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Assessing the Efficacy of School Desegregation

Michael Heise
Cornell Law School, michael.heise@cornell.edu

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Michael Heise†

CONTENTS

INTRODUCTION

Future civil rights scholarship is likely to be more empirical than conceptual, particularly in the school desegregation area.[1] The Supreme Court's *Brown v. Board of Education* decision[2] fueled a national quest for the definition and fulfillment of a crucial civil right: equal educational opportunity. The courts were assigned or assumed the task of defining for the nation what equal educational opportunity means in terms of race. Indeed, many commentators describe the courts' efforts to define and secure equal educational opportunity through school desegregation as among the nation's most important—and perhaps most visible—civil rights struggles in the second half of the twentieth century.[3] The struggle for equal educational opportunity that already

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† Assistant Professor of Law and Director, Program in Law and Education, Indiana University School of Law, Indianapolis. A.B., Stanford University; J.D., University of Chicago Law Schoo ; Ph.D., Northwestern University.

1. For a discussion about civil rights scholarship in the voting rights area, see Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Groffman eds., 1994)).

2. Brown I, 347 U.S. 483 (1954).

3. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE (1976); Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 237 (1969); George W. Spicer, *The*

spans generations is far from over and, indeed, may never end. Despite decades of significant judicial involvement in the school desegregation effort, many empirical questions about the efficacy of the courts' involvement persist and have been ignored far too long by legal scholars.

The Court's evolving understanding of what the Constitution requires in terms of school desegregation complicates and therefore prolongs the nation's quest for equal educational opportunity. Although the *Brown* decision put an end to *de jure* school segregation,[4] it has been used as legal authority for later court decisions that do much more. Three subsequent decisions demonstrate the Court's evolving understanding of what the Constitution guarantees and what it requires from public school boards.

First, *Green v. County School Board*[5] illustrates that the Constitution requires school boards to do more than refrain from segregative activities. In *Green*, the Court articulated school boards' duty not only to desegregate but also to create unitary school systems.[6] Second, three years later, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court provided "guidelines" that placed in grave constitutional danger student assignment policies that had the effect of creating racially identifiable schools, such as assignments based on neighborhoods or other geographic criteria.[7] Third, the allocation of evidentiary burdens in *Keyes v. School District No.1* effectively exposed school boards to liability for the segregative effects of policies not under their direct control, including policies that influenced residential housing patterns.[8]

This evolving constitutional doctrine, and the related legal uncertainty created by it, provided one source of momentum for school desegregation litigation during the decades following *Brown*. In many ways, little has changed. School desegregation doctrine continues to evolve, uncertainty continues to cloud many legal issues, and as a result, desegregation litigation endures. Indeed, the country remains engaged

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Federal Judiciary and Political Change in the South, 26 J. POLITICS 154, 176 (1964).

4. *Brown I*, 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.").

5. 391 U.S. 430 (1968).

6. *Id.* at 437-38 ("School boards . . . operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert a unitary system . . . .").

7. 402 U.S. 1, 25 (1971).

8. 413 U.S. 189, 207-08 (1973).

in school desegregation efforts more than forty years since the *Brown* decision.

Unfortunately, data describing the extent of the nation's engagement with school desegregation are scarce. One recent survey reports that 960 school districts attempted to desegregate between 1968 and 1986.[9] In 1990, the Department of Education's Office for Civil Rights reported that 256 school districts, with a total combined student enrollment exceeding two million, operated under court supervision in school desegregation cases brought by the Justice Department.[10] In addition, of the forty-four members of the Council of the Great City Schools, an organization of the nation's largest urban public school districts, only four had *not* implemented a school desegregation plan by the 1990-91 school year.[11]

The school desegregation effort does not operate in a vacuum. Important concurrent efforts include those designed to improve and reform schools and school systems. However, the nation's current quest for better schools now appears to be eclipsing the school desegregation movement. Recent educational reform efforts reflect concerns about educational excellence and quality.[12] The 1983 publication of *A Nation At Risk* alerted many Americans to a crisis facing the nation's educational system.[13] The report argued that our static educational system creates profound risks for our increasingly dynamic economy and society.[14] In its assessment of the risks posed, the report did not mince words: "[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and as a people."[15] *A Nation At Risk*, and the

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9. KARL TAUBER, RESEGREGATION OF PUBLIC SCHOOL DISTRICTS, 1968-1986 (Univ. of Wisconsin-Madison, Center for Demography and Ecology Working Paper No. 90-16, 1990).

10. David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV. 61, 63 n.20 (citing OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., 1990 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS SURVEY: COURT-ORDERED SCHOOL DISTRICTS (1990)).

11. COUNCIL OF THE GREAT CITY SCHOOLS, NATIONAL URBAN EDUCATION GOALS: BASELINE INDICATORS, 1990-91, 81 n.28 (1992).

12. *See, e.g.*, NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983) [hereinafter A NATION AT RISK].

13. *Id.*

14. *Id.* at 6-8.

15. *Id.* at 5.

numerous reports and studies it prompted,[16] helped to elevate concerns about educational excellence and quality over desegregation to the top of many subsequent reform efforts.[17] These recent reform efforts are more likely to address such issues as a school's standards, governance, and resources than a school's racial composition.[18]

Even in relative decline, the school desegregation movement continues to cast a large and important shadow over educational policy and reform. However, much of the current school desegregation activity, in stark contrast to earlier activity, focuses on when to cease judicial oversight.[19] Moreover, courts continue to find new limits to desegregation remedies' breadth, scope, and contours. During its past term, the Supreme Court in *Missouri v. Jenkins* reversed a lower court's requirement that the state of Missouri continue to fund educational programs in Kansas City under a school desegregation order because of stubborn and undesirable gaps between minority and non-minority student achievement levels.[20] The Court noted that numerous external factors beyond the school board's control influence minority student achievement.[21] According to the Court, factors that do not stem from school segregation should not guide judicial remedies.[22] Insistence

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16. *See, e.g.*, CARNEGIE FORUM ON EDUCATION AND THE ECONOMY, A NATION PREPARED: TEACHERS FOR THE TWENTY-FIRST CENTURY (1986); EDUCATION COMMISSION OF THE STATES, ACTION FOR EXCELLENCE (1983); EDUCATION COMMISSION OF THE STATES, THE NEXT WAVE: A SYNOPSIS OF RECENT EDUCATION REFORM REPORTS (1987). For a review of these reports and others, see Joseph Murphy, *The Educational Reform Movement of the 1980s: A Comprehensive Analysis*, *in* THE EDUCATIONAL REFORM MOVEMENT OF THE 1980S, PERSPECTIVES & CASES (Joseph Murphy ed., 1990).

