵ or whether Seven-Up can label a soft drink "Quirst" after the soft drink "Squirt" is already on the market,⁸⁶ do not usually involve ideologically charged issues.⁸⁷ Judges are unlikely to have prior views about the proper outcome in most of these cases. Consistent with the findings from social and cognitive psychology, judges thus are likely to be more open to the findings of social science studies that bear on these cases. This is surely not the only reason why social science studies play a more prominent role in these cases, but it seems plausible to assume that it is one important factor.⁸⁸ Indeed, the plausibility of this hypothesis is strengthened by

81. See JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 93-95 (5th ed. 2002).

82. See John Monahan & Laurens Walker, *Empirical Questions Without Empirical Answers*, 1991 WIS. L. REV. 569, 574; see also Jack P. Lipton, *A New Look at the Use of Social Science Evidence in Trademark Litigation*, 78 TRADEMARK REP. 32, 63 (1988) (noting the growing acceptance of such surveys and commenting that "the failure of a trademark owner to run a survey may now give rise to an adverse inference").

83. See *supra* note 68.

84. See, e.g., *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 441 F. Supp. 1220, 1231 (S.D.N.Y. 1977) (per curiam), *aff'd*, 580 F.2d 44 (2d Cir. 1978).

85. *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 254 (5th Cir. 1980).

86. *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1088 (8th Cir. 1980).

87. For a sampling of similar cases, see MONAHAN & WALKER, *supra* note 81, at 95-119.

88. Additional factors include the two others identified as relevant in the desegregation context: the legal standard and the nature of the evidence. As for the former, the legal standard allows ample room for the consideration of social science evidence, and specifically consumer surveys, as the dispositive question is whether consumers are likely to be confused by the alleged trademark infringement. As for the latter, surveys are of varying quality, but "the techniques of testing and sampling buyer reactions have been developed to a fairly high degree of accuracy." 5 MCCARTHY, *supra* note 68. Courts, moreover, have developed fairly clear standards governing the administration of proper surveys, suggesting that they have gained some expertise in sorting out flawed and reliable studies. See *Bacardi & Co. v. New York Lighter Co.*, 54 U.S.P.Q.2d 1335, 1338 (E.D.N.Y. 2000) (noting that the court set forth standards in a 1983 decision for "governing the administration of a proper likelihood of confusing survey" and that these standards had been "repeatedly used and cited by courts throughout the country").

contrasting the trademark cases with voluntary integration and affirmative action cases, where survey and other social science evidence *could* play an important role but usually does not.

II. THE CONSTITUTIONALITY OF VOLUNTARY INTEGRATION

Before examining the extent to which the relevant legal standards allow for consideration of social science evidence, it might be helpful to provide some background about voluntary integration plans, as they are not as familiar as their mandatory counterparts. The term “voluntary integration” refers to integration efforts made by school districts that are under no compulsion to integrate, either because they were never subject to a court order or because they have been declared unitary and released from court supervision. Although their details vary considerably, there are essentially three major types of voluntary integration plans: those that involve examination schools, those that involve magnet schools, and those that offer structured choices among traditional public schools. Examination schools use merit-based admissions policies, which typically rely on test scores as one factor in determining admission.⁸⁹ Magnet schools do not have merit-based admissions policies, but like some examination schools, they are often developed around a particular theme or curricular focus, such as music and the performing arts or math and science.⁹⁰ Choice programs allow students to transfer from one school to another, either within or outside of the same school district.⁹¹

The common thread linking the plans is that all rely on racial criteria to influence if not determine student assignment. Thus, some districts with examination schools, such as Boston, have taken race into account when determining admission.⁹² These programs are akin to affirmative action plans at colleges and universities. Many districts with magnet schools have also taken race into account in an attempt to achieve some measure of racial balance.⁹³ Other school districts

89. For an example, see *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998), which discusses the famous Boston Latin School.

90. For a discussion of magnet and other specialized schools, see, e.g., Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 13, 17–19 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

91. For further discussion of intra- and interdistrict choice programs, see Ryan & Heise, *supra* note 29, at 2064–73.

92. *Wessmann*, 160 F.3d at 793.

93. *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 126–67 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 701 (4th Cir. 1999) (per curiam). See

have adopted various forms of public school choice plans, some of which involve structuring or limiting the choices available in order to produce racially balanced schools or prevent increased imbalance.⁹⁴

A. *The Legal Standards*

The legal standards governing voluntary integration programs are uncertain and warrant some discussion.⁹⁵ Since the Supreme Court decided *Croson*⁹⁶ in 1989, it is clear that most government decisions that rely on race as a factor are subject to strict scrutiny.⁹⁷ This means that the programs must be narrowly tailored to achieve a compelling state interest.⁹⁸ It is also clear that remedying prior, specific acts of race discrimination satisfies strict scrutiny; that is, this sort of remedial affirmative action is, in the Court's view, a compelling governmental interest.⁹⁹ It is unclear whether any other interests are sufficiently compelling to justify the use of race. Specifically, it is unclear whether achieving diversity in an educational setting is a compelling interest.¹⁰⁰ If it is, presumably universities could continue narrowly tailored, race-based affirmative action plans

generally Henig & Sugarman, *supra* note 90 (discussing magnet schools' imposition of racial criteria in their admission processes).

94. See Ryan & Heise, *supra* note 29, at 2064–65, 2070–71 (discussing magnet schools created to foster voluntary racial integration and interdistrict programs allowing urban students to attend suburban schools).

95. The discussion that follows is abbreviated on the assumption that readers are generally familiar with the Court's affirmative action jurisprudence. For a more extended discussion that does not assume such familiarity, see James E. Ryan, *Race Discrimination in Education: A Legal Perspective*, 105 TCHRS. C. REC. (forthcoming 2003) (manuscript at 7–14, on file with the North Carolina Law Review).

96. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

97. *Id.* at 493–95; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225–26 (1995) (refusing to apply a lower standard of review to federal racial classifications).

98. *J.A. Croson Co.*, 488 U.S. at 493–94.

99. *Id.* at 495.

100. The uncertainty arises from differing interpretations of Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978). Some lower courts read Justice Powell's opinion, which no other Justice joined, as nonetheless controlling for the Court and thus as establishing that diversity is a compelling interest. See, e.g., *Grutter v. Bollinger*, 288 F.3d 732, 738–44 (6th Cir. 2002) (holding that Justice Powell's opinion was binding and for that reason finding that "achieving a diverse student body" is a compelling interest), *cert. granted*, 123 S. Ct. 617 (2002). Other lower courts have disagreed, holding that Justice Powell's opinion is not controlling and that diversity is not a compelling state interest. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) ("[A]ny consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."). For an argument that Justice Powell's opinion is controlling and that *Bakke* remains a valid precedent, see Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1753–72 (1996).

and public school districts might also be able to consider race when assigning students to schools, be they examination, magnet, or traditional public schools.

The Supreme Court presumably will decide this Term, in cases involving affirmative action programs at the University of Michigan and the University of Michigan Law School, whether diversity in undergraduate and graduate schools constitutes a compelling interest.¹⁰¹ Although this decision might be relied upon by lower courts when assessing the constitutionality of voluntary integration plans in elementary and secondary schools, it is not clear that the contexts are sufficiently alike to warrant identical treatment. There are two ways in which these issues could be treated differently.

First, the Court could decide to apply different standards to each context. Although the Court, as mentioned above, has generally applied strict scrutiny to governmental decisions that rely on race, it has created a limited exception in the context of voting rights. Governments can take race into account when drawing voting districts, without triggering strict scrutiny, provided that race is not the predominant factor in drawing the district lines.¹⁰² The Court might allow a similar exception for university affirmative action plans that use race as one factor, but not the predominant factor, in determining admission.¹⁰³ It is not clear that such an exception, were it made, would also be appropriate for the grade-school context, where decisions about assigning students are not usually made based on an overall assessment of the student's merit or background.¹⁰⁴ Thus, it may be that universities are ultimately subject to a lower standard than are grade schools.

101. See Marcia Coyle, *Supreme Court May Erect Landmarks: Affirmative Action Challenge in the Offing*, NAT'L L.J., Dec. 9, 2002, at A7.

102. See *Easley v. Cromartie*, 532 U.S. 234, 241, 257-58 (2001); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). For discussion of these cases and how they create an exception to the Court's typical approach to race-based classifications, see Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1581-86 (2002).

103. For an argument that the Court should do this, see Karlan, *supra* note 102, at 1594-98.

104. Public schools that do rely on competitive admissions policies, such as the Boston Latin School, are more analogous to the university setting and thus may be able to take advantage of this approach to race-based affirmative action. See *supra* note 92. This possibility in turn suggests not only that there are important differences between the university and grade-school context, but that there are also important differences between voluntary integration plans. Depending on the legal standards developed to assess affirmative action, as well as the accepted rationale, if any, for non-remedial affirmative action, some types of voluntary integration plans may be more constitutionally suspect than others.

On the other hand, in the grade-school context, the Court has traditionally deferred to school officials when adjudicating students' constitutional rights. When the government is acting in its capacity as grade-school educator, it is subject to less demanding standards regarding the First Amendment, Fourth Amendment, and Due Process rights of students.¹⁰⁵ Although the Court has not yet shown similar deference regarding student equal protection rights, it has suggested in dicta that voluntary efforts to achieve integration are constitutionally acceptable. This dicta, however, appeared in *Swann*,¹⁰⁶ which predated *Croson*¹⁰⁷ and thus may no longer be valid now that the Court believes that strict scrutiny should generally apply to all racial classifications. Nevertheless, the Court has never explained why it shows deference to school officials regarding some rights but not others, and it is possible that the Court would be open to the argument that school officials should be given some deference to implement policies designed to achieve integrated schools. Such policies, after all, do not typically challenge traditional notions of merit by giving race-based preferences in a competitive admissions process.¹⁰⁸ It cannot usually be said, in other words, that any particular student "deserves" to be assigned to a particular school because of his or her special talents or aptitudes.¹⁰⁹ Considering race to achieve integrated schools is thus less likely to create stigmatic harms or foster notions of inferiority, which are costs that the Court has associated with affirmative action programs and has used as a justification for subjecting such programs to strict scrutiny.¹¹⁰ Thus, it is also possible that the Court will hold grade schools to a lower standard than universities.

105. See James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1343-69 (2000).

106. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); see *id.* at 16 (acknowledging that school officials "might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole"). Federal courts could not *order* school officials to take such action in the absence of a finding of prior intentional segregation, but the Court concluded that to take such action voluntarily "as an educational policy is within the broad discretionary powers of school authorities." *Id.*

107. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

108. Again, racial preferences at examination schools are an exception.

109. See, e.g., *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 259 (D. Mass. 1999) (emphasizing that assigning grade school students typically does not involve a merit-based decision), *claim dismissed* by 98 F. Supp. 2d 111 (D. Mass. 2000).

110. See *J.A. Croson Co.*, 488 U.S. at 493-94; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228-29 (1995) (noting that stigmatic harms make a persuasive case for applying strict scrutiny to racial classifications).

