

# Michigan Journal of Race and Law

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Volume 14

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2008

## From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law

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### Recommended Citation

Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law*, 14 MICH. J. RACE & L. 61 (2008).

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# FROM PEDAGOGICAL SOCIOLOGY TO CONSTITUTIONAL ADJUDICATION: THE MEANING OF DESEGREGATION IN SOCIAL SCIENCE RESEARCH AND LAW

*Anne Richardson Oakes\**

*In the United States following the case of Brown v. Board of Education (1954) federal judges with responsibility for public school desegregation but no expertise in education or schools management appointed experts from the social sciences to act as court advisors. In Boston, MA, educational sociologists helped Judge W. Arthur Garrity design a plan with educational enhancement at its heart, but the educational outcomes were marginalized by a desegregation jurisprudence conceptualized in terms of race rather than education.*

*This Article explores the frustration of outcomes in Boston by reference to the differing conceptualizations of desegregation in law and social science. It argues that whereas social scientists see desegregation in terms of social change requiring integration, for lawyers desegregation is a remedy the content of which is shaped by the nature of the litigation. The imperatives of law and social science have in the past coincided in a jurisprudence of affirmative action but the recent school assignment cases demonstrate the extent to which they have now diverged. This divergence underlies the indeterminacy of the desegregation mandate and provides an analytical framework for a theory of the role of the court expert in schools desegregation.*

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## INTRODUCTION

In the United States, in the years following the case of *Brown v. Board of Education*,<sup>1</sup> the federal judiciary assumed direct responsibility for supervising the desegregation of the nation's schools. In the *Brown* case itself, however, the term "desegregation" is never used, and its meaning has changed over time. Whereas the issue in *Brown* was the legality of state laws mandating educational apartheid, under a sympathetic political regime in the 1960s the Supreme Court extended the requirement to affirmative "integration" and set performance indicators couched in terms of "racial balance."<sup>2</sup> By the 1990s, however, it was clear that absent state fault racial identifiability per se did not offend the Constitution, and judges were encouraged to disengage from the desegregation process.<sup>3</sup> Affirmative action policies designed to perpetuate "integration" rather than to remedy past discrimination fell victim to the Court's dislike of judicial intervention in social policy matters.

It is commonly asserted that the *Brown* Court was influenced by social science concerning the "harm" of segregation and the benefits of integration. In the 1970s, social science research became central to desegregation litigation in the North where segregation was a function of residential patterns rather than overt legislative discrimination.<sup>4</sup> Designing

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1. *Brown v. Board of Educ.* (*Brown I*), 347 U.S. 483 (1954). Technically there were four cases which were consolidated on appeal to the Supreme Court: *Belton v. Gebhart*, 87 A.2d. 862 (Del. Ch. 1952) (on appeal from Delaware); *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951) (on appeal from Kansas); *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951) (on appeal from South Carolina); and *Davis v. Sch. Bd.*, 103 F. Supp. 337 (E.D.Va. 1952) (on appeal from Virginia).

Following the Supreme Court's ruling that the provision of "separate but equal" education was a violation of the Fourteenth Amendment, the case was adjourned for the Court to hear argument concerning the remedy. The remedial ruling came one year later in *Brown v. Bd. of Educ.* (*Brown II*), 349 U.S. 294 (1955). In this text, references to "*Brown*" should be taken as references to both *Brown I* and *Brown II*.

2. *Green v. County Sch. Bd.*, 391 U.S. 430, 437-438 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 1279-80 (1971).

3. *Missouri v. Jenkins* (*Jenkins III*), 515 U.S. 70, 92-93 (1995); *Freeman v. Pitts*, 503 U.S. 467, 489-491 (1992).

4. See *infra* Part II.B.

a desegregation plan in urban centers such as Detroit, MI, required an analysis of the relationship between school policies,<sup>5</sup> faculty assignments and other administrative practices that the state was responsible for, and other causes of segregation, notably patterns of residence and demographic factors for which it was not.<sup>6</sup> Social science evidence on these matters became a standard feature of desegregation litigation and the use of social science “experts” at both liability and remedy stages was routine.<sup>7</sup>

In cities such as Boston, MA, where elected school officials actively opposed the desegregation orders of the federal court, district judges who assumed direct responsibility for desegregation planning appointed social science experts as their personal advisers, raising due process questions of legitimacy and transparency in an adversarial context.<sup>8</sup>

In Boston itself, Judge W. Arthur Garrity Jr., facing opposition on a scale unprecedented outside of the South,<sup>9</sup> saw desegregation as an opportunity to restructure the decayed public school system and chose advisers who shared his commitment to “educational enhancement.”<sup>10</sup> His involvement continued for twenty years, but the educational outcomes were frustrated by the countervailing imperative of “racial balance.” In terms of desegregation jurisprudence, the case was a “race case,” not an “education” case.<sup>11</sup>

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5. For example construction, boundary changes, grade level and feeder pattern changes

6. See *infra* Part II.B.

7. See *infra* Part II.B.

8. See generally Anne Richardson Oakes, Legitimacy and the Court Expert: Narratives of Impropriety in a Schools Desegregation Case (Nov. 2008)(unpublished draft manuscript, on file with the author).

9. See RONALD P. FORMISANO, *BOSTON AGAINST BUSING: RACE CLASS AND ETHNICITY IN THE 1960S AND 1970S* (1991). The extent of the violence invited comparisons with Little Rock, Arkansas: “Some observers, recalling a dramatic outburst of Southern opposition to desegregation in 1957, now called Boston ‘the Little Rock of the North.’” *Id.* at 1. On September 2, 1957 Governor Orvil Faubus deployed the National Guard to prevent nine black children from attending Little Rock Central High School, requiring President Eisenhower to send in Federal troops to protect them and place the National Guard under federal control. See *Cooper v. Aaron*, 358 U.S. 1, 8–10 (1958).

10. In *Morgan v. Hennigan*, 379 F. Supp. 410, 480–81 (D. Mass. 1974), Judge Garrity found that the Boston public school system was unlawfully segregated and announced his Court desegregation plan in *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff’d*, 530 F.2d 401, 423 (1st Cir. 1976). He appointed as “court experts” Dr Robert Dentler and Dr Marvin Scott, respectively Dean and Associate Dean of Education, Boston University. *Id.* at 227.

11. Transcript of Hearing of April 10 1975, *Morgan v. Kerrigan*, 401 F. Supp. 216 (1975)(No. 72–911–G)(on file with the University of Massachusetts, Healy Library Archives & Special Collections, Center for Law & Education Papers, *Morgan & Hennigan Case Records 1964–1994*). Judge Garrity observed from the bench that “this is a race case, not a school case primarily” and stated the issue that was going to give him the most difficulty in formulating an order: Supreme Court jurisprudence protects equality not education. He stated:

A. *The Paradox of Desegregation Jurisprudence:  
Integration and Discrimination*

In 1979 after a decade of urban school desegregation, Judge Harvie Wilkinson wrote that

The problem is that we are no longer certain what kind of question public school desegregation really is. Twenty years ago we were convinced it was a matter of showing southern school segregation to be morally wrong. But with busing, good moral arguments exist on both sides. To the extent that desegregation has become less a moral question, or at least more a moral standoff, it is also less clearly a constitutional requirement the Supreme Court is entitled to impose.<sup>12</sup>

The loss of faith with the desegregation process that took place in Boston in the 1980s was underpinned by confusion about what exactly the process of desegregation was intended to achieve. It raised questions about what the Constitution might or might not require: how does a right not to be discriminated against turn into a requirement for racial balance? What is wrong with freedom of choice and the neighborhood school? Why must children be bused and schools closed? The Boston plan incorporated specific provisions for educational enrichments, but the Court refused to consider matters of teaching and learning or to take into account disparities in academic outcomes.<sup>13</sup> When the burdens of busing, school closures and teacher lay-offs appeared to fall disproportionately upon the black community, their leaders returned to the issue *Brown* had supposedly resolved and asked once again: what exactly is the relationship between racial isolation and educational opportunity for African Ameri-

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“What is protected? Equality is protected. The right to equal education. What that means is that once the state undertakes to supply education, well, then it must be available without discrimination among the races. There is a constitutional right to equal education. That is what this case is all about.” *Id.*

12. J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–78* 132 (1979).

13. See Transcript of Hearing, *supra* note 11. Boston’s prestigious examination schools were not required to achieve the same degree of integration as the city’s other magnet schools although their selection policies, progression rates and teaching and learning methods were thought to disadvantage black students. *Kerrigan*, 401 F. Supp. at 243–244. Robert Dentler took the view that the schools were educationally poor and recommended to the judge that the schools be closed on educational grounds, but general opposition forced him to withdraw his recommendation. He removed his advice to the judge before the chambers papers went into the public domain, deposited with the Archives and Special Collections at the University of Massachusetts Healey Library in Boston one year after the Morgan litigation was formally closed in 1997. Interview with Robert Dentler in Boston, MA. (Sept. 14, 2005). Garrity’s comments, noted *supra* note 11, were typical of his approach to these issues.

cans?<sup>14</sup> To seek answers to these questions in key aspects of this branch of Equal Protection jurisprudence is to discover what desegregation analyst David J. Armor has termed “the desegregation dilemma,”<sup>15</sup> namely the apparent paradox that *Brown v. Board of Education*, the case which declared the constitutional incompatibility of racial discrimination, came itself to require purposive racial discrimination as an aspect of effective relief.<sup>16</sup>

As Professor Lino A. Graglia suggests, the history of the law of race and schools since *Brown* has seen the Supreme Court convert a prohibition of segregation into a requirement of integration.<sup>17</sup> In the process, he argues, a decision that stood as authority for a prohibition on all forms of racial discrimination became the basis for a new form of racial discrimination.<sup>18</sup> Public schools were required to conform to requirements of racial balance.<sup>19</sup> Access to schools was once again controlled by reference to considerations of race.<sup>20</sup> A constitutional mandate to desegregate to prevent discrimination became the affirmative requirement to discriminate to secure integration, despite the assurance given contemporaneously with *Brown I* that the Constitution did not require integration.<sup>21</sup>

Most commentators have concluded that it was the need to provide an effective remedy that pushed the Court in the direction of affirmative action.<sup>22</sup> Two challenges in particular required an effective response. The first was the attempt by elected officials in Southern states to subvert the effect of *Brown*, initially by outright opposition and then by adopting policies that were overtly race-neutral but which operated in practice to perpetuate segregation.<sup>23</sup> Freedom of choice assignment plans fell into that category.<sup>24</sup> By 1968, noting that ten years after *Brown* a “freedom of

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14. See *infra* Part III.B.

15. DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 3 (1995).

16. *Id.*

17. See Lino A. Graglia, *From Prohibiting Segregation to Requiring Integration: Developments in the Law of Race and the Schools since Brown*, in SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE 69 (Walter G. Stephan & Joe R. Feagin eds., 1980)[hereinafter Graglia, *Developments*]. See also LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT'S DECISIONS ON RACE AND THE SCHOOLS (1976)[hereinafter Graglia, *DISASTER BY DECREE*].

18. See Graglia, *Developments*, *supra* note 21 at 69–96.

19. *Id.*

20. *Id.*

21. *Briggs v. Elliot*, 132 F. Supp. 776, 777 (E.D.S.C. 1955)(“Nothing in the Constitution or in the decision [in *Brown I*] takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination.”).

22. See Graglia, *Developments*, *supra* note 17 at 75; see also Armor, *supra* note 15, at 27–28.

23. Practices included the pupil placement laws and freedom of choice plans explained in *Green v. County Sch. Bd.*, 391 U.S. 430, 431–33 (1968).

24. See *infra* note 26 and accompanying text.

choice" policy had made virtually no changes to the racial composition of the schools of New Kent County (VA),<sup>25</sup> a unanimous court declared that "such delays are no longer tolerable" and emphasized that school boards had a duty to take affirmative action to take "whatever steps might be necessary" to establish a "unitary non-racial system."<sup>26</sup>

The second challenge was the need to respond to segregation in urban areas where racially identifiable schools reflected residential segregation coupled with neighborhood school policies. In a case from North Carolina, the Court had accepted racial balance as a criterion of desegregation and compulsory busing as an appropriate response to this kind of situation.<sup>27</sup> By the time that Judge Garrity came to order his remedial plan for Boston, compulsory reassignment of pupils to secure racial balance in the public schools had become the norm in northern school desegregation planning, despite its unpopularity with white parents whose withdrawal to the suburbs made racial balance in urban schools virtually impossible to achieve.<sup>28</sup>

25. Under a Virginia pupil placement law adopted after *Brown*, students were automatically reassigned to schools previously attended unless they specifically applied for permission to change. See *Green*, 391 U.S. at 433.

26. See *Green*, 391 U.S. at 437-438. The court further noted the following:

The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in the light of other courses which appear open to the board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

See *id.* at 441-42.

27. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22, 30 (1971).

28. See generally Robert A. Dentler, *School Desegregation Since Gunnar Myrdal's American Dilemma* in *THE EDUCATION OF AFRICAN AMERICANS*, 27-49 (Charles Vert Willie et al. eds., 1991); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society* 80 *MINN. LAW REV.* 825, 825-873 (1996). The precise nature of the relationship between mandatory desegregation plans and so-called "white flight" has been contested since Coleman et al.'s 1975 study asserting a causal link. See JAMES S. COLEMAN ET AL., *TRENDS IN SEGREGATION 1968-73* 76-80 (1975) (cited in Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society* 80 *MINN. LAW REV.* 825, 830 (1996)); see also Charles Vert Willie & Michael Fultz, *Comparative Analysis of Model School Desegregation Plans*, in *SCHOOL DESEGREGATION PLANS THAT WORK*, 197-213 (Charles Vert Willie 1984).

IN SCHOOL DESEGREGATION PLANS THAT WORK 163-173 (Charles Vert Willie ed. 1984); DAVID J. ARMOR, *WHITE FLIGHT AND THE FUTURE OF SCHOOL DESEGREGATION IN SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE* 187-226 (Walter G. Stephan and Joe R.

