North Dakota Law Review

Volume 81
Number 1 *Number 1*

Article 4

January 2005

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Recommended Citation

Smith, Kevin H. (2005) "The Jurisprudential Impact of Brown v. Board of Education," *North Dakota Law Review*: Vol. 81 : No. 1 , Article 4.
Available at: https://commons.und.edu/ndlr/vol81/iss1/4

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THE JURISPRUDENTIAL IMPACT OF *BROWN V. BOARD OF EDUCATION*

KEVIN H. SMITH*

That *Brown v. Board of Education*[1] had a profound—if not necessarily immediate—impact on American society is universally acknowledged. Legal scholars have focused their attention on *Brown's* impact on the desegregation of public K-12 schools.[2] Their emphasis is understandable. *Brown* established a fundamental and unambiguous constitutional principle: separate public K-12 educational facilities are inherently unequal and violate the equal protection provision of the 14th Amendment.[3] And *Brown's* immediate effect was to spark an intense, decades-long legal struggle over the methods and speed of implementing public K-12 school desegregation.[4]

Legal scholars also have examined *Brown's* significant impact on desegregation jurisprudence beyond the sphere of public K-12 education.[5] *Brown* can be read as being limited to public K-12 education. For example, the Court stated:

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1. 347 U.S. 483 (1954) (hereinafter *Brown*, *Brown I*, or *Brown v. Bd. of Educ.*). One year after *Brown I* was decided, the United States Supreme Court heard arguments concerning the appropriate standards and methods for implementing *Brown I* and then published an opinion in which it set forth those standards and methods. *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (sometimes referred to as *Brown II*). Because *Brown I* established the substantive constitutional principle, it is the subject of this paper.

2. James L. Hunt, Brown v. Board of Education *After Fifty Years: Context and Synopsis*, 52 MERCER L. REV. 459, 552 n.62 (2001) (observing, correctly, that "[t]he secondary literature on *Brown*, covering the NAACP legal strategy and the subsequent efforts to implement *Brown*, is enormous and ever expanding"); *see generally* William H. Manz, Brown v. Board of Education*: A Selected Annotated Bibliography*, 96 LAW LIBR. J. 245 (2004).

3. *Brown*, 347 U.S. at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

4. *See generally* JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001) (discussing both the events leading to the Supreme Court's decision in *Brown* and the reaction to it, including several lengthy court battles to implement *Brown*).

5. *See generally, e.g.*, Francine Sanders, Brown v. Board of Education*: An Empirical Reexamination of Its Effects on Federal District Courts*, 29 LAW & SOC'Y REV. 731 (1995).

> We conclude that in *the field of public education* the doctrine of "separate but equal" has no place. Separate *educational facilities* are inherently unequal. Therefore, we hold that the plaintiffs and *others similarly situated* for whom the actions have been brought are, by reason of *the segregation complained of*, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[6]

However, *Brown* also contains language that can be read more broadly. For example, the Court stated: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*,[7] [the *Brown* Court's] finding [concerning the negative impact of state-mandated segregation] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[8] In the years immediately following *Brown*, the Court's new understanding of the negative psychological impact of state-mandated segregation was used by federal and state courts to strike down numerous forms of state-mandated segregation that previously had been permitted under *Plessy's* "separate but equal" doctrine.[9]

It is now well-settled that *Brown* effectively overruled *Plessy* and eviscerated the constitutional authority for any government-mandated segregation based on the principle of "separate but equal."[10] As a result, legal scholars have come to identify *Brown* with those aspects of American jurisprudence that relate to the end of the separate-but-equal doctrine in its many forms and applications.[11]

Whether *Brown* has had a more pervasive influence, an enduring influence on American jurisprudence that extends beyond the abolition of the separate-but-equal doctrine, is at once less studied and more uncertain. If *Brown's* legacy is to be completely understood, the full extent of its impact on American jurisprudence must be examined.

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6. *Brown*, 347 U.S. at 495 (emphasis added). The Court also framed the issue presented in terms of children and public educational facilities, stating:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

Id. at 493.

7. 163 U.S. 537 (1896).

8. *Brown*, 347 U.S. at 494-95.

9. See *infra* notes 15-19.

10. *See Brown*, 347 U.S. at 494-95.

11. *See generally, e.g.*, PATTERSON, *supra* note 4.

The remainder of this article is divided into four parts and a conclusion. In Part I, I briefly observe that an examination of cases decided since *Brown* indicates that courts routinely cite *Brown* other than for its holding abolishing the separate-but-equal doctrine. In Part II through Part IV, I examine three purposes not directly related to desegregation for which *Brown* repeatedly is cited: (1) *Brown* as an explicit recognition of the negative psychological, emotional, and social impacts of discrimination in its many forms; (2) *Brown* as an example of when it is proper for a court to overrule a long-standing and deeply rooted legal precedent; and (3) *Brown* as an example of a court's ability to use social science evidence in legal decision making. And, finally, I conclude that *Brown* continues to exert an important influence on American jurisprudence in addition to its influence on the issue of racial desegregation.

I. THE CHANGING NATURE OF COURTS' USE OF *BROWN*

The purposes for which courts cited *Brown* have changed over time. In the years immediately after *Brown* was decided, courts cited *Brown* primarily in cases involving desegregation issues.[12] In the last several decades, however, courts frequently cited *Brown* in cases that do not involve desegregation issues.[13] *Brown* now enjoys an influence on American jurisprudence that extends beyond its core holding.

Brown has been cited in approximately 2,000 cases.[14] I began by reviewing approximately the first 250 cases to cite to *Brown* (which cover the period from 1954 to 1963) and approximately 140 of the most recent cases to cite to *Brown* (which cover the period from 1997 to 2003). I adopted this strategy in order to determine whether the attributes of cases citing *Brown* had changed over time. And, indeed, this examination revealed distinct and changing patterns in the contexts in which, and the purposes for which, courts cited *Brown*.

In the first set of cases, *Brown* was cited mainly by lower courts in the context of public school desegregation cases and for the purpose of reiterating the unconstitutionality of state-mandated racial segregation in public K-12 school education.[15] *Brown* also was cited in striking down

12. *E.g.*, Willis v. Walker, 136 F. Supp. 177 (W.D. Ky. 1955).

13. *See* Part II, *infra*.

14. All cases discussed in this article were identified using Westlaw, a computerized database service that is akin to an electronic law library. I generated the list of cases in which *Brown* had been cited using the ALLCASES database, which contains all federal and state cases (including some "unreported" cases) decided after 1944. I used a "terms and connectors" search with the following search parameters: (brown /5 educ! /p 347 +5 483). To provide a cutoff date, I used the following date restriction: & da (bef 01/01/2004).

15. *E.g.*, Willis v. Walker, 136 F. Supp. 177 (W.D. Ky. 1955).

state-mandated racial segregation in public facilities such as swimming pools and beaches,[16] parks,[17] and golf courses,[18] and with respect to services such as public transportation.[19] In these latter cases, courts either (1) held that *Brown* directly overruled *Plessy* and outlawed all forms of discrimination based on the doctrine of "separate but equal" or (2) reached their decision through reasoning by analogy that state-mandated segregation of the type at issue in the particular case was unconstitutional because it produced the same types of harmful effects about which the Court had been concerned in *Brown*.

The pattern of use to which *Brown* was put during the initial period examined is understandable. *Brown* provided the legal basis for the many suits challenging the constitutionality of segregated public K-12 schools in particular school districts. In these cases, *Brown* was cited in that part of each opinion in which the court set forth the case law that governed its decision. And *Brown* also was cited, directly or by analogy, in cases in which courts struck down various forms of state-mandated segregation.

Brown's core holding was never subjected to serious challenges. A unanimous Supreme Court decision saw to that. Opponents of segregation framed their arguments in terms of the speed at which, and the methods in which, desegregation of public K-12 schools should occur.[20] And before too many years, the applicability of *Brown* to other forms of state-mandated segregation also was too entrenched to be seriously questioned. *Brown* had served its original purpose.

More recently, courts have had little reason to cite *Brown* for its core holding (regarding public K-12 schools) or for its broader holding (striking down the separate-but-equal doctrine and state-mandated segregation). *Brown* continued to be cited in school desegregation cases, but only in historical context, as part of the procedural overview of the case.[21] Courts cited *Brown* in contexts outside of racial segregation, drawing upon elements of the opinion distinct from its core holding.[22] Three categories of citation usage were evident: (1) *Brown* as an explicit recognition of the

16. *E.g.*, Dawson v. Mayor of Balt., 220 F.2d 386 (4th Cir. 1955), *aff'd* 350 U.S. 877 (1955).

17. *E.g.*, Tate v. Dep't of Conservation & Dev., 133 F. Supp. 53 (E.D. Va. 1955).

18. *E.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 252 F.2d 122 (5th Cir. 1958).

19. *E.g.*, Morrison v. Davis, 252 F.2d 102 (5th Cir. 1958); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd* 352 U.S. 903 (1956).

20. *E.g.*, Dove v. Parham, 282 F.2d 256 (8th Cir. 1960); Allen v. County Sch. Bd., 249 F.2d 462 (4th Cir. 1957).

21. *E.g.*, Valley v. Rapides Parish Sch. Bd., 145 F.3d 329, 330 (5th Cir. 1998).

