



# Intangible Factors: Social Capital, Social Networks, and America's Second Reconstruction

## Citation

Biblarz, Jimmy. 2023. Intangible Factors: Social Capital, Social Networks, and America's Second Reconstruction. Doctoral dissertation, Harvard University Graduate School of Arts and Sciences.

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Intangible Factors:  
Social Capital, Social Networks, and America's Second Reconstruction

A dissertation presented

by

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to

The Committee on Higher Degrees in Social Policy

in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

in the subject of

Sociology and Social Policy

Harvard University

Cambridge, Massachusetts

May 2023

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Intangible Factors:

Social Capital, Social Networks, and America's Second Reconstruction

Abstract

This dissertation comprises three studies of meaning-making in judicial opinions involving school desegregation in the United States over the past 60 years. In the first study, I examine rhetorical shifts across 82 Supreme Court rulings that consider school segregation. The discourse analysis shows that segregation's meaning has been unstable and contested since *Brown v Board of Education* (1954), with five discrete meaning eras and vigorous internal contestation within each period. At different times, segregation has referred to the presence of a legal statute, the existence of demographic imbalance, and laws intending to perpetuate racial imbalance. Given the fluctuating meanings of segregation, the accompanying requirements of *desegregation* have accordingly shifted among eliminating official segregation laws, identifying and eradicating laws that intend to segregate, and widespread busing.

*Brown v. Board of Education* (1954) famously held that that a set of “intangible considerations” prevented separate schools from ever being made equal. In the second study, I trace the meaning of “intangible” throughout the case law. First, drawing on publicly available legal documents, I built a new dataset called the SSCC (School Desegregation Court Cases) that comprises the full corpus of federal and state supreme court cases on school desegregation between 1930 and 2015 (N = 2,207). Second, utilizing a series of computational techniques, I built a terminological dictionary of words that were likely candidates to relate to or reflect the

meaning of the judiciary's "intangible" concept. I found that the dictionary terms tended to cluster into five concepts in the judges' opinions: social capital or sociological factors, psychological factors, assimilation, diversity, and other intangible considerations. While these concepts were present in a substantial proportion of the case law, especially in the years before and after *Brown*, their appearance in judicial opinions has declined over time, suggesting that judges have become less interested in utilizing social scientific thinking and concepts to arrive at or support their rulings on school desegregation.

While the second study documented a relatively high frequency of counts of appearances of sociological terms in court decisions involving school segregation, it did not explore *how* judges were using those terms. In the third study, I interpretively analyzed a subset (65) of school desegregation cases most saturated with these terms to understand what they meant to the judges authoring the opinions, what larger arguments or ideas they served, and towards what ends they were invoked. Of particular interest was the nature of intangibility (the term "intangible factors" that appeared in many of these cases). The interpretive analysis found that in a nontrivial portion of the case law, judges were "thinking like sociologists" and making sociological arguments about nonmaterial (intangible) dimensions to the nature of inequality that exists between groups. It also revealed that the sociological language was used to serve a variety of ideological ends and was relevant to case adjudication. Additional themes also emerged from the cases: school financing, the notion that segregation created a feeling of inferiority in Black children, and the idea that segregation prevented democratic inculcation. The findings provide insight into an important and under-explored part of the *Brown* story, show how thinking and beliefs shaped actions (i.e. judges' rendering highly impactful decisions), and demonstrate the strengths and limitations of text analysis for socio-legal research rooted in case law.

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## Acknowledgements

This project was a long-time coming. I am grateful to have some of the world's best people in my life. To my parents and my sister, who have been constant sources of support throughout my Cambridge years. My grandparents, my first intellectual role models. My grandfather was reading my papers until nearly his dying day. And to my beautiful and patient partner Harry, who put up with every emotional swing, through this and the campaign, but always, without fail, pushed me to finish. I love you.

To my esteemed committee. Mario Small – every meeting I ever had with him left me feeling more excited and confident than when I went into it. What more could you want in an adviser? Martha Minow, who I've known since my first months at Harvard, inspired and encouraged my interests in school and neighborhood integration, the causes of my academic and professional life. Bart Bonikowski, was a champion from day one, and was one of the earliest people to support and applaud my non-academic interests. Thank you.

Gratitude as well to all my cheerleading supporters: Bill Wilson (who taught the best course I have ever taken), Michèle Lamont, Rob Sampson, Sasha Killewald, Larry Bobo (who first told me to go to grad school), Nicholas Stephanopoulos (for direction-shifting feedback, at just the right time), Fran Hagopian, Jennifer Hochschild, Maya Sen, David Deming, Jocelyn Viterna, Richard Fallon (for introducing me to J. Skelly Wright), the late Tom Hehir, Anya Bernstein Bassett, Mandy Pallais, Kay Merseth, Yochai Benkler, and Mary Waters and Mary Brinton (for making sure I ended up in the program!). And to our unrivaled department staff, most especially Jessica Matteson and Pam Metz, and Mindy Kent of the HLS Library.

So many older graduate students showed me the way and helped sharpen my thinking, especially Jackelyn Hwang, Jared Schachner, Ekédi Mpondo-Dika, Jessica Simes, and Monica Bell, as did a host of brilliant and loyal friends, Amy Alemu, Ben Scuderi, Claire Dailey, Cresa

Leonard, Ethan Raker, Joey Wallerstein, Eric Cervini, Nicholas Rinehart, ImeIme Umana, and Taylor Dodson. I am so glad we got to share graduate school, and that we'll always have the Cambridge years. And to my incomparable cohort mates, who made graduate school a time I will remember with nothing but joy and appreciation: Andreja, Mo, Bri, Eun Se, Olenka, and Hanna.

I could not have done grad school without the support of Eliot House. How I loved living there. I looked forward to coming home every day. Thank you to the dozens of advisees who supported me more than they could ever know. Special thanks to Timnah Baker and Brandon Tilley, Mike Hankinson, Marianne Potvin, Stephanie Paulsell and Kevin Madigan, Sue Weltman, and Doug Melton and Gail O'Keefe. I'd also like to thank my generous funders: Jim and Kathy Stone, the National Science Foundation, the Open Gate Foundation, and most especially the Inequality Program at the Harvard Kennedy School, a program I love and hope to be affiliated with for the rest of my life. I also must thank my incredible team of creative research assistants: Joon Yang, Isaac Robinson (a newly minted Rhodes Scholar), Will Schreferman, and Amy Dong.

My life pivoted toward the end of graduate school. Launching a political campaign was quite the swing, but I am so glad for it. I felt like an evangelist for sociology every day, working to explain stratification and mobility to the public. It helped me find my place in the world. Thank you to my campaign team, especially Nick Wyville, for making that happen, the thousands who supported our efforts, and to my advisers who recognized what we were trying to do, told me it was worth something, and gave me the freedom to go for it as a career.

And lastly, to the millions of American school children, and their families, who rode buses to school hoping for an equal shot. Those rides changed history, and I hope to honor your bravery in my life and work.

## **Dedication**

*To my father, Dr. Tim Biblarz, my favorite sociologist, who read every word of this, and of everything else*

*And to Dr. Devah Pager, whose office was next to mine in William James Hall, who showed me how much sociology could matter in the world, and who left us far too soon*

## Introduction

### *Animating Questions*

What evil was *Brown v. Board of Education* (1954) trying to cure, and why? Its most famous phrase, “separate schools are inherently unequal,” has become a fiercely held social and legal truth. But is it really obvious what that phrase means, from a legal or sociological perspective? Even asking the question can make one squirm, for *Brown* means so much to so many people – the greatest legacy of the Civil Rights Movement, the great hope for a more integrated society, the pinnacle of what the legal system can do for social progress. It is almost as if the answer is too obvious to make the question worth interrogating. But grappling with it – the main task of this project – is necessary to fully understand the history of *Brown* and the present social reality of segregation. Why should equally provisioned schools, regardless of racial composition, not be considered equal?

Was it the state categorization – the labeling of some schools as Black and others as white – that created the *inherent* inequality?<sup>1</sup> Ameliorating that evil required removing the legal Black/white barriers to accessible schooling in the seventeen states that had formal segregation ordinances on the books in 1954. Were these legal codes and school signs what made separate schools inherently unequal – because the state’s segregation imprint was enough to imply superiority and inferiority, without regard to the resources or materials available within formally segregated schools?

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<sup>1</sup> In recent decades the Court has been focused on limiting the government’s, including school districts’, ability to categorize people by race in any context, limiting the possibilities for race-conscious integration. The last major Supreme Court ruling on K-12 desegregation severely limited school districts’ ability to use race to assign students to schools (*Parents Involved v. Seattle*, 2007). When the government seeks to use race to categorize people or to distribute resources in some way, it must narrowly tailor that policy to serve a compelling governmental interest (a test known as “strict scrutiny”). The Court has found two interests that qualify as compelling in the school context: (1) the compelling interest of remedying the effects of past intentional discrimination, and (2) the interest of diversity in higher education.

What if that legal designation were to disappear – no more Black and white schools codified in law, but then city governments relied on segregated housing patterns and neighborhood school assignments to ensure that schools remained segregated? Or if the legal barriers were to turn more insidious and covert, through a series of strategic school closures, school district splintering, school choice models, and student assignment plans that preserved demographic racial segregation without the strong arm of state law? Absent laws on the books, should equally resourced, yet still deeply segregated, schools be considered inherently unequal?

Perhaps the answer was less legal and more emotional. How about the psychology of segregation – the feeling of inferiority that could accompany forced attendance at a legally segregated school? The famed yet fiercely contested Clark doll studies of the mid 20th century, which argued that segregation caused Black children to see themselves as inferior to white children, were cited in *Brown* for the proposition that segregation hindered Black children’s self-esteem and confidence development. Was that the inherent inequality, impossible to cure without ending the yoke of segregation full stop?

But might all of these answers ultimately be too small – what about the pernicious history of segregation and its powerful influence on contemporary socioeconomic disparities? We know that Black communities and schools have been woefully under-resourced since this country’s founding. But while that history may be politically relevant, should it bear on constitutional questions of equality; put differently, should the compounded disadvantage associated with historic segregation be constitutionally relevant in the contemporary world? Should *Brown* be read as a form of aggressive reparations via American schools?

And even without wading into that long history of compounded disadvantage, could there be another dimension of education that made separate schools inherently unequal, perhaps one

that is more difficult to see? What about the *intangible* factors associated with education – not per-pupil funding, teacher education and salaries, and quality of facilities – but the social capital and social networks that develop at schools? Could addressing these intangible factors have been relevant in thinking through why separate schools are inherently unequal?

### *The Long Debate Over Segregation and Integration*

Inherently unequal sounds self-evident, but a second thought yields perplexion. At its most narrow, the inherent evil behind separate schools were laws that required separation of the races. Those laws are gone – the state cannot constitutionally separate children in public schools based on their race. That sounds obvious and simple enough, and was a key holding of *Brown*. But the case law after *Brown* shows us that while the legal answer is necessary to telling *Brown's* story, it is by no means sufficient.

If the answer were simple, desegregation would have been a short story, rather than arguably the defining social policy intervention of the twentieth century. And it would have been a far more regional story largely contained to the south, a dead letter throughout the North, Midwest, and western United States. In the South, removing desegregation orders would have encouraged more racially integrated schools, assuming residential zones were the primary student assignment method. But in the north, there were no explicit segregation laws, and even if there had been, removing them would likely have had little impact, given residential segregation patterns and neighborhood school assignment criteria.

This project engages with the constellation of definitions, meanings, and concepts embedded in debates over “segregation,” “desegregation,” “integration,” and “resegregation.” School segregation has meant many things over time: legally mandated policies codified in law separating children by race, race neutral laws that attempt to maintain racially identifiable

housing or schooling patterns, or the varied social practices, economic practices, and preferences that produce racially identifiable demographic realities. Accordingly, the remedies mandated to address school segregation have shifted: from undoing legally mandated school assignments, to rejecting laws that intended to keep students separated, to state-ordered racial mixing via school busing and family incentive programs.

In the seventy years since *Brown*, advocates across the political spectrum have harnessed the case for a variety of political purposes, from those advocating for a legal order that rejects nearly all uses of race, to those advocating for robust, affirmative efforts to make schools and neighborhoods more racially and socioeconomically integrated. To contemporary conservative legal advocates, the inherent inequality of segregation ended when the segregation laws were struck from the legal codes. *Brown* represents the triumph of the “colorblind constitution,” inspired by the famous *Plessy* dissent from which the term derives. *Brown*’s meaning was about removing the stain of legal segregation. To rip “Black” and “white” signs off school doors was accomplishment enough. To imply otherwise could be offensive in its own right – why should a “Black school,” equally provisioned and without the pernicious banner of legal segregation, be *inherently* unequal to one whose student body was composed of all white children?

But for much of *Brown*’s history, the case meant something else, something broader, and is still invoked today to symbolize a bold vision of American education, and American society writ large.<sup>2</sup> For many advocates, *Brown* was not just about formal legal codes, it was about a

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<sup>2</sup> *Brown* and its progeny held that under the Equal Protection Clause students had a right to a desegregated education. Vindicating the right to desegregation is clear if it means ending legally mandated segregation: the remedy of removing Black/white school signs fully vindicates the right to desegregation. But if the right to attend desegregated schools is broader, how to fully vindicate that right via traditional remedies is more difficult. After formal segregation laws were removed, courts shifted to evaluating facially race neutral policies that either had been designed to perpetuate “segregation,” or that in effect did perpetuate segregation. For the two decades after *Brown*, the constitutional test focused on showing that a certain policy had a disparate impact on people of color; evidence of the intent behind policies was secondary. From there the court developed various tests for whether a school system was still constitutionally violative. In *Green*, the Court identified six indicia of a dual system: racial

system of segregation, built over hundreds of years of American history. *Brown's* meaning was far bigger than a few sentences in a dozen legal codes; it was about undoing that deeply entrenched system and ending segregation root and branch, removing all vestigial remainders of segregation. As evidence, they point to the decades of school busing and other affirmative integration efforts that followed the *Brown* ruling. These massive efforts were required to undo the havoc segregation had wreaked on educational and economic opportunities.

And apart from what *Brown's* correct legal meaning was, integration itself, across its long history, has not been considered an unequivocal good. Critiques have been myriad: that neighborhood schools are valuable despite persistent residential segregation, that integration does not improve student outcomes, that the costs on children and families are too profound, and that it prioritizes proximity to white families as a means of improving opportunities rather than investing resources in communities of color. This last critique was perhaps most famously made by Harvard Law School Professor Derrick Bell, who, despite being an early proponent of integration, came to see the policy as insidious and more geared toward placating white families than truly empowering Black children and undoing systemic oppression (Bell 1980). Bell came to argue that improving schools in communities of color, independent of integration, was wiser

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identification of students (i.e. demographic segregation), faculty, staff, transportation, extracurricular activities, and facilities. The doctrinal rule for desegregation became whether a school district had eliminated all racial inequality in the *Green* factors. Once a district had eliminated these vestiges of "segregation," it could be declared "unitary," or no longer operating dual black/white school systems, and be freed from judicial oversight. The tests differed for the south and the rest of the country – in districts that had never had formal segregation orders (in the north and west), the standard came from *Keyes*: plaintiffs must prove that "a current condition of segregation resulted from intentional state action." The Supreme Court has long been slippery as to what actually constitutes unitary, noting in *Pitts* and *Dowell* that the term "does not have fixed meaning." With *Dowell* and *Pitts*, the Court began to de-emphasize the *Green* factors, instead finding that judicial control should be relinquished if a court determined that school districts had complied with desegregation plans in good faith for a reasonable period of time and had eliminated vestiges of intentional discrimination to the extent practicable. Evidence of intentional discrimination and/or efforts to preserve school segregation became the key criteria. A series of Supreme Court rulings limited the constitutional relevance of disparate impact cross domains, instead emphasizing that litigants needed to prove intentional discrimination for there to be a constitutional violation. (*Griggs v. Duke Power* (1971); *City of Mobile v. Bolden* (1980); *Wards Cove Packing* (1989); but see *Inclusive Communities* (2015)).

policy. Justice Clarence Thomas has invoked a version of this argument, calling the idea that access to white children is required for Black children to succeed offensive, misguided, and racist (*Parents Involved* 2017 dissent). The evil of segregation was state imposed racial separation; any efforts beyond that to affirmatively integrate are demeaning.

Grappling with these questions took the United States courts on an unprecedented journey – one that spawned thousands of cases and, at its peak, millions of children put on school buses in the name of constitutional rights, or equal opportunity, or reparations, or all of the above. By 1979, integrationist interventions were at work in over 2000 school districts affecting more than 34% of the U.S. student population (Wilkinson 1979, 190). The scale of desegregation was so vast that some scholars have called it America’s “Second Reconstruction” (Woodward 1955). Desegregation was the only systematic effort in U.S. history that sought to improve opportunity through racial mixing in a major avenue of life: the schools. But today, just over 300 school districts are under desegregation orders, affecting less than 5% of American school children (Ryan 2010). School busing for integration has all but evaporated in large school districts (McDonald 2007), and studies show that schools are becoming more demographically segregated (Reardon et al. 2012; Orfield 1996). Despite what we know about the negative effects of “segregation,” desegregation is no longer at the top of the education policy agenda (Mehta 2014; Orfield 1996; Massey and Denton 1996; Loury 1997). While for much of the 20<sup>th</sup> century equal opportunity through racial school integration dominated civil rights activism, contemporary education reformers no longer place integration at the top of the policy agenda. KIPP, the Harlem Children’s Zone, and the Broad and Gates Foundations, for instance, explicitly prioritize educating low-income students of color within hyper-segregated contexts. These

organizations implicitly argue that the correct combination of *tangible* factors can overcome disparities in the *intangible* ones.

In this dissertation, I investigate the meanings and legacy of *Brown* through the language judges used to discuss these concepts. Equal opportunity depends on undoing segregation. Segregation depends on what the courts do, and what the courts do depends on how judges think. Thus, the *first goal* of this project is simply to understand what segregation meant to the Courts (Chapter 1). How did the judiciary define segregation? Was it one definition, or many? Did the definition change at different times? And how does this matter for desegregation, the policy corollary that intimately depends on the meaning(s) of segregation. To answer these questions, I go to the source, and turn to the full corpus of Supreme Court cases on school desegregation over the past 60 years.

*Brown v. Board of Education* (1954) famously held that “intangible considerations” made segregated schools “inherently unequal.” This idea has not been sufficiently explored as an explanation for how *Brown* came out the way it did, or a motivator for desegregation case law writ large. The *second goal* of this project is to empirically determine the prevalence of the concept of intangible considerations in the 60 years of school desegregation court cases (Chapter 2), and how that prevalence has changed over time. Its *third goal* is to unwrap the nature of the concept of intangible considerations, or intangibility, to the judges authoring school segregation court cases throughout the country (Chapter 3).

The beliefs and subsequent actions of these powerful actors, judges, affected the schooling experiences of millions of children. Once institutionalized in law, normative orientations about how it is (or is not) fair to distribute educational resources in society impact us all. Understanding how legal language about desegregation, for example, has changed, can

provide insight into why desegregation came to fall off the policy agenda. This, in turn, has implications for thinking more broadly about how ideas impact the sorts of public policies adopted. This project grapples with how deeply institutional actors, judges, meaning-makers about segregation, inequality, and law. It uses judicial texts as data.

Sociologists of knowledge are interested in questions of how ideas come about, spread, change, become fixed, and disappear. The public education system represents the longest arm of the state most citizens ever experience; therefore, the schools have historically been the primary site at which clashing visions of equal opportunity are deliberated (Dewey 1900; Duncan and Murnane 2011; Mann 1957). Few areas pose as ripe a ground for studying these processes as federal court cases, where the currency of the realm is the interchange of ideas. Furthermore, sociologists of law are interested in the ways law structures our social world – gaps between law on the books and law in real life, and sites where law is contested. Studying fraught legal concepts provides purchase on these questions, demonstrating the deep instability within a legal order that relies on stability, predictability, and public confidence.

Courts, like any institution, do not exist in a vacuum. These cases were all decided within changing social realities. As much as judges were dealing with the litigants before them, they were also responding to, at various times, resistance and evasion by school districts, segregated housing patterns, funding for school busing, white flight in reaction to court ordered desegregation, the increase in private school enrollment, changing presidential administrations and accompanying friendliness or hostility to desegregation,<sup>3</sup> elections, increasingly multi-racial

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<sup>3</sup> Cross-branch cooperation is typically thought of as having spurred the pace of integration dramatically, with the cooperation of the Department of Education following the passage of the 1964 Civil Rights Act and the increased pressure districts, and the judiciary, were under to integrate. President Nixon publicly embraced the intent rule, championing an understanding of the causes of school segregation as rooted in market forces and personal preferences, rather than intentional government policy (Siegel, 2018, p. 7).

student populations, and an ever-rising focus on student performance and test scores. The composition of the Court is inherently political, with changing political winds, via elections, dictating the ideologies of each new appointment. The courts, while not always explicitly, are forced to grapple with these realities, and make their rulings in conversation with them.

This project helps us better understand the story of *Brown*; it demonstrates the deeply fraught nature of “segregation,” and shows the presence of a pivotal and unique language set largely missing from analyses of desegregation history. How political actors imagine what segregation and equality mean, and then what those concepts do and do not require of the state, is a necessary first step for assessing the *effects* of policies on outcomes of interest (e.g. cumulative advantage, life earnings, educational/occupational attainment).

### *Chapter 1*

In Chapter 1, the research question is a simple one, at least on face: What did segregation mean to the Supreme Court justices who were making decisions about its future? I also asked, how did the meaning of segregation change over time at the Supreme Court? The data were the 82 Supreme Court rulings that considered the meaning and constitutionality of school segregation between 1954 and 2007. The discourse analysis conducted in the chapter revealed something startling (or maybe not): what segregation means, its very definition, varied across the cases, the justices, and time periods. Desegregation policy changed right along with it. That segregation had more than one meaning underscores the highly contested nature of the concept.

The analysis uncovered an historical arc in the case law, and five distinct “meaning eras.” For example, just after *Brown* (1954), the Court defined segregation as the existence of a legal statute requiring separation of the races. Later, this conception expanded to include the existence of any government policy that intended to keep students separate. A fundamentally more

expansive definition emerged in the 1970s, where segregation came to be defined as numerical racial imbalance in student composition, regardless of the existence of a law or policy. In the last thirty years, the Court has reverted back to where it began, closing the “circle” of segregation’s meaning.

These meaning eras each represent a fundamentally different conception of the problem of segregation. Within each era, definitions of segregation were contested with dissenting and concurring opinions, and even with contradictory views within single opinions. To treat the meaning of segregation as settled would obscure the dramatic, lingering meaning disagreements that exist. The chapter concludes that this combination of two dimensions of contestation (within- and between-) has left segregation an “incompletely institutionalized legal concept.”

Most social scientific analyses of school desegregation seek to connect various judicial regimes to the amount of demographic integration achieved by court rulings (Reardon et al. 2012; Logan, Oakley, and Stowell 2008; Rossell and Armor 1996), or to the associations between desegregation and an outcome of interest, like test scores (Angrist and Lang 2004; Card and Rothstein 2007; Gamoran and An 2016; Hanushek, Kain, and Rivkin 2009), inter-racial friendships (Hallinan and Williams 1989; Quillian and Campbell 2003), or long-term socioeconomic outcomes (Reardon and Owens 2014). But statistical evidence of persistent segregation, for example, can be mistakenly used to suggest the failure of goals that it turns out may never have been goals to begin with. The chapter’s findings challenge the notion that the efficacy of *Brown* and other desegregation cases can be measured by the degree of statistical integration that came afterward. The truth is that for most of the post-*Brown* era, desegregation was a relatively narrow idea among its institutional designers (the judiciary), not an attempt to dramatically undo a social system of racial oppression.

## Chapter 2

The research in Chapter 1 exposed how deeply contested the logics underlying *Brown* have been throughout history. Part of the reason for this was a concept that *Brown* invoked that came to have a powerful role in shaping subsequent debate. Specifically, *Brown* noted that a set of “intangible considerations” prevented separate schools from ever being made equal. The research question of Chapter 2 is: What was the prevalence of the appearance of intangible considerations in the 60 years of case law? How frequently did this concept figure into the decisions being made?

Reading case law from the years immediately before and after *Brown*, I observed a set of terms across cases that felt deeply sociological. In the five cases *Brown* cited most heavily, widely understood as the intellectual origins of *Brown*, there were arguments that intentional segregation by the state was anti-democratic, and that it exacted a psychological toll on Black children. But I noticed that alongside these arguments sat other concepts in the case law that have received less attention, including talk about disparities in sociological dimensions of inequality – social networks, prestige, and reputation, among others. I became extremely interested in whether these sociological concepts were in the minds of judges when they arrived at the deduction that intangible factors make segregated schools inherently unequal.

To explore this further, in Chapter 2 I extracted digital documents from a legal archive to create a new dataset (the School Segregation Court Cases – SSCC – dataset) that constitutes the full corpus of federal and state supreme court school desegregation cases – 2,207 opinions. This is the first project that uses computational text analysis to analyze desegregation cases. Though various case studies have analyzed single desegregation orders (Bonastia 2012; Bass 1990; Peltason 1961), mostly in cities that had landmark busing battles, there have been no attempts to gather or study the full set of orders and rulings to trace changing rationales. I then built a

terminological dictionary of words, based on language in *Brown* and related cases, that was intended to capture the intangible concept. Most of the dictionary words reflect sociological concepts of one kind or another. Computational text methods were applied to the dataset to search for the appearance of the dictionary throughout the corpus, and other statistics were employed to find out if the frequency of the dictionary's appearance has changed over time. As you might imagine, these data and methods tasks were not unchallenging; Chapter 2 explains how it was all done. This is one of the first studies to use text analysis on court documents, and is part of an emerging trend in sociology (Evans & Aceves 2016; Grimmer & Stewart 2013).