17. Evidence mounts on educational excellence concerns' displacement of traditional school desegregation concerns. *See, e.g.*, Chris Hansen, *Are the Courts Giving Up?: Current Issues in School Desegregation*, 42:3 EMORY L.J. 863 (1993) (symposium issue focusing on current school desegregation issues—school desegregation's relative decline is suggested).

18. *See, e.g.*, Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (codified at 20 U.S.C. § 5801-6084 (Supp. 1994)).

19. *See, e.g.*, Freeman v. Pitts, 112 S. Ct. 1430, 1443-46 (1992) (permitting withdrawal of judicial supervision over desegregation plan before full compliance has been achieved); Board of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991) (emphasizing that judicial supervision over school desegregation was intended to be temporary); Chip Jones, Comment, Freeman v. Pitts: *Congress Can (and Should) Limit Federal Court Jurisdiction in School Desegregation Cases*, 47 SMU L. REV. 1889 (1994) (arguing that Congress can limit federal court jurisdiction over desegregation cases); Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759 (1993) (arguing that school districts seek unitary status with caution).

20. 115 S. Ct. 2038, 2055 (1995).

21. *Id.* at 2056.

22. *Id.*

upon the contrary unwarrantably postpones the return of control to local school boards.[23]

Partly because visions about equal educational opportunity remain unfixed, it is important to assess the efficacy of school desegregation efforts with empirical rigor. A more objective understanding of what judicial school desegregation did and did not accomplish will help judges and policy makers assess competing educational policy options. An empirically grounded understanding of desegregation's results will also benefit larger research questions that extend beyond the civil rights arena and into the legal impact arena.

Similar to traditional school desegregation scholarship, legal impact scholarship remains largely underdeveloped and overwhelmingly non-empirical.[24] What little empirically based legal impact research that does exist is largely descriptive.[25] A recent and important contribution to this "small but exceedingly stimulating and valuable" literature is illustrative.[26] In *The Hollow Hope*, Professor Rosenberg asks, "To what degree, and under what conditions, can judicial processes be used to produce political and social change?"[27] Although not the first to address this important question, Professor Rosenberg's treatment of it includes an assessment of the effect of the *Brown* decision on school integration levels.[28] His empirical approach, though helpful, is

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23. *Id.*

24. For possible explanations why many legal scholars typically avoid empirical research, see Peter H. Schuck, *Why Don't Law Professors Do Much Empirical Research?*, 39 J. LEGAL EDUC. 323, 323-36 (1989) (identifies possible reasons for a dearth of empirical legal research and proposes a possible remedy). Of course, important contributions to the legal impact work already exist, and some of these are empirical. Notable examples include: PAUL T. HILL & DOREN L. MADEY, EDUCATIONAL POLICYMAKING THROUGH THE CIVIL JUSTICE SYSTEM (1982) (examines the implementation of federal handicapped legislation through federal courts); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM (1982) (analyzes effects of non-desegregation courts decisions on educational policy); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). Despite these and other helpful contributions, the legal impact literature remains decidedly underdeveloped.

25. *See, e.g.*, HILL & MADEY, *supra* note 24; HOROWITZ, *supra* note 24; R. Shep Melnick, THE POLITICS OF THE NEW PROPERTY: WELFARE RIGHTS IN CONGRESS AND THE COURTS (1991); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983); GERALD N. ROSENBERG, *supra* note 24.

26. Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1764 (1991).

27. ROSENBERG, *supra* note 24, at 1.

28. *See generally* Schuck, *supra* note 26, at 1765 n.8 (review of ROSENBERG, *supra* note 24, and GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF

descriptive rather than inferential and raises even more questions than it settles.

Important questions about the courts' contribution to the school desegregation movement endure despite substantial judicial activity. By approaching these questions from an empirical perspective, *Forced Justice* increases our understanding about school desegregation in particular and the relation between courts and social policy more generally.[29] As a result, *Forced Justice* represents a solid contribution to the maturing school desegregation and, to a lesser extent, legal impact literatures. Written by David J. Armor, a leading social scientist and school desegregation expert, *Forced Justice* benefits from Armor's empirical skills, balanced presentation of data, as well as his healthy respect for ambiguity, those who disagree with him, and the limits of data. With his lucid presentation of data and systematic analysis of school desegregation, Armor contributes much needed calm to a civil rights arena noted for its passion and ideology.

Despite its strengths, *Forced Justice* will disappoint some readers. One group includes those seeking an intimate, personal, or anecdotal account of the impact of school desegregation on students, families, and communities. Such accounts, and they are numerous, helpful, and important, appear elsewhere.[30] The second group in for a disappointment includes those expecting to find one-sided or distorted analyses. Armor can be characterized accurately as a participant-observer due to his long involvement with desegregation battles across the country.[31] Over the years, Armor has participated in school desegregation cases as an expert, typically on behalf of defendant school districts.[32] *Forced Justice* certainly expresses Armor's point of view on various school desegregation issues. However, to Armor's credit, *Forced Justice* presents counter-arguments fairly and evidences a measured, deliberate, and judicious approach towards the difficult task of assessing school desegregation efforts and their results. *Forced Justice* has its limitations, but a distorted or limited presentation of data and analyses are not among them.

PROGRESSIVE LAW PRACTICE (1992)).

29. DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW (1995).

30. *See, e.g.*, J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985).

31. ARMOR, *supra* note 29, at vi.

32. ARMOR, *supra* note 29, at vi.

Part I of this essay summarizes the information that *Forced Justice* presents in its evaluation of school desegregation's major assumption and whether desegregation achieved its stated goals. Part II analyzes Armor's proposed "equity choice" proposal—his effort to find common ground between a declining school desegregation movement and an ascending school choice movement.[33] Part III moves beyond *Forced Justice*'s contribution to school desegregation literature and explores its relevance to the legal impact literature.