22. *See* Part II, *infra*.

negative psychological, emotional, and social impacts of discrimination;[23] (2) *Brown* as an example of when it is proper for a court to overrule a long-standing and deeply rooted legal precedent;[24] and (3) *Brown* as an example of a court's ability to use social science evidence in legal decision making.[25]

These preliminary findings suggested that *Brown* has had a pervasive and enduring impact beyond its core holding. Left unanswered, however, were the questions of the extent to which, and the manners in which, courts cited to *Brown* in each of the three non-desegregation categories. I returned to the Westlaw database and performed three searches, each search being designed to identify the set of cases belonging to a specific category. In Parts II-IV, I report the results of these searches.

II. THE PERVASIVENESS OF *BROWN'S* INFLUENCE: *BROWN* AS AN EXPLICIT RECOGNITION OF THE NEGATIVE PSYCHOLOGICAL, EMOTIONAL, AND SOCIAL EFFECTS OF DISCRIMINATION

The *Brown* Court minced no words about the negative psychological, emotional, and social effects of state-mandated racial segregation. The Court categorically and explicitly stated that state-mandated racial segregation of school children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[26] The Court found that the short-term effect of this sense of inferiority was "to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."[27] And, the Court determined that in the long-term "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education" as a result of state-mandated racial segregation.[28]

The Court, at least implicitly, acknowledged that any form of state-mandated racial segregation had negative psychological, emotional, and social effects when it declared that its determination regarding the effects of state-mandated racial segregation undermined *Plessy*. The Court stated: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern

23. *See id.*
24. *See id.*
25. *See id.*
26. Brown, 347 U.S. at 494.
27. *Id.* (quoting an unattributed statement by the lower court) (parentheses in original).
28. *Id.* at 493.

authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[29]

The Court's statements in *Brown* and my initial review of recently decided cases suggested that courts might apply *Brown* by analogy to state-mandated actions other than racial segregation that they perceive as creating a sense of inferiority. To investigate this possibility, I used Westlaw to generate a list of all federal and state cases that include the quotation from *Brown* concerning the sense of inferiority created by state-mandated racial segregation.[30] I removed all cases dealing exclusively with racial segregation and examined the remaining cases.

Brown's influence extends beyond racial segregation and is pervasive. First of all, the quotation from *Brown* has been cited at all levels of the federal court system, that is, by the United States Supreme Court,[31] courts of appeal,[32] and district courts;[33] and the quotation also has been cited by at least one judge on two state supreme courts.[34] In addition, courts have cited the quotation from *Brown* with respect to a wide variety of legal issues other than state-mandated racial segregation, including law school affirmative action admissions programs,[35] denial of admission of an all-black

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29. *Id.* at 494-95. For example, the *Plessy* Court, writing in the context of railroad accommodations, had stated:

> Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

30. I generated the list using the ALLCASES database, which contains all federal and state cases (including many unreported cases) decided after 1944. I used a "terms and connectors" search with the following search parameters to locate all cases in which the quotation from Brown had been cited: (brown /5 educ! /p 347 +5 483) /250 "feeling of inferiority". To provide a cutoff date for my research, I appended the following date restriction: & da (bef 01/01/2004).

31. *E.g.*, City of Memphis v. Greene, 451 U.S. 100, 135, 153 (1981) (Marshall, J., with whom Brennan, J. and Blackmun, J. join, dissenting); Evans v. Abney, 396 U.S. 435, 450, 454 (1970) (Brennan, J., dissenting).

32. *E.g.*, Hopwood v. Texas, 78 F.3d 932, 947 (5th Cir. 1996); Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 667 (6th Cir. 1981) (Jones, Circuit Judge, concurring in part and dissenting in part); Lee v. Macon Bd. of Educ., 453 F.2d 1104, 1109-10 (5th Cir. 1971); United Packinghouse, Food & Allied Workers Int'l Union v. NLRB, 416 F.2d 1126, 1136 (D.C. Cir. 1968).

33. *E.g*, Bercovitch v. Baldwin Sch., 964 F. Supp. 597, 598 (D. P.R. 1997); Baldwin v. Ledbetter, 647 F. Supp. 623, 639 (N.D. Ga. 1986); Bailey v. Binyon, 583 F. Supp. 923, 934 (N.D. Ill. 1984); Hobson v. George Humphreys, Inc., 563 F. Supp. 344, 353 (W.D. Tenn. 1982); Sterling v. Harris, 478 F. Supp. 1046, 1052 (N.D. Ill. 1979); St. Augustine High Sch. v. Louisiana High Sch. Athletic Ass'n, 270 F. Supp. 767, 774 (E.D. La. 1967); Dawley v. City of Norfolk, 159 F. Supp. 642, 644 (E.D. Va. 1958).

34. *E.g.*, DeFunis v. Odegaard, 507 P.2d 1169, 1179 (Wash., 1973); State v. Brown, 108 So. 2d 233, 234 (La. 1959).

35. Hopwood v. Texas, 78 F.3d 932, 947 (5th Cir. 1996). In assessing the constitutionality of an affirmative action admissions program run by a state law school, Circuit Judge Wiener, in

high school to a state athletic association,[36] suspension from school of a student with behavioral and emotional problems,[37] segregation from the general student body of students with AIDS,[38] the constitutionality of a city-mandated road closure at the border between a white neighborhood and a black neighborhood,[39] treatment of a trust intended to benefit only white people,[40] the constitutionality of a rule prohibiting co-educational teams in

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his concurring opinion, cited to *Brown* when discussing the potential of racial classifications to stigmatize, and he stated:

> The Court also has recognized that government's use of racial classifications serves to stigmatize. *See, e.g., Brown* (observing that classification on the basis of race "generates a feeling of inferiority"). While one might argue that the stigmatization resulting from so-called "benign" racial classifications is not as harmful as that arising from invidious ones, the current Court has now retreated from the idea that so-called benign and invidious classifications may be distinguished. As the plurality in *Croson* warned, "[c]lassifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility. (internal citation omitted)"

Id. at 947 (Wiener, J., concurring) (internal citations omitted). *Cf. DeFunis*, 507 P.2d 1169, 1179 (upholding an affirmative action program at a state law school the court interpreted *Brown* as forbidding only "invidious racial classification—i.e., those that stigmatize a racial group with the stamp of inferiority").

36. St. Augustine High Sch. v. Louisiana High Sch. Athletic Ass'n, 270 F. Supp. 767, 774 (E.D. La. 1967) (citing *Brown* in an action by an all-black high school for admission to high school athletic association, in conjunction with the observation that "[i]f nothing else, the mere fact of exclusion and segregation of Negroes from whites is injury enough" but that "the effects [in this case were not limited to, and were] more far-reaching than the hampering feelings of inferiority and isolation imposed by the segregated system").

37. *Bercovitch*, 964 F. Supp at 597, 598. The court granted preliminary injunction for reinstatement and reasonable accommodations under Americans with Disabilities Act, Rehabilitation Act, and local law to a student diagnosed with attention deficit-hyperactivity disorder, oppositional defiance order, and childhood depression after being indefinitely suspended from school. *Id.* The court quoted *Brown's* comments on enforced separation, and noting that although *Brown* "addressed the issue of racial segregation in public schools, we find the foregoing statement remarkably appropriate to the matter which is currently before the Court." *Id.*

38. Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440, 447 (N.D. Ill. 1988) (granting a preliminary injunction reinstating an elementary student with AIDS as a full-time student). The court cited *Brown* when discussing the stigma caused by the segregation of students with AIDS:

> The stigma attached to Student #9387 is even greater considering the increased negative importations associated with AIDS. Further, the Supreme Court in [*Brown*], discussing the issue of segregation on the basis of race, stated most succinctly:
>
> > To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.
>
> Similarly, if AIDS-infected children are segregated, they will suffer the same feelings of inferiority the Supreme Court sought to eradicate in *Brown* 34 years ago.

Id. at 447 (internal citations omitted).

39. City of Memphis v. Greene, 451 U.S. 100, 136, 153 (1981) (Marshall, J., with whom Brennan, J. and Blackmun, J. joined, dissenting) (citing *Brown* while observing that closing a street at the edge of a white neighborhood sends a message that damages and stigmatizes the members of the black community who are being blocked from access).

40. Evans v. Abney, 396 U.S. 435, 451, 453-54 (1970) (Brennan, J., dissenting) (internal citations omitted) (relying on *Brown* while arguing that Georgia Supreme Court's failure to use

high school contact sports,[41] treatment of minority principals when schools close as a result of a plan to end desegregation,[42] racial discrimination as a form of unfair labor practice,[43] employment discrimination,[44] housing discrimination,[45] denial of supplemental social security income benefits to patients of public mental hospitals,[46] treatment of children benefiting from

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the *cy pres* doctrine to prevent the failure of a trust intended to benefit only whites violated black citizens' constitutional rights partly because it "conveys an unambiguous message of community involvement in racial discrimination . . . and 'generates (in Negroes) a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone'").

41. Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 667 (6th Cir. 1981) (Jones, Circuit Judge, concurring in part and dissenting in part) (arguing that rules prohibiting coed teams in contact sports might be unconstitutional and observing that "[t]he Supreme Court's reasoning in *Brown* . . . . may prove to be equally applicable to the intentional separation of female athletes from competition with male athletes . . . [although recognizing that] a decision on the stigma question must await a developed factual record and argument by the parties in another case").

42. Lee v. Macon Bd. of Educ., 453 F.2d 1104, 1110 (5th Cir. 1971) (observing in a case where a black principal of an all-black high school sued after losing his job when the school closed that "[w]e find it impossible not to conclude that the same feeling of inferiority inevitably results among the students when the leaders of the educational processes—the principals, the teachers, and administrators—are likewise separated from principals, administrators, teachers, and students of other races").

43. United Packinghouse, Food & Allied Workers Int'l Union, v. NLRB, 416 F.2d 1126 (D.C. Cir. 1968) (invidious discrimination by employer on the basis of race and national origin constituted an unfair labor practice). The court observed:

> The conclusion that racial discrimination may impede its victims in asserting their rights seems inescapable. This docility stems from a number of factors—fear, ignorance of rights, and a feeling of low self-esteem engendered by repeated second class treatment because of race or national origin. Discrimination in employment is no different in this respect than discrimination in other spheres. In its historic decision in *Brown* . . . the Supreme Court stated: "To separate (Negroes) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may effect their hearts and minds in a way unlikely ever to be undone."

Id. at 1136 (parentheses in original).

44. Bailey v. Binyon, 583 F. Supp. 923, 934 (N.D. Ill. 1984) (denying a defendant's motion to dismiss in an employment discrimination case, relying on *Brown* and observing that "[l]anguage . . .allegedly used by [the employer], when addressed to black people, as Chief Justice Warren wrote in a different context, 'generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone'") .

45. Hobson v. George Humphreys, Inc., 563 F. Supp. 344, 353 (W.D. Tenn. 1982). The court relied on *Brown* when holding upon finding violations of the Fair Housing Act and Civil Rights Act of 1866 by real estate broker, noting that "the plaintiffs are entitled to recover damages for humiliation and mental anguish resulting from . . . the intentional racial discrimination [because] they were humiliated, upset and distracted at work as a result." *Id.* This was to "be expected, for as the Supreme Court recognized in [*Brown*] [racial segregation] generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* (internal citation omitted).

46. Sterling v. Harris, 478 F. Supp. 1046, 1052 (N.D. Ill. 1979). In assessing whether termination of supplemental security income benefits upon hospitalization in a public institution was unconstitutional, the judge quoted *Brown,* observing that "the present legislative classification, by denying inmates of public health institutions the funds necessary to purchase personal, non-institutional items, serves to perpetuate 'a feeling of inferiority as to their status in

aid to families with dependent children,[47] and a state statute criminalizing miscegenation.[48]

The *Brown* Court's finding that state-mandated racial segregation in public K-12 schools produces harmful effects has been extended in at least three ways. First, the principle has been extended to actual, physical state-mandated separation based on factors such as gender,[49] emotional and behavioral illnesses,[50] and medical illness.[51] Second, the principle has been extended to state-mandated actions which do not physically segregate, but which have a stigmatizing effect, such as the denial of supplemental social security income benefits to patients of public mental hospitals.[52] Third, the principle has been used to recognize that the psychological and emotional harm that results from discrimination is a compensable form of injury.[53]

None of these courts cited *Brown* for its core holding; therefore, *Brown* did not serve as the primary legal authority for these decisions. Instead, the

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the community . . . (and its) impact is greater when it has the sanction of law.'" *Id.* (internal citation omitted).

47. Baldwin v. Ledbetter, 647 F. Supp. 623, 639 (N.D. Ga. 1986). Considering a challenge by AFDC recipients to a Social Security Act amendment, the court quoted *Brown* as it expressed concern that the effect of the law on "the relationship between the child and the non-custodial parent [may cause] the child support recipient . . . to lose that self-esteem and dignity which accompanies being supported by one's own family." *Id.* (internal citation omitted). The overall effect of the "new found circumstances may be to generate a 'feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.'" *Id.* (internal citation omitted).

48. State v. Brown, 108 So. 2d 233 (La. 1959). In upholding the constitutionality of a Louisiana anti-miscegenation statute, the Louisiana Supreme Court invoked the letter, but not the spirit, of *Brown* in finding an ostensible state interest. The court stated:

> A state statute which prohibits intermarriage or cohabitation between members of different races we think falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Id. at 234.

49. Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 667 (6th Cir. 1981) (Jones, Cir. Judge, concurring in part and dissenting in part) (discussing rules prohibiting coeducational teams in contact sports).

50. Bercovitch v. Baldwin Sch., 964 F. Supp. 597 (D. P.R. 1997) (granting preliminary injunction for reinstatement and reasonable accommodations under Americans with Disabilities Act, Rehabilitation Act, and local law to a student diagnosed with attention deficit-hyperactivity disorder, oppositional defiance order, and childhood depression).

51. Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988) (granting a preliminary injunction reinstating an elementary student with AIDS as a full-time student).

52. Sterling v. Harris, 478 F. Supp. 1046 (N.D. Ill. 1979) (striking down termination of supplemental security income benefits upon hospitalization in a public mental hospital).

53. Bailey v. Binyon, 583 F. Supp. 923 (N.D. Ill. 1984) (employment discrimination case); Hobson v. George Humphreys, Inc., 563 F. Supp. 344 (W.D.Tenn. 1982) (housing discrimination).

courts appeared to view *Brown* as establishing a general legal principle regarding the importance of promoting human dignity and self-esteem or, at a minimum, a general legal principle restricting governmental activities that undermine human dignity and self-esteem. In either event, *Brown* served a facilitative function by providing the courts with an open-ended principle that could be applied in a variety of legal contexts.

III. THE PERVASIVENESS OF *BROWN'S* INFLUENCE: *BROWN* AS AN EXAMPLE OF THE OPERATION OF STARE DECISIS

Brown was a jurisprudential sea change, a sea change made possible only by a court overruling a long-standing precedent that had both a profound importance to existing constitutional jurisprudence and a profound impact on society. The *Brown* Court acted, however, without discussing either its authority to overrule a prior Supreme Court decision or the circumstances in which it would be appropriate to do so. Despite this lack of discussion, numerous courts have cited *Brown* both as authority for the general power of a court to overrule itself and to illustrate the circumstances in which it is appropriate to do so.[54] Before I examine these cases, I begin with a brief description of relevant jurisprudential concepts.

A. STARE DECISIS AND PRECEDENT

Courts at all levels are influenced by the related doctrines of "stare decisis" and "precedent."[55] Stare decisis provides that a legal issue[56] decided by a court of competent jurisdiction remains settled unless the decision is overruled by the deciding court or the deciding court is overruled by a higher court of competent jurisdiction.[57] Thus, for example, any legal issue properly decided by the United States Supreme Court is deemed settled unless and until the Supreme Court overrules itself, that is, unless

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54. *See* Part III.B, *infra*.

55. A thorough examination of the doctrines of "stare decisis" and "precedent" is far beyond the scope of this article. Legal scholars, as well as judges, disagree about the appropriate nomenclature, definition, and application of each of the doctrines. And, no doubt, my characterization of the doctrines will find critics. The interested reader may employ a search of either major electronic database service, which will yield several hundred law review articles on the topic.

56. To put a substantial gloss on the matter, with respect to constitutional questions, the legal issue concerns the selection and interpretation of the applicable constitutional provision(s) in order to determine the existence, scope, and application of a constitutional right. So, for example, one might characterize *Plessy* as having involved the legal issue of whether the Fourteenth Amendment's equal protection clause permitted state-mandated racial segregation if separate but (allegedly) equal facilities were provided.

57. *See* generally William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53 (2002) (discussing "horizontal" and "vertical" stare decisis).

and until the Supreme Court changes its decision regarding the proper resolution of the legal issue. Disagreement exists regarding the circumstances under which a court is permitted to "change its mind" and overrule a previous decision.[58] It is well-settled, however, that the doctrine of stare decisis embodies a strong presumption against overruling a prior decision.

Once a court has decided a legal issue, the doctrine of precedent applies. The doctrine of precedent provides that a court is bound by its own prior decisions and by the decisions of any higher court in its vertical chain of authority.[59] For example, the United States Supreme Court's interpretation of the Fourteenth Amendment is binding on all other federal and state courts because the United States Supreme Court is the highest court in the land with respect to the proper interpretation of the United States Constitution. On the other hand, the United States Supreme Court's interpretation of the Fourteenth Amendment is not binding on a state court that is interpreting a similar provision of its state constitution.[60] Rather, the decision of the United States Supreme Court is merely "persuasive authority."

B. *BROWN* AND STARE DECISIS: THE CASES

My initial review of recently decided cases revealed instances in which courts cited *Brown* in conjunction with discussions concerning whether to overrule a prior decision. To investigate the possibility that courts might regularly cite to *Brown* in this context, I used Westlaw to generate a list of federal and state cases in which *Brown* had been cited in a court's discussion concerning whether to overrule a prior decision.[61] I eliminated those cases that simply referred to the fact that *Brown* had overruled *Plessy*. An examination of the remaining cases revealed that *Brown* has been used

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58. *E.g.* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Thornburg v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986). The Justices' debate concerning when it is permissible—or required—to overrule a prior decision is discussed more fully in Part III.B., *infra* at notes 96-107.