Whatever the justification, it is undeniable that the objective of racial integration as a mechanism for enhancing the life opportunities afforded to African Americans is, or ought to be, a social policy objective requiring political decisions involving the allocation of public resources and judgments as to what results could thereby be achieved. This is exactly the kind of decision in respect of which politicians turn to the work of social scientists, but it is not normally one within the purview of the federal judge. In *Brown v. Board of Education*, the Court appeared to require federal judges to take on the task of implementing social policy objectives for reasons which were not clear and in a manner which was not directly articulated.<sup>29</sup>

In this Article, I explore the meaning of desegregation for both lawyers and social scientists and its consequences for desegregation planning. I argue that, whereas for social scientists desegregation was a process of social change and required integration, for lawyers desegregation was a remedy, its content shaped by the nature of the litigation process. That the two conceptions of social science and law came together for a period of twenty-five years or so following the *Brown* litigation should not divert attention from the fundamental underlying differences containing within themselves the basis for divergence and underpinning the reluctance of current members of the Supreme Court to sanction race-conscious remedies which are not directly linked to issues of constitutional fault.<sup>30</sup>

In Part One I outline the general argument by reference to what I term the “underlying imperatives” of social science and law. By this I refer to the values of social policy reform and remedial process that underpin these respective disciplines and which determine the disciplinary boundaries within which solutions legitimate to that discipline must be framed. The disciplines of law and social science were brought together as a matter of conscious policy on the part of the National Association for the Advancement of Colored People (NAACP),<sup>31</sup> the organization formed in

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Feagin eds. 1980). For a recent overview, see Christine Rossell, *The Effectiveness of Desegregation Plans*, in *SCHOOL DESEGREGATION IN THE 21<sup>st</sup> CENTURY* 67 (Christine H. Rossell et al. eds., 2002). For the decline in numbers of white students in Boston public schools see Robert A. Dentler, *The Boston School Desegregation Plan* in *SCHOOL DESEGREGATION PLANS THAT WORK* 60–67 (Charles Vert Willie ed. 1984) and ROBERT A. DENTLER & MARVIN B. SCOTT, *SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE* 26 (1981).

29. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 18–19 (2004).

30. See, e.g., *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70 (1995) (Thomas, J., concurring).

31. Technically, the NAACP Legal Defense Fund Inc., later known as the LDF set up as a separate organization headed by Thurgood Marshall in 1939, achieved financial independence in 1957 and finally broke with the NAACP in 1978 following an unsuccessful lawsuit by the NAACP to compel the LDF to drop the NAACP initials from its name. For a personal account see JACK GREENBERG, *CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT* 517–24 (2004). For a history of the NAACP



1909 which became the nation's premier civil rights organization, largely because it recognized and harnessed the power of litigation to initiate social change.<sup>32</sup> Two issues relating to NAACP litigation strategy have particular significance for the development of desegregation jurisprudence: the decision to litigate for integration as opposed to educational equity and the strategic use of social science statements to lobby the US Supreme Court.

In Part Two I consider the main contours of this strategic use by reference to four such statements. Sociologists Mark Chesler, Joseph Sanders and Debra Kalmuss<sup>33</sup> have drawn on the influential work of Harvard professor Abram Chayes<sup>34</sup> to argue that the effect of social science in schools desegregation litigation has been the development of "new legal theory," in the course of which the remedial imperative may be said to have moved from a "private law" conception of litigation as assertion of individual rights in favor of a "public law" conception of litigation as correction of social grievance.<sup>35</sup> I consider whether social science conceptualizations of the harm of segregation and the benefits of integration can be said to have influenced the Court's desegregation jurisprudence. I argue that, whereas some of the earlier decisions may be consistent with such a view, in later years this is no longer the case. With the benefit of hindsight I argue that the earlier cases represent the aberration and that, with the disengagement cases of the 1990s, we see a reversion to a private law model which probably never really went away and in respect of which the capacity of social science to influence legal content is necessarily circumscribed.<sup>36</sup>

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and its involvement in school desegregation cases see MINNIE FINCH, *THE NAACP: ITS FIGHT FOR JUSTICE* (1981); LANGSTON HUGHES, *FIGHT FOR FREEDOM: THE STORY OF THE NAACP* (1962); CHARLES F. KELLOGG, *NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE* (The Johns Hopkins Press 1973) (1967). The LDF played no part in the Boston case but NAACP General Counsel Nathaniel Jones acted for the black plaintiffs in *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974), with his successor Thomas Atkins taking over from Harvard Center for Law and Education counsel Larry Johnson in the later stages of the litigation. For an account of the dispute between attorneys Johnson and Atkins in the *Morgan* consent decree negotiations see Marsha Murningham, *Court Disengagement in the Boston Public Schools: Towards a Theory of Restorative Law* (1983)(unpublished Ed D. thesis, Harvard University)(on file with Birmingham City University Library, Birmingham City University).

32. ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE AND THE CONSTITUTION* 51 (2003).

33. MARK A. CHESLER ET AL., *SOCIAL SCIENCE IN COURT: MOBILIZING EXPERTS IN THE SCHOOL DESEGREGATION CASES* (1988).

34. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

35. See CHESLER ET AL, *supra* note 33, at 27–61.

36. For the "disengagement cases," see *Freeman v. Pitts*, 503 U.S. 467 (1992) and *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70 (1995). See also discussion *infra* Part II.C.

I deal with the decision to press for integration as opposed to educational equity in Part Three when I return to this Article's opening questions and consider the claim that *Brown* should have been decided differently.

Whatever the impact of social science on the content of legal doctrine, in practical terms the remedial imperative inherent in the litigation process required judges and social scientists to interact at the district court level to construct a desegregation remedy.<sup>37</sup> I return to the relationship between social science and law in my conclusion. In the uncertain content of the term "desegregation" itself I identify a framework for analysis that sees the court expert as fundamental to the process by which federal district judges gave meaningful content on a pragmatic basis to the task of desegregating the nation's schools.

### I. LAW AND SOCIAL SCIENCE IN SCHOOLS DESEGREGATION

Much has been written about the underlying ambiguities of the *Brown I* reasoning and the difficulty of identifying a constitutional justification for the decision.<sup>38</sup> In over-ruling the decision in *Plessy*<sup>39</sup> which underpinned the racial segregation laws of the South, the Supreme Court made clear that, in the field of education, the doctrine of "separate but equal" had no place<sup>40</sup> but failed to make clear the nature of segregation's harm. Although, as Professor Ronald Dworkin has suggested,<sup>41</sup> the scope for reliance in constitutional adjudication upon matters of empirical evidence is necessarily limited, the reference in footnote 11 of *Brown I* to the research of seven social scientists on the social and psychological effects of segregation upon black children has inaugurated a debate about the impact of social science which continues to characterize school selection jurisprudence to this day.<sup>42</sup> Since *Brown I* lawyers have continued to argue, with varying degrees of success, that the federal judiciary should take notice of social science research regarding the causes and consequences of

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37. See *infra* Conclusion.

38. See Owen M. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971); see also Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57 (1978); James S. Liebman, *Desegregating Politics: "All-out" School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Wilkinson, *supra* note 12.

39. *Plessy v. Ferguson*, 163 U.S. 537 (1895).

40. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 294 at 495 (1955).

41. Ronald M. Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty, in EDUCATION, SOCIAL SCIENCE AND THE JUDICIAL PROCESS: AN INTERNATIONAL SYMPOSIUM* 19 (Ray C. Rist & Ronald J. Anson eds., 1976).

42. See *Parents Involved in Community Schools v. Seattle School District No. 1* 127 S. Ct. 2738 (2007)(discussed *infra* Part II.B).

racial isolation and its impact upon the psychological and educational development of African American children.<sup>43</sup>

The result has been the emergence of what Judge John Minor Wisdom has referred to as a “love match” between social science and law.<sup>44</sup> Lawyers have relied upon social science research to substantiate claims of constitutional harm and the effectiveness of the desired relief; social scientists have provided the empirical bases upon which schools cases have been fought.<sup>45</sup> Social scientists have addressed federal courts on matters such as the changing demographic patterns of cities, the causes of “white flight,” the relationship between state policy, patterns of residence and the racial identifiability of schools<sup>46</sup> and the extent to which the underachievement of African American children constitutes a “lingering vestige” of discrimination.<sup>47</sup> In this kind of litigation more than almost any other, lawyers have looked to social science to translate issues of social fact into constitutional issues and constitutional requirements into social remedies.

As Charles T. Clotfelter<sup>48</sup> points out, however, it is important to bear in mind that lawyers and social scientists have different conceptions of what constitutes segregation and what the process of desegregation might require.<sup>49</sup> In social science research, the term “segregation” is used descriptively. Segregation occurs when black children are educated separately from white children. In this sense, the terms “segregation” and “racial isolation” are synonymous and integration is the appropriate social policy response.<sup>50</sup> For lawyers, however, segregation refers to state-mandated or sponsored discrimination on the grounds of race, accordingly violating the Fourteenth Amendment equal protection guarantee. To be successful, a plaintiff must establish an element of fault on the part of the state or state actors and seek a remedy specifically tailored to respond to harm that is a direct consequence of the constitutional violation.<sup>51</sup> It is

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43. See *infra* Part II.

44. John M. Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-making Process in School Desegregation Cases*, 39 LAW AND CONTEMP. PROBS. 134, 142 (1975).

45. See discussion *infra* Part II.

46. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

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

48. CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 201 (2004).

49. *Id.*

50. *Id.*

51. See Justice O'Connor on equal protection analysis in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (“All racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”). See also *Grutter v. Bollinger*, 539 U.S. 306, 308–09 (2003).

the legal emphasis on issues of causation that ties this branch of Equal Protection jurisprudence to the empirical evidence afforded by social science research.

### A. *The Differing Imperatives of Social Science and Law*

Although the term does not appear in either case, desegregation following the *Brown* decisions came to represent the American commitment to deliver on the promise of equal opportunity for all. The process of public school reform brought together social scientists and lawyers with different understandings of what the word meant and what the purpose of the exercise might be. I argue here that these differences reflect the fundamentally different imperatives of social science and law.

As education professor Diane Ravitch points out,<sup>52</sup> the way in which words are defined “is far more than a semantic exercise” but reflects important underlying assumptions concerning values and policy goals.<sup>53</sup> To that extent, the act of definition becomes in itself a statement of policy with the capacity to have important strategic consequences. I argue that, whereas both professionals speak in terms of desegregation as process, for social scientists the underlying imperative is one of social change requiring integration measured in terms of racial balance<sup>54</sup> and inter-racial exposure.<sup>55</sup> The integration imperative is underpinned by what Armor has termed the “harm-benefit thesis of social science,” i.e. the thesis “that school segregation is harmful and desegregation is beneficial to the educational and social outcomes of schooling.”<sup>56</sup> On this view, full integration in terms of student population, faculty and educational programs, and also of resource allocation, addresses the psychological and educational harm of segregation and enables African American children to compete on an equal footing not just in the classroom but also in terms of wider life opportunities. In social policy terms, integration was the way to respond to the disparity between the condition of “the Negro”<sup>57</sup> in American society

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52. Diane Ravitch, *Desegregation: Varieties of Meaning*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 31 (Derrick Bell ed., 1980).

53. *Id.*

54. This ties the racial mix of a school to that of its surrounding district within specified permissible limits of deviation. See Armor, *supra* note 15, at 159 (noting that what is important is the possibility of “meaningful interracial contact”); see also Clotfelter, *supra* note 48, at 201.

55. This measures the extent to which white children and black children are able to mix with each other in the same school or classroom. See Christine H. Rossell, *The Effectiveness of School Desegregation Plans*, in SCHOOL DESEGREGATION IN THE TWENTY-FIRST CENTURY 75 (Christine H. Rossell et al. eds., 2002).

56. Armor, *supra* note 15, at 4.

57. I use this term self-consciously to reflect contemporary usage.

and the American ideal of equal opportunity for all, which Gunnar Myrdal had identified as representative of the "American dilemma."<sup>58</sup>

For lawyers, however, the process of desegregation is remedial and governed by what are well-understood constraints concerning the nature and limits of remedial relief. The underlying imperative is that of legitimacy, the need to keep within the proper compass of the law and of judicial process that ultimately must tie judicial intervention to the remedial process.

The judicial function in constitutional litigation is to declare the nature and extent of constitutional rights and to provide a remedy that must be tailored to the nature of the right. Attention to the requirement of legitimacy in constitutional adjudication must also require a court to pay due respect to the limitations that considerations of federalism and the separation of powers place on the nature and extent of the judicial role, issues I deal with elsewhere.<sup>59</sup> In this Article, I refer primarily to those aspects of legitimacy arising out of the nature of the remedial process which can be expressed by reference to the maxim *ubi ius ibi remedium* (Where there is a right there must be a remedy).<sup>60</sup> The principle has two related ideas: the existence of an actionable right which will usually require the identification of fault on the part of a defendant, and the requirement for a remedy which must address the fault either by giving effect to expectations which have been aroused or, more usually, by providing recompense or restitution in respect of loss which has been sustained.<sup>61</sup>

In lawyers' terms, desegregation is a remedy for a constitutional violation. The action is usually couched in terms of the Equal Protection clause of the Fourteenth Amendment of the Federal Constitution, which provides that "no state shall . . . deny to any person within its jurisdiction

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58. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* xlviii (1944).

The ever-raging conflict between on the one hand, the valuations preserved on the general plane which we shall call the "American creed," where the American thinks, talks and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of persons or types of people; and all sorts of miscellaneous wants, impulses and habits dominate his outlook.

*Id.* at xii.

59. See Oakes, *supra* note 8.

60. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

61. *Id.*

the equal protection of the laws.”<sup>62</sup> The question then is: what constitutes the violation and what must be done for the purpose of affording relief?