The findings of this research effort proved fascinating. I found hundreds of uses by judges of the sociological terms of interest, indicating that sociological ideas were present in a sizable proportion of the desegregation court opinions. This aspect of judges' thinking about segregation, the sociological aspect, has largely been overlooked in the literature about desegregation. Moreover, the intangible dictionary words coalesced around five sociological concepts in the court opinions: social capital (and cultural capital), psychological factors, diversity, assimilation, and other intangible factors. The diversity concept appeared in 34% of all of the cases, the intangible concept in 25% of all cases, the social capital/sociology concept in 18%, psychology in 16%, and assimilation in 8%. To the extent that judges were using particular words in these concept clusters, the inference is that these ideas were present in their thinking about whether and how to remedy the particular kinds of inequalities that they were adjudicating.<sup>4</sup>

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<sup>4</sup> The core remedial principle repeatedly articulated by the courts in desegregation cases is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken II*. But like the nature of the constitutional violation, remedies too shifted over time. *Brown II* famously held that integration had to proceed "with all deliberate speed," halting the progress of integration's speed through the second half of the 1950s. The remedy for school desegregation was typically the imposition of an injunction on a school district ordering them to integrate, alongside a judicially managed desegregation program that changed school zoning and student assignment methods to produce more racially integrated schools. The injunctive power of the courts to order these integration

The other finding was that the appearance of this language in the judges' opinions declined markedly over time. It remains present today, though in a smaller proportion of cases. The time trend away from the intangible dictionary's appearance in legal opinions suggests that the window may be closing on the influence of social science in the courts.

These findings are important because they uncover an intellectual motivator behind the desegregation rulings that has not been fully interrogated before: the idea that separate schools were inherently unequal because a set of intangible factors prevented them from ever being made equal, and that those intangible factors were quintessentially sociological in nature. For example, the chapter brings social capital into the history and politics of desegregation, and exposes inequalities in access to social capital as a potentially compelling argument in the judiciary for why desegregation was considered legally necessary.

### *Chapter 3*

The research in Chapter 2 presents some fascinating counts, but its statistics cannot describe what the words or concepts actually meant to the judges who were authoring the opinions. Chapter 3 asks, what is the nature of intangibility? How were judges using words or concepts like intangible factors or social capital? How did the words matter in these cases? The chapter uses content analysis to interpretively analyze a subset of 65 representative school desegregation cases to understand what the terms and concepts meant to the judges authoring the opinions, what larger arguments or ideas they served, and towards what ends they were invoked.

The analysis found that judges were considering intangibility with a nuance and richness that one might not necessarily have expected. For example, regarding the intangible factors that

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plans was unprecedented (Gewirtz 2017). For liberals, the remedial measures need to be broad: busing, demographic racial integration, reparations, and race-conscious programs. For conservatives, the remedial measure ballooned from its correct original goal.

fell under the general heading of social capital, I found judges thinking about inequalities produced by segregation in children's ability to access the other group's social networks and social spaces; adjust themselves personally and socially to settings comprising members of the other group; benefit from the knowledge of the peers in the other group (an early version of peer effects); enjoy companionship, friendship, cooperation with the other group; exchange ideas, attitudes, opinions, perspectives, and debate with the other group; experience competition with members of the other group; gain exposure to varied personalities, abilities, propensities, ways of thought, and cultural attitudes of the other group; obtain knowledge about the habits and manners of the other group; secure acceptance by the other group based on one's own merits; and sit, stand, play, and work physically next to members of the other group.

Additional themes also emerged from the interpretive analysis that the statistical analysis of Chapter 2 was not able to detect. The most interesting one had to do with the intangible inequalities produced by segregation around the concept of democracy. For example, judges considered whether segregation would abort children's development into adults who know how to practice good citizenship, hinder children's preparation to deal with a pluralistic society, and deny them the opportunity to practice democracy via intergroup interaction and cooperation. In the most recent cases, intangible factors came to be understood as an assumed reality of inequality, but one that was beyond the control of the courts. Thus, how the intangible considerations actually affected the judges' rulings depended on the historical time period.

The findings provide insight into an important and under-explored part of the *Brown* story, show how thinking and beliefs shaped actions (i.e. judges' rendering highly impactful decisions), and demonstrate the strengths and limitations of text analysis for socio-legal research

rooted in case law. In the final, Conclusion, chapter, I assess the importance of the study's findings and their implications for scholarship in sociology, law, and social policy.

This project does not assert that words are the only way law matters, or the only form in which law exists. Rather, focusing on words, especially using empirical methods, gives sociologists an additional site of study. Showing how this language has changed in judicial thinking demonstrates the narrowing place for law in doing anything serious about inequality. Sociologists know that law is multi-faceted; words on the page are the beginning, not the end of how law affects our daily lives. And in reality, they are not even the beginning, for a series of social processes necessarily precede the litigation that produces opinions. But what the words can tell us is what judicial space exists for a given policy area. The words help us see how debates are structured and influence how realities on the ground play out. As we follow ideas and words around the judicial system, across time and court, we are better able to understand a key dimension of desegregation's history. The findings of this project show us the increasingly limited judicial space for arguments that broaden the concept of inequality to include intangible factors like social networks, prestige, and reputation. On the ground, that means champions of these ideas, who are keen to recognize the role of intangible factors in educational inequality, are going to have a more difficult time. Furthermore, the retrenchment away from intangible factors helps us better understand the contraction of integration as a judicial policy goal. Sociologists of law, understanding the variety of places law is constructed, refined, and implemented, are typically not focused on judicial language, in favor of empirical study of law and legal actors' actions on the ground, or the impact of a legal change on an outcome of interest. But overlooking words, and how those words change over time, cedes too much ground to legal scholars, and misses an important social setting where law is made.

## **Chapter 1: Seemingly Settled: Judicial Rhetoric and the Meaning of Segregation**

### **Abstract**

This chapter examines rhetorical shifts across 82 Supreme Court rulings that consider the meaning and constitutionality of school segregation (1954–2007). This chapter argues that segregation’s meaning has been unstable and contested within the Supreme Court since *Brown*, with five discrete meaning eras and vigorous internal contestation within each period. At different times, segregation has referred to the presence of a legal statute, the existence of demographic imbalance, and laws intending to perpetuate racial imbalance. Given the fluctuating meanings of segregation, the accompanying requirements of *desegregation* have accordingly shifted among eliminating official segregation laws, identifying and eradicating laws that intend to segregate, and widespread busing. This paper has implications for how scholars 1) think about legal meaning-making processes, 2) measure the “success” of judicial rulings, 3) understand how precedent enters judicial decision-making, and 4) envision the future of school integration.

## **Introduction**

School segregation is a prominent topic within sociology. Research typically takes two forms: 1) studies of how population concentration by race and class affects life outcomes (Fiel 2013; Reardon et al. 2012; Massey and Denton 1993) and 2) evaluations of the impact of removing judicial desegregation orders on school composition (Reardon et al. 2012; Logan, Stowell, and Oakley 2008; Rossell and Armor 1996). The studies typically begin at *Brown v. Board of Education* (1954) and treat segregation as a settled concept; the only question becomes how it has evolved demographically. While certainly important, neither tradition grapples with how judges, the main architects of desegregation law and policy, understood segregation across time, and how those understandings have shifted.

But for the federal courts, segregation has always been a deeply contested idea (Kull 1992; Tushnet 1997; Siegel 2003). If sociologists are to understand why segregation persists, they must grapple directly with legal meaning making processes and the ways legal notions of segregation have changed. Differences in judicial meanings helped dictate the schooling experience of millions of children, families, and communities; desegregation touched nearly everyone in some way (Cover 1986).

This paper examines the 82 Supreme Court cases (1954–2007) that debate the meaning of racial school segregation. New social categories are inherently unsettled, and in 1954, determining what segregation meant was uncharted terrain for the courts. I argue that 1) Segregation's meaning at the Court can be clustered into five eras, each representing a fundamentally different conception of the problem of segregation (ranging from formal legal statutes to demographic imbalance in schools as compared to community/district racial composition), with different accompanying policy prescriptions for *desegregation* (ranging from removing formal segregation laws to mandatory busing). Internal to each of these eras was

further contestation in concurring and dissenting opinions. 2) The combination of shifting dominant viewpoints across time, and the permanent internal contestation, has caused segregation to be “incompletely institutionalized” (Cherlin 1978). This helps to account for the limited consensus around the success of desegregation, or its future prospects.

The paper begins by introducing the theory and literature on law and social change, legal meaning-making, and institutionalization, followed by a brief history of school desegregation. The next section presents an interpretive analysis of how the legal meaning of segregation changed over time. The paper concludes by discussing implications for the sociology of school segregation, and the future of American school integration.

### **Law and Social Change**

Studies of the impact of court rulings typically look at “gaps” between a “treatment” (a court ruling) and its effect (an intended on-the-ground outcome) (Rosenberg 1991; Reardon and Owens 2014; Gould and Barclay 2012). Rosenberg’s *The Hollow Hope* (1991) remains a dominant “gap” study of desegregation, and argues that *Brown* had little lasting impact on its intended outcome – racial mixing in American public schools. Other studies have also found limited or mixed evidence about the changes in racial demographics associated with *Brown* or later desegregation rulings.

While Rosenberg’s analysis has been critiqued for methodological shortcomings and a narrow time frame (Schultz & Gottlieb 1996), it also suffers from a narrow approach, as do similar studies. Rosenberg evaluated *Brown*’s success using the metric of demographic change. But Rosenberg failed to recognize that what he claimed the Court was *unable* to achieve (demographic integration) was something it did not necessarily *intend* to achieve. The

demographic imbalance definition ignores the Court's constantly changing goal post about the meaning of segregation.

Rosenberg briefly addressed this issue, but dismissed it casually. Discussing the famous "Briggs Dictum," (1955) in which 4<sup>th</sup> Circuit Judge John Parker held that *Brown* forbid discrimination (meaning it only required removing formal segregation ordinances), rather than required actual integration,<sup>5</sup> Rosenberg dismissed Parker's argument as a politically-motivated, incorrect reading of *Brown*. He characterized the Briggs Dictum as an outlier view; accordingly, he argued, it remained appropriate to evaluate *Brown's* success by changes in student composition.

This is a significant oversight; Rosenberg overlooked the prevalence of Briggs Dictum-logic in segregation case law. Only briefly, and never fully, did the Court take desegregation to mean change in student composition. To overlook how judicial language about segregation fundamentally expanded and contracted fails to connect why the empirical realities of school integration may not match the lofty ideals often imposed on desegregation history. Rosenberg's argument fails to "take law seriously," as Friedman (2006) calls it. In taking law seriously, studies would more closely assess the intended effects of court cases, or at least engage with legal conceptions of empirical topics. Outcomes could then be assessed with a more direct tie to intended goals.

Accordingly, this chapter serves as an antecedent to studies of law and social change. The goal of this paper is not to assess the "effects" of *Brown*, but to trace segregation's meaning according to judicial actors. Properly determining how to measure the "effects" of a case requires understanding the precise nature of what was being decided; failing to do so risks incorrectly

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<sup>5</sup> 132 F. Supp. 776, 777 (E.D.S.C. 1955).

evaluating a case's success, or judging a case's impact by contemporary goals. Similarly, understanding how a ruling is mobilized and the sorts of opportunities and constraints legal language presents, requires a close tracking of legal meanings and expectations over time.

### **Legal Meaning-Making**

While the law is often imagined as a stable set of rules structuring social order, in reality, law is built and maintained by a variety of actors: legislatures, police, lawyers, and judges among them. Determinacy is not "inherent" in statutes, but is established socially (Mitchell 1990; Ewick 1992; Weissbourd and Mertz 1985). Even precedent, the stabilizing force of a common law system, lends itself to fluid interpretation over time. While certain legal categories are agreed upon (e.g., burglary, murder), particularly charged legal concepts, including segregation, hate crimes (Phillips and Grattet 2001), labor laws (Pedriana 2006), and gender (Meadow 2010), remain unsettled.

Certainly, the legal meaning-making process does not exist solely in the realm of formal institutions; the nature of law is determined locally and often privately (Ewick and Silbey 1998). Yet judicial review has long defined the American constitutional order, a tradition with roots in English legal history that was solidified in *Marbury v. Madison* (1803). Accordingly, the Supreme Court has held a unique role as the final arbiter of legal meaning. Rules and regulations serve as a key constraint on and resource for social action (Pedriana 2006; Edelman et al. 1992). Despite this grand position, Phillips and Grattet (2000) argue there has been comparatively little work in sociology tracing the processes by which "legal concepts are formed, elaborated, and delimited" (568) within the judicial sphere.

School desegregation represents an optimal site to study how legal meanings change. By 1979, integrationist interventions were at work in over 2000 school districts affecting more than

34% of the U.S. student population (Wilkinson 1979, 190). The desegregation effort, scholars have argued, represented a “principle of human oneness” (Wilkinson 1979, 42), “an occasion for the rebirth of America” (Sarat 1997, 4), and an “attempt to eliminate prejudice, provide equal opportunity, and guarantee rights for all” (Hochschild 1984, 11). Yet in 2018, just over 300 districts were under mandatory desegregation orders (Ryan 2010), as scholars lament *Brown’s* “demise,” (Perez 2004), “dismantling,” (Orfield 1996), and the rise of “resegregation.” Understanding how the problem of segregation was defined by the Supreme Court, whose words trickled down to hundreds of federal judges across the country, who crafted plans and ordinances for thousands of school districts serving millions of students, is an important task.

While most contemporary studies of school desegregation in sociology adopt an outcomes-focused approach, there is a long history of studying legal ideas and meaning-making. All the way back to Weber, the “constitutive” nature of ideas has been of interest to sociologists, for “ideas have, like switchmen, determined the tracks along which action has been pushed” (Weber 1958, 64). Bourdieu (1986) too thought studying legal meaning was essential for sociology, for law yields a massive “but often invisible” (806) force on social life. He urged sociologists to go directly to court cases, for “much of the social structuring happens in the strange linguistics, symbolics, and hermeneutics of legal texts” (Bourdieu 1987, 810). Within legal writings are “forms of social consciousness – systems of values and cognitive assumptions” (Cotterrell 1992, 115). These “interpretations, elaborations, and justifications of doctrine” are important because they “help to propagate structures of perception and belief that are foundations of social order” (226).

Several studies in sociology have looked at legal meaning-making in various contexts. Pedriana (2006) traced the interplay of judicial rulings and feminist social movements around

sex discrimination. While judges initially adopted a “protective” frame, in which women needed to be shielded from certain types of work, this frame eventually shifted to an “equal treatment” frame, in which all jobs and tasks should be open to women. The shift had real-world consequences for women’s occupational access. Dobbin and Kelly (2007) traced the history of sexual harassment protocol. While in the 1970s sexual harassment meant employment discrimination, by the 1980s, a more nebulous “hostile work environment” definition emerged. Meadow (2010) traced the legal history of gender. She argued that over time, the courts have had to “manage the uncertainty of postmodern gender identities” (816). They have settled largely on a binary, where those seeking gender reassignment are treated surprisingly generously, yet those seeking third categories, or non-categories, have been met with legal resistance.

Like sex discrimination, workplace harassment, and gender, segregation is an important and contested concept. How its meaning is defined by judges continues to have real impact on the ground. This project traces how judges have understood segregation across time, how those definitions have changed, the internal contestations of those meanings, and how those meanings mapped onto desegregation policy.

### **Legal Settling, Institutionalization, and Domain Expansion and Contraction**

The process by which law becomes settled is similar to what Berger and Luckmann (1966) termed institutionalization. Social norms of action and organization must come to be seen as the correct way of doing things; they provide certainty and stability (DiMaggio and Powell 1991; Tolbert and Zucker 1996). Once modes of action are institutionalized, they are seen as legitimate and demand conformity. Individuals come to forget that these mores are human inventions requiring debate, construction, and reinforcement. Phillips and Grattet (2000) make a parallel argument about the “settling,” or institutionalization, of legal meaning. As concepts

become settled, they should require fewer new justifications and less debate. Dissenting opinions should diminish. Over time, major disagreements abate and concepts gain settled meanings.

Once settled, legal constructs become portable to new substantive areas.

Institutionalization must confront ambiguities in human choices, social processes, and measurement strategies. Ambiguity exists in all major social anchors – religion, the economy, the family, and, notably, law. While law requires fixity, it is also inherently ambiguous, determined and interpreted by individuals at various points in time, and emergent from messy conflicts over power and distribution. As Edward Levi famously said, “If a rule had to be clear before it could be imposed, society would be impossible. The mechanism of legal reasoning accepts the ambiguities of words” (Levi 1948). The only way to address the problems ambiguity creates, Levine argued, is to study ambiguous concepts directly – to clarify semantic differences in usages of specific terms, place these meanings within larger intellectual contexts, and catalog what political or intellectual agendas the different meanings imply (Levine 1988, 31–32).

Yet institutionalization is not always a linear, nor a complete, process. Cherlin (1978) termed second marriages an “incomplete institution.” Institutionalization requires social roles, definitions, and norms to cement over time and become socially acceptable. Second marriages lack these. Few social norms exist for how to navigate relationships with first families or treat step-children. Cherlin (2004) built on the original concept, and argued that even first marriages have become “deinstitutionalized” as new marriage expectations, non-marriage cohabitation, and same-sex marriage have challenged marriage’s traditional meaning. In both articles, Cherlin advocated for the centrality of law in establishing institutionalized arrangements, and suggested that “close studies of changes in language and the law may be illuminating” (Cherlin 1978, 647) for helping understand institutionalization processes. Laws have facilitated the

deinstitutionalization of marriage by loosening the requirements for divorce, granting shared child custody, and recognizing same-sex unions (Cherlin 2004). The language of law, then, structures how people interact with institutions, backed up by the power of the state.

I argue that segregation is an “incompletely institutionalized” legal concept. *Brown* (1954) ignited a vigorous constitutional debate about the meaning of segregation. Tushnet has argued that the Court “never really resolved...what desegregation meant” (Tushnet 1997, 69).<sup>6</sup> While some argued, then and now, that *Brown* (1954) sought only to require race-neutral student assignment policies (Bickel 1955; McConnell 1995; Kull 1992), others regarded desegregation’s goals as more broadly seeking racial balance and compensatory justice (Patterson 2001). Only by carefully tracing the contours of segregation at the Court over time can we see how meanings changed over time, and what implications those meaning changes might have for social life.

### **A Brief History of School Desegregation**

Although the first litigation challenge to segregation was in the Massachusetts case *Roberts v. City of Boston* (1849), historians tend to place the beginning of judicial engagement with racial segregation at *Plessy v. Ferguson* (1896). *Plessy* (1896) held that separate rail cars, so long as they were “equal in fact,” were constitutionally permissible. *Plessy* secured the legality of statutory segregation in transportation, education, and public facilities. After the defeat in *Plessy* (1897), the National Association for the Advancement of Colored People (NAACP)

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<sup>6</sup> Lower courts recognized the ambiguity in *Brown*’s meaning, leading to wide variation in rulings. The Briggs Dictum (“The Constitution does not require integration. It merely forbids discrimination...[the Supreme Court] has not decided that the states must mix persons of different races in the schools”) famously rejected the idea *Brown* was about racial mixing. This logic became a model for many southern judges seeking to avoid any demographic change. Judge Wisdom Minor of Louisiana had an alternative interpretation. Neither non-racial assignment policies nor token integration were sufficient to undo a segregation system. It did not matter whether the state operated segregated schools “by law or by custom.” *U.S. v. Jefferson County* (1969). Minor argued that “the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.” *Id.*

embarked on a litigation project to secure access to higher education opportunities for African-Americans (*see, e.g., Missouri ex rel. Gaines* (1938), *Sweatt v. Painter*, (1950)). The NAACP sought to prove that separate facilities were not equal, as *Plessy* required, because no segregated white university was offering an “equal” college for African-Americans (Kugler 2004). By the early 1950s, these challenges had moved to the K-12 context.

*Brown* (1954) struck down the separate but equal doctrine, famously holding that “separate educational facilities are inherently unequal.” Following *Brown*, most states resisted efforts to remove racial segregation statutes.<sup>7</sup> In the south, legal separation was a more pronounced barrier to school integration than in the north or west, where residential segregation was the main culprit.<sup>8</sup> This meant that removing segregation statutes was likely to produce increases in inter-racial contact in the south, assuming neighborhood schools as the default student assignment option, but not necessarily in the hyper residentially segregated north and west.<sup>9</sup>

After *Brown*, plaintiffs would sue a district, arguing that it continued to operate segregated schools. District courts would review the case, often with a trial. The judge would

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<sup>7</sup> The states that had explicit racial segregation statutes were: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Washington D.C.

<sup>8</sup> Throughout 20<sup>th</sup> century American history, children have most often attended the school nearest their home. With the advent of desegregation plans and the rise of school choice, this model has changed somewhat, particularly in major cities, but remains true for the vast majority of American schoolchildren.

<sup>9</sup> The debate about segregation in the north and west versus the south is long-standing. In 1970, as the Elementary and Secondary Education Act was being debated in Congress, Senator Stennis, of Mississippi, sought to de-regionalize the government’s approach to desegregation. He proposed an amendment to eliminate the bill’s de jure (southern)/de facto (northern) distinction. Unsurprisingly, northern senators worked to kill the amendment. Senator Ribicoff of Connecticut, however, argued in favor, accusing the north of hypocritically hiding behind southern segregation statutes to avoid demographic integration (Crespino 2006). Senator Ribicoff argued that “Somehow residential segregation in the North was accidental or de facto and that made it better than the legally supported de jure segregation of the South.” Mississippi Senator James Eastland made a similar argument: “I have never been able to understand how a 10-year-old colored student in a public school in Harlem, Watts, or South Chicago, is expected to look around and see nothing but black faces in his classroom and say to himself, ‘This kind of racial separation does not hurt me because the State of Illinois does not have a law requiring me to attend all-black schools. I should not feel hurt by this racial separation because it is the result of housing patterns that just accidentally developed.’” (Crespino 2006).

write an opinion determining whether unconstitutional segregation was at work, and if so, impose judicial oversight over the districts. Often judges were writing the student assignment plans because local school boards refused.

These plans were hindered by white resistance to desegregation decrees. “Massive resistance” occurred in the first decade after *Brown*, in which various localities refused to implement the ruling, with watershed moments all over the country, including in Little Rock, where it took the National Guard shepherding nine students into integrated classrooms, and Prince George Island in Virginia, where the district opted to shutter its schools full-stop rather than integrate. Following the massive resistance phase, “white flight” to suburban school districts and private schools further limited the effectiveness of desegregation remedies. Judges were forced to adopt the role of strategic planners, and had to act strategically to maximize the effectiveness of remedies.

Over time, districts began to petition judges to lift their desegregation orders. If a judge found the district to be desegregated, no longer operating “dual Black white systems,” they would declare the district “unitary,” releasing it from judicial oversight. Various cases – *Green*, *Keyes*, *Dowell*, *Pitts*, among others, established the contours of when a district was eligible for release from judicial oversight.

Often segregation debates involved the state action doctrine, or the principle that the Constitution and its protection of rights applies only to the government, not to private conduct.<sup>10</sup>

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<sup>10</sup> Higher education cases have long been adjacent to K-12 desegregation cases. While initially questions of segregation were also the focus of higher education law (though never questions of racial mixing as a component of desegregation, as there were at the K-12 level), more recent cases have questioned when, if ever, colleges can permissibly use race in admissions programs. All racial classifications employed by public universities are strictly scrutinized, meaning that the respondent university and its officials have to demonstrate that the use of race in an admission program is narrowly tailored to further a compelling governmental interest. Diversity in higher education has been found to be a compelling state interest. These are live issues and are likely to change in the coming months when the decision in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* is handed down. It is widely expected that the ruling will further limit the permissible uses of race in higher education admissions,

The doctrine explains why, for example, public schools and universities must protect privacy and speech, among other rights, more rigorously than private institutions do. Where to draw the line on what constitutes “state action” is an ongoing legal debate. A broad view might recognize the implicit role the government has in daily life – the government backs up contracts and commercial transactions, it invests in infrastructure and urban design. Alternatively, a narrow view looks more closely at official government action, rather than the pervasive force the government exerts. In the desegregation context, a narrow state action doctrine might only find that formal, intentional desegregation reaches the level of state action. A wider view might recognize the various ways education policy (crafting student assignment plans, designing attendance zones, choosing where to build new schools) can contribute to segregation.

### **Data and Research Strategy**

I examine all Supreme Court rulings (N=82, 1954–2007) that deal with *school* segregation. As Bonastia (2006) demonstrated, no branch of government ever supported mandatory housing integration. Similarly, the desegregation of public parks, pools, recreation centers, and private hotels and clubs was almost entirely access oriented; there was no effort to *require* racial mixing as a component of desegregation. Therefore, the majority of the “unsettled” political debates about the nature of segregation are confined to the education sector. While the majority of cases analyzed are about Black/white segregation, cases involving Latinx and Asian-American students are also included.

Gender segregation rulings are excluded from analysis.<sup>11</sup> Gender segregation is not as pronounced in public schools as racial segregation is. Litigation around gender segregation in

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and may end race-conscious admissions altogether. Stulberg and Chen (2013) offer a thorough discussion of the origins of race-conscious affirmative action in undergraduate admissions.

<sup>11</sup> Cases involving language, disability, or religious segregation are similarly not included.

schools has focused on equal provisions in academic course access and extra-curricular activities, namely sports. Gender segregation cases have been more prominent in higher education than K-12.

I take *Brown* (1954) as the starting point because the case catalyzed Supreme Court debate about the meaning of segregation. Before *Brown*, the Court sidestepped cases that required tackling segregation directly, letting many wind through the lower courts (the reason *Brown* is the combination of five separate cases). Courts had to grapple with defining segregation almost overnight: when *Brown* was decided. Relevant cases beforehand were mostly confined to higher education.

Using Westlaw, I identified all Supreme Court cases that use the terms “segregation,” “desegregation,” “integration,” “Negro,” “Black,” or “race,” or that cited *Plessy* (1897) or *Brown* (1954). I cross-checked The Court Listener, HeinOnline, LexisNexis Legal, and the Supreme Court Database. I tried to attain the largest data corpus possible, that included both “major” desegregation rulings, as well as more minor ones. Because my research question is about how legal meanings become institutionalized, I included all majority, concurring, and dissenting opinions. For each case, I coded the judge’s conception of segregation, looking for continuities and breaks across time. I also wrote analytic memos about each case, cataloging the different ways segregation was treated.

