Brown v. Board of Education, Footnote 11, and Multidisciplinarity

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INTRODUCTION

After fifty years, the Brown v. Board of Education1 decision endures as a prominent quasi-Rorschach test for legal scholars and others. Understandings of the Brown decision and its legacy have varied tremendously over the past fifty years. These variations reflect social and

† Professor, Cornell Law School. I am grateful to Cyanne T. Chutkow and Trevor W. Morrison for their input on earlier drafts. I thank the participants in the Brown v. Board of Education Symposium at Cornell Law School as well as participants in faculty workshops at Vanderbilt and Indiana University law schools. Thanks as well to Hayley E. Reynolds and librarians at Cornell for excellent research assistance and to Joanna Hooste for helpful administrative support.

legal changes as much as they do the decision itself. One aspect of Brown's legacy frames an intriguing dilemma that has vexed legal scholars for decades. For many, Brown endures as one of the most important Supreme Court decisions of the twentieth century, if not the most.2 A review of what Brown accomplished, however, suggests that it fell short of its goal of integrating public schools. To put the point more precisely, although Brown succeeded in launching a desegregation movement, both the decision and movement failed to adequately integrate public schools. Despite this failure, however, the Brown decision continues to profoundly influence education litigation. What remains curious is how the Brown decision achieved iconic status without achieving much success in integrating public schools.

Brown and its legacy understandably continue to fuel an already voluminous commentary. The decision's fiftieth anniversary contributes another spike in scholarly and public attention. Many dwell upon the decision's implications for separation of powers and constitutional interpretation.3 Others focus on such questions as the decision's influence on school integration and the incorporation of social science evidence in footnote 11 of the Brown opinion.4 Much of the commentary, however, ignores one of Brown's critical—though underappreciated—indirect effects: transforming the equal educational opportunity doctrine by casting it empirically. Moreover, this indirect effect in turn contributed to one of Brown's key unanticipated effects: contributing to law's increasingly multidisciplinary character. This Article explores both aspects of Brown's legacy.5 If my central claims are

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3 See, e.g., Jack M. Balkin, What Brown Teaches Us About Constitutional Theory, 90 Va. L. Rev. 1537, 1537 (2004) (describing that "one of the most enduring lessons Brown offers us is the relative importance of positive constitutional theory and the relative limitations of normative constitutional theory").

4 See, e.g., Erica Frankenberg et al., A Multiracial Society with Segregated Schools: Are We Losing the Dream? (2003) (describing the "patterns of racial enrollment and segregation in American public schools at the national, regional, state, and district levels for students of all racial groups"), available at http://www.civilrightsproject.harvard.edu/research/reseg03/resegregation03.php; Michael Heise, Litigated Learning and the Limits of Law, 57 Vand. L. Rev. (forthcoming 2004). For a discussion of footnote 11's importance, see infra notes 69–79 and accompanying text.

5 In a prior Article, I sketched out the initial contours of the first claim: How Brown—specifically footnote 11—empiricized the equal educational opportunity doctrine. See
correct, my response to the *Brown* dilemma is that although it did not accomplish its intended goal of school integration, it accomplished much else, albeit indirectly and unexpectedly.

This Article proceeds in three parts. Part I considers various ways to assess *Brown’s* numerous meanings. While acknowledging *Brown’s* Rorschach test-like qualities, this Article nonetheless argues that the *Brown* decision remains, at least to some degree, about public school integration. The perspective of school integration casts a negative light on the *Brown* decision’s efficacy. To argue that *Brown* (and the school desegregation movement it inspired) did not achieve its school integration goals, however, is not to argue that the decision lacked impact or consequence. Indeed, how the Court articulated *Brown* has generated interest, criticism, and future change, as did what the Court decided. Part II considers one indirect impact flowing largely from *Brown’s* footnote 11: the empiricization of the equal educational opportunity doctrine. Not only did the *Brown* decision transform how courts construe educational opportunity, but a review of post-*Brown* education litigation reveals that the decision’s influence has persisted for five decades and penetrated a variety of different areas beyond desegregation, including school finance, school choice, and single-sex education. Finally, Part III demonstrates how *Brown* generated additional unanticipated results as well. Specifically, the decision’s indirect effect of empiricizing the equal educational opportunity doctrine produced the unexpected consequence of contributing to and reflecting a discernable trend in the law toward multidisciplinarity. Part III examines judicial opinions as well as legal scholarship to demonstrate this trend. The concluding section ties the various arguments together to make the point that, after fifty years, what is clear is that the *Brown* decision was influential, but in surprising and unexpected ways.

1

**WHAT *BROWN* MEANS**

The *Brown* decision continues to mean different things to different people at different moments in time. According to Professor Jack Balkin, *Brown’s* meaning shifts over time because of a similarly shifting political center.6 Balkin observes that “the *Brown* we have today has been formalized and domesticated, limited in its remedial scope, and made palatable for mass consumption.”7 The *Brown* decision’s deploy-
ment by political movements has also evolved. By signaling a clear end to public schools’ formal exclusion of African-American students in 1954, Brown delivered a manifest civil rights victory and ignited a movement to integrate public schools. Decades later, Brown and its legacy were pressed back into service by those seeking to preserve public universities’ ability to preference African-American applicants in an effort to enhance higher education diversity.  

Contributing to Brown’s multiple meanings, each generation has its own opportunity to reread, rewrite, and reinterpret such seminal legal decisions. Each successive generation’s reworking of Brown adds additional layers of gloss over our understanding of the decision. For many in 1954, the Brown decision embodied a promise for timely, practical results. For example, Thurgood Marshall famously remarked that Brown would mean the end of all forms of segregation “by the time the 100th anniversary of the Emancipation Proclamation is observed in 1963.” Today, however, after decades of sustained struggle with various issues germane to race, many view Brown as more an ideal than a legal decision. Like most ideals, the decision’s meaning lies not in practicalities, such as whether it actually helped integrate public schools, but rather its embodiment of the more abstract proposition that the struggle for integrated public schools is legally, politically, and morally a struggle worth fighting for.

Despite a constantly changing political context and different evolving understandings of Brown’s meaning, modern interpretations of Brown’s legacy usually gravitate towards one of two general themes: what the decision accomplished or what it did not. This Article argues that Brown and its legacy are best understood for representing

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9 To some, modern interpretations of Brown diverge significantly from its original or core meaning. See, e.g., David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. CHI. L. REV. 935, 939 (1989) (describing how “Washington v. Davis constituted a ‘taming’ of Brown and a conservative approach to that decision”).


aspects of both. Although the decision did not generate the desired levels of public school integration, despite fifty years of effort, the decision did help recast the equal educational opportunity doctrine in empirical terms and in a manner that continues to influence education litigation.

A. Brown's Unfulfilled Mission: Public School Integration

Although Brown means many different things to many different people, almost all agree that the decision is at the very least about school desegregation. Consequently, the lack of success in integrating public schools is an important part of Brown's legacy. Although I argued in a previous article that the admittedly narrow lens of school desegregation progress casts an unflattering light on the Brown decision's efficacy, the general point, as well as the supporting empirical evidence, warrant repeating.

Although the Brown decision can rightfully claim credit for eliminating de jure segregation, by the turn of the century most African-American and Hispanic students still attended schools that were predominately minority. During the 2000–2001 school year, for example, 72% of African-American and 76% of Hispanic students attended schools that were predominately (between 50% and 100%) minority. More than one-third of African-American and Hispanic students attended schools that were intensely (over ninety percent) minority. At the same time, the overwhelming majority of white students attended predominately white schools; indeed, the average white student attended a school that was almost 80% white. Notwithstanding the Brown decision and five decades of Brown-inspired litigation, "there has not been a single year in American history in which at least half of the nation's black children attended schools that were largely white."

1. Urban Public School Districts

Although these national public school enrollment data are telling, they miss some critical nuances. Current data from the nation's

ed. 2004) and Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (1994)).

13 See Heise, supra note 4.

14 Frankenberg et al., supra note 4, at 33 (providing figures); id. at 31 (defining "predominately minority" schools as "schools with 50–100% minority student populations").

15 Id. at 31 (showing percentages for African Americans); id. at 33 (showing percentages for Hispanics).

16 Id. at 27.

largest school districts brings current levels of school segregation into sharper focus. As Table 1 illustrates, all but one (Hillsborough County, Florida) of the nation’s largest school districts are predominately minority. Of course, even Table 1 does not fully capture the extent of racial isolation in certain school districts. For example, as of 1995 all of the students in East St. Louis, Illinois, and Compton, California, were minority. Close to all (between 93% and 96%) of the students in Detroit, Washington, D.C., Hartford, New Orleans, San Antonio, Camden, Oakland, and Atlanta were minority. In Richmond, Virginia and Newark, New Jersey, over 90% of the students were minority.

Table 1 also evidences another critical development that, while subtle, helps frame evolving school demographic profiles. A comparison of columns 1 and 2 reveals that, in every instance, the proportion of white, non-Hispanic individuals living in these large cities exceeds—in some districts by more than 100%—the proportion of white, non-Hispanic students attending public schools. Thus, white families living in the nation’s largest areas avail themselves of private school options at a rate that greatly exceeds their non-white counterparts. This trend, combined with white families’ greater willingness to pursue other educational options, depart urban areas when their children reach school age, or avoid living in cities to begin with, form a double-whammy. As a consequence, both trends fuel a disproportionate absence of white schoolchildren in urban public schools and contribute to levels of racial isolation in urban districts that exceed what residential integration levels predict. To be sure, the migration of white families with school-age children from urban to non-urban areas is a function of many factors, some of which remain in dispute. Many point to forced and voluntary desegregation efforts as one such factor contributing to this migration.

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20 Jerald & Curran, supra note 18, at 65.
TABLE 1. DISTRICT RESIDENTIAL POPULATION\textsuperscript{22} AND TOTAL PUBLIC SCHOOL ENROLLMENT,\textsuperscript{23} BY RACE AND ETHNICITY IN THE NATION'S LARGEST SCHOOL DISTRICTS\textsuperscript{24} (PERCENT)

<table>
<thead>
<tr>
<th>Residential School District</th>
<th>White, non-Hispanic (1)</th>
<th>School District White, non-Hispanic (2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York City</td>
<td>35.0</td>
<td>15.3</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>29.7</td>
<td>9.9</td>
</tr>
<tr>
<td>Chicago</td>
<td>31.3</td>
<td>9.6</td>
</tr>
<tr>
<td>Dade Cty, FL</td>
<td>41.3</td>
<td>11.3</td>
</tr>
<tr>
<td>Broward Cty, FL</td>
<td>58.0</td>
<td>41.2</td>
</tr>
<tr>
<td>Clark Cty, NV</td>
<td>60.2</td>
<td>49.9</td>
</tr>
<tr>
<td>Houston</td>
<td>30.8</td>
<td>10.0</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>42.5</td>
<td>16.7</td>
</tr>
<tr>
<td>Hillsborough Cty, FL</td>
<td>63.3</td>
<td>51.8</td>
</tr>
<tr>
<td>Detroit</td>
<td>10.5</td>
<td>3.7</td>
</tr>
</tbody>
</table>

2. Increasingly Unstable "Successfully" Integrated Public School Districts

Despite the substantially segregated school environments in many urban school districts, few dispute that \textit{Brown} contributed to an increase in school integration in some—perhaps many—districts. Indeed, commentators rightly note that \textit{Brown}-inspired school desegregation efforts in such communities as Shaker Heights, Ohio; Berkeley, California; and Evanston, Illinois generated important pro-

\textsuperscript{22} Source: U.S. Census Bureau, Census 2000 Summary File 1, Matrices P3 and P4.