I. SCHOOL DESEGREGATION AND AN ASSUMPTION

Armor's major research project in *Forced Justice* is to present and discuss data on school desegregation and its effects. The harm and benefit thesis—a foundational assumption upon which much school desegregation activity rests—receives particular and much needed attention. Armor doesn't set out to prove or disprove the validity of this thesis. Rather, his more circumscribed goal is to illustrate the inconclusiveness of the thesis' supporting evidence.

A. School Desegregation: What Happened and What Did Not

Given the vast judicial resources that the nation's courts have invested (and continue to invest) in school desegregation efforts, it is logical to ask what these efforts have accomplished. How much desegregation has occurred in public schools is one obvious question. Unfortunately, even this relatively straightforward question defies a simple answer. Vigorous disputes about how to define and measure school desegregation cloud further already murky water.[34] These disputes aside, what Armor finds is that available data too often provide inconclusive evidence on many aspects relating to the overall effectiveness of school desegregation remedies and their effects.[35]

Although school desegregation's inherent complexities and the lack of consensus on crucial definitions and measures work against accurate or helpful generalizations about school desegregation's effects, Armor offers a few on three important questions. First, school districts with formal desegregation plans enjoy greater desegregation gains than districts without plans.[36] Thus, from the narrow perspective of

33. ARMOR, *supra* note 29, at 228-33.
34. ARMOR, *supra* note 29, at 158-65.
35. ARMOR, *supra* note 29, at 208-10.
36. ARMOR, *supra* note 29, at 185.

increasing desegregation, implementing a school desegregation plan appears more effective than doing nothing. Second, mandatory desegregation plans generate more racial balance[37] (one measure of school desegregation) than voluntary plans,[38] but less interracial exposure[39] (another common desegregation measure). Third, one cost of implementing either type of desegregation plan is white flight.[40] Specifically, both mandatory and voluntary school desegregation plans contribute to white flight, especially in larger public school systems located near suburban or private school systems and serving relatively high percentages of minority students.[41]

As Armor notes, current student enrollment trends in larger public school systems temper any hope one might glean from school desegregation's results.[42] Simply put, it is unlikely that school desegregation measures will improve by any meaningful degree in the future.[43] If anything, they are likely to worsen. School desegregation requires, by definition, a sufficient number of white students. White students, however, are becoming increasingly scarce in many public school systems, particularly urban ones, due partly to demographic reasons as well as white flight. As a result, an increasingly desegregated public school experience is less likely for many minority students, especially Hispanics.[44]

B. Harm and Benefit Thesis

Forced Justice pays considerable attention to the harm and benefit thesis. The thesis, as Armor notes, "has played the greatest role in the evolution of school desegregation policy."[45] Construed broadly, the harm and benefit thesis contains two distinct but related components. The first holds that segregated schools harm the educational and academic achievement of minority students.[46] Specifically, segregated schools reinforce negative racial stereotypes that harm minority students

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37. ARMOR, *supra* note 29, at 163-66.
38. ARMOR, *supra* note 29, at 188.
39. ARMOR, *supra* note 29, at 163-66.
40. ARMOR, *supra* note 29, at 180.
41. ARMOR, *supra* note 29, at 180.
42. ARMOR, *supra* note 29, at 208-10.
43. ARMOR, *supra* note 29, at 208.
44. GARY ORFIELD & FRANKLIN MONFORT, STATUS OF SCHOOL DESEGREGATION: THE NEXT GENERATION at v (1992).
45. ARMOR, *supra* note 29, at 8.
46. ARMOR, *supra* note 29, at 8-9.

and reduce their self-esteem. The second component holds that school desegregation benefits minority students' academic achievement and improves their self-esteem.[47] While minority students gain long-term educational and social benefits, all of society benefits from improved race relations.[48]

Armor's focus on the harm and benefit thesis is well placed as it continues to receive attention from judges and social scientists. The *Brown* opinion,[49] particularly its footnote citing social science research exploring segregation's effects on children,[50] immeasurably increased the harm and benefit thesis' influence on the judiciary. Whether, or to what degree, the integrity of the Court's *Brown* opinion relies upon a social science finding of harm remains a subject of debate.[51] Nevertheless, Armor notes that the thesis influenced "numerous lower courts" and has been invoked by "many civil rights groups and social scientists to justify and defend both comprehensive racial balance remedies and an extension of these remedies to *de facto* situations."[52]

Forced Justice's attention to the harm and benefit thesis and its influence on school desegregation is also timely. Debates about the thesis in the social science and legal arenas persist. Moreover, recent debates evidence how they have changed over time. The social science statement submitted by the appellants in the *Brown* case explicitly limited the harm and benefit thesis' application to *de jure* segregation settings.[53] In sharp contrast is a federal government report released fourteen years later which expanded the thesis' application to *de facto* segregation.[54] After more than two decades of additional research, the social science community became more cautious. The most recent social science statement, released in 1991, reflects school

47. ARMOR, *supra* note 29, at 8-9.
48. ARMOR, *supra* note 29, at 8-9.
49. 347 U.S. 483 (1954).
50. *Id.* at 494 n.11.
51. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57 (1978).
52. ARMOR, *supra* note 29, at 22.
53. *The Effects of Segregation and the Consequences of Desegregation*, 37 MINN. L. REV. 427 (1953).
54. U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).

desegregation's inconsistent research findings and expresses a more tempered endorsement of school desegregation.[55]

Similar to social scientists, judges' endorsement of the harm and benefit thesis has waned over time. In *Brown*, a unanimous Court concluded that racially "separate schools are inherently unequal"[56] and "[s]eparation of white and colored children in public schools has a detrimental effect upon the colored children."[57] Justice Marshall argued this perspective more than three decades later in *Board of Education v. Dowell*.[58] In *Dowell*, Justice Marshall's dissenting opinion argued against lifting a desegregation decree "so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remains feasible methods of eliminating such conditions."[59] However, other Justices less sanguine about the harm and benefit thesis have revisited it in more recent opinions. For example, Justice Thomas recently voiced his uneasiness with the thesis' research foundation as well as its assumptions: "It never ceases to amaze me that the courts are so willing to assume that anything predominately black must be inferior."[60] Justice Thomas also characterized much of the early desegregation research as "questionable" and the harm and benefit thesis as resting on an "assumption of black inferiority."[61] The juxtaposition of Justices Marshall and Thomas illustrate markedly different perspectives. Where Justice Marshall finds insult in one-race schools, Justice Thomas (and perhaps Scalia) find insult in the assumption that one-race schools are constitutionally unacceptable.[62] It is into this increasingly turbulent debate that *Forced Justice* injects much needed data.