This search produced 82 cases. I also read all attached lower court rulings. I included all forms of case disposition including when the Court heard a full oral argument and issued its own opinion (57), issued a summary affirmance or vacation of a lower court ruling (7), or issued a procedural ruling like a refusal to stay a desegregation order (18). I also read hundreds of certiorari denials; while many of these are perfunctory, others contain judicial reasoning. I

attempted to read all relevant cert denials as well. While I mention a few of these denials, I cannot say with confidence that I identified and analyzed the full set. By encompassing all forms of disposition, I was able to gain insight into the process by which this legal meaning did and did not become settled. The full set of Supreme Court cases analyzed can be found in the References section.

## **Findings**

### *Settling and the Judicial Interpretation of Desegregation*

I identify five meaning eras for segregation at the Supreme Court. Table 1 summarizes the “circle” of meaning segregation went through. The multitude of definitions adopted by the Court, and the internal contestation within each meaning era, demonstrates that segregation is an incompletely institutionalized legal concept.

While other scholars have periodized desegregation based on the degree of demographic change seen on the ground (Reardon and Owens 2014; Clotfelter 2004), I have grouped cases according to the predominant definitions utilized. In each period, the Court “delineated the circumstances in which a construct can be invoked...articulating and establishing a foundation for the rule or concept” (Phillips and Grattet 2000). Periodizing desegregation as such takes the law on its own terms, foregrounding legal arguments over outcomes. Within each period, definitions were unstable, with cases coming out in various directions and multiple definitions being adopted. While the eras help impose order on an incompletely institutionalized concept, internal to each there was not absolute consistency.

**Table 1. The Circle of Meaning of Segregation in the U.S. Supreme Court**

<b>Era</b>	<b>Years</b>	<b>Segregation</b>	<b>Desegregation</b>	<b>Integration</b>	<b>Remedial Measures</b>
<i>Brown's Aftermath</i>	1954-1960	Legal statute separating the races	Removal of legal statute	Not mentioned	Eliminating segregation laws
<i>Intention to Segregate</i>	1960-1968	Legal statute separating the races Policy intended to maintain separation	Removal of legal statute Curtailing intentional segregation policy	Not mentioned	Above + Finding laws that intended to segregate unconstitutional
<i>Toward, and Away, from Racial Balance</i>	1968-1974	Legal statute separating the races Policy intended to maintain separation Statistical, demographic imbalance	Removal of legal statute Curtailing intentional segregation policy Requiring (permitting) affirmative racial mixing	Racial mixing, demographic balancing, statistical representation	Above + widespread busing
<i>End of Racial Balance</i>	1974-1990	Legal statute separating the races Policy intended to maintain separation	Removal of legal statute Curtailing intentional segregation policy Permitting limited affirmative racial mixing	Racial mixing, demographic balancing, statistical representation	Above, with much more limited busing (within district only)
<i>Unitary Era</i>	1990-present	Legal statute separating the races	Effectively completed Severely limiting affirmative racial mixing	Racial mixing, demographic balancing, statistical representation	None

To summarize Table 1, immediately after *Brown* (*Brown's Aftermath*), the Court took segregation to mean the existence of a formal segregation law. Desegregation was the elimination of these laws; that was the legal remedy imposed on states to vindicate children's right to a desegregated education. Increasingly, states adopted strategies to avoid desegregation, including crafty school assignment plans that kept students at pre-*Brown* schools, rezoning school attendance boundaries, and even shuttering schools; the Court responded by expanding the scope of segregation's meaning to include government policies that intended to segregate (Intention to Segregate). Desegregation meant eliminating these laws.

Quickly, the Court realized the difficulty of determining government "intent" behind school policies, and adopted a wide notion of segregation: observed racial imbalance based on counts. Desegregation meant demographic integration, and the associated legal remedy was primarily mandated busing for the purpose of achieving some degree of racial mixing to mirror district or community demographics.

Almost as quickly as the Court adopted this demographic posture, it backtracked, limiting the circumstances in which racial imbalance amounted to segregation (*Toward and Away from Racial Balance*). The remedy remained busing, but under more limited circumstances. In earlier years, the Court looked to government intent as a way to broaden the definition of segregation from explicit laws mandating racial separation. During this era, the Court used intent as a way to narrow segregation's definition from observed racial imbalance to racial imbalance produced only by knowable, traceable, intentional government policies, with few policies reaching that high bar.

Soon, racial imbalance did not even enter the evaluation of segregation, as the term contracted back to a legal definition (*End of Racial Balance*). Busing's reach narrowed even

further. At present, for the Court's majority, segregation is unrelated to racial imbalance, and the desegregation project is effectively complete (Unitary Era), because laws ordering segregation, or separation based on color, are extinct.

In each period, there was a dominant meaning of segregation, but contestation was never eliminated. The divisive eras of disagreement did not settle the term's meaning, but contributed to the continued divisions that exist. Even within Court majorities, internal disagreements about the precise evil of segregation and appropriate desegregation remedies lingered. Dissents at times advocated for wholly different meanings, and those meanings did not follow a universal ideological valence. Treating segregation as settled misses the debates endemic to desegregation's long history, debates still being waged at the Court. Even today, a powerful dissent consistently invokes earlier meanings. The legal machination process for segregation did not culminate in a stable, institutionalized term, but rather set the stage for continued disagreement, making segregation incompletely institutionalized as a legal concept. In the pages that follow, I demonstrate the accordion-like way segregation's meaning expanded and contracted through the five phases outlined in Table 1.

#### *Brown's Aftermath (1954-1960)*

*Brown* (1954) laid the groundwork for decades of unsettled legal meaning. After the first *Brown* hearing in 1952, the Court requested additional information from the litigants. In the order, the Court suggested if it were to find the challenged segregation statutes unconstitutional, it would "permit an effective gradual adjustment to be brought about from existing systems segregated by law to systems not based on color distinctions." The Court implied that segregation *by law* was the issue to be addressed. However, the language in the final, unanimous decision suggested the Court recognized a difference between racial imbalance and legal

segregation. “Segregation of white and colored children in public schools has a detrimental effect upon the colored children,” making no immediate reference to legal segregation as particularly damaging. The next line though, “The impact is greater when it has the sanction of the law,” suggests a legal interpretation. This juxtaposition implied an early recognition of statistical versus legal segregation, though an equivocation as to which definition *Brown* embraced. Segregation’s tension for the Court is evident in this seemingly simple line in *Brown*.

In the years following the landmark ruling, the Court utilized a narrow definition of segregation: the existence of a segregation law. Had segregation statutes been lifted immediately, and southern school districts adopted neighborhood school assignment policies, changes in racial school composition would have occurred. However, with *Brown II* (1955), the Court ruled that the implementation of *Brown* (1954) could proceed “with all deliberate speed,” rather than immediately. *Brown II* empowered southern obstructionists, who were quickly able to devise new policies to circumvent integration. Initially, even clearly racially motivated policies withstood constitutional muster so long as states had eliminated segregation statutes. The Court denied certiorari on a 6th Circuit cases, upholding a “minority to majority” transfer plan (in which any student assigned, by neighborhood, to a school in which they were in the racial minority could transfer to a school in which they were in the majority), despite it perpetuating racial isolation and being motivated by racially discriminatory intent (*Kelley*, 1959).

But this narrow position was not universal. In dissent to the cert denial in *Kelley*, Chief Justice Warren, and Justices Douglas and Brennan, argued that the “m to m” plan effectively amounted to a segregation statute, for it “explicitly recognized race as an absolute ground for the transfer of students between schools.” Segregation, they argued, ought to be thought of as more

widely inclusive of all state-driven, race-based barriers to school attendance. Fundamental fractures as to the meaning of segregation were evident just three years after the ruling.

### *Intention to Segregate (1960-1968)*

The question of statutory segregation “on the books” versus policies that maintained a segregated system remained a sticking point for the Court. Gradually, the Court began to define segregation to include policies that intended to maintain racial separation. In *McNeese* (1963), the 8-1 Court held that Missouri having technically outlawed segregation was irrelevant, and established that district policies could amount to segregation even without a statute. In *Griffin* (1964), the unanimous court held that a race-neutral district closure was done, “to ensure...that white and colored children...would not, under any circumstances, go to the same school,” cementing the relationship between intent and segregation. In *Monroe* (1968), the unanimous Court ruled against “m to m” programs, school zoning, and pupil placement laws that automatically assigned students to the same schools they were assigned to pre-*Brown*.

Yet even as segregation’s domain began to include intent, the meaning remained controversial in two directions. At times, judges thought the majority had over-interpreted *Brown* and defined segregation too broadly. In his dissent in *McNeese*, Justice Harlan argued that the Court should be remiss to “hold unavailing an administrative remedy afforded by a State which long before *Brown* outlawed both by its constitution and statutes racial discrimination in its public schools.” He clung to the solely statutory meaning, and resented the move to define segregation as anything other than law on the books. He was explicit that the Court should not be imposing desegregation plans on states that had not had legal segregation regimes pre-*Brown*.

Alternatively, other members of the Court were seeking an even broader definition, if implicitly. In *Goss* (1963), the unanimous Court held that an “m to m” plan would “inevitably

lead to segregation of students by race.” The idea that statistical integration was a necessary element of gauging desegregation was slowly emerging. In *Calhoun v. Latimer* (1964), the unanimous Court ruled that a race-neutral free-transfer system was insufficient for “the plan would not achieve desegregation until sometime in the 1970s.” Here, the Court used “desegregation” to refer to demographic integration. In *Rogers v. Paul* (1965), the Court ruled insufficient a plan that desegregated students a grade at a time, rejecting this pace as not achieving enough integration soon enough. Without explicitly recognizing the meaning shift, the Court was implicitly defining segregation as racial imbalance, with accompanying demands for desegregation remedies that achieved demographic integration.

In this period, construct elaboration is evident in the increasingly specified role of intent in defining segregation. Over time, the judges were presented with a more diverse array of behaviors and situations to reconcile with the segregation construct. The continued unsettled definition of segregation is clear from emergent disagreements about segregation’s scope, particularly whether segregation ought to be defined by racial imbalance. For the first time, we see racial integration emerge as the appropriate and required response to segregation.

#### *Slouching Toward, and Away, From Racial Balance (1968-1974)*

In the late 1960s, segregation as racial imbalance solidified as a dominant definition of segregation for the Court. But the period in which the Court utilized this definition, and the accompanying broad desegregation remedies, was brief and never unequivocal. Almost as soon as the Court inched toward racial imbalance, it contracted. While districts were still permitted to adopt plans that sought racial balance, though increasingly constrained in their race-conscious options, they were not required to. Decisions became more contentious, with an increasing number of split cases, leaving segregation even less settled.

### *Domain Expansion*

In *Raney* (1968), the unanimous Court defined segregation by racial imbalance, emphasizing a desegregation policy's *effectiveness* in producing racial balance over policymakers' *intent* to segregate as the acceptable gauge of constitutionality. The only acceptable plans were those that "promised realistically to convert" segregated school systems to ones "without 'white' schools and 'Negro' schools, but just schools." The Court was operating against the backdrop of school districts' evasion and resistance – the Court had seen district responses to desegregation range from massive resistance bordering on nullification to crafty schemes to evade judicial requirements. The idea that segregation was a demographic reality defined by the actual racial composition of schools, not just a legal ordinance or intentionally discriminatory laws, was repeated in unanimous rulings: "dual school systems must cease to exist in an objective sense as well as under the law... [plans must] promise realistically to work, and to work now" (unanimous opinion, *Green*, 1968); "Negro children and white children will sit together and learn together in the same public schools" (*Alexander*, 1969); "[school districts] ought to make every effort to achieve the greatest possible degree of actual desegregation," (*Davis v. Mobile County*, 1970); "desegregation is not achieved by splitting a single school system operating 'white schools' and 'Negro schools' into two new systems...where one, is, in fact, 'white'" (Burger in *Scotland Neck*, 1972); "In a very real sense, the children...would continue to attend 'Negro schools' and 'white schools' (Powell in *Scotland Neck*, 1972); "the measure of any desegregation plan is its effectiveness" (*Wright v. Emporia*, 1974).

Terms like "in fact," "actual," "objective sense," and "very real," suggest that the judges were defining segregation by demographic imbalance. Until *Raney* (1968) and *Green* (1968), the Court had defined segregation by state policy intending to segregate, expanding the types of

policies included. With these cases, the Court began to treat segregation as a descriptive reality. Though the Court's language indicated a greater emphasis on racial balancing, the stance was not exceptionally aggressive, and while the Court upheld a number of local plans that pursued racial balancing, the Court did not universally mandate that school districts seek dramatic demographic changes. The expansion of segregation's meaning, though limited, still presented a wider window for plaintiffs and advocates as to what desegregation remedies could be. In this era, we see a Court wary about the potential ramifications of its own decision-making: while it recognized the importance of racial mixing to the desegregation project, wholeheartedly embracing that view could have had dramatic on-the-ground ramifications the Court was not prepared to endorse or require, much less enforce or actualize.

#### *Domain Contraction*

Alongside these decisions were others that obfuscated and eventually contracted segregation's meaning. Even many "pro-integration" decisions internally challenged the relevance of racial balance to constitutional adjudication, further solidifying segregation as an unsettled term.

*Swann* (1971) endorsed school busing as a segregation remedy, striking down a North Carolina statute that prohibited school districts from pursuing racial balance. The Court found that the statute's race neutral assignment requirement "against the background of [residential] segregation...would render illusory the promise of *Brown*... the flat prohibition against... racial balance conflicts with the duty of school authorities to disestablish dual school systems." Here, the Court defined segregation as racial imbalance, for otherwise the duty of *desegregation* would not have required actual racial mixing. The "promise of *Brown*" was real increases in demographic school integration.

But the message was mixed. While *Swann* (1971) held that racial mixing and desegregation were connected, it simultaneously quoted earlier definitions of segregation used by the federal government: “desegregation means the assignment of students to public schools...without regard to their race...[not] assignment to overcome racial imbalance.”<sup>12</sup> Racial ratios should serve as “useful starting points,” rather than constitutional mandates, and while districts should be allowed to seek racial balance, they would not be required to. In a single case, the Court equivocated; it defined segregation demographically and suggested that part of the required duty of desegregation was achieving actual racial mixing, but also endorsed early conceptions that defined segregation more narrowly and suggested racial mixing was not required for desegregation.

In *Keyes* (1973), the Court took a broad view of what constituted intentional segregation in a non-southern context (Denver) where no segregation ordinance had existed. It was not the demographic imbalance, per se, that was the problem, but rather the “actions of school authorities motivated by segregative intent,” including gerrymandered attendance zones and school site selection. The Court re-embraced intent as a primary dimension of segregation.

But in the same ruling, though, Justice Powell called the process of “identifying ‘segregative acts’ and deducing ‘segregative intent’” “torturous” and labeled the narrow focus on intent as “perpetuat[ing] a legalism rooted in history rather than present reality.” He went so far as to say that the Court ought to “minimize and ameliorate segregated conditions by pursuing an affirmative policy of desegregation...on a national basis without regard to a doctrinal distinction

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<sup>12</sup> The original Health, Education, and Workforce Department Civil Rights Act guidelines treated desegregation as solely about non-discriminatory school assignment. However, the 1966 U.S. Commission on Civil Rights Report objected to this guideline, given the myriad policies districts were adopting to resist integration. The HEW guidelines were revised in response to read: “The single most substantial indication as to whether a free choice plan is actually working to eliminate the dual school structure is the extent to which Negro or other minority group students have in fact transferred from segregated schools” (Cooper 1966).

which has outlived its time.” In a concurring opinion, Justice Douglas continued to advocate for a broad definition of segregation focused on racial imbalance and the deep roots of demographic segregation in government policy. While *Keyes* appeared to expand the scope of desegregation to a non-southern context, it gestured toward an earlier era focused on intent, yet simultaneously embraced a vision of desegregation as racial balance and labeled the focus on intent overly-legalistic. This internal confusion, and disagreement, left segregation incompletely institutionalized.

Operating in the face of white flight out of urban school districts, in *Milliken v. Bradley* (1974), the 5-4 majority rejected the relevance of racial balance in imposing mandatory desegregation. White flight had proven so extreme in Detroit, demographic integration within the city schools was impossible. Policymakers had designed an inter-district remedy plan, which would have merged thirteen metropolitan Detroit school districts and assigned children across this larger, metro-wide area. The Court rejected the plan, given that the plaintiffs had only proven the existence of policies meant to segregate the *city* schools, not the suburban surrounding twelve districts. Racial imbalance was irrelevant. The ruling blamed racial imbalance on “unknown and perhaps unknowable factors such as immigration, birth rates, economic changes, or cumulative acts of private racial fears,” and therefore the Court, and the state, bore no responsibility for balancing students by race. Perhaps seeking to institutionalize this definition, the Court held that “segregation as racial imbalance finds no support in our prior cases.”

Even as *Swann* endorsed busing as a method of overcoming legal segregation, and *Keyes* moved desegregation outside of the south, the cases, alongside *Milliken's* clear policy limitations, helped cement the idea that segregation meant intentional policies meant to separate

students by race. The contestation is pronounced; *Milliken* attempted to claim that its rejection of racial balance was always the law of the land, but that statement neglects the dozens of prior cases emphasizing the relevance of racial balance. In a short period of time, the Court adopted multiple definitions of segregation, reducing the likelihood of institutionalizing a legal meaning.<sup>13</sup>

### *Dissenting Opinions as De-Settling*

The rise of dissenting opinions made institutionalization even more difficult. Chief Justice Burger, joined by three others, dissented in *Wright* (1974), which had endorsed a racial balance definition. He argued that desegregation meant the “dismantling of a legal, dual school system,” rather than “the difference of one or two children per class, which would not even be noticed.” A racial balance notion gave “controlling weight to sociological theories rather than constitutional doctrine.” Pointedly, he accused the court of an “obsession with minor statistical differences” reflecting the “gravely mistaken view that a plan providing more consistent racial ratios is somehow more unitary than one which tolerates a lack of racial balance.” In dissent in *Keyes* (1973), Rehnquist echoed the Briggs Dictum, and argued that *Brown* did not require integration, but rather prohibited discrimination. Rehnquist found *Keyes* to be a “long leap” for the Court, accusing the majority of equating “gerrymandering individual attendance zones in a

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<sup>13</sup> Occasionally, justices recognized segregation’s unsettled meaning. In a procedural denial of relief in *Gomperts* (1971), Douglas wrote that “the precise contours of de jure [legal] segregation have not been drawn...the remedies that are available where school segregation is de facto and not de jure are not yet clear.” Justice Powell in *Keyes* lamented, “the doctrine of *Brown* did not retain its original meaning...the concept of state neutrality was transformed into the present constitutional doctrine requiring affirmative state action to desegregate school systems,” meaning achieve demographic integration. In *Freeman v. Pitts* (1992), Justice Scalia argued in a separate opinion that the affirmative nature of desegregation had become “such a part of our legal fabric,” courts acted “as though the Constitution requires such racial balancing,” an idea he objected to forcibly.

district where separation of the races was never required by law” with southern segregation statutes.

Justices Douglas and Marshall dissented as forcefully in the other direction. Douglas argued that *Milliken* diminished *Brown*'s legacy, for “the Detroit schools are segregated by race and the black schools are not only ‘separate’ but ‘inferior.’” He reiterated how active the government had been “in building black ghettos” and the responsibility it ought to bear for the educational consequences. Justice Marshall went even further, arguing that “Whether state action is responsible for the growth of the core of all-Negro schools in Detroit is, in my view, quite irrelevant” when the real issue was the dramatic racial imbalance between the city and suburban schools. This demographic reality “should be enough to support the choice of an inter-district remedy,” employing perhaps the clearest racial balance definition a justice had ever used. Demographic integration, is “what desegregation is all about.”

In less than twenty years, segregation had morphed from a narrow legal category intending to eliminate segregation laws, to a project to purge school districts of a variety of segregation-producing policies, to an even loftier effort that intended to change the racial composition of schools and was beginning to move back again. In this time, the composition of the Court had turned over almost completely, with Republican presidents appointing judges with a far narrower view of segregation's meaning than the earlier crop. Fundamental disagreements about the relevance of racial imbalance to determining the existence of illegal segregation, and the role of the state in creating this imbalance, led to segregation emerging from this period incompletely institutionalized.

### *The End of Racial Balancing*

After *Milliken* (1974), the pivot away from racial balancing accelerated. However, the domain contraction was not absolute, as a number of cases continued to utilize a racial balance frame with a broad view of state actions that perpetuate demographic imbalance.

In *Austin v. U.S.* (1976), the 7-2 Court held that the lower court had “imputed segregative intent far more pervasive than the evidence justified” to a board policy. “When separation is not caused by state action,” the Court argued, “there is nothing inherently inferior about all Black schools.” Similarly, in *Dayton v. Brinkman* (1977), the Court found the lower court’s mandatory integration remedy overly punitive, given that the district had ended legal segregation years earlier. Whereas *Green* (1968) held that “a remedy is to be judged by its effectiveness,” in *Dayton* (1977) the Court held that “effectiveness is not a reason for extending a remedy to all schools in a district,” if state policy is only partially responsible for segregation rates. In *Pasadena v. Spangler* (1976), the 7-2 Court interpreted segregation’s cause as “people randomly moving into and out of and around,” rather than government action. In *Freeman v. Pitts* (1992), the 8-1 Court held that segregated housing and school patterns were not traceable to state policy but rather to “independent factors consistent with the mobility that is characteristic of our society.”

In dissents, segregation’s meaning remained contested. In *Pasadena* (1976), Justice Marshall argued that desegregation compliance required sustained inter-racial contact. In *Dayton* (1977), Justice Powell reiterated his broad interpretation of state action, rejecting the Court’s narrow statutory view. In *Freeman* (1992), Souter and Blackmun both argued that legally segregated school systems had been responsible for massive demographic shifts, and therefore demography was not legally innocent. “Private preferences,” Blackmun wrote, “may in fact have been created, in part, by actions of the school district.” Particularly given initial district

resistance to *Brown* (1954), racial imbalance as solely due to demographic change was “implausible.”

And even as more opinions adopted a narrow definition, others clung to a broader view, with dissents in the opposite direction. In *Columbus v. Penick* (1979), the Court upheld a massive racial balancing desegregation plan. “There is no magical difference between segregated schools mandated by statute and those that result from local segregative acts and policies,” the majority held. Rehnquist’s dissent argued that segregation was caused by “a *mélange* of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near people of one’s own race.” Districts “could [not] have read *Brown* and gleaned from it a constitutional duty to practice...integration *uber alles* [above all].” Powell, dissenting, was particularly concerned with the majority’s view that a school assignment plan would “be capable of bringing about and maintaining the desired racial balance in each of these schools.” This bestowed on districts, and courts, too much power and responsibility for producing an integrated society.<sup>14</sup> In *U.S. v. Fordice* (1992), a higher education case, the Court adopted a broad view of state action, including policies like historical ACT score minimums. Even Justice Thomas agreed with this view, arguing that the policies showed a clear, rather than attenuated connection to racial imbalance. Scalia dissented, differentiating the “compelled integration” of K-12 from higher education, where only discriminatory admissions

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<sup>14</sup> At times, justices argued against aggressive integration plans (e.g. large-scale busing, school closures, district mergers etc.) because such plans would engender white flight to private schools and suburbs. This logic, interestingly, utilized a racial balance notion of segregation: even though we think that racial balance is not the legal goal, we don’t want to approve a plan that will result in *more* demographic imbalance, thereby inhibiting the integrationist goal we may privately, if not legally, support. Powell argued in *Columbus* (1979) that massive system-wide remedies produced “resegregation,” because white flight always followed. Burger expressed skepticism about the efficacy of busing, writing that “It is becoming increasingly doubtful that massive public transportation really accomplishes the desirable objectives sought.” Powell dissented in *Estes* (1980) arguing that the Courts ought to recognize and “appreciate that perfect solutions may be unattainable in the context of the demographic, geographic, and sociological complexities of modern urban communities.”

standards needed to be eliminated. “There is nothing unconstitutional about a black school,” he wrote, distinguishing “a school blacks must attend,” which is unconstitutional, from “a school that, as a consequence of private choice...contains, and has long contained, a large black majority.”

Many lower courts continued to approve plans that pursued racial balance, and the Court tacitly approved these plans by refusing to hear the cases. In *Cleveland v. Reed* (1980), Rehnquist dissented to the cert denial, and argued Cleveland had gone too far in “restructuring the entire demography of the city” through large-scale busing. Dissenting to the cert denial in *Delaware v. Evans* (1980), Rehnquist called the plan the majority approved, which merged eleven school districts in Wilmington, “more Draconian than any ever approved by this Court.” In *Estes* (1980), the Court approved a racial balance focused plan that required extensive busing in the Dallas schools. In dissent, Powell argued that “It is puzzling that many trial and appellate courts continue to misapply *Green* and largely ignore more recent statements on this issue.”

Two distinct views cemented in this period: one utilized a narrow, legalistic segregation definition, and one that maintained racial imbalance’s relevance, with each claiming occasional victories. In the twenty years after the onslaught of desegregation cases in the early 1970s, the Court was still unable to settle segregation’s meaning and the appropriate scope of the concept, leaving lower courts and school districts with limited guidance.

### *The Unitary Era*

By the 1990s, decisions approving racial balancing had mostly ended, as the definition of segregation contracted further, though forceful dissents continue to ensure segregation’s meaning remains unsettled.

In *Oklahoma v. Dowell* (1991), the 5-4 Court rejected the idea that housing policies were responsible for school segregation. In *Missouri v. Jenkins* (1995), the Court struck down a program to attract suburban white students to city schools for the purpose of racial balancing. Rehnquist objected to “the suggestion that schools which have a majority of Negro students are not ‘desegregated,’” without clear evidence of state action. Concurring, Thomas emphasized the racial balancing implications of the dissent, writing that “it never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior.” School segregation patterns were about voluntary housing choices and private decisions, not legal segregation.