Beginning with the 2000 census, respondents were permitted to select more than one ethnicity or race, or they could write in their own racial description. To account for the possibility for double-counting I present racial and ethnic data in terms of either "White, non-Hispanic" or "all other." To derive the percentage of white, non-Hispanic residents I divided the total number of single race, white-only non-Hispanics by the total population. The resulting percentage captures those individuals who described themselves as only white \textit{and} non-Hispanic. Minimizing double-counting comes at a cost of a loss of greater racial specificity. Insofar as school desegregation has traditionally been construed in terms of white and non-white students, such a cost, though regrettable, is reasonable. For a description of problems that now confront demographers and researchers, see, e.g., Tamar Jacoby, \textit{An End to Counting By Race?}, 111 COMMENTARY 6 (June 2001) (describing the changes to Census policy); Glenn D. Magpantay, \textit{Asian American Voting Rights and Representation: A Perspective From the Northeast}, 28 FORDHAM URB. L.J. 739, 748 n.69 (2001) (arguing that the Census Bureau's new policy on racial and ethnic identification will complicate enforcement of voting rights); Mireya Navarro, \textit{Going Beyond Black and White, Hispanics in Census Pick 'Other,'} N.Y. TIMES, Nov. 9, 2003, at A1 (noting how Hispanic respondents react to the new Census options regarding race and ethnicity).


\textsuperscript{24} Due to an array of anomalies, the list of the largest school districts excludes two districts—Puerto Rico and Hawaii.
gress. Even though there has been important school integration progress, a comparison between school demographic profiles and relevant residential demographic profiles suggests demographic instability. Table 2 provides demographic data for five school districts—perceived to maintain some of the nation's most desirable and high-performing public high schools—that commentators frequently cite as examples of successful integration.25

A closer examination of these school districts—noted for both academic success and racial and ethnic diversity—uncovers reasons for concern. School districts where litigation failed to increase school integration (Table 1) and districts widely acknowledged to have successfully established integrated schools (Table 2) share one critical point. A comparison of columns 1 and 2 in Table 2 reveals that, like Table 1, in every instance the percentage of white, non-Hispanic residents living in the successfully integrated school districts exceeds the percentage of white students attending the district’s public high school.26 Although the size of the disparities in the successfully integrated school districts (Table 2) is less than the size of the disparities noted in Table 1, the trend exists in both contexts. White households—even those in well-to-do suburbs zoned for academically successful public high schools—continue to exercise educational options by removing their children from integrated public high schools at a much higher rate than their non-white counterparts. In other words, despite residing in some of the nation’s most sought-after suburban locations—largely because of their high-achieving public schools—some white families nevertheless continue sending their children to private schools. Even more ominous are the current trends suggesting that gradual resegregation, which is already in progress even in “successfully” desegregated districts, will likely persist.27

26 These suburbs were selected, in part, because they each have only one public high school. Thus, the high schools’ demographic profiles capture the entire area’s high school-age cohorts attending public school.
Table 2. District Residential Population and Public High School Enrollment, by Race and Ethnicity in “Successfully” Integrated Districts (percent)

<table>
<thead>
<tr>
<th></th>
<th>(1) Residential White, non-Hispanic</th>
<th>(2) Public High School White, non-Hispanic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shaker Heights, OH</td>
<td>59.3</td>
<td>44.3</td>
</tr>
<tr>
<td>Evanston, IL</td>
<td>62.6</td>
<td>50.6</td>
</tr>
<tr>
<td>White Plains, NY</td>
<td>54.2</td>
<td>40.4</td>
</tr>
<tr>
<td>Berkeley, CA</td>
<td>55.2</td>
<td>41.4</td>
</tr>
<tr>
<td>Oak Park-River Forest, IL</td>
<td>69.9</td>
<td>64.6</td>
</tr>
</tbody>
</table>

Much of the public debate and academic attention—like Tables 1 and 2—focus on white families' migration from public to private schools. Interestingly, however, the migration of African-American students from public to private schools—especially those from upper- and middle-income households—has continued largely unabated with comparatively less comment. While precise data on African Americans' departure from public schools do not exist, circumstantial data hint at the migration's magnitude. Nationwide, approximately 200,000 African-American students attend Catholic elementary and secondary schools. Minority enrollment as a percentage of total Catholic school enrollment increased from approximately ten percent in 1970 to more than twenty-five percent in 2004.

Interpretations of Brown's impact on school integration data vary. For some, the less-than-positive school integration data suggest that the courts were not aggressive enough in flexing their Article III authority. Others draw from these data lessons about judicial inefficacy predictably flowing from courts venturing too far into legislative

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28 See supra note 22.
29 See supra note 23.
31 Id.
32 Id.
33 See, e.g., Jennifer L. Hochschild, The New American Dilemma: Liberal Democracy and School Desegregation 147-48, 190-97 (1984) (arguing that gradual desegregation is ineffective, and that integration can be successfully achieved through strong court authority, unequivocal policy, and firm enforcement); David R. James, City Limits on Racial Equality: The Effects of City-Suburb Boundaries on Public School Desegregation, 1968-1976, 54 Am. Soc. Rev. 963, 981-82 (1989) (concluding that uneven and inconsistent federal desegregation actions permitted increasing segregation between school systems); Gary Orfield, Turning Back To Segregation, in Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education 1-2 (Gary Orfield et al. eds., 1996) (asserting that "[a]s long as school districts temporarily maintain some aspects of desegregation for several years and do not express an intent to discriminate, the [Supreme] Court approves plans to send minority students back to segregation").
(or executive) matters for which judges and courts possess no particular institutional competence, comparative or otherwise. Regardless of one’s perspective, however, evidence of Brown’s efficacy with regard to school desegregation is, at best, mixed. As Table 2 illustrates, “success” in this context is both tenuous and fragile. Moreover, prospects for increasing integration levels in the near future are slim. Some school desegregation proponents—those on the front-lines of this effort—conclude that, if anything, public school integration will likely worsen.

3. Was Brown Doomed to Fail to Integrate Public Schools?

Those who view the Brown decision and its subsequent implementation as a lost opportunity frequently point to other crucial Supreme Court decisions to explain Brown’s failure to fully integrate American schools. According to Professor Chemerinsky, “[d]esegregation likely would have been more successful, and resegregation less likely to occur, if the Supreme Court had made different choices.” More strident advocates of this argument assail recent Court decisions as abandoning the multi-decade school desegregation effort.

Other Court decisions clearly contribute to Brown’s inability to integrate America’s public schools. Prominent among these decisions are those that protect parental freedom to select nonpublic education for their children, generating remedial latitude through Brown II’s “all-deliberate-speed” language and permitting suburban school districts to opt out of participation in metropolitan desegregation plans. More concretely, these court decisions secure parents’ rights to send their kids to private schools, allow school districts broad latitude in defining “all deliberate speed,” and insulate culpable suburban school districts from the reach of desegregation remedies that impede school desegregation efforts.

Three decades before the Brown decision, the Court concluded in Pierce v. Society of Sisters that the government could not encroach upon parental autonomy by compelling public school attendance. In other words, parents were entitled to satisfy state compulsory educa-

35 See, e.g., Erwin Chemerinsky, The Segregation and Resegregation of American Public Education: The Courts’ Role, 81 N.C.L. Rev. 1597, 1622 n.190 (2003) (asserting that “[t]ragically today, America has schools that are increasingly separate and unequal” and calling for a “major national initiative for school desegregation”).
36 Id. at 1620.
38 268 U.S. 510 (1925).
39 Id. at 534–35.
tion laws with either public or private schooling.\textsuperscript{40} Although a variety of school choice options now exist\textsuperscript{41}—including the largest variant, parents selecting where to live based on the quality of public schools in a residential area\textsuperscript{42}—a critical point is that a family’s decision to leave public schools for private schools is constitutionally protected, notwithstanding its implications for school integration.

The impact of increased parental choice on school integration has varied over time. In the mid-twentieth century, in many areas in the South, white families abandoned public schools to thwart federal court desegregation efforts.\textsuperscript{43} More recent history, however, rehabilitates private schools’ implications for minorities and integration. Since the 1980s and 1990s, policymakers have viewed increasing access to private schools as one way to enhance racial integration.\textsuperscript{44} Furthermore, despite private schools’ implications for public school integration levels, it is important to emphasize private schools’ comparatively small footprint on the total elementary and secondary school market. In 1999–2000, private schools accounted for just over 24% of the nation’s schools and served just over 10% of the nation’s schoolchildren.\textsuperscript{45} Consequently, the ability of private schools to dramatically influence public school integration levels in either direction is circumscribed by private schools’ substantially smaller (though growing) market share.

Much of the conventional wisdom concerning the Brown decision’s inability to successfully integrate public schools dwells on the

\textsuperscript{40} Id. at 534.

\textsuperscript{41} For a full discussion on these options, see James E. Ryan & Michael Heise, The Political Economy of School Choice, 111 Yale L.J. 2043, 2063–85 (2002).


\textsuperscript{43} See Betsy Levin, Race and School Choice, in School Choice and Social Controversy, supra note 42, at 267–68.

\textsuperscript{44} See, e.g., Jeffrey R. Henig, Rethinking School Choice: Limits of the Market Metaphor 110–11 (1994) (describing “controlled choice” and “magnet school” plans, which employ public funds to create special educational programs in racially or economically homogenous areas to attract students from a variety of backgrounds and thus increase sudden diversity); Richard D. Kahlenberg, All Together Now: Creating Middle-Class Schools Through Public School Choice 116–50 (2001) (explaining how various methods of offering choice among public schools, as opposed to traditional geographic attendance zone assignments, can counteract the problem of residential segregation bleeding into school segregation); Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 58–60 (1999) (describing a system of limited parental choice that purports to increase integration voluntarily through a blend of vouchers and racial caps.).

Court's implementation decision, Brown II. In a break from customary practice, the Court separated the liability and remedy portions of the Brown litigation. The Court decided Brown II more than one year after the initial Brown decision, following rebriefing and reargument. In Brown II, the Court advanced two atypical points. First, the Court noted that the defendants—the losing public school districts—bore primary responsibility for implementing the Brown remedy. The second novel point involved timing. Specifically, the Court concluded that school districts need not comply with Brown immediately, but rather with "all deliberate speed." Both points from Brown II served as a relief valve for districts operating dual school systems. The relief valve facilitated resistance to the Brown decision in the South.