59. *E.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (observing that "a court is always bound to follow a precedent established by a court 'superior' to it").

60. *E.g.*, People v. Antkoviak, 619 N.W.2d 18, 25 (Mich. Ct. App. 2000) ("Indisputably, state courts are free to interpret rights in state constitutions differently than federal courts interpret similar federal constitutional rights.").

61. I generated the list using the ALLCASES database, which contains all federal and state cases (including many unreported cases) decided after 1944. I used a "terms and connectors" search with the following search parameters: (brown /5 educ! /p 347 +5 483) & (brown /255 (overrule or "stare decisis")). To provide a cutoff date for my research, I used the following date restriction: & da (bef 01/01/2004).

to frame judicial debates concerning whether a particular decision should be overruled.

Brown's pervasive influence may be measured by the range of courts that have cited *Brown*, the nature of the legal doctrine being considered, and the nature of the legal issues being considered. First of all, *Brown* has been cited at all levels of the federal court system, which is, by the United States Supreme Court,[62] courts of appeal,[63] and district courts;[64] and *Brown* also has been cited by at least one judge on eleven state supreme courts.[65] In addition, *Brown* has been cited by courts that considered overruling, or that actually overruled, prior decisions involving the United States Constitution,[66] a state constitution,[67] state or municipal legislation,[68] and common

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62. *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981).

63. *E.g.*, Igartua de la Rosa v. United States, 229 F.3d 80, 82 (1st Cir. 2000); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997).

64. *E.g*, United States v. Sampson, 245 F. Supp. 327 (D. Mass. 2003).

65. *E.g.*, Perez v. State, 620 So. 2d 1256 (Fla. 1993); People v. King, 851 P.2d 27 (Cal. 1993); State *ex rel.* Moore v. Molpus, 578 So. 2d 624 (Miss. 1991); Stamper v. Allstate Ins. Co., 766 P.2d 707 (Idaho 1988); Scott v. News-Herald, 496 N.E.2d 699 (Ohio 1986); Giles v. Adobe Royalty, Inc., 684 P.2d 406 (Kan. 1984); Flagiello v. Pennsylvania Hosp., 208 A.2d 193 (Pa. 1965); Williams v. City of Detroit, 111 N.W. 2d 1 (Mich. 1961); Van Dorpel v. Haven-Busch Co., 85 N.W.2d 97 (Mich. 1957); Gallegos v. Midvale City, 492 P.2d 1335 (Utah 1972); State *ex rel.* Sullivan v. Boos, 126 N.W.2d 579 (Wis. 1964); Moskow v. Dunbar, 309 P.2d 581 (Colo. 1957).

66. *E.g.*, *Casey*, 505 U.S. at 833 (discussing, by several Justices, whether it would be appropriate to overrule *Roe v. Wade*); *Thornburgh*, 476 U.S. at 747 (same); *Florida Nursing Home Ass'n*, 450 U.S. 147 (considering whether to overrule a case interpreting the Eleventh Amendment); Mitchell v. W.T. Grant Co., 416 U.S. 600, 629 (1974) (Stewart, J., with whom Douglas, J. and Marshall, J. concur, dissenting) (dealing with the proper scope of procedural due process); *Igartua de la Rosa*, 229 F.3d at 82 (considering whether U.S. citizens residing in Puerto Rico have a constitutional right to vote for president and vice-president in national elections); *Causeway Medical Suite*, 109 F.3d at 1113 (Garza, Cir. Judge, concurring) (considering the constitutionality of a Louisiana abortion statute); New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3rd Cir. 1986) (considering whether the United States and New Jersey Constitutions were violated by municipal ordinances regulating door-to-door canvassing and solicitation).

67. *E.g.*, *Perez*, 620 So. 2d at 1258 (considering whether to overrule a case interpreting the application of the Florida Constitution to a criminal case); *Molpus*, 578 So. 2d at 624 (declining to overrule its previous interpretation of the Mississippi Constitution's initiative and referendum provision); *Scott*, 496 N.E.2d at 699 (interpreting federal and state constitutional provisions relevant to freedom of the press in a defamation case); *Sullivan*, 126 N.W.2d at 590 (Dieterich, J., dissenting) (arguing that the court should depart from precedent and refuse to consider judges "officers" within the meaning of the Wisconsin Constitution); *Moskow*, 309 P.2d at 598 (Sutton, J., dissenting) (examining the constitutionality of a Colorado statute forbidding the Sunday sale of motor vehicles and arguing that the court ought to overrule existing authority permitting such laws).

68. *E.g.*, *King*, 851 P.2d at 42 (Mosk, J., concurring and dissenting) (dissenting from the majority's decision to overrule a case concerning sentencing enhancement under state sentencing statute); *Gallego*, 492 P.2d 1335 (declining to overrule existing precedent concerning the proper interpretation of a statute tolling the statute of limitations in personal injury cases against

law rules.[69] Further, *Brown* has been cited by courts that considered overruling, or that actually overruled, prior decisions dealing with a wide variety of legal issues besides segregation and other forms of racial discrimination, including abortion,[70] the Eleventh Amendment,[71] procedural due process,[72] voting rights for residents of Puerto Rico,[73] defamation in the press,[74] criminal sentencing,[75] insurance,[76] alleged medical malpractice and charitable immunity,[77] sovereign immunity,[78] tolling of statutes of limitation involving personal injury suits against municipalities,[79] workers compensation,[80] state law forbidding the sale of motor vehicles on Sunday,[81] sale of real property,[82] the initiative and referendum provision of the Mississippi Constitution,[83] and the determination of whether judges are

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municipalities); *Van Dorpel*, 85 N.W.2d at 106 (overruling a case interpreting the state's workers compensation statute).

69. *E.g.*, *Stamper*, 766 P.2d at 707, 710 (interpreting uninsured motorist provision of an insurance policy); Flagiello v. Pennsylvania Hosp., 208 A.2d at 193, 207-08 (Penn. 1965) (overruling the judge-made doctrine of charitable immunity); *Williams*, 111 N.W. 2d at 9 (prospectively overruling the judge-made doctrine of sovereign immunity).

70. *E.g.*, *Casey*, 505 U.S. at 833; *Thornburgh*, 476 U.S. at 747.

71. Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981) (considering whether to overrule a case interpreting the Eleventh Amendment).

72. *Mitchell*, 416 U.S. at 629 (Stewart, J., with whom Douglas, J. and Marshall, J. concur, dissenting) (dissenting from majority's action, which was characterized as overruling the existing procedural due process standard).

73. Igartua de la Rosa v. United States, 229 F.3d 80 (1st Cir. 2000) (considering whether U.S. citizens residing in Puerto Rico have a constitutional right to vote for president and vice-president in national elections).

74. Scott v. News-Herald, 496 N.E.2d 699, 719 (Ohio 1986) (Sweeney, J., concurring in judgment only, and dissenting in part) (arguing in favor of retaining existing precedent by refuting the assertion that precedent should not be adhered to because of "a dearth of decisional law" supporting the precedent).

75. Perez v. State, 620 So. 2d 1256, 1257 (Fla. 1993); People v. King, 851 P.2d 27, 42 (Cal. 1993) (Mosk, J., concurring and dissenting) (examining the proper interpretation of a state sentencing statute, dissenting from the majority's decision to overrule a case concerning sentencing enhancement).

76. Stamper v. Allstate Ins. Co., 766 P.2d 707, 710 (Idaho 1988) (using common law to construe an uninsured motorist provision in an insurance policy).

77. Flagiello v. Pennsylvania Hosp., 208 A.2d 193 (Pa. 1965) (overruling the judge-made doctrine of charitable immunity).

78. Williams v. City of Detroit, 111 N.W. 2d 1, 9 (Mich. 1961) (overruling prospectively the judge-made doctrine of sovereign immunity).

79. Gallegos v. Midvale City, 492 P.2d 1335, 1338 (Utah 1972) (declining to overrule existing precedent concerning the proper interpretation of a statute tolling the statute of limitations in personal injury cases against municipalities).

80. Van Dorpel v. Haven-Busch Co., 85 N.W.2d 97, 106 (Mich. 1957) (overruling an interpretation of a workers compensation statute).

81. Moskow v. Dunbar, 309 P.2d 581, 598 (Colo. 1957) (Sutton, J., dissenting).

82. Giles v. Adobe Royalty, Inc., 684 P.2d 406, 411 (Kan. 1984) (providing that its decision to overrule precedent would have only prospective application).

83. State *ex rel.* Moore v. Molpus, 578 So. 2d 624 (Miss. 1991).

"officers" within the meaning of the Wisconsin Constitution.[84] While these cases suggest *Brown* has had a pervasive impact on American jurisprudence concerning the operation of stare decisis, the more specific nature of that impact still remains to be discussed.