*Parents Involved v. Seattle* (2007) split the Court 5-4 yet again. The case hinged on questions of state racial classification (long the key issue in higher education cases). Given that Seattle was not under a desegregation order in 2007, the majority held the district was not legally segregated. Therefore, it was not permitted to utilize the limited race-conscious methods the Court allowed for in districts still under mandatory desegregation orders.

In his separate opinion, Thomas argued that “resegregation is not occurring in Seattle,” rejecting a demographic notion in favor of a strictly legal one. “Racial imbalance is not segregation,” he said directly, and argued that the dissent used terms like resegregation as a “mere incantation” of past unconstitutional policies. Only in the context of statutory segregation, he argued, are race-based remedial measures required or permitted. In Louisville and Seattle, while there is a danger of racial imbalance, “there is no danger of resegregation,” for there is no threat that either city will reestablish dual systems in law.

Yet contestation remains. In dissent in *Dowell* (1991), Marshall again argued that the point of desegregation was inter-racial contact. The effects of legal segregation can persist well

beyond the lifting of a segregation order, and the “potential reemergence of one-race schools is a relevant vestige of de jure segregation.” In Justice Kennedy’s concurring opinion in *PICS* (2007), thought to have controlling weight given that he was the deciding vote, he argued that the Court should not accept demographic segregation as the “status quo.” School districts should be allowed to use race in student assignments, so long as race was used alongside other criteria like income and family education level. He invoked a demographic definition, arguing that segregation can be as demeaning when it “stems from bias masked deep within the social order as when it is imposed by law.” He even noted that “the distinction between government and private action can be amorphous.” While he was careful to maintain the risks associated with state-based racial classification, he concluded by saying that the United States is obligated to create “an integrated society that ensures equal opportunity for all of its children,” suggesting actual demographic integration will remain at least tangentially legally relevant.

The four judges in the minority in *PICS* utilized the unsettled history of segregation to make their case. Justice Breyer noted that for most of the Court’s history, a legal segregation ordinance was not the measure of segregation. While “The plurality could validly claim that no court ever found that Seattle schools were segregated in law,” in fact, many laws worked together to create the racial imbalance observed in Seattle’s schools. In the face of a “return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to maintain or to extend their integration efforts.” The minority opinion did not hold that racial imbalance was unconstitutional segregation per se, but that localities should be given leeway to pursue racial balance as they see fit.

For the dissent, the hard-won gain was integration. For the majority, the hard-won gain was the elimination of legal segregation, for as Thomas argued, “to equate the achievement of a

certain statistical mix in several schools with the elimination of systematic de jure segregation trivializes the latter accomplishment.” This debate remains powerful at the Court, leaving segregation an unsettled legal concept, and making it difficult for lower courts and social policymakers to find guidance from on-high.

## **Discussion**

These findings demonstrate that segregation remains incompletely institutionalized, and has implications for how social science ought to think about segregation, the institutionalization of legal concepts, and the future of school integration.

### *Measuring the Success of Desegregation*

Whether desegregation “worked” is an important question, given the resources that went into the effort, and the violence and trauma associated with it. To assess judicial desegregation’s success, though, requires “taking law seriously,” and developing a clear understanding of desegregation’s goals at different moments in time. We can only evaluate if desegregation “worked” if we know the goal posts, and how they changed. Evaluating success solely by school race composition indices at once gives too much and too little credit to the Court. While desegregation rulings erased segregation statutes from the books in states across the country, a massive success, they have not produced sustained increases in inter-racial school contact. To claim that the latter is the lone metric desegregation is to be assessed by ignores the comparatively short historical moment (1968-1971) in which this was the measure that the majority of the Court employed. So much of the literature is focused on desegregation and demographics, or desegregation and test scores, that the history of meaning at the Court has been overlooked.

While the schools remain highly demographically segregated, they do not remain so legally, at least in terms of explicit ordinances. Future research might focus on demonstrating the role long-term state action has had in producing segregation, as others have advocated (Rothstein 2017; Katznelson 2005; Oliver and Shapiro 1995). Additionally, the almost singular focus on the federal judiciary as the government body responsible and blame-worthy for school segregation has allowed the federal legislative and executive branches, and state/local governments, to escape much of the criticism for school attendance patterns (Bonastia 2006). Shifting research toward legislative and executive policies would more accurately reflect the varied political forces (particularly urban-suburban district boundaries) that contribute to segregated schools and neighborhoods.

#### *The Incomplete Institutionalization of Legal Concepts*

Accepting law as inherently socially determined (Mitchell 1990; Ewick 1992; Weissbourd and Mertz 1985), the analysis sought to trace changes in segregation's meaning since *Brown*. This paper challenges Phillip and Grattet's (2000) characterization of time as fundamentally settling for legal concepts. Time did not ensure that segregation's meaning settled into a fixed legal category, for fundamental and consistent disagreements as to the role of state action in producing demographic segregation and the relevance of policymaker intent have existed since *Brown* (1954). The segregation debate has existed far longer than the debate over hate crimes yet is a far less settled legal concept.

Judicial opinions are the primary vehicle through which meaning is transmitted within the legal field. Understanding how judges elaborate and justify doctrine is important, given the social structuring in legal rulings. When the communicated meanings vary so widely, lower courts and local policymakers struggle to set policy, leading to prolonged contestation. I argue

that the combination of shifting meaning eras, and the ever-present vocal opposition via dissents, has provided lower courts unclear guidance for how to determine and address segregation, leaving the concept incompletely institutionalized. Institutionalization is a process that makes social definitions and norms clear; it constrains social actors within institutional bounds. Because segregation's meaning has never been institutionalized, judges and policymakers have been largely left to hammer out the meanings themselves, leading to divergent understandings of this pivotal social reality, and limited tools for ameliorating this endemic problem. This paper, then, has implications for how we think about institutionalization more generally, and the non-linear routes concepts can take to becoming only partially settled.

I seek to place precedent within a larger sociological framework. Precedent explains how judicial behavior conforms to institutionalized rules. Alternatively, this paper explores how such rules do and do not become settled and how meaning is attached to rules. *Stare decisis* implies that precedent has a decisive impact on how a case is adjudicated; once a precedent is established, subsequent cases should be decided easily. While precedent always has shiftable borders, recognizing that factual variations that were unanticipated or unaddressed must be handled, ultimately, precedent is meant to solidify the juridical system. In the case of segregation, the meanings attached to the concept, and thereby the precedential cases, have been so varied, the way precedent functions is contingent upon rhetorical justifications.

Law's indeterminacy has long been a critique of the legal order, both from those who question the legitimacy of law's uneven application and those seeking stricter legal rules (Kelman 1981). Thinking about legal meaning-making as a manifestation of the broader concept of social institutionalization helps us understand how legal actors develop patterns of interpreting and justifying legal rules.

## Conclusion

While this paper is not the first to recognize that segregation's meaning shifted in the decades after *Brown* (Tushnet 1997, 2004; Wolters 2004), it is the first to carefully track just how wide of fluctuations there have been. As segregation's domain expanded, the Court equivocated. As the domain contracted, the Court approved dozens of desegregation plans. To some, desegregation is a completed, successful, legal project that successfully eliminated racial categorization in student assignment. To others, desegregation represents a failed effort to fundamentally change the racial composition of schools. Within each meaning regime, the lack of settlement is apparent; the meaning ambiguity is pronounced. The incomplete institutionalization of segregation has contributed to the vastly different interpretations of constitutionally permissible segregation by the lower courts. Additionally, it has contributed to the divergent academic interpretations of desegregation's success. From one perspective, the Court accomplished a massive change in the social structure – the deinstitutionalization of segregation by extinguishing laws separating groups, helping to end Jim Crow. And yet this deinstitutionalization continued in Jim Crow's wake, unsettling for the next half century what the state was required and permitted to do to address the long-term consequences of legal segregation.

Judicial desegregation was one of the few large-scale policy efforts that sought to mix people (children) in a major domain of social life: the schools. Despite desegregation's scale, the logic of desegregation as requiring integration was quite short-lived at the Supreme Court. As many lament the failure of *Brown* and desegregation to produce true integration, it is important to situate analyses of the effects of desegregation within the Court's goals, and to not impose broad political goals onto a single unelected branch of government. Doing so displaces the

responsibility for addressing segregation from all levels and branches of governments, and from our own private choices.

Racial and socioeconomic school and neighborhood segregation are profound realities for millions of American children; segregation perpetuates inequality and deepens social stratification. Whether government actors are willing and able to engage in affirmative desegregation programs (via busing, school district mergers, public housing quotas, and other race-conscious policies) depends in part on how the Court circumscribes segregation. The meanings judges have attached to segregation have at times empowered, and at other times limited, lawyers, community advocates, families, elected officials, communities, and social scientists seeking to ameliorate segregation. Over three hundred school districts remain under active desegregation orders (Reardon et al. 2012); lower courts are still supervising their student assignment policies, school-level offerings, and demographics. How local judges ought to go about deciding to release districts depends on the meaning of segregation.

Future research should continue to assess the portability of incomplete institutionalization to other areas of the law. Law can seem fixed, yet its ambiguity is all the more interesting. And it's not just gaps between law on the books and law on the ground; even law on the books can be internally divided, contested, and unsettled. While desegregation is perhaps unique in its affirmative scope, many other controversial areas of the law are susceptible to massive changes in meaning. For example, what constitutes a legal family has certainly changed over time, with new advocacy efforts to expand the category (Bennion and Joffe 2016; Stacey 2012). In terms of contraction, the legal definition of an employee is constantly shifting, with the rise of precarious employment and the "gig economy" (Cunningham-Parmeter 2016; Kalleberg 2011). Tracing the legal histories of these concepts helps us understand policy-making's contours of, given, as

Pedriana (2006) argued, the law's status as a "master frame." As is most certainly the case with segregation, we cannot understand the politics and political pushback around legal issues unless we understand how the courts are defining them.

## **Chapter 2: Intangible Factors: The Judicial Meaning of Equal Schools**

### **Abstract**

*Brown v. Board of Education* (1954) famously held that separate schools are “inherently unequal.” Why, exactly, separate schools were *inherently* unequal, has been debated ever since. In this chapter, I focus on an under-researched phrase in *Brown*. *Brown* noted that a set of “intangible considerations” prevented separate schools from ever being made equal (*Brown v. Board*, n. 4). I trace the meaning of “intangible” and related terms throughout case law in the years immediately preceding *Brown*, and the six decades after it. First, drawing on publicly available legal documents, I built a new dataset called the SSCC (School Desegregation Court Cases) that comprises the full corpus of federal and state supreme court cases on school desegregation between 1930 and 2015 (N = 2,207). Second, utilizing a series of computational techniques, I built a terminological dictionary of words that were likely candidates to relate to or reflect the meaning of the judiciary’s “intangible” concept. I found that the dictionary terms tended to cluster into five concepts in the judges’ opinions: social capital or sociological factors, psychological factors, assimilation, diversity, and other intangible considerations. While these concepts were present in a nontrivial proportion of the case law, especially in the years before and after *Brown*, their appearance in judicial opinions has declined over time, suggesting that judges have become less interested in utilizing social scientific thinking and concepts to arrive at or support their rulings on school desegregation. These findings have implications for 1) the history of school desegregation and the Fourteenth Amendment, 2) the role of sociological dimensions of inequality in politics and law, 3) the relevance of ideas in social policymaking, and 4) how we understand the meaning of *Brown*.

## Introduction

The doctrinal story of major court decisions on school desegregation in the years preceding and following *Brown v. Board of Education* (1954) can be characterized as a slow build toward a major expansion in the meaning of segregation, followed by an abrupt and assertive contraction toward a hyper-legal definition. The legal tests focused initially on the presence or absence of a formal segregation order; following the removal of these, the courts looked for “vestiges” of a prior legal segregation regime, eventually narrowly focusing on evidence of intentional racial discrimination by the state, rather than disparate racial impacts caused in part by prior segregation regimes.

*Brown* famously held that separate schools are “inherently unequal.” Why, exactly, separate schools were *inherently* unequal, has been debated ever since. Coleman (1968) noted this, writing that *Brown* gave definition to the “unarticulated feeling” that separate schools were not equal. Was it because state-sanctioned racial separation created two classes of citizens, violating the Fourteenth Amendment? Because racial segregation marked Black children with a “badge of inferiority” with damaging psychological effects? An implicit recognition that all-Black schools would never have the financial resources all white schools do? All of the above? Tushnet (2004) opines that “*Brown* continues to be controversial because Americans remain uncertain about what its substantive commitments were” (p. 1693).

As I was analyzing cases for Chapter 1, I was struck by a phrase I had not seen before in my readings on *Brown* that could shed light on the “inherent” inequality *Brown* articulated. *Brown* noted that a set of “intangible considerations” prevented separate schools from ever being made equal (*Brown v. Board*, n. 4). This line is puzzling: absent legal separation and the mark of second-class status it implies, why should de facto separate schools not be equal, or equilizable?

This is the logic of today's high-performing charter schools: that a strategic investment of tangible resources can overcome pre-existing social inequality. These intangible considerations felt reminiscent of sociological ideas like social capital, social networks, and related concepts.

Sociologists have recognized, though not studied directly, the possible social capital motivations behind *Brown*. Moody (2001), for example wrote that "At the heart of *Brown* was the recognition that separate could never be equal, in part because the social relations formed in school are an essential part of the educational process" (p. 679). Analyzing the various dimensions of inequality, especially those that are more difficult to see like social capital and networks, is foundational to sociology (Coleman 1974, p. 741; DiMaggio and Garip 2012, 5). These elements are deeply powerful for social mobility and cannot be "made equal" through tangible investments. In a world dominated by white supremacy, perhaps the only way to give Black students a fighting chance at equal access to these "intangibles" was racial integration. If this logic is correct, today's policies of tangible investment in segregated environments will have limited effectiveness. In exploring the meaning of intangibles, and testing whether it reflected unobservable or non-material social forces as much as observable economic ones, we may be able to reveal, uncover, or revive a new or dormant argument for why desegregation is legally necessary.

While today's lawyers, judges, and legal scholars are grappling with shifting doctrinal realities, this chapter seeks to add a sociohistorical perspective to the current discourse, first by bringing intangible thinking into the story of *Brown* and desegregation, and second by assessing whether, alongside intentional discrimination, intangible factors were a legally relevant, compelling, and robust vision of why desegregation mattered for American schoolchildren.

This chapter explores the intangible concept directly. The main research questions are 1) in the years before and after *Brown*, were sociological ideas about equality informing the judiciary's thinking about why segregated schools were unconstitutional? and 2) has the frequency of representation of those ideas in court cases changed over time? This involves, in part, exploring what *Brown*'s "intangible considerations" were. I hypothesize that "intangible" was a capacious term, and meant non-financial, hard to see forms of inequality that inhere in relationships: resources like social networks, reputation, prestige, role models, and job contacts. The term "social capital" is often used in sociology as shorthand for these dimensions of "intangible" (or not strictly economic) inequality that *Brown* was considering to understand why separate schools could not be equal.

Based on language identified in Chapter 1, and utilizing a series of computational techniques, I built a terminological dictionary to capture the "intangible" concept. The dictionary contains 41 words (see Table 2), most of which are elemental sociological concepts and their synonyms. I then use computational text methods to search for the appearance of the dictionary throughout the full corpus of federal and state court cases that used the term "school" and "segregation" between 1955 and 2015 ( $N = 13,600$ ). After trimming for validity (i.e., making sure that the cases in the dataset were in fact school desegregation cases – see Figure 1), I arrived at a sample size of 2,207 cases for analysis. The distribution of these cases on level of "saturation" with terms of interest was inspected, both in terms of raw numbers (e.g., the number of times each term was used in each case, and the total number of terms used in each case), and proportional to the total number of words in each case. The analysis below shows which terms appear most frequently in the court cases, how they tend to cluster in judicial opinions, and how their appearance has changed over the 60 year period.

The primary hypothesis is that the intangible (or sociological) dictionary was present in judicial thinking but evaporated over time. This hypothesis bore out: intangible thinking was present in a substantial percentage of cases and this percentage declined markedly over time. The findings suggest that in the past, courts were engaging with sociological notions of inequality, but that the judicial space for asserting these forms of inequality as constitutional rights has narrowed over time. It also calls for further interpretive analysis, to elucidate how these concepts were being deployed, what they meant to judges, and why their presence diminished.

This chapter begins, in the sections below, with a discussion of the various literatures that inform the analysis and to which the project contributes: the role of ideas in policymaking, the history of school desegregation, and social stratification. I then discuss the data and methods used to construct the dictionary of terms and the dataset of school segregation court cases, followed by results.

### **Desegregation Policy History**

Race and class segregation present barriers to equal opportunity, leaving swaths of people less able to access goods and resources, and limiting their potential outcomes. The public education system represents the longest arm of the state that most citizens ever experience. As such, tackling persistent segregation in schools is a key site for policy attempts to improve people's life chances by changing the racial and socioeconomic composition of the people and places they are exposed to. Racial separation hinders the networks that can be formed across the "color line" (Charles 2003). Accordingly, sociologists have been concerned with the impacts of segregation for life outcomes in part because racial segregation impedes the kind of "informal, neighborly relations" that matter for inequality and mobility (Myrdal 1944, see also Taeuber and Taeuber 1965; Massey and Denton 1993).

Public schools have historically been seen as an appropriate site for political “tinkering” (Tyack 1995). Attempts to overcome both *de jure* segregation formally mandated by law and *de facto* segregation that emerges from a wider set of social factors have been a focus of policy and activism for decades. The courts, to varying degrees, have attempted to do both in the decades since *Brown v. Board of Education* (1954). Historian C. Vann Woodward has gone so far as to call the era America’s “Second Reconstruction” (Woodward 1955). Perhaps more so than in any other research arena, sociologists have been involved in desegregation policy crafting and evaluation, with University of Chicago Professor James Coleman’s famous 1968 report widely credited as inaugurating massive efforts to desegregate the American public school system through busing (Hallinan 1988, p. 7).

Desegregation’s history is roughly broken into two periods: *Brown* to the mid-1970s and the mid-1970s to present (although see Chapter 1 for a more detailed historical sequencing). The first period represents the most aggressive court-ordered desegregation efforts, after a series of strategic attempts by anti-integration advocates to evade *Brown*, like freedom of choice plans (Baum-Snow and Lutz 2011; Reber 2005; Clotfelter 2004). Studies of judicial desegregation orders during this period have similarly shown modest increased rates of integration (Reardon et al. 2012; Logan, Oakley, and Stowell 2008; Rossell and Armor 1996; Logan, Zhang, and Oakley 2017; Orfield 1996).

But community backlash to desegregation was pronounced (Klarman 1994); President Nixon famously centered his 1972 campaign as a referendum against mandated busing. Slowly, judicial aggressiveness waned, symbolized by *Milliken v. Bradley* in 1974, which curtailed courts’ ability to order between-district, regional integration. Districts started to abandon integration plans and courts were quick to declare districts “unitary,” or free from the legal

requirements of desegregation orders. Most scholars have accepted that schools have gotten more demographically segregated since the 1980s, particularly between school districts rather than within individual ones (Fiel, 2013, p. 828; Reardon and Owens, 2014).

Since the 1980s, the courts have released thousands of school districts from judicial oversight, with just over 300 school districts remaining under active desegregation orders (Reardon et al. 2012). School busing for integration has all but evaporated in large school districts (McDonald 2007), and studies show that schools are becoming more demographically segregated (Reardon et al. 2012; Orfield 1996), though there are methodological challenges to making comparisons over time, especially with an increasingly multi-racial student population.

Education reformers, “by necessity in some cases and by choice in others,” turned to policy goals that accepted racially and socioeconomically isolated schools (Ryan, 1999, p. 25). As desegregation requirements weakened at the courts, litigants turned to alternative legal remedies, notably school finance litigation that sought equal per-pupil funding for all children regardless of district and school (Baker and Green 2005), socioeconomic desegregation (Crosnoe, 2009, p. 709), and school adequacy litigation aimed at ensuring baseline standards all children could meet (Roellke, Green, and Zielewski, 2004; Glen, 2006, p. 64).

While for much of the 20th century equal opportunity through racial school integration dominated civil rights activism, and despite what is known about segregation’s negative effects on life outcomes, contemporary education reformers no longer place integration as a top policy priority (Mehta 2013; Orfield 1996; Massey and Denton 1993). Ryan (1999) called it downright “unfashionable . . . if not atavistic” to focus policy discussions on racial integration at the turn of the 21st century (Ryan, 1999, p. 4). Massey and Denton (1993) observed that the term “segregation” disappeared from the public vocabulary in the 1970s and 1980s. Various popular

media articles, including James S. Kunen's 1996 "The End of Integration" in *Time* and Glenn C. Loury's 1997 "Integration Has Had Its Day" in the *New York Times* similarly declared a death knell. Leading educational reform groups, including KIPP charter schools, the Harlem Children's Zone, and the Broad and Gates Foundations, for instance, explicitly prioritize educating low-income students of color within hyper-segregated contexts.

### **Intangible Inequality**

Sociologists study how non-financial resources, particularly network ties, can exacerbate inequality and compound individual level advantages (Granovetter 1974; Burt 2004; Freese and Lufey 2011; DiMaggio and Garip 2012). Social capital, or "the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance or recognition" (Bourdieu 1985, p. 248; 1980), is important for job acquisition (Gorman and Marsden 2001), health outcomes (Pampel, Krueger and Denney 2010), social and emotional support (Verdery and Campbell, 2019, p. 725; Uttermark 2020), and residential stability (Riina, Lippert, and Brooks-Gunn 2016). Social capital is uniquely troubling for those concerned with equal opportunity; it upends the notion that in a free society, each individual can rise to the level justified by their merit, because "no one travels that road entirely alone" (Portes, 1998, p. 7). One's social context "strongly conditions what otherwise equally competent individuals can achieve," making equal opportunity all the more difficult to realize for those without access to social capital rich networks (Loury 1977, p. 176 in Wallace).

Perhaps put most famously by Granovetter in his seminal 1974 paper, "weak ties" are the relationships people have outside of close intimates, but that yield more expansive social networks. These ties, while seemingly "weak" on standard measures of closeness, are actually

quite strong in exposing people to new acquaintances, new ideas, and new opportunities. In turn, the social resources gained from weak ties can often be transformed into jobs and other economic resources. Accordingly, unlike economic capital, social capital cannot be seen in assets, but rather “inheres in the structure of relationships.” (Portes, 1998, p. 7). Segregated housing and school patterns result in people of color having less access to social networks in settings that continue to be dominated by whites. Accordingly, access to integrated schools may augment the weak ties that form the basis of social capital.

Networks studies typically seek to assess how the presence or absence of social networks, and how those networks are constituted, bear on outcomes of interest, or how network ties form. But they too often fail to engage with how ideas about networks enter policy design, and the impact the presence or absence of those ideas can have on shaping the contours of policy aimed at reducing social inequalities. Despite the importance of intangible inequality to sociologists, the thrust of the literature has not engaged with desegregation’s intangible underpinnings. Similarly, legal literature has largely overlooked the role intangible factors played in desegregation case law.

Desegregation is an ideal yet overlooked place to study how sociological ideas about inequality entered policy thinking in a massive, decades-long policy area. Typically, desegregation studies in sociology focus on the effects of inter-racial contact on outcomes of interest, mainly test scores (Angrist and Lang 2004; Card and Rothstein 2007; Gamoran and An 2016), inter-racial friendship (Quillian and Campbell, 2003), and long-term socioeconomic outcomes (Reardon and Owens 2014; (Fiel and Zhang, 2019, p. 1687), with most studies having found generally positive results across all three areas (Reardon and Owens, 2014, p. 210), though the research faces a variety of methodological challenges and numerous studies point in the other

direction (Bradley and Bradley 1977, Crain & Mahard 1983). How the state prioritizes networks-thinking in policy design bears on people's access to networks and the likelihood of reducing inequalities in intangible factors. For example, policies aimed at better resourcing low-income communities are different in kind from policies that aim to give people from low-income areas more access (via housing, transit, occupations, or education) to high-income communities, in how much they prioritize networks thinking as a policy value. Accordingly, sociologists ought to engage deeply with the ways networks thinking has inflected policymaking, how that thinking has changed over time, and how the absence of networks thinking in policy may bound the possibility of real reductions in intangible inequality, especially in a domain of life as monumental as education.

This chapter works to “bring the state in” to studies of social capital (Evans et al., 1985) by analyzing whether political actors (judges) recognized the role intangible inequalities play in life outcomes, and how that recognition has changed over time. When constitutional rights are thought to be a baseline status for all, whether some of the dimensions of inequality most important to sociologists entered judicial thinking about constitutional rights matters for understanding the contours of stratification over time. Rather than testing how network differences bear on individual-level outcomes, this chapter analyzes how political actors have viewed less tangible forms of inequality as relevant for public-policymaking.

While social networks influence opportunities and life outcomes, friends and family are traditionally thought of as being in the private sphere, outside the appropriate scope of government intervention. Findings illuminate how policymakers have viewed social capital disparities as threatening to equal opportunity, and how and when they have seen intangible forms of inequality as legally relevant and an appropriate site for government intervention.

## **The Role of Ideas in Social Policy Making**

Sociologists know that culture is an important dimension of the policymaking process. (Anderson, 2013, p. 81; Dobbin 1994; Campbell 2002; Steensland 2006; Esping-Anderson 1990; Skretny 2006). Policymakers bring different values and personal narratives to their roles; they frame issues differently depending on audience and electoral needs, and those frames can change over the course of the policymaking process (Steensland 2007). A problem's framing can have implications for the types of policy solutions that seem desirable, as can the values policymakers hold (Hitlin and Piliavin 2004). Culture-focused policy research, at best, supplements structural explanations with cultural ones, recognizing that the beliefs, values, and other dimensions of culture are relevant to policy trajectories and outcomes.