Southern school districts' resistance to Brown proved difficult to overcome—even with sustained litigation—and integration levels in southern public schools did not substantially change after Brown. Indeed, from almost any plausible perspective, the effort in the South to implement the Brown decision "was not characterized by speed, deliberate or otherwise." Although judicial action alone proved generally insufficient to increase integration levels, Congress's Civil Rights Act of 1964 provided much-needed muscle. By permitting the federal government to withhold federal education funding from school districts that did not satisfactorily comply with school desegregation orders—and thereby supplying an economic consequence for resistance—legislation and enforcement threats helped stimulate school integration.

While Pierce v. Society of Sisters insulated family decisions to exit public schools, Milliken v. Bradley directly preferred local school district autonomy over school integration and indirectly protected decisions about where people live from the full reach of court-ordered school desegregation plans. While Brown II slowed the pace of school integration, the Court advanced two atypical points.
desegregation, *Milliken* effectively brought it to a close. Partly triggered by school desegregation efforts, particularly those involving aggressive school busing programs, residential migration accelerated.\(^{58}\) The migration of middle- and upper-income families—especially those with school-age children—from cities to suburbs substantially implicated school desegregation efforts. Prior to 1974, much of this migration proceeded under an implicit assumption that local suburban school districts would retain control over student assignments to their schools.\(^{59}\) The *Milliken* decision confirmed that assumption.\(^{60}\)

After *Milliken*, the migration of middle- and upper-income families benefited from the legal certainty of suburban districts’ insulation from metropolitan school desegregation remedies.

Persistent residential segregation occupies a high position on the list of numerous and complex factors that explain today’s low school integration levels. Unsurprisingly, the application of neighborhood school assignment policies to residentially segregated areas generates segregated schools. The prominence of neighborhood school assignment policies makes disaggregating school and residential segregation patterns necessary. To understand the latter, however, is to understand the former.\(^{61}\) What is clear five decades after *Brown* is that the decision did little to dislodge the tight link bonding residential and school enrollment patterns. Moreover, the *Milliken* decision can be read to imply just the opposite effect: that the link between residence and public school assignment endures partly because of the *Brown* decision.

For an array of reasons, the overwhelming majority of public school students attend neighborhood schools and, as a consequence, public schools are as segregated as the neighborhoods in which they are located. The same Court that previously endorsed a judicially-sponsored effort to integrate public schools\(^{62}\) also concluded that lo-


\(^{59}\) *Id.* at 180 (noting the attractiveness to white families of suburban (and private) school districts that can serve as a refuge for those assigned to school districts encumbered by a school desegregation plan).

\(^{60}\) *Id.* at 744–45 (holding that the courts could not cross school district boundaries to desegregate without evidence of de jure segregation in both—even if de facto segregation precluded achievement of integration goals).

\(^{61}\) See Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 Minn. L. Rev. 795, 796 (1996) (“One need not delve exhaustively into the research on school desegregation to find acknowledgment of the important effect of residential segregation on school segregation.”).

cal school district autonomy interests precluded interdistrict school desegregation plans. These two general principles—a desire for integrated schools and respect for local control—collided in the school desegregation setting. By 1974, the Court realized it could not have it both ways. When forced to choose, the *Milliken* decision illustrates that local autonomy prevailed.

Partly due to the *Pierce*, *Brown II*, and *Milliken* decisions, individually and collectively, the school desegregation movement ignited by *Brown* began buckling under its own weight. A series of Court decisions in the 1990s accelerated school districts' efforts to seek unitary status as well as signaled the Court's desire to disengage with decades of court supervision of school desegregation activities. In *Board of Education v. Dowell*, the Court made clear its view that court-ordered school desegregation plans were temporary and that local school districts could petition for unitary status, earn a release from court supervision, and reinstate neighborhood school assignment practices even if the result would be either to return to de facto segregated schools or enhance racial isolation. Moreover, almost five years later, in *Missouri v. Jenkins*, the Court noted that lagging student achievement gaps between minority and non-minority students could not alone prevent a local school district from achieving unitary status.

Court decisions prior to and following *Brown* thereby undermined the realization of *Brown's* school integration goals. Specifically, Court decisions during the past two decades helped clarify an exit strategy for school districts seeking relief from court supervision, and hastened the demise of the school desegregation movement. Despite their persuasiveness, however, these court-centered explanations risk obscuring the contribution of nonjudicial factors to current school integration levels. As is frequently the case, the interaction of legal and nonjudicial factors accounts for social change, including school desegregation. More persuasive accounts of *Brown's* inability to integrate public schools balance the interactions between key Supreme Court decisions and nonjudicial factors.

B. Footnote 11

In addition to what *Brown* says, the decision's structure is similarly important. Indeed, *how* the Court crafted the *Brown* opinion has a legacy of its own. Specifically, the Court's deployment of social sci-

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63 *See Milliken*, 418 U.S. at 744–45.
65 *Id.* at 244–51.
67 *Id.* at 100–01.
68 Title VI of the Civil Rights Act of 1964 is one obvious nonjudicial factor that influenced school integration. *See Rosenberg, supra note 52.*
ence evidence in footnote 11 contributed to an increasingly empirical equal educational opportunity doctrine.

If the goal of integrating America's public schools was not controversial enough, how the Court justified its goal generated additional controversy. Correctly anticipating an adverse public reaction to the Brown decision, historians note that Chief Justice Warren set out to write a brief (by legal opinion standards), uncomplicated legal opinion in a plain, nonaccusatory tone. Chief Justice Warren astutely surmised that a brief opinion increased the probability that it would be reprinted in its entirety by a larger number of the nation's newspapers.

Within the opinion, a single sentence distills the Court's core argument in Brown:

"To separate [schoolchildren] 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."71

Having advanced a psychological argument to buttress its conclusion of constitutional harm, the Court favorably referenced a lower court finding that linked state-sanctioned segregation with psychological harms. It was at this juncture that the Court sought to push its psychological argument even further by framing it in social science research, noting that "this finding [of psychological harm] is amply supported by modern authority."73 As a result, Chief Justice Warren dropped a footnote—the much-maligned footnote 11—which references a list of social science sources purporting to support the Court's finding of psychological harm.74

The Court's finding of psychological harm draws on research by Dr. Kenneth Clark. The reference to Clark's work in the Brown opinion generated increased attention to Clark's research in general. The particular study by Dr. Clark that the Brown opinion cites involved asking a small number of African-American schoolchildren to select

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69 See, e.g., Lucas A. Powe, Jr., The Warren Court and American Politics 29 (2000) ("Brown was ... short because it was nonaccusatory. Southerners weren't going to like the result no matter what the Court said, but Warren wanted nothing to unnecessarily inflame them.").

70 Id.


73 Brown, 347 U.S. at 494.

74 Id. at 495 n.11.

75 Id.
among an assortment of white and black dolls. When the African-American schoolchildren identified the white dolls as "nicer," Dr. Clark concluded that the children lacked adequate self-esteem. Both Dr. Clark and the Court identified state-sponsored school segregation as the cause of the inadequate self-esteem (the psychological harm).

Although Chief Justice Warren sought to minimize controversy, which was perhaps a naive undertaking, it nonetheless arrived almost instantly. Footnote 11 attracted much attention, especially with regard to Dr. Clark's research. However, Dr. Clark's study did not endure close scrutiny well. Observers characterized as "astounding" the fact that Dr. Clark's studies contributed to the foundation for one of the Court's most important decisions of the twentieth century. Critics advanced two broad attacks against footnote 11. First, a technical critique focuses on the quality of the research cited in footnote 11. Second, a theoretical critique questions the extent to which footnote 11 influenced the outcome in Brown. Debates on both criticisms persist.

Technical aspects of Dr. Clark's research drew heavy criticism. Critics noted that Clark's study involved a small sample size and lacked anything remotely resembling a control group. Commentators described Dr. Clark's methodology as "primitive," certainly by today's standards and even perhaps by social scientific standards existing in the mid-1950s. Important causation problems fueled additional technical criticism of the Clark study. The Court's use of Dr. Clark's research rests on the integrity of a causal link between state-sponsored segregation and the plaintiffs' harm. The Court construed the harm in terms of psychological harm flowing from state-enforced segrega-

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78 Id.
79 Viteritti, supra note 76, at 94.
81 Id. at 804-06.
82 See, e.g., id. at 803-14 (describing the enduring debate over footnote 11). See generally James E. Ryan, The Limited Influence of Social Science Evidence in Modern Desegregation Cases, 81 N.C. L. REV. 1659 (2003) (arguing that the influence of social science evidence on the outcome of court decisions is limited).
83 See Powe, supra note 69, at 43.
84 Id. at 42-43.
tion policies.\textsuperscript{85} One logical inference from the Court's characterization of the plaintiffs' harms was that such harm would not occur absent de jure school segregation. Results from Dr. Clark's study, however, also included findings that African-American children attending schools in northern states (that is, states \textit{without} de jure state-sponsored school segregation) were even more likely to prefer white dolls than the African-American children attending state-segregated schools in the South.\textsuperscript{86} This finding, of course, compromises the presumed causal link between state-sponsored segregation and the harm pressed in the \textit{Brown} litigation.

In addition to raising technical questions about the social science underlying footnote 11, critics also decried the footnote's implicit influence on the outcome in \textit{Brown}.\textsuperscript{87} On a theoretical level, critics recoiled at the possibility that the integrity of the \textit{Brown} decision rested upon the integrity of the social science evidence cited by the Court.\textsuperscript{88} Further questions arose about the implications for \textit{Brown}'s precedential value if the underlying social science changed over time. Many also balked at the implicit suggestion flowing from footnote 11 that more traditional constitutional values were insufficient to support the Court's decision.\textsuperscript{89} Most now argue that the Court need only to venture as far as the Fourteenth Amendment's Equal Protection Clause to gain support for the conclusion that state-sponsored school segregation is unconstitutional.\textsuperscript{90} Of course, such an argument, though perfectly obvious today, may have been less apparent fifty years ago. Indeed, much of the Equal Protection Clause's modern development, in both relative and absolute terms, took place after the \textit{Brown} decision. In any event, footnote 11 has not weathered the test of time well. Most of today's leading constitutional scholars basically eschew the particular path taken by the Court in \textit{Brown}.\textsuperscript{91}


\textsuperscript{86} \textit{Powe}, supra note 69, at 43; \textit{Norman I. Silber, With All Deliberate Speed: The Life of Philip Elman} 215 (2004).

\textsuperscript{87} Although the inclusion of social science evidence invited sustained criticism, at least one scholar suggests that, criticisms aside, the social scientific evidence probably played a minor role in the decision itself. \textit{See generally} Dennis J. Hutchinson, \textit{Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958}, 68 Geo. L.J. 1, 87 (1979) (suggesting that unanimity was what played a crucial role in the decision).

\textsuperscript{88} \textit{Mody}, supra note 80, at 805 (quoting Professor Edmond Cahn's statement that "I would not have the constitutional rights of [any Americans] . . . rest on any such flimsy foundation as some of the scientific demonstrations in the records.").

\textsuperscript{89} \textit{See, e.g.}, Charles L. Black, Jr., \textit{The Lawfulness of the Segregation Decisions}, 69 Yale L.J. 421, 426 (1960) (arguing that the \textit{Brown} decision, though correctly decided, should have been grounded in less alternative constitutional principles).