In *Brown I*, the Court’s declaration was clear but its reasoning ambiguous. State-mandated separate provision of schooling for black and white children must cease because a) separation offends the Constitution *per se*;<sup>63</sup> b) governmental discrimination by race causes psychological damage to black children<sup>64</sup> and c) governmental discrimination by race deprives black children of the educational benefits of mixing with white children.<sup>65</sup> *Brown II* directed federal courts to supervise the implementation of the remedial process but was similarly vague as to how this was to be done.<sup>66</sup> The Court invoked the exercise of equitable discretion but gave little guidance to federal judges as to how that discretion was to be exercised.<sup>67</sup>

Since then the Court has attempted to provide remedial guidelines that, at times, have been couched in the very widest terms. It has authorized desegregation plans for racial balance,<sup>68</sup> compulsory busing,<sup>69</sup> magnetic schools and programs<sup>70</sup> and even programs of educational enhancement,<sup>71</sup> apparently on the basis that it shared the social science view of the curative effects of racial integration although it has never made this clear. The Court has, however, continued to assert, as it did in *Swann*, the remedial imperative that “the nature of the violation determines the scope of the remedy.”<sup>72</sup> In other words, the issue of fault as defined in legal terms remains central to the definition of the remedy. Thus in the absence

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62. U.S. CONST. amend. XIV, § 1.

63. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 294 at 495 (1955)(stating that “Separate educational facilities are inherently unequal.”).

64. *Id.* at 494. “To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown I*, 347 U.S. at 494.

65. *Id.* at 493 (citing *Sweatt v. Painter*, 339 U.S. 629 (1950) and *McLaurin v. Okla. State Regents for High Educ. Et al.*, 339 U.S. 637, 438 (1950)) (discussing the “intangible” benefits for a law student of mixing with white students, i.e. “his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession.”).

66. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. at 300 (1955).

67. *Id.*

68. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 23–25 (1971).

69. *Id.*

70. *Missouri v. Jenkins (Jenkins II)*, 495 U.S. 33 (1990). “‘Magnet schools’ as generally understood, are public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality.” *Id.* at 40.

71. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

72. *Swann*, 402 U.S. at 16.

of fault, as the Court made clear in *Swann*<sup>73</sup> and again in *Keyes*,<sup>74</sup> issues of racial isolation or the under-performance of African American children are simply not the Court's concern.<sup>75</sup>

In legal process of this kind it is, of course, the plaintiff who seeks relief and the role of the court to that extent is passive; it either grants or refuses to grant the relief sought. In this connection and with the benefit of hindsight, the decision of the NAACP to abandon claims for "equal education" and press for "racial integration" has been criticized.<sup>76</sup> Professor Derrick Bell goes so far as to offer an alternative response to *Brown* which would have upheld the legality of *Plessy*, specifically for the purpose of giving full effect to its premise of "equality."<sup>77</sup> I offer a brief outline of NAACP strategy and deal with Bell's arguments below.<sup>78</sup>

My argument in general terms is that, for a period of twenty-five years or so following *Brown*, the social science imperative of integration and the legal remedial imperative coincided in the identification of racial balance or integration as the appropriate remedy for segregated schools. Desegregation during this period meant integration, and integration could justify race-conscious action. The coincidence was, however, temporary and was undermined as demographic changes coupled with white flight frustrated the attempt to integrate and cast doubt upon the assumptions that racial integration *per se* was a necessary aspect of equal education. New questions were asked concerning the extent to which the continuing academic under-achievement of African Americans should be regarded as a "vestige" of discrimination sufficient to warrant the adoption of affirmative action policies and the retention of court supervision. As social scientists argued amongst themselves, the causal value of their research in legal terms was correspondingly reduced. Reluctant to act on the basis of an inconclusive "pedagogical sociology"<sup>79</sup> and anxious to set limits to the duration of the remedial process, the Rehnquist Court turned to those other aspects of legitimacy, federalism (or states' rights) and the separation of powers to justify federal court disengagement.<sup>80</sup>

73. *Id.* "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Id.* at 28.

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

75. *Id.*

76. Notably by law professor and former NAACP counsel Derrick Bell. For an overview of his contribution to the literature of so-called "Critical Race Scholarship" see James R. Hackney Jr., *Derrick Bell's Re-Sounding: W.E. Du Bois, Modernism and Critical Race Scholarship*, 23 LAW & SOC. INQUIRY 141 (1998).

77. BELL, *supra* note 29, at 20.

78. See *infra* Part I.B.

79. *Jenkins By Agyei v. Missouri*, 19 F.3d 393, 404 (8th Cir. 1994)(Beam, J., dissenting).

80. See *infra* Part II.D.

The result was that the jurisprudence of schools desegregation returned to the more familiar territory of the “color-blind Constitution,”<sup>81</sup> and the negative imperative of non-discrimination by reference to race.<sup>82</sup> No longer prepared to accept that integration *per se* constituted a legitimate constitutional goal, the Court struck down affirmative action policies unlinked to official segregative action.<sup>83</sup> The re-appearance of racially-identifiable schools in a way that reflects demographic issues, as opposed to intentional state discrimination, has been termed “resegregation” and the accusation made that the Court has betrayed the legacy of *Brown*.<sup>84</sup>

### B. Resegregation and Race-Conscious Policies

The issue of so-called resegregation perpetuates the dialogue between social science and law by posing new constitutional questions about the harms of racial isolation and the benefits of integration.<sup>85</sup> In cities where active court supervision of the desegregation process has ceased, school boards which have voluntarily adopted race-conscious assignment policies or quotas have been challenged in the courts by white students denied a place at over-subscribed schools on the grounds of their race.<sup>86</sup> The ensuing litigation once again raises the social policy questions concerning the educational purpose of racial integration which were not answered in *Brown I*: is integration a necessary ingredient of equal education? Or conversely: what is the harm of racial isolation and how will integration advance the educational opportunities of minority children?

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81. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896)(Harlan, J., dissenting); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2782 (2007)(Thomas, J., concurring).

82. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Milliken v. Bradley*, 418 U.S. 717 (1974).

83. *Adarand*, 515 U.S. 200; *City of Richmond*, 488 U.S. 469.

84. See, e.g., GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996); DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: the Court's Role*, 81 N.C. L. REV. 1597 (2003).

85. See *infra* Part II.

86. See *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (D. Mass. 1996) (discussing Boston School Committee policy); see also *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir.1998); *Anderson v. City of Boston*, 375 F.3d 71 (1st Cir. 2004); *Boston's Children First v. Boston Sch. Comm. (BCF IV)*, 260 F. Supp. 2d 318 (D. Mass. 2003); *Boston's Children First v. Boston Sch. Comm. (BCF III)*, 183 F. Supp. 2d 382 (D. Mass. 2002); *Boston's Children First v. City of Boston (BCF II)*, 98 F. Supp. 2d 111 (D. Mass. 2000); *Boston's Children First v. City of Boston (BCF I)*, 62 F. Supp. 2d 247 (D. Mass. 1999).



## II. LOBBYING THE SUPREME COURT: THE "HARM-BENEFIT THESIS" AS LITIGATION STRATEGY

The two affirmative action cases from Seattle and Kentucky that have recently come before the Supreme Court represent the latest attempt in the endeavor to link social science research with constitutional or legal imperative.<sup>87</sup> The court was asked to test the issue of constitutionality of race-conscious admissions policies by reference to the harm prevented and the goal achieved.<sup>88</sup> The school boards argued that racial balance is necessary in order to enhance the educational opportunities of African American children.<sup>89</sup> The white parents' groups, the petitioners in these cases, opposed this on the grounds of unconstitutional racial preference.<sup>90</sup> At issue, once again, was the alleged "harm" of racial isolation and the educational benefits of integration. The court was asked to consider exactly what the constitutional relationship was between racial integration and the equal opportunities of African American children.<sup>91</sup>

As has become typical in schools cases, the litigation set expert against expert. The school authorities' argument that race-conscious policies promote educational benefit was supported by an *amicus curiae* brief submitted by 553 social scientists who testified to the educational benefits of racially integrated schools and the harmful educational implications of racial isolation.<sup>92</sup> In a rival brief for the plaintiffs, social scientist and desegregation expert Armor together with the academics Thernstrom and Thernstrom critically reviewed the research in the field, concluding that evidence of either a short-term or a long-term benefit of integration is simply lacking.<sup>93</sup> There is, in their view, "no evidence of a clear and consistent relationship either between desegregation and academic achievement" or "between desegregation and such long-term outcomes as college attendance, occupational status, and wages. . . ."<sup>94</sup> In terms of social outcomes such as "racial attitudes, prejudice, race relations and inter-racial

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87. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

88. *See id.*

89. *Id.*

90. *Id.* at 2746.

91. *Id.*

92. Brief for 553 Social Scientists as Amici Curiae Supporting Respondents at 1–2, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05–908, 05–915).

93. Brief for David J. Armor et al. as Amici Curiae Supporting Petitioners at 5, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05–908, 05–915).

94. *Id.*

contact,” they suggest that the impact of racial balancing policies on white students is likely to be negative.<sup>95</sup>

The Seattle and Kentucky brief represented the fifth in a series of statements submitted to the Supreme Court in schools cases, starting with *Brown I* where Earl Warren’s footnoted reference to the work of social scientists began a debate concerning the influence of social science on Supreme Court jurisprudence in school desegregation cases.<sup>96</sup>

#### A. *The Topeka Brief and the Harm of Segregation*

The NAACP argument as set out in the Appellate Brief submitted to the Supreme Court on behalf of the Plaintiffs made two assertions claimed to represent the consensus of social scientists: 1) Distinctions or classifications based upon race or color reflect a myth of Negro inferiority which has no basis in fact, and 2) State-enforced segregation harms the psychological development of African American children who interpret separation as connoting inferiority and are deprived of the benefits of an integrated education.<sup>97</sup>

Attached to the brief in the form of an appendix was a social science statement with 32 signatories who claimed to be “some of the foremost authorities in the area of American race relations,”<sup>98</sup> representing a spectrum of expertise from sociology and anthropology to psychology and psychiatry.

The decision of NAACP lawyers to use social science to mount a direct attack on the constitutionality of segregated education has been well-documented.<sup>99</sup> The so-called “Jim Crow” laws<sup>100</sup> of the South were legitimated by the Supreme Court decision in *Plessy*<sup>101</sup> which held that

95. *Id.*

96. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 n.11 (1954).

97. Brief for Appellants at 5, *Oliver Brown, et al., Appellants, v. Bd. of Educ. of Topeka, KS et al.*, 349 U.S. 294 (1955) (No. 1).

98. *Id.*

99. See, e.g., HERBERT HILL & JACK GREENBERG, *CITIZEN’S GUIDE TO DESEGREGATION: A STUDY OF SOCIAL AND LEGAL CHANGE IN AMERICAN LIFE* (1955); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 555–557 (1975)(describing fissures within NAACP over the use of social science data); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987)(describing early stages of litigation that led to the 1954 decision in *Brown*); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 197–205* (1998)(describing NAACP’s decision to submit psychologist Kenneth Clark’s “doll study” as evidence of segregation’s harmful effect on black children); Louis Menand, *Civil Actions: Brown v. Board of Education and the Limits of Law*, *NEW YORKER*, Feb. 12 2001, at 91.

100. See, e.g., C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2001)(classic account of these state laws).

101. *Plessy v. Ferguson*, 163 U.S. 537 at 544 (1895).

separate facilities for blacks were not inherently objectionable: "laws permitting, and even requiring, [racial] separation . . . do not necessarily imply the inferiority of either race to the other."<sup>102</sup> Moreover, the Court held that while the purpose of the Fourteenth Amendment was to enforce equality before the law, "it could not have been intended to abolish distinctions based upon color, or to enforce social, as opposed to political equality."<sup>103</sup> Enforced racial separation connotes black inferiority only because "the colored race chooses to put that construction upon it."<sup>104</sup>

Early NAACP challenges had had some success in requiring states to eliminate substantial disparities in the provision of facilities and educational opportunities, but left intact the racist assumptions upon which *Plessy* rested.<sup>105</sup> Under the leadership of Thurgood Marshall, NAACP lawyers worked with social scientists to develop a strategy which would disrupt these assumptions by demonstrating a) that the biology of race and racial inferiority was unsound, b) that the causes of racial inequality were social and economic, and c) that segregative practices reflecting scientifically unsound assumptions reinforced the psychological perceptions of young black children concerning their own inferiority and so operated as a structure of subordination.<sup>106</sup>

The "sociological argument" that they developed drew heavily upon the work of sociologists such as Kenneth and Mamie Clark, whose "doll studies" indicated the negative effects of racism on young children,<sup>107</sup> and Gunnar Myrdal, whose *American Dilemma* (1944) had done much to familiarize the American public with sociological arguments concerning the connection between race and social oppression.<sup>108</sup> In sociological terms, the argument went, equalization of resources and materials in a dual system would not of itself provide black children with an equal education because black schools, however well-resourced, would continue to

102. *Id.* at 544.

103. *Id.*

104. *Id.*

105. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). The Gaines court believed that the "separate but equal" doctrine rested "wholly upon the equality of the privileges which the laws give to the separated groups within the State." *Id.* at 349. Missouri's failure to provide a law school for blacks constituted a manifest denial of equal protection, even though the State offered the black applicant a scholarship to attend a law school in an adjoining State. *Id.* at 345. "The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color." *Id.* at 349.

106. *See sources cited supra* note 99.

107. *See, e.g.,* Kenneth B. Clark & Mamie K. Clark, *Segregation as a Factor in the Racial Identification of Negro Pre-school Children: A Preliminary Report*, 8 J. EXPERIMENTAL ED. 161 (1939). For further discussion *see* COTTRILL ET AL., *supra* note 32, at 124. *See also* Kluger, *supra* note 99.

108. Myrdal, *supra* note 58.

be regarded as inferior.<sup>109</sup> Calculation of the “harm” of segregation was more than a matter of resources; the intangible social and economic consequences rendered a dual system inherently discriminatory.

The Topeka arguments were trialed in two cases (*Sweatt* and *McLaurin*<sup>110</sup>) which preceded the *Brown* litigation and reached the Supreme Court in 1950. NAACP lawyers assembled expert testimony from social scientists, sociologists, psychologists and educators, all testifying to the potential of segregation to cause psychological harm.<sup>111</sup> The novelty of the approach was recognized in the opening words of the *Sweatt* Petitioner’s Brief:

This case is believed to present for the first time in this Court a record in which the issue of the validity of a state constitutional or statutory provision requiring the separation of the races in professional schools is clearly raised. It is the first record which contains expert testimony and other convincing evidence showing the lack of any reasonable basis for racial segregation. . . .<sup>112</sup>

The argument had some success. Both *Sweatt* and *McLaurin* were “equalization” cases and the Court was not required to address directly the constitutionality of *Plessy*.<sup>113</sup> Nevertheless, by emphasizing the importance of “intangible” benefits as an aspect of equality, the Court signaled its receptiveness to the sociological argument. In *Sweatt*, where a black applicant was denied access to the University of Texas Law School, the court referred to qualities “which are incapable of objective measurement but which make for greatness in a law school”, and included matters such as “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige”, as aspects of equal educational opportunity.<sup>114</sup> In *McLaurin*, Chief Justice Vinson for the Court laid particular emphasis upon the need for black students to mix with their white counterparts.<sup>115</sup> Thus when

109. See sources cited *supra* note 99.

110. *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma*, 339 U.S. 637, 641 (1950).