The influence of ideas, or general propositions concerning the nature of social reality, is a further facet of cultural sociology's approach to studying policy. The study of ideas in sociology goes back to Max Weber, who treated ideas as motivational for social action and thereby social change. Weber, famously, wrote that ideas are like 'switchmen' who direct interest-based action down one track or another (Weber 1954, 1930). Ideas interact with institutional factors to serve as motivators for policy change,

Especially in areas where policy effects are controversial and unclear, meaning no one policy is clearly preferable to another, ideas about appropriateness, fairness, justice, and effectiveness shape policy (Lipset 1996; March and Olsen 1989; Edelman and Suchman 1997). Ideas become institutionalized (Steensland 2006), but they are not fixed, and update in response to new situations (Emirbayer and Mische 1998). That is why it is important to study change in ideas over time, the ways they inform different policy programs and serve as the raw materials policymakers draw on to justify their goals. With "careful attention to how discourse is crafted

and mobilized” (Campbell, 2002, p. 27), studying ideas can illuminate how and why some policy ideas win out and others fade away (Mehta 2011; Campbell, 2002, p. 23).

Ideas-focused sociology has included several foundational policy-focused studies on education. Mehta (2013) argued that the Nation at Risk Report (1983) first tied educational success to economic success. Externally verifiable tests were required to ensure American students were not “falling behind.” This created a new policy paradigm, which then “created” its own politics, with states rushing to enact accountability standards. Berrey (2015) traced the meaning of educational diversity over time. She argued that the legal embrace of multicultural diversity, while on face about inclusiveness, masked structural forces producing inequality, making diversity logic, perhaps counter-intuitively, a barrier to structural reforms. Gordon (2015) tracked how academic ideas about the nature of inequality have transformed over time. She found that early twentieth century reformers were concerned with power inequalities, acknowledging the robust ways power operates in schools, politics, and communities. As the Civil Rights Movement focused more on discrete legal wins, a much narrower vision of what was being fought for emerged. This pivot, she argues, has stunted the imagined possibilities for social reform and has allowed the courts to adopt a narrow view of appropriate government intervention.

Legal ideas, as put forward by courts, have received relatively less attention in sociology, despite some early recognition of the importance of law. Bourdieu thought studying legal ideas was essential, for law yields a profound “but often invisible” (1991, 806) force on social life. While legal scholars dissect the language of opinions to understand the law, and lawyers spend years training to understand and interpret legal writing, sociologists have largely eschewed treating court documents as data, instead limiting their use of court cases to binary outcomes,

winners and losers (Corley, 2008, p. 469). Considering the language of opinions, however, rather than just the outcomes of cases, can be crucial to explaining the development of the law and fully understanding its force in social life, especially in an area like school desegregation, where the line between law and policy was so blurred, and judges were hands on in the actual creation of district desegregation plans.

Friedman argued that this divide between law and social science has negatively impacted collective knowledge – social scientists have an “almost pathological skepticism that law matters,” failing to take “law and legal institutions seriously” (Friedman, 2006, p. 262). He argued that social scientists were so constrained by empirical methodology, they overlooked the role of legal opinions themselves, unwilling to grapple with the perplexing, contested, and contestable nature of law. Despite calls in social science for deeper engagement with opinion content (Segal et al. 1995; Maltzman, Spriggs, and Wahlbeck 2000, 154; Budziak et al., 2019, p. 2), these calls have rarely been heeded. Judicial “interpretations, elaborations, and justifications of doctrine” (Cotterrell 1992, 226) are important topics for sociological study, because they “help to propagate structures of perception and belief that are the foundations of social order” (226). While sociologists of law have recognized that legal rules and judicial rulings are key resources for social action (see, e.g., Bernstein 2001; Burstein 1991; Edelman 1992; McCann 1994; McIntyre 1994; Stryker 1994, Pedriana, 2006, p. 1722), there remains next to no engagement in sociology with the primary medium through which legal ideas are debated, refined, and disseminated.

Meadow (2010) is among the exceptions. She analyzed how courts throughout American history have made gender determinations, what criteria they have used to establish gender categories, and how ideas about gendered characteristics have changed over time. Meadow

accomplishes this by looking at the content of court documents, assessing how powerful and final actors make sense of the facts before them, elaborate their ideas in text, and ultimately come to decisions that profoundly impact people's lives. By studying legal discourse, she was able to capture judges' rationales at "the moment of the creation and installation of gender categories...map[ping] the key ideological battles fought around gender across contexts."

(Meadow, 2010, p. 821).<sup>15</sup> Another example is Rogers Smith's *Civic Ideals*, in which he analyzed the dimensions of citizenship adopted by American federal courts, showing how ideas about race, gender, and (in)egalitarianism were incorporated into American legal categories across the full span of U.S. history, and how those ideas, and accompanying definitions, have varied over time (Smith 1997).

Investigations of ideational change in case law can help to explain how policy programs change over time, and how certain ideas fade, and others emerge. Though institutional and political factors are crucial pieces of the puzzle, ideas have an important role in this story too. Furthermore, court cases can be a central site in which sociological ideas are transmitted and made influential. While there has long been study of newspaper articles as idea disseminators, court cases also form a written record of how sociological ideas are communicated among a specific, important public audience (Hallett et al., 2019, p. 2). Especially in a policy area as massive as school desegregation, judicial ideas directly impacted the day-to-day lives of millions of children, families, and working professionals. This project brings ideas into discussions of policy change, analyzing how one group of key actors – judges – theorized the nature of equal

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<sup>15</sup> Studies discussing the social construction of legal categories are more common in law than in sociology. Lon Fuller's famous 1967 *Legal Fictions* helped found this tradition. He argues that courts rely on false, or at least incomplete, contestable, or untested statements not in an attempt to deceive, but rather to temper the potentially disruptive changes of doctrinal shifts. Legal fictions can have a stabilizing and legitimizing effect on political and legal categories, like precedent, and they are one of the ways judges maintain power. They also potentially allow judges to mask normative choices in more abstract or detached language.

rights, and how those ideas got cemented in public policy. To fully grasp the story of how desegregation fell off the policy agenda, for example, would require an analysis of policymakers' ideas about the relative value of integration compared to alternative goals, and an examination of the variety of justifications put forward for this massive policy shift.

While sociologists have long been concerned about the causes and consequences of neighborhood and school segregation rates for life outcomes (Fiel 2013; Massey and Denton 1993; Reardon and O'Sullivan 2004), this project tackles the segregation problem from a different angle: how have legal ideas about why segregation matters changed, particularly its relationship to equal educational rights. Because school desegregation was led by the judiciary, the outcomes of cases served as the public policy documents. Judges, more than other political actors, are expected to formulate their decisions through broad discussions of ideas, intersecting the case at hand, abstract notions of justice, precedent, and the Constitution. Therefore, while ideas are important determinants of policy generally, school desegregation is a ripe area for ideas research.

### **Social Science & Desegregation**

The relevance of social psychological research to the *Brown* decision is long-debated. The discussion usually begins with *Brown's* Footnote 11, which listed a variety of studies that found that segregation harmed Black children by creating "feelings of inferiority" in them in school. The most famous of these was the Clark doll study, in which social psychologists Ken and Mamie Clark conducted lab experiments with Black children. Their subjects, children between the ages of three and seven, were asked to identify the race of four dolls and then report which color dolls they preferred. A majority of the children preferred the white dolls and assigned positive characteristics to them. The Clarks concluded that prejudice, discrimination,

and segregation created a feeling of inferiority among Black children that damaged their self-esteem. By appealing to social science, some have argued that the Court hoped to enhance the legitimacy of the ruling or felt that a ruling grounded in empirical social science would not be viewed as a moral condemnation of Southern segregation (Balkin, 2001, p. 51).

In addition to the Clark doll research, Gordon Allport's contact hypothesis has long been thought to have been influential to desegregation (Mussen, 1950; Pettigrew 1979; Paluck, Green, and Green 2019; Pettigrew and Tropp 2006). Allport wrote that prejudice "may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom, or local atmosphere), and provided it is of a sort that leads to the perception of common interests and common humanity between members of the two groups." (p. 281). The "contact hypothesis" set in motion decades of research assessing whether and under what conditions intergroup contact diminishes (or catalyzes) hostility toward outgroups. Though not conclusive, an influential 2006 meta-analysis, and a 2019 followup, generally showed that contact typically helps reduce prejudice.

Scholars have questioned how impactful the doll study actually was on *Brown*. Some have argued that this was not the basis of judicial decision-making and that the crux of the legal wrong identified was that state racial classifications were deeply insulting to Black people (Taylor 1978). Others have argued that desegregation legal standards were more value-laden and abstract than they were empirically based, making social science less relevant (Ryan 1999).

Regardless of social science's impact on the *Brown* decision, in the aftermath of *Brown*, social science evidence was deployed both for and against integration orders: to try and causally tie school desegregation to test scores or another educational outcome, to show no relationship

between school racial composition and student achievement, to show the complexity of determining what causes demographic integration in schools and neighborhoods, to assess the degree to which race neutral policies perpetuate segregation, among other questions. A cottage industry of social scientist expert witnesses grew up out of *Brown*, with a handful of scholars routinely testifying about the impact of desegregation on outcomes or the efficacy of certain plans (names include Christine Rossell, Gary Orfield, David Armor, and Diane Ravitch).

While social science ideas have long been swirling in the desegregation space, there are few references in existing literature to the intangible language in *Sweatt* and *Brown*, despite its clear social science origins. Exclusively focusing on the inferiority concept or the contact hypothesis (which is focused on racial tolerance and prejudice, not the social networks benefits that may come from desegregation) misses a broader set of social scientific ideas embedded in much of the case law. “Intangible considerations” and “feelings of inferiority” are not inherently co-extensive. In the cases leading up to *Brown*, the thrust of “intangible” is the idea that a set of non-financial resources inhere in students and institutions. The language is reminiscent of sociological ideas about non-financial forms of inequality, rather than psychological ideas about self-esteem, actualization, or prejudice.

In demonstrating the relevance of intangible thinking in the pre-*Brown* cases, this chapter challenges the idea that social scientific notions of inequality were not ultimately relevant to the *Brown* ruling, or to the thousands of desegregation cases that followed. The intangible language the Supreme Court used could be incredibly capacious, implying that various non-financial factors were constitutionally relevant. While it is impossible to know the slew of social and political forces that weigh on judicial decision-making, recognizing the relevance of intangible factors, via the texts themselves, provides helpful purchase on how an under-appreciated

dimension of social science research, or at least social science thinking, may have influenced desegregation's trajectory.

### **Changing Legal Ideas About Equality, Desegregation, and Subordination in the Law**

Scholars in both law and sociology have recognized shifts in judicial understandings of desegregation and *Brown*, yet with little to no attention to changes in the relevance of intangible factors in desegregation decisions. Coleman (1968), for example, argued that the concept of equal opportunity in education has held different meanings at different times, ranging from a guaranteed minimum years-of-schooling to a common curriculum (versus a heavily tracked one), to racial school integration, to per-pupil funding. These disagreements have left education policy a messy terrain, with vastly different interpretations of what the government is expected to guarantee.

Siegel (2003) tracked changes in legal writing about equality, specifically in the context of desegregation. She argued that while *Brown* was originally decided on anti-group subordination grounds (harm caused to Black children by legal segregation), a combination of factors including backlash, the conservatization of the courts, and the legal academy's resistance to social science evidence, morphed the reasoning to anticlassification, or the view that equal protection means shielding minority groups from all state classifications, even if those classifications are meant to improve equal opportunity. What was initially a real recognition of the pervasive forces of inequality and oppression became a formal, narrow, and abstract near-obsession with state categorization as the pernicious force *Brown* meant to cure. The goal post had moved; the evil *Brown* meant to ameliorate was initially racial subordination, but slowly, the

evil became the government's use of racial categories.<sup>16</sup> Conservative judges have argued that this anti-categorization is essential to a project of racial equity; liberals have argued that this approach is narrow, color-blind, overly abstract, and misses the depths of material inequality.

Tushnet (2004) made similar claims, holding that anticlassification was easier for the courts to enforce, for the logic did not require a real interrogation of the reasons segregation harmed Black children (e.g., diminished self-esteem, resource disparities). Ryan (1999) documented a responsive trend in litigation, with advocates, recognizing the shift to anticlassification, moving toward equal financing and educational adequacy suits. He lamented this shift, though, particularly the abandonment of the idea that non-financial factors might figure into school equity litigation in a serious way, as they did with desegregation.

Missing from the scholarship on changing legal ideas about desegregation and *Brown*, specifically the anti-subordination versus anti-classification scholarship, is a direct engagement with the way “intangible factors” have been presented throughout litigation up to and following *Brown*. This chapter, and the following one, dive deep into the broad conception of what barriers to equal rights segregation presented, and demonstrates that for part of desegregation's history, “intangible factors” were thought to be part of the bundle of rights desegregation constituted. This study builds on Siegel (2003) by showing one area in which the courts were embracing an anti-subordination approach: by recognizing the dramatic and sometimes hard to see ways inequality actually works for school children.

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<sup>16</sup> This debate wasn't just happening in the school segregation context. In the inter-racial marriage context, the Court more openly embraced on-the-ground realities. The state in *Loving v. Virginia* (1967) defended restrictive marriage laws on the ground that they were technically neutral. The Court rejected this, acknowledging that the laws were intended as tools of racial oppression. The Court was willing to peel back the curtain on a seemingly neutral law.

Furthermore, by building intangible factors into the story of *Brown*, I help to explain how the desegregation *remedy* got so big (i.e. the massive busing of seventy million children) – because the underlying rights also did, if briefly. Limiting children’s access to intangible factors was a denial of their rights. The only remedy for this vision of desegregation, then, that would actually vindicate children’s rights, was demographic integration. The remedy, though, was perhaps inherently flawed, in that courts, with limited powers and limited resources, would have had to fundamentally reshape school systems and neighborhoods to actually see intangible factors vindicated as rights, intervening in children and family networks, relationships, and connections, areas far outside even broad traditional remedies. But any hope of actually realizing those rights required at minimum aggressive desegregation injunctive orders, despite opposition and resistance from white families that forced judges to approve imperfect remedies that did not (and perhaps could not) vindicate childrens’ rights.

This project reveals courts grappling with the ways inequality actually works on the ground, the sociological forces that comprehensively shape the lived experience and opportunities available for children. The project also reveals how broad ideas about the nature of inequality can give way to narrower ones reliant on abstract theories of law, where all desegregation meant was stripping Black/white signs from schools, rather than a social system of oppression, with the rise of intent focused language that narrowed the mission of *Brown* and its progeny from undoing inequality to rejecting government classifications based on race.

Lastly, this will be the first project that uses computational text analysis methods to track changing legal ideas in the full corpus of desegregation case law. Computational methods are a useful tool in helping track changing ideas. Hall and Wright (2008), writing just before the proliferation of computational text analysis, made the case that content analysis could “form the

basis for a uniquely legal empirical methodology” (65). Though various case studies have analyzed the logics of single desegregation orders (Bonastia 2012; Bass 1990; Peltason 1961; Reed 1978), mostly in cities that had busing battles, there have been no attempts to gather or study the full set of orders and rulings to trace changing rationales. Most judicial scholarship focuses on Supreme Court decisions and marquee lower court decisions. Harnessing computational text analysis allows for analysis of the full set of lower court cases and a truly national assessment of the presence of the concepts of interest. Text analysis methods align well conceptually with legal scholars who have studied judicial writing and the framing of disputes. The computational component allows scholars to study a larger number of cases and identify broad patterns across cases. While the thrust of litigation may move in broad strokes, the debates about the meaning of equal opportunity occur in the discourse of opinions.

## **Data and Methods**

### *Background: Text Analysis*

Computational text methods in sociology are fast transforming interpretive content analysis, allowing researchers to analyze a vastly larger corpora of text data with new tools to reduce bias. These methods presumably hold promise for researchers to glean the unspoken, easy to miss, or implicit meanings that occur in impossibly large to read data sets. The end goal is a better understanding, through computer-assisted immersions into what people say and write, of the forces that shape how people understand the social and political world (Bail, 2014, p. 467; DiMaggio 1997).

Various computational methods have sought to capture the hermeneutic appeal of content analysis more powerfully. Topic modeling, for instance, measures the co-occurrence of words within documents to estimate common topics or themes across a large corpus (Roberts et al.

2014). Structural topic modeling allows document-level covariates (for example, political party affiliation, date, and region) as inputs to improve the coherence of the topics. Sentiment analysis, alternatively, allows research to assess the positive or negative affect or opinion valence of a certain document, or that surrounding a certain term or topic within a document, on its own, over time, or as a function of other covariates (Idler et al., 2022, p. 4).

Dictionary methods are perhaps the most common text analysis tool in sociology. Researchers start by theoretically deriving, based on prior knowledge, a cohesive dictionary of words connected to a category or concept of interest (Browne et al., 2021, p. 7), and then count the instances of these words in their documents to estimate word frequency (or proportion) distributions and, often, their changes over time (Grimmer and Stewart 2013). Word frequencies are viewed as a measure of emphasis, relying on the classic linguistic assumption that language reflects culture and meaning (Whorf 1940). Thus, word frequencies are used to assist assessments of what concepts are central in each document (Haber, 2021, p. 49). To the extent that judges use a particular set of words, for example, that set of ideas is assumed to be represented in their thinking. Dictionary methods are best suited for moments when the researcher already has a predetermined category of interest (Bonikowski and Nelson 2022).

While text analysis methods are relatively new, particularly in sociology (Evans and Aceves 2016; Grimmer and Stewart 2013), they are growing, with studies on topics as diverse as factions within women's movements (Nelson 2021), populism in political speech (Bonikowski and Gidron 2016), charter school language around inquiry based learning (Haber 2021, p. 44), the political leanings of economists (Jelveh et al., 2014), and constitutional discourse in Congressional hearings (Pozen et al., 2019).

Until recently, though, studies have lacked sufficient theoretical anchoring (Bonikowksi and Nelson 2022). While in some ways an improvement on traditional content analysis, computational methods largely developed in computer science, where questions tend to deal more with prediction and pattern recognition than with the theoretical questions about meaning, culture, and social structure that sociologists care about. How useful these new methods are, acting alone, for gleaning information about how people understand the world, remains an open question (e.g., DiMaggio 1997; Bail, 2014, p. 467). This is especially complicated given that social scientists have largely embraced the idea that meaning is flexible, personal, and impermanent (Mohr et al., 2013, p. 677).

As a strategy for best utilizing computational methods to answer pressing sociological questions, Nelson (2020) advocates what she called a computational grounded theory approach to text data. Grounded theory is a classical approach in sociology (Glaser and Strauss 1967). Scholars adopting this method move back and forth between inductive and deductive methods, updating theoretical ideas and hypotheses based on the empirical data collected. Nelson's approach attempts to mirror this interplay with computational methods: 1) begin with a basic computational inquiry, like topic modeling or dictionary search, into patterns in the texts, and sort the texts into categories; 2) follow that with a deep hermeneutic dive into (usually subsamples of) the text data; and then 3) conduct confirmatory computational analyses to test hypotheses inductively derived from the first two steps. Initial topic weights from Step 1 allow researchers to select documents for targeted, qualitative close reading from a very large corpora (Nelson, 2021, p. 15). The interpretive middle step translates the initial computational output into meaningful sociological concepts about the social world (Nelson 2020, p. 30). Step 3 deductively tests if these concepts hold and/or how they vary throughout the corpus.

Few studies have utilized computational methods on court documents. Perhaps there is some wariness among legal scholars in ceding interpretive ground to computational methods when interpretation is the coin of the legal doctrinal scholarship realm. But there are notable exceptions. Douglas Rice, for example, a political scientist, is a leader in this field. His questions focus on the internal workings of the Court, and how the courts interact with other branches of government. Rice (2014) found that Supreme Court decisions quiet litigation in adjudicated upon issue areas; however, they also raise new issues that then show up in later federal court cases. Rice and Zorn (2016) used large-scale sentiment analysis on the full corpus of every Supreme Court decision to show that since the 1920s, dissenting opinions have gotten more intensely emotional in language used, and that the same is true for majority opinions since the 1970s. Rice (2016) found that in cases with dissenting opinions, the majority opinions are longer and cover a wider array of issues. He argued that dissenting opinions are a strategic tool used by dissenting justices to influence framing of majority decisions. Other legal text analyses have considered judicial ideology (McGuire and Vanberg 2005), clarity and complexity of opinions (Owens and Wedeking 2011), the Supreme Court's treatment of the press over time (Jones and West 2021), the influence of party briefs on opinion content (Corley 2008), and intergovernmental relations (Owens, Wedeking and Wohlfarth 2013).

### *Data*

The empirical goal of this chapter is to trace the meaning of “intangible” and related terms throughout case law in the years preceding and following *Brown*. Put differently, the chapter is interested in whether sociological concepts, flagged as the “intangible factors” – social capital, social forces, social interactions, and their indicators – were present in judges’ thinking

about school desegregation and the difficulties inherent in making separate equal. The first step was to compile the school desegregation court case opinions.

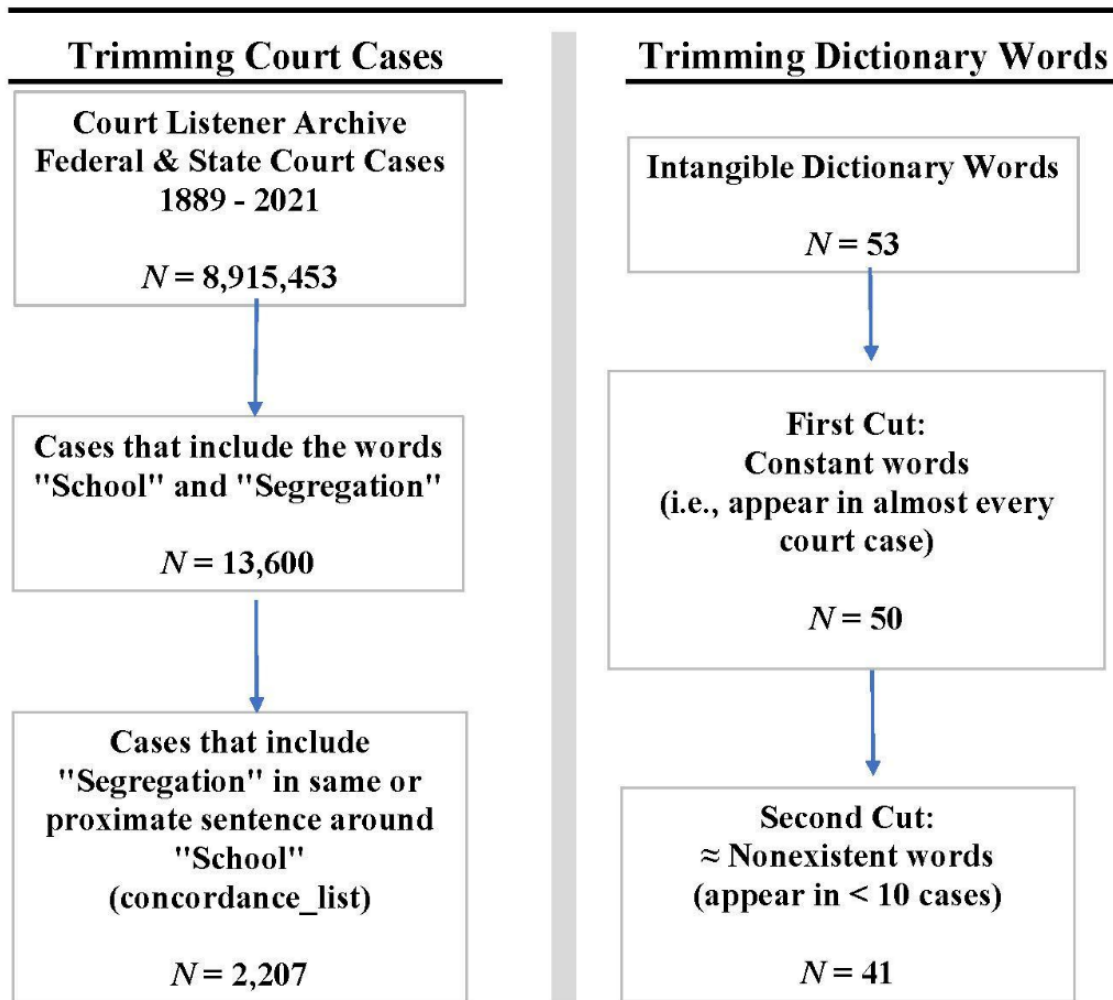
*The Court Listener*, a not-for-profit organization that collects and digitizes legal documents, has gathered the raw text of more than eight million judicial opinions from court websites, in addition to several other variables (e.g., judges' names, court level, state of case origin, etc.). These variables are attached to the cases as digital "metadata."

I retrieved the federal opinions and state supreme court opinions from *The Court Listener* (roughly 30GB worth of opinions). I then produced a smaller set of school segregation-related cases by scraping only opinion texts that contained both the words "school" and "segregation" (or its lemma), yielding a set of 13,600 opinions. I did a random spot check with WestLaw and LexisNexis Legal, two for-profit legal indexers, and found near perfect alignment between *The Court Listener* and these programs.

The raw dataset required significant processing, cleaning, and normalization (Denny & Spriling 2018). This included converting to plain text, removing control characters, unexpected symbols, and stop words, setting one space between words, and so on. Inspection of selections of the cleaned opinions from the 13,600-case dataset quickly revealed a validity problem: even though all the opinions had the words "school" and "segregation" in them, not all the opinions were school desegregation cases. To give just one example: Chief Justice John Roberts' opinion in *McCutcheon et al. v. Federal Election Commission* contained the word "school" in his citation of a free speech case, and the word "segregated" in the context of discussion about the need for separate financial accounts for political action committees (i.e., nothing to do with school desegregation). Seeking to validate the corpus, in the next step, I trimmed the dataset further by using "school" as the anchor, finding the proximate sentence(s) around the term "school," and

checking to see if “segregation” was present, heeding Bonikowski and Nelson (2022)’s guidance to “theorize [one’s] data.”