\textsuperscript{90} \textit{See generally} Balkin, supra note 2, at 57 ("States can forego a public education completely, but once they provide public education they have constitutional duties of fairness and equality under the Equal Protection Clause.").

\textsuperscript{91} \textit{See id.} at 44–53 (arguing that many of today's constitutional scholars disagree with Chief Justice Warren's reliance on social science evidence). In an interesting thought ex-
Today's criticism of the Brown decision benefits from fifty years of hindsight. While such ample hindsight provides an advantage that the Warren Court lacked, it also supplies unusual clarity on the decision's consequences. While Brown's overall legacy will likely remain a subject of vigorous debate in the future, the racial composition of public schools today supports the conclusion that the decision's legacy on the school desegregation front is best characterized as one of unfulfilled promise.

II

ONE INDIRECT CONSEQUENCE OF BROWN: AN EMPIRICIZED EQUAL EDUCATIONAL OPPORTUNITY DOCTRINE

Although the net contribution of the Brown decision—and particularly footnote 11—to America's public school integration remains unclear, what is clear is that Brown was influential. Two of Brown's underanalyzed consequences warrant discussion. This Part focuses on one indirect consequence: the empiricization of the equal educational opportunity doctrine. A second unintentional consequence, considered in Part III, involves the increasingly empiricized equal educational opportunity doctrine's contribution to an increasingly multidisciplinary law.

The equal educational opportunity doctrine has been empiricized for two main reasons. First, after Brown, litigants, attorneys, educators, policymakers, and judges conceptualize the doctrine from an empirical perspective. That is, whether educational opportunity is deemed equal rests on an assessment of measurable variables (e.g., per-pupil spending, integration levels, and student achievement). This first point leads to the second. Namely, that litigation, especially modern, sophisticated litigation seeking to enhance educational equity and opportunity, increasingly draws on empirical social science, with parties basing their claims on the conceptualization of equal edu-

experiment, in 2000, Professor Jack Balkin gathered eight other constitutional law scholars to re-write the Brown opinion. The participants included: Professors Bruce Ackerman, Jack Balkin, Derrick Bell, Drew Days, III, John Hart Ely, Catherine MacKinnon, (now-Judge) Michael McConnell, Frank Michelman, and Cass Sunstein. Id. As Balkin notes, most declined to rely on empirical social science evidence as proof of the unconstitutionality of state-segregated public schools. Id. Although Professor Ely relied upon the notion of psychological harm, he did not cite to the sources identified in footnote 11. Id. Professor MacKinnon accepted the social science evidence relied upon in Brown, though she interpreted the evidence quite differently than did Chief Justice Warren. Id.

92 Mark A. Chesler et al., Social Science in Court: Mobilizing Experts in the School Desegregation Cases 60–61 (1988) (noting the increased role (empirical) social science played in school desegregation litigation since Green v. County School Board of New Kent County, 391 U.S. 430 (1968)).

cational opportunity prompted by Brown. Although no direct evidence exists to support (or refute) this assertion, indirect evidence abounds to support the claim that footnote 11 empiricized the equal educational opportunity doctrine. A brief review of the major litigation efforts seeking to promote educational equity since Brown reveals the palpable influence of empirical social science. These efforts include litigation over post-Brown school desegregation, school finance, school choice, and single-sex schooling.

A. Post-Brown School Desegregation Litigation

By making de jure school desegregation unconstitutional, the Brown decision necessitated a strategic change in subsequent litigation especially regarding theories of plaintiff harm. The harm in Brown, psychological damage flowing from state-sponsored school segregation, was no longer apt. Instead, post-Brown de facto school segregation litigation focused on educational harms to minority students flowing from attending racially isolated schools.

Despite a shift in the focus of the alleged harm, the empirical flavor of educational equity litigation remained. Just as litigants responded to evolving legal terrain, social scientists who were sympathetic to school desegregation efforts likewise responded and, consequently, continued to serve the litigation project. Not only did many social scientists accommodate their research focus to new, evolving legal issues, but the magnitude of their engagement increased as well. Moreover, defendant school districts, having learned about the import of social science evidence in Brown, began marshalling rebuttal evidence of their own.

If ascertaining which variables influenced student achievement and how they did so was not difficult enough, derivative efforts to identify the unique educational harms suffered by minority students as a result of attending racially identifiable schools faced additional difficulties. Moreover, research efforts sought to assess the costs and benefits flowing from mandatory and voluntary school desegregation

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94 Heise, supra note 5, at 1310 (noting that much of the educational litigation seeking increased educational opportunity since Brown has relied heavily upon social science evidence).

95 For example, it might be possible to conduct a random sample of federal judges that handled education litigation and assess whether and, if so, to what degree, they approached the task from an empirical mooring, but such an effort would likely be incomplete, unreliable, and in any event, impractical. For an example of a largely anecdotal approach, see, Chesler et al., supra note 92, at 203–34, which suggests that social science evidence informed judges' understandings of the equal educational opportunity doctrine.

96 See infra Parts II.A–D.

97 Chesler et al., supra note 92, at 24–26.

98 Id. at 60–61.
policies, as well as differences between the two approaches.\textsuperscript{99} Although the social science literature offers few clear, definitive answers to such questions, litigants asked courts to reach conclusions on these very questions.

Post-	extit{Brown} desegregation litigation posed many challenges, and the 	extit{Hobson v. Hansen}\textsuperscript{100} case illustrates the difficulties encountered by district courts that struggled with litigants' competing definitions of equal educational opportunity. 	extit{Hobson} also illustrates the scope and limits of empirical evidence and its role in education litigation.\textsuperscript{101} In 	extit{Hobson}, the plaintiffs claimed that District of Columbia school district policies denied minority students equal educational opportunity in various ways.\textsuperscript{102} Racial disparities in per-pupil spending and the application of tracking policies attracted particular attention.\textsuperscript{103} Importantly, both sides of the lawsuit construed educational opportunity in empirical terms, drew on expert testimony, and introduced empirical evidence that endeavored to prove the ill-effects or lack thereof of various District of Columbia policies on school integration.\textsuperscript{104} The competing complexity, density, and indeterminacy of the empirical evidence frustrated, among others, sitting Judge Skelly Wright. Indeed, Judge Wright's frustration with the case's presentation forced the court "back to its own common sense approach to a problem which, though admittedly complex, has certainly been made more obscure than was necessary."\textsuperscript{105}

Notwithstanding the challenges posed by the empirical evidence and the problems that emerged in 	extit{Hobson}, litigants continue to draw on social science in school desegregation litigation. While the equal educational opportunity doctrine's empirical mooring endures, the state of school desegregation litigation has changed dramatically during the decades since 	extit{Brown}. As Professor James Ryan aptly observes, one half-century after 	extit{Brown}, two forms of school desegregation litiga-

\textsuperscript{99} Id. at 180–94 (summarizing research comparing the efficacy of various types of school desegregation plans).
\textsuperscript{100} 327 F. Supp. 844 (D.D.C. 1971).
\textsuperscript{101} See generally DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (discussing the role of empirical evidence in education litigation more fully and noting how competing expert testimony—rather than assisted the court—made a complicated matter even more complicated).
\textsuperscript{102} See 	extit{Hobson}, 327 F. Supp. at 845.
\textsuperscript{103} Tracking (or "ability-grouping"), a common education policy and practice, involves organizing class assignments around some metric of academic achievement or ability. For a discussion of tracking, see generally JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 14 (1985), which suggests that tracking policies do not achieve what they set out to accomplish.
\textsuperscript{104} See 	extit{Hobson}, 327 F. Supp. at 847–55.
\textsuperscript{105} Id. at 859.
tion persist.\textsuperscript{106} One involves efforts to unwind desegregation decrees by obtaining unitary status designation and pivots upon the question of whether a school district has adequately eliminated the prior vestiges of desegregation.\textsuperscript{107} Another involves challenges to voluntary desegregation plans that use student race in school assignment policies, and the main question is whether such policies constitute a compelling governmental interest.\textsuperscript{108} Similar to their predecessor school desegregation cases, both forms of current school desegregation cases reflexively draw upon social science evidence.\textsuperscript{109}

B. School Finance Litigation

At its core, school finance litigation theory presumes, either explicitly or implicitly, a positive correlation between school funding and student academic achievement.\textsuperscript{110} More concretely, school fi-

\textsuperscript{106} See Ryan, supra note 82, at 1600. Of course, indirectly contrary to my thesis, while acknowledging the efforts by litigants to press social science into service and acknowledging the existence of potentially relevant social science data, Professor Ryan ultimately concludes that the utility of social science evidence, from the perspective of influencing court decisions, is limited. \textit{Id.} at 1660–64.

\textsuperscript{107} See, e.g., Freeman v. Pitts, 503 U.S. 467, 485–92 (1992) ("[U]pon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court inappropriate cases may return control to the school system in those areas where compliance has been achieved.").

\textsuperscript{108} See, e.g, Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 701 (4th Cir. 1999) (per curium) (holding that the school board’s use of race failed to advance a compelling state interest and thus violated the Equal Protection Clause).

\textsuperscript{109} Although Professor Ryan presents a strong case for his assertion that the influence of social science evidence in today’s school desegregation cases is limited, see Ryan, supra note 82, at 1600, his thesis and mine differ slightly. First, Ryan’s main point is that social science evidence does not play an “influential role” in school desegregation cases. My general point is not that social science drives legal decisions but rather that lawyers, educators, policymakers, and others conceptualize the equal educational opportunity doctrine in empirical terms. Second, Professor Ryan’s analysis pivots overwhelmingly on litigation in the Supreme Court. Despite its obvious importance, far more education litigation takes place in the lower trial and appeals courts. At the trial stage in particular, where evidence is presented, the influence of social science evidence is likely more apparent.

nance advocates assert that increased educational spending will lead to increased student academic achievement, which will in turn enhance equality of educational opportunity. To be sure, explanations for why some students perform well and others poorly remain endlessly debated in the research literature. These critical debates aside, lingering disputes about whether school funding matters are noted for their technical complexities as well as their perseverance. What is salient, however, is that these controversies are invariably cast in empirical terms.

A major study led by Professor James Coleman ignited the modern controversy. Professor Coleman and his colleagues explored the relation between school spending and student achievement. Their study's provocative conclusion was that family influence matters the most in determining student academic achievement, followed by the socioeconomic status of the student's classmates. Needless to say, Coleman's findings challenged conventional wisdom and generated substantial attention and consternation, especially from the education establishment. Over the years, however, scores of subsequent studies largely confirm Coleman's main findings that school variables are overwhelmed by variables that students bring into school. Indeed, education observers from across the ideological spectrum now acknowledge the strength and consistency of these results. Consequently, "[i]f there is one thing that is more related to a child's academic achievement than coming from a poor household, it is going to school with children from other poor households."