Although *Brown* overruled a long-standing precedent, the *Brown* Court did not specifically address the doctrine of stare decisis. Rather, after acknowledging that its decision turned on the "effect of segregation on public education,"[85] the Court looked at the then-current conditions in society and the then-current state of "psychological knowledge"[86] concerning the impact of state-sanctioned segregation.[87] This line of reasoning implies that the *Brown* Court believed a court may overrule a previous decision if the theoretical underpinnings of the earlier decision no longer are valid and the decision has a harmful effect. In the absence of a clear statement concerning the theory of stare decisis on which it was operating, however, *Brown's* legacy depends upon how courts choose to use these cryptic statements and the general context within which the *Brown* Court chose to overrule *Plessy*.

Broadly speaking, courts use *Brown* in one of four ways. First, *Brown* is sometimes cited with little or no discussion, apparently as a naked example of a court's authority to overrule itself.[88] Because the general authority of a court to overrule itself is so well-settled, one supposes that this use of *Brown* represents both a manifestation of the adage that "one should provide a citation for every legal point" and a means of saying "if the United States Supreme Court recognizes a court's power to overrule itself, that's good enough for this court." This use of *Brown* is content neutral because it permits a court to overrule a prior decision regardless of whether doing so has a "liberal" or a "conservative" impact. Thus, this use of *Brown* is facilitative, only.

Second, courts cite *Brown* as authority for the proposition that a court may overrule itself even with respect to a case that spawned a long-standing line of authority[89] and even where overruling a case may have a significant

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84. State *ex rel.* Sullivan v. Boos, 126 N.W.2d 579, 590 (Wis. 1964) (Dieterich, J., dissenting).

85. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

86. *Id.* at 494.

87. *See id.* at 494-95 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.").

88. *See, e.g.*, Junot v. Lee, 372 So. 2d 707, 710 (La. Ct. App. 1979) (in a "malicious prosecution" case, relying on *Brown*, among other cases, to illustrate the ability of a court to overrule itself).

89. *See, e.g.*, Igartua de la Rosa v. United States, 229 F.3d 80, 88-89 (1st Cir. 2000) (characterizing *Brown* as involving a situation that "required corrective judicial action even in the

impact on society.[90] This use of *Brown* also is content neutral because it permits a court to overrule a prior decision regardless of whether doing so has a "liberal" or "conservative" impact. Again, this use of *Brown* is facilitative, only.

Third, courts cite *Brown* as an example of a court involving itself in an issue by overruling a prior case in order to protect a politically powerless group when the political branches had not involved themselves to remedy the problem.[91] This use of *Brown* is not content specific; it may be used with respect to any legal issue. Nonetheless, because of its emphasis on protecting the politically powerless, this use of *Brown* presumably will tend to assist in producing a "liberal" outcome.

The fourth—and most numerous—category of cases cite *Brown* as an example of a court overruling a case that is wrong, that is, in error. Several variations on this theme can be identified. In one subset of these cases, courts view *Brown* as an example of a court overruling itself when there has been a change in the circumstances upon which the initial decision was based. The circumstances might involve some form of societal change[92] or a change in society's understanding of the proper scope of "constitutionally protected civil rights."[93] In another subset of these cases, courts view

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face of longstanding legal precedent [such as *Plessy*]"). *See also* State *ex rel.* Sullivan v. Boos, 126 N.W.2d 579, 590 (Wis. 1964) (Dieterich, J., dissenting) (interpreting the Wisconsin Constitution to determine whether state judges are "officers," citing and describing *Brown* as "the United States [S]upreme [C]ourt's historic school-desegregation decision which overturned the age-old 'separate but equal' doctrine first announced by that court in *Plessy*").

90. *See, e.g.*, Giles v. Adobe Royalty, Inc., 684 P.2d 406, 411 (Kan. 1984) ("Retroactive application of a change of interpretation of the Constitution affects an untold number of persons and constitutional rights. This difficulty is apparent from the constitutional history of the past thirty years, commencing in 1954 with [*Brown*] which *overruled* [*Plessy*], thereby making separate but equal educational facilities unconstitutional.").

91. *See, e.g.*, *Igartua*, 229 F.3d at 80. The court characterized *Brown* as involving a situation that required corrective judicial action even in the face of longstanding legal precedent. In Brown, the Court recognized that, as the ultimate interpreter and protector of the Constitution, it must at times fill the vacuum created by the failure or refusal of the political branches to protect the civil rights of a distinct and politically powerless group of United States citizens. *Id.* at 88-89 (internal citations omitted).

92. *See, e.g.*, *Boos*, 126 N.W.2d at 590 (Dieterich, J., dissenting) (observing that the *Brown* Court based its decision at least in part on an assessment of changed role of public education in American society circumstances since *Plessy*); Williams v. City of Detroit, 111 N.W.2d 1, 26 (Mich.1961) (stating "it is the peculiar genius of the common law that no legal rule is mandated by the doctrine of *stare decisis* when that rule was conceived in error or when times or circumstances have so changed as to render it an instrument of injustice."); Van Dorpel v. Haven-Busch Co., 85 N.W.2d 97, 106 (Mich. 1957) (asserting changed conditions permitted it to overrule earlier interpretation of a workers' compensation statute although the relevant statutory language had not changed, and describing *Brown* as an example of case where "[b]etween th[e] two decisions the Constitution had not changed. Nothing had changed but the hearts and minds of men.").

93. Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 152 (1981) (Stevens, J., concurring) (internal citation omitted) (observing he would not overrule a decision with which he disagreed because it "did not announce a rule of law

Brown as an example of a court overruling itself when the original case was wrongly decided and produced harmful effects.[94] In a third subset of these cases, courts view *Brown* as an example of a court overruling itself when it came to conclude that the prior decision was somehow wrong or was based on a mistaken concept.[95] Again, the uses of *Brown* falling within this category are content neutral.

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fundamentally at odds with our current understanding of the scope of constitutionally protected civil rights" and citing *Brown* as an example of when overruling on such grounds was permissible); People v. King, 851 P.2d 27, 42 (Cal. 1993) (Mosk, J., concurring and dissenting) (dissenting from majority's decision to overrule a case concerning sentencing enhancement, stating, "It must be conceded that there have been rare occasions in our history when human progress required alteration of previous judicial conclusions. Abandonment of the 'separate but equal' doctrine in *Brown* . . . is a prime example.").

94. State *ex rel.* Moore v. Molpus, 578 So. 2d 624, 635 (Miss. 1991) Deciding not to overrule a case interpreting the Mississippi Constitution's initiative and referendum provision, the court observed:

> One accepted ground for judicial overruling of a demonstrably erroneous prior constitutional interpretation is that, across the years, it has produced great and sustained harm; . . . if it is 'clearly . . . hurtful . . . .' The test is an objective one, that [is, that the court] find[s] over time the precedent has repeatedly had a substantial adverse or significantly harmful effect upon the people. Nationally, we think of *Brown* . . . ([which overruled an] interpretation of [the] Equal Protection Clause that allowed state-imposed racial segregation).

Id. (internal citations omitted).

95. Gallegos v. Midvale City, 492 P.2d 1335 (Utah 1972) (examining proper interpretation of a state statute concerning tolling the statute of limitations in cases against municipalities, and declining to overrule the existing interpretation). The court cited *Brown* as an illustration that it was permissible to overrule a case in order to correct error, but decided that the original decision in the case had been decided correctly. *Id.* at 1138 (internal citation omitted). Citing *Brown* and a state case, the court stated:

> We have no disagreement with the proposition that if an error has been committed in the judicial interpretation or application of the law it should not be regarded as so cast in concrete that it must live in perpetuity. When such an error is recognized, the same authority which made it has the power, and should have the willingness, to correct it.

Id. (internal citation omitted). *See also* Stamper v. Allstate Ins. Co., 766 P.2d 707, 709-10 (Idaho 1988) (Bistline, J., dissenting). In *Stamper*, the majority adhered to precedent and denied recovery to the insured. *Id.* The dissent criticized the majority for adhering to precedent despite an error in original decision. *Id.* The dissent cites *Brown* as authority for the position that a court may correct obvious error, which he asserted was the case, and he stated:

> The doctrine of *stare decisis* is an important one in the field of jurisprudence: it provides our society with a certain degree of stability. For example, it enables citizens to ascertain what conduct is—and is not—permissible. As a result, no competent jurist takes lightly the task of overruling settled precedent. Nevertheless, experience often correctly teaches that prior decisions were wrongly decided in the first place. *See, e.g. Brown* . . . (overruling "separate but equal" doctrine enunciated in Plessy). Otherwise put, *stare decisis* should not command a blind allegiance to obvious error.

Id. at 709 (internal citation omitted). *See also* Williams v. City of Detroit, 111 N.W. 2d 1, 26 (Mich. 1961) (overruling the judge-made doctrine of sovereign immunity and citing *Brown* stating "it is the peculiar genius of the common law that no legal rule is mandated by the doctrine of *stare decisis* when that rule was conceived in error or when times or circumstances have so changed as to render it an instrument of injustice."); Moskow v. Dunbar, 309 P.2d 581, 598 (Colo. 1957) (Sutton, J., dissenting) (examining the constitutionality of a state statute forbidding Sunday sale of

The courts' use of *Brown* in each of the previous four broad categories of cases was more-or-less ad hoc, opportunistic, if you will. *Brown* was cited when it would advance or facilitate the argument being made by the particular court or judge. *Brown* was not cited as part of a comprehensive explication of a philosophy of stare decisis. In two cases, however, various members of the United States Supreme Court cited *Brown* as part of an on-going debate concerning the proper role of stare decisis in the decision whether to overrule a case that establishes an interpretation of the United States Constitution. A full discussion of each side's position is far beyond the scope of this chapter; however, several general observations are offered.