The full sequence of this data trimming process is summarized in the left panel of Figure 1. As shown, the process produced a final sample of 2,207 opinions that constitutes my School Segregation Court Cases (SSCC) dataset. As a check, I randomly selected a number of cases from the SSCC and all were relevant to school segregation.



**Figure 1.** Steps to Producing the School Segregation Court Cases (SSCC) Dataset

Table 2 provides some descriptive information on the SSCC. Inspection of the modes shows that the number of desegregation cases hit its height in the 1970s (29% of the opinions came between 1970 and 1979, with cases falling in rough bell-shaped curve around that peak). Forty-eight percent of segregation cases were federal court of appeals opinions, followed by federal district courts (28%) and state supreme courts (17%). The greatest proportion of segregation cases came from the South (41%) and Midwest (23%). Texas was the most likely state of origin (14% of all cases), followed by California (9%). Accordingly, for the federal court cases, the Fifth Circuit (which includes Texas, Louisiana, and Mississippi) and Ninth Circuit (most all of the western states including California) were the most likely circuits of case origination (20% and 15% of all cases, respectively, not shown in the table).

### *Dictionary Methods*

The next step was to create a dictionary of words that were likely candidates to relate to or reflect the meaning of the judiciary’s “intangible” concept, that I could explore in the SSCC court opinions. Topic modeling was also applied to the SSCC to identify key concepts but proved ineffective.<sup>17</sup> To develop the dictionary, I followed Nelson (2017) and Haber (2021) and used a combination of data-driven and interpretive techniques. An emerging trend in the social sciences, this workflow represents a modified form of computational grounded theory (Nelson 2017): It begins with content knowledge (seed terms), detects patterns with computational

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<sup>17</sup> The main problem with topic modeling was the method’s limited ability to pick up the small topic slice of data of interest to this project from text documents that are dominated by legal language dispersed throughout their hundreds of thousands of words. The method had no difficulty yielding word clusters – considerably more than a dozen – but all of them reflected topics in the legal domain – often legalistic language about judicial process – of the sort we might expect from legal documents. Examples included word clusters around plaintiffs, defendants, and courts, companies, employers and employees, laws, actions, and evidence, federal and state, and schools, districts, and boards. Figure A (in the appendix) shows a word cloud from the most frequently occurring words in the opinions. The topic modeling algorithm focused on the co-occurrence frequency and distance of these most often occurring words to extract topics, such that my terms did not register as a topic. The dictionary method proved more useful because it allowed for inputs to give the computer estimation procedure some directions for targeting.

methods (finding similar terms with word embeddings), and then confirms sociological patterns via interpretation (Haber, 2021, p. 51). Specialized dictionaries have the benefit of being domain specific and are especially useful when specific phrases are of interest, or terms are likely to be rare but nonetheless important (Nelson et al., 2021, p. 27).

To create the intangible dictionary, word-embedding models were constructed from the set of cases cited in *Brown*. I read the cases several times and selected terms for inclusion based on the degree to which they reflected sociological concepts of interest. The goal was to build a set of terms that captured the “intangible” factors that the *Brown* Court felt prevented separate schools from ever being made equal through resource fortification. I had four research assistants do the same. There was tremendous (blind) overlap between the five of us in words selected. I also discussed my dictionary with a variety of leading scholars on school desegregation; they approved the terms in the sense that, knowing the cases, they expected that the dictionary would successfully locate the aspects of the judges’ thinking that was the focus of the project.

I then used these terms to iteratively expand a set of seed terms into a longer dictionary of words and phrases that also have meanings reflective of the core concepts, using word embedding techniques. Word embeddings are vector representations of words that preserve the words’ semantic meaning relative to other words – a process that can be used to generate related terms based on contextual usage (Pozen et al. 2019). Mechanically, word embeddings assess word associations using “word context windows,” indicating the number of words (typically 5 to 12) on either side of focal word  $w$  to consider as connected to  $w$  (Haber, 2021, p. 51).

**Table 2.** Descriptive Statistics: School Segregation Court Cases (SSCC) Dataset ( $N = 2,207$ )

<b>Variable</b>	<b><i>N</i></b>	<b>Percentage</b>
<b><i>Year</i></b>		
1949 or earlier	14	0.6
1950 - 1959	151	6.8
1960 - 1969	361	16.4
1970 - 1979	644	29.2
1980 - 1989	440	19.9
1990 - 1999	319	14.5
2000 - 2009	205	9.3
2010 or later	73	3.3
<b><i>Court Level</i></b>		
U.S. Supreme Court	64	2.9
U.S. District Court	619	28.1
U.S. Court of Appeals	1058	47.9
State Supreme Court	366	16.6
Other Court	100	4.5
<b><i>Region of Origin (where available)</i></b>		
Northeast	235	15.6
Midwest	350	23.3
South	610	40.6
West	309	20.6
<b><i>Most Frequent (Top 20) States of Origin (where available)</i></b>		
Texas	214	14.2
California	135	9.0
Illinois	82	5.5
Washington D.C.	70	4.7
New York	66	4.4
Pennsylvania	63	4.2
Michigan	47	3.1
New Jersey	47	3.1
Louisiana	45	3.0
Ohio	41	2.7
Missouri	38	2.5
Maryland	37	2.5
Washington	36	2.4
Nebraska	30	2.0
Tennessee	28	1.9
Alabama	27	1.8
Iowa	27	1.8
Massachusetts	26	1.7
Florida	25	1.7
Oklahoma	25	1.7
<b><i>Case Length (number of words)</i></b>		
111 - 1,536	552	25.0
1,537 - 3,025	552	25.0
3,026 - 5,672	552	25.0
5,673 - 102,063	551	25.0

I identified word vectors positioned in the vector space near the seed terms, indicating semantic similarity (Radim and Sojka 2010). I then manually honed the dictionary, removing terms that were conceptually irrelevant, given my knowledge of the corpus, and words that did not capture the concepts of interest. Compared to unsupervised methods, dictionary methods require more judgment calls to interpret and verify results (Nelson et al., 2021, p. 17). It is possible that the dictionary could be improved by more iterations of adding or subtracting terms, but small tweaks at this stage are unlikely to significantly impact results (Pozen et al., p. 70).

The right panel of Figure 1 shows that the baseline intangible dictionary contained 53 words. Three words (objective, status, and standing) were cut because of lack of variation – as common legal terms (e.g., “plaintiff objected,” or lacked “standing”), they appeared in most of the opinions. Nine other words were cut for the opposite reason – they appeared in almost no (< 10) cases. The result was a final-form intangible dictionary of 41 words. Table 3 lists the 41 words that constitute the intangible dictionary, in alphabetical order.

The logic of dictionary text analysis hinges on the idea that selected terms capture concepts of interest, and that the appearance of those terms in the text data means authors were indeed thinking about concepts of interest. Therefore, when judges used these terms, it reflects an engagement with sociological ideas about inequality. Some terms in Table 3 are very recognizably social scientific: quantitative, stigma, sociological, psychological, measurable, and survey, for example. Another group of terms seeks to capture the idea of social networks and the role they play in school equality: network, status, reputation, alumni, and prestige, among others. Appearance of this set of terms, on first cut, shows judges engaging at least somewhat with sociological ideas about inequality. Other terms come more directly from reading the cases that led to *Brown* and iterating from there. For example, substantial equality was used to reflect a

broad vision of school equality that runs deeper than purely objective financial dimensions. Similarly, made equal, and the inability for schools to be made equal without integration, were included toward capturing judicial thinking about what input factors could make a school equal, and which were insufficient. Engage with, encounter, commingling, participate fully, tolerate, and diversity have the potential to capture ideas about the benefits of integration for children's long-term development, and the risks segregation posed for dividing American society.

### *Analytic Approach*

First, using the SSCC dataset and intangible dictionary, I explored the statistical distribution of the words in the court opinions. Second, using exploratory factor analysis, I examined whether and how subsets of words cluster into distinct sociological concepts in the court opinions. Third, I plotted the proportion of cases that included the concepts by year, and estimated regression models to summarize those plots and show how, on average, the representation of the concepts in the legal opinions changed over historical time.

## **Results**

### *Word Distributions in the SSCC*

The counts and percentages in Table 3 show that 168 cases (7.6%) used the word “sociological” explicitly, and 77 (3.5%) spoke of “intangible” factors. Several cases contained words such as “expectations,” “stigma,” “inferiority,” “equal opportunity,” and “psychological.” Other words, such as “self-image,” “melting pot,” and “meaningful integration” appear considerably less frequently, though that rarity may be useful later (in Chapter 3), for identifying the smaller number of cases saturated with these terms for interpretive reading.

**Table 3.** Percentage of Cases with Intangible Dictionary Words:  
School Segregation Court Cases (SSCC) Dataset ( $N = 2,207$ )

<i>Word (alphabetical)</i>	<i>N</i>	<i>%</i>
1. Acquaintance	84	3.8
2. Alumni	45	2.0
3. Apartheid	29	1.3
4. Aspirations	120	5.4
5. Assimilation	37	1.7
6. Associate	1128	51.1
7. Commingling	47	2.1
8. Conduit	25	1.1
9. Destiny	27	1.2
10. Diversity	365	16.5
11. Educational opportunity	560	25.4
12. Enclave	71	3.2
13. Encounter	250	11.3
14. Equal opportunity	314	14.2
15. Exchange views	19	0.9
16. Expectations	879	39.8
17. Inferiority	458	20.8
18. Influence	560	25.4
19. Intangible	77	3.5
20. Interaction	210	9.5
21. Less measurable	13	0.6
22. Made equal	23	1.0
23. Mainstream	101	4.6
24. Meaningful integration	18	0.8
25. Measurement	1124	50.9
26. Melting pot	21	1.0
27. Multiracial	28	1.3
28. Network	65	2.9
29. Participate Fully	32	1.4
30. Prestige	83	3.8
31. Profession	810	36.7
32. Psychological	307	13.9
33. Reputation	150	6.8
34. Self image	13	0.6
35. Sociological	168	7.6
36. Stigma	182	8.2
37. Substantial equality	102	4.6
38. Survey	294	13.3
39. Tangible	134	6.1
40. Tolerate	384	17.4
41. Traditions	835	37.8
<i>Total Number of Dictionary Words Used</i>		
0	233	10.6
1 - 2	580	26.3
3 - 4	480	21.7
5 - 9	664	30.1
10 - 14	185	8.4
15 - 19	49	2.2
20 or more	16	0.7

Quantitatively, saturation and frequency are common methods for evaluating results. For example, cases that have a high frequency of terms can be thought to reflect the key ideas more robustly, and cases that had a higher number of unique terms in the dictionary can be thought to be more saturated with the concepts of interest. The bottom panel of Table 3 shows the total number of intangible dictionary words used in each case. The mode was 5 to 9 words – 30% of the 2,207 opinions (664 cases) in the SSCC contained 5 to 9 of the intangible dictionary terms. Eleven percent of cases included ten or more of the words. At the extremes, 233 cases (11%) used none of the words, and 16 cases (1%) contained 20 or more of the words. On average (not shown), the cases contained 4.6 words, with a standard deviation of 4.1 words.

The presence of this language in the court cases, on a meaningful scale, is itself an important finding. It demonstrates that the concepts were present in a significant number of cases, and that the terms appeared a significant number of times. These kinds of representations and distributions would have been exceedingly difficult to see with reading alone (Nelson 2021).

### *Word Clusters*

Investigating each of 41 words item-by-item through the corpora would more likely confound than clarify understanding of the presence of sociological concepts. Instead, I entered the dictionary terms into a principal component factor analysis (Promax rotation) to determine whether the relatively large number of observed words might be indicators of a smaller number of concepts, by observing how the words tended to go together or cluster together in the data.

Table 4 shows the results. The five factors with eigenvalues greater than 1.5 are displayed, and together they explain about 30% of the variance in the data. Words with factor loadings  $\geq .4$  were considered contributing variables to the given factor and are shown in the table.

Based on my interpretation of the underlying concepts (or latent variables) reflected by the factors, each word-item cluster is given a substantive label in the first column of Table 4. The first factor, referred to as “social capital,” includes several words reflecting that idea: noneconomic resources and social ties (e.g., associations, expectations, alumni, professions, influences) that may be important to life outcomes and hindered by school segregation. Alternatively, this first factor may also be viewed as a more general sociology dimension (note that the word “sociology” is in the cluster), where cases high on this factor are probably invoking some kind of sociological thinking in their opinions (including social capital, which is itself a distinctly sociological concept). The second factor is labeled “diversity” and includes that word along with the word “multiracial.” The conceptual analog to factor three is labeled “intangible.” This factor is presumed to reflect intangible factors as conceptualized in *Brown* and discussed throughout this dissertation. As a check, I selected a few cases that had high loading on this factor and surveyed their text (a much deeper version of this kind of text work is the subject of Chapter 3). This conceptualization was supported – cases here discussed, for example, the discrimination created by segregation because of the impact upon segregated students of (tangible and) intangible factors, the lack of equal protection afforded when Black students are not able to enjoy the intangible considerations like exchanging views (a term also loading on this factor), etc. Factors four and five seem straightforward, reflecting dimensions of psychology, and assimilation, respectively.

The first factor, social capital, includes 10 words that may reflect a broad range of concepts. While some of the words (e.g., associations, alumni, professions, expectations) on face reflect some of the (typically nonmonetary) shared social values, ties and resources related to life chances that are commonly associated with social capital, other words (e.g., measurement) are

not obvious indicators of that term. To explore this further, I conducted separate factor analyses (not shown) on just the 10 terms in factor 1, under a variety of more or less conservative selection criteria and loading requirements, to detect whether there were finer conceptual distinctions within factor 1. Most iterations continued to load the 10 words on a single factor, indicating loosely that cases where the obvious social capital words were used were also cases more likely to use the other words, like measurement, less measurable, and sociological, alongside them.

**Table 4.** Loadings from Factor Analysis of Intangible Dictionary Words: SSCC Dataset

Concept	Word	Factor No.				
		1	2	3	4	5
1. Social Capital	Profession	0.69				
	Measurement	0.67				
	Associate	0.62				
	Expectations	0.58				
	Alumni	0.56				
	Influence	0.51				
	Less measurable	0.50				
	Traditions	0.49				
	Sociological	0.45				
	Aspirations	0.41				
2. Diversity	Multiracial		0.79			
	Diversity		0.76			
	Tolerate		0.63			
	Interaction		0.63			
3. Intangible	Intangible			0.65		
	Tangible			0.54		
	Exchange views			0.51		
	Inferiority			0.47		
4. Psychology	Self image				0.72	
	Mainstream				0.70	
	Psychological				0.59	
5. Assimilation	Assimilation					0.72
	Enclave					0.71
<i>Eigenvalue</i>		5.49	2.05	1.79	1.63	1.52
<i>% variance explained</i>		13	5	4	4	4

*Note: Promax rotation, min. eigenvalue = 1.5, blanks < .4. N = 2,207 court opinions*

I also spot checked a few cases that loaded highly on this factor and found consistency with the conceptualization – cases here talked about the complicated sociological forces that disadvantaged Black students in segregated schools, including students’ likelihood and quality of participation in extracurricular activities; relationships with school staff who could address anticipated needs in college and cultivate career interests; the importance of minority role models for Black children; the importance of both white and minority students being exposed to positive role models of different races; the problem that in segregated Black schools employees who interact with Black students were more likely to be janitorial staff or other service workers than teachers or other professionals; the importance of the teacher/student relationship and high teacher expectations for student achievement, etc. While these texts recognizably line up with the factor’s social capital label, the cases I sampled also variously referenced the (presumptively mainstream or middle class) values that best reflect cultural traditions, the importance of educational aspirations, the lower teacher expectations minority students are subjected to, and other aspects of what might be viewed as minority students’ access to cultural capital. Thus, while the factor is labeled social capital, I caveat that it may also be indicative of a more general sociological thinking present in the case, or of a case’s invocation of some combination of dimensions of social and cultural capital concepts.

Guided by the factor analysis, I created summative scales (number of cluster words used in the opinion) for each concept, and then scored each case 1 for the presence (above mean) of that concept in the opinion, otherwise 0. An opinion scored 1 can be viewed as including the idea of social capital, for example, 0 otherwise; on diversity 1 = includes the concept of diversity, 0 otherwise, and so on. De facto, this meant that cases with four or more of the ten social capital words scored 1 on social capital; one or more of the four diversity terms scored 1 on diversity;

one or more of the four intangible terms scored 1 on intangibles; one or more of the three psychology terms scored 1 on psychology; and cases that included either the word “assimilation” or the word “enclave” were scored 1 on assimilation. We can’t know from this statistical flagging whether the idea was referenced in the court opinion in passing, embraced, rejected, interrogated, critiqued, dismissed, etc., but it is reasonable to infer that, when scored 1, the opinion was utilizing or invoking the concept in some fashion. In the full dataset across all years, the diversity concept appeared in 34% of all cases, the intangible concept in 25% of all cases, the social capital/sociology concept in 18%, psychology in 16%, and assimilation in 8%.

By plotting the concept’s presence/absence over the 60 year period, we can, in turn, track the proportion of all school desegregation cases where judges were invoking these ideas over historical time. The results are shown in Figures 2 through 5.

### *Change Over Time*

Any inspection of time-change in the appearance of words in court cases will have to first take into account length of court opinion. Length of the opinion is a potential confounding variable in the relationship between time/year and the probability of word appearances if 1) court opinions changed (likely got longer) over time (i.e., case length was correlated with the independent variable); and 2) longer opinions per se were more likely to contain words of interest (i.e., case length was correlated with the dependent variable). Both turn out to be true.

First, inspection of the plot of mean case length by year and simple regressions (not shown) showed that in 1955, the average length of the opinions was about 2000 words (after “stop” and other words were removed – see Data section above). Case length increased by about 100 words per year, on average, or by about 1000 words every 10 years, over the period. Second, plots of word appearance by case length suggest that each additional 100 words of opinion length

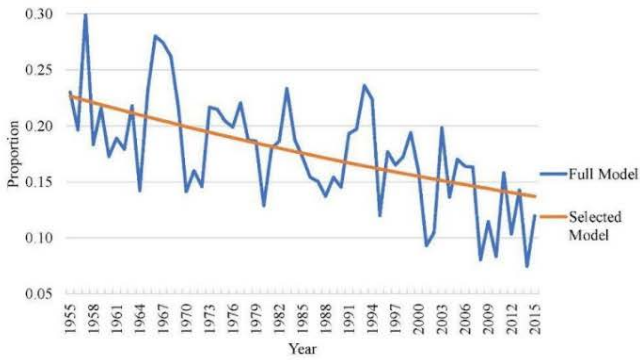
increased the odds of the words appearing in a case by anywhere from 1% to 5%. This is true of almost any word (and I tested it on dozens): the longer the text, the greater the chance a word has to appear in it.

Figures 2-5 each display two lines. The first line gives the proportion of cases with concepts year to year, adjusting for case length via logistic regression. The second line shows the best summary line through that plot. I tried not to force any particular functional form by estimating and comparing a variety of models of time-change (e.g., those that allowed for no change, upward or downward change, slowdown in change, U-shaped, etc.) so that the regression was “free” to find whatever form maximized the likelihood of the observed data.

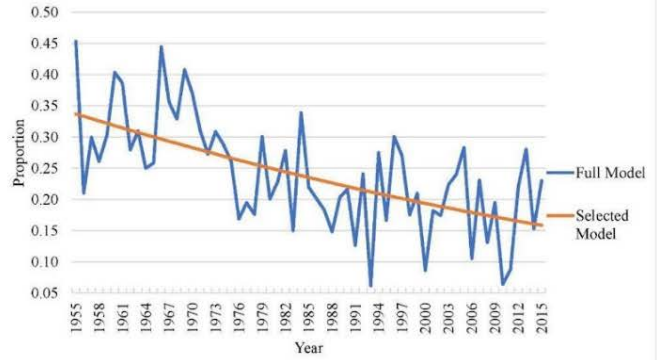
The likelihood of appearance of psychology words (not shown) exhibited no change over time but, controlling for case length, all of the other concepts changed over the time period 1955 through 2015, where most of the data points lie. In practice, a simple model of (log) linear change over time fit best for each of the concepts.

In the main, the presence of these ideas in school desegregation court opinions *decreased* over time, with one exception (diversity). The probability estimates displayed in Figure 2’s summary line show that the language of social capital (or sociology) significantly decreased over time. In 1955, for example, about 23% of the school segregation cases invoked social capital concepts in some way. By 2015, only about 14% of the cases were using those terms. Figure 3 shows that the appearance of the concept of “intangible” factors followed a similar trend, appearing in, on average, about 30% to 35% of the cases in the 1950s and 1960s, declining in appearance to only about 16% of the cases by 2015. While the language of “assimilation” (Figure 4) also declined (from an appearance rate of about 12% down to 5% over the period), diversity terms (e.g., diversity, multiracial) increased over the period.

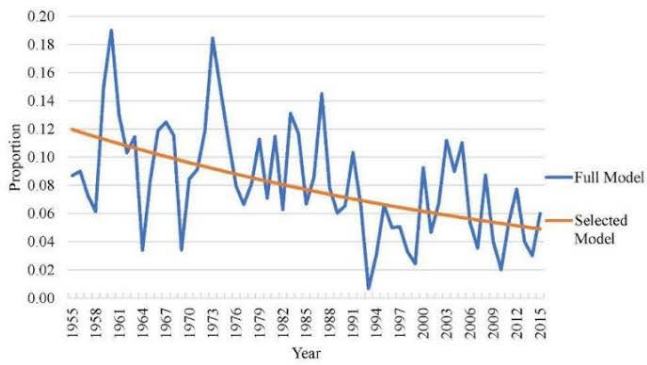
**Figure 2. Probability of Appearance of Social Capital Concept in Court Cases, 1955 to 2015**



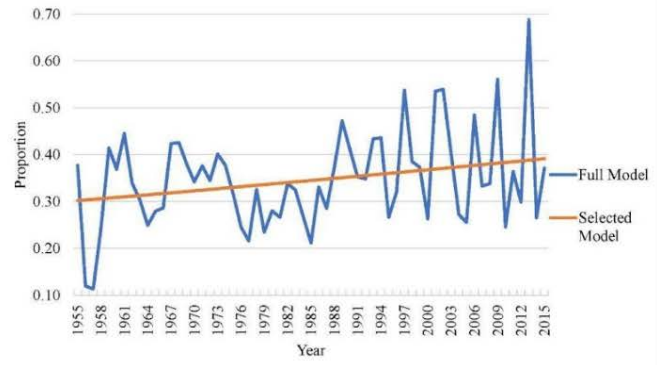
**Figure 3. Probability of Appearance of Intangibles Concept in Court Cases, 1955 to 2015**



**Figure 4. Probability of Appearance of Assimilation Concept in Court Cases, 1955 to 2015**



**Figure 5. Probability of Appearance of Diversity Concept in Court Cases, 1955 to 2015**



The figures show that, on average, as we moved from the 1950s closer to the present day, sociological concepts were less likely to be considered or invoked by judges in school desegregation court opinions (though cases using the term diversity were more likely to be newer cases). The figures also show wide variation year to year (or dispersion about the average lines) in the estimated proportions of opinions invoking the terms. (For example, as per social capital in Figure 2, the observed percentage of cases in a given year where the term appears is about +/- 4% away from the summary line, on average, adjusting for case length). There may be at least four reasons for this.

First, inherent variability may exist across the writing of individual judges who come from a variety of backgrounds, ages, and genders, and originate in a variety of places and different kinds of courts across the country. It is not unusual, for example, to have a broad cultural change over an extended period of time, and still have lots of variation within any given time point (e.g., year) within that extended period. Second, judges change year to year, which introduces another source of variability that has not been accounted for (in future analysis of these data I will be able to track the opinions over time within individual judges). This kind of high dispersion is often found in longitudinal analysis of cross-sections that do not include the same respondents. Third, there may be errors in the measurement of the concepts whose frequency distributions are presented. It is possible that the dictionary could be improved by more iterations of adding and subtracting terms, and that improved measurement would have the potential to return less scatter as well. Finally, while all 2,207 cases in the dataset are school desegregation cases in the sense that they use those terms in close proximity, there may still be variation across cases in the degree to which they are on point. For example, it is possible that the subset of cases dealing directly with school desegregation's constitutionality or violation of

the 14th Amendment would show more systematic (less scattered) patterns than the dataset as a whole.

### *Discussion & Conclusion*

In this chapter, I investigated whether sociological ideas about inequality were present in judicial thinking about desegregation and equal protection in the decades before and after *Brown*. I applied computational text methods to court documents by constructing a novel terminological dictionary, and then searched for the dictionary in a dataset that I created constituting the full corpus of school desegregation court cases of the past 60 years. I found hundreds of uses by judges of the sociological terms of interest, indicating that sociological ideas were present in a sizable proportion of the desegregation court opinions. This aspect of judges' thinking about segregation, the sociological aspect, has largely been overlooked in the literature about desegregation. It remains present today, though in a smaller proportion of cases.

The time trend away from the intangible dictionary's appearance in legal opinions is an important finding because it supports the chapter's main hypothesis that the window has been closing on the influence of social science in the courts. One interpretation of the findings is that the legal relevance of social forces – sociological, “intangible” factors – that produce inequality has waned in court decisions about whether and how to remedy the particular kinds of inequalities studied here. This narrowing has implications for what rights are guaranteed under the Fourteenth Amendment's Equal Protection Clause, especially those of schoolchildren, and for the likelihood of success of policies that seek to incorporate sociological dimensions of inequality in their solutions.

In the long-run, I hope the findings contribute to a new litigation and social policy strategy that seeks to equalize schools across a wide variety of non-financial factors, that

recognizes the power of social capital and its relationship with race and integration, and that advocates for a more robust vision of equal opportunity. The narrow conception of input factors necessary for long-term mobility and success adopted by some of today's education advocates and courts is vastly different from the "intangible considerations" *Brown* emphasized and social scientists embraced as essential to life chances. I hope that this work helps advocate for a renewed policy recognition of the nuanced and difficult to see forms of inequality that shape political and economic advantage.