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111 See id.
112 See, e.g., supra note 110.
114 KAHLENBERG, supra note 44, at 47-61 (finding that student body characteristics explain an impressive amount of variance in student achievement, and that children from a given family background, when put in schools of different social compositions, will achieve at quite different rates and levels). Scores of subsequent studies have confirmed Coleman's conclusion. For citations to the literature, see id. at 26-28 and James E. Ryan, Schools Race, and Money, 109 YALE L.J. 249, 287 n.165 (1999).
115 See, e.g., Richard D. Kahlenberg, Learning from James Coleman, PUB. INT., Summer 2001, at 54, 58 (noting that Coleman's findings were considered, at that time, "shocking").
116 See KAHLENBERG, supra note 44, at 26-28 (listing various studies confirming Coleman's general findings); Ryan & Heise, supra note 41, at 2105 (citing James S. Coleman, Toward Open Schools, PUB. INT., Fall 1967, at 20).
117 See, e.g., KAHLENBERG, supra note 44, at 37 (stating that "money is not the only issue that determines inequality. A more important factor, I am convinced, is the makeup of the student enrollment, who is sitting next to you in class" (quoting Interview by Ted Koppel with Jonathan Kozol, Nightline (ABC television broadcast, Sept. 17, 1992))); Chester E. Finn, Jr., Education That Works: Make the Schools Compete, HARV. BUS. REV., Sept.-Oct. 1987, at 63, 64 (acknowledging that "disadvantaged children [tend] to learn more when they attend [ ] school with middle-class youngsters").
Regrettably, many of the critical issues surrounding the influence of school spending quickly become technical and complicated. One does not need to peer deeply into the research literature to find animated debates surrounding such arcane methodological matters as research design, sample size, variable operationalization, and participation rates. Social scientists continue to study and debate the effect of school funding upon student academic achievement in particular and equal educational opportunity in general. Amid these ongoing scholarly debates and empirical uncertainty, judges continue to decide school finance cases.

Interestingly, and no doubt owing partly to the issue's complexities, courts have split on the existence of a connection between school funding and student achievement. On the one hand, the U.S. Supreme Court described the asserted relation between school spending and student achievement as "unsettled and disputed." On the other hand, some of the state supreme courts that examined the same issue reached the opposite conclusion. Perhaps most startling is the confidence expressed by some courts in reaching either conclusion, especially in light of the acknowledged uncertainty within the social science community.

One school finance litigation saga that continues to unfold in New York illustrates many common themes in the school finance movement. Frustrated after years of unsuccessful appeals to state lawmakers for increased resources for its public schools, New York City (and other plaintiff districts) turned to the courts for financial relief. The plaintiffs argued that the application of New York's school funding formula denies New York City public schoolchildren, among others, an adequate education. After protracted litigation

119 See, e.g., Samuel Bowles & Henry M. Levin, The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence, 3 J. HUM. RESOURCES 6-17 (1968) (concluding that a more careful assessment of the effect of different characteristics on achievement is necessary before policy conclusions concerning school resources can be drawn).
124 Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 529-34 (N.Y. Sup. Ct. 2001). The New York Constitution reads, in pertinent part, "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI, § 1. New York's Court of
spanning more than one decade, New York's highest state court ordered the state to reform its school finance system.\(^{125}\)

During the protracted litigation, both sides generated and presented sophisticated empirical evidence bearing on a range of issues. The trial lasted seven months and involved seventy-two witnesses and 4300 exhibits.\(^{126}\) The plaintiffs focused on per-pupil spending discrepancies and developed a complicated costing-out study, which sought to identify minimum funding levels necessary to meet state constitutional education obligations.\(^{127}\) The defendants attacked the premises upon which the plaintiffs' claims rested by employing their own empirical studies, supplying expert testimony disputing the underlying judicial assumption of a link between education spending and student academic achievement.\(^{128}\) Although New York's school finance litigation effort is noted for its technical sophistication and deployment of complex social science evidence, its empirical orientation toward the educational opportunity doctrine evidences a common theme that binds many school finance lawsuits.

C. School Choice Litigation

Although school choice programs vary tremendously,\(^{129}\) policy discussions animate assertions about whether—and, if so, how—such programs enhance equal educational opportunity.\(^{130}\) The intersection of school choice and the equal educational opportunity doctrine is typically viewed with respect to three outcomes: student academic achievement, school integration, and school competition. Analyses of all three outcomes lend themselves to empirical inquiry. As school choice programs increase and continue to attract litigation, the lawyers, judges, and courts who assess legal claims incident to school choice policies and rooted in the equal educational opportunity doctrine will continue to pursue empirical assessments of the three outcomes.

Appeals has previously interpreted this to mean "a sound basic education." Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982).


\(^{127}\) For a helpful discussion of studies seeking to "cost-out" state constitutionally mandated "adequate" education, see James E. Ryan & Thomas Saunders, Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?, 22 Yale L. & Pol'y Rev. 463, 475–77 (2004).

\(^{128}\) See Campaigning for Fiscal Equity, 100 N.Y.2d at 920–25.

\(^{129}\) For a thorough discussion of the various types of school choice programs, see Ryan & Heise, supra note 41, at 2063–85 (2002).

\(^{130}\) For a sampling of recent scholarship see Peter W. Cookson, Jr., School Choice: The Struggle for the Soul of American Education (1994); Henig, supra note 44; School Choice and Social Controversy, supra note 42; School Choice: Examining the Evidence (Edith Rosell & Richard Rothstein eds., 1993); Viteritti, supra note 44.
Although school choice policies are frequently moored in claims bearing on all three educational outcomes, for many concerned with the school choice debate the ultimate barometer of success or failure pivots on student academic achievement. Contemporary scholarly studies of the differences in student academic achievement between assigned schools and schools of choice began with a study led by Professor Coleman. Professor Coleman, along with colleagues, published the first large-scale study exploring achievement differences generated by public and private (principally Catholic) schools. They found that, even after controlling for critical student background characteristics (such as race and socioeconomic status), private school students slightly outperformed their public school counterparts. Not surprisingly, their findings attracted sustained criticism and spurred follow-up research. These criticisms notwithstanding, the line of research ignited by Coleman persists and has gained momentum as the number and type of school choice programs increase. The recent increase in the number and type of school choice programs, in turn, generates greater opportunities for more helpful research.

Much of today’s research concerning the implications of school choice programs on student achievement remains contested and lacks results that reach definitive conclusions. Studies of the publicly-funded voucher program in Milwaukee aptly illustrate the vigorous disputes that frequently accompany education research. On the one hand, the state-appointed voucher program evaluator found no systematic achievement differences between voucher and nonvoucher students. Reanalyses of the same data by other researchers, however, uncovered systematic achievement differences. In a third independent analysis of the Milwaukee data, researchers found a

131 See James S. Coleman et al., High School Achievement: Public, Catholic, and Private Schools Compared 3-14 (1982).
132 Id. at 176–78.
modest advantage for private schools in math achievement, but no similar advantage in reading.¹³⁷ In his survey of the empirical literature on the efficacy of vouchers on student achievement, Professor Levin agreed that vouchers accounted for some systematic achievement gains.¹³⁸ Notably, while academic disputes over such technical issues as sample bias, control groups, and regression equations are typically confined to academic journals, fallout from school choice research spilled into the national press.¹³⁹ Moreover, other dramas, similar to what took place in Milwaukee, have played out elsewhere, albeit to lesser fanfare. The general pattern is for one team of researchers to report their findings whether positive or negative, and the next team of researchers to criticize the other team’s methodology or interpretation.¹⁴⁰

Although the influence of social science research on the equal educational opportunity doctrine is usually most pronounced at the trial court level, the leading Supreme Court decision on the voucher question, as well as the supporting briefs, demonstrate a growing sensitivity to relevant social science research. In Zelman v. Simmons-Harris,¹⁴¹ the Court concluded that the First Amendment does not preclude a publicly-funded voucher program that includes religious schools.¹⁴² Unlike in Brown, however, the Court in Zelman took great pains to moor its decision in traditional legal authority. The Court wrestled with whether the voucher program in Zelman had the "effect of advancing or inhibiting religion"¹⁴³ on conventional First Amendment terrain. Much of the jurisprudential wrestling involved synthesizing relevant and analogous, though nonbinding, legal precedent.¹⁴⁴ In assessing the effect of Cleveland’s voucher program, how-

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¹³⁸ Professor Levin acknowledges that school vouchers can generate positive student achievement gains, but he concludes that these positive effects are outweighed by negative social consequences. See Henry M. Levin, Educational Vouchers: Effectiveness, Choice, and Costs, 17 J. Pol’y Analysis & Mgmt. 375, 374 (1998).


¹⁴² Id. at 650-55.

¹⁴³ Id. at 649 (citing Agostini v. Felton, 521 U.S. 203, 222-23 (1997)).

ever, the Court also cited to research by social scientists.\textsuperscript{145} Although
the social science research was not the basis for the Court’s decision in
\textit{Zelman}, the Court partly understood the question of how choice pro-
grams influence equal educational opportunity as an empirical ques-
tion. The \textit{Zelman} opinion’s empirical flavor will influence other
courts that are forced to resolve equal educational opportunity cases
nested in school choice policies. Future school choice litigation will
similarly draw upon an increasing number of empirical studies.

\textbf{D. Single-Sex Schooling Litigation}

As an increasing number of parents turn to single-sex schools
(overwhelmingly private schools), policymakers seek to assess their im-
 pact on student learning while legal scholars consider whether pub-
 licly-funded single-sex schools are permissible. Although the \textit{Brown}
decision’s proclamation that “separate is inherently unequal” is unam-
 biguous as it relates to race,\textsuperscript{146} the proclamation’s salience as it relates
to gender continues to animate debate.

In \textit{U.S. v. Virginia},\textsuperscript{147} the Supreme Court articulated the Constitu-
tion’s “skeptical” posture towards a public school’s use of gender clas-
sifications.\textsuperscript{148} In striking down the Virginia Military Institute’s (VMI)
all-male admissions policy, the Court noted that any gender classifica-
tion must be “substantially related” to an “important governmental in-
terest” and supported by an “exceedingly persuasive justification.”\textsuperscript{149}
Moreover, any sex-based classification must not promote “fixed no-
tions concerning the roles and abilities of males and females.”\textsuperscript{150}
Thus, proponents of public single-sex schooling must articulate and
defend an exceedingly persuasive justification as well as a justification
that does not reify existing gender stereotypes to depart from the de-
fault constitutional presumption of coeducation.

Such a legal standard essentially begs for empirical confirmation
of single-sex schooling’s asserted benefits. In a recent argument for
constitutional and statutory leniency for public single-sex schools (es-
pecially for female students from low-income households), Professor

\begin{footnotesize}
\begin{itemize}
\item[145] See, e.g., \textit{Zelman}, 536 U.S. at 659 (citing research by Jay Greene). Various concur-
ring and dissenting Justices also referenced relevant social science evidence. See, e.g.,
\textit{Zelman}, 536 U.S. at 675 (O’Connor, J., concurring) (citing research by Paul Peterson,
William Howell, and Jay Greene); \textit{Id.} at 682 (Thomas, J., concurring) (citing research by
Terry Moe); \textit{Id.} at 705 n.15 (Souter, J., dissenting) (citing findings in a GAO report).
\item[147] 518 U.S. 515 (1996).
\item[148] \textit{Id.} at 531.
\item[149] \textit{Id.} at 524, 531.
\item[150] \textit{Id.} at 541 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).
\end{itemize}
\end{footnotesize}
Salomone delves deeply into the existing social scientific literature. Although the empirical literature is far from definitive, Salomone identifies three general conclusions. First, Salomone finds no clear evidence that schoolchildren are harmed by single-sex schooling, especially since it is volitional. Second, single-sex schooling fosters more positive student attitudes in a wider array of academic subjects. Third, where the benefits arise, they appear to accrue disproportionately to minority students.

