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*Race Discrimination in Education:
A Legal Perspective*

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Introduction

This paper has three goals: to describe the formal legal definitions of race discrimination in education; to demonstrate how those definitions are applied in various contexts and cases; and to highlight the role that social science evidence has played and could play in the cases. At first blush, one might be surprised that the issue of race discrimination remains prevalent enough to justify sustained inquiry. Given the distance that separates us from the Court's momentous decision in *Brown v. Board of Education*,¹ one might be lulled into thinking that legal claims of race discrimination in education are now historical artifacts. Not so. State-mandated segregation has indeed been eliminated, but that did not exhaust the field of potential race discrimination claims in the education context. Such claims continue to be raised by white and black plaintiffs alike, who challenge practices ranging from race-based assignment policies at magnet schools to the use of high-stakes tests that have a disproportionately adverse effect on racial minorities. Rather than disappearing after *Brown* and its progeny, race discrimination claims instead have been transformed.

Courts, in turn, have embraced some of these new claims of race discrimination, in some instances standing old principles on their heads in the process. To cite the most dramatic example, whereas the Supreme Court once aggressively ordered previously segregated school districts to take steps to integrate their schools, it has recently suggested that school districts might be *prohibited* from taking voluntary steps to increase integration. From *Brown* forward, finally, courts have at different times relied on social science evidence to support their legal conclusions, though it is debatable whether courts have actually been influenced by the social science evidence they cite. Whether such

evidence should play a larger or smaller role in adjudication is also, not surprisingly, debatable.

All of which is to suggest that what currently counts as race discrimination in education and how such discrimination is proven are, at least from a legal perspective, at once both straightforward and complex questions. The relative easy part consists of formally defining race discrimination. There are two legal grounds upon which race discrimination claims may be based.² The first is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the other is the so-called “disparate impact” regulation promulgated by the Department of Education pursuant to Title VI of the 1964 Civil Rights Act. As described below, Equal Protection and Title VI claims have different legal elements and therefore establish two different formal definitions of race discrimination.

Equal Protection and Title VI claims, in turn, are raised in a variety of contexts, and it is here where the complexity lies. Equal Protection claims were traditionally made in the context of cases challenging intentional segregation but are currently (and somewhat paradoxically) made primarily in cases challenging voluntary efforts to integrate schools. Title VI claims, by contrast, are typically raised in cases challenging either testing, tracking, or funding decisions that have a disparate impact on minority students. When one examines the various cases in which these claims are made, it is apparent that at times the formal definitions of race discrimination are modified in their application, and it is also apparent that important questions remain about whether those definitions are satisfied in a particular case or context. In order to understand the legal

definitions of race discrimination, therefore, attention must be paid to the cases in which discrimination claims are raised.

This paper is accordingly organized as follows. Part I will set forth the two formal legal definitions of race discrimination, one based on the Equal Protection Clause and the other on the Title VI disparate impact regulation. Part II will discuss the contexts in which these definitions are applied, beginning with the early desegregation cases brought pursuant to the Equal Protection Clause, then moving to the modern cases brought under that Clause that seek to limit or prohibit voluntary integration plans, and turning finally to the various claims raised under the Title VI regulation. Although I will identify examples in Part II of where and how courts have (at least purportedly) relied on social science evidence, in Part III I will pull these examples together to discuss more generally the role that social science evidence has played in the cases and to outline ways in which social science evidence could be relevant to future decisions. In so doing, I hope to contribute to what I understand to be the ultimate goal of this Panel, namely offering research suggestions and directions to social scientists interested in documenting the extent and significance of racial discrimination in various contexts, including the field of public education.

I. The Formal Legal Definitions

A. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution traditionally prohibited any state action intentionally designed to disadvantage racial minorities. In *Brown v. Board of Education*, the Court extended this principle to laws mandating school segregation, largely on the ground that such laws

harmed minority students. In *Brown* and its progeny, therefore, the Court set out to dismantle legally segregated school systems, in both the South and the North, on the theory that such school systems violated the Equal Protection Clause.

The Equal Protection Clause is currently read, however, to restrict severely the intentional use of race in any government program, regardless of whether the program is designed to help or to disadvantage minorities. Any racial classification, whether “benign” or “invidious,” provokes what is known as “strict scrutiny” from the Court, which is the most stringent standard of review applied under the Equal Protection Clause and usually results in the law or policy at issue being struck down as unconstitutional. The strict scrutiny test requires that the government demonstrate that the use of race is necessary to achieve a compelling state interest and that the program or policy at issue is narrowly tailored to accomplish that interest.³ Thus, the first formal legal definition of race discrimination in education can be stated as follows: no government program or policy can explicitly use race as a criterion unless doing so is necessary to achieve a compelling state interest and the program is narrowly tailored to achieve that interest.

The law is unsettled as to what counts as a “compelling” state interest and as to what is necessary to ensure that a program is sufficiently tailored. The only clearly constitutional use of race is when the government is attempting to remedy prior, specific discrimination, meaning that a government institution or program is attempting to remedy discrimination committed by that institution or program. Remedying prior societal discrimination is not considered a compelling interest.⁴ Although the Court has suggested that remedying prior, specific discrimination may be the *only* context in which it is permissible to use race as a factor in decisionmaking, it has not completely

foreclosed other possibilities. In particular, it has not yet resolved what is perhaps the most important question for race-conscious programs at both the university and grade school level: whether achieving a diverse student body might also count as a compelling state interest. If achieving diversity is not considered a compelling interest, and if remedying prior, specific discrimination is the only context in which race may be considered, affirmative action programs at the university level and voluntary integration programs at the grade school level are in serious jeopardy.

Before turning to the definition of racial discrimination created by the disparate impact regulation under Title VI, one more point about the Equal Protection Clause should be mentioned. As indicated above, strict scrutiny is applied to laws that intentionally discriminate (or differentiate, really) on the basis of race; when it is applied, such scrutiny is often fatal to the law at issue. Strict scrutiny is also applied to laws that are neutral on their face but are intended to discriminate on the basis of race. This category of equal protection claims can essentially be ignored here, however, because proving that facially neutral laws are intentionally discriminatory is remarkably difficult. Plaintiffs must show that government actors pursued a particular course not merely with knowledge of its foreseeable adverse effects but *because of* those effects.⁵ Unless government actors are blatant about their intent or unless there exists no plausibly legitimate justification for their actions, plaintiffs will have a very difficult time in proving intent to discriminate. If plaintiffs fail to prove an intent to discriminate, policies that have a racially adverse effect are subject not to the strict scrutiny test but rather to the rational basis test, which is almost ridiculously easy to satisfy. All that must be shown to

pass this test is that there exists some “reasonably conceivable state of facts that could provide a rational basis for the classification.”⁶

The difficulty of proving that a facially neutral policy is intentionally discriminatory is why most successful equal protection challenges are brought against policies that intentionally seek to use race in ways that benefits minorities. It is in the affirmative action or voluntary integration context that legislatures and officials are not shy about relying on race. Their intent to use race as a means of classification is usually apparent from the face of the law or policy in question, and thus plaintiffs need do no more than point to the law to demonstrate that the law is intended to discriminate on the basis of race. In other educational contexts, however, government officials presumably would either refuse to rely on race or would be reticent about doing so. Surely a government official would be reluctant to say that a particular testing policy, tracking program, or funding decision was made *because of* its predictably adverse effects on racial minorities. As one might have guessed by now, the difficulty of demonstrating that facially neutral laws are intended discriminate on the basis of race makes the Title VI definition of race discrimination all the more important.

B. Title VI Disparate Impact Regulation

Section 601 of Title VI of the Civil Rights Act of 1964 forbids discrimination on the basis of race, color, or national origin by any program that receives federal funding, which includes both public and private elementary and secondary schools.⁷ In order to prove a violation of § 601, a plaintiff must show that the relevant government officials intentionally discriminated on the basis of race, color, or national origin.⁸ Section 601, therefore, creates a liability standard that is identical to the Equal Protection Clause; to

prove a violation of § 601, therefore, a plaintiff would have to make the same showing necessary to prove a violation of the Equal Protection Clause. The only differences between an Equal Protection and § 601 claims are that § 601 applies to both public and private institutions, including schools, and the remedy for a violation of § 601 is a loss of federal funding.