This chapter's findings speak to a variety of sociological literatures. First, they document an important moment when sociological thinking entered political and legal discourse. The dictionary's appearance in judicial opinions reached its height in the 1950s and 1960s, and while that representation has tailed off, it has not disappeared. How political actors like judges were thinking about the legal relevance of sociological ideas about the causes of inequality – then and now – is important for studies of social stratification. The field of stratification is keenly interested in understanding how inequality takes shape; investigating the ideas held and disseminated via case law by legal decision-makers can contribute to that field's project. For example, why inequality looks the way it does (one of stratification's core questions) may be related in part to this paper's observed decline in the judiciary institution's concern with the role of intangible (e.g., social) forces. This paper's empirical surveying of how ideas appear (or not) in law over time may, at least indirectly, contribute to our understanding of how law shapes social stratification.

Second, the findings speak to the role ideas play in social policymaking, especially in school desegregation policy, where the courts were at the forefront. This is an emergent area of study at the intersection of political and cultural sociology. Beliefs about how inequality works

can be important determinants of the contours of policy history (for example, the shift from intangibles to intent logics in school desegregation policies). By showing that ideas about the problem of segregation shifted, we can better situate, understand, and potentially explain the decline of desegregation orders across the country, and the actual contemporary segregation patterns of schools and neighborhoods that have been so well documented by social demographers and quantitative scientists.

Lastly, from an historical perspective, the findings challenge our understanding of the history of *Brown* and why the courts pursued desegregation. The “intangible” concept, though mentioned in *Brown*, has not been studied in any meaningful way; this is the first paper to mine the concept through the complete case law, show its familial relationship to core sociological ideas, and demonstrate its presence through desegregation history. Indeed, the concept may have been one impetus behind the *Brown* decision. Studying how its representation has changed over time, as this project has, offers a picture of changes in legal thinking about equality in action.

This study also demonstrates that computational text methods can be useful for sociological studies of law and legal change and shows how the tools (in this case dictionary methods) can be applied to court documents.<sup>18</sup> The school desegregation movement yielded thousands of (often lengthy) judicial opinions from nearly every court in the United States. This project would have been impossible without the aid of computational tools to search for concepts

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<sup>18</sup> The methods of course also have limitations. Bounding the proper corpus, especially in legal doctrine, where issues cross topical boundaries and citations vary widely, can prove difficult and introduce bias in decisions about which observations to include and leave out of the sample. For example, the concept of this chapter, “intangible factors,” has been used by judges in court cases adjudicating whether something like civil unions could ever be equal to civil marriage. One could make an argument for or against including other separate-but-equal cases beyond school segregation that allude to intangible factors. This makes the first step of computational grounded theory more difficult in corpora like court cases. Legal scholars also understand that certain cases have more weight than others; text analysis generally gives every case equal weight. Also, in computation text analysis, the author must make a number of interpretive (potentially biased) decisions, including how to bound the corpus, how to design the dictionary, what words to include and leave out, how much to let prior knowledge affect those decisions, and so on.

within that large corpus (about 10 million words of text in the 2,207 cases after cutting stop words, most frequently occurring words, characters, etc.). The tools also proved useful for identifying particularly important or theoretically interesting cases within a large sample, because once the counts have been generated, the researcher can estimate the level of “saturation” of each observation, and select particular observations for further review (i.e., reading). Used in conjunction with conventional statistical methods like factor analysis and regression, I was able to make progress uncovering the “black box” that was Brown’s “intangible factors” that led one institution, the courts, to view separate schools as inherently unequal. The statistical analysis suggested that the intangible factors being weighed by the courts had something to do with inequality around students’ social capital (or also cultural capital or other sociological resources), psychological factors, assimilation, and diversity.<sup>19</sup>

That progress in understanding, however, simultaneously revealed its limitations. Put differently, in one sense, the analysis has produced five new black boxes. New questions arising out of the present analysis include, what did social capital actually mean to the judges who were authoring these opinions, how did it matter to them? How were they using words related to that concept, and the other concepts? Did the word or idea’s appearance and usage in the judges’ opinion come in the form of concrete examples, stories, evaluations, anecdotes, or what, and did it matter what form it took for how the case was adjudicated? What weight were judges giving to one or another idea in reaching their decisions? Was the idea referenced in passing, referenced and then dismissed, embraced, interrogated, used in consistent or contradictory ways? The decisions of these judges have profoundly affected the experiences of children, schools, families,

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<sup>19</sup> The increase in diversity language is interesting, and worthy of further exploration. It perhaps is evidence in support of Berrey (2015)’s theory that “diversity talk” has become so ubiquitous it has little policy meaning, and has become in effect a neutral term.

neighborhoods, and beyond. In the manuscripts of their opinions, their thinking and beliefs sit right alongside their consequent actions of rendering highly impactful decisions about school segregation. The computational methods of this chapter quantified elements of those manuscripts and flagged the presence of a word(s) or concept(s) in each observation. While this produced valuable new information, reading the judges own words (i.e., interpretive content analysis) remains vital for a full understanding of what they were thinking, and what the concepts identified in this paper meant to them.

### **Chapter 3: The Path Not Taken: The Story of Brown’s “Intangible Factors” in Case Law**

#### **Abstract**

Recent quantitative research documented a relatively high frequency of counts of appearances of sociological terms in 2,207 court decisions involving school segregation between 1955 and 2015, but did not explore *how* judges were using those terms. This chapter interpretively analyzed a subset (65) of school desegregation cases most saturated with these terms to understand what they meant to the judges authoring the opinions, what larger arguments or ideas they served, and towards what ends they were invoked. Of particular interest was the nature of intangibility (the term “intangible factors” that appeared in many of these cases). The interpretive analysis found that in a nontrivial portion of the case law, judges were “thinking like sociologists” and making sociological arguments about nonmaterial (intangible) dimensions to the nature of inequality that exists between groups. It also revealed that the sociological language was used to serve a variety of ideological ends and was relevant to case adjudication. Additional themes also emerged from the cases: school financing, the notion that segregation created a feeling of inferiority in Black children, and the idea that segregation prevented democratic inculcation. The findings provide insight into an important and under-explored part of the *Brown* story, show how thinking and beliefs shaped actions (i.e. judges’ rendering highly impactful decisions), and demonstrate the strengths and limitations of text analysis for socio-legal research rooted in case law.

## **Introduction**

The new School Segregation Court Cases (SSCC) dataset includes all federal cases and state supreme court cases on school desegregation between 1955 and 2015 (N = 2,207). The dataset is accompanied by a dictionary of “intangible” terms (mostly sociological words). Recent research on the SSCC has documented the appearance (and change over time in the appearance) of the terms in the judicial opinions, suggesting that sociological ideas about inequality were present in judicial thinking about desegregation in the decades before and after *Brown* (Biblarz, Chapter 2).

However, this research has not described what the words or concepts actually meant to the judges who were authoring these opinions. It established a compelling “black box” calling for qualitative validation (Bonikowksi and Nelson 2022; Voyer et al. 2022; Grimmer and Stewart 2011). How were judges using words related to concepts like intangible factors or social capital? How did the words matter in these cases? What weight were judges giving to one or another idea in reaching their decisions? Were the words or concepts referenced by judges in passing, or were they being seriously applied to the issues at hand and substantially informing judges’ decision-making processes? Understanding how these ideas and concepts knitted into judges’ thinking (or not) is important because the judiciary remains a core institutional definer of segregation and desegregation, and in turn a major influencer on the social policies that come out of those definitions.

Simple statistical analysis of the variables in the SSCC dataset can allow users to identify individual court cases that are especially saturated with its intangible dictionary terms. In this chapter, I selected cases from the SSCC that had within them 25 or more appearances of the sociological terms, or where the dictionary terms accounted for >1.25% of the total words in the case, and interpretively analyzed them. The interpretation revealed the roles these terms played

in the case law: how they were used, what they meant, why they mattered, and where they mattered, especially at the lower courts.

Among cases saturated with relevant terms, the interpretive analysis uncovered debates about the value and purpose of education, the limitations of the Fourteenth Amendment, and the factors that enable and constrain opportunity. There was a considerable amount of thinking by judges about non-financial forms of inequality, and judges used these ideas in adjudicating their cases. This strand of reasoning in the court opinions has not been fully interrogated before in the *Brown* story. The fact that hundreds of judges adopted, if briefly, such a monumental notion of inequality is historically important. Furthermore, as desegregation policy has abated, and school reform models have emerged that focus on educating low-income children of color within hyper-segregated contexts, despite massive disparities in intangible factors, it is important to remember that there was another vision at play, one as rooted in *Brown* as any contemporary interpretation.

The interpretive analysis also revealed dimensions of “intangible inequality” that were not anticipated at the outset. While the initial hypothesis, informed by findings from previous research (e.g., Chapter 2), focused on “intangible” and related terms as evidence that judges were thinking about social ties and networks (or social capital) as a relevant area of inequality, three additional themes emerged: school financing, the notion of inferiority Black children experience in segregated environments, and the idea that segregation prevented democratic inculcation in children. Intangible factors were even occasionally invoked as a reason for *not* requiring equal per-pupil financing: why should schools need equal funding when we know that a series of non-financial factors are arguably more determinative for life outcomes?

I begin by briefly describing the contours of desegregation in the United States, the relatively limited role intangible factors has played in existing analysis, and why that is

unfortunate for fully understanding the story of desegregation. This section came out of both the interpretive readings of the present study as well as past research. I then discuss the urgency of using interpretive methods to open the “black box” and help validate quantitative text analysis, and to reveal important dimensions of text data only possible through close reading. I then circle back to a more systematic discussion of the data and methods used in this study, and present the main findings that constitute new additions to that story. I conclude with suggestions for further research, and a discussion of the implications of this work for social stratification and law.

### **Desegregation and Intangible Factors**

Before and after *Brown*, there was tremendous debate about the nature of segregation, the precise constitutional violation at play, the dimensions of inequality that were relevant to the Equal Protection Clause, and the appropriate remedies for the constitutional violations. Prior to *Brown*, several court decisions invoked intangible factors, particularly cases involving colleges and law schools (this is discussed in greater detail in the “pre-*Brown*” section of the Results below). These cases recognized the tremendous influence social capital and related concepts have on life outcomes. *Brown* emerged out of and into this thinking, and applied these concepts to a national K-12 context (Wolters 2004). Every lower court case that led to *Brown* invoked intangible thinking. Despite this, the substance underlying *Brown* has most often been credited to the idea that state-sanctioned segregation engendered feelings of inferiority in Black children, or, later, to an attempt to financially equalize schools.

In the middle part of the twentieth century, hundreds of judges were charged with interpreting *Brown*'s substantive commitments, determining the motivations of the case, implementing its requirements, and often designing integration plans for school districts. The implementation required courts to engage in areas long thought to be within the private sphere.

Post-*Brown*, many judges recognized the potentially revolutionary changes desegregation could engender. Alongside this potential revolution were threads of a counterrevolution: early challenges to a broad understanding of *Brown's* reach and advocacy of a narrower role for the courts.

While there has been some recognition of the role intangible factors might have played in motivating the desegregation regime (Moody 2001; Tushnet 2003), the idea has largely been overlooked until recent quantitative analysis demonstrated the significant presence of this thinking in the corpus of desegregation case law. This is unfortunate given limitation to current legal answers for how desegregation swelled so widely in the late 1960s and early 1970s, with tens of millions of children subjected to mandatory busing regimes in the name of desegregation and *Brown*.

Intangible factors is a natural, if partial, explanation for how desegregation “got so big”: The clear policy corollary to recognizing that intangible factors play a central role in equal schooling and opportunity was *actual integration*. Social capital acquisition depends on access to white power networks; ergo, the only way for Black children to attain this socially important form of capital was integration. Furthermore, intangible factors presents a far more robust understanding of the forces that bear on life outcomes than, for example, the per-pupil financing factor that tends to monopolize contemporary discussions. The fleeting suggestions to intangible factors in existing literature, in conjunction with the recent quantitative analysis, suggests that there was judicial recognition (and even embrace) of the power of those factors for social mobility, job acquisition, educational attainment, and housing, and calls for greater interpretive engagement with these concepts.

Analysis of desegregation has focused on the development of doctrinal tests, with less attention to how changing ideas about the dimensions of inequality relevant to desegregation (Tushnet 2003). Reducing the evil *Brown* was trying to cure to a legalistic vision of segregation, and the measurable, short-term vestiges of that segregation, successfully matched evil with remedy: there is no need for actual integration when intangible factors are not part of the constitutional harm Black children experience. Analysis of the legal decline of desegregation has focused on a narrowing of the state action doctrine and the embrace of a “colorblind” Constitution, where racial categorization of any kind by the state has come to be seen as the dominant evil the Equal Protection Clause was meant to address, rather than racial oppression or inequality (Yoshino 2011; Siegel 2003).

Yet intangible thinking has been absent from analyses of changing ideas in desegregation case law, or how those changes reflect changing judicial understandings of the forces that shape inequality in our society, and the role of the state in proactively designing social policy that is meant to target the private sphere: childhood and family social networks. This is an unfortunate oversight, given the helpful purchase shifts in thinking about intangible factors can provide to explaining desegregation’s trajectory. Expunging intangible factors from judicial thinking enabled a policy narrowing that did not require mental gymnastics; if desegregation was never meant to wade into intangible factors terrain, then busing, racial mixing, and demographically evaluating desegregation’s success was not necessary.

### **Opening the Black Box**

Prior work has established the quantitative presence of intangible thinking in case law, but has left scholars with a black box. Increasingly, studies in text analysis are recognizing the “black box” problem and are using interpretive methods to more rigorously validate their results,

often allowing the text analysis to guide them to especially topical documents (Nelson 2020).

What often goes unsaid in text analysis papers is that the qualitative, interpretive element frequently serves as the origin site for theoretical analysis – put differently, this is where much of the thinking happens. While text analysis often provides proof of concept, thematic development and argument more typically comes from the interplay of text analysis and close reading (Knight 2022; Nelson 2020). Especially with texts like court cases, where the interstitial connections among cases forms the basis of a common law legal system, careful attention to how terms are being harnessed is a pivotal dimension of research.

Prior research has demonstrated the presence of intangible terminology in desegregation case law. But only through interpretation can we understand *how* judges were using these terms. In assessing segregation cases, judges, bound by the strictures of legal adjudication, had to frame the issue and result as they saw fit. Frames provide insight into how people think the “world works” (Young 2004). How judges came to render these impactful decisions depends on the “lens through which they observe and interpret social life” (Small and Lamont 2008, p. 14), i.e. their views on the relevance of intangible factors of law and inequality. Judges’ views on the relevance or non-relevance of intangible factors reveals a dimension of their prioritization of these values among others. While past work has engaged with legal framing, for “law is a central meaning making institution” (Pedriana 2006, 1723), it has more so focused on how litigants frame disputes, rather than on how judges frame the issues before them. In an area like desegregation, where judges were at the forefront of designing policy and the cases are so rich in language and exposition, this is an unfortunate oversight. Understanding how judges framed these debates is pivotal, as law can set “rigid and enduring boundaries on the very words and discourses available” to advocates and future judges (Pedriana 2006, 1727), and it had real world

stakes for children and families on the ground. Interpretation allows the researcher to dive into these questions of legal framing, and show how judges were using these concepts, how they were weighted alongside competing goals, the degree to which they mattered to the result of a case, and to identify the “horizons of possibilities” (Small and Lamont 2008, 15) judges established for desegregation.

Especially in a policy area as massive as school desegregation, judicial ideas directly impacted the day-to-day lives of millions of children, families, and working professionals. Segregation creates stratification in access to jobs, housing, schools, and employment. Segregation has long depended on what the courts do, and what courts do depends on how judges think. The beliefs and subsequent actions of these powerful actors affected the schooling experience of millions of children.

The research section below begins by discussing the data utilized and the interpretive method applied to the data. It then proceeds to analyze the relevant case set chronologically, demonstrating how, when, and where intangible factors have mattered over time.

## **Data and Methods**

### *Data*

Biblarz (Chapter 2) followed a set of computational steps through *The Court Listener* archive to create a dataset (the SSCC) that presumptively constitutes the universe of federal and state supreme court school desegregation cases over the past 60 years. The data were cleaned and spot checked against other legal indexers to verify their validity. The study also combined prior knowledge with computational word embedding methods to develop an “intangible” dictionary of 41 words (e.g., aspirations, expectations, prestige, multiracial, networks, stigma, and so on) that were likely candidates to relate to or reflect the meaning of the judiciary’s “intangible”

concept. Most of the words are ones commonly used in sociology, and reflect sociological (or social scientific more generally) concepts (see Table 2 of that study).

In the present study, I accessed the SSCC and its dictionary, and created two flags: did the court case have 25 more occurrences of the dictionary terms (= 1, else 0), and did the dictionary terms account for more than 1.25% of the total words in the case (= 1, else 0). Cases that met either of these criteria were considered particularly representative of a certain kind of sociological thinking in the courts, or of thinking about intangible factors in the problem of segregation, and are selected for the interpretive analysis below. What that thinking actually was is the subject of the analysis. This approach follows Nelson (2017): use computational methods to aid identifying documents that are of most interest in enormously large corpora; conduct a deeper, interpretive content analysis of the identified documents. I read all briefs submitted in the cases, recognizing that these writings were before the judges making their decisions, and that they provided a helpful context for the decisions. Many interpretive projects in sociology round out their primary text sources in a similar manner (Brown 2020; Pedriana 2006).

### *Methods*

The final number of cases totaled 65, and comprised approximately 2000 pages of legal text, though there was wide variation in case length. Analysis began with carefully reading each case twice, tracking the considerations raised by judicial rationales, and focusing on the terms from the initial dictionary. This included reading the full set of cases in each case's trajectory through the courts – the trial court, appellate court, and Supreme Court, if applicable, as well as the briefs attached to these cases. This added a considerable number of pages to the total volume of reading (roughly 3000). For each case, I wrote short analytic memos describing the ways intangible considerations entered into the case. I then re-read the cases a third time, gathering

particularly illustrative text examples, and organized them into the various thematic categories described in the Results section. Discursive analysis of judicial rationales demonstrates how judges were thinking about intangible factors at the moment of case adjudication.

Court cases do not exist in asocial vacuums; the legal process is inherently social with a variety of social actors weighing in over the process of litigation (Ewick and Silbey 1998). This project, of course, focuses on the language used in formal legal documents, and demonstrates how political changes translate into shifting legal language with the effect of shrinking the space possible for doing anything serious about inequality. However, reading the briefs submitted, and tracking a case's trajectory through the courts, helped garner a fuller picture of the arguments being made, and what the judges were responding to.

Interpretive methods have a long history in sociology, including interpretations of judicial texts (Dilthey 1900, 231; Ricouer 1969, 27). Judicial "interpretations, elaborations, and justifications of doctrine" (Cotterrell 1992, 226) are important topics for sociological study, because they "help to propagate structures of perception and belief that are the foundations of social order" (226). Content analysis involves carefully reading sets of documents, often newspaper articles, to derive meaning and patterns (Ferree et al. 2002; McAdam, Tarrow & Tilly 2008). Styles of reading and cataloging vary. Some content analyses focus on formal coding and labeling sections of text with specific tags, and then validating those codes with additional readers, while others adopt an approach more commonly found in the humanities and law, which focuses on interpreting texts holistically (Nelson, 2020, p. 6). Researchers seek to glean thematic emphases and interconnections across the data (DeSoucey and Waggoner 59).

The strength of interpretive methods comes from allowing the reader the flexibility to think deeply about texts. Interpretive methods allow researchers to enter a conversation about

text data and provide perspectives that others can and should disagree with. While interpretive methods do not lack rigor, transparency about the judgment calls that must be made typifies strong use of these methods. Steensland (2008) for example, adopted a selection process in which he made had to decide which articles were “about” his topic of study, guaranteed minimum income policy “in a substantively meaningful way.” Brown (2020) made a similar interpretive choice – she identified all places where policymakers and judges discussed their views on the meanings of an “Indian child” in Indian Child Welfare Act adjudications, eschewing documents she felt did not sufficiently engage with the meaning she was most interested in. Pedriana (2006) was perhaps most upfront about this reality, writing that in making interpretive decisions, he “relied on the totality of [his] knowledge of this entire historical sequence” and noting that while elements of the work were quite systematic, there was wide reading that informed his theoretical contributions but that were not systematically coded. To address this, he included a list of all sources consulted, allowing other researchers to conduct their own interpretations, not to discredit his per se, but to bring their own, perhaps distinct interpretations to bear alongside his.

Computational text scholars advocate utilizing quantitative analysis methods in conjunction with interpretive ones. Roberts et al. (2014) and Grimmer and Stewart (2013) both advocated for careful and frequent comparisons of methods. Empirical analysis from the one previous study using the SSCC (Biblarz, Chapter 2) found that words or concepts related to intangible factors were present in the case law, provided a rough estimate of how common their appearance was over time, and detected subsets of words that were likely to co-occur in the cases. The quantitative analysis of that study, however, could not explain the ways those terms of

interest were being invoked, the intellectual or narrative/textual context within which they were likely to show up, nor the potential contradictions and complications in their use.

Accordingly, we often want more meaning than computational methods allow for. This is especially true when working with legal data, where single words can bear heavily on impact and precedent. Many meaningful descriptors will not co-occur frequently enough to have high weights in a topic model, for instance. Especially in an arena as nuanced as constitutional law, text analysis works best in conjunction with traditional interpretive analysis.

## **Results**

### *Pre-Brown*

In the years leading up to *Brown*, courts wrestled with the nature of segregation, its shaky constitutionality under *Plessy*, and the contours of equality guaranteed by the Equal Protection Clause. A cluster of intangible-saturated cases involved challenges to segregation in American higher education, particularly law schools. Scholars have argued that part of the litigation strategy leading up to *Brown* was to focus on law schools under the theory that judges had a strong sense of how legal education worked, and why segregation posed a threat to equal opportunity for law students of color (Klarman 1994). Independent of whether judges had their own law school experiences in mind, language present in the cases indicates engagement with sociological ideas about inequality.

In *State of Missouri ex rel. Gaines v. Canada* (1938), for example, a Black man was prevented from attending the University of Missouri Law School because of the state's segregation statute. The state funded his legal education in a neighboring state. The Supreme Court noted that "there are special advantages" to attending an in-state law school, including developing familiarity and intimacy with the local courts, and "the prestige of the Missouri law

school among the citizens of the State” and among prospective clients<sup>20</sup>. The Court held that because of this, states that provided schooling to white students had to provide in-state education to Black students as well, and could do so by allowing Black students and white students to attend the same school, or by creating a second school for Black students.

As early as 1938, we see the Court engaging with the constitutional relevance of the intangible qualities associated with education. The focus was not on equal financial provisioning of schools, but rather on the “special advantages” to be gained from going to an in-state law school. While not precise in defending what these special advantages were, the immediate invocation of “prestige...among the citizens” suggests the Court was recognizing the powerful role prestige can play in occupational opportunities in a professional community. While the Court did not strike down segregation in 1938, it substantially engaged with conceptions and dimensions of equality.

*Sipuel* also focused on legal education. The Black plaintiff, Ada Lois Sipuel, sought access to the segregated University of Oklahoma Law School. The Court ruled that Oklahoma had to provide equal instruction for Black students, requiring the admission of qualified Black students to previously all-white state law schools. The briefs in *Sipuel* show clear intangible reasoning. Segregation “prevents both the Negro and white student from obtaining a full knowledge of the group from which he is separated.”<sup>21</sup> One brief was explicit in its definition of intangible factors, writing that it was the “sum total of the intangible qualities” that determine the status of a law school, including “such concepts as heritage, tradition, reputation,” which could not be acquired in a brand new, all-Black law school.<sup>22</sup> Lack of racial mixing prevents the “inter-

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<sup>20</sup> 305 U.S. 337, 348–49 (1938).

<sup>21</sup> *Sipuel v. Bd. of Regents of the University of Oklahoma*, 1947 WL 44231 (U.S.), 45–47 (U.S., 2006).

<sup>22</sup> *Sipuel v. Bd. of Regents of the University of Oklahoma*, 1948 WL 47425 (U.S.), 10 (U.S., 2006).

change of ideas and attitudes which is so necessary to a full education.”<sup>23</sup> Plaintiffs can only reach “equal footing at the bar of Oklahoma” if permitted to attend the state university with “white lawyers.” *Id.* A new all-Black law school, even in-state, would be inadequate, because legal education is not “the sole work of the professors,” but also requires exposure to the “varied personalities, abilities and propensities of” peers.<sup>24</sup> Quoting Justice Holmes, access to social networks is essential for a profession that “supplies ‘our social mechanics and many, if not most of our social inventors.’”<sup>25</sup> The briefs move among a variety of dimensions of intangible factors – gaining knowledge of the values and beliefs of peers from other racial groups, heritage, reputation, and prestige, and social capital and network access.

This logic deepened and expanded in the years following. In *McLaurin v. Oklahoma State Regents*, George McLaurin, a Black graduate student in education, was allowed in the same classrooms as his white peers but was forced to sit behind a screen. He was not allowed to eat in the cafeteria, but only on an elevated mezzanine in the lunchroom. The restrictions left him “handicapped in his pursuit of effective graduate instruction.”<sup>26</sup> While he had access to the same tangible resources as other law students, the restrictions “impair[ed] and inhibit[ed] his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”<sup>27</sup> Again, the Court held that intangible considerations were relevant to Equal Protection analysis. There was no reference to feelings of inferiority or emotional strife, but rather, the emphasis was on the power of social networks. Lack of access to networks meant a

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<sup>23</sup> *Id.*, 47.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641–42 (1950).

<sup>27</sup> *Id.* at 642.

student's "training [was] unequal to that of his classmates," and therefore the restrictions were unconstitutional.