In *Planned Parenthood v. Casey*,[96] and *Thornburg v. American College of Obstetricians and Gynecologists*,[97] a number of Justices considered the proper role of stare decisis in their decision whether to overrule *Roe v. Wade*.[98] In the most recent case, *Casey*, Justices O'Connor, Kennedy, and Souter authored a joint opinion in which they discussed their interpretation of the doctrine of stare decisis and explained the role that stare decisis played in their decisions not to vote to overrule *Roe v. Wade*. They asserted that a case establishing a constitutional principle could be overruled only if a "special reason" existed, such as an alteration in the facts upon which the original case had been faced; that the prior decision had been wrongly decided was not sufficient by itself to justify overruling the decision.[99] In their view, the benefits of adhering to a prior decision outweigh the costs of allowing a wrongly decided case to stand—unless there is some additional, special reason for overruling the prior decision. To overrule a case merely because a majority of the then-current Court believe the prior decision to be wrong would jeopardize the Court's legitimacy by making the Court appear to be as political as the other two branches of government.[100]

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motor vehicles and citing *Brown* as an example of a court overruling a prior decision when it "believed the case was based upon a mistaken concept").

96. 505 U.S. 833 (1992).

97. 476 U.S. 747 (1986).

98. 410 U.S. 113 (1973).

99. They explained their decision, stating:

> Because neither the factual underpinnings of *Roe's* central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown) the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.

Id. at 864 (citing Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)).

100. The Justices offered the following quotation from *Mitchell v. W.T. Grant Co.* in support of their position:

To illustrate the situations in which they believed special circumstances would warrant overruling a decision, Justices O'Connor, Kennedy, and Souter analyzed two occasions on which the Supreme Court had—correctly in their view—overruled itself with respect to a major constitutional issue. Their analysis included the following description of *Brown*:

> The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy's* time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. (citation omitted) Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, see *Plessy* . . . (Harlan, J., dissenting), we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine was on this ground alone not only justified but required.
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> . . .
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> *Brown* . . . rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. [*Brown*] was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decision [was] thus comprehensible [it was] also defensible, not merely as the victor[y] of one doctrinal school over another by dint of numbers (victor[y] though [it was]), but as [the] application[] of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept

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> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

Id. (quoting *Mitchell*, 416 U.S. at 636).

each decision to overrule a prior case as a response to the Court's constitutional duty.[101]

The Justices then concluded that no special reason existed for overruling *Roe v. Wade*.[102]

Chief Justice Rehnquist and Justices, White, Scalia, and Thomas disagreed and took the position that the Court had the power—indeed the obligation—to overrule a case on a constitutional issue when the case was wrongly decided.[103] No special reason was needed. *Brown* was justified by the simple fact that *Plessy* originally had been decided incorrectly as a matter of constitutional law.[104] They asserted that the Court improves, not undermines, its stature when it overrules erroneous decisions.[105]

The debate in *Casey* is reminiscent of an earlier debate. In *Thornburgh v. American College of Obstetricians and Gynecologists*,[106] the Court examined the constitutionality of a Pennsylvania abortion statute. Justice White, with whom then-Justice Rehnquist joined, dissented from a majority decision that struck down aspects of the statute.[107] Justice White cited

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101. *Casey*, 505 U.S. at 863-64.

102. *Id.* at 869; *see also Mitchell*, 416 U.S. at 636 (Stewart, J., dissenting). Justice Stewart offered a similar analysis of when it was proper to overrule a constitutional case. *Id.* at 630. Concluding that no reason existed for departing from precedent, he observed:

> I would add, however, a word of concern. It seems to me that unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so. (internal citation omitted) A substantial departure from precedent can only be justified, I had thought, in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment. (citing *Brown*) Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of stare decisis.

Id. at 634-35.

103. *See, e.g., Casey*, 505 U.S. at 944 (Rehnquist, C.J., concurring in part and dissenting in part) ("We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.").

104. *See id.* at 962-63 (Rehnquist, C.J., concurring in part and dissenting in part). According to Rehnquist:

> The Court in *Brown* simply recognized, as Justice Harlan had recognized beforehand, that the Fourteenth Amendment does not permit racial segregation. The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground alone the Court was justified in properly concluding that the *Plessy* Court had erred.

Id.

105. *Id.* at 963. ("The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution.").

106. 476 U.S. 747 (1986).

107. *Thornburgh*, 476 U.S. at 785 (White, J., with whom Rehnquist, J. joins, dissenting).

Brown as an application of the principle that the Court may overrule a constitutional case solely because it was incorrect when originally decided.[108]

The debates in *Casey* and *Thornburgh* about the proper interpretation and application of stare decisis likely never will be settled. Yet, the fact that *Brown* is used to frame the debate indicates that *Brown* will continue to play a central role in the jurisprudence regarding the circumstances under which a court may overrule a case consistently with the doctrine of stare decisis. The relevance of *Brown* to this debate may be seen by the fact that several lower courts have cited to it.[109] It should be noted, however, that either interpretation of *Brown* is content neutral, that is, does not necessarily lead to liberal or conservative decisions.

Overall, while it appears that *Brown* will continue to be cited as an example of the operation of stare decisis, it also appears that *Brown's* role will continue to be more facilitative than substantive. Courts will continue to disagree about the nature of *Brown's* relevance to the operation of stare decisis. Courts will continue to cite *Brown* to justify a conclusion that a case should or should not be overruled, rather than to provide an objective rule or test either for when a prior decision should be overruled or for what the new rule of law, if any, should be.

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108. Justice White wrote:

> The Court has therefore adhered to the rule that *stare decisis* is not rigidly applied in cases involving constitutional issues . . . and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution. *Stare decisis* did not stand in the way of the Justices who, in the late 1930's, swept away constitutional doctrines that had placed unwarranted restrictions on the power of the State and Federal Governments to enact social and economic legislation (internal citations omitted). Nor did *stare decisis* deter a different set of Justices, some 15 years later, from rejecting the theretofore prevailing view that the Fourteenth Amendment permitted the States to maintain the system of racial segregation. In both instances, history has been far kinder to those who departed from precedent than to those who would have blindly followed the rule of *stare decisis*. And only last Term, the author of today's majority opinion reminded us once again that "when it has become apparent that a prior decision has departed from a proper understanding" of the Constitution, that decision must be overruled.
>
> In my view, the time has come to recognize that *Roe v. Wade*, no less than the cases overruled by the Court in the decisions I have just cited, "departs from a proper understanding" of the Constitution and to overrule it.

Id. at 787-88 (internal citation omitted).

109. Circuit Judge Garza referred to this debate in his concurring opinion in Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997) (considering the constitutionality of a Louisiana abortion statute). *See also* Perez v. State, 620 So. 2d 1256, 1258-64 (Fla. 1993) (Overton, Justice, concurring) (discussing *Casey* at length before concluding he would overrule precedent because no special reason existed for doing so beyond his belief the original case was wrongly decided).

IV. THE PERVASIVENESS OF *BROWN'S* INFLUENCE: *BROWN* AS AN EXAMPLE OF THE USE OF SOCIAL SCIENCE

The *Brown* Court's conclusion that separate educational facilities were inherently unequal rested, at least in part, on the Court's determination that such facilities had a negative psychological and sociological impact on minority schoolchildren.[110] The Court stated:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.
>
> . . .
>
> To separate [children in grade school and high school] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> > "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."[111]

The Court's determination concerning the negative effect of segregation was based—at least in part—on social science research. In the text of its decision, the Court stated that its conclusion was based on contemporary "psychological knowledge" concerning the effects of segregation. [112] The Court supported its conclusion with a footnote listing

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110. Brown v. Bd. of Educ., 347 U.S. 483, 493-94 (1954).

111. *Id.*

112. *Id.* at 494 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.").

the citations of five social science research projects.[113] Thus, the Court took judicial notice of the results of social science research studies and used that information as a legislative fact, that is, as the foundation for the constitutional principle it established. [114]

The legislative fact regarding the impact of state-mandated segregation was, of course, binding on the Court and on all lower courts in the context of state-mandated racial segregation in public K-12 education. In addition, the Court's determination regarding the psychological and sociological effects of segregation was applied by analogy to strike down the separate-but-equal doctrine as it was being applied to ethnic segregation in public education[115] and in a wide variety of non-educational circumstances, such

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113. *Id.* at 494 n.11 (citing KENNETH B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950); HELEN LELAND WITMER & RUTH KOTINSKY, PERSONALITY IN THE MAKING: THE FACT-FINDING REPORT OF THE MIDCENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH, chap. VI (1952); Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948); Isidor Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT. J. OPINION AND ATTITUDE RES. 229 (1949); THEODORE BRAMELD, EDUCATIONAL COSTS, *in* DISCRIMINATION AND NATIONAL WELFARE 44-48 (Robert M. MacIver, ed., 1949); FRAZIER, THE NEGRO IN THE UNITED STATES 674-681 (1949); and citing generally GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944)).