111. See Kluger, *supra* note 99, at 256 (discussing the trial court evidence). In *Sweatt v. Painter*, the court received evidence on the psychological effects of segregation from Robert Redfield, Chair of the Department of Anthropology at the University of Chicago. An *amicus* brief submitted on behalf of a group of 187 law professors (The Committee of Law Teachers Against Segregation in Legal Education) made the argument that racial segregation was unconstitutional *per se*. See Kluger, *supra* note 99, at 275; see also Tushnet, *supra* note 99, at 70, 82, 105.

112. Petition for Writ of Certiorari, *Sweatt v. Painter*, 339 U.S. 629 (1950)(No. 2).

113. *Sweatt v. Painter*, 339 U.S. 629, 636 (1950).

114. *Id.* at 634.

115. *McLaurin v. Oklahoma*, 339 U.S. 637, 641 (1950). “Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant’s case

shortly afterwards the NAACP Board of Directors announced its resolution to seek desegregation in all future education cases, the structure of the arguments which were later deployed in *Brown I* was largely in place.<sup>116</sup>

Whether the decision of the Supreme Court was thereby influenced is a matter of some debate.<sup>117</sup> The words of Chief Justice Warren are well-known: “to separate [children] from others of a 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.”<sup>118</sup> His quotation of the lower court<sup>119</sup> and the famous footnote eleven which referenced the work of seven social scientists<sup>120</sup> to support his rejection of *Plessy* invited an affirmative conclusion from which he himself subsequently backtracked<sup>121</sup> and which

represents the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State imposed restrictions which produce such inequalities cannot be sustained.” *Id.*

116. In July 1950 following a conference of lawyers convened by Marshall to “map . . . the legal machinery for an all-out attack” on segregation. See Tushnet, *supra* note 99, at 136.

117. See Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002).

118. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 494 (1954).

119.

“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”.

*Id.*

120. *Id.* at 495, FN11. (citing Kenneth B. Clark, ADDRESS AT THE MID-CENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH: THE EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950); PERSONALITY IN THE MAKING (Helen Leland Witmer & Ruth Kotinsky eds., 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’L J. OPINION AND ATTITUDE RES. 229 (1949); THEODORE BRAMELD, EDUCATIONAL COSTS IN DISCRIMINATION AND NATIONAL WELFARE 44–48 (MacIver ed., 1949); FRANKLIN E. FRAZIER, THE NEGRO IN THE UNITED STATES 674–681 (1949); and GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1949)).

121. Kluger, *supra* note 99, at 706 (stating “it was only a footnote, after all.”).

has garnered opposition from both contemporary and subsequent academic commentators.<sup>122</sup>

As Dworkin and others have commented, the task of constitutional adjudication is a search for values that should not depend on matters of empirical research, particularly when researchers themselves do not agree.<sup>123</sup> The validity of the “doll studies” upon which the Topeka brief had drawn was itself challenged more or less immediately by subsequent researchers,<sup>124</sup> while the Coleman Report of 1966 sponsored by the U.S. Office of Education failed to find either the expected resource disparities between black schools and white schools or a discernible relationship between distribution of resources and academic achievement.<sup>125</sup> Its conclusion, that the major causes of under-achievement of both blacks and whites lay not in segregation but in the socio-economic class of their parents, undermined the harm-benefit thesis which produced the Topeka argument and brought about a split in the social science community.<sup>126</sup> In the years that followed, social scientists were no longer necessarily prepared to testify that racial separation constituted a denial of equal educational opportunity.<sup>127</sup>

Nevertheless, the Topeka statement set a strategic precedent that was followed in the years after *Brown* as the focus of desegregation moved to the north where there was no overtly discriminatory legislation. Here the NAACP needed social scientists to establish the causal connections between official policy and school and faculty composition required for a finding of constitutional violation.

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122. See Mody, *supra* note 117 (discussing the literature).

123. See Dworkin, *supra* note 41, at 24; see also Edmond Cahn, *A Dangerous Myth in the School Desegregation Cases*, 30 N.Y.U. L. Rev. 150, 157–58 (1955) (“[I] would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records”); Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

124. See ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* 70 (3rd ed. Carolina Academic Press 2005) (1950) (discussing research critical of the “doll studies”). The “doll studies” conducted by Professor Kenneth Clark and his wife and fellow psychologist Mamie, claimed that black children in New York when given a choice of playing with a black or white doll showed a clear preference for the white doll. When asked to draw “the nice doll” the children again opted for the white. The Clarks drew the conclusion that black children in a segregated school system suffered from a sense of self-rejection and a loss of self-worth. See generally Kluger, *supra* note 106, at 317–18.

125. Armor, *supra* note 15, at 66. (discussing James S. Coleman et al., *Equality of Educational Opportunity* (1966)).

126. Professor Coleman himself refused to testify from this data in support of desegregation. See Chesler et al., *supra* note 33, at 41–43.

127. *Id.*

B. *Social Science and Desegregating the North: The Columbus Brief and "The Web of Institutional Discriminations"*

The hope that the Supreme Court would extend recognition of the social science harm-benefit thesis to the schools of the North, where racial identifiability reflected the heavy concentrations of the black urban population rather than state-mandated racial separation, evaporated after the Court ruled in *Keyes* that *de facto* segregation was not a constitutional violation *per se*.<sup>128</sup> Chesler *et al.* describe *Keyes* as "the last nail in the coffin of the harm theory of northern school desegregation."<sup>129</sup> Although, as Justice Powell pointed out, social science research confirmed that segregation in biracial metropolitan areas is largely a function of residential patterns,<sup>130</sup> the Supreme Court majority was not prepared to accept that racial separation *per se* offended the Constitution.<sup>131</sup> What was required was an officially mandated or produced dual system, involving proof of two things: segregative purpose causing segregative effect.<sup>132</sup> Causal analysis assumed central importance in northern schools desegregation jurisprudence: "where Plaintiffs proved that the school authorities had carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of a dual school system."<sup>133</sup> Following the Detroit schools case<sup>134</sup> which was the immediate predecessor for the Boston case, social science testimony on the causes and effects of racial separation and particularly the interrelationship between schools and their surrounding neighborhoods became a standard feature of NAACP—LDF litigation

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128. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

129. Chesler *et al.*, *supra* note 33, at 46.

130. *Keyes*, 413 U.S. at 222–23 (Powell, J., concurring in part and dissenting in part) ("[T]he familiar root cause of segregated schools in all the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities. This is a national, not a southern, phenomenon. And it is largely unrelated to whether a particular State had or did not have segregative school laws.")

131. *Keyes*, 413 U.S. at 205.

132. *Id.* at 205, 208 (stating that "the essential elements of *de jure* segregation [are] stated simply, a current condition of segregation resulting from intentional state action . . . "[w]e emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate."). See also *Washington v. Davis*, 426 U.S. 229, 240 (1976).

133. *Keyes*, 413 U.S. at 201.

134. *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971) was decided at the district court level on September 27, 1971. It reached the U.S. Supreme Court for the first time in 1974 in *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974).

strategy, not simply in relation to issues of liability but also to support a claim for a system-wide remedy.<sup>135</sup>

The *Keyes* court had been generous in one respect: the Court held that a finding of intentional discrimination in one part of the school system gave rise to a presumption that the discrimination is system wide, shifting the burden to the school authorities to prove that segregated schools were not “the result of intentionally segregative acts.”<sup>136</sup> However, when the Detroit case reached the Supreme Court in 1974, causal analysis moved centre-stage as the Court refused a metropolitan solution to a city-district problem.<sup>137</sup> The plan, which involved busing from the (black) city to the (White) suburbs, was not acceptable because the out-of-district suburbs were not implicated in the urban-district violation.<sup>138</sup> A remedy which involved desegregation across district lines was only permissible where the plaintiffs could show “a constitutional violation within one district that produces a significant segregative effect in another district.”<sup>139</sup>

Two cases from Ohio in which the Court was asked to sanction system-wide remedial plans were the occasion for the second social science statement submitted to the Supreme Court.<sup>140</sup> In *Dayton I* the court, while emphasizing the importance of tying relief to acts of discrimination, was prepared to recognize the existence of an “incremental segregative effect” which might justify a system-wide remedy.<sup>141</sup> When *Dayton II* and *Columbus*<sup>142</sup> reached the Supreme Court on the remedy issue, the Social Science Statement attached as an appendix to the *Columbus* Respondents’ Brief<sup>143</sup> had 38 signatories, whose background was not psychology or social psychology as in *Brown*, but who were primarily identifiable as sociologists, or political or educational scientists.<sup>144</sup> The purpose was to

135. See *supra* note 106 and accompanying text.

136. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

137. *Milliken I*, 418 U.S. at 744–45.

138. *Id.*

139. *Id.*

140. *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

141. *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406 (1977) (Rehnquist, J., dissenting). Rehnquist stated that “[When a constitutional violation has been found] the District Court [...] must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system wide impact may there be a system wide remedy.” *Id.* at 420 (citing *Keyes*, 413 U.S. 526 (1979)).

142. *Dayton II*, 443 U.S. 526; *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

143. Brief for Respondents, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979)(No. 78–610).

144. See Chesler et al., *supra* note 33, at 25. The list of signatories included Robert A. Dentler.



lend support to the NAACP claim for a system-wide remedy by asserting the cumulative effect of a “web of institutional discriminations” as the basic cause of school and residential segregation.<sup>145</sup> The statement recast the “harm-benefit” thesis into three basic claims: 1) that patterns of residential segregation were attributable to the actions of public authorities, including school boards; 2) that the relationship between school segregation and residential segregation was interdependent, and 3) that neighborhood school policies and attendance zones which produce racially identifiable schools can and do contribute to residential segregation and thus can be regarded as discriminatory.<sup>146</sup> In a section headed “Conclusions Social Science Can and Cannot Supply,” the social scientists set out two important caveats: 1) the cumulative effect for which they were arguing was not susceptible to a “but for” test (i.e. would the segregation have occurred “but for” the discriminatory acts complained of),<sup>147</sup> and 2) there was an absence of consensus about matters such as the terms of the debate, the appropriate measurement techniques and theoretical formulations and the trustworthiness of empirical results.<sup>148</sup>

The assertion of “an emerging consensus” concerning a preference for system-wide relief was apparently enough for the *Dayton II* and *Columbus* majorities<sup>149</sup> (there is no direct or indirect reference to the statement in the majority opinion in either case), but not for Justice Rehnquist whose criticism of the district court’s “cavalier approach to causality and purpose” continued to emphasize the importance of a “but for” approach to issues of violation and remedy.<sup>150</sup> Thus awareness of a likely segregative effect should not be regarded as intentional discrimination, and remedies must be tailored to the violation. In his view “the fundamental mission of [desegregation] remedies is to restore those integrated educational opportunities that would now exist but for purposefully discriminatory school board conduct.”<sup>151</sup>

145. Brief for Respondents, *supra* note 148, Appendix at 13a.

146. *See id.* at 3a, 7a, 10a-14a.

147. *Id.* at 18a. The brief argues: “[s]ocial scientists cannot answer such questions with precision. The questions can be rephrased to call for stating what the present would be like if the past had differed in certain specified respects. This is reminiscent of the grand ‘what if’ games of history [. . .] The present state of empirical knowledge and models of social change does not permit precise specification of the effects of removing particular historical actions. Although many of the causes of segregated outcomes are known, this knowledge is not so thoroughly quantified as to permit precise estimates of the effects of specific discriminatory acts on general patterns of segregation.” *Id.* at 19a.

148. *Id.* at 25a.

149. *Id.* Research indicated that system-wide desegregation plans which minimize the possibility of “white-flight” were more successful at establishing stability in student enrolments and thus more likely to succeed than plans which were limited “to the immediate vicinity of a ghetto or barrio.” *Id.* at 25a-26a.

150. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 515 (1979).

151. *Id.* at 524 (Rehnquist, J., dissenting).

C. *The Harm-Benefit Thesis and Unitary Status:  
The Freeman and Jenkins Briefs*

The inability of social science to provide precise answers to questions concerning the exact relationship between specific discriminatory acts and their alleged lingering effects significantly limited the utility of the “harm-benefit” thesis in the termination cases of the 1990s. In *Brown II* the Court directed school boards “to effectuate a transition to a racially non-discriminatory school system” and directed district judges to maintain jurisdiction during the transition.<sup>152</sup> The *Green* Court recast the goal of desegregation in terms of “unitary status”: “the transition to a unitary non-racial system of public education was and is the ultimate end to be brought about.”<sup>153</sup> In the case of *Board of Education v. Dowell*,<sup>154</sup> the Court required a two-part inquiry for unitary status and federal court withdrawal: 1) had the school district complied in good faith with the court order, and 2) had the vestiges of past discrimination been eliminated “to the extent practicable”?<sup>155</sup> In considering the latter point, the District Court should consider not only student assignments but “every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities.”<sup>156</sup> The question in *Freeman* was whether the District Court could relinquish jurisdiction incrementally even though full compliance with a desegregation order might not have been achieved.<sup>157</sup>

The Social Science Statement submitted by way of an *amicus* brief<sup>158</sup> in support of continuing jurisdiction re-articulated the “harm-benefit thesis” in terms of the benefits of desegregation: “desegregation is generally associated with moderate gains in the achievement of black students and the achievement of white students is typically unaffected.”<sup>159</sup> “Its benefits extend beyond the classroom to the larger issues of integration in employment, higher education, and housing.”<sup>160</sup> It acknowledged the association with “white flight” but asserted that the relationship between school segregation and residential segregation is reflexive; desegregated schools can influence housing choice, and desegregation plans, including

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

153. *Green v. County Sch. Bd.*, 391 U.S. 430, 436 (1968).