Section 602 of Title VI, however, indirectly creates another basis of liability for race discrimination. Section 602 authorizes federal agencies to create regulations to effectuate the law. The Department of Education, like other federal agencies, has issued regulations pursuant to Title VI, which incorporate a disparate impact standard of liability. Specifically, these regulations prohibit recipients of federal funding from using “criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color or national origin.”⁹ Proof of intent to discriminate, therefore, is not necessary to prove a violation of this regulation. Rather, this “disparate impact” regulation restricts the use of even facially neutral practices if they have a racially disproportionate and adverse effect, regardless of the purpose or intent behind those practices.

The elements of a Title VI disparate impact claim are simple enough to state. They are based on the same elements courts have established to adjudicate cases based on Title VII of the 1964 Civil Rights Act, which bars similar discrimination in the employment context.¹⁰ To begin, plaintiffs bear the initial burden of establishing a prima facie case, which requires them to demonstrate, by a preponderance of the evidence, that a facially neutral practice has had an adverse and disparate impact on a protected class of people. In order to show an adverse impact under Title VII, the Supreme Court has held

that a plaintiff must show that “it is the application of a specific or particular employment practice that has created the disparate impact under attack.”¹¹ Applying this in an analogous fashion to Title VI, the plaintiff has a duty to show a “causal link between the defendant’s challenged practice and the disparate impact identified.”¹² Although some courts have explicitly discussed what evidence is necessary to prove an adverse, disparate impact, most courts seem to accept that plaintiffs meet their burden if they simply demonstrate that the practice has some adverse effect that falls disproportionately on a group protected by Title VI.

If the plaintiffs meet this burden, the burden shifts to the defendants to justify the practice in spite of its disparate impact. In the employment context, defendants can justify a challenged employment practice by showing that it is a “business necessity.”¹³ Borrowing this standard, courts require defendants in the educational context to demonstrate that the practice in question is an “educational necessity.”¹⁴ Although, as articulated, this standard seems quite stringent and difficult to meet, most courts have watered it down by concluding that “an educational necessity exists where the challenged practice serves the *legitimate* educational goals of the institution.”¹⁵ Defendants can thus typically meet their burden by showing that the educational practice at issue has a demonstrable relationship to a legitimate educational goal, which basically requires showing that the practice is at least defensible or debatable.¹⁶ If the defendants meet this rebuttal burden, the burden shifts back to the plaintiffs. In order to prevail, plaintiffs must demonstrate either that there exists an equally effective alternative practice that has less of a disparate impact or that that the proffered justifications are only a pretext for discrimination.¹⁷

Clearly something is lost when the formal legal definition of discrimination under the Title VI regulation is translated into practice, and thus understanding the cases in which Title VI claims have been raised is especially important. Before turning to the contexts in which Equal Protection and Title VI claims are raised, however, it must be pointed out that private individuals may no longer have the right to bring claims directly under the Title VI regulations. In *Alexander v. Sandoval*,¹⁸ a very controversial case decided in 2001, the Supreme Court held that private individuals do not have a right to base a claim directly on the disparate impact regulations of Title VI. In technical terms, the Court held that the regulations do not create a private right of action, a ruling that contradicted decades of lower court decisions, as well as past Supreme Court decisions, which either held or assumed that private individuals could enforce the disparate impact regulations of Title VI.

It may be, for technical reasons not worth explaining here, that plaintiffs can enforce the regulations by basing their claims on 42 U.S.C. § 1983, which creates a general right of action to enforce violations of federal law. The Supreme Court has yet to address this possibility, so the enforceability of the disparate impact regulations remains uncertain. If plaintiffs can rely on § 1983, then the *Sandoval* decision is really a sport, and it will not prevent private claims based on the Title VI regulations. On the other hand, if § 1983 does not provide an alternative route for enforcement, then the only way that the regulations can be enforced is through actions brought by the federal agencies themselves. This will almost surely have the effect of reducing the number of Title VI claims brought, and it may slow the number of claims to a trickle, especially if those

leading federal agencies are politically opposed to challenging facially neutral practices that have a racially disparate impact.

None of this means that the disparate impact regulations are currently meaningless or that the cases that have applied Title VI can be ignored. The law is uncertain, and even if it turns out that only federal agencies can enforce Title VI, the claims would still be adjudicated in the same way that they have been in the past. That is, a Title VI claim brought by the Department of Education would be treated to the same burden-shifting analysis that characterizes such claims brought by private individuals.

II. The Contexts and The Cases

A. Equal Protection

1. The Desegregation Cases

To best understand current equal protection doctrine in the education context, it is helpful to have some working knowledge of the Court's early desegregation cases. Although they defy easy categorization, desegregation cases have proceeded in roughly four phases, the first of which began with the Court's 1954 decision in *Brown*. (Two Supreme Court cases before *Brown* touched on the issue of race discrimination in education,¹⁹ but the Court's decision in *Brown* really began the modern era of protecting minority students against discrimination.). The Court in *Brown*, as is beyond well-known, declared state-mandated segregation unconstitutional. The Court rejected the notion, based on the Court's 1896 decision in *Plessy v. Ferguson*,²⁰ that separate but equal schools were constitutional. Separate education facilities, the Court concluded, were inherently unequal and therefore violated the Equal Protection Clause.

In reaching its conclusion, the Court famously cited, in footnote eleven of the opinion, to social science evidence that the Court suggested demonstrated the harmful effects of school segregation on minority students.²¹ This citation drew a lot of attention, and no small amount of criticism, from academic commentators, and many have suggested that this citation did much to create what has become a cottage industry of social science studies regarding desegregation and a host of other educational policies.²² Despite the attention it garnered, however, there is a good deal of evidence that indicates that the studies themselves did not actually influence the Justices. Accounts by some of the Justices and clerks involved in drafting *Brown* suggest that the evidence did not influence the outcome.²³ In addition, after *Brown* the Court struck down ordinances that required racial segregation in various public facilities, including beaches, buses, and golf courses.²⁴ The Court did so in a series of brief opinions, which did nothing more than say that such ordinances were unconstitutional in light of the *Brown* opinion. If social science evidence about the deleterious effects of segregation in education were really important to the *Brown* decision, it is difficult to understand how the Court could use that decision – and nothing else – to strike down laws requiring segregation in other contexts. The more plausible explanation, and the one consistent with the various accounts of the drafting of the opinion, is that the Court cited to social science evidence as a way of bolstering and in some ways obscuring its normative judgment – controversial at the time – that racial segregation is simply wrong.²⁵ As I hope to show throughout this paper, the practice of citing to social science evidence to bolster already-reached normative conclusions continues today in education cases involving claims of race discrimination.

The second phase of desegregation cases involved the issue of remedies and enforcing the Court's mandate in *Brown*. It began a year after the first *Brown* decision, when the Court in *Brown II* issued a vague call for states and localities to dismantle dual systems of education. The Court failed to establish any kind of standard or timetable, famously indicating instead that desegregation should occur "with all deliberate speed" through plans developed by federal district courts.²⁶ For the next decade, desegregation occurred with no speed at all, deliberate or otherwise, as southern states engaged in various tactics of defiance, avoidance, and delay. For the most part, the Court stood on the sidelines and did not put pressure on school districts to take affirmative steps to desegregate their schools.²⁷

In 1968 and 1971, however, the Court returned to the field and made it clear that school districts had an affirmative obligation to achieve integration in previously segregated schools. The *Green* decision in 1968 struck down an ineffective freedom of choice plan and held that dual school systems had to be eliminated "root and branch."²⁸ In practical terms, this meant that districts had to ensure that students, faculty, and staff were integrated, and that facilities, transportation, and extracurricular activities were sufficiently equal that one would be unable to distinguish between a traditionally all-white school and one that was traditionally all black. Importantly, and controversially, the decision in *Green* effectively made "desegregation" synonymous with "integration" by indicating that it was not sufficient for local school districts simply to cease assigning students by race; they had an affirmative duty to ensure that schools were actually integrated. The Court went even further in the *Swann* decision in 1971, ruling that desegregation must be achieved to the greatest extent possible and approving court-

ordered busing as a means to accomplish this goal.²⁹ The Court justified busing students away from neighborhood schools on the presumption that current residential segregation, which produced segregated neighborhood schools, was itself the product of prior school segregation. Rather than seriously examine the empirical underpinnings of this presumption, however, the Court more or less established it by way of fiat.