114. One court provided the following—representative—description of legislative facts:

> "Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern [only] the parties." By examining scientific articles outside the record of the instant case, we can determine what course of action to take with regards to the reliability of the [scientific test at issue in the case]. The facts contained in those scientific articles do not concern only the parties to the instant case, and are therefore "legislative facts" within the context of this opinion.

Emerson v. State, 880 S.W.2d 759, 764-65 (Texas Crim. App.1994) (quoting Weinstein & Berger, WEINSTEIN'S EVIDENCE ¶ 200(03)).

Legislative facts are to be distinguished from "adjudicative facts." Adjudicative facts are "facts about the particular event which gave rise to the lawsuit and, like all adjudicative facts, . . . [help] explain who did what, when, where, how, and with what motive and intent."

Id. at 765 (quoting MCCORMICK ON EVIDENCE § 328).

115. For example, in *Texas Educ. Agency*, the Fifth Circuit relied in part on *Brown* to conclude that the segregation of Mexican-American students was unconstitutional. United States v. Texas Educ. Agency, 467 F.2d 848, 863 n.21 (5th Cir. 1972) (en banc), *aff'd after remand*, 532 F.2d 380 (5th Cir. 1976), *remanded sub nom.* ("The relationship between racial segregation and educational, psychological, and social harms was established long ago. We see no reason to believe that ethnic segregation is any less detrimental than racial segregation." (internal citations omitted)); *see also* United States v. Texas, 506 F. Supp. 405, 414 (E.D. Tex. 1981). According to that court:

> The adverse impact of racial or ethnic segregation upon school children is well documented. As the Supreme Court observed more than a quarter-century ago, segregation 'generates a feeling of inferiority as to their status in the community which may affect their hearts and minds in a way unlikely ever to be undone.' Such treatment affects, not only educational achievement, but social and psychological development as well.

as parks,[116] beaches and swimming pools,[117] golf courses,[118] and public transportation.[119]

These uses of *Brown* and the initial review of recently decided cases suggested that courts might rely on *Brown* as authority to use social science research results in other contexts. In order to investigate this possibility, Westlaw was used to generate a list of such cases.[120]

Brown's influence arguably is pervasive. First, *Brown* has been cited at all levels of the federal court system, that is, by the United States Supreme Court,[121] courts of appeal,[122] and district courts;[123] and *Brown* has been cited by at least one judge on several state supreme and intermediate appellate courts.[124] In addition, *Brown* has been cited by courts to authorize the use of social science research with respect to a wide variety of legal issues other than desegregation of public K-12 schools, including the constitutionality of two prisoners in a single prison cell;[125] the constitutionality

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Id. (internal citation omitted).

116. *See, e.g.*, Dep't of Conservation & Dev., v. Tate, 231 F.2d 615 (4th Cir. 1956).

117. *See, e.g.*, City of St. Petersburg v. Alsup, 238 F.2d 830, 831-32 (5th Cir. 1956); Dawson v. Mayor of Balt., 220 F.2d 386, 388 (4th Cir. 1955), *aff'd* 350 U.S. 877 (1955).

118. *See, e.g.*, Holmes v. City of Atlanta, 223 F.2d 93, 103 (5th Cir. 1955).

119. *See, e.g.*, Morrison v. Davis, 252 F.2d 102 (5th Cir. 1958); Browder v. Gayle, 142 F. Supp. 707, 717 (D.D.C. 1956), *aff'd* 352 U.S. 903 (1956).

120. I generated the list of relevant cases using the ALLCASES database, which contains all federal and state cases (including many unreported cases) decided after 1944. After consulting with a Westlaw reference attorney, I used a "terms and connectors" search with the following search parameters to locate all cases in which the quotation from *Brown* had been cited: (brown /5 educ! /p 347 +5 483) /250 ("social science" or empirical or psychological or sociological). To provide a cutoff date for my research, I appended the following date restriction: & da (bef 01/01/2004).

121. *E.g.*, Missouri v. Jenkins, 515 U.S. 70, 114 (1995). (Thomas, J., concurring); Rhodes v. Chapman, 452 U.S. 337, 369 (1981) (Marshall, J., dissenting); Castaneda v. Partida, 430 U.S. 482, 501 (1977) (Marshall, J., concurring).

122. *E.g.*, Grutter v. Bollinger, 288 F.3d 732, 773 (6th Cir. 2002) (en banc) (Boggs, Cir. Judge, dissenting), *aff'd* 539 U.S. 306 (2003); Ortiz v. City of Philadelphia, 28 F.3d 306, 319 (3rd Cir. 1994) (en banc) (Lewis, Circuit Judge, dissenting); Dunagin v. City of Oxford 718 F.2d 738 (5th Cir. 1983); United States v. Bd. of Sch. Comm'rs, 503 F.2d 68 (7th Cir. 1974).

123. *See, e.g*, Democratic Party of the U.S. v. Nat'l Conservative Political Action Comm., 578 F. Supp. 797, 797, 830 n.96 (E.D. Pa. 1983); Horson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

124. *See, e.g.*, State v. Cromedy, 727 A.2d 457 (N.J. 1999); Emerson v. State, 880 S.W.2d 759 (Texas Crim. App. 1994); State v. Mitchell, 563 S.W.2d 18, 34 (Miss. 1978) (Shangler, Special Judge, dissenting); State v. Flemino, No. C5-02-617, 2003 WL 21061236, at *11 (Minn. Ct. App. 2003) (Randall, concurring specially); Brust v. Brust, 266 So. 2d 400 (Fla. Dist. Ct. App. 1972); City of Pittsburgh v. Plumbers Local Union No. 27, Nos. C1122, C1123, 1965 WL 1337, at *10 (Pa. Co. Ct. 1965).

125. Rhodes v. Chapman, 452 U.S. 337, 369 (1981) (Marshall, J., dissenting) (examining whether the housing of two prisoners in one cell at a state prison violated the constitutional prohibition against cruel and unusual punishment).

of the death penalty;[126] the constitutionality of an affirmative action admissions program at a public law school;[127] the constitutionality of a state law banning the intrastate advertising of alcohol;[128] the constitutionality of campaign finance limitations;[129] the constitutionality of methods of remedying public school segregation;[130] whether a jury instruction regarding cross-racial identification is constitutionally required in certain criminal cases;[131] whether a state voter-purge statute violated the Voting Rights Act;[132] and the effect of racial discrimination by a labor union.[133]

It is worth noting that these cases do not require that unanimity exist among social scientists in order for a court to take judicial notice of social science research. Some courts made this observation to buttress the use of social science research results in a particular case. For example, in *State of New Jersey v. Cromedy*,[134] the court relied on social science research to support a constitutional requirement that cross-racial identification jury instructions be given in appropriate cases despite recognizing that a "snapshot of the literature reveals that although many scientists agree that witnesses are better at identifying suspects of their own race, they cannot agree on the extent to which cross-racial impairment affects identification .... The research also indicates disagreement about whether cross-racial impairment affects all racial groups."[135]

To other courts, the observation that social scientists disagree on research results reflects a criticism of basing constitutional principles on social science research. For example, dissenting from a decision upholding the University of Michigan Law School's admissions policy, which employed race as a factor, Circuit Judge Boggs observed:

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126. McCleskey v. Kemp, 753 F.2d 877, 888 (11th Cir. 1985) (examining the constitutionality of the death penalty in light of an alleged disparate impact in the application of the death penalty based on race).

127. *Grutter*, 288 F.3d at 805.

128. Dunagin v. City of Oxford, 718 F.2d 738, 748-49 n.8 (5th Cir. 1983) (assessing the effect of advertising on alcohol consumption while examining whether a state law banning intrastate liquor advertising violated commercial speech interests).

129. Democratic Party of the U.S. v. Nat'l Conservative Political Action Comm, 578 F. Supp. 797, 830 n.46 (E.D. Pa. 1983).

130. Horson v. Hansen, 269 F. Supp. 401, 406-06 (D.D.C. 1967).

131. State v. Cromedy, 727 A.2d 457, 462-63 (N.J. 1999) (determining whether the United States Constitution required a jury instruction on cross-racial identification).

132. Ortiz v. City of Philadelphia, 28 F.3d 306, 319 (3rd Cir. 1994) (en banc) (Lewis, Circuit Judge, dissenting).

133. City of Pittsburgh v. Plumbers Local Union No. 27, Nos. C1122, C1123, 1965 WL 1337, at *10 (Pa. Co. Ct.) (concerning effect of union discrimination on African-Americans).

134. 727 A. 2d 457 (N. J. 1999).

135. *Cromedy*, 727 A.2d at 462.