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

155. *Id.* at 249, 250.

156. *Id.* at 250 (citing *Green*, 391 U.S. at 435).

157. *Freeman v. Pitts*, 503 U.S. 467, 471 (1992).

158. Brief for NAACP et al. as Amici Curiae Supporting Respondents, *Freeman v. Pitts*, 503 U.S. 467 (1991) (No. 89-1290). See generally Armor, *supra* note 15, 71-76.

159. Brief for NAACP et al. , as Amici Curiae Supporting Respondents, *supra* note 162, at 51 (quoting Willis D. Hawley & Mark A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration in Eliminating Racism: Profiles in Controversy* 284-285 (Phyllis A. Katz and Dalmas A. Taylor eds.1988)).

160. *Id.* at 58.

extensive court-ordered plans, can foster long-lasting demographic stability.<sup>161</sup> At its best, it concluded, desegregation is not simply a process of placing black and white children together in a school but is a matter of developing techniques, including those of educational innovation that will further the goals of racial integration.<sup>162</sup>

However, as Armor suggests, the acknowledgement that effective desegregation is dependent upon certain conditions, without which the promised benefits will not necessarily be delivered, weakened the impact and deprived the “harm-benefit” thesis of some of its moral authority.<sup>163</sup> Upholding the power of the District Court to withdraw from supervision incrementally, the Supreme Court was not to be deflected from strict causal analysis.<sup>164</sup> In a rare unanimous decision, the Court affirmed what it said was implicit in its earlier ruling in *Pasadena Bd. of Educ. v. Spangler*<sup>165</sup>: “racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation.”<sup>166</sup> Justice Scalia in a concurring opinion noted the difficulties of attributing the existence of racially imbalanced schools to constitutional violations “dating from the days when Lyndon Johnson was President or earlier.”<sup>167</sup>

The inclination of the Court to move its jurisprudence to a post-desegregation climate was the occasion for the fourth social science statement to be submitted to the Court, this time in a case that considered the harm-benefit thesis in terms of educational under-achievement. In *Jenkins III*, the issue was whether the State of Missouri should be required to continue to fund quality education programs established to compensate for the reduction in achievement levels of minority children attributable to prior *de jure* segregation.<sup>168</sup> The *Milliken II* Court had accepted the argument that the harms of unconstitutional segregation could include educational harm as well as racial isolation.<sup>169</sup> The remedial plan ordered into effect in Missouri had been described as the most ambitious and expensive remedial program in the history of school desegregation.<sup>170</sup>

161. *Id.* at 44–50.

162. *Id.* at 72–73.

163. Armor, *supra* note 15, at 73.

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

165. *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976). In *Spangler* the Court held that once a unitary system had been achieved there was no duty to maintain racial balance where the imbalance was the result of demographic forces rather than constitutional violation. *Id.* at 435–37.

166. *Freeman*, 503 U.S. at 494.

167. *Id.* at 506 (Scalia, J., concurring). See also *id.* at 503 (Scalia, J., concurring) (“Racially imbalanced schools are hence the product of a blend of public and private actions and any assessment that they would not be segregated, or would not be as segregated, in the absence of a particular one of these factors is guesswork.”).

168. *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70, 74–80 (1995).

169. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 287–288 (1977).

170. *Jenkins III*, 515 U.S. at 78.

The total cost for the quality education programs alone exceeded \$220 million.<sup>171</sup> The class plaintiffs now opposed a partial termination order, arguing that the fact that student achievement levels as measured by annual standardized tests were still “at or below national norms at many grade levels” constituted a vestige of discrimination which had yet to be fully eliminated.<sup>172</sup>

Submitted as an appendix to a Social Science amicus brief and entitled *Educational Remedies for School Segregation: A Social Science Statement*, the purpose of the statement was to caution against application of a crude causal analysis in relation to the vestiges of segregation.<sup>173</sup> The documented under-achievement of minority children, it argued, reflects a culture of low expectations on the part of teachers and students alike and is associated with the high concentration of economic poverty in urban school districts. Both of these factors have their origins in decades of racial segregation and continue to affect behavior and achievement patterns long after the unconstitutional discriminatory practices have ceased.<sup>174</sup> To be effective, the scientists argued, remedial programs need to be long term and the educational components should be rigorously monitored and evaluated by recognized indicators which include standardized testing of student outcomes.<sup>175</sup>

#### *D. Does the Court Take Note? The Harm-Benefit Thesis and a Public Law Remedial Model*

The extent to which desegregation jurisprudence at the Supreme Court level has, or indeed should, take account of social science has generated considerable debate.<sup>176</sup> Apart from Footnote Eleven in *Brown* it is difficult to identify any clear evidence that social science submissions have had a direct impact on the jurisprudence of the Court.<sup>177</sup> However, as Professor James Ryan points out, in a political climate supportive of the goal of integration, the Court was apparently prepared to accept the remedial benefits of integration for minority students more or less without

171. *Id.* at 76.

172. *Id.* at 72.

173. Brief of Anderson et al. as Amici Curiae Supporting Respondents, *Missouri v. Jenkins*, 515 U.S. 70 (1995)(No. 93-1823), reprinted in Mark A. Smylie et al., *Educational Remedies for School Segregation: A Social Science Statement to the U.S. Supreme Court in Missouri v. Jenkins*, 27 Urb. Rev. 207(1995).

174. Smylie, *supra* note 173, at 212.

175. *Id.* at 220-24.

176. For a recent review of the literature regarding *Brown* see Mody, *supra* note 117. For a recent discussion of later case law see James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. Rev. 1659 (2003).

177. Ryan, *supra* note 176.

question.<sup>178</sup> Indeed, the relaxed approach to issues of causation evident in the presumptions of *Green*,<sup>179</sup> *Swann*,<sup>180</sup> and *Keyes*<sup>181</sup> more or less assumes the “web of institutional discriminations” which the later Columbus social science statement argued made education a “pervasive governmentally organized activity.”<sup>182</sup>

There is, however, no doubt that in the termination cases of the 1990s the Court accorded higher priority to disengagement than to social science-based arguments concerning the continuing harms of segregation. In *Dowell* the Court upheld a finding of unitary status even though, as the dissent pointed out, the conditions likely to inflict the “stigmatic injury condemned in *Brown I*” persisted and there remained “feasible methods of eliminating such conditions.”<sup>183</sup> In *Freeman*,<sup>184</sup> the Court sanctioned partial and incremental withdrawal from desegregation supervision and in *Jenkins III* it permitted termination of remedial programs which had been in place for seven years on the basis, despite the findings of the district judge to the contrary, that “white flight” and the continuing disparities between the achievements of minority and majority students must be attributable to “external factors, beyond the control of the [school committee] and the State.”<sup>185</sup> The Social Science statement was more or less ignored. Justice Thomas, concurring, was overtly dismissive of the value of social science evidence generally in schools cases: “[T]he judiciary is fully competent to make independent determinations concerning the existence of state [dis-

178. *Id.* at 1666.

179. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

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

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

182. Brief for Respondents at 7a, 13a, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979)(No. 78–610). See also *Green*, 391 U.S. 430; *Swann*, 402 U.S. at 26 (establishing the presumption that any present segregation is the result of prior acts of segregation); *Keyes*, 413 U.S. at 208 (establishing the presumption that a finding of intentional acts of discrimination in one part of a school district warranted a presumption that other parts of the district were similarly affected).

183. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 252 (1991). (Marshall, J., dissenting).

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

185. *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70, 102 (1995). The trial court had specifically found that *de jure* segregation “caused a system-wide reduction in student achievement” in the Kansas City, MO schools and developed a remedial plan. *Jenkins v. Missouri*, 639 F. Supp. 19, 24 (W.D.Mo.), *aff’d Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986). The Eighth Circuit upheld the district court’s later decision denying the school district’s motion for a finding of unitary status. See *Jenkins v. Missouri*, 19 F.3d 393, 404 (8th Cir. 1994). Dissenting from the denial of a request for rehearing en banc and objecting to the district court’s establishment of a student achievement goal gauged by results from standardized tests, Judge Beam wrote “in my view, this case as it now proceeds, involves an exercise in pedagogical sociology not constitutional adjudication.” *Id.* at 404 (Beam, J. dissenting). The Supreme Court ordered the district court to “sharply limit, if not dispense with, its reliance on” student achievement as measured by test scores. *Jenkins III*, 515 U.S. at 101.

crimatory] action without the unnecessary . . . assistance of the social sciences.”<sup>186</sup> Lower courts “should not be swayed by the easy answers of social science, nor should they accept the findings and the assumptions of sociology and psychology at the expense of constitutional principle.”<sup>187</sup> The Civil Rights Project has these remarks in mind when it attributes the decline in the momentum of desegregation to changes in Supreme Court jurisprudence. “Since the Supreme Court changed desegregation law in three major decisions between 1991 and 95, the momentum of desegregation for black students has clearly reversed in the South, where the movement had by far its greatest success.” In consequence, it charges, federal courts have changed from being “on the leading edge” of desegregation activity to become “its greatest obstacle.”<sup>188</sup>

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186. *Jenkins III*, 515 U.S. at 121 (Thomas, J., concurring).

187. *Id.* at 122–23.

188. Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 5–6 (2003), Available at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf>. See, e.g., *Little Rock Sch. Dist. v. Pulaski County*, 237 F. Supp. 2d. 988 (E.D. Ark. 2002) (for Jenkins-induced skepticism regarding social science testimony in termination cases); see also *Davis v. Sch. Dist. of Pontiac*, 95 F. Supp. 2d. 688, 697 (E.D. Mich. 2000) (dismissing social science information).

In Pulaski the district court, holding that plaintiffs had not come forward with evidence to attribute the achievement gap to unconstitutional conduct of the school board, commented:

Sociologists and educators have recognized for over a decade that there are a host of factors, completely unrelated to the effects of *de jure* segregation, that also are responsible for the minority student achievement gap. Some of these other factors include low birth weight, poverty, whether the student is raised by a single parent, parental interest and involvement, and peer influence. Complicating this issue still further is the fact that the achievement gap “exists across the country in prior segregated school districts and school districts that have not discriminated against minority students.”

237 F. Supp.2d. at 1037 (quoting *Jenkins v. Missouri*, 959 F. Supp. 1151, 1158–64 (W.D. Mo. 1997)).

The court continued,

How does a trial court go about determining, with *any* degree of precision, the percentage of the achievement gap (assuming there is any) that is causally related to *de jure* segregation (which ended many decades earlier)—after somehow excluding the host of other socioeconomic factors that are universally recognized as also contributing to the achievement gap? Reviewing the reported cases in which brave souls have undertaken this task puts one in mind of trying to nail jelly to a wall.”

*Id.*

In *Davis* the court was dismissive of the information value of social science evidence:

Even now, with the perspective of almost three decades, historians, sociologists and legal scholars vigorously disagree over the socio-economic, demographic and educational impact busing has had on our communities. As

Chesler *et al.*<sup>189</sup> have suggested that school desegregation remedial jurisprudence evidences a tension between two models of adjudication described in Chayes' much-cited article published in 1976.<sup>190</sup> Chayes argued that the traditional conception of the civil lawsuit as a vehicle for settling disputes between private individuals about private rights does not fit class action suits in constitutional matters which are primarily concerned with grievances about the operation of public policy.<sup>191</sup> In the traditional conception, the "private law model," the focus of judicial inquiry is on issues of intent (intentional infringement of plaintiffs' rights) and the remedial purpose is restitution or compensation.<sup>192</sup> The orientation is retrospective; the court asks "what are the consequences for the parties of specific past instances of conduct?" and tailors relief to remedy those consequences. In the school desegregation class action, however, issues of intent lose their centrality and the orientation of inquiry becomes essentially forward-looking. The relief sought is usually injunctive, and fashioned by reference to the likely consequences of policy implementation and official behavior.<sup>193</sup> The consequence is that in a public law model, remedial outcomes depend upon a process of fact-evaluation more akin to legislative than judicial process as traditionally conceived:

The whole process begins to look like the traditional description of legislation: Attention is drawn to a "mischief," existing or threatened, and the activity of the parties and court is directed to the development of on-going measures designed to cure that mischief. Indeed, if, as is often the case, the decree sets up an affirmative regime governing the activities in controversy for the indefinite future and having binding force for persons within its ambit, then it is not very much of a stretch to see it as, *pro tanto*, a legislative act.<sup>194</sup>

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in so many areas of debate, current perspectives on the impact of busing appear divided along the lines of the old adage, "Where you come in is where you go out."

*Davis*, 95 F. Supp.2d. at 695.

*Accord* *Wessmann v. Gittens*, 160 F.3d. 790, 804 (1st Cir.1998) (finding that a post-termination race-conscious admissions policy for the Boston Latin schools was not justified by the prior history of *de jure* segregation, and criticizing the experts' testimony: "we do not propose that the achievement gap bears no relation to some form of prior discrimination. We posit only that it is fallacious to maintain that an endless gaze at any set of raw numbers permits a court to arrive at a valid etiology of complex social phenomena.").

189. CHESLER, *supra* note 33.

190. CHAYES, *supra* note 34.

191. *Id.* at 1302.

192. *Id.* at 1285.

193. The court is asked "to enjoin future or threatened action, or to modify a course of conduct presently in train or a condition presently existing." *Id.* at 1296.

194. *Id.* at 1297.