Even if the Court applies the same compelling interest test in both contexts, it is not at all clear that the results will be the same. Whether diversity is or is not a compelling interest at the university level does not necessarily establish that it is or is not a compelling interest at the elementary and secondary school level. On the one hand, courts might conclude that diversity among students is more important at the university level, where exchanges among students within and outside of the classroom may seem more integral to education than exchanges among grade-school students.¹¹¹ On the other hand, a court might conclude that racial and ethnic integration among younger students is more important than integration among older students, given that younger students are generally more impressionable and thus may benefit more from integration than older students.¹¹²

In addition, a court might distinguish between the goal of student-body diversity and the goal of overcoming de facto racial isolation in the grade school context. At least one lower court has recognized these as distinct interests,¹¹³ and there are good reasons for doing so.¹¹⁴ Racial isolation is a distinct and historically significant problem in the context of grade-school education, and it is conceivable that a court would find that efforts to address this problem in the grade school context represent an independent, compelling government interest.¹¹⁵ A court inclined in this direction may thus find a compelling interest sufficient to justify voluntary

111. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978) (noting that a great deal of learning at a university occurs informally through interactions among students from diverse backgrounds); see also Amar & Katyal, *supra* note 100, at 1773–79 (stressing benefits of diversity in the university setting).

112. Some courts have already suggested as much. See, e.g., *Boston's Children First*, 62 F. Supp. 2d at 259 (noting that the case involved elementary schools and suggesting that “[d]iversity may well be more important at this stage than at any other—Kindergarten is when first friendships are formed and important attitudes shaped”).

113. See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 742, 745–47 (2d Cir. 2000).

114. Relying on integration rather than diversity as a goal for affirmative action policies might also be a better way to defend those policies, as Elizabeth Anderson has recently argued. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1196 (2002). But see Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34–46 (2002) (arguing that the diversity rationale for affirmative action is not especially coherent or persuasive and that Anderson's attempt to use integration as the rationale has already been foreclosed by the Supreme Court). But it may be too late to switch rationales at this point, given the impending ruling by the Supreme Court in the University of Michigan affirmative action cases, where achieving diversity was the central justification for the policies.

115. See *Brewer*, 212 F.3d at 747–53.

integration plans at the grade-school level, even if diversity is not considered a compelling interest in universities or grade schools.

All of which is to say that the Court's decision in the University of Michigan cases¹¹⁶ will not necessarily determine the constitutionality of voluntary integration plans at the grade-school level, and that the very standards the Court will apply to those plans is uncertain. The legality of voluntary integration plans will ultimately have to await a Court decision specifically addressing them. In the meantime, lower courts will be left to their own devices in determining the appropriate legal standards. Thus far, these courts have uniformly held that voluntary integration plans must satisfy strict scrutiny, and every court to reach a final decision has found the plan at issue unconstitutional.¹¹⁷ Courts that have reached this conclusion, however, have dodged the question of whether student-body diversity is a compelling interest by accepting for argument's sake that it is and then striking down the plans on the ground that they were not narrowly tailored.¹¹⁸

With this background understood, notwithstanding some lingering uncertainty, it is possible to assess the extent to which the relevant legal standards allow for or require reliance on social science research. Following the lead of the lower federal courts, I will accept for now that the proper legal standards require answering two questions: whether the use of race in assigning students serves a compelling interest and whether any particular program is sufficiently narrowly tailored to achieve that interest. The latter question does not seem to require much reliance on social science research regarding the costs and benefits of desegregation. The lower court cases that have addressed the issue of narrow tailoring suggest that courts will examine the details of the program involved and make a value judgment as to whether the means adopted for achieving diversity are limited to achieving that goal.¹¹⁹ Evidence about the

116. See *supra* note 101.

117. *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 129, 132–33 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704, 707 (4th Cir. 1999) (per curiam); *Wessmann v. Gittens*, 160 F.3d 790, 794, 808 (1st Cir. 1998). In three cases, courts have refused to grant preliminary injunctions to halt race-based transfer programs. *Brewer*, 212 F.3d at 753; *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 69 (D. Mass. 2000), *dismissed by* 131 F. Supp. 2d 253 (D. Mass. 2001); *Boston's Children First*, 62 F. Supp. 2d at 262.

118. See *Eisenberg*, 197 F.3d at 130–34; *Tuttle*, 195 F.3d at 705–07; *Wessmann*, 160 F.3d at 796–800.

119. See *Eisenberg*, 197 F.3d at 130–34; *Tuttle*, 195 F.3d at 705–07; *Wessmann*, 160 F.3d at 796–800.

scope and operation of the programs, including the intended duration of the program and whether it relies on any kind of quota or racial balancing, is certainly relevant.¹²⁰ But research relating to the costs and benefits of integration is simply irrelevant to the issue of narrow tailoring.¹²¹

Such research, however, is directly relevant to the issue of whether student-body diversity or overcoming de facto segregation is a compelling interest. Determining whether a particular use of race satisfies a compelling interest presumably requires asking whether the consideration of race carries certain benefits that outweigh any costs. Answering this question would require an examination of the purported benefits of voluntary integration plans and consideration of the costs of using race to assign students. In theory, then, there is more potential for social science research to influence the outcome of cases challenging voluntary integration plans than there is for similar research to influence cases seeking to dismantle existing desegregation decrees.

There are, however, two important limitations on the potential influence of such research. The first is temporal. The Court could decide that diversity or overcoming de facto segregation *can* constitute compelling interests *if* a particular integration plan generates more benefits than costs. More likely, however, the Court will treat the question as binary and conclude that diversity (or overcoming de facto segregation) either is or is not a compelling interest. If the Court takes this latter approach, the ability of social science evidence to influence the outcome of these cases will be limited to the cases that precede the Supreme Court's ultimate decision, as well as the Court's decision itself. Even within this limited temporal sphere, the second limitation will curb the influence of social science evidence.