> Even more fundamentally, social science data as to the efficacy, in the eyes of one or another researcher, of policies of discrimination are themselves of limited utility in resolving the ultimate constitutional issue. At the time of *Brown* . . . there were certainly researchers with academic degrees who argued that segregated education would provide greater educational benefits for both races.[136]

Such statements not only reflect skepticism about social science research, but evidence a concern that social science evidence might be marshaled to support contradictory constitutional rules. Indeed, Judge Boggs went on to state:

> Does anyone think that a factual belief in such analyses would have, or should have, led to a different constitutional outcome in *Brown*? I very strongly doubt it. Similarly, research asserting that Jews and Gentiles in fact interacted more harmoniously under Lowell's Harvard plan would not justify that policy either.[137]

Additionally, at least one court attempted to limit *Brown's* effect by arguing that in the particular case the record of evidence, including social science research, indicated that separate educational facilities did not produce any psychological harm.[138]

Other courts have noted that social science research results may be subject to a variety of conceptual and methodological criticisms.[139] Indeed, even the sociological statements in *Brown* have been criticized,[140] with Justice Thomas, for example, noting that "[t]he studies cited in *Brown I* have received harsh criticism."[141]

Apart from the concerns about contradictory and methodologically questionable research results, some judges have been troubled by the practice of grounding—even in part—constitutional rights on social science

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136. Grutter v. Bollinger, 288 F.3d 732, 805 n.37 (6th Cir. 2002) (Boggs, Circuit Judge, dissenting), *aff'd* 539 U.S. 306 (2003).

137. *Id.*

138. *E.g.*, Stell v. Savannah-Chatham County Bd. of Educ., 220 F. Supp. 667 (S.D. Ga. 1963).

139. *E.g.*, United States v. Bd. of Sch. Comm'rs, 503 F.2d 68, 84, 85 n.21 (D. Ind. 1974) (citing articles criticizing the work of an expert witness, the exclusion of whose testimony ultimately was upheld).

140. Missouri v. Jenkins, 515 U.S. 70, 120 n.2 (1995). (Thomas, J., concurring).

141. *See id.* (asserting "there simply is no conclusive evidence that desegregation either has sparked a permanent jump in the achievement scores of black children, or has remedied any psychological feelings of inferiority black schoolchildren might have had").

research.[142] They believe that constitutional rights exist independently, based, for example, on the original intent of the Framers.[143] Therefore, these courts would be critical of basing constitutional rights on even a well-established, unanimous set of well-designed social science research projects. Typical of statements reflecting this perspective is the following comment offered by Justice Thomas:

> *Brown I* . . . did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. As the Court's unanimous opinion indicated: "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences.[144]

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142. *Id.* For an interesting examination of Justice Thomas' concerns regarding the use of social science, see Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1 (1997).

143. *E.g.*, Jenkins, 515 U.S. 70 at 20 n.2 (Thomas, J., concurring). For an interesting examination of Justice Thomas' originalist predispositions, *see* Smith, *supra* note 141.

144. *Jenkins*, 515 U.S. at 120 n.2 (1995) (internal citations omitted). *See also* Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983). The court in *Dunagin* stated:

> The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court. *E.g., Brown* . . . (the effect of segregation upon minority children).
>
> . . . .
>
> There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction and illegal in another? Should the fundamental principles of equal protection delivered in Brown . . . be questioned if the sociological studies regarding racial segregation set out in the opinion's footnote 11 are shown to be methodologically flawed? The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are transcendent.

While both the sociological approach and the specific social science research results used in *Brown* have not met with unanimous agreement, *Brown* nonetheless serves as the focal point, the organizing case for the debate, at least within the context of the psychological impacts of segregation and discrimination.

Courts have not confined their use of *Brown* to cases involving constitutional issues, however. Several courts have cited *Brown* to support the use of social science research results and scientific techniques in the determination of party-specific, case-specific adjudicative facts.[145] For example, in *Ortiz v. City of Philadelphia, Office of the City Commissioners Voter Registration Division*, Circuit Judge Lewis referred to social science works, including at least one work cited by the *Brown* court, in dissenting from the majority's finding that a voter purge statute removing inactive votes did not violate the Voting Rights Act.[146] And in *City of Pittsburgh v. Plumbers Local Union No. 27*, the court based its conclusion in part on social science research regarding "various facets of discrimination such as is here established and its effects upon its victims."[147]

Brown also has been cited to justify the use of hard science in determining adjudicative facts. In *Emerson*, the court took judicial notice of "it would take judicial notice of reliability of both theory underlying horizontal gaze nystagmus (HGN) test and its technique for purpose of determining whether testimony regarding HGN test was admissible as expert testimony."[148]

Dunagin, 718 F.2d at 748 n.8 (internal citations omitted).

145. *See* notes 145-46 and accompanying text, *infra*.

146. Ortiz v. City of Philadelphia, 28 F.3d 306, 326 (3rd Cir. 1994) (Lewis, J., dissenting) (relying upon MYRDAL, *supra* note 112).

147. City of Pittsburgh v. Plumbers Local Union No. 27, 1965 WL 1337, at *15 (Pa. Co. Ct.). The court stated:

> We would note in conclusion that we have looked to the studies introduced by the City of a department of the local Urban League in the determination of various facets of discrimination such as is here established and its effects upon its victims. In the school segregation opinion, the Supreme Court of the United States supported its conclusion that segregation has detrimental social and economic effects by citing a number of sociological and psychological studies: (citing *Brown*). The lengthy record doubtless is too lengthy. In accordance with the power vested in the trial judge to control the course of a trial, limited only by statute and constitutional requirements, we attempted to use common sense and legal discretion as to what should be here permissible.

Id.

148. Emerson v. State, 880 S.W.2d 759, 765 (Texas Crim. App. 1994). The court noted:

> [T]hat the United States Supreme Court, in United States v. Leon . . . relied upon the technique of judicial notice to gain access to important facts which formed the basis of that decision. In Leon, the Court cited a series of social science articles concerning the effects of the exclusionary rule on the criminal justice system, most of which were the result of the Court's independent investigation. The conclusion of those articles, that

Courts also have used *Brown* as an example of the appropriate use of social science when criticizing courts that have created rules without an empirical basis. For example, in *State v. Flemino*,[149] the court criticized a court-established rule permitting expert testimony for the legal conclusion that a child suffered sexual abuse. The court stated:

> The *Myers* court cited no sociological studies or identifiable and reliable empirical data to prove that juries in child abuse cases are so hamstrung by the "enormity of the charge," that they are helpless unless experts for the state patiently explain to them that, yes, this minor was sexually abused and yes, when she described the abuse, she was truthful. There is simply no reliable way to defend this proposition in *Myers*.[150]

And courts have used *Brown* as an example of the appropriate use of social science research while declining to do so in the particular case. For example, in *Brust v. Brust*,[151] the court declined to resort to social science research while determining whether it would retain a presumption that the mother in a divorce case was better suited than the father to care for children of "tender years."[152]

Overall, it appears that *Brown* will continue to be cited as an example of the role of social science research in judicial decision-making and that *Brown*'s role will continue to be more facilitative than substantive. Courts will continue to disagree about the situations in which social science research is relevant and will continue to cite Brown to justify the use of such research. *Brown*, however, does not provide an objective rule or test either for when social science research should be used or what the new implications of its use, if any, should be.

> the exclusionary rule has a significant negative impact on the rate of prosecutions and convictions of felony arrestees, was an essential element of the Court's decision to create a good faith exception to the warrant requirement.

Id. at 765 n.2 (internal citations omitted). *See also* State v. Mitchell, 563 S.W.2d 18, 34 (Miss. 1978) (Hangler, Special Judge, dissenting) (taking notice of existing scientific research regarding whether marijuana is addictive).

149. State v. Flemino, No. C5-02-617, 2003 WL 21061236, at *12 (Minn. App. 2003).

150. *Id.* Footnote 2 in the quoted passage cited *Brown* and stated: "The use of credible sociological data in this fashion is exemplified by *Brown* [at 495 n.11]. . . . There, the United States Supreme Court relied on numerous sociological and psychological studies to support the proposition and holding that segregation is inherently detrimental to minority children in schools." *Id.*

151. 266 So. 2d 400 (Fla. Dist. Ct. App. 1972).

152. *See id.* at 402 (noting that "[u]nlike the Federal Supreme Court's dilemma in Brown v. Board of Education, it is not necessary for this Court to resort to sociological dissertations in construing the jurisprudence of this State.").

V. CONCLUSION

Brown has had a profound and enduring impact on American jurisprudence. *Brown* eviscerated the separate-but-equal doctrine. This is its greatest legacy. But *Brown* continues to exert a broader influence on American jurisprudence.

At its core, *Brown* concerned human rights, human dignity, and self-esteem, concepts with no logical boundary on their application. Courts have seized hold of these themes and have applied them in an ever-increasing variety of circumstances.

Brown also represented a monumental break with legal precedent, a break that brought tremendous conflict to the legal system. Despite—or, perhaps, because of—the Court's silence regarding its theory of stare decisis, courts cite to *Brown* as a single example of when it is appropriate to overrule precedent. The *Brown* Court's silence has meant, however, that courts offer conflicting interpretations of *Brown* and cite to *Brown* opportunistically. As it is likely *Brown* will remain one of a handful of truly monumental cases in which the Court overruled itself, *Brown* likely will continue to be at the heart of any serious discussion of stare decisis.

Brown represents a classic example of the use of social science research in judicial decision making. Once again, despite—or, perhaps, because of—the Court's silence regarding its theory of when the use of social science research is warranted, courts cite to *Brown* as a signal example of when such use is appropriate. The Court's failure to provide a clear statement of when such use is permissible has resulted in courts citing to *Brown* opportunistically, whenever and however it seems to support the current court's desired outcome.

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