Green and *Swann* seemed to indicate that, after a decade long-hiatus, the Court had decided to become actively and aggressively involved in turning the promise of *Brown* into a reality, where substantial numbers of white and black students would attend school together in school districts across the country. But it was not to be. *Green* and *Swann* remained important precedents for lower federal courts, which relied on them to demand that school districts devise desegregation plans that showed results. Only three years after *Swann*, however, the Supreme Court itself dealt a crippling blow to urban school desegregation.

In *Milliken I*, decided in 1974, the Court struck down a desegregation plan that would have required integration among the predominantly black city schools of Detroit and the predominantly white schools in the suburbs.³⁰ The Court held that a federal district court could not require students to cross school district lines to remedy segregation absent a showing of an interdistrict violation -- that is, absent a showing that the district lines themselves had been manipulated to achieve segregation between and among different school districts. Such a showing was difficult to make in *Milliken* and would be difficult elsewhere, primarily because of residential segregation between cities and suburbs. In most Northern and Western metropolitan areas, school district lines have traditionally been coterminous with municipal boundaries. Given the intensity and

prevalence of residential segregation, especially between cities and surrounding suburbs, there was no need, in Detroit or elsewhere, to manipulate school district lines in order to achieve segregated school districts. The lines could remain coterminous with municipal boundaries, and residential segregation would do the rest.

To be sure, proof that the state or local government was responsible for residential segregation might have justified imposing an interdistrict school desegregation remedy, on the theory that the government had effectively committed an interdistrict violation by sponsoring residential segregation.³¹ But in one of the least-noticed and important mysteries in the desegregation cases, the Court explicitly and disingenuously ducked the question of residential segregation in *Milliken*, and it has never surfaced again in any other Supreme Court desegregation case.³² To be sure, the Court has talked about whether school desegregation causes residential segregation, but it has never addressed the more obvious and obviously more important question of whether governments responsible for residential segregation should be held responsible for the school segregation that follows as a result of (government-created) neighborhood school policies.

In holding that a court could not order an interdistrict remedy in the absence of an interdistrict violation, the Court in *Milliken* essentially foreclosed the possibility of achieving real integration in Detroit and a host of other Northern and Western metropolitan areas. Because of the difficulties of proving an interdistrict violation, almost all desegregation plans in the North and West were limited to single, usually urban districts, where there was some proof of intentional acts taken to segregate the schools. Wherever urban areas were populated primarily by minorities, desegregation

plans limited to urban school districts would necessarily be ineffective in achieving any substantial racial mixing in public schools. Without being able to draw on the heavily white student population in the suburbs, urban desegregation plans could not hope to achieve much integration, because of the simple fact that there were not enough white students to go around.³³

Having effectively shut the door on interdistrict desegregation plans in *Milliken I*, the Court approved a different form of relief in *Milliken II*, and in so doing ushered in the third phase of desegregation cases. In *Milliken II*, the Court approved a desegregation remedy, affecting only schools within Detroit, that required the state to help fund remedial and compensatory education programs.³⁴ Just as it did in *Swann*, the Court presumed that prior school segregation retarded the educational achievement of minority students, without really relying on any relevant social science evidence, and on this basis justified compensatory relief. The irony of *Milliken II* was immediately apparent to observers: if suburban and urban schools were going to be separate as a result of *Milliken I*, *Milliken II* seemed to hold out the possibility that they might at least be equal, a curious result given that it came twenty-five years after *Brown* purported to inter the separate-but-equal standard of *Plessy v. Ferguson*. Taken together, *Milliken I* and *Milliken II* fundamentally altered the nature of desegregation remedies. Given that achieving real integration was next to impossible when desegregation plans were limited to urban districts, plaintiffs in Northern and Western urban school districts began focusing on securing *Milliken II* relief. The goal of much desegregation litigation in the third phase thus was to secure funding from the state to pay for remedial plans designed to improve the quality of facilities and instruction at racially isolated schools. Rather than trying to

achieve some measure of equality through racial integration, plaintiffs instead sought to achieve some measure of adequacy through remedial funding.³⁵

Court-ordered desegregation is currently in its fourth and twilight phase. Through a trio of cases decided in the early 1990s, the Supreme Court has established guidelines as to when a district can be declared “unitary” and released from court supervision.³⁶ Described most simply, these guidelines require courts to determine whether school district officials have acted in good faith to eliminate the vestiges of prior segregation to the extent practicable. A key question confronting courts asked to terminate busing decrees is the extent to which current residential segregation can be attributed to prior school segregation. If the two can still be linked, busing can continue, because residential segregation would still be considered a vestige of prior school segregation. If the two are no longer connected, busing becomes impossible to justify, as the residential segregation that produces segregated neighborhood schools could no longer be considered the product of prior school segregation. Here, again, social science evidence could potentially be quite helpful to figuring out what link, if any, remains between prior school segregation and current residential segregation. It does not appear, however, that the Court intends for lower courts to engage in much empirical analysis, as the opinions suggest in not so subtle terms that desegregation decrees have been in place long enough and that courts should begin the process of returning control over student assignments to state and local officials.³⁷ The inquiry into unitary status reflects this sentiment that enough has been enough, as it requires courts to ask whether the vestiges of prior segregation have been eliminated “*to the extent practicable.*”³⁸ This caveat allows, if not invites, federal courts to assume that there might still be a link between prior school

segregation and current school conditions, including residential segregation, but to nonetheless terminate the desegregation decree on the ground that the decree has been in place long enough to conclude that any improvements that were going to occur have already occurred.³⁹

At roughly the same time that the Court began to encourage lower courts to dismantle desegregation decrees, it also began, whether intentionally or not, to make it difficult for districts to undertake voluntary efforts to integrate public schools. Whereas federal courts had been, until the early 1990s, primarily involved in forcing schools to integrate in order to remedy violations of the Equal Protection Clause, they have over the last decade begun to strike down integration programs adopted voluntarily by districts. The resulting transformation of equal protection race discrimination claims has been dramatic: once a source for black plaintiffs to secure an integrated school environment, the Equal Protection Clause has now become the favored source for white plaintiffs interested in blocking efforts to integrate schools. The seeds of this transformation were planted in the Supreme Court's affirmative action decisions and have been harvested by lower courts intent on precluding voluntary efforts to enhance integration in public schools.

2. Restrictions on Voluntary Integration

The term "voluntary integration" refers to integration efforts made by school districts that are under no compulsion to integrate, either because they were never subject to a court order or because they have been declared unitary and released from court supervision. Although the details of plans vary considerably, there are three major types of voluntary integration plans: those that involve examination schools, those that involve

magnet schools, and those that rely on choice among traditional public schools. The common thread linking the plans is that all rely on racial criteria to influence if not determine student assignment. Thus, some districts with examination schools, such as Boston, have taken race into account when determining admission. Districts with magnet schools have done the same thing in an attempt to achieve some measure of racial balance. Other school districts have adopted various forms of public school choice plans, all of which involve structuring or limiting the choices available in order to produce racially balanced schools or to prevent increased imbalance.

Prior to 1989, one could reasonably have concluded that voluntary integration plans raised no serious constitutional questions. The Supreme Court had not yet determined whether government programs that relied on race in an effort to benefit minorities ought to be treated, from a legal perspective, identically to programs that used race to disadvantage minorities. It was thus somewhat unclear before 1989 whether so-called “benign” racial classifications, designed to help minorities, would be treated more favorably than so-called “invidious” classifications. In addition, and perhaps more importantly, in its 1971 decision in *Swann*, the Court seemed to give its blessing to voluntary integration plans, albeit in *dicta*. The Court acknowledged that school officials “might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.” Federal courts could not *order* school officials to take such action in the absence of a finding of prior intentional segregation, but the Court concluded that to take such action voluntarily “as an educational policy is within the broad discretionary powers of school authorities.”⁴⁰

In 1989, however, the Court decided an affirmative action case, *City of Richmond v. Croson*,⁴¹ which at once clarified the legal standard to apply to all racial classifications and rendered uncertain the continued validity of the *dicta* in *Swann*. In *Croson*, which involved a challenge to a Richmond law that gave minority contracting firms an advantage in the bidding process for government work, the Court held that all racial classifications must be subject to strict scrutiny. The Court reasoned, somewhat controversially, that all racial classifications have potential costs, even those designed to assist historically disadvantaged minorities, and for that reason all such classifications must be closely examined and limited in their use.⁴² As described in Part I, this means that any time a state or local government explicitly relies on race to make a decision or implement a policy, the government must be able to demonstrate that using race is necessary to satisfy a compelling interest and that the program is narrowly tailored to accomplish that purpose. This is a very difficult burden to meet, primarily because the Court has suggested that there will be very few justifications that rise to the level of “compelling.” Thus far, the Court has only explicitly sanctioned the use of race in order to remedy prior, specific discrimination.