Armor's assessment of the harm and benefit thesis synthesizes data on the relation between school desegregation and student achievement as well as on other outcomes such as self-esteem and race relations.[63] After conceding one obvious point, that forced racial segregation is both

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55. Brief for the NAACP et al., as Amicus Curiae in Support of Respondents at 1a, Freeman v. Pitts, 503 U.S. 467 (1992) (No. 89-1290).

56. 347 U.S. 483, 495 (1954).

57. *Id.* at 494.

58. 111 S. Ct. 630 (1991).

59. *Id.* at 639 (Marshall, J., dissenting).

60. *Jenkins*, 115 S. Ct. at 2061 (Thomas, J., concurring).

61. *Id.* at 2062.

62. Brian K. Landsberg, *Equal Educational Opportunity: The Rehnquist Court Revisits* Green *and* Swann, 42 EMORY L.J. 821, 838 (1993).

63. ARMOR, *supra* note 29, at 76-111.

wrong and unconstitutional, Armor develops a different and decidedly less obvious point: "no major component of the [harm and benefit] thesis receives unequivocal support from available evidence."[64] Specifically, the suggested harms to minority students attending segregated schools, as well as the gains to minority students attending desegregated schools, have not been conclusively demonstrated.[65] Indeed, the most striking theme suggested by school desegregation data is the variation in outcomes in student achievement, self-esteem, and race relations.[66]

While Armor raises important questions concerning the evidence purporting to support the harm and benefit thesis, it is also important to look carefully at his argument and its structure. Armor's critique of the harm and benefit thesis gains considerable advantage from subtle burden shifting. Consider the task of establishing a relation between desegregation and student achievement. Armor acknowledges that such a task is difficult, if not impossible.[67] Indeed, psychometric limits and formidable methodological hurdles almost insure against finding conclusive evidence pointing in any direction. By artfully and implicitly assigning to the harm and benefit thesis' proponents the onerous burden of establishing a causal connection between desegregated schooling and student achievement gains, Armor creates a potentially overwhelming evidentiary burden. In contrast, Armor saves for himself the relatively easy task of demonstrating that evidence on the relation between desegregation and student achievement is inconclusive. By achieving his comparatively limited goal, Armor wins the rhetorical skirmish.

Thankfully, Armor is a gracious winner. He quickly points out that even inconclusive evidence cannot sustain the inference that school desegregation efforts lack merit or even benefits.[68] However, he notes that desegregation levels have never reached the degree envisioned by its advocates.[69] Given current enrollment trends, they are likely to get worse. Also, Armor correctly notes that school desegregation efforts can be expensive.[70] Armor estimates annual costs for many desegregation plans at approximately $1,000 per desegregated student.[71] This

64. ARMOR, *supra* note 29, at 112.
65. ARMOR, *supra* note 29, at 112.
66. ARMOR, *supra* note 29, at 112.
67. ARMOR, *supra* note 29, at 76.
68. ARMOR, *supra* note 29, at 112.
69. ARMOR, *supra* note 29, at 208.
70. ARMOR, *supra* note 29, at 221.
71. ARMOR, *supra* note 29, at 221.

additional cost to the taxpayer is substantial, particularly since the nation spends, on average, just over $5,400 on each public elementary and secondary school student.[72] It is precisely within the context of the "modest and variable benefits attributable to desegregated schools," that Armor raises the uncomfortable but important question involving desegregation's costs.[73] To Armor, whether school desegregation efforts' benefits exceed their costs remains an open question.[74]

II. SCHOOL DESEGREGATION AND CHOICE

About the same time that the Court began providing school districts with more concrete guidance on how to end judicially supervised desegregation activities and achieve unitary status,[75] an old educational policy idea—school choice—re-emerged.[76] The educational research literature has described the current school choice movement as "the single most rousing idea in the current school reform debate,"[77] and "the most prevalent reform idea of the 1990s."[78] Despite the growing popularity of school choice policies, few scholars address the potentially uncomfortable point where school choice and desegregation intersect. Armor does not shy away from this complex intersection, and deserves credit for the effort. Unfortunately, his attempt to reconcile school desegregation and school choice comes up short in a few important respects.

As Armor knows well, school choice policies vary considerably. The array of terms used to describe such school choice policies—"controlled choice," "limited choice," and "public

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72. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, DIGEST OF EDUCATIONAL STATISTICS 165 (1994) (Table 166).

73. ARMOR, *supra* note 29, at 221.

74. ARMOR, *supra* note 29, at 221.

75. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467 (1992); Board of Educ. v. Dowell, 498 U.S. 237 (1991).

76. Allowing parents to choose education for their children is hardly a novel idea. Modern school choice proposals are forty years old and popularly attributed to Milton Friedman. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1962); Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123-44 (Robert A. Solo ed., 1955).

77. Ernest L. Boyer, *Foreword* to SCHOOL CHOICE: EXAMINING THE EVIDENCE at xi (Edith Rasell & Richard Rothstein eds., Economic Policy Institute 1993).

78. John F. Witte, *Public Subsidies for Private Schools: What We Know and How to Proceed*, 6:2 EDUC. POL'Y 206, 206 (1992); *see also* Philip T.K. Diamond, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome?*, 43 DEPAUL L. REV. 1 (1993).

choice"—attempt to capture the variety of approaches toward such issues as allowance for interdistrict options, racial and ethnic balance, and funding.[79] Most choice policies, which include interdistrict open-enrollment plans, magnet schools, and intradistrict choice plans, are publicly funded and restrict educational options to specific sets and subsets of families and public schools. School choice programs confined to public schools do not generally evoke the degree of controversy that private school choice or voucher programs do.[80] The less prevalent though more controversial and well-known form of school choice—voucher programs—presently dominates the public debate surrounding educational choice.