That limitation arises from the fact that the costs and benefits of using race to assign students cannot all be informed by social science evidence. Some of the alleged benefits of integration are indeed conducive to social science research and have been the subject of extensive study.¹²² In addition, the Court has identified some potential costs of using race as a factor in decisionmaking that *could*

120. See, e.g., *Tuttle*, 195 F.3d at 705–08 (discussing these factors in making the narrowly-tailored determination).

121. See *Eisenberg*, 197 F.3d at 130–34; *Tuttle*, 195 F.3d at 705–08; *Tito v. Arlington County Sch. Bd.*, No. 97-540-A, 1997 U.S. Dist. LEXIS 7932, at *1, **17–18 (E.D. Va. May 13, 1997).

122. See *supra* Part I.B.

be subjected to social science inquiry,¹²³ including the claim that racial preferences create stigma and the related danger that programs purporting to benefit minorities will injure them.¹²⁴ At the same time, however, the Court has also suggested that considering race prevents achieving the normative goal of a colorblind society, where race is legally irrelevant.¹²⁵ That cost, of course, cannot be quantified or otherwise determined by social science inquiry. Thus, even if social science studies could show that voluntary integration plans benefit students, and that these benefits outweigh some of the costs, this is only part of the equation. The other part requires consideration of costs that social science research cannot really inform, and it is anyone's guess as to how a court would weigh any established benefits against these more abstract costs.

Ultimately, courts must make a normative value judgment as to whether the benefits of voluntary integration so outweigh the costs that such plans should be allowed. Although social science research is relevant to this task and could thus inform a court's judgment, including the Supreme Court's judgment, the strength of the research and the nature of the issues involved reduce the likelihood that such research will be very influential.

B. The Nature and Strength of the Social Science Evidence

Given that the social science research pertinent to this issue is similar to the research relevant to dismantling desegregation decrees, I will not belabor the points made above. The key point to recognize is that the compelling interest standard is strongly tilted against any use of race in government programs, which means that if this is indeed the appropriate standard to apply, the burden on those seeking to justify voluntary integration plans will be heavy. Social science evidence pertaining to integration generally, as already discussed, is often equivocal and subject to conflicting interpretations. In addition, just like cases involving desegregation decrees, cases involving the constitutionality of voluntary integration plans feature dueling experts. Those challenging the plans hire experts who testify and present studies showing that the social and academic gains from integration are limited at best, while those defending them hire

123. As discussed below, *see infra* notes 129–37 and accompanying text, although these costs could be informed by social science data, the Court does not seem interested in such evidence.

124. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989).

125. *Id.* at 505–06; *see Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring).

experts who paint a more positive and optimistic picture of the benefits of integration.¹²⁶ Given the difficulty of demonstrating that any use of race is compelling, presumably social science evidence would have to be fairly strong and consistent in order to influence a court's decision. As it stands, however, the social science evidence, at least as it is presented to courts, is mixed at best.

To the extent national or case specific studies about integration are indeterminate, there is less reason to expect that such studies will influence the outcome of cases involving voluntary integration plans. It is also less likely that the Supreme Court, when it finally confronts this issue, will be influenced by social science research on the topic. The nature of the issues involved, finally, reduces the potential influence of social science research even further.

C. *The Nature of the Issues Involved*

Voluntary integration plans raise the difficult question of when, if ever, it is appropriate for the government to use race as a factor in decisionmaking. Although there is no way to measure this, I strongly suspect that most judges and Justices have quite firm views about this issue. Moreover, I suspect that most of them see this question as requiring a normative, moral judgment.¹²⁷ To be sure, one's normative judgment about the general propriety of using race might initially be informed by a sense of how the world works and, in particular, a sense of the inevitability of racial segregation or the importance of integrated schools. Social science research on these topics might, at some point in his or her thinking, influence a judge's views. It seems much more plausible to suppose, however, that judges are like most other educated nonspecialists, in that their world views are only weakly influenced by hard data. Once those views are formed, moreover, they may create something of a presumption about the mechanics of society, which could potentially be overcome,

126. For example, in *Comfort v. Lynn School Committee*, 100 F. Supp. 2d 57 (D. Mass. 2000) (denying a motion for preliminary injunction), *dismissed by* 131 F. Supp. 2d 253 (D. Mass. 2001), one of the few cases to go to trial, plaintiffs presented expert testimony that discounted the benefits of integration, while defendants presented expert testimony extolling those benefits. Telephone Interview with Chinh Quang Le, Assistant Counsel, NAACP Legal and Educational Defense Fund, Inc. (Jan. 9, 2003).

127. Cf. John E. Coons, *Recent Trends in Science Fiction: Serrano Among the People of Number*, in *EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS* 50, 51–53 (Ray C. Rist & Ronald J. Anson eds., 1977) (expressing doubt that courts in race discrimination or school finance cases rely on social science evidence in part because “[e]quality is not an inference from data; it is an act of faith about intrinsic human worth”).

but only if the evidence is reasonably clear and one remains sufficiently open-minded to study the evidence.¹²⁸ It seems fair to say that the evidence regarding the benefits of school desegregation is not sufficiently clear to dislodge any but the most weakly held beliefs about the propriety of using race as a criterion in education programs.