Left undecided by the Court’s decisions is what else, if anything, might be considered a compelling state interest. In the context of education, the million-dollar question is whether diversity might count as a compelling interest. Supreme Court precedent is somewhat unclear. In his famous opinion in an early affirmative action case, *Bakke v. Board of Regents*, Justice Powell reasoned that attempting to achieve and maintain diversity in an undergraduate or graduate school could constitute a compelling interest.⁴³ Justice Powell wrote only for himself, however, and despite the fact that his

opinion (because of the split among the other Justices) controlled the outcome of the case, disagreement lingers as to whether Powell's conclusions about diversity represent a valid precedent of the entire Court. At least one lower court, the Court of Appeals for the Fifth Circuit, has held that Powell's opinion is not controlling and has rejected the idea that diversity is a compelling state interest.⁴⁴ Other lower courts have been more cautious and are clearly waiting for the Supreme Court to resolve this issue.⁴⁵ Many believe that it will do so in a case recently decided by the Court of Appeals for the Sixth Circuit, in which the appeals court upheld the affirmative action plan at the University of Michigan Law School on the grounds that it helped achieve the state's compelling interest in achieving and maintaining diversity.⁴⁶

In the meantime, however, lower courts have been left to puzzle over the constitutional status of voluntary integration plans. Although there have not been a great number of cases, in general it is fair to say that lower courts have not been very receptive to such plans. School districts seeking to justify voluntary integration plans typically cannot argue that such plans are necessary to remedy prior discrimination, which is the one goal clearly recognized as compelling and thus constitutional. The reason this justification is unavailable is fairly straightforward. Recall that districts adopting voluntary plans have either been declared unitary or were never under any court obligation to desegregate in the first place. Districts that have been declared unitary have been found by a federal court to have eliminated the vestiges of prior segregation (or discrimination) to the extent practicable. It would be inconsistent with such a finding to hold that a unitary district is seeking to remedy prior discrimination; the unitary status finding indicates that such discrimination has already been remedied. Similarly, those

districts never under a court order presumably never engaged in intentional acts of segregation. While it is theoretically possible that some districts did engage in intentional acts of segregation but were essentially never called on it, and thus these districts could now justify voluntary integration as a way of finally remedying prior discrimination, in reality these districts are probably few and far between. To date, there have been no litigated cases involving such a situation.

What this means is that districts that have voluntary desegregation plans must justify them as necessary either to achieve diversity or to overcome *de facto* racial isolation. Although some courts have recognized these interests as distinct, and there are important reasons for distinguishing them, most courts tend to treat both interests as identical.⁴⁷ That is, most courts view voluntary plans as an attempt to achieve diversity and begin by asking whether diversity is a compelling interest. Because of the uncertain status of *Bakke* and lingering questions about whether the Supreme Court believes diversity in education to be a compelling interest, a common move made by lower courts is simply to assume, for argument's sake, that diversity is a compelling interest and then to ask whether the plan at issue is sufficiently narrowly tailored to accomplish the goal of diversity.

This was the move made in the three leading cases on voluntary integration plans, one of which was decided by the Court of Appeals for the First Circuit and two of which were decided by the Court of Appeals for the Fourth Circuit. The First Circuit case, *Wessman v. Gittens*,⁴⁸ involved a challenge to the race-conscious admission policy in place at the Boston Latin School, a prestigious public examination school. The Fourth Circuit cases, *Tuttle v. Arlington County School Board*⁴⁹ and *Eisenberg v. Montgomery*

County Public Schools,⁵⁰ both involved race-conscious assignments to magnet schools. In all three cases, the courts assumed that diversity was a compelling interest but nonetheless struck down the plans on the grounds that there were not narrowly tailored. The reason the plans were not narrowly tailored was essentially that they involved (according to the courts) racial balancing, meaning that they all sought to ensure that there was a particular percentage of racial and ethnic minorities in the respective schools. Racial balancing, the courts concluded, could not be justified as necessary to achieve diversity. There are reasons to question the courts' conclusions on this ground, as it is unclear why some attempt to achieve racial and ethnic balance is not closely aligned with the goal of achieving a racially and ethnically diverse student population. Although this is speculative, it may be that the courts involved were looking for a way to strike down these plans, perhaps believing that the Supreme Court will ultimately hold that diversity is not a compelling interest. Rather than making that controversial prediction, however, the courts relied on the narrow tailoring prong in an effort to achieve the same result – invalidation of the plans.

Lower courts have been somewhat friendlier to student transfer plans, which condition a student's ability to transfer on whether the student was in the racial minority at the school from which the transfer is sought.⁵¹ In three recent cases, federal courts have refused to grant a preliminary injunction to plaintiffs who sought to have such plans declared unconstitutional.⁵² One potential reason for the more generous reception of these plans may have to do with the fact that they involve traditional public schools and thus do not necessarily involve a situation where a student is being denied the ability to attend a specialized and perhaps superior school.⁵³ But the significance of these

decisions should not be exaggerated, and their procedural posture must be emphasized. All three cases involved requests for preliminary injunctions, which essentially constitute an order to the government to do or refrain from doing something while the case is being litigated. Preliminary injunctions are granted only in extraordinary cases and require the plaintiff to show, among other things, a likelihood of ultimate success on the merits. Although each of the three courts concluded that plaintiffs did not demonstrate a likelihood of success, the courts are not bound by this conclusion and may well grant victory to plaintiffs after a trial is conducted.

The constitutionality of voluntary integration plans, as should be apparent, thus remains uncertain and will not be fully resolved until the Supreme Court addresses the issue. An important first step towards resolving this issue could come in an affirmative action decision at the university level, but it must be recognized that such a decision, regardless of the outcome, will not necessarily dictate the results for voluntary integration plans at the elementary and secondary school level. Whether diversity is or is not a compelling interest at the university level does not necessarily resolve whether diversity is or is not a compelling interest at the elementary and secondary level. In addition, even if diversity is a compelling interest at both levels, the requirements of narrow tailoring may play out differently in the two contexts, as one involves university admissions policies that purport to apply certain criteria of merit to individual candidates while the other often involves non-merit based assignments. The fact that university applicants denied a spot may not necessarily gain admission elsewhere, or may be relegated to an inferior school, while grade school students will necessarily attend school somewhere and have no inherent right to attend any particular school, may also influence the analysis.

All of which is to say that resolution of this issue will likely have to await a case that involves an actual voluntary integration plan adopted by a public school district. Even then, the lower court decisions suggest that it is possible that the Court will adopt different standards depending on whether the plan involves a magnet or examination school or whether it involves choices and transfers among traditional public schools.

Social science evidence may indeed be relevant to establishing whether any particular plan accomplishes a compelling state goal, if that evidence can demonstrate that there are clear benefits to racial integration. I will discuss this possibility in greater detail in Part III, but first it should be stressed that the goal identified by defenders of these plans may very well influence their likelihood of success. In particular, whether defenders of voluntary integration contend that the plans are designed to attain diversity or eliminate de facto racial segregation may be significant. As I mentioned, some courts treat the two goals as identical, but there is a difference between the two, which has been recognized by at least one court.⁵⁴ The difference is that achieving a diverse student body logically entails attracting more than students from one or two racial or ethnic groups, which may limit the means by which schools can attempt to insure a particular racial mix within their schools. On the other hand, if reducing racial isolation is itself, standing alone, a constitutionally permissible goal, there is obviously no more effective means of achieving that goal than to base decisions on race. Social science evidence can influence the choice of goals identified by voluntary integration plans, insofar as it might provide stronger evidence in support of one or the other goal, while at the same time the choice of goals itself could suggest the appropriate direction of future social science research.

B. Title VI Cases

Although there are a host of educational policies and practices that have a racially disparate impact, Title VI disparate impact claims have been raised primarily in three contexts: challenges to testing, tracking, and funding decisions that have a racially disparate impact. Plaintiffs often raise equal protection challenges simultaneously with their Title VI claims, but such challenges are usually summarily rejected for failure to prove intentional discrimination. Proving a racially disparate impact, by contrast, is usually not difficult, but this does not mean that these cases are usually successful.