E. Pedagogical Sociology and Judicial Activism:  
*The Search for Legitimacy*

*Brown II* required the federal judiciary to step outside a traditional role of adjudication and assume responsibility for tasks of management and supervision. The widespread expansion of the process described by Chayes<sup>195</sup> into fields such as prisons, housing and mental health, underpinned by a widespread cynicism verging on nihilism concerning the autonomous nature of legal reasoning, has generated what Professor Mark Yudof has described as a “crisis of legitimacy” in relation to judicial activity.<sup>196</sup> In this context, the attraction of social science evidence is its capacity to defuse arguments concerning the irrational nature of judicial reasoning; if processes of legal reasoning could not themselves be described as “scientific,” they could at least claim to be of social benefit, as determined by the objective processes of “scientific” disciplines.<sup>197</sup>

In desegregation litigation, the submission of sociological information and data for the judge’s information became unremarkable to the point of routine; yet, as Cahn<sup>198</sup> points out, the so-called Brandeis brief,<sup>199</sup> when used as a strategy of attack, is a two-edged sword.<sup>200</sup> In an adversarial process, “shrewd, resourceful lawyers can put a Brandeis brief together in support of almost any conceivable exercise of legislative judgment.”<sup>201</sup> The politicization of social science research in schools desegregation cases did much to undermine faith in its claims of objectivity and maturity and engendered a growing perception of a crisis of legitimacy on the part of the social sciences themselves.<sup>202</sup> The dissent’s dismissal of “pedagogical sociology” in *Jenkins III* articulates the growing mistrust on the part of the

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195. Chayes, *supra* note 34.

196. Yudof, *supra* note 38, at 67.

197. *Id.*

198. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 154 (1955).

199. LOUIS D. BRANDEIS, ASSISTED BY JOSEPHINE GOLDMARK, *WOMEN IN INDUSTRY: DECISION OF THE UNITED STATES SUPREME COURT IN CURT MULLER VS. STATE OF OREGON: UPHOLDING THE CONSTITUTIONALITY OF THE OREGON TEN HOUR LAW FOR WOMEN AND BRIEF FOR THE STATE OF OREGON* (1908), available at <http://ocp.hul.harvard.edu/ww/organizations-ncl.php>. The brief was filed by future Supreme Court Justice Louis Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908), and argued the need for special protection for women on health and safety grounds in support of an Oregon statute that purported to restrict women’s working hours. The Brandeis brief contained two pages of legal argument accompanied by approximately 100 pages of sociological and economic data. The style was replicated in the NAACP’s brief in *Brown I*. See generally PAUL L. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* 75–101, 134–172 (1972).

200. See Cahn, *supra* note 198, at 154.

201. *Id.* at 154. See generally ROSEN, *supra* note 199, at 75.

202. Yudof, *supra* note 38, at 71.



judiciary concerning the value of testimony from the “soft sciences” in constitutional matters.<sup>203</sup>

Chesler *et al.* suggest that school desegregation cases represent a battle over a point of view: what kind of a problem is racial inequality?<sup>204</sup> It was also a battle about responsibility. The NAACP/LDF use of social science evidence in school desegregation cases was a strategy designed to persuade the Court to conceptualize desegregation in terms of outcomes rather than intentions.<sup>205</sup> From this point of view, the affirmative action requirement of *Green*<sup>206</sup> and the racial balance criterion of *Swann*<sup>207</sup> represent public law models of adjudication whereby the Court, apprised of a social problem requiring address, sanctioned orders that required policy formulation and implementation.<sup>208</sup> In the northern cases, however, the Court drew back from the logic of this approach. By preserving the *de jure* /*de facto* distinction and refusing to accept the social science based argument that segregation was a “harm” *per se*, the Court returned to a private-law model at least as far as issues of liability are concerned.<sup>209</sup> *Milliken II*, in which the Court refused to sanction a metropolitan remedy for an intradistrict violation, is fully consistent with this approach.<sup>210</sup> In remedial terms, however, as the Ohio cases demonstrate, the Court continued to sanction system-wide remedial decrees characteristic of a public law results-oriented approach<sup>211</sup> until the 1990s termination cases, by which time the priority of the Court was no longer social change but legitimacy and the propriety of continuing judicial supervision of state affairs.<sup>212</sup>

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203. *Jenkins v. Missouri (Jenkins III)*, 19 F.3d 393, 404 (8th Cir. 1994).

204. CHESLER ET AL., *supra* note 33, at 203.

205. *Id.* at 37.

206. *Green v. County Sch. Bd. of New Kent*, 391 U.S. 430 (1968).

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

208. *See also* Fiss, *supra* note 38.

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

210. *Milliken v. Bradley*, 418 U.S. 717, 744, 746, 752 (1974).

211. *See Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (“Where a racially discriminatory school system has been found to exist, *Brown II* imposes a duty on local school boards to ‘effectuate a transition to a racially non-discriminatory school system. *Brown II* was a call for the dismantling of well-entrenched dual systems’ and school boards operating such systems were ‘clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.’ Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.”)(quoting *Brown v. Bd. of Educ.*, 347 U.S. 294, 301 (1955) and *Green v. County Sch. Bd.*, 349 U.S. 430, 437–38 (1968)).

212. *See Freeman v. Pitts*, 503 U.S. 467 (1992). *See also Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70 (1995).

F. *The Changing Priorities of Constitutional Adjudication*

The Court has never articulated a theory of desegregation which can adequately explain either the contradictions inherent in the above account or the role that social science should play in constitutional adjudication.<sup>213</sup> In an attempt to do both, Dworkin has distinguished between what he terms the causal and interpretive judgments of social sciences.<sup>214</sup> The former, he argues, derive from observation and, without a mechanical model of causation, rest upon statistical correlations which are susceptible to fluctuation and have no resonance in the normal vocabulary of constitutional adjudication.<sup>215</sup> However, judgments about the nature of a community's response to a particular social phenomenon or practice—such as segregation—are interpretive judgments of the kind regularly employed by the judiciary in constitutional adjudication:

“Interpretive judgments are not foreign to the judge; they don't draw on a kind of technology that is for him arcane. On the contrary, they draw upon the same kinds of skills, and are indeed identical in their structure, with the judgment that a judge makes when he draws from a line of precedent a characterization that seems to him a more sensitive characterization of the precedents than any other.”<sup>216</sup>

If, as Dworkin argues, the Equal Protection guarantee of the Constitution is a commitment that the government, in making political decisions, will treat each individual with equal concern and respect, and the judicial decision to require government to take affirmative action to desegregate reflects the Court's judgment that the political process at any particular time cannot be relied upon to secure that guarantee,<sup>217</sup> then two things become clear and an explanation for the changing attitude of the Court emerges. Interpretive judgments of social science may have done much to convince the federal judiciary first of the social consequences of “the Negro problem” and the value of integration as an appropriate response and then of the “web of segregation” that renders political process an unreliable mechanism of change. Justice Thomas's comments in *Jenkins III*, however, reflect a clear perception that forty years after *Brown* the

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213. Yudof, *supra* note 196, at 87 (“Indeed it has done all that is within its power to obfuscate the underlying bases of its decisions.”). See also *id.* for a discussion of theoretical models; James S. Liebman, *Desegregating Politics: “All-out” School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO.L.J. 1355, 1357 (1991) (stating that “The remedial process in public law litigation is a practice in search of a theory.”).

214. Dworkin, *supra* note 41, at 20–26.

215. *Id.*

216. *Id.* at 21.

217. See *id.* at 24–26.

interpretive assumptions of “Negro inferiority” which underpinned the judicial mandate for affirmative action were outdated, while the causal judgments concerning segregation’s lingering effects were no longer sufficiently reliable to warrant continuing departure from the norms of federalism and judicial deference to elected legislatures that otherwise set limits to the legitimacy of judicial interference with state and federal affairs.<sup>218</sup>

In the schools affirmative action cases that came before the Supreme Court in the 2006–2007 Term,<sup>219</sup> hopes that the Court would afford a favorable reception to social science submissions, as it had in the case of the University of Michigan Law School admission policies, were dashed.<sup>220</sup> Despite extensive social science submissions on both sides, the plurality chose not to enter the debate, basing their decision upon the primacy of the “color-blind constitution” in a non-desegregation situation.<sup>221</sup>

The affirmative action cases differ from the desegregation cases in that they do not as yet directly engage the question of remedy. At issue is the legitimacy of policies of racial preference in the pursuit of racial diversity and the extent to which, more than fifty years after *Brown*, a Court in retreat from an activist model of adjudication should be willing to lend constitutional legitimacy to integrative social policies underpinned by contestable social science.<sup>222</sup> For the Seattle Court, the distinction be-

218. *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70, 114, 138 (1995)(Thomas, J., concurring)(“It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior. We must forever put aside the notion that simply because a school district today is black, it must be educationally inferior.”).

219. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

220. *Grutter v. Bollinger*, 539 U.S. 306 (2003). The majority opinion accepted the testimony of *amici* who included business and military leaders as well as social scientists concerning the educational benefits of racial diversity. “The Law School’s claim of a compelling interest is further bolstered by its *amici* who point to the educational benefits that flow from student body diversity” *Id.* at 333. “These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints” *Id.* at 333–34. “High-ranking retired officers and civilian leaders of the United States military assert that, ‘based on [their] decades of experience, a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principal mission to provide national security’” *Id.* at 331.

221. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2755–8, 2765–68.

222. *Id.* at 2778–9 (Thomas, J., concurring)(stating that the constitutionality of the school boards’ race-conscious policies should not be left “at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists. To adopt [such an approach] would be to abdicate our constitutional responsibilities.”).

The *Grutter* majority had been careful to bolster its reliance on social science with the opinion of business and military leaders on the benefits of racial diversity, while Justice

tween “integration” and “desegregation” was clear. School boards act unconstitutionally if they seek to perpetuate the “hard won gains” of the desegregation era by race-conscious programs to combat “resegregation” that is not directly attributable to state action.<sup>223</sup> The divisions within the Court were predictable. For Justice Breyer, the school board plans “represented local efforts to bring about the kind of racially integrated education” that was the promise of *Brown*.<sup>224</sup> Justice Kennedy was prepared to recognize the compelling nature of state action to further the nation’s “historic commitment” to equal educational opportunity for all;<sup>225</sup> but, for Justice Thomas, once again the “tenuous”<sup>226</sup> or “far from apparent”<sup>227</sup> link between racial balance and improved educational outcomes for black children did not justify unconstitutional race-based experiments to achieve socially desirable ends: “this Court does not sit to ‘create a society that includes all Americans’ or to solve the problems of ‘troubled inner city schooling.’ We are not social engineers.”<sup>228</sup>

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Thomas in dissent dismissed the “faddish slogan of the cognoscenti” with counter- research citations with contrary outcomes. See *Grutter*, 539 U.S. at 350, 364 (Thomas, J., dissenting).

223. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

224. *Id.* at 2800 (Breyer, J., dissenting).

225. *Id.* at 2797 (Kennedy, J., concurring) (“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating equal opportunity for all its children.”).

226. *Id.* at 2778 (Thomas, J., concurring) (“Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling.”).

227. *Id.* at 2776 (“The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites certain social science research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.”).

228. *Id.* at 2779 n.14. The court stated:

regardless of what Justice Breyer’s goals might be, this Court does not sit to “create a society that includes all Americans’ or to solve the problems of ‘troubled inner city schooling.’ We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.

*Id.*

In his concurrence, Justice Thomas directly articulates the view that the “actual” gain in these cases lies not in the elimination of racial imbalance but in the elimination of state-enforced separation. “The dissent’s assertion that these plans are necessary for the school districts to maintain their ‘hard-won gains’ reveals its conflation of segregation and racial imbalance.” *Id.* at 2770 n.3. His opinion continues: “In the context of public schooling, segregation is the deliberate operation of a school system to ‘carry out a governmental policy to separate pupils in schools solely on the basis of race.’ In *Brown*, this court declared that segregation was unconstitutional under the Equal Protection Clause of the Fourteenth

## III. EDUCATION VERSUS INTEGRATION IN BOSTON

One of the main arguments employed by the Boston school committee to justify its opposition to court-ordered desegregation was that of usurpation of power.<sup>229</sup> Judge Garrity's court plan and orders<sup>230</sup> usurped power the constitution had given to elected state officials; yet, as Judge Frank Johnson has explained, so-called "judicial activism" in cases like this was a function of abdication of civic responsibility.<sup>231</sup> Federal judges faced with official opposition were left largely to their own devices. The Supreme Court had declared war on "gradualism" and "freedom of choice" and other overtly race-neutral policies which masked attempts to subvert the effect of *Brown*, and indicated the broad parameters of the remedial powers of district courts to fashion appropriate decrees where school authorities default. It left the details to be worked out by district judges on a case-by-case basis.

As Judge Frank Coffin<sup>232</sup> has pointed out, the process was unfamiliar and far from standardized.<sup>233</sup>

Amendment . . . [but] [r]acial imbalance is not segregation." *Id.* at 2769 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971)). "Outside of the context of remediation for past *de jure* segregation, 'integration' is simply racial balancing." *Id.* at n.2.

229. *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir. 1976).

230. I have been unable to ascertain the exact number. The court records are not complete. Formisano gives a figure of 415 orders in eleven years. See RONALD P. FORMISANO, *BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S 2* (1991).

231. Frank M. Johnson, Jr., *The Role of Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 279 (1981). Johnson asserts:

The remedy for judicial activism is a recognition that this trust is not one solely for the judiciary. As long as government officials entrusted with responsibility for constitutional governance disregard that responsibility, the judiciary must and will stand ready to intervene to the extent necessary on behalf of the deprived. To avoid this intervention, all that government officials need do is confront their responsibilities with the diligence and honesty that their constituencies deserve. Conscientious, responsible leadership will in most instances make judicial intervention unnecessary.

*Id.*

232. Frank M. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CAL. L. REV. 983, 985 (1979).

233. It could also be extremely complex, presenting reviewing courts with considerable difficulties, *vide* the Fourth Circuit's abdication in *Swann*:

We understand that the record in the case is voluminous, and we would note at the outset that we have been unable to analyze the record as a whole. Although we have carefully examined the district court's various opinions and orders, the school board's plan, and those pleadings readily available to us, we feel that we are not conversant with all of the factual considerations which may prove determinative of this appeal. Accordingly, we here attempt, not to

The judge must find the best way to accomplish a goal, seeking help not only from the parties but from court-appointed experts and masters and from citizens' committees. In this case, the district judge was concerned with such things as bus routes and distances, appropriate white-black-other minority ratios from specific schools, magnet schools, enrichment programs, methods of transfer between schools, teacher recruitment, and pairings of colleges and universities with specific secondary schools. All of these issues ordinarily would be appropriate grist for the relevant educational policymaking body, here the Boston School Committee. Indeed, the function is very close to legislative decision-making. Because the legislative authorities would not act, however, the district judge was forced to move beyond the traditional role . . . and fashioned his own remedy.<sup>234</sup>

The immediate precedent for the Garrity orders came from the Southern state of South Carolina, where District Judge James B. McMillan faced a residentially segregated urban school system and a school committee unable or unwilling to produce an acceptable plan. Judge McMillan's appointment of education expert Dr James Finger as court advisor was a tactic which was subsequently followed by Judge Jack Weinstein in New York as well as by Judge Garrity in Boston.<sup>235</sup> The court-ordered "Finger

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deal extensively with factual matters, but rather to set forth some legal considerations which may be helpful to the Court.