Private funds support all but one of the nation's major educational voucher programs, and these programs currently operate in Indianapolis, Milwaukee, and San Antonio.[81] Because these voucher programs do not receive public dollars, they side-step difficult Establishment Clause and regulatory issues. However, a long-awaited constitutional showdown appears inevitable as more states, cities, and school districts experiment more aggressively with voucher programs. For example, in addition to hosting one of the nation's largest privately funded voucher programs, Milwaukee is also home to the nation's largest and most visible publicly funded voucher program. The Milwaukee Parental Choice Program, launched in 1990, initially only included qualified secular private schools.[82] However, it was recently modified to include qualified religious schools.[83] Not surprisingly, the program has attracted litigation since its inception.[84]

Although important differences distinguish the array of school choice programs, these programs share two important principles. First, school choice programs, in varying degrees, seek to provide more families, particularly low-income families, with greater access to more educational opportunities. Increasing low-income families' access to the private school market is the centerpiece of the major voucher programs. Only families whose household income qualifies them for federal reduced lunch programs are eligible to participate.[85]

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79. Michael Johanek, *Private Citizenship and School Choice*, 6:2 EDUC. POL'Y 139, 139-40 (1992).

80. Witte, *supra* note 78, at 207.

81. *See generally* PRIVATE VOUCHERS (Terry M. Moe ed., 1995).

82. Witte, *supra* note 78, at 211.

83. WIS. STAT. ANN. §§ 119.01-.84 (West 1991 & 1995).

84. *See, e.g.*, Witte, *supra* note 78, at 212.

85. *See* PRIVATE VOUCHERS, *supra* note 81.

Second, by increasing the influence of market forces school choice programs seek to increase the influence of private choice and contract in the area of student assignments to schools. One crucial and frequently debated assumption is that parents have an incentive and are able to seek out educational opportunities for their children.[86] Unfortunately, this assumption and others remain woefully understudied. The relative absence of large-scale school choice programs, particularly voucher programs, helps explain the paucity of empirical data that might shed light on such assumptions in addition to the effects of school choice policies on students, families, and schools.[87] Despite this data vacuum, the school choice debate continues to grow.[88]

Much of this debate addresses the growing perception that complex bureaucratic factors overly encumber public schools and impede their ability to respond to changing educational needs. School choice proponents argue that such policies offer parents greater control over their children's education.[89] Increased parental control over student assignments should give schools an incentive to become more responsive to their students' needs. Other proponents note that choice policies might create nongeographic communities that would help establish and enforce desired norms and behaviors.[90] Increased pluralism is another possible product of school choice.[91] Moreover, traditional cost-benefit analysis supports school choice policies. Specifically, the ability of many private schools to provide the same or better educational services than many public schools[92] for generally less cost escapes few careful observers.[93] Also, Chubb and Moe argue, in sharp contrast to their critics, that school choice policies should increase educational equity

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86. *See, e.g.*, Amy S. Wells, *The Sociology of School Choice: Why Some Win and Others Lose in the Educational Marketplace*, *in* SCHOOL CHOICE: EXAMINING THE EVIDENCE (Edith Rasell & Richard Rothstein eds., Economic Policy Institute 1993).

87. Witte, *supra* note 78.

88. For example, one indicator of this growth is that an entire issue of a scholarly journal, 6:2 EDUC. POL'Y (1992), is devoted to school choice articles.

89. *See generally* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990).

90. James S. Coleman, *Changes in the Family and Implications for the Common School*, 1991 U. CHI. LEGAL F. 153, 166-68 (1991).

91. Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, 1991 U. CHI. LEGAL F. 171, 176 (1991).

92. *See generally* CHUBB & MOE, *supra* note 89; *see also* JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES 57-95 (1987).

93. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, DIGEST OF EDUCATIONAL STATISTICS 72, 163 (1994) (Tables 61, 165).

because private schools promote some aspects of educational equality more effectively than public schools.[94] According to its supporters, school choice policies will improve America's schools by directly addressing structural aspects of educational service, production, and delivery.[95]

However, many school choice critics fear just the opposite. While conceding that choice policies might not destroy public school systems, critics argue that school choice will impoverish and further reduce public confidence in public school systems, and lead to a two-tiered educational system.[96] Other critics suggest that school choice policies, if implemented, will likely exacerbate "racial and social-class segregation and stratification."[97] Also, several scholars have attacked the major quantitative work supporting school choice.[98] Still others cite to administrative burdens and associated costs incident to establishing and maintaining school choice programs[99] and the necessary oversight needed to protect against fraud and waste[100] as possible problems that might eliminate any benefits attributable to school choice policies.

The school choice debate will not subside anytime soon. In the meantime, as academics, policy analysts, and others continue to argue over the merits and nuances of school choice policies, state legislatures—the governmental units primarily charged with the constitutional duty to educate students—and local school boards continue to explore and implement various school choice policies. Approximately twenty states already have implemented programs described as school choice.

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94. John E. Chubb & Terry M. Moe, Politics, Markets, and Equality in Schools, Paper Presented at the Annual Meeting of the American Political Science Association in Chicago (Sept. 3-6, 1992).

95. CHUBB & MOE, *supra* note 89, at 217 ("Without being too literal about it, we think reformers would do well to entertain the notion that choice is a *panacea*.") (emphasis in original).

96. *See, e.g.*, Arnold F. Fege, *Private School Voucher: Separate and Unequal*, *in* WHY WE STILL NEED PUBLIC SCHOOLS 221, 221-35 (Art Must, Jr. ed., 1992); Eli Ginsburg, *The Economics of the Voucher System*, 72 TCHRS. C. REC. 373, 373-82 (1971).

97. Wells, *supra* note 86, at 30.

98. The major quantitative work is presented in CHUBB & MOE, *supra* note 87. Although reactions to Chubb & Moe's work were swift and furious, it remains unclear whether any shed new light. *See, e.g.*, Witte, *supra* note 78, at 206. SCHOOL CHOICE: EXAMINING THE EVIDENCE, *supra* note 77, at chs. 8, 9. For a response, see Chubb & Moe, *The Forest and the Trees: A Response to our Critics*, *in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 219-40 (Edith Rasell & Richard Rothstein eds., Economic Policy Institute 1993).

99. CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE: A SPECIAL REPORT (1992) [hereinafter CARNEGIE FOUNDATION].

100. Sugarman, *supra* note 91, at 171, 179-82.

Thirteen have done so in the past decade.[101] In addition to state efforts, scores of school districts have introduced choice programs.[102]

Developing and implementing school choice programs are difficult tasks. Desegregation concerns along with the interaction of school choice and desegregation policies increase the difficulty of these tasks. Armor argues that the current school "choice movement has no direct relation to desegregation movement."[103] However, because school choice and desegregation policies involve the distribution of students among schools[104] they necessarily involve each other in important respects. Moreover, the historical legacy of earlier school choice efforts links the current school choice and desegregation movements.

School choice policies' lineage no doubt hinders current choice efforts. Many school choice policies launched soon after judicial desegregation efforts began in earnest were designed to thwart public school desegregation. Shortly after *Brown*, some southern states attempted to use school choice policies as a vehicle to enable white families to circumvent school desegregation efforts.[105] Courts took a dim view of such transparent policies. In Louisiana, for example, a district court overturned a voucher statute designed to help fund white flight from newly desegregated schools.[106] A subsequent Louisiana statute adopted a different approach for the same end.[107] This voucher statute focused on parents' rights to influence their children's education.[108] The court, noting Louisiana's growing history of resistance to school desegregation, struck down the statute, declaring that its intent and effect were to maintain segregation.[109]

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101. *See generally* CARNEGIE FOUNDATION, *supra* note 99; ARMOR, *supra* note 29, at 226.

102. *See generally* CARNEGIE FOUNDATION, *supra* note 99; ARMOR, *supra* note 29, at 226.

103. ARMOR, *supra* note 29, at 212.

104. ARMOR, *supra* note 29, at 225.

105. Diamond, *supra* note 78; Henry Levin, *Market Approaches to Education: Vouchers and School Choice*, 11 ECON. EDUC. REV. 279, 280 (1992); Amy S. Wells, *Choice in Education: Examining the Evidence of Equity*, 93 TCHRS. C. REC. 137, 140 (1991).

106. Hall v. St. Helena Parish Sch. Dist., 197 F. Supp. 649, 651 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).

107. Louisiana Financial Assistance Commission, Act 147 of 1962 (LSA-R.S. 17:2951-:2959).

108. *Id.*

109. Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 88 S. Ct. 693 (1968).

Also in 1968, the Supreme Court's *Green v. New Kent County* decision forged an indelible bond between school choice and desegregation.[110] *Green* involved a two-school district in Virginia.[111] After years of state-enforced segregation, in 1965 the school district reluctantly adopted a "freedom of choice" student assignment plan.[112] The plan did little to desegregate the two schools.[113] As a result, the plan's critics argued that it failed to provide equal educational opportunity in a school system with a recent *de jure* segregative past.[114] The Supreme Court agreed with the freedom of choice plan's critics and invalidated the plan.[115] In a harshly worded opinion, a unanimous Court required the school board to develop an alternative plan that promised to promptly convert the school district into one "without a 'white' school and a 'Negro' school, but just schools."[116]

The weight of school choice's historical legacy on current choice efforts is unclear. Also unclear is what the racial composition of America's public schools would look like if parents rather than public school officials determined student assignments. Although Armor speculates that unrestricted school choice policies "can have adverse effects on racial balance," he refuses to infer segregative intent from such evidence alone.[117] While an answer to this question remains illusive, the question looms large for school districts contemplating school choice policies, particularly districts presently under court supervision and districts with segregative histories.

A. Armor's "Equity Choice" Proposal

In an effort to reconcile school choice and desegregation goals, Armor proposes a "common-ground" policy that seeks to achieve both.[118] Armor's intriguing "equity choice" proposal is certainly ambitious and perhaps even plausible.[119] His proposal combines existing ideas (e.g., inner-city magnet schools) and innovative concepts

110. 391 U.S. 430 (1968).
111. *Id.* at 433
112. *Id.*
113. *Id.* at 437
114. *Id.* at 438
115. *Green*, 391 U.S. at 439, 440.
116. *Id.* at 442
117. ARMOR, *supra* note 29, at 226.
118. ARMOR, *supra* note 29, at 228-33.
119. ARMOR, *supra* note 29, at 228-33.

(e.g., free transportation as a carrot to improve racial balance).[120] The rationale underlying Armor's proposal is solid: to increase families' educational opportunities by increasing their access to better or more desirable schools.[121] In the end, however, the questions Armor ignores weaken the presentation of his equity choice proposal.[122] Two questions in particular warrant further attention.

First, Armor does not directly answer whether his proposal includes private religious schools. He hints that they would be,[123] but relegates the obvious and difficult Constitutional questions to a footnote.[124] Unfortunately for Armor, avoiding the complex issues raised by including religious elementary and secondary schools in a publicly funded voucher program does not make the issues any less important. Indeed, the resolution of the legal question about whether the First Amendment precludes religious schools from participating in a publicly funded voucher program poses enormous consequences for the school choice movement as well as Armor's equity choice proposal.

Although the Court has recently decided important Establishment Clause cases involving public schools,[125] Armor correctly notes that the Court has not yet squarely decided the constitutionality of a publicly funded voucher program that includes religious schools.[126] If the Court interprets the Establishment Clause[127] to prohibit religious elementary and secondary schools from participating in a publicly funded voucher program, a large percentage of the private school market will be unable to participate in what many feel is a plausible effort to improve the educational opportunities for numerous students, particularly low-income students attending inner-city public schools.[128]

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120. ARMOR, *supra* note 29, at 229.

121. ARMOR, *supra* note 29, at 232.

122. To be fair, Armor notes late in his book that his "outline of an equity choice policy leaves out many administrative and procedural details . . . ." ARMOR, *supra* note 29, at 230.

123. ARMOR, *supra* note 29, at 230. ("Not all private or parochial school would be expected to participate in a state-sponsored choice policy . . . .").

124. ARMOR, *supra* note 29, at 227 n.6.

125. *See, e.g.*, Rosenberger v. University of Virginia, 63 U.S.L.W. 4702 (1995); Board of Educ. v. Grumet, 114 S. Ct. 2481 (1994); Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993).