There have been surprisingly few litigated cases, which makes it hazardous to draw firm conclusions. Nonetheless, it is fair to say that courts have not been especially receptive to Title VI challenges to either testing or tracking. Most challenges to testing and tracking policies have failed because courts appear unwilling to second guess or even closely scrutinize the claim made by school officials that a particular testing or tracking system is an “educational necessity.” Courts, by contrast, have been somewhat more receptive to challenges to unequal funding schemes, although there are very few decisions on point and most involved the early stages of litigation. Challenges to funding schemes may be faring better simply because, once a disparate impact is demonstrated, it is difficult to articulate a decent justification for providing less funding to districts that have more minority students. These three contexts – testing, tracking, and funding – will be discussed in turn. I will end this section by highlighting two additional contexts – school districting and school choice – in which Title VI claims could be brought.

1. Challenges to High-Stakes Testing

Schools across the country use tests for various high-stakes purposes, including determinations about tracking, promotion, or graduation from high school.⁵⁵ Using achievement tests for promotion or graduation decisions has increased in recent years, as part of the standards-based reform movement's emphasis on accountability. Challenges to such tests under the Title VI disparate impact standard all follow the same pattern.

Plaintiffs must first demonstrate that the use of the test has a disparate adverse impact on a protected group, which in cases thus far has always been minority (usually African-American and sometimes Hispanic) students. The Supreme Court has not spoken on this question and courts are not in complete agreement as to what level of disparity must be demonstrated in order to prove a sufficiently disproportionate impact. Some courts have suggested borrowing the Four-Fifths Rule from the employment context, which finds an adverse impact where the passing rate for the minority group is less than 80 percent of the passing rate for the majority group. Most courts, however, simply look to whether there is a statistically significant disparity among racial groups in their performance on the tests, agreeing with one court's observation that "no rigid mathematical threshold of disproportionality . . . must be met to demonstrate a sufficiently adverse impact."⁵⁶ As a result, demonstrating a disparate impact is usually not difficult; indeed, I found no reported case where plaintiffs failed to make this showing.

The real action in these cases, and the place where most claims founder, occurs within the application of the second part of the test. Once plaintiffs meet their burden, defendants have the opportunity to demonstrate that the test is an "educational necessity."

Again, in practice this usually means that defendants must simply show that the test “serves the *legitimate* educational goals of the institution.”⁵⁷ As a general matter, this requires demonstrating that the test is reliable and valid for the purposes for which it is used. This in turn requires showing that the test in question meets professional testing standards for reliability and validity that apply given the purpose for which the test is being used.⁵⁸ When applied to achievement or assessment tests, this standard also requires that there be some proof that students have actually been given an opportunity to learn the material that is taught on the test.

At first blush, this requirement might seem to place a heavy burden on defendants to prove that their tests are reliable and valid, and to prove where relevant that students have been given a realistic opportunity to learn the material. In reality, however, courts seem reluctant to place too much of a burden on defendants and appear willing to accept whatever proof defendants can offer in defense of their testing policies. In a 1985 decision, for example, a federal appellate court gave only cursory consideration to a claim that testing used to determine ability-group placements was invalid. Even though the district court never determined whether the tests adequately measured a student’s ability in the subjects where ability grouping occurred, the court upheld the use of testing for making tracking decisions on the ground that there was some “evidence in the record establishing the validity of certain of the testing procedures.”⁵⁹ Inverting the burden of proof (as well as apparently missing the point), the court also thought it relevant that there was “no direct evidence” showing that students were assigned to ability groups based on “criteria not manifestly related to the subject matter taught in the specific class.”⁶⁰

Another federal court was equally deferential in one of the most recent and well-known testing cases. In *GI Forum v. Texas Education Agency*,⁶¹ plaintiffs challenged the use of the Texas Assessment of Academic Skills (TAAS) examination, asking for an injunction preventing the Texas Education Agency from using failure of the exit-level TAAS test as a basis for denying high school diplomas. The plaintiffs successfully demonstrated the TAAS test did adversely affect minority students, by showing that minority students failed the test in higher percentages than did white students. The court nonetheless rejected plaintiffs' challenge because it concluded that the use of the tests was an educational "necessity," defined by the court to mean that the use of the tests served "the *legitimate* educational goals of the institution."⁶² In reaching this conclusion, the court found that the test was an effective way to motivate students to learn the material tested and that the test provided a fair and objective assessment of whether students mastered a discrete set of skills and knowledge. The court refused to consider the claim that teaching to the test actually harmed some students, and it did not take seriously the claim that the test itself caused drop-out rates among minorities to rise, despite plaintiffs effort to demonstrate this point. It also expressed sympathy for the argument that minority students did not receive educational opportunities equal to those provided to white students, but it concluded (without explanation) that the use of the TAAS test actually helps identify and address educational inequalities.⁶³

In the course of rejecting an alternative claim – that the use of the tests violated the Due Process Clause -- the court in *GI Forum* also concluded that students had an ample opportunity to learn the material taught on the test. It is unclear why this was not also a part of the Title VI analysis, as surely it cannot serve the legitimate educational

goals of a school to test students on material they were never given the opportunity to learn. Future Title VI challenges to graduation or promotion tests surely will focus on this factor, as they should. For this reason, the court's approach to this issue is worth describing. Rather than require the government to demonstrate that the material was actually taught in the classroom, the court pointed to the fact that the test was aligned with statewide curriculum standards. The court also pointed to the fact that the state provided some vague remedial instruction for students who failed the test and it provided students eight chances to pass the test before leaving school. Notice that requiring school officials to demonstrate that the material is actually taught to students could in theory place a very substantial burden on them to document what actually occurs in classrooms. The court in *GI Forum* relieved them of that burden by pointing to circumstantial evidence, some of it quite weak, and inferring from that evidence that students had an adequate opportunity to learn the material.⁶⁴

Again, it would be wrong to draw strong conclusions from the limited number of cases that have been litigated. In addition, there is at least one case pointing in the opposite direction. In *Larry P. v. Riles*,⁶⁵ the Court of Appeals for the Ninth Circuit prohibited the use of I.Q. tests to determine the placement of students in classes for the educable mentally retarded (EMR), concluding that defendants did not show that the tests were valid for determining whether students were capable of learning more than was taught in the EMR classes. At the moment, however, *Larry P.* appears to be the exception to the emerging rule that courts will be deferential to the claim made by school officials that testing for purposes of deciding promotion, graduation, or tracking placements is an educationally legitimate practice.

In theory, once defendants have demonstrated an educational necessity, plaintiffs have an opportunity to show that there are equally effective alternatives to the testing policy, which would have less of a racially disparate impact. As one would imagine, however, cases almost never turn on this prong. Given that courts are deferential to school officials' argument that testing is educationally legitimate, it would be surprising if they then second-guessed the use of the policy and suggested doing something else. Discussion of this prong thus tends to be fairly perfunctory, with courts acknowledging that plaintiffs have proposed a plausible alternative but concluding that they have failed to show that the alternative would be as effective as the policy in place.⁶⁶

2. Challenges to Tracking

Challenges to tracking and ability grouping per se, as opposed to challenges to the tests used to determine placements, have been few and far between. In the desegregation era, there were some successful challenges to tracking policies that were obviously implemented to maintain racial segregation.⁶⁷ There apparently have been very few recent challenges to tracking or ability grouping per se, as opposed to cases challenging the means by which students are placed in particular tracks or groups. In fact, I discovered only one reported decision on this topic. This is somewhat surprising, given that there is a great deal of social science data that tends to show, both generally and with regard to specific programs, that lower track classes are educationally inferior.⁶⁸ If the one reported decision is any indication, however, this data may not be enough to persuade courts to interfere with tracking and ability grouping policies.