Having implicitly carved out a role for empirical social science in the legal analysis of public single-sex schools, Professor Salomone’s treatment of the legal question confronts a dilemma. Insofar as the underlying empirical evidence about the efficacy of single-sex schools is not definitive, questions arise about which side of the debate should benefit from the evidentiary uncertainty. How a rebuttable presumption is loaded—how severe and in which direction—could prove enormously important, perhaps even dispositive. The social science uncertainty on critical questions surrounding single-sex schooling all but ensures that the position assigned to the wrong side of the rebuttable presumption will lose. Thus, if single-sex schooling proponents must shoulder the evidentiary burden to establish that equal educational opportunity is enhanced before single-sex schools are deemed constitutional, the social science uncertainty on single-sex schooling likely precludes single-sex schooling from surviving skeptical scrutiny. In contrast, if opponents must demonstrate that single-sex schools degrade educational equity, single-sex schools will likely survive legal scrutiny.

Although the Court in U.S. v. Virginia did not ultimately resolve the numerous technical questions surrounding the procedural nuances that flow from applying skeptical judicial scrutiny, the opinion evidences a receptivity to social science. For example, the opinion cites to work by Professors Christopher Jencks and David Riesman that bears on the question of the purported educational benefits flowing from single-sex educational settings. At trial, the influence of social science was palpable as, according to one observer, the empirical efficacy of VMI’s claim for the need of a single-sex environment to deliver its unique educational offering “became an evidentiary war” involving a host of experts on both sides. Social scientists were not only in-
volved in the litigation by presenting their research findings. One scholar, Professor Carol Gilligan, noted for her work on how learning styles differ between boys and girls, submitted an amicus brief in the VMI litigation challenging what she perceived to be misuse of her research by other social scientists. Thus, similar to the education litigation that preceded it, single-sex litigation draws significantly from the empirical literature exploring the influence of coeducation and single-sex settings on student achievement.

Ironically, although education litigation's sustained and continued attention to and use of empirical social science arcs back to footnote 11 in the Brown opinion, footnote 11 was merely an afterthought to its author, Chief Justice Earl Warren. Indeed, the critical attention the footnote attracted befuddled him somewhat. Despite Chief Justice Warren and the Court's intentions, and regardless of footnote 11's precise role in the Brown decision, one of the decision's indirect consequences is that it profoundly influenced subsequent equal educational opportunity litigation by casting the elusive goal of achieving equality of educational opportunity through litigation in empirical terms. Subsequent education litigation since Brown—including post-Brown desegregation litigation as well as litigation involving school finance, school choice, and gender equity issues—evidences footnote 11's enduring influence.

III

ONE UNANTICIPATED CONSEQUENCE OF BROWN: FUELING MULTIDISCIPLINARITY

One of Brown's indirect consequences—an increasingly empiricized equal educational opportunity doctrine—both evidences and contributes to an unanticipated consequence of the Brown decision: an increasingly multidisciplinary law. As a descriptive term, "multidisciplinary" escapes fixed meaning. For the narrow purposes of this Article, multidisciplinary law pertains to law that is in-

[^159]: Chesler et al., supra note 92, at 22.
[^161]: Indeed, although some might parse definitional distinctions between such terms as "multidisciplinary" and "interdisciplinary," my goal is to generally reference the trend evoked by both terms. See Douglas W. Vick, Interdisciplinarity and the Discipline of Law, 31 J. Law & Soc. 163, 164-65 (2004).
creasingly welcoming of previously ignored nonlegal sources, disciplines, and influences. That is, rather than look exclusively "inward," law now looks increasingly "outward" and draws from other, nonlegal fields. To be sure, this Article do not make the bold claim that changes in the equal educational opportunity doctrine alone prove that law has become more multidisciplinary. Rather, the point is that this unanticipated consequence both reflects and informs a consistent, yet broader, shift in the law toward greater multidisciplinarity.

Direct and indirect evidence support my claim that law is increasingly multidisciplinary. Judicial opinions supply direct evidence of this change. A random draw of published court decisions from a random pull of areas would almost assuredly demonstrate an increased receptivity of courts to nontraditional sources of legal authority. Simply put, what is now considered authority to support legal propositions has broadened, in some instances considerably. Courts' increasing acceptance of and reliance on such disciplines as economics, political science, psychology, and sociology—to name only a few—are among the more prominent nontraditional sources. Analogous changes in legal scholarship supply further, indirect evidence of increased multidisciplinarity.

A. Judicial Opinions

1. Economics

The influence of economic theory on modern antitrust doctrine has achieved near ubiquity and, in many ways, represents something of an easy example. Modern antitrust doctrine's incorporation of economics is manifest and, as a result, aptly illustrates the point. Indeed, today the debate is not whether economic theory shapes antitrust doctrine, but rather which variant of economic theory is in favor. Not

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162 For at least one noble effort to define "nonlegal" in this context, see generally Lawrence M. Friedman, The Law and Society Movement, 38 STAN. L. REV. 763 (1986), which describes nonlegal as the "Law and Society Movement" in which there is a "general commitment to approach law with a vision and with methods that come from outside the discipline itself."

163 For a discussion and further development of this point, see generally Richard A. Posner, Legal Scholarship Today, 115 HARV. L. REV. 1314 (2002), describing the "internal" and "external" perspectives that shape academic law.

164 I construe the relation between legal scholarship and the law as indirect in the interests of both accuracy and modesty. Too many law professors have a tendency to overestimate the influence of legal scholarship on law. To the extent that some influence might exist, the relation between law and legal scholarship becomes iterative.

165 See generally Fred S. McChesney, Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law, 52 EMORY L.J. 1401 (2003) (describing how the current generation has witnessed competition "as to which intellectual (including economic) paradigm animates antitrust law-competition for the field").
surprisingly, judicial opinions in antitrust cases reflect the strong influence of economics.\textsuperscript{166}

For example, in \textit{Continental T.V., Inc. v. GTE Sylvania Inc.},\textsuperscript{167} the Supreme Court revisited default rules relating to nonprice vertical restraints. Traditionally, courts approached claims based on Section One of the Sherman Act in a dichotomous manner: a per se presumption of anticompetitive behavior for certain market practices and a "rule of reason" approach for other practices whose anticompetitive consequences are deemed less obvious.\textsuperscript{168} The high-water mark of the per se rule emerged in 1967 when the Court in \textit{U.S. v. Arnold, Schwinn & Co.}\textsuperscript{169} extended it to nonprice vertical restrictions imposed by a supplier on its distributors.\textsuperscript{170}

The dominance of the Court's per se rule caused significant problems in the marketplace. The rigid and formalistic rule, when mechanically applied, precluded certain conduct without serious consideration of its actual economic effects. Consequently, the per se rule deterred beneficial, as well as anticompetitive, business practices. For example, the nonprice vertical restraints condemned by the Supreme Court in \textit{Schwinn} plausibly promoted competition between retail brands. Consequently, criticisms of the \textit{Schwinn} decision arrived from various quarters. Many law and economic scholars quickly noted the unintended (and sometimes perverse) consequences that flowed from having nonprice vertical restraints triggering an automatic judicial presumption of anticompetitive conduct.\textsuperscript{171} Lower courts began to rebel, limiting \textit{Schwinn}'s application by distinguishing the case factually at every conceivable opportunity.\textsuperscript{172}

Ten years after the \textit{Schwinn} decision, the Court switched position in \textit{Sylvania} and reinstated the "rule of reason" approach for assessing

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\item[166] Early Supreme Court decisions helped align antitrust doctrine and economic theory. See, e.g., \textit{Cont'l T.V., Inc. v. GTE Sylvania Inc.}, 433 U.S. 36 (1977) (holding that the facts of the case did not justify a per se rule, and that location restriction should be judged under the traditional "rule of reason" standard); \textit{Ill. Brick Co. v. Illinois}, 431 U.S. 720 (1977) (holding that whichever rule is to be adopted regarding pass-on theories in antitrust actions must apply equally to both plaintiffs and defendants); \textit{Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.}, 429 U.S. 477 (1977) (concluding that plaintiffs must prove injury that reflects the anticompetitive effects of the violation).
\item[168] \textit{Id.} at 48-50.
\item[169] 388 U.S. 365 (1967).
\item[170] \textit{Id.} at 372-82.
\item[172] See, e.g., \textit{Colorado Pump & Supply Co. v. Febco, Inc.}, 472 F.2d 637 (10th Cir. 1973) (concluding that the per se rule applies when the buyer can avoid restraints by electing to purchase the product at a higher price).
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the competitive effects of vertical restraints. \footnote{Sylvania, 433 U.S. at 58–59.} In \textit{Sylvania}, the Court recognized that "there is substantial scholarly and judicial authority supporting their [vertical restraints'] economic utility. There is relatively little authority to the contrary." \footnote{Id. at 57–58.} According to some commentators, \textit{Sylvania} caused a revolution in antitrust law and established the foundation for modern antitrust's reliance on empirical economic evidence. After \textit{Sylvania}, the federal courts had to confront a new paradigm: henceforth, they could not indulge in any presumptions of illegality under Section One that were not supported by economic facts. \footnote{See Thomas A. Piraino, Jr., \textit{A Proposed Antitrust Approach to Collaborations Among Competitors}, 86 Iowa L. Rev. 1137, 1146–47 (2001).}

The clear articulation of economic theory was not lost on Justice Byron White who, in his concurrence, warns against the majority's over reliance on economic theory in general and the scholarly writing of one prominent law and economic thinker in particular—then-Professor (and now also Circuit Judge) Richard Posner. \footnote{Sylvania, 433 U.S. at 69–70 (White J., concurring).}

Two reasons caused the field of antitrust to be especially ripe for a multidisciplinary approach. First, core provisions of the Sherman Act were left undefined. \footnote{See 15 U.S.C. §§ 1–2 (2000).} Indeed, accounts of the legislative history surrounding the Sherman Act note that lawmakers, through open-ended statutory drafting, practically invited judicial input. \footnote{See, e.g., Frank H. Easterbrook, \textit{Workable Antitrust Policy}, 84 Mich. L. Rev. 1696, 1702 (1986) (describing the Sherman Act as a “blank check” ripe for judicial interpretation).} Salient language in two other critical antitrust statutes, the Clayton Act \footnote{15 U.S.C. §§ 14, 18 (2000).} and Federal Trade Commission Act, \footnote{15 U.S.C. § 45(a)(1) (2000).} is similarly "skeletal." \footnote{McChesney, \textit{ supra} note 165, at 1404.} Second, a discrete handful of leading legal theorists, including Richard Posner, Frank Easterbrook, and Robert Bork, helped to craft an intellectual foundation that animated antitrust doctrine with economic theory. The fact that all three legal scholars later became federal appellate judges allowed them (and others) to "apply [as judges] the new law that they espoused as academics." \footnote{Id. at 1402.}