126. ARMOR, *supra* note 29, at 227 n.6.

127. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

128. *See generally* Michael Heise, *Public Funds, Private Schools, and the Court: Legal Issues and Policy Consequences*, 25 TEX. TECH L. REV. 137 (1993).

Second, Armor does not adequately address regulatory issues raised by school choice policies. Armor correctly notes that private schools participating in a publicly funded voucher program would most likely be subject to increased regulation.[129] Unfortunately, Armor does not fully discuss the degree or nature of increased regulation that private schools participating in a voucher program can expect in exchange for public funds.

Private schools have been regulated, at varying levels, for most of the twentieth century. Justifications for some of these regulations are obvious and, for the most part, adequate as their benefits typically exceed their costs. Few would argue against the proposition that the government has a valid interest in helping ensure the health, safety, and welfare of students attending private schools.

That some level of increased regulation would greet participating private schools, as Armor notes, is obvious.[130] Less obvious are how much and what type of increased governmental regulation would likely be triggered by private school participation in a publicly funded voucher program. These questions contain economic and autonomy dimensions with significant policy consequences. Some private schools might not be able to afford to participate in a voucher program if the costs associated with increased regulation exceed a program's financial benefits. Moreover, the prospect of losing autonomy might deter those schools that could afford to participate in a publicly funded voucher program.

The full economic costs associated with increased school regulation, though difficult to assess accurately, are potentially consequential. Costs could mount quickly if private schools are required to comply fully with special education or other civil rights statutes. Private school compliance with a host of laws, including section 504 of Rehabilitation Act of 1973[131] and Title VI of the Civil Rights Act of 1964,[132] might be a condition for participating in a federally funded voucher program.[133] Both statutes apply to "recipients" of federal funds.[134]

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129. ARMOR, *supra* note 29, at 230.

130. ARMOR, *supra* note 29, at 230.

131. 29 U.S.C. § 794 (1988).

132. 42 U.S.C. § 2000(e)(2) (1988).

133. The important relation between regulation and publicly funded vouchers was illustrated by former President Bush's proposed Federal Grants for State and Local G.I. Bill for Children Act. *See* S. 3010, 102d Cong., 2d Sess. (1992), *reprinted in* 138 Cong. Rec. S10251-3 (daily ed. July 23, 1992) (statement of Sen. Danforth). This legislative proposal, which died in the Senate, would have created a federally funded voucher program. *Id.* It

The enabling regulations define recipients to include those schools that receive federal financial assistance directly or through another recipient, such as a state education agency.[135] Because the statutes are models of ambiguity, it is not entirely clear whether private schools participating in a federally funded voucher program would be subject to them. However, if these or other such statutes apply, compliance costs could deter private school participation, particularly the cash-starved private schools that dominate the nation's urban areas.

A less quantifiable though potentially even more damaging problem faced by private schools is governmental encroachment on autonomy that would result from increased regulation. Similar to economic cost estimates, precise estimates about reduced levels of autonomy are difficult. More certain is the assumption that a school's autonomy decreases as governmental regulation of the school increases. It is also probable that schools, particularly good schools, would be understandably reticent to cede their autonomy as some researchers identify autonomy as a key variable distinguishing high- and low-performing schools.[136]

One paradox is that the prospect of increased regulation, its economic costs and associated loss of autonomy, might deter the very private schools that Armor's equity choice proposal is designed to attract. Another paradox is that private schools financially able to comply with increased regulation and willing to cede some level of institutional autonomy in exchange for access to publicly funded voucher students may come to resemble more closely the very public schools the nation is attempting to reform. While aware of these paradoxes, Armor chooses not to fully engage them. Unfortunately, *Forced Justice* suffers as a consequence.

III. SCHOOL DESEGREGATION AND LEGAL IMPACT

By directly examining court-ordered desegregation efforts' foundational thesis and results, Armor casts important though indirect light on the ability of courts to formulate and implement social policies. What *Forced Justice* suggests will discourage those with an overly

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remains unclear whether participating private schools would have been forced to comply with federal education regulations as a condition for participation.

134. 29 U.S.C. § 794 (1988); 42 U.S.C. § 2000(e)(2) (1988).

135. *See, e.g.*, 34 C.F.R. §§ 100.13(i), 104.3(f) (1992).

136. *See generally* CHUBB & MOE, *supra* note 89.

optimistic view of litigants' ability to achieve desired policy goals through institutional litigation and the courts.

Regrettably, legal impact scholarship is markedly underdeveloped. Methodological difficulties associated with assessing the effects of court decisions impede its development. Court decisions' effects—including secondary and tertiary effects—are frequently difficult to discern and measure. Also, numerous variables moving simultaneously in different directions further complicate many legal impact studies. Moreover, different people and different institutions can view and respond to a single judicial intervention differently. Notwithstanding these difficulties, the relative dearth of legal impact scholarship will dishearten those who believe that empirical reality should inform normative theories. Legal scholars, particularly law professors, must shoulder much of the responsibility for this research void. Judge Posner recently urged law professors to assume more of the task of conducting detailed empirical inquiries into legal doctrines' presuppositions.[137] Similarly, law professors should perform the derivative task of assessing the results and impact of legal rules and court decisions, and the ability of these rules and decisions to achieve desired social policy change.

As *Forced Justice* illustrates, the educational context provides a conducive setting for legal impact research. Educational data, while certainly far from perfect, are generally more plentiful than data in other policy areas. Also, judicial involvement with educational issues is substantial. Indeed, it is difficult to overstate the influence of laws and court decisions on educational policy and institutions, particularly during the past four decades.[138] Despite this relatively inviting setting, legal scholars overlook too many legal impact research questions in general and those relating to education in particular.[139] Fortunately, scholars such as Armor, from departments and schools other than law, have attempted to fill the legal impact research void.

A more sophisticated and nuanced understanding of the contours of legal impact will expand and thus benefit legal scholarship. Regardless of who pursues such work, increased scholarly attention to

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137. RICHARD A. POSNER, OVERCOMING LAW 210 (1995).

138. For an excellent historical account of the influence of law on educational policy before the *Brown* decision, see DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954 (1987).

139. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. OF LEGAL EDUC. 570, 582 (1983). For possible explanations about why law professors do not engage in more empirical research, see Schuck, *supra* note 24, at 323.

legal impact questions is warranted for two reasons. First, legal impact and important concerns about judicial legitimacy relate. That is, the ability of the courts to achieve what their decisions set out to accomplish will influence the degree to which the public perceives court decisions as legitimate expressions of governmental power. As Professor Horowitz notes, a court lacking capacity risks ceding its claim to legitimacy.[140]

Second, the scope, range, and nature of judicial decisions have broadened over the past few decades and exert greater influence over people's lives. Despite the "long and honorable tradition of normative argument[s]" supporting a limited judicial role,[141] courts, particularly since the Warren Court, now reach deeper into the lives of more people.[142] Courts continually venture into new areas of adjudication, devise new remedies, and exert more influence over public budgets.[143] As a result, courts now engage in "problem solving" as well as the more traditional "grievance answering."[144] Examples of the former are numerous and include judicial roles in the operation of prisons,[145] mental hospitals,[146] and public housing complexes.[147] An active judicial posture injects courts into unfamiliar roles which frequently include administrative and operational duties.[148]

The judiciary's pursuit of equal educational opportunity in general and school desegregation in particular provides a significant point of entry for judges and courts into numerous administrative and operational aspects of schools. Despite the Court's recognition that inflexible restraints on states and school districts may handicap the discovery of solutions to educational problems, educational institutions and policy

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140. HOROWITZ, *supra* note 24, at 18-19.

141. Stephen L. Wasby, Book Note, 31 VAND. L. REV. 727, 728 (1978) (reviewing HOROWITZ, *supra* note 24).

142. Nathan Glazer, *Towards an Imperial Judiciary?*, 41 THE PUB. INTEREST 104, 106 (1975).

143. HOROWITZ, *supra* note 24, at 4-9.

144. HOROWITZ, *supra* note 24, at 4-9.

145. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337 (1981).

146. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1311 (1971), 344 F. Supp. 373 (1972), 344 F. Supp. 387 (1972), *aff'd in part sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

147. *See, e.g.*, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

148. *See generally* Nathan Glazer, *Should Judges Administer Social Services?*, 50 THE PUB. INTEREST 64 (1978).

making have been particularly attractive to courts.[149] School desegregation decisions, many of which include detailed and elaborate student assignment plans, influence school closures and construction, teaching assignments, and curricula, equipment, and student disciplinary policies.[150] Although the level of judicial involvement with schools varies among school desegregation plans, the cumulative effect of the plans on schools is substantial. According to Professor Glazer, the *Brown* decision and subsequent school busing decisions are "arguably the most disruptive decisions ever made by the courts."[151]

Existing legal impact scholarship examines the nature and extent of these and other "disruptions" caused by court decisions. Much of it seeks to understand better the courts' relative strengths and weaknesses in developing and implementing social policies. Professor Schuck recently identified three broad views concerning the effectiveness of court-driven approaches on producing "significant social reform."[152] "Strong-court" scholars believe that the courts are often effective reformers because of their unique institutional characteristics, especially their relative independence from electoral politics.[153] Less sanguine "court-skeptics" hold that judicially-driven reform efforts, although not inevitably doomed to failure, are highly problematic.[154] Finally, "court-fatalists" argue that effective social reform depends on factors that courts can reinforce, but to which courts are otherwise irrelevant.[155]

Forced Justice sets forth its version of court skepticism by carefully assessing the school desegregation movement's results and assumptions as well as its shortcomings and unanticipated consequences. Other factors evidencing Armor's allegiance to court-skepticism include

149. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973).

150. Glazer, *supra* note 148, at 65.

151. Glazer, *supra* note 142, at 105.

152. Schuck, *supra* note 26, at 1769.

153. *Id.* Examples include: MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM (1982); Owen Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1978).

154. Schuck, *supra* note 26, at 1769. *See generally* HOROWITZ, *supra* note 24; JEREMY A. RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989).

155. Schuck, *supra* note 26, at 1769. Examples include ROSENBERG, *supra* note 24, at 338 ("U.S. courts can *almost never* be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government.") (emphasis in original).

his dissatisfaction with earlier school desegregation court decisions that ignored white flight evidence.[156] Armor implies that by turning away from the "extensive demographic and social science evidence" courts limited their ability to influence school desegregation.[157] While *Forced Justice* retains some hope in the judiciary's ability to desegregate the nation's public schools, its overall tone conveys a strong sense of pessimism. Not only might courts be institutionally ill-suited for such tasks, but social forces outside the courtroom may prove more powerful and influential than court decisions.

CONCLUSION

As the title of his book suggests, Armor clearly prefers voluntary school desegregation plans over mandatory plans. His preference appears generally supported by the data he presents, particularly white flight data. His equity choice proposal, which seeks to harness the power of parental choice to achieve desegregation goals, also evidences his fondness for voluntary action.

Armor's preference for voluntary plans and pessimism of mandatory plans may also reflect his wariness with the courts' institutional capacity to handle the complex task of desegregating America's public schools. Armor is no stranger to courtrooms, serving as an expert in numerous school desegregation battles.[158] Whether his underlying skepticism of the judiciary in these matters masks an overly exalted view of social science or social scientists is unclear. Regardless, his concerns about judicial capacity are well-founded.[159]

Armor chafes at the possibility that some proponents of school desegregation oversold its benefits to the judiciary and public.[160] Perhaps too many judges blinded by desegregation's promises felt that they could improve the educational lives of minority students with a stroke of their judicial pens. It appears that many minority students (indeed, white students as well), particularly those from middle-class families, may benefit from well-intentioned judges and their desegregation remedies. However, any realized gains are not achieved without a

156. ARMOR, *supra* note 29, at 174 ("[T]he white flight issue played virtually no role in most federal court decisions during the 1970s.").

157. ARMOR, *supra* note 29, at 175.

158. ARMOR, *supra* note 29, at vi.

159. *See, e.g.*, HOROWITZ, *supra* note 24 (discussing various aspects of judicial capacity); *but see* REBELL & BLOCK, *supra* note 153.

160. ARMOR, *supra* note 29, at 112.

cost. Armor's concern about desegregation's costs—economic, educational, and other—is well-placed. Too many students, particularly those from low-income families attending inner-city public schools, may bear a disproportionate share of desegregation's costs.