In *Georgia State Conference of Branches of NAACP v. State of Georgia*,⁶⁹ the court assumed for purposes of the case that plaintiffs had demonstrated that ability

grouping in various Georgia schools had a racially disparate impact. It nonetheless upheld the policies because defendants had demonstrated that tracking is an educational necessity, defined by the court to mean that it bears “a manifest demonstrable relationship to classroom education.”⁷⁰ Defendants contended that students in lower track classes benefited from greater resources and lower pupil teacher ratios, and that they were improving educationally, as demonstrated by their improved performance on standardized tests and by the fact that some improved enough to be reassigned to higher-level classes. Although plaintiffs offered evidence that showed that tracking exacerbated rather than alleviated the problem of lower achievement among African-American students, the district court did not credit this evidence and the court of appeals left the district court’s conclusion undisturbed.⁷¹ The court then dismissed, without much consideration, plaintiffs’ claim that intraclass grouping would be just as effective educationally as interclass ability grouping.⁷²

The tenor of the opinion is quite deferential, and it is clear that the court was unwilling to intrude upon education policy decisions made by local school officials. Whether other courts would be equally deferential is difficult to predict, but it is somewhat telling that a different court, in the context of a desegregation suit, expressed similar reluctance to interfere with tracking or ability grouping policies. In an opinion by Chief Judge Richard Posner, the Court of Appeals for the Seventh Circuit asserted that “[l]awyers and judges are not competent to resolve the controversy” over whether tracking should be allowed. “The conceit that they are belongs to a myth of the legal profession’s omniscience that was exploded long ago.”⁷³ Although Chief Judge Posner does not elaborate on this last point, he was probably referring to the judiciary’s

difficult experience with school desegregation. Regardless, it seems quite plausible that the difficulties courts had with school desegregation, and the repeated charges that courts were usurping local control of the schools, have made them wary about interfering with education policies like testing or tracking.

3. Challenges to Funding

Of the three main contexts for Title VI challenges, the area of school financing seems to hold the most hope for those who seek to eliminate policies that have a disparate and adverse impact on minority students.⁷⁴ I have discovered four reported cases on this issue, three of which were favorable to the plaintiffs who brought a Title VI claim.⁷⁵ However, the three “successful” decisions simply allowed plaintiffs to litigate their claims – i.e., the decisions rejected requests from defendants to dismiss the complaint before trial. The one case decided on the merits, *Campaign for Fiscal Equity v. State of New York*, held that plaintiffs could not enforce the Title VI regulations, either directly or through § 1983.⁷⁶ It may thus be premature to conclude that unequal funding schemes are generally vulnerable on this front.

It is nonetheless important to understand how these cases might be adjudicated, and to see this it makes sense to examine the trial court’s decision in *Campaign for Fiscal Equity v. State of New York*,⁷⁷ which contains the most extensive discussion of the Title VI claim and is for that reason the most instructive. Although this decision was reversed on appeal, on the ground that plaintiffs have no right to enforce the regulations, this decision itself will be appealed to the State’s highest court and could be reversed; if it is, the trial court’s discussion of the merits of plaintiffs’ claim will become quite important.

Plaintiffs claimed that the state’s funding scheme had an adverse and disparate impact on New York City’s minority students, and the trial court ultimately agreed. In order to prevail, plaintiffs first had to convince the Court that minority students were disproportionately disadvantaged by the funding scheme. This was complicated, and will be in future cases, because state funds go to school districts, not to individual students. It can therefore be tricky to demonstrate that the state’s funding mechanism “*caused* the alleged disparate impact” on individual students.⁷⁸

In *Campaign for Fiscal Equity*, causation could nonetheless be proved simply by looking at statistics, or so the court concluded. The court found it significant that 73% of the State’s minority students are enrolled in New York City’s public schools, and that minority students account for 84% of the City’s public school enrollment. Under these circumstances, the court held that a disparate impact could be established by comparing this district’s funding with average district funding in the rest of the State.⁷⁹ The court then determined that New York City did not receive its fair share of state funds. During the relevant time period, New York City public schools educated about 37% of the students in the state but only received about 34% of total state aid. This was sufficient, the court concluded, to establish a disparate impact. The court went on to discuss more sophisticated studies of the financing scheme, rejecting some studies as inconclusive and accepting one regression analysis that tended to show that “minority students receive less State aid as their over-all concentration increases in a particular district.”⁸⁰

Having concluded that plaintiffs met their burden, the court then turned to the defendants’ justifications for their funding scheme. Defendants offered four justifications – that New York receives less because it is a relatively wealthy district; that funding is

properly based on attendance rather than enrollment, which depresses the amount that New York receives; that transportation and building aid should not be considered in the mix of state funding; and that the formulas take student need into account. The court rejected each one of the justifications, demonstrating none of the deference that characterized cases involving challenges to testing and tracking.⁸¹

Whether the trial court's approach in *Campaign for Fiscal Equity* will turn out to be unique remains to be seen. The other reported decisions, however, do follow a somewhat similar pattern, at least with regard to demonstrating a disparate impact. Plaintiffs are presumed to state a claim if they allege that a state funding mechanism or a state policy about resources has a disparate impact on high-minority districts. Importantly, plaintiffs need not show that *only* African-Americans are disadvantaged by such policies, or that *all* African-Americans are.⁸² It is enough if plaintiffs allege that districts with a high proportion of minority students receive less in state funding or other resources compared to districts with a high proportion of white students. In addition, courts have been quite willing to accept that receiving less funding results in an adverse impact, accepting that there is a connection between the amount of funding and the quality of education provided.⁸³ Again, all this means, for now, is that plaintiffs' complaints will not be dismissed. It does not mean that they will ultimately prevail, though it must be recognized that school officials will likely have a harder time justifying unequal funding than they do justifying tracking or high-stakes testing.

4. Future Challenges

There are two additional Title VI claims worth mentioning. The first has been raised in a couple of cases,⁸⁴ and the second is still on the horizon. As for the former,

plaintiffs have challenged school districting and attendance policies on the grounds that they result in the concentration of racial minorities in particular districts or schools. Although it is not clear from the cases, the adverse impact of such policies could be stated as follows: given that minority students are disproportionately poor, concentrating students by race will usually mean concentrating them by poverty. Concentrated poverty, in turn, makes it more difficult to assure adequate educational achievement. Whether this is actually the theory relied upon by plaintiffs is uncertain, because the court opinions do not discuss plaintiffs' disparate impact theory in detail. Instead, both courts faced with such claims ruled that school officials had a legitimate justification for their policies. In the case most directly on point, *Paynter v. State of New York*, the court held that school officials had a substantial interest in maintaining residency requirements.⁸⁵ This is not a very persuasive response to plaintiffs' claim, however, given that redistricting in order to reduce racial and socioeconomic segregation is not necessarily inconsistent with residency requirements. To the extent other plaintiffs may be interested in challenging districting, therefore, it seems like this area is ripe for exploration.

The challenge on the horizon relates to school choice policies. Many public school choice plans do not provide transportation, making it difficult for parents unable to transport their children to take advantage of school choice. It is possible that the failure to provide for transportation could have a racially disparate impact, and that this impact could be considered adverse insofar as school choice is deemed to provide benefits for students able to take advantage of it.⁸⁶ School officials would then have an opportunity to show that failing to provide transportation is educationally justified, which might be a difficult showing to make. Then again, if courts are deferential, one could imagine them

accepting an argument of the sort that transportation is simply too expensive to provide and would mean that there would be no choice plans at all if it were required.

III. The Role of Social Science Evidence

A. Equal Protection Cases

Social science evidence has thus far played a fairly limited role in school desegregation cases. The *Brown* Court's citation to social science studies about the effects of school desegregation suggested to some that the Court was basing its conclusion in that case on social science data. But it seems implausible that the Court was actually influenced by those studies. A more plausible possibility is that the Court used the studies as a way of justifying its decision to depart from the separate-but-equal doctrine; the studies provided cover, in a sense, for the normative moral judgment that segregation was wrong and harmful.⁸⁷ The later desegregation cases exhibited a similar tendency toward social science evidence, in that the Supreme Court occasionally nodded in the direction of such evidence but did not make it a crucial component of its analysis. For example, instead of making the use of busing turn on the extent to which plaintiffs could demonstrate a causal connection between prior school segregation and current residential segregation, the Court in *Swann* presumed that there was a sufficient connection between the two to justify the use of busing.⁸⁸ Similarly, rather than require plaintiffs to demonstrate that prior school segregation disadvantaged them academically in order to obtain compensatory relief pursuant to *Milliken II*, the Court presumed such an effect existed and allowed for such relief in that case and in all other cases.⁸⁹

As courts turned from the issue of enforcing or dismantling desegregation decrees to the question of whether voluntary integration plans are constitutional, social science

evidence has continued to play a limited role. There seem to be two main reasons why this is so. First, and perhaps most importantly, the legal standard allows for only a limited consideration of social science data. Recall that the legal standard requires that any use of race satisfy a compelling state interest. Social science evidence might demonstrate why a program that uses race as a criterion carries important benefits. Social science evidence, for example, could demonstrate the educational or social benefits of an integrated school or integrated classroom. Simply because a particular use of race carries some benefits, however, does not establish that it satisfies a compelling state interest. At the end of the day, it is a court, not a social scientist, that has to make the ultimate normative judgment of whether the benefits outweigh the costs and thus whether the program satisfies an interest that the court believes is “compelling.”