To get a better sense of the points I am trying to illuminate, consider three concrete examples, each representing a different approach to the issue of when it is appropriate to use race as a factor in government programs. The first two come from the Supreme Court's decision in *Adarand*.¹²⁹ On the one hand, Justices Scalia and Thomas strongly believe that it is almost never appropriate to use race as a factor in government decisionmaking. As Justice Scalia argued in his concurring opinion: "To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."¹³⁰ Justice Thomas went further: "I believe," he wrote, "that there is a 'moral [and] constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."¹³¹

Justice Thomas wrote in response to a dissenting opinion authored by Justice Stevens and joined by Justice Ginsburg. Contrary to Justice Thomas, Justice Stevens argued that there is "no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."¹³² "Invidious discrimination," he continued, "is an engine of oppression," while "[r]emedial race-based preferences reflect . . . a desire to foster equality in society."¹³³ Justices Thomas and Scalia obviously entertain different beliefs than do Justices Stevens and Ginsburg, but notice that all of them cast the issue in vaguely or explicitly moral terms and that none of them suggests that their beliefs might change with a new empirical study concerning the benefits or costs of some race-based program.

128. Studies regarding confirmation and assimilation bias suggest as much. See *supra* notes 76–79 and accompanying text.

129. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

130. *Id.* at 239 (Scalia, J., concurring).

131. *Id.* at 240 (Thomas, J., concurring) (alteration in original) (citations omitted) (quoting *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting)).

132. *Id.* at 243 (Stevens, J., dissenting) (emphasis added).

133. *Id.* (Stevens, J., dissenting).

The separate concurrences of Justices Scalia and Thomas are especially noteworthy because each Justice identifies potential costs of racial preferences that social science *could* inform. Justice Scalia, for example, suggests that racial preferences lead to racial hatred,¹³⁴ which presumably could be tested through surveys that assess whether affirmative action programs increase or decrease racial hostility among participants and observers. Justice Thomas is even more specific in suggesting that affirmative action programs:

[i]nvariably . . . engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.¹³⁵

Again, survey evidence, like the sort routinely relied upon by courts in trademark cases, presumably could shed light on the veracity of Justice Thomas's suppositions. But it is hard to believe that Justice Thomas is inviting such inquiry or advancing what he considers falsifiable hypotheses. The costs are simply presumed, much in the same way that the Court in early desegregation cases presumed that prior segregation had lingering or widespread effects. Justices Scalia and Thomas, in making empirical assertions without inviting empirical inquiry, indicate that they do not believe the constitutionality of racial preferences should depend on social science evidence.¹³⁶ Just as importantly, it seems highly unlikely that these Justices would give much weight to social science data that contradicted their assertions.¹³⁷

Contrast this with the approach taken by Chief Judge Richard Posner in *Wittmer v. Peters*,¹³⁸ which raised the question of whether a boot camp style prison for young offenders could consider race when hiring prison guards.¹³⁹ Judge Posner relied explicitly on expert testimony offered by the defendants, which stated that the boot camp would not succeed in its mission if there were not more black prison

134. *Id.* at 239 (Scalia, J., concurring).

135. *Id.* at 241 (Thomas, J., concurring).

136. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 119–20 (1995) (Thomas, J., concurring) (suggesting that "social science research" in a desegregation case "certainly cannot form the basis upon which we decide matters of constitutional principle").

137. *See supra* notes 76–78 (discussing assimilation bias).

138. 87 F.3d 916 (7th Cir. 1996).

139. *Id.* at 917–18.

guards, given that the prison population was majority black.¹⁴⁰ Although the experts who offered this testimony had little direct experience with boot camp style prisons, and although they relied on social science evidence regarding traditional prisons, their opinions were both plausible and not contradicted by plaintiffs.¹⁴¹ Under these circumstances, Judge Posner concluded that race could be used as a factor in hiring prison guards, at least until enough evidence was gathered to demonstrate that there was little need for some correspondence between the race of the guards and the race of the inmates.¹⁴²

One could quarrel with Judge Posner's reliance on fairly thin social science evidence, but the relevant point for this Essay is that his approach to the issue of using race as a factor in government decisionmaking is strikingly different from that of Justices Scalia, Thomas, Stevens, and Ginsburg. Rather than framing the issue as one involving a basic moral choice, Judge Posner's approach is pragmatic and explicitly tied to existing social science evidence and expert opinion. Judge Posner's approach, for better or for worse, is most likely exceptional among federal judges who confront the question of when race can be used as a decisionmaking factor. It is certainly not the approach taken by the Justices currently sitting on the Supreme Court, most, if not all, of whom—depending on when the Court finally hears a relevant case—will ultimately decide the fate of voluntary integration plans. For these Justices, the use of race raises basic moral and philosophical issues, which social science evidence can at most only weakly and indirectly inform.

III. LOOKING AHEAD

One of the points of this Conference, and the papers in this Symposium, is to consider strategies for preserving or creating racially integrated schools. I have focused so far on the two most obvious strategies. But advocates, lawyers, or social scientists interested in fostering racially integrated schools should recognize that attempting to preserve existing desegregation decrees or promoting and protecting voluntary racial integration plans are not the only tools available. For this reason, it makes some sense to consider alternative strategies and to examine whether social science evidence might be more influential in connection with these alternative

140. *Id.* at 920.

141. *See id.* at 920–21.

142. *See id.*

approaches. There are at least three alternatives: socioeconomic integration plans; claims based on state education clauses; and Title VI disparate impact claims. Each of these three routes may offer more promise of success, but social science evidence will likely remain only tangentially relevant to the various court decisions along the way. The only cases that *might* offer more room for social science evidence to be influential would be those based on state education clauses. I will discuss each alternative, briefly, in turn.