2. \textit{Survey Research}

Of course, the incorporation of social science into judicial opinions is neither limited to economics nor antitrust doctrine. The Su-
The Supreme Court’s decision in Atkins v. Virginia\textsuperscript{183} is a relatively recent example of a judicial opinion pressing nontraditional sources into service. In Atkins, the Court concluded that the Eighth Amendment precludes executing a mentally retarded offender convicted of a capital crime.\textsuperscript{184} More to the point, the Court asserted that “the practice [of executing mentally retarded defendants] . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.”\textsuperscript{185}

Critical to the Court’s reasoning in Atkins is how it discerned the “national consensus” and what evidence the Court advanced to support its characterization. Thirteen years before Atkins, the Court in Penry v. Lynaugh\textsuperscript{186} concluded that “evolving standards of decency” did not preclude the execution of mentally retarded defendants.\textsuperscript{187} Even more instructive was the Penry Court’s language on how it discerned these “evolving standards.” In addition to historical documentation, the Court provided two examples of “objective evidence” germane to its assessment of evolving standards. First, “the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”\textsuperscript{188} Second, the Court considered “data concerning the actions of sentencing juries.”\textsuperscript{189}

What changed during the thirteen years that separate the Penry and Atkins decisions? The Court pointed to changed standards of decency as one rationale for changing its mind about the constitutionality of executing mentally retarded defendants.\textsuperscript{190} The structure of the Court’s opinion in Atkins, however, reveals that what the Court considered in discerning a national consensus changed as well. To support its conclusion that a national consensus had emerged against the practice of executing mentally retarded defendants (and that such a consensus had changed within thirteen years), the Atkins opinion drew on four main factors.\textsuperscript{191} One of these four factors, tucked away in a footnote, includes survey data.\textsuperscript{192} The Court, however, took pains to note that none of the four factors—including the survey data—was dispositive.\textsuperscript{193} Nevertheless, the Court expressly relied to some degree on “unmediated and unverified” survey data as a basis for deciding

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  \item\textsuperscript{183} 536 U.S. 304 (2002).
  \item\textsuperscript{184} Id. at 321.
  \item\textsuperscript{185} Id. at 316.
  \item\textsuperscript{186} 492 U.S. 302 (1989).
  \item\textsuperscript{187} Id. at 331–40.
  \item\textsuperscript{188} Id. at 331.
  \item\textsuperscript{189} Id.
  \item\textsuperscript{190} Atkins v. Virginia, 536 U.S. 304, 311–14 (2002).
  \item\textsuperscript{191} Id. at 314–18.
  \item\textsuperscript{192} Id. at 316 n.21.
  \item\textsuperscript{193} Id. at 318–21.
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whether a punishment comported with prevailing standards of decency and, ultimately, the Eighth Amendment. 194

Dissenting Justices sharply criticized the majority opinion’s reliance on polling data for constitutional decisionmaking. Chief Justice Rehnquist’s dissent focused on methodological problems that accompany polling data. 195 In particular, dissenting Justices noted that such issues as question framing, objectivity, and sampling—all critical issues to social science research in general as well as the survey research discipline in particular—cast important questions surrounding the integrity and, therefore, legal admissibility, of polling results. 196

3. Social Science

Another timely example of multidisciplinarity comes from the Court’s decision in Grutter v. Bollinger, 197 which upheld the University of Michigan Law School’s use of race in its admissions process as a way to promote diversity. After announcing that it would apply strict judicial scrutiny, 198 the Court considered whether educational diversity constituted a compelling governmental interest. In reaching its conclusion that Michigan Law School’s desire for educational diversity was compelling and that the benefits flowing from diversity were “substantial,” 199 the Court’s opinion expressly referenced empirical social scientific evidence that the University of Michigan presented as part of its litigation effort. 200

The conspicuousness of the Court’s reliance on the sociological research to support the assertion that educational diversity generated educational benefits was further highlighted by Justice Clarence Thomas’s dissenting opinion. Justice Thomas noted that “the Court relied heavily on social science evidence to justify its deference.” 201 Justice Thomas noted that the University of Michigan’s “conclusion that its racial experimentation lead[s] to educational benefits would, if adhered to, have serious collateral consequences.” 202

194 See Tracey E. Robinson, Note, By Popular Demand? The Supreme Court’s Use of Public Opinion Polls in Atkins v. Virginia, 14 Geo. Mason U. Civ. Rts. L.J. 107, 120 (2004) (“[T]he Court held that, along with other evidence, public opinion polls are relevant to a determination of whether a punishment violates the Eighth Amendment’s ban on cruel and unusual punishment.”).
195 Atkins, 536 U.S. at 322–23 (Rehnquist, C.J., dissenting).
196 Id. at 326–28 (Rehnquist, C.J., dissenting).
198 Id. at 326.
199 Id. at 330.
200 Id. at 330–31. The expert reports presented into evidence in Grutter, as well as its companion case involving the University of Michigan’s undergraduate admission policies, Gratz v. Bollinger, 539 U.S. 244 (2003), are reproduced at 5 Mich. J. Race & L. 241 (1999).
201 Grutter, 539 U.S. at 364.
202 Id.
Regardless of one's opinion about the usefulness of the survey data in the Atkins decision or the social science evidence considered in the Grutter decision, the Court's reliance on such source material in both opinions is consistent with a growing trend of judicial opinions embracing an increasingly multidisciplinary approach. The Brown decision accelerated this trend. Judicial use of evidence such as opinion polls and survey data is now almost routine, but usually only after the information has been formally entered into evidence (unlike the situation in Atkins). Indeed, the Federal Judicial Center's Reference Manual on Scientific Evidence and the Manual for Complex Litigation contain specific suggestions for judges on how to assess the weight and admissibility of survey data.

Normative questions about whether judicial opinions should draw on disciplines other than law are essentially all but moot. Disputes today typically focus on whether any particular nonlegal source is credible. In McCleskey v. Kemp, the defendant, an African-American male who was convicted and sentenced to death for murdering a white female victim, challenged the application of Georgia's death sentence as racially discriminatory. The plaintiff entered into evidence Professor David Baldus's empirical research on the racial disparities arising from the application of Georgia's death penalty statute. Informed observers describe Baldus's research as among the "most comprehensive empirical record of racial patterns in the imposition of the death penalty that has ever been developed in this country, or that is likely to be developed in the foreseeable future." Indeed, the Baldus study endures as a leading example of empirical research's application on a pressing legal issue. Baldus's study was the crucial variable that transformed the debate about the intersection of race and the death penalty from a question about whether racial discrimination existed to a question about the degree to which it existed. If empirical evidence was admitted, the burden would fall to judges and jurors to decide whether the degree of discrimination crossed the constitutional threshold.

The Baldus study's utterly exhaustive array of variables forced the district court onto new terrain in criticizing empirical studies' proba-

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204 See id. § 21.493, at 101-03.
206 Id. at 286.
207 Id.
209 See Gross, supra note 208, at 1321-25.
tive value. The district court concluded, remarkably, that the Baldus study was invalid\textsuperscript{210} and, consequently, "[t]o the extent that McCleskey contended that he was denied either due process or equal protection of the law, his [statistical] methods failed to contribute anything of value to his cause."\textsuperscript{211} The Eleventh Circuit was somewhat more amenable to the Baldus study and its use of regression models as a device to support a legal inference of discrimination.\textsuperscript{212} Although the circuit court concluded that the Baldus study was a valid piece of evidence, it went on to conclude that the racial disparities demonstrated by Baldus's research "still do not constitute prima facie evidence of discrimination."\textsuperscript{213} Baldus's research met with a similar reception in the Supreme Court. The Court concluded that Baldus's empirical evidence "is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose."\textsuperscript{214} By reaching such a conclusion, however, the Supreme Court and circuit court—unlike the district court—implicitly acknowledged the Baldus study's underlying validity.

The heated debates over the validity of Baldus's empirical evidence in the death penalty context should not obscure the general acceptance of statistical evidence to support an inference of discrimination in many areas of the law. For example, ever since the landmark \textit{Griggs v. Duke Power Co.}\textsuperscript{215} in 1971, statistical evidence has been the primary tool to establish a prima facie case for employment discrimination under Title VII of the Civil Rights Act of 1964.\textsuperscript{216} Largely in response to Supreme Court decisions that eroded \textit{Griggs},\textsuperscript{217} the Civil Rights Act of 1991\textsuperscript{218} tinkered with technical aspects involving proper sample groups\textsuperscript{219} and reinforced the disparate impact the-

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\item \textsuperscript{210} McCleskey, 753 F.2d at 894 (court characterizing the district court as concluding that the Baldus study was "invalid").
\item \textsuperscript{212} McCleskey, 753 F.2d at 890.
\item \textsuperscript{213} Id. at 898-99.
\item \textsuperscript{214} McCleskey v. Kemp, 481 U.S. 279, 297 (1987).
\item \textsuperscript{215} 401 U.S. 424 (1971).
\item \textsuperscript{217} One of these decisions includes \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642 (1989).
\item \textsuperscript{219} Although the Civil Rights Act of 1991 was passed partly in response to Supreme Court decisions, notably \textit{Wards Cove}, the Act left intact the judicial proposition articulated in \textit{Wards Cove} that the relevant comparison involves the racial composition of the contested
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ory as well as the role of statistical evidence in establishing the prima facie case.\textsuperscript{220} Although battles over how statistical evidence should be used to inform legal analyses endure, battles over whether statistical evidence should be considered have abated.

B. Legal Scholarship

Trends in legal scholarship provide indirect evidence of increased multidisciplinarity. Since approximately the 1960s, legal scholarship's increasingly multidisciplinary flavor has been palpable. By the 1970s and 1980s, a series of "law and" innovations became common within law schools.\textsuperscript{221} As Judge (and Professor) Richard Posner observes, the trend toward multidisciplinarity is especially true for more recent entrants into the legal professoriate as well as at the nation's leading law schools.\textsuperscript{222} According to some commentators, if multidisciplinary scholarship's current rate of growth continues, it will eventually dominate academic law.\textsuperscript{223} Although few worry about traditional doctrinal scholarship's position in the legal academy, a quick review of the dramatically increasing number of law reviews and their titles illustrate the trend toward multidisciplinary work.\textsuperscript{224} Submission instructions at some of the leading faculty-edited, peer-reviewed law journals—such as Chicago's Journal of Law and Economics, Cornell's Journal of Empirical Legal Studies, and the Law & Society Review—further evidence a growing commitment to multidisciplinary research. Multidisciplinary legal research also penetrates cyberspace. The web-based Social Science Research Network (SSRN) includes the Legal Scholarship Network (LSN), which contains numerous titles that convey a clear mooring in multidisciplinary legal scholarship. Indeed, the influence of multidisciplinary legal scholarship is such that relevant questions today focus not on whether it is influential as a genre of jobs and the racial composition of the otherwise qualified population in the relevant labor market. See \textit{Wards Cove}, 490 U.S. at 650–51 (quoting Hazelwood Sch. Dist. v. U.S., 433 U.S. 299, 308 (1977)).