The second reason why social science evidence has thus far played a fairly minor role in these cases has to do with the evidence itself. It is often equivocal and subject to conflicting interpretations. Just like cases concerning whether desegregation decrees should be dismantled, cases involving the constitutionality of voluntary integration plans often feature dueling experts. Those challenging the plans hire experts who testify and present studies showing that the social and academic gains from integration are limited at best, while those defending them hire experts who paint a more positive and optimistic picture of the benefits of integration. Given the difficulty of demonstrating that any use of race is compelling, presumably social science evidence would have to be fairly strong and consistent in order to influence a court’s decision. As it stands, however, the social science evidence, at least as it is presented to the court, is mixed at best.

This is not to suggest that social science evidence is or has to remain irrelevant, or that future studies might not be more influential. Social science evidence could plausibly influence the decision of the Supreme Court as to whether diversity or eliminating racial isolation are generally compelling interests. It is also possible that the Court will eventually establish a standard that requires examining each program to determine whether it is beneficial. That is, rather than simply declaring that programs attempting to achieve diversity or eliminate racial isolation always satisfy a compelling interest, the Court might establish a standard that requires those defending particular programs to demonstrate that the program has real benefits. Were the Court to adopt such a standard, obviously social science data would be moved to the front and center in cases challenging voluntary integration plans.

Researchers interested in influencing the outcome of future cases about voluntary integration plans would do well to study those plans and attempt to determine what benefits, academic or social, flow from those plans. To the extent the overall results are mixed, with some plans showing gains and others not, researchers ought to conduct more sophisticated analyses in an attempt to isolate those variables that are associated with successful plans. Researchers have conducted such studies with regard to mandatory desegregation plans, although it seems as if those studies were too little and too late to prevent the Supreme Court from beginning its efforts to dismantle desegregation decrees.⁹⁰ In order to avoid a similar fate for voluntary integration plans, researchers should begin now to document whatever gains might be associated with such plans and to identify what factors are necessary in order to achieve those gains. None of this, of course, will necessarily prevent an ideologically-driven court from reaching the result it

desires, but data might influence those judges or Justices who are willing to be convinced one way or the other about the actual benefits of voluntary integration plans.

B. Title VI Cases

Social scientists may have more influence in Title VI claims, but even here, that influence thus far seems slight. The reasons again have to do with the legal standard and how that standard is applied in the cases, as well as the usually mixed social science evidence. Courts tend to be willing to accept that a particular practice causes a disparate impact, without requiring plaintiffs to make a very detailed showing of the impact. At the same time, however, courts seem willing to defer to justifications offered by school officials in defense of the challenged practice or policy. Taken together, this means that social science evidence, while relevant to both establishing a disparate impact and establishing (or challenging) a legitimate justification, plays a diminished role. It is really the inverse of the desegregation cases. In desegregation cases, the legal standard is so difficult to meet that social science evidence cannot carry an entire case. In Title VI cases, the legal standards are so easy to meet that social science evidence also will not usually influence the outcome unless it is strong and difficult to contest, which it rarely is.

Again, this is not to suggest that social science evidence is irrelevant or that stronger evidence would never be influential. Social science evidence is surely relevant to establishing that a particular practice has a disparate, adverse impact. What sort of evidence is relevant depends on the type of practice or policy being challenged. If the challenge is to the use of high-stakes test, a disparate impact can usually be demonstrated simply by showing that minority students disproportionately do worse on the tests and

that negative consequences follow. If the challenge is to tracking, the showing is more complicated, because plaintiffs presumably should have to show that students in lower tracks are receiving an inferior education compared to those in the higher track. Evidence about the resources available in lower track classes, as well as the effect that those classes have on student performance, should all be relevant. Last, if the challenge is to funding, evidence about how state money is distributed will obviously be necessary in order to show that predominantly minority districts receive less than predominantly white districts. Some evidence demonstrating the link between resources and educational opportunity may also be necessary, but courts thus far seem willing to presume that such a link exists.

Similarly, when the burden is placed on defendants to justify the challenged practice, social science evidence can be very relevant. Indeed, it is here that social science evidence probably has the most potential to influence the outcome of cases. Again, the sort of evidence needed will depend on the case. With regard to testing, evidence about the reliability and validity of the test will be relevant to determining whether the tests are educationally justified. In addition, evidence about the extent to which students are actually taught the material could also be very relevant. This may be difficult to gather, and it may, in any event, not be persuasive to those courts willing to presume that simply aligning the curriculum with the test is sufficient to demonstrate that students had an adequate opportunity to learn the material. With regard to tracking, the same evidence that would demonstrate an adverse impact should suffice to answer the question of whether tracking is educationally justified. If plaintiffs can show that there are adverse effects to being placed in a lower track, presumably school officials should

not be able to show that the practice is educationally justified. Finally, with regard to funding, evidence about the funding scheme that might justify unequal expenditures among predominantly minority and predominantly white districts will clearly be relevant.

In short, social scientists interested in conducting research that might influence court decisions should focus on the extent to which particular educational practices are worthwhile –i.e., the extent to which the benefits outweigh the harms. Much of this research will have to be fairly specific and pertain to the particular policy at issue. Some of it, however, could be more broadly based. Researchers could study, for example, the extent to which high stakes testing increases the drop-out rates for disadvantaged students. They could also study, as some have already, the extent to which most students perform better in mixed-ability classrooms rather than in ability-grouped classrooms. Finally, for those interested in assisting challenges to districting policies, more studies about the consequences of concentrated poverty on academic achievement could help those seeking to show that current district lines have an adverse impact on minority students.

Conclusion

Some readers may have noticed the irony lurking within the two different approaches to race discrimination that are described above. Under current legal standards, it is much easier to prohibit efforts designed to assist minority (and white) students by encouraging school integration than it is to prohibit practices that unintentionally disadvantage minorities. For those who believe that any use of racial criteria carries a high price, making it very difficult to consider race in student assignment, even when done for the purpose of assisting minorities, may seem perfectly

justified. Similarly, if one is primarily concerned with making sure that the decisionmaking process is not “tainted” by explicit considerations of race, there may be less reason to worry about racially neutral policies that nonetheless disadvantage minorities. On the other hand, for those who are more concerned about the actual impact of educational policies and practices on minority students, it may appear that the legal standards are exactly backwards.

Social scientists interested in conducting relevant research need not come down on one side or the other of this debate. They ought to realize, however, that the deck is stacked against them. Current legal standards make it fairly difficult for social science evidence to influence, much less determine, the outcome of cases. Studies and research about the costs and benefits of particular policies are certainly worth conducting, and the stronger the research and research methodologies, the better. Unless the legal standards change, however, it is my view that even the strongest research will likely have a fairly limited impact on court decisions. Whether such research can influence legislative decisions or public opinion, which in turn might effect court decisions, is another issue altogether, and one that I will leave for another day and another paper.

ENDNOTES

¹ 347 U.S. 483 (1954).

² This paper is confined to identifying race discrimination claims based on federal law, and it is confined to claims raised by students and their parents (as opposed to teachers). State statutes and constitutions may provide additional protections and thus generate additional definitions. To cite just one example, in *Sheff v. O’Neil*, 733 A.2d 925 (Conn. Super. Ct. 1999), the Connecticut Supreme Court held that, as a matter of state constitutional law, the legislature has an affirmative duty to prevent racial segregation in schools, even if that segregation occurs through private residential choices. Federal law does not impose a similar duty. To the contrary, as will be discussed below, federal constitutional law may actually prevent state legislatures from taking such affirmative steps to increase integration. The state constitutional law in Connecticut thus may be in violation of the federal Constitution.

³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

⁴ *Id.* at 237.

⁵ *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 278-79 (1979).