A. *Socioeconomic Integration*

A few school districts across the country have instituted some type of socioeconomic integration plan.¹⁴³ Some officials responsible for such programs have likely been motivated, at least in part, by a recognition that race-based plans are constitutionally problematic and that socioeconomic integration is an indirect, if second best, way to achieve racial integration. Others may have been motivated by the fairly strong and consistent social science evidence establishing the academic benefits of majority-middle-class schools.¹⁴⁴

If and when those plans are challenged in court, however, social science evidence regarding the benefits of socioeconomic integration will largely be irrelevant. The reason has to do with the legal standard that will be employed. The use of socioeconomic status to determine student assignment is obviously racially neutral, and it will not trigger strict scrutiny unless it can be shown that the legislators intended to use socioeconomic status as a proxy for race.¹⁴⁵ If such an intent can be demonstrated, which is a difficult showing to make,¹⁴⁶ the case would become identical to one challenging voluntary race-based integration plans. If such intent cannot be proven, any socioeconomic integration plan will be subject to rational basis scrutiny, which is notoriously simple to satisfy.¹⁴⁷ Proof that there are real benefits to socioeconomic integration is not necessary to pass this test; it is enough if legislators could rationally have believed that socioeconomic integration would be beneficial. Although social science evidence regarding socioeconomic integration is obviously

143. See RICHARD D. KAHLBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 228–57 (2001).

144. See *id.* at 23–76.

145. *Washington v. Davis*, 426 U.S. 229, 242–45 (1976).

146. Those challenging such racially neutral plans presumably would have to demonstrate that the plans were adopted not in spite of, but because of their racial effects. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278–79 (1979).

147. See *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 591–92 (1979); *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949).

relevant to establish this point, it would be an exaggeration to say that the evidence will influence the outcome, because the outcome would be pre-ordained by the selection of the rational basis test.¹⁴⁸

B. State Education Clause Claims

Another potential route to secure racial or socioeconomic integration is to raise a claim based on the education clauses that exist within every state constitution. A number of courts have held, in the context of school finance cases, that such clauses guarantee an “adequate” education.¹⁴⁹ Although most cases have revolved around whether a state provides sufficient funds to deliver an adequate education, there is no theoretical reason why adequacy needs to be defined solely in monetary terms. Plaintiffs interested in racial or socioeconomic integration could argue that such integration, along with sufficient funding, is necessary to provide an adequate education.¹⁵⁰ Indeed, plaintiffs successfully raised such a claim in Connecticut, in the now famous *Sheff v. O’Neill* case.¹⁵¹ Similar claims were raised in Minnesota,¹⁵² in a case that resulted in a settlement, and in Rochester, in a case that is still pending.¹⁵³

If any claim could turn on social science evidence, this would be it. The main reason is that the legal standards for determining what constitutes an adequate education are completely open-ended. Courts are essentially free to decide for themselves what ingredients are necessary to provide students an adequate education, and many have not been shy about identifying those ingredients.¹⁵⁴ At the very least, social science evidence regarding racial and/or socioeconomic integration would be directly relevant to the question of whether either or both are necessary aspects of an adequate education. In theory, then, there is much more room for social science evidence

148. To be fair, it is possible that the strength of the social science evidence regarding the benefits of socioeconomic integration might help convince a court that such a plan was adopted to achieve those benefits rather than as a proxy for a race-based plan. The stronger the benefits, the more plausible it is to believe that legislators were not simply looking for a way to achieve racial integration through a facially neutral program.

149. See Ryan, *supra* note 7, at 266–72.

150. For further discussion of this point, see James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 553–60 (1999). If voluntary racial integration plans are held unconstitutional, of course, state courts interpreting state education clauses could only require socioeconomic and not racial integration.

151. *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996).

152. See KAHLENBERG, *supra* note 143, at 175–77 (discussing the litigation).

153. *Paynter v. State*, 735 N.Y.S.2d 337, 340 (N.Y. App. Div. 2001).

154. See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (enumerating the characteristics of an “efficient” system of common schools).

regarding the benefits of either racial or socioeconomic integration to influence the outcome of such decisions.

There are reasons to remain skeptical, however, about the extent to which the social science research itself will influence the outcome of any cases alleging that an adequate education requires *racial* integration. Those reasons relate to the earlier discussion of desegregation and voluntary integration.¹⁵⁵ The evidence regarding the benefits of integration is contested. The issue itself, moreover, is likely to be seen in moral or philosophical terms, and it is an issue about which courts will likely have strong, preconceived views.

There may be more room for social science evidence to influence the outcome of claims that education clauses require *socioeconomic* integration. Here, the evidence that socioeconomic integration is academically beneficial is generally stronger and more consistent than similar evidence regarding racial integration.¹⁵⁶ Moreover, although this is speculative, it may be that courts have less strongly held views about socioeconomic integration than they do about racial integration, and they may be more willing to view the issue in instrumental rather than moral or philosophical terms. On the other hand, socioeconomic and racial integration often go hand-in-hand, and regardless of the precise correlation, they may be viewed as linked. A court's views about the propriety of racial integration thus might determine its views about socioeconomic integration, which would reduce the influence of social science evidence accordingly. Nonetheless, if there is one legal context where social science evidence might be useful in influencing a court decision to require integration, this is probably it. Although the integration would be along socioeconomic lines, socioeconomic integration in many areas of the country would produce a decent amount of racial integration as well.

C. *Title VI Disparate Impact Claims*

Another intriguing possible claim could be based on the disparate impact regulations promulgated pursuant to Title VI of the 1964 Civil Rights Act.¹⁵⁷ Title VI prohibits programs receiving federal funds from discriminating on the basis of race, and it permits

155. See *supra* Parts I.B, I.C, II.B, II.C.

156. For discussion of this evidence and citations to the literature, see KAHLBERG, *supra* note 143, at 23–46; Ryan, *supra* note 7, at 297–307.

157. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 602, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. § 2000d (2000)).

federal agencies to establish regulations to implement the statute.¹⁵⁸ The Department of Education, like other federal agencies, adopted regulations that prohibit not only intentional discrimination but also policies that have the *effect* of discriminating on the basis of race.¹⁵⁹ Courts have interpreted these regulations to create a disparate impact standard of liability, and the cases operate similarly to those brought pursuant to Title VII, which prohibits discrimination in employment. Plaintiffs bear the initial burden of demonstrating a racially disparate, adverse impact. If plaintiffs succeed, defendants then must demonstrate, in the education context, that the challenged practice is an “educational necessity.” If defendants meet their burden, plaintiffs can still succeed if they identify an equally effective alternative policy that does not have a disparate impact or if they demonstrate that the policy is really a pretext for intentional discrimination.¹⁶⁰

To date, most disparate impact claims have challenged tracking, high stakes testing, and funding schemes.¹⁶¹ A disparate impact claim could be brought, however, challenging school districting policies that result in racial isolation. Indeed, plaintiffs in the Rochester case alluded to above included a Title VI claim along with their claim that an adequate education, guaranteed by the state education clause, requires racial and socioeconomic integration.¹⁶² Although the theory underlying the Title VI claim is not discussed in the reported decisions, it is easy enough to describe a plausible theory. Where residential segregation exists between municipalities, and school district lines track municipal boundaries, plaintiffs could argue that the school district lines result in segregated schools. Given that minorities are disproportionately poor and that concentrated poverty in schools creates obstacles that majority-middle-class schools need not face, plaintiffs could argue that the segregation that results from existing school districting policies causes a disparate, adverse impact based on race. In effect, plaintiffs could use the fairly strong body of evidence regarding the difficulties created by concentrated poverty to bolster their claim that *de facto* racial segregation has an adverse impact on minority students—for the simple reason that minority students will often, as a result, end up in majority poor schools.

158. See 42 U.S.C. §§ 2000d–e (2000).

159. Regulations for the Offices of the Department of Education, Office for Civil Rights, 34 C.F.R. § 100.3(b)(2) (2002).

160. See Ryan, *supra* note 95 (manuscript at 11–13).

161. *Id.* (manuscript at 29–39).

162. *Paynter v. State*, 735 N.Y.S.2d 337, 340 (N.Y. App. Div. 2001).

Although such a claim might be theoretically plausible, at least two serious obstacles confront it. The first is that plaintiffs may no longer be able to base any claims on the disparate impact regulations. In *Alexander v. Sandoval*,¹⁶³ decided in 2001, the Supreme Court held that the disparate impact regulations of Title VI do not create a private right of action.¹⁶⁴ The regulations, the Court concluded, do not create individually enforceable rights.¹⁶⁵ Left undecided by *Sandoval* was whether plaintiffs could bring their claims pursuant to 42 U.S.C. § 1983.¹⁶⁶ The Court's subsequent decision in *Gonzaga University v. Doe*,¹⁶⁷ however, seems to foreclose this possibility. In *Gonzaga*, the Court held that § 1983 is only available to enforce clearly established individual rights.¹⁶⁸ Given that the Court held in *Sandoval* that the regulations do not create such rights,¹⁶⁹ *Gonzaga* seems to preclude their being enforced by § 1983. If this is correct, only the Department of Education can enforce the disparate impact regulations. This, in turn, will significantly diminish the number of disparate impact claims decided by federal courts, especially during times when those leading federal agencies are politically opposed to challenging facially neutral practices that have a racially disparate impact.

Even if some disparate impact claims make it to court, the legal standards make it unlikely that the social science evidence regarding the benefits of socioeconomic integration will influence the outcome. The key here is the showing required to demonstrate an "educational necessity." Although this standard seems to place a significant burden on defendants to justify the challenged policy or practice, courts have lightened defendants' load by interpreting "educational necessity" to mean, essentially, "educationally legitimate."¹⁷⁰ That is, courts typically have concluded that defendants satisfy their burden if they can show that the challenged policy has a demonstrable relationship to a legitimate educational goal. Courts, moreover, seem quite willing to defer to education officials on this issue.¹⁷¹

163. 532 U.S. 275 (2001).

164. *Id.* at 293.

165. *Id.* at 288–89.

166. *See id.* at 299–300 (Stevens, J., dissenting).

167. 536 U.S. 273 (2002).

168. *Id.* at 321.

169. 532 U.S. at 293.

170. *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 679–80 (W.D. Tex. 2000).

171. *See, e.g., Georgia NAACP v. Georgia*, 775 F.2d 1403, 1420 (1985) (holding that the State had rebutted a claim of disparate impact by establishing the educational "necessity" of achievement grouping).

Consider the treatment given to the Title VI claim raised by plaintiffs in the Rochester case.¹⁷² The court there was willing to accept, for the sake of argument, that plaintiffs succeeded in demonstrating a disparate impact.¹⁷³ In the next line, however, the court concluded, without explanation, that defendants' districting policy was nonetheless justified because defendants had a substantial interest in maintaining residency requirements.¹⁷⁴ This, of course, is a non sequitur, as de facto racial segregation could be addressed by altering district lines and maintaining residency requirements within the newly created districts. But it gives a hint of what the general judicial reaction to such a claim might be.

The better response to plaintiffs' claim, and the one that will surely be offered if such claims are brought in the future, is that states and localities have a legitimate interest in maintaining neighborhood schools. It is unlikely that states and localities will offer hard proof in support of the proposition that neighborhood school assignments are preferable to other alternatives; instead, they will likely point to the convenience and sense of community created by neighborhood school assignments. This, in turn, will most likely be more than enough to satisfy a court, especially in light of the deference given to defendants in these cases. Given the predominance of neighborhood schools and the abiding attachment to them throughout the country, it is very unlikely that a court will question the legitimacy of this interest.