\textsuperscript{223} See, e.g., Posner, \textit{supra} note 163, at 1317 ("Interdisciplinary scholarship looms very large, and if it continues to grow as fast as it has in the last thirty years . . . it will come eventually to dominate academic law.").

\textsuperscript{224} See generally Tracey E. George & Chris Guthrie, \textit{An Empirical Evaluation of Specialized Law Reviews}, 26 \textit{Fla. St. U. L. Rev.} 813, 814 (1999) ("Currently, Harvard, Yale, and Columbia collectively publish three generalist law reviews as well as twenty-six, specialized law reviews, not one of which existed three decades ago.").
legal scholarship, but rather how multidisciplinarity has grown so rapidly and what its future might look like.\textsuperscript{225}

In many ways, the forty-year history of the Law & Society Association, as well as its journal, \textit{Law & Society Review}, reflect and contribute to legal scholarship's increased multidisciplinary tenor. Although as a descriptive term, "Law and Society Movement" is, as Professor Lawrence Friedman notes, "rather awkward," there are no other obvious terms that describe the collective efforts of legal scholars who, in their work, adopt the perspectives or deploy the methodologies of sociologists, economists, historians, political scientists, psychologists, feminists, critical legal and race theorists, structuralists, post-structuralists, and so on.\textsuperscript{226} The absence of a clearly recognized descriptor has not diminished the influence of law and society scholarship, however. The \textit{Law & Society Review} endures as a major, long-standing, influential scholarly outlet of multidisciplinary legal research.

Although the multidisciplinary scholars occupy an uneven and tenuous position inside and outside American law schools, they have managed to secure a foothold that they are unlikely to relinquish anytime soon. The position of multidisciplinary legal scholars is uneven, because some nonlegal disciplines (e.g., economics) command far more respect and prestige than other nonlegal disciplines. Despite variation among disciplines within the law and society genre, the genre itself remains something of an "outsider" to the formal legal academy, uncomfortably occupying space located somewhere between the law school and the university. Even if the genre itself is viewed as a law school "frill,"\textsuperscript{227} its influence on legal scholarship is palpable. Moreover, multidisciplinary scholarship's gain has generated something of a loss for the once dominant doctrinal legal scholarship. As a percentage of all legal scholarship, traditional doctrinal work has declined. Perhaps more important is the fact that its prestige has declined as well. Although first-rate doctrinal scholarship continues to be produced at the leading law schools, it is also becoming increasingly devalued.\textsuperscript{228}

Professor Tom Ulen recently explored the relation between the development of multidisciplinary legal scholarship and the concurrent development of empirical legal scholarship.\textsuperscript{229} As a trained econ-

\textsuperscript{225} See Posner, supra note 163, at 1317.
\textsuperscript{226} Friedman, supra note 162, at 763; see also Posner, supra note 163, at 1316–17 (providing a list of new "interdisciplinary" approaches and noting the change from purely "doctrinal" legal scholarship).
\textsuperscript{227} Friedman, supra note 162, at 777.
\textsuperscript{228} Postner, supra note 163, at 1321. It is important to note that multidisciplinary scholarship has received its fair share of criticism.
\textsuperscript{229} The growth of empirical legal scholarship, and reasons for it, are described elsewhere. See, e.g., Michael Heise, \textit{The Past, Present, and Future of Empirical Legal Scholarship}. 
omist with a principal appointment in a law school, it is not surprising that Professor Ulen argues that law and economics is the central contributor to the "law and" movement in legal scholarship since the 1970s. What is surprising, however, is the reason why Professor Ulen ascribes law and economics centrality in legal scholarship's increasingly multidisciplinary flavor. Central to law and economics's lasting contribution to legal scholarship, according to Professor Ulen, is that it imported into legal scholarship a different method of inquiry into legal scholarship. The central component of the different method of inquiry is the commitment to empirical investigation. That is, what Professor Ulen sees as the novelty and legacy aspects of the law and economics influence is legal scholarship's emerging trend toward a method of inquiry that includes theory, empirical testing, and theory refinement as its central features.

Although the trend toward multidisciplinary legal scholarship is largely beyond dispute, the trend's desirability remains contested. Among those who criticize legal scholarship's palpable directional change from the pure, classic doctrine to more multidisciplinary work, Judge Harry Edwards is one of the most prominent and vocal. According to Judge Edwards and others, the increased academic tendency toward multidisciplinary legal scholarship exacerbates a rift between law professors and judges. The rift partly flows from Judge Edwards's perception that law faculty, particularly those who are younger, and especially those at elite law schools, have become "disdainful of the practice of law" and committed to "impractical" scholarship that has little relevance to concrete issues or addresses them in a

Judicial Decision Making and the New Empiricism, 2002 U. ILL. L. Rev. 819, 826-32 (suggesting three factors for the dramatic increase of empirical legal scholarship: the nature of legal scholarship, the people conducting such research, and the practical developments independent of legal scholarship that influence empirical legal scholarship).

See Ulen, supra note 221, at 405 (describing law and economics' role as central).

Id.

Id.

Id. at 428 ("[L]aw and economics imparted into the study of law a commitment to the same theory—empirical work—refined theory cycle.").


See, e.g., Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 35 (1992) ("[I]n my view, a good 'practical' scholar gives due weight to cases, statutes and other authoritative texts, but also employs theory to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in the law or in systems of justice."). Judge Edwards's comments ignited extensive commentary. See Symposium, Legal Education, 91 Mich. L. Rev. 1921 (1993). To be fair, others share Judge Edwards's concerns. See, e.g., Ulen, supra note 221, at 428 ("[Judge Edwards] is, in my view, correct. This is a problem, and I don't know how law schools will deal with this gap in the future."). For another type of criticism of multidisciplinary legal scholarship, see Brian Leiter, Intellectual Voyeurism in Legal Scholarship, 4 Yale J.L. & Human. 79, 79-80 (1992).

See Edwards, supra note 235, at 34-35.
wholly theoretical manner. Although another member of the federal judiciary, Judge Posner, agrees with Judge Edwards’s perceptions of trends in the legal academy, Judge Posner disagrees with Judge Edwards’s sense of the magnitude of the shift as well as its importance. According to Judge Posner, traditional forms of legal scholarship continue to be produced. In addition, some of the more recent multidisciplinary forms of legal scholarship have contributed to the professional lives of lawyers and judges.

Many share Judge Posner’s perspective. While Judge Edwards cites to law and economics as an example of “impractical” scholarship, others quickly disagreed. Professor Gordon—though generally partial to Judge Edwards’s argument—described how his “jaw dropped when [he] came to the part of Judge Edwards’s article that seem[ed] to argue that even law and economics [was] not ‘practical.’” Professor Gordon notes just a few of the more obvious practical applications of law and economics research, ranging from Executive Branch requirements that administrative agencies engage in cost-benefit analyses to the Justice Department’s Antitrust Division’s adoption of the Chicago School theory.

Setting aside important normative aspects relating to a shift toward increasingly multidisciplinary legal scholarship, the central point is only an empirical one. Specifically, legal scholarship, along with judicial opinions, draw on nontraditional legal sources more than they did prior to Brown. This trend supplies indirect evidence of an increasingly multidisciplinary law. To be sure, seeds of this shift from traditional doctrinal to more multidisciplinary legal scholarship were planted long before the Brown decision, but the decision and, in particular, footnote 11, served as an accelerant.

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237 Edwards, supra note 235, at 35. Judge Edwards goes on to describe law and economics as an example of “impractical” scholarship. Id. at 47; see also Deborah L. Rhode, Legal Scholarship, 115 Harv. L. Rev. 1327, 1331 (2002) (“Baldly stated, the uncomfortable fact is that too much of the legal scholarship now produced is of too little use to anyone.”).

238 Posner, supra note 222, at 94.

239 Id.

240 Judge Posner identifies successful multidisciplinary perspectives, including (but not limited to) economics, cognitive psychology, and feminist jurisprudence. Posner, supra note 169, at 1325. Other less successful perspectives, according to Judge Posner, include moral philosophy. Id.

241 Edwards, supra note 235, at 47.


243 Id.

244 The legal realism movement is one obvious pre-Brown source. For a description of the history and development of legal realism in America, see generally John Henry Schlegel, American Legal Realism and Empirical Social Science (1995).
CONCLUSION

After fifty years, interpretations of the *Brown* decision and its legacy continue to evolve. It is not surprising that a decision like *Brown*, with its profound legal, political, and moral implications, resists a final, definitive interpretation. Each generation undertakes the task of framing *Brown* within that generation’s similarly dynamic constitutional and civic contexts. Consequently, a definitive consensus on *Brown* and its meaning does not yet exist and is unlikely to emerge anytime soon. Moreover, efforts to interpret *Brown* and its legacy reveal just as much about our current understanding of law, the role of courts and legal institutions in our society, and constitutional democracy as they do about the decision itself.

The fact that *Brown* can be plausibly assessed from an array of perspectives and that these different perspectives generate different images about the decision’s efficacy and legacy complicates efforts to understand *Brown*. Complications aside, the various perspectives typically orient around one of two general themes: What the *Brown* decision achieved and what it did not achieve. The perspective of public school integration levels focuses on what the decision and the school desegregation movement failed to accomplish. By ending de jure school segregation, *Brown* accounts for critical progress. Nevertheless, existing school integration data reveal persistent de facto segregation that has endured despite, or even perhaps because of, the *Brown* decision. Where some level of school integration has been achieved, school demographics remain notoriously fragile and dynamic. Consequently, the school integration perspective emphasizes *Brown’s* unfulfilled mission.

To judge the *Brown* decision’s force solely in terms of school integration data is to ignore other perspectives that reveal indirect and unexpected aspects of the decision’s complex and rich legacy. The empiricization of the equal educational opportunity doctrine was one indirect consequence of the *Brown* decision, principally through footnote 11. Generations of lawsuits seeking greater educational equality since *Brown* demonstrate the decision’s imprint on how courts, lawyers, and policymakers construe constitutional requirements for educational equity. This indirect impact flowing from *Brown* contributed to one unexpected result: increased multidisciplinarity. Judicial opinions and legal scholarship both contribute to and reflect a trend toward increased multidisciplinarity. Both indirect and unexpected consequences contribute important texture and nuance to *Brown’s* legacy.

After fifty years, the quest for *Brown’s* true legacy persists. Given *Brown’s* importance, the persistent quest is understandable. Despite such a quest’s importance and allure, it is also likely quixotic. *Brown’s*
legacy will continue to change over time because the points of reference used to assess *Brown* will also continue to change over time. Even when time is held constant, different perspectives of the decision offer different images of what it accomplished and what it did not accomplish. Consequently, efforts to characterize *Brown* will likely suffer from unavoidable imperfections. Paradoxically, an imperfect image of *Brown* may capture more of *Brown*'s meaning than many might wish to admit. To acknowledge *Brown*'s imperfections uncomfortably implies that our legal institutions are imperfect as well. Moreover, when the issue at stake is equal educational opportunity for American schoolchildren, any imperfections are difficult to digest. Nevertheless, however discomfiting or difficult, the drive for greater equal educational opportunity must persist.