⁶ See, e.g., *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307 (1993) (“In the areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes on fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

⁷ “No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1988).

⁸ See *Campaign for Fiscal Equity v. State of New York*, 719 N.Y.S.2d 475, 540 (N.Y. Sup. Ct. 2001).

⁹ 34 C.F.R. § 100.3(b)(2) (emphasis added).

¹⁰ See *Ga. State Conference of NAACP v. State of Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Powell v. Ridge*, 189 F.3d 387, 393-94, cert. denied 528 U.S. 1046 (1999). See also Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533, 1544-6 (1995) (“Indeed, when Title VI and Title VII were enacted as part of the same historic act, legislators and jurists identified an inextricable link between the two provisions.”)

¹¹ *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989).

¹² *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

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- ¹³ See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Fisher v. Transco Services—Milwaukee, Inc.*, 979 F.2d 1239, 1245 n. 4 (7th Cir. 1992), *cf.* 42 U.S.C. 2000e—2 (k)(1)(A)(i) (Supp. V. 1993).
- ¹⁴ See *Bd. of Educ. v. Harris*, 444 U.S. 130, 151 (1979).
- ¹⁵ *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 679 (W.D. Tex. 2000).
- ¹⁶ See *GI Forum*, 87 F. Supp. 2d at 679.
- ¹⁷ *Ga. State Conference*, 775 F.2d at 1417.
- ¹⁸ 532 U.S. 275 (2001).
- ¹⁹ See *Cumming v. Bd. of Educ.*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927).
- ²⁰ 163 U.S. 537 (1896).
- ²¹ *Brown*, 347 U.S. at 494 n. 11.
- ²² See, e.g., Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793, 806-07 (2002).
- ²³ See *id.* at 813-14.
- ²⁴ See *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (public beaches and bathhouses); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (municipal golf courses).
- ²⁵ See Mody, *supra* note 22, at 823-24.
- ²⁶ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).
- ²⁷ See J. HARVIE WILKINSON, FROM BROWN TO BAKKE 61-116 (1979).
- ²⁸ *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968).
- ²⁹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26, 30 (1971).
- ³⁰ *Milliken v. Bradley*, 418 U.S. 717 (1974).
- ³¹ See *id.* at 753-57.
- ³² In *Milliken*, the district court had found that all levels of government – federal, state, and local – were responsible for housing segregation in Detroit and its surrounding suburbs. *Bradley v. Milliken*, 338 F. Supp. 582, 587 (E.D. Mich. 1971). After claiming that the outcome in *Milliken* might be different if there were evidence of housing discrimination, Justice Stewart said that no such evidence had been presented. *Milliken*, 418 U.S. at 756 (Stewart, J., concurring).
- ³³ See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 261 (1999).
- ³⁴ See *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).
- ³⁵ See Ryan, *supra* note 33, at 261-65.

³⁶ *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

³⁷ *See, e.g.*, *Freeman*, 503 U.S. at 500-07.

³⁸ *See, e.g.*, *Dowell*, 498 U.S. at 249-50.

³⁹ The Court made a similar move in *Jenkins* with regard to *Milliken II* relief, suggesting that such relief should not continue indefinitely and should be granted only insofar as current academic deficiencies can be traced to prior acts of segregation. *See Jenkins*, 515 U.S. at 102. One can easily imagine the difficulty of making such a showing with any degree of precision.

⁴⁰ *Swann*, 402 U.S. at 16.

⁴¹ 488 U.S. 469 (1989).

⁴² *Id.* at 721-22.

⁴³ *Bakke*, 438 U.S. 265, 320 (1978).

⁴⁴ *Hopwood v. State of Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (“[A]ny consideration of race or ethnicity... for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”).

⁴⁵ *See, e.g.*, *Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704-05 (4th Cir. 1999).

⁴⁶ *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. May 14, 2002).

⁴⁷ *See, e.g.*, *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 130 (4th Cir. 1999), citing *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999).

⁴⁸ 160 F.3d 790, 796 (1st Cir. 1998).

⁴⁹ 195 F.3d 698, 704-05 (4th Cir. 1999).

⁵⁰ 197 F.3d 123 (4th Cir. 1999).

⁵¹ For example, in Lynn, Mass., “a white student attending the Harrington elementary school, which is 80% minority, generally cannot transfer out of the school because it would increase racial imbalance at the school.” *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 61 (D. Mass. 2000).

⁵² *See Boston’s Children First v. City of Boston*, 62 F. Supp. 2d 247 (D. Mass. 1999); *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000); *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57 (D. Mass. 2000).

⁵³ *But see* Paul Diller, Note, *Integration without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity*, 99 MICH. L. REV. 1999, 2031-33 (1999) (arguing that it is a constitutional harm to deny one child the right to transfer between schools because of race if another child is allowed the same transfer even if the schools purport to offer the same education).

⁵⁴ *See Brewer*, 212 F.3d at 742.

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- ⁵⁵ MARK G. YUDOF ET AL., *EDUCATION POLICY AND THE LAW* 516 (4th ed. 2002) (1974).
- ⁵⁶ *See* GI Forum, 87 F. Supp. 2d at 679, citing Cureton v. NCAA, 37 F. Supp. 2d 687, 697 (E.D. Pa. 1999).
- ⁵⁷ *Id.* at 679.
- ⁵⁸ YUDOF, ET AL., *supra* note 55, at 519.
- ⁵⁹ Georgia NAACP v. Georgia, 775 F.2d 1403, 1420 (1985).
- ⁶⁰ *Id.*
- ⁶¹ GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000).
- ⁶² *Id.* at 679-80.
- ⁶³ *Id.* at 681-83.
- ⁶⁴ *Id.* at 682-83.
- ⁶⁵ 793 F.2d 969 (9th Cir. 1986).
- ⁶⁶ *See, e.g.*, GI Forum, 87 F. Supp. 2d at 681-82.
- ⁶⁷ *See, e.g.*, Lemon v. Bossier Parish Sch. Bd., 444 F.2d 1400 (5th Cir. 1971).
- ⁶⁸ *See* YUDOF, ET AL., *supra* note 53, at 501-02.
- ⁶⁹ 775 F.2d 1403 (11th Cir. 1985).
- ⁷⁰ *Id.* at 1418.
- ⁷¹ *Id.* at 1419.
- ⁷² *Id.* at 1420.
- ⁷³ People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 536 (7th Cir. 1997).
- ⁷⁴ *See* Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just a Tort*, 96 NW. U. L. REV. 99, 172 (2001).
- ⁷⁵ Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999), *cert. denied*, 528 U.S. 1046 (1999); Ceaser v. Pataki No. 98 Civ. 8532 (LMM), 2000 U.S. Dist. LEXIS 11532, *1 (S.D.N.Y. August 14, 2000); Robinson v. Kansas, 117 F. Supp. 2d 1124 (D. Kan. 2000). But see Campaign for Fiscal Equity v. State, 744 N.Y.S.2d 130 (N.Y. App. Div. 2002) (holding that Title VI regulations cannot be enforced directly or through § 1983).
- ⁷⁶ Campaign for Fiscal Equity v. State, 744 N.Y.S.2d 130 (N.Y. App. Div. 2002).
- ⁷⁷ Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).
- ⁷⁸ *Id.* at 542.
- ⁷⁹ *Id.*
- ⁸⁰ *Id.* at 546.
- ⁸¹ *Id.* at 547-49.

⁸² See, e.g., Campaign for Fiscal Equity, 719 N.Y.S.2d at 542; Powell, 189 F.3d at 396.

⁸³ See, e.g., Campaign for Fiscal Equity, 719 N.Y.S.2d at 546-47; Powell, 189 F.3d at 396-97.

⁸⁴ See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394 (11th Cir. 1993); Paynter v. State, 735 N.Y.S. 2d 337 (N.Y. App. Div. 2001).

⁸⁵ Paynter, 735 N.Y.S. 2d at 344.

⁸⁶ For discussion of this sort of claim, see Biegel, *supra* note 9.

⁸⁷ See Mody, *supra* note 22.

⁸⁸ See Swann, 402 U.S. at 29-30.

⁸⁹ See Milliken II, 433 U.S. at 283-88.

⁹⁰ See, e.g., amicus brief of social scientists, filed in *Freeman v. Pitts*, 503 U.S. 467 (1992) (identifying factors associated with successful desegregation plans, in a case where the court established standards for dismantling desegregation decrees).