The possibility that social science evidence will influence the outcome of a Title VI claim is, in any event, quite remote. This sort of claim, even if focused on the educational harms of concentrated poverty, ultimately raises the question of whether courts should order mandatory racial integration. As discussed above, social science evidence will not likely influence decisions regarding the legality of voluntary integration plans. There is no reason to think that it will have more influence over claims for mandatory racial integration. Indeed, given the direction of desegregation cases and the dismantling of desegregation decrees,¹⁷⁵ the likelihood that federal courts would use Title VI regulations to restart mandatory desegregation seems sufficiently slim that it would be unrealistic to suppose that social science evidence will influence these cases.

172. *Paynter v. State*, 735 N.Y.S.2d 337 (N.Y. App. Div. 2001).

173. *Id.* at 344.

174. *Id.*

175. *See supra* Part I.A.2.

CONCLUSION

One might ask where this analysis leaves lawyers and social scientists interested in fostering integrated schools, aside from slightly dejected. What, if anything, might be done? Although I think it is an uphill battle, I do think several strategies are available.

The key step, I think, is to develop strong arguments in favor of allowing school districts discretion to adopt voluntary integration programs, as I describe below. But it must first be recognized that preventing a finding of unitary status by employing social science data is likely a lost cause. To be sure, there are hundreds of decrees still in place, mostly because no one has bothered to move for unitary status in those districts.¹⁷⁶ Documenting the benefits of these plans may indeed forestall motions for unitary status, especially if the decrees are not causing controversy. Lawyers for the original plaintiffs in these cases should thus consider whether a study documenting the specific benefits of a particular plan might carry some strategic, political benefits. This may indeed buy some time. But it will not, of course, preserve desegregation decrees forever. It is inevitable that they will all be dismantled, regardless of potentially relevant social science research on the extent and costs of any ensuing resegregation.

Which leads to the next point: how to fight to preserve voluntary integration plans. Here, I think the lawyers should have the laboring oar, at least initially. Lawyers should focus less on social science evidence per se and more on the pertinent legal standards. As discussed above, the appropriate legal standard to apply to voluntary integration plans is uncertain. Lawyers obviously must be prepared to respond to the Supreme Court's upcoming decision in the affirmative action cases. In doing so, they should focus on two arguments.

First, they should develop the argument, sketched in Part II.A, that school officials should not be subject to strict scrutiny when they act to promote integrated elementary and secondary schools. Regardless of the standard used to assess university affirmative action plans, lawyers ought to argue that something less than strict scrutiny should govern voluntary integration plans at the grade school level. Second, lawyers should continue to develop arguments that racial integration is uniquely important at the grade-school level. Whether the Court concludes that diversity is or is not a compelling interest at the university level, lawyers defending voluntary integration plans

176. See Parker, *supra* note 58, at 1159-60.

should argue that integration in grade schools is sufficiently important to satisfy whatever legal standard is ultimately applied. In making both of these arguments, lawyers should emphasize the historical commitment, begun in *Brown*, to create integrated schools, and they should also emphasize how assigning students to grade schools is fundamentally different from apportioning limited spaces, on the basis of merit, in universities.¹⁷⁷

To make the argument that racial integration is uniquely important at the grade school level, lawyers should work closely with social scientists to develop compelling evidence about a particularly successful plan. That is to say, lawyers should be strategic in selecting the cases that they pursue on appeal. Lawyers defending voluntary integration plans cannot select the plans that will be challenged in court, but they can determine which unfavorable rulings to appeal. They should be careful to select those plans that have the most well documented benefits. To be sure, for reasons explained at length above, this evidence may ultimately fail to persuade a court that is committed to striking down voluntary integration plans, but developing a strong record certainly cannot hurt. Moreover, to the extent lawyers can make arguments about voluntary integration that incline courts to uphold such plans by emphasizing the historical commitment to integrated education and the absence of merit-based issues in school assignments, courts might be more favorably inclined toward social science evidence that supports such plans. For this to work, however, lawyers and social scientists should steer clear of national studies, which can easily be contradicted by other, similarly broad studies. Instead, they should build their case and their evidence around the particular plan at issue.

Whether the effort to defend voluntary racial integration plans is successful or not, lawyers, advocates, and social scientists should also be making the *political* case for socioeconomic integration. As discussed earlier, the evidence regarding the benefits of socioeconomic integration is quite strong, and it may be that there is less political opposition to such integration than there is to racial integration. The effort to promote socioeconomic integration, however, has thus far been sporadic and disorganized. Some may

177. For an argument along these lines, see *Comfort v. Lynn School Committee*, 100 F. Supp. 2d 57, 66 (D. Mass. 2000) (emphasizing that race-based transfer plans did not involve any issues of merit: "The policies do not grant preferences to students of one race who are objectively less qualified than students of other races. Unlike many challenged race-based programs, more qualified applicants are not excluded from access to a scarce resource or benefit"), *dismissed by* 131 F. Supp. 2d 253 (D. Mass. 2001).

doubt that a push for socioeconomic integration would yield results, but in my mind, there is no way to tell without first making the effort. If and when such plans are adopted, as they have been in several school districts,¹⁷⁸ they almost surely will be upheld as constitutional, given that they should not trigger strict scrutiny.

In short, there are reasons to be gloomy about the prospects for school integration, especially along racial lines. But the situation is not hopeless. By working together to present sound legal theories and a strong political case for racial and socioeconomic integration, lawyers and social scientists may yet be able to prevent our schools from becoming even more racially and socioeconomically segregated than they are today.¹⁷⁹

178. See KAHLBERG, *supra* note 143, at 228–57.

179. For data on current levels of racial and socioeconomic segregation, see Ryan & Heise, *supra* note 29, at 2092–96.