*Swann*, 431 F.2d at 150.

234. Coffin, *supra* note 232, at 985.

235. *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 311 F. Supp. 265 (W.D.N.C. 1970) *vacated in part*, *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 431 F.2d 138 (4th Cir. 1970), *aff'd in part*, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). See BERNARD SCHWARTZ, *SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT* (1986)(for a discussion of McMillan's order); see also DAVISON M. DOUGLAS, *READING WRITING AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOL* (1995)(for a general account).

As Schwartz points out, the choice of Dr. Finger reflected the practical difficulties faced by judges and counsel in securing assistance from local educators who were unwilling to testify for fear of antagonizing the school board. SCHWARTZ, *supra* at 14. It seems that the first appointment of an educational expert in a schools case was by Judge Bohanon, supervising the desegregation of the public schools of Oklahoma City. He appointed education experts Dr William R. Carmack, Dr. Willard B. Spalding and Dr. Earl A. McGovern to carry out a study and file a desegregation report which the court then adopted. See *Dowell v. Sch. Bd. of Okla. City Pub. Sch.*, 244 F. Supp. 971, 973 (W.D. Okla. 1965).

For Judge Weinstein's orders, see *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699 (E.D. N.Y. 1974), and for the discussion by Special Master, See Curtis J. Berger, *Away from the Courthouse and into the Field: the Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). For Judge Garrity's appointment of experts, see *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975).

Plan” which adopted “racial balance” as a criterion of desegregation and compulsory busing as a strategy received Supreme Court approval in 1971 and provided a blueprint for Northern school desegregation.<sup>236</sup>

Judge Garrity’s court plan implemented, in September 1975, was essentially a student assignment and redistricting plan on the *Swann* model, with additional educational enrichment features of the kind later approved in *Milliken II*.<sup>237</sup> The “political dynamite”<sup>238</sup> of both plans that provoked controversy on the national stage and rioting on an unprecedented scale on the streets of Boston was the requirement for compulsory transportation of students.<sup>239</sup> Busing in Boston became the focal point for school committee-led opposition to court-ordered desegregation.<sup>240</sup> Both the State plan, ordered into effect in September of 1974, and the Court plan that took effect the year after required the busing of students out of their neighborhoods to schools in another part of the city.<sup>241</sup> The arrival of buses carrying black children into white, mainly Irish working class South Boston triggered the riots that made Boston the worst symbol of white racism outside the South and saw state troopers join city police on the streets and in the schools in an effort to restore order.<sup>242</sup>

### A. The Campaign for Racial Balance in Boston

The lawsuit filed on behalf of black plaintiffs against the Boston school committee on March 2 1972 did not come out of the blue.<sup>243</sup> Dis-

236. Hart v. Cmty. Sch. Bd., 383 F.Supp. 699 (D.C.N.Y. 1974).

237. Milliken v. Bradley, 433 U.S. 267, 275–76, 279 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); *Kerrigan*, 401 F.Supp. 216.

238. Schwartz, *supra* note 235, at 19.

239. See J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985); see also RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE CLASS AND ETHNICITY IN THE 1960S AND 1970S (1991); J. MICHAEL ROSS & WILLIAM M. BERG, ‘I RESPECTFULLY DISAGREE WITH THE JUDGE’S ORDER’: THE BOSTON SCHOOL DESEGREGATION CONTROVERSY, (1981).

240. See Lukas, *supra* note 248; see also Formisano, *supra* note 248; Ross & Berg, *supra* note 248.

241. *Kerrigan*, 401 F.Supp. at 239. The Court plan required the busing of approximately 21,000 students. This number was an estimate based upon analysis by the court-appointed experts. School committee figures had grossly over-estimated the numbers of students in the system. See ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE, 27–28 (1981).

242. In October of 1974, Governor Sargent’s request for federal assistance resulted in the 82nd Airborne Regiment, stationed in Fort Bragg (N.C.) being placed on stand-by alert. See ROSS & BERG, *supra* note 239, at 263. Announcing his Phase II plan for implementation at school opening in autumn 1975, Judge Garrity noted that 166 state and local police officers continued to be stationed inside South Boston High, with 134 stationed in the vicinity during school hours. *Morgan v. Kerrigan*, 401 F.Supp. 216, 225 (D. Mass. 1975).

243. *Morgan v. Hennigan*, 379 F.Supp. 410 (D. Mass. 1974).

satisfaction on the part of black parents with the poor level of instruction available to their children predated the *Morgan* litigation by more than one hundred years. Although *de jure* segregation had never existed in Massachusetts, the city of Boston had maintained separate schools for black children since 1820.<sup>244</sup> In 1849, the case of five-year old Sarah Roberts became a *cause célèbre* when her father took action in the state courts to secure her admission to a white school.<sup>245</sup> The black school that she attended was badly run down. An evaluation committee had reported to the city that "the school rooms are too small, the paint is much defaced," and the equipment was "so shattered and neglected that it cannot be used until it has been thoroughly repaired."<sup>246</sup> Sarah had to walk past five white elementary schools to reach it.<sup>247</sup> The action was argued on her behalf by anti-slavery campaigner Charles Sumner who advanced the argument of racial stigmatization which, one hundred years later, found approval in *Brown*.<sup>248</sup> The case was ahead of its time and failed in the state Supreme Judicial Court, with Chief Justice Lemuel Shaw articulating the principles of "separate but equal" that the *Plessy* court subsequently adopted.<sup>249</sup> The case symbolized the underlying assumption on the part of black parents that, in a dual system which separated white children from black, the education offered to their children would be inevitably inferior.

In June 1961, the Massachusetts Commission Against Discrimination examined the issue of student allocation. Its finding that there was no intentional discriminatory practice on the part of the school committee was rejected by NAACP leaders who called upon the black community for support by boycott action.<sup>250</sup> On February 26 1964, following a nationwide week of boycotts, a "Freedom Stay Out" day in Boston was supported by 22,000 students, a figure which represented over 20 per cent of the city's 92,000 student population.<sup>251</sup> The following month saw the establishment of the Kiernan Committee consisting of 21 members drawn from the ranks of university presidents, religious leaders and representatives of labor and business, tasked with assisting the State Board of Education to carry out a study of racial imbalance in Commonwealth schools.<sup>252</sup> The Committee's report, published on April 15, 1965, identified fifty-five schools in the state and forty-five in Boston itself that were racially imbalanced, defined as having over fifty percent minority

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244. See *Roberts v. City of Boston*, 59 Mass. 198 (Mass. Dist. Ct. 1849).

245. *Id.*

246. Quoted in KLUGER, *supra* note 99, at 75.

247. *Roberts*, 59 Mass. at 201.

248. *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483 (1954).

249. See *Roberts v. City of Boston*, 59 Mass. at 209 as approved in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

250. See ROSS AND BERG, *supra* note 239, at 47, 48.

251. *Id.* at 49.

252. *Id.*



enrollment.<sup>253</sup> In terms of educational effect, the report concluded that racially imbalanced schools caused serious educational damage to black children by “impairing their confidence, distorting their self-image and lowering their motivation.”<sup>254</sup> Moreover, the inferior educational facilities in predominantly black schools further reduced the opportunities of black children to prepare for the “professional and vocational requirements of our technological society.”<sup>255</sup>

In 1965, when Governor John Volpe signed into law the Racial Imbalance Act (RIA) Massachusetts became the first state to mandate racial balance in its public schools.<sup>256</sup> In the course of the next seven years, neither the State Board of Education nor the federal government was able to make the Boston School Committee produce an acceptable plan.<sup>257</sup> The State Board finally produced its own plan, ordered into implementation by the state Supreme Judicial Court for September 1974 and which Judge Garrity adopted as an interim measure until the Court could devise a desegregation plan in accordance with Supreme Court mandate. Busing was integral to both State and Court plans and, given the city’s residential patterns, an unavoidable desegregation technique as defendant school committee Chairman Kerrigan himself testified.<sup>258</sup> However, as Dentler and Scott point out, the concept of “forced busing,” like the neighborhood school, was essentially a fabrication.<sup>259</sup> There was nothing remarkable about school buses: they had been a fact of Boston school life

253. MASS. STATE BD. OF EDUC., *BECAUSE IT IS RIGHT—EDUCATIONALLY: REPORT OF THE ADVISORY COMMITTEE ON RACIAL IMBALANCE AND EDUCATION 2* (1965).

254. *Id.*, as quoted in ROSS AND BERG, *supra* note 242, at 50.

255. *Id.*

256. MASS. GEN. LAWS ANN. ch. 71, §§ 37C, 37D (2008).

257. The State Board withheld state aid, giving rise to action in the state courts by the school committee to release the funds and annual bills in the legislature for the repeal of the RIA. See *Morgan v. Hennigan*, 379 F. Supp. 410, 439 (D. Mass. 1974). A complaint by a black parent to the Massachusetts Commission Against Discrimination produced a “cease and desist” order against the Committee and enforcement proceedings in the Superior Court, which remanded for a consideration of mootness, as the complaining student had already graduated. See *id.* at 450. On May 28, 1974, an MCAD Commissioner reported that the discriminatory practices continued and had not been eliminated. See *id.* at 451. Abortive attempts by Federal officials to secure compliance resulted in the withholding of Federal funds and enforcement action by the Department of Health Welfare and Education (HEW). *Id.* at 421. Following a complaint by HEW, Administrative Law Judge Ring found the city “in violation of federal statute.” *Id.* “Judge Ring’s decision was affirmed, with minor exceptions, by the final reviewing authority in HEW, In the Matter of Boston Public Schools, April 19, 1974, which found that the city had been guilty of *de jure* segregation.” *Id.* For a general account see ROSS AND BERG, *supra* note 239, at 63–66.

258. *Morgan v. Kerrigan*, 401 F. Supp. 216, 226 (D. Mass. 1975)(quoting Committee Chairman Kerrigan, “There is no way it [desegregation] can be done without the forced busing of children.”).

259. ROBERT A. DENTLER & MARVIN B. SCOTT, *SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE 27* (1981).

for many years prior to 1974,<sup>260</sup> while school committee zoning practices ensured that “the ‘neighborhood school’ [had] been a reality only in areas of the city where residential segregation [was] firmly entrenched.”<sup>261</sup> The rallying calls of “forced busing” and the “neighborhood school” were ostensibly neutral objectives behind which lurked the racism which the black plaintiffs and their lawyers sought to expose: “just as the myth of neighborhood schools gave its believers something ‘neutral’ to support, so busing gave them something ‘neutral’ to oppose.”<sup>262</sup>

Judge Garrity retained active oversight of the desegregation process in Boston for ten years. The Court plan which he ordered into implementation was an ambitious attempt to overhaul and modernize the outdated Boston public school system, and much was achieved. By the early 1980s, however, the project was in trouble; a coalition of plaintiffs, school defendants, teachers and parents combined to frustrate court orders for school closings.<sup>263</sup> Support for racial mixing ebbed, undermined by growing disillusionment with the ability of the desegregation process to bring about lasting improvements to the quality of education experienced by black children.<sup>264</sup> Influenced by the radical ideas of Derrick Bell and Ronald Edmonds,<sup>265</sup> plaintiffs’ counsel Larry Johnson began actively to question the nature of the desegregation process and to advocate a “freedom of choice” plan focusing on educational equity as opposed to “desegregation.”<sup>266</sup> In so doing, he fragmented the plaintiffs’ case and frustrated the consent decree negotiations that had been begun by State Commissioner Anrig as a way of terminating court jurisdiction, but largely to no avail.<sup>267</sup> By this time, the “law of the case” was firmly established. The

260. *Id.* On their figures “over 30,000 out of an alleged 90,000 students had been taking buses subways and taxis from home to public schools in Boston for many years prior to 1974.” *Id.* School Department figures for the school year 1972–73 showed that 10% of elementary, 50% of intermediate and 85% of high school students rode to school. See Memorandum from Robert Dentler to the Masters: Commentary on Busing and Student Transport (Feb. 24, 1975)(On file with the University of Massachusetts, Healey Library Archives and Special Collections, Garrity Papers, Series XXXVIIIf—Masters and Experts: Dentler & Scott Memos 1974– 1975 Folder 17).

261. *Morgan v. Hennigan*, 379 F.Supp. 410, 473 (D. Mass. 1974).

262. DENTLER & SCOTT, *supra* note 259, at 27.

263. For an account see DENTLER & SCOTT, *supra* note 259, at 93.

264. *Id.*

265. See, e.g., Ronald Edmonds et al., *Desegregation Planning and Educational Equity*, 17 Theory into Practice 12 (1978) and Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

266. On February 23, 1982, Attorney Johnson wrote to Defense Attorney Simonds withdrawing from the consent decree negotiations and stating his intention to develop an alternative plan that would be more responsive to his clients’ interests. See discussion in Murningham, *supra* note 31, at 108–09.

267. For an account of the difficulties of the Consent Decree negotiations, see *Morgan v. McDonough*, Memorandum and Draft Orders Toward Closing Case No. 72–911–G (D. Mass. 1982)(on file with the University of Massachusetts, Healey Library Archives and

case was a “race” case and not an “education” case.<sup>268</sup> The consequence was that, however sincere the judge’s concern with educational improvement might initially have been, the requirements of desegregation as mandated by the Supreme Court set limits to the extent that this concern could be realized, raising questions concerning the gains that *Brown* had been able to achieve.

B. *Lawyers Versus Clients: Should Brown Have Been Decided Differently?*

In 1976, Derrick Bell, himself a former NAACP/LDF staff attorney, published an important article asserting a conflict of interests between NAACP/ LDF attorneys and the black plaintiffs whom they claimed to represent.<sup>269</sup> Black plaintiffs, he argued, wanted the best education for their children, but litigators were committed to a strategy of integration as racial balance and paid insufficient attention to making black schools educationally effective.<sup>270</sup> A court desegregation plan requiring the transportation of students over long distances in the interests of racial integration which failed to materialize could not command the confidence of black parents, if the schools and the education they provided were of poor quality.<sup>271</sup> Though not the first to make these arguments, Bell’s article—in effect advocating a return to the neighborhood school policies in force in most school systems prior to desegregation—reignited a debate about tactics within the NAACP/LDF which dated back at least to 1935, when W.E. B. Du Bois warned that “the Negro needs neither segregated schools nor mixed schools. What he needs is Education.”<sup>272</sup>

As Yudof points out, whilst in the pantheon of constitutionally protected values the status of equal educational opportunity is secure, consensus breaks down in the task of translating the general into the par-

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Special Collections, Garrity Papers, Series XLd Miscellaneous: Postscript Orders 1978–88 Folder 72).

268. Transcript of hearing on April 10 1975, *Morgan v. Kerrigan*, 401 F. Supp. 216, 226 (D. Mass. 1975)(No. 72–911–G)(on file with the University of Massachusetts, Healy Library Archives & Special Collections, Center for Law & Education Papers, Morgan & Hennigan Case Records 1964–1994). In *Morgan v. McDonough*, 689 F. 2d 265 (1st Cir. 1982), school committee appellants contended that the district court had exceeded its legitimate role as the enforcer of a desegregation remedy and strayed into the realm of general educational policy. The First Circuit observed that absent racial bias, dislike of a desegregation proposal on educational grounds was not a valid reason for rejecting it. *Id.* at 276.

269. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470(1976).

270. *Id.* at 488.

271. *Id.* at 480.

272. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

ticular.<sup>273</sup> Equal opportunity in the context of education can mean one of three things: equal access (which requires absence of discrimination); equal resources (requiring equal inputs in terms of financial expenditure and availability of resources) or equal outcomes (measured in terms of academic achievement).<sup>274</sup> As a litigation strategy, the third will always be the least attractive, being dependent upon social science evidence that by then was heavily politicized. The argument received short shrift in *Jenkins III* on the basis that the District Court had not identified “the incremental effect [of] segregation . . . on minority student achievement,” i.e. it had not paid enough attention to the fact-finding exercise necessary to establish the required direct causal link between segregative acts and continuing educational harm.<sup>275</sup> In the absence of such a link, continuing achievement disparities must be attributable to external factors which were not the court’s concern:

Just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments, so too will numerous external factors beyond the control of [the school committee] and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus. Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when [the school committee] will be able to operate on its own.<sup>276</sup>

The initial NAACP strategy was one of equalization. The campaign to challenge the disparities in expenditure between white schools and black schools in state courts on matters such as, for example, teachers’ salaries had received piecemeal success but left individual teachers exposed to victimization while the ability of the state to rely on endless permutations of possible factual situations made litigation an expensive long-term strategy.<sup>277</sup> The decision to press for access in federal courts represented a change in tactic;<sup>278</sup> the immediate success of *Brown* deflected attention from the underlying assumption that integration in the form of access to

273. Mark Yudof, *Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 412 (1973).

274. *Id.*

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

276. *Id.* at 102.

277. See Cottrol et al., *supra* note 32, at 54. The tactic was to confront the State with a “Hobson’s choice”: abolish the dual system or face bankruptcy. See also Tushnet, *supra* note 99, at 102–4; Kluger, *supra* note 99, at 132; Greenberg, *supra* note 31, at 58. The NAACP’s first major victory in a federal court was *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938).

278. For a discussion see Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968).

white schools would of itself bring about the objective of educational enrichment.<sup>279</sup> Had the NAACP continued to press for educational equity, the argument goes, the difficult questions of the legitimacy of race-conscious action unlinked to fault would not have arisen. As it was, the statement that “separate” was inherently unequal invited the conclusion that all that needed to be done was to integrate. Once that had been accomplished, official responsibility for the education of African Americans was *prima facie* discharged.<sup>280</sup>

In the early 1970s, disenchantment with the failure of desegregation to bring about measurable improvements in the quality of education experienced by many black children prompted a new strategy focusing on funding. School expenditure is funded in most states by means of local property taxes. The variation in property values within a particular state, coupled with residential patterns which concentrate black families in poor urban areas and white students in wealthier suburban areas, can lead to serious disparities in the funding available to black students relative to white students.<sup>281</sup> Bell wrote that “many, including myself, decided that given the difficulty of integrating black and latino students with their swiftly fleeing white counterparts, we should concentrate on desegregating the money.”<sup>282</sup>

School funding suits had some initial success in state courts in California, where the state Supreme Court ruled that the public school funding system’s heavy reliance on local property taxes caused substantial disparities among individual school districts in the amount of revenue available per pupil and thus invidiously discriminated against the poor and violated the equal protection clause of the Fourteenth Amendment.<sup>283</sup> The hope that equalized expenditure suits might substitute for racial integration suits was dashed when the U.S. Supreme Court, in a case from Texas, ruled that education was not a fundamental right and wealth was not a suspect classification.<sup>284</sup> The Texas system attracted mere rational scrutiny as opposed to strict scrutiny and prevailed despite substantial disparities in local school resources and differences in tax effort throughout the State.<sup>285</sup> *Per* Justice Powell, the system—which was similar to those employed in virtually every other state—was not the product of purposeful discrimina-

279. Tushnet, *supra* note 106, at 105–37.

280. See generally DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM*, 20–28, 186 (2004).

281. See generally DOUGLAS S. REED, *ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY* (2001).

282. BELL, *supra* note 29, at 161.

283. *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971).

284. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

285. *Id.* “The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard.” *Id.* at 55.

tion against any class but, instead, was a responsible attempt to arrive at practical and workable solutions to educational problems.<sup>286</sup>

## CONCLUSION

### A. *Towards a Theory of the Court Expert in Schools Desegregation Suits*

In *Brown v. Board of Education (Brown I)*, the Supreme Court established a constitutional basis for the moral responsibilities of the nation in racial matters. The decision represented a defining point in the development of race relations in the United States but the principles it rested upon were ambiguous and the process of schools desegregation it inaugurated depended on political processes which the Court could command but not control. The constitutionalization of the desegregation mandate ensured that the political struggles it spawned were played out in the courts, but the inherent underlying ambiguity produced an open textured jurisprudence wherein the requirements of desegregation changed and the link between racial isolation and educational opportunity that underpinned NAACP demands for integration could no longer be assumed. Fifty years after *Brown*, a Court in retreat from an activist model of adjudication was unwilling to lend constitutional legitimacy to integrative social policies underpinned by contestable social science.<sup>287</sup>

For Judge Garrity and the lawyers involved in the Boston case, the immediate answers to the questions with which this Article opened were determined by reference to contemporary desegregation jurisprudence; these actions were necessary because the Constitution so required.<sup>288</sup> Where official action and policy had resulted in a dual system and freedom of choice would perpetuate the *status quo*, affirmative action was a mandate, not an option.<sup>289</sup> Racial balance in terms of student assignment and faculty composition were indicia of desegregation and achievement might require school closings.<sup>290</sup> Magnet schools and educational enrichment programs were legitimate techniques of enhancing “desegregative attractiveness.”<sup>291</sup> The latter might be required to combat lingering vestiges

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286. *Id.* at 55. School finance litigation has had some success at the state level but as Professor Ryan contends, it continues to be “hamstrung by the obstacles created by poor race relations and the Court’s desegregation jurisprudence.” James E. Ryan, *Schools, Race and Money*, 109 *YALE L.J.* 249, 255 (1999). See also Godwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 *LAW AND INEQ.* 81 (2006).

287. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2776–2781 (2007) (Thomas, J., concurring).

288. *Morgan v. Kerrigan*, 388 F. Supp. 581, 582 (D. Mass. 1975).

289. *Green v. County School Bd.*, 391 U.S. 430, 438–40 (1968).

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

291. *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70, 100–103 (1995). (stating that the district court plan was designed to improve the desegregative attractiveness of the Kansas

of segregation in matters of student achievement, in which case, however, detailed fact-finding must be scrupulously undertaken and the duration must be limited.<sup>292</sup> The curriculum was a legitimate area for scrutiny but, in the absence of proof of discriminatory intent, teaching and learning were pedagogical issues which were properly left to the State. Academic tracking or ability grouping, however, which might mask discriminatory intent, would not normally be permissible.<sup>293</sup>

As Forbes Bottomley, himself a former superintendent of schools in Seattle, Washington, has pointed out, an effective desegregation plan for a complex public school system such as that of Boston is more than a matter of jurisprudence.<sup>294</sup> Lawyers may be comfortable with standards couched in terms of "reasonableness" and "adequacy," but educational planners need more detailed guidance.<sup>295</sup> Translation from constitutional guidelines to specific proposals of design and implementation requires both professional expertise and a working relationship with the educational planners and school officers whose job it is on the ground to give effect to the orders of the court.<sup>296</sup> Where, as in Boston, school officials are recalcitrant and administrative default forces the judge to take over, the relationship can become "complex and frustrating."<sup>297</sup> The appointment of court experts in Boston extended the reach of the judge beyond the courtroom and the confines of the adversarial process, and so their role was part of the machinery of implementation. But in taking on the task of supervising and supplying the educational planning expertise necessary to devise and implement a workable plan, they shaped and gave content to the desegregation process in Boston and, to that extent, their role was more fundamental.

In identifying the importance of educational enhancement in a desegregation remedy, Judge Garrity's plan went further than any of his predecessors in federal desegregation suits and became the prototype for a new type of desegregation planning in which educational concerns were ostensibly as important as issues of student assignment.<sup>298</sup> Ultimately, the educational component fell victim to a desegregation jurisprudence con-

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City, Missouri (KCMSD), School District but was "so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that {...] it is beyond the admittedly broad discretion of the District Court.")

292. *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70 (1995); *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

293. *Hobson v. Hansen*, 269 F.Supp. 401, 511-514 (D.D.C. 1967).

294. Forbes Bottomley, *The Professional Educator in the Desegregation Suit*, in *LIMITS OF JUSTICE: THE COURT'S ROLE IN SCHOOL DESEGREGATION*, 621,633 (Howard I. Kalodner & James J. Fishman eds., 1978).

295. *See id.* at 633.

296. *Id.*

297. *Id.*

298. Robert A. Dentler, *Improving Public Education: The Boston School Desegregation Case* 7 *SUFFOLK U.L. REV.* 3, 8 (1975).

ceptualized in terms of “race” and not “education.” “Desegregation”, said the First Circuit, “is not a mandate to equalize schools.”<sup>299</sup>

Taking the failure of outcomes as a focus, this Article now takes the indeterminacy of the term “desegregation” as a starting point towards a theory of the role of the court expert in schools desegregation litigation. If the term “desegregation” is seen as inherently indeterminate, or, to borrow a term from discourse theory, an empty or floating signifier whose meaning crystallizes only as the general is translated into the particular, then a framework for analysis emerges.<sup>300</sup> The desegregation process becomes a forum for a negotiation between representatives of two professional discourses with differing and sometimes conflicting understandings and conceptualizations of what the process might require.

From this perspective, the court expert operates at the interface between two discursive imperatives: the so-called “harm-benefit thesis” of social science which seeks integration as a solution to “the Negro problem” and the legal imperative which prioritizes “legitimacy” and permits “integration” only as an aspect of remedial process. The two imperatives came together in the context of education, and both sets of professionals sought enhanced educational outcomes for African Americans; but, for lawyers, the harm which shaped strategy was racial discrimination whilst for social scientists the harm was racial separation.

In the forum of the federal courtroom, the discourses of law and the social sciences do not meet on an equal footing. The authority of the modern liberal state is defined in legal terms, and answers to questions of legitimacy are sought by reference to the concepts and rhetoric of legal discourse. Thus, in terms of an interaction between the rival discourses of the law and of the social sciences, it is the former which is dominant and hegemonic. The discourse of the social sciences acquires political legitimacy only to the extent that it has been subsumed within the discourse of law.<sup>301</sup> The role of the court expert can be theorized in terms of mediation or translation, the task being to give to the federal judge the content that he needs to give meaning to the otherwise indeterminate signifier “desegregation.” The voice of legitimacy is the voice of the federal judge and his attempts to articulate the boundaries of the term represent so-called nodal points for the crystallization of meaning.

In this context, the relationship between the judge and the expert is dialectical: the judge has to guide the expert on “the law.” This requires identification of the general legal principles which regulate the exercise of

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299. *Morgan v. McDonough*, 689 F.2d 265, 267 (1st Cir. 1982).

300. For a series of essays on the value of discourse theory as an analytical perspective in social and political analysis see *DISCOURSE THEORY IN EUROPEAN POLITICS: IDENTITY POLITICS AND GOVERNANCE* (David Howarth and Jacob Torfing eds., 2005).

301. See CAROL SMART, *FEMINISM AND THE POWER OF LAW* 4–25 (1989) (for an analysis of the “power of law” to not only define what constitutes legal discourse but also to assimilate “truths” from other discourses).



the judicial function, and the specific principles of constitutional liability and relief which have been provided by the Supreme Court and Circuit Courts in previously-decided cases. These give the judge his "road map"; from these he identifies his imperatives and sets an agenda. Translation of these imperatives into proposals for practical changes in educational policy and practice is the task of the expert, who may be a testifying witness or may be a specially appointed court adviser. Either way, these proposals are acceptable only to the extent that they can be justifiable in terms of legal discourse. In other words, the practical proposals of the social scientist must be capable of translation into the language of the law and justifiable by reference to the legal signifiers to which they give content. The measure of accomplishment is the scrutiny of the wider legal community as represented in the first instance by the appellate judges to whose authority appeal might lie. Ultimately, however, the effect is to bring about a transfer of power from elected school officials to the wider group of academic and practicing lawyers and the politicians and representatives of business interests with whom they interact who collectively make-up the hermeneutic community that Dworkin has identified as the community of legal discourse.<sup>302</sup>

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302. See RONALD DWORKIN, *LAW'S EMPIRE* 52, n.2 (1986) (identifying the philosophical foundations of creative interpretation and paying tribute to the influence of H.G. Gadamer).