The *McLaurin* Court recognized that the removal of the racist restrictions McLaurin had to endure did not guarantee cross-racial exchange; it did not guarantee that the social capital benefits of integration would flow to Black students. Yet the Court found this largely irrelevant, for "at the very least, the state will not be depriving the appellant of the opportunity to secure acceptance by his fellow students on his own merits."<sup>28</sup>

The plaintiff briefs in *McLaurin* adopted this line of thinking as well. The NAACP legal team made an explicit comparison between education and rail transportation (the origin of the *Plessy* decision). Equality did not look the same in the two contexts. In transportation, equality is clearer, for "the primary considerations are the type of comfort and convenience, courtesy, fare, speed, time of arrival and departure."<sup>29</sup> Things are more complicated in the educational realm, for equal schooling "necessarily requires consideration of psychological, sociological and spiritual factors in addition to pure physical measurements."<sup>30</sup> Plaintiffs implored the court to consider the intangible ways inequality functions in the schooling context, noting that the objective, financial ways of comparing transportation were insufficient in the schooling context.

Intangible language had been cemented by the *Sweatt v. Painter*, decision, and this case often stands in for this type of thinking in subsequent lower court citations. In *Sweatt*, a student challenged the University of Texas' establishment of a separate law school for Black students, arguing that the disparities in tangible and intangible resources violated the Equal Protection Clause. While the *Sweatt* Court noted gaps in tangible resources (like library books and

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<sup>28</sup> See also *Fisher v. Hurst*, 333 U.S. 147, 151–52 (1948).

<sup>29</sup> *McLaurin v. Oklahoma State Regents for Higher Educ.*, 1950 WL 78675, 37 (U.S., 2006)

<sup>30</sup> *Id.*

facilities), it held that “what is more important” is that the white law school possessed “those qualities which are incapable of objective measurement but which make for greatness in a law school.”<sup>31</sup> These factors included “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.”<sup>32</sup> It noted that the white law school’s “alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State,” and that Black students would be unable to access these networks from separate schools.<sup>33</sup> Despite tangible improvements to the Black law school (e.g. a growing student body, faculty, and library, in addition to “one alumnus who has become a member of the Texas Bar”<sup>34</sup>) the intangible gaps meant the two schools did not have “substantial equality.”<sup>35</sup> Given the potency of intangible factors, the Court found it difficult to “believe that one who had a free choice between these law schools would consider the question close.”<sup>36</sup>

Furthermore, the Court emphasized the inherently social nature of education. Legal education “cannot be effective in isolation from the individuals and institutions with which the law interacts.”<sup>37</sup> The Black law school excluded “85% of the population of the State,” including “most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar.”<sup>38</sup> This lack of exposure severely limited professional opportunities for Black law students.<sup>39</sup> The Court rejected any contention that segregation equally excluded white students from Black students. This

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 634.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Sweatt v. Painter*, 339 U.S. 629, 633–35 (1950).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

proposition overlooked the reality of white power. White schools had “rich traditions and prestige,” the decisive majority, and a “story of consistently maintained excellence.”<sup>40</sup> It was almost laughable that any white student “would claim that the opportunities afforded him for legal education were unequal to those held open to [Black students].”<sup>41</sup>

The *Sweatt* briefs had made similar arguments. Education involves factors “which have no relation to the ‘equality’ or adequacy of physical facilities.”<sup>42</sup> “The opportunity for discussion, debate and exchange of ideas” is the primary mode of training, and this training cannot happen without a “student body [that] is composed of persons having different and varied backgrounds and divergent views and attitudes toward current affairs, politics and other subjects.”<sup>43</sup> Education requires “exchange,” “the interplay of contributions from all persons and all groups,” and “the fullest opportunity to associate intellectually.”<sup>44</sup> Here, the briefs emphasize the benefits of intellectual exchange and dialog as a non-financial form of inequality that segregation prevents. A separate, Blacks-only school would not provide these resources, despite funding, library books, facilities, and faculty. In an all-Black school, students are “deprived of needed intellectual challenges from white fellow students.”<sup>45</sup> Furthermore, segregation prevents black students from accessing the “intimate knowledge of the ways of thought of the community.”<sup>46</sup> Only through commingling can a lawyer “sense the drives, interests (and weaknesses) of those with whom he deals.”<sup>47</sup> “Intimate knowledge” suggests insider

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Sweatt v. Theophilis Shickel Painter*, 1950 WL 78684 (U.S.), 35-37 (U.S., 2006).

<sup>43</sup> *Sipuel v. Bd. of Regents of the University of Oklahoma*, 1948 WL 47425, 10 (U.S., 2006)

<sup>44</sup> *Id.*

<sup>45</sup> *Sweatt v. Theophilis Shickel Painter*, 1950 WL 78684, 36 (U.S., 2006)

<sup>46</sup> Edward Hirsch Levi, Thomas I. Emerson, John P. Frank & Alexander Hamilton Frey, “Segregation and the Equal Protection Clause: Brief for Committee of Law Teachers Against Segregation in Legal Education,” 34 *Minnesota Law Review* 289 (1950).

<sup>47</sup> *Sweatt v. Theophilus Shickel Painter*, 1950 WL 78683 (U.S.), 44-46 (U.S., 2006).

information; in a professional world dominated by whites, Black students need access to their ways of thought and being if they are ever to compete on equal footings.

The briefs also emphasized the interplay of ideas essential to schooling. School social relationships come from “the spirited and enthusiastic participation in extracurricular activities such as moot courts, law review and other fields of interest.”<sup>48</sup> In “classrooms, dormitories, clubs, and playing fields,” students teach each other, learn to emulate each other, and their knowledge “cross-fertilizes.”<sup>49</sup> Not having this knowledge leaves Black lawyers less able to deal with “with attorneys and judges who are a part of the broad stream of Texas jurisprudence deepened as a result of the years of group association at the Austin school,” referring to the established, white-only law school at UT.<sup>50</sup> Here, we see the advocates connect the social learning and intellectual cross-pollination that happens in school with the social capital benefits that develop at school and carry into legal careers. Legal training depends on “not only on instruction but on the association with fellow students of all races, creeds and walks of life.”<sup>51</sup> These sites are where connections are built, for “[e]ducation is in large part association.”<sup>52</sup>

Above and beyond the limitations within the law school, Black students would not graduate with the prestige their white counterparts would. Graduation from a newly formed, “colored” law school would leave students with “unequal professional standing.”<sup>53</sup> The new Black law school was not accredited, and was “regarded as a ‘poor college’; it is not a ‘real university.’”<sup>54</sup> Noting the way intangible factors like prestige can be turned into financial capital, the brief argued that “prestige carries through in later life, especially in professional life, and has

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<sup>48</sup> *Id.*

<sup>49</sup> *Sweatt v. Theophilus Shickel Painter*, 1950 WL 78683, 45 (U.S., 2006)

<sup>50</sup> *Sweatt v. Theophilus Shickel Painter*, 1950 WL 78683 (U.S.), 44-46 (U.S., 2006)

<sup>51</sup> *Sweatt v. Theophilus Shickel Painter*, 1949 WL 50365 (U.S.), 8-9 (U.S., 2006)

<sup>52</sup> *Id.* at 47.

<sup>53</sup> *Id.* at 43.

<sup>54</sup> *Id.* at 8-9 (U.S., 2006).

a substantial pecuniary value.”<sup>55</sup> Intangible qualities are why segregated schools “could not possibly achieve an equality” that would satisfy the Fourteenth Amendment.<sup>56</sup>

In addition to prestige, students would be hindered by their inability to access white alumni. This hinders students’ “placement opportunities,” given how essential alumni are to professional placement in law firms.<sup>57</sup> Hiring depends on “the loyalty of alumni and the established reputation of the institution.”<sup>58</sup> These factors ensured that the new law school could not be equal. Tying this thinking directly to economic inequality, the plaintiffs argued that in law, “social relationships lead to economic opportunities which shape a lawyer’s career.”<sup>59</sup> These exchanges become the raw material for weak ties. Black students denied these social relationships are “deprived of economic rights.”<sup>60</sup> Prestige too impacts economic outcomes, for “professional careers are seriously affected by the repute in which the school is held by the profession at large.”<sup>61</sup>

The Fourth Circuit reiterated much of this thinking in *McKissick v. Carmichael*, a case quite parallel to *Sweatt* in its facts. There, the court noted that the law school North Carolina had established for Black students had “achieved no reputation in legal circles,” and that reputational inequality was part of why a separate Black-only law school was constitutionally insufficient.<sup>62</sup> The larger white law school “represent[ed] a cross section of the white people of the State, who constitute 74% of its population. From this society the colored law students . . . are excluded.”<sup>63</sup> The fact that the Black students were excluded from accessing these networks, most especially

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<sup>55</sup> *Id.*, 35–37 (U.S., 2006).

<sup>56</sup> *Id.* at 29.

<sup>57</sup> *Id.* at 43.

<sup>58</sup> *Id.*

<sup>59</sup> *Sweatt v. Theophilis Shickel Painter*, 1950 WL 78684, 7 (U.S., 2006)

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.*

<sup>62</sup> 187 F.2d 949, 951 (4th Cir. 1951).

<sup>63</sup> *Id.* at 952.

because the “heart of legal education is found in discussion with one’s associates . . . to engage in discussion with his fellows in and out of the classroom”<sup>64</sup> was constitutionally suspect. As in *Sweatt*, the Court recognized the social network function of education: it is of “specific value that the students form acquaintance with the persons who will later occupy positions of influence and power in the profession and in the public life of the State.”<sup>65</sup> Legal success requires that lawyers “know and be known” by the powers that be in business and in public life. School equips students with much of this learning via the connections and relationships developed there.<sup>66</sup>

Language of this type was not only present in pre-*Brown* cases involving schools, but also in a variety of other areas, including segregation in recreational facilities and parks, employment, and housing. Given the cross-pollination of legal topics, and the ubiquity of school segregation citations, some of these cases ended up in the corpus, particularly cases that most heavily borrowed from the think of the education cases. In *Harris v. City of Daytona Beach* (S.D. Fla. 1952), Blacks were excluded from publicly owned concert venues. The court ruled that this exclusion violated the Equal Protection Clause. Recognizing the power of cultural access, the court held that “plaintiffs cannot be required to await the acquisition of culture” until there is sufficient demand for an all-Black theater.<sup>67</sup> It was a denial of Equal Protection to force plaintiffs to travel to another state to hear “Nelson Eddy, or Lauritz Melchior sing, or the United States Marine Band play, or the Virginia Barter Theatre Players perform.”<sup>68</sup> The court’s concern was with the *types* of performers that performed at each of the two venues. The lack of access to popular white performers, even though there was a parallel venue of seemingly equal quality for

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 105 F. Supp. 572, 573.

<sup>68</sup> *Id.*

Black performers, meant that Black residents did not enjoy “equality in fact” with white citizens given their denial of cultural access.<sup>69</sup> Access to white cultural capital was necessary to “equality in fact,” and denial of that access was a constitutional violation.

Yet in the same case, the state action doctrine limited the court’s willingness to constitutionalize intangible forms of inequality in the *private* sphere, failing to recognize the potent ways informal connections and networks determine life outcomes and the prospect of social mobility. Private clubs, like the “Civic Music Association, the Lion’s Club, and the like,” would remain permitted to lease the city-owned auditoriums, “with the right to select their own members and their own audiences.”<sup>70</sup> The court was clear to note that these agreements were “outside the issues presented in this suit and are not within the scope of the permanent injunction” preventing segregation during municipally organized events.<sup>71</sup>

In the same few paragraphs, the court acknowledged the cultural power inherent in music knowledge and access, while rejecting the idea that private social clubs should be prohibited from using government-owned space, even if whole categories of citizens were denied access to those elite and important spaces by virtue of their race. Private associations, long-regarded as important “old boys’ networks,” critical for occupational advancement, especially in the 1950s, were considered outside the Court’s purview. While intangible thinking was present, it was not absolute, and was still bound by limitations of the judiciary and perceptions of the proper role of legal intervention. The court was only so willing to recognize on the ground realities of how inequality operates; in the same breath, it held that public spaces prevented people of color from accessing cultural capital, and also held that access to private clubs, where social capital is

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 575.

routinely cultivated, was outside their appropriate purview, while failing to recognize just how much this access can bear on job and educational opportunities.

These early cases reveal deep engagement with sociological thinking as constitutionally relevant dimensions of inequality, both from judges and from legal advocates. Their language and logic sounds almost exactly like the way sociologists use the concept of social capital today. Courts were grappling with the deep and hard to see ways intangible factors work – sitting next to peers in a dining hall or classroom, access to alumni networks, access to elite spaces and the reputation those spaces bring, and the ways social connections can yield opportunities. And perhaps most importantly, we see courts recognizing and adopting the view that social capital can be converted into economic capital. Long before “the strength of weak ties” (published in 1973), became common parlance, pre-*Brown* judges recognized intangible factors as important determinants of life outcomes, and built these factors into judicial assessments of permissible school policy. These cases provide little by way of references to the psychological harms of segregation; rather, the focus is squarely on the ways integration promotes access to social capital and networks. Rather than just legal abstraction, these cases were deeply attuned to on-the-ground realities of the complicated ways social lives figure into education and career. This was the context of segregation law going into *Brown*.

### *The Brown Line of Cases*

By the time *Brown* was decided, these cases and arguments had been circulating for over twenty years, in both arguments from litigants and in precedent. *Brown* consolidated cases with similar issues presented from lower courts in Delaware, Kansas, Washington, D.C., South Carolina, and Virginia. In each case, judges recognized dimensions of inequality that could not

be addressed through financial resources alone. The language varied in degree of ex/implicitness, but suffused into these cases was intangible thinking.

The *Briggs v. Elliott* court (South Carolina) upheld the *Plessy* separate but equal doctrine, but ruled that the school district needed to comply with the “equal” portion more fully by investing in tangible, financial resources in Black schools.<sup>72</sup> The dissent rejected the premise that separate could ever be made equal. If the court could solve this case “by the mere device of admission that some buildings, blackboards, lighting fixtures and toilet facilities are unequal but that they may be remedied by the spending of a few dollars, then, indeed people in the plight in which these plaintiffs are, have no adequate remedy or forum in which to air their wrongs,”<sup>73</sup> the dissenting judge wrote.

Put simply, goes the dissent, the majority was missing the point. A few thousand dollars of tangible improvements was cold comfort for children in segregated schools. Tangible equality would forever be limited in what it could accomplish for Black children. With its commitment to the idea that separate schools could be made tangibly equal, the constitutional baseline, the majority had left Black children with no adequate remedy to fundamentally improve school equality. Despite it being about K-12 education, the dissent argued that the case should be “based upon exactly the same reasoning followed in the *Sweatt* and *McLaurin* decisions,” where the Supreme Court had “clearly recognized that education does not alone consist of fine buildings, classroom furniture and appliances but that included in education must be all the intangibles that come into play in preparing one for meeting life.”<sup>74</sup>

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<sup>72</sup> *Briggs v. Elliott*, 98 F. Supp. 529, 535 (D.S.C. 1951).

<sup>73</sup> *Id.* at 540 (dissenting opinion).

<sup>74</sup> *Id.* at 545.

Like the dissent in *Briggs*, the district court in *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 800 (D. Kan. 1951), recognized the “educational benefits [that come] from commingling with white students.”<sup>75</sup> The court asked itself a rhetorical question “if the denial of the right to commingle with the majority group in higher institutions of learning as in the *Sweatt* case and gain the educational advantages resulting therefrom is lack of due process,” was impermissible, then why would “such denial not result in the same lack of due process if practiced in the lower grades,”<sup>76</sup> acknowledging that a similar logic held in the K-12 context and that “commingling,” had educational benefits across the education spectrum.

In *Gebhart v. Belton*,<sup>77</sup> the Delaware case, the court grappled with what factors contributed to “substantial equality.” While “identity or absolute equality in all respects” is “impractical,” courts still have the “difficult and delicate task of drawing the line between the unimportant and incidental differences inevitably occurring in any comparison of two schools” and assessing whether a “substantial disparity placing the plaintiff at a material disadvantage because of his race or color.”<sup>78</sup> The courts went through a variety of factors that “constituted” substantial equality, some of which could be equalized through financial resources, like school buildings, per-pupil ratios, and instructional materials, and some of which could not, like extracurricular activities, the quality of the neighborhood the school site was located in and its aesthetic beauty, and the educational status of the school faculty.

Intangible ideas show up in *Brown* itself too, despite nearly no scholarship recognizing their relevance to the watershed case. In many districts, there was real evidence that “tangible”

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<sup>75</sup> *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 800 (D. Kan. 1951).

<sup>76</sup> *Id.*

<sup>77</sup> 33 Del. Ch. 144, 154–55, (1952), *aff'd sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

<sup>78</sup> *Id.*

resources (specifically buildings, curricula, and the qualifications and salaries of teachers) were being equalized in the years before *Brown*. The *Brown* Court could have written a decision demanding that *Plessy* have teeth: the other districts also needed to make the separate but equal guarantee a reality. Instead, the Court redirected and struck down segregation in principle. Given the formal equalization that had been occurring, its decision could not “turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases.”<sup>79</sup> Citing the intangible logic of *McLaurin* and *Sweatt*, the *Brown* Court held that “Such considerations apply with *added* force to children in grade and high schools” (emphasis added).<sup>80</sup> The idea that the *Sweatt/McLaurin* logic applied as forcefully in the K-12 context was cemented in *Brown*. *Brown* famously phrased the question presented as “Does segregation of children in public schools solely on the basis of race, *even though the physical facilities and other ‘tangible’ factors may be equal*, deprive the children of the minority group of equal educational opportunities?” (emphasis added) and answered in the affirmative “We believe that it does.” *Brown* leaned heavily on the intangible line of thinking present in *Sweatt*, *McLaurin*, and *Gaines*. It borrowed the higher educational logic of social capital and networks, rather than solely embracing psychological thinking about perceived inferiority in segregated schools.

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<sup>79</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954).

<sup>80</sup> *Id.* This strong language in *Brown* is perhaps a not-so-subtle rejection of the lower court’s logic in *Briggs v. Elliott*, 98 F. Supp. 529, 535 (D.S.C. 1951), which held that “The problem of segregation as applied to graduate and professional education is essentially different from that involved in segregation in education at the lower levels. In the graduate and professional schools the problem is one of affording equal educational facilities to persons sui juris and of mature personality. Because of the great expense of such education and the importance of the professional contacts established while carrying on the educational process, it is difficult for the state to maintain segregated schools for Negroes in this field which will afford them opportunities for education and professional advancement equal to those afforded by the graduate and professional schools maintained for white persons . . . The problem of segregation at the common school level is a very different one. At this level, as good education can be afforded in Negro schools as in white schools and the thought of establishing professional contacts does not enter into the picture.” *Brown* rejected this idea, and embraced the notion that professional contacts and intangible factors applied with added force at the K-12 level.

The briefs in *Brown* and affiliated cases also emphasized this line of argument. Segregation denied Black children “the learning that comes from free and full association with other students in the school,”<sup>81</sup> an important element of the educational process and a “constitutional guarantee[.]”<sup>82</sup> Segregation denies children the ability to “adjust themselves personally and socially in a setting comprising a cross-section of the dominant population.” Given the “blockage in the communications and interaction” segregation presents, feelings of “mutual suspicion, distrust and hostility” develop rather than friendship and cooperation.<sup>83</sup> The “relative absence of opportunities for equal status contact” creates “the low level of aspiration and defeatism so commonly observed in segregated groups” and leaves Black children with low “expectations with regard to opportunities for achievement” and few “opportunities for making use of these achievements.”<sup>84</sup> The briefs frequently referenced the *McLaurin/Sweatt* intangible arguments, including “standing in the community, traditions and prestige and “the interplay of ideas and the [opportunity to] exchange of views with the dominant majority.”<sup>85</sup> Here again the briefs connected the generalized benefits of cross-group exchange and mixing with the tools Black students need to get ahead in life – access to white networks and connections.

The plaintiffs argued that “substantial equality” required a recognition of the role intangible factors play in equal schooling and specifically tied the substantiality language to intangible factors. Students educated in schools that “require daily contact and competition with members of racial groups comprising the dominant and more advantaged majority” would inevitably receive a better education than students trained in schools that “limit him to daily

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<sup>81</sup> Spottswood Thomas BOLLING, et al., Appellants, v. C. Melvin SHARPE, et al., Appellees., 1952 WL 47283 (U.S.)

<sup>82</sup> *Id.*, 9–10.

<sup>83</sup> Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmanuel, et al., Appellants, v. Board of Education of Topeka, Shawnee County, Kansas, et al., 1952 WL 47265 (U.S.), 8.

<sup>84</sup> *Id.*

<sup>85</sup> *Brown v. Bd. of Educ. of Topeka*, 1952 WL 82047, 9 (U.S., 2006).

contact and competition from members of a single racial group comprising the state's most disadvantaged minority.”<sup>86</sup> The crux of substantial equality comes from the factors integration creates. Interpreting the Court's reasoning in *Sweatt*, the plaintiffs asserted that intangible considerations are “controlling factors in determining substantial equality at the law school level.” Again, the emphasis is not on the tangible resources integration guarantees, but on the intangible forces that can only be achieved through integration. Therefore, “it is impossible for any segregated law school to be an equal law school.” Accordingly, “substantial equality in professional education is ‘substantially equal’ only if there is no racial segregation.”<sup>87</sup> The same logic held in the K-12 context.

Analogizing education to real property, one brief opined that quality is not solely about the “value and desirability of property” but also “its association with persons enjoying a certain reputation.”<sup>88</sup> The analogy continued: “The desirability of a beautiful resort may be lessened by its being visited by people deemed of ‘low’ social standing.” These sorts of differences are “significant under the Fourteenth Amendment,” then citing *McLaurin*.

As in the briefs in *Sweatt*, the plaintiffs in *Brown* made the sociological case that networks bear on life outcomes and social mobility. Plaintiffs argued that “social contacts make possible the enlargement of personal experience” and are essential for “human development.”<sup>89</sup> Education hinges on one's ability to “know where he is in the world and how he stands with his

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<sup>86</sup> *Brown v. Bd. of Educ. of Topeka*, 1951 WL 82600 (U.S.), 8-9 (U.S., 2006).

<sup>87</sup> *Brown v. Bd. of Educ. of Topeka*, 1953 WL 78288 (U.S.), 48-50 (U.S., 2006).

<sup>88</sup> *Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmanuel, et al., Appellants, v. BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al.*, 1952 WL 47254 (U.S.), 11.

<sup>89</sup> *Brown v. Bd. of Educ. of Topeka*, 1952 WL 82043 (U.S.), 12 (U.S., 2006).

fellows.”<sup>90</sup> Focusing on equal facilities is “like trying to cure cancer with a mustard plaster [an old home remedy used to treat congestion, coughing, and muscle aches].”<sup>91</sup>

And the briefs noted the relevance of perception and reputation to equality. Comparing the present case to *McLaurin* and *Sweatt*, petitioners cited to courts that “took into account the community’s actual evaluation of the schools involved,”<sup>92</sup> acknowledging the relevance of prestige and community reputation. The same was true here, where “racial segregation in elementary education denoted the inferiority of Negro children” based on community reputation.<sup>93</sup>

Intangible factors are a pivotal part of the *Brown* story, one under-appreciated in studies about the case’s origins and legacy. The cases leading up to *Brown* recognized the limitations of tangible, financial factors for equal schooling. In each of the lower court cases, the courts explicitly embraced intangible thinking, as did the Supreme Court in the final decision. Implicit in this language is the embrace of social capital and social network thinking. We see little effort to label segregation as a solely legalistic idea; instead, segregation is a social system of oppression that keeps Black children from opportunities and mobility, including those derived from social contact, interaction, exposure, and relationships.

### *Immediate Aftermath of Brown*

Intangible language continued immediately after *Brown*, as courts were working to determine what the take-aways and requirements were from the ruling.

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<sup>90</sup> *Brown v. Bd. of Educ. of Topeka*, 1952 WL 82043 (U.S.), 11-12 (U.S., 2006).

<sup>91</sup> *Spottswood Thomas BOLLING, et al., Petitioners, v. C. Melvin SHARPE, et al., Respondents.*, 1952 WL 47281 (U.S.), 7-9.

<sup>92</sup> *Brown v. Bd. of Educ. of Topeka*, 1952 WL 82046 (U.S.), 13 (U.S., 2006).

<sup>93</sup> *Id.* at 12-13.

In *Fayson v. Beard*, the court noted that *Brown* had “placed great emphasis upon the intangible (psychological) factors involved in segregation in public schools.”<sup>94</sup> Their interpretation of *Brown* was that “equality in tangibles was not a complete answer to the problems of segregation in public schools, for notwithstanding such equality, there still existed an unconstitutional discrimination created by segregation because of the impact upon segregated students of intangible or psychological factors.” While not defining what intangible factors meant, the first line seems to parenthetically conflate intangible with psychological, and couples the two again in the second line. This early interpretation of *Brown* was that money was not enough, and neither was legal desegregation. Intangible factors were also constitutionally relevant to the opinion, a residual inequality that remains even when formal discrimination orders are lifted. Similarly, in *Dawson v. Mayor & City Council of Baltimore City*, the court recognized that equality in “tangible facilities” was insufficient in light of *Brown*, which required courts to “consider public education in the light of its full development and its present place in American life” and take into account not only the “tangible factors only of a given situation” but also the intangible ones.<sup>95</sup> Here the court is urging consideration of how inequality actually works – education’s role in modern society is dominant, part of that education is social, and those social factors are part of why education has become so dominant. *Brown* required a real reckoning with how education and inequality actually function on the ground.

In *Lonesome v. Maxwell* (1955), the court recognized the lack of clarity in what constituted intangible factors, writing that “The question of what matters fall within the field of ‘social equality’ has never been clear” and expressing confusion at *Brown*’s new recognition that “certain claimed rights which may have been heretofore regarded as social matters should now

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<sup>94</sup> 134 F. Supp. 379, 380–81 (E.D. Tex. 1955).

<sup>95</sup> 220 F.2d 386, 387 (4th Cir.), aff’d, 350 U.S. 877, 76 S. Ct. 133 (1955).

be considered civil rights entitled to constitutional protection.”<sup>96</sup> With “social matters” the court is suggesting that desegregation requires legal engagement with matters long considered outside the public sphere – friendships, relationships, and social interactions. Failing to recognize how these dimensions of life contribute to inequality is now a violation of civil rights rising to the constitutional level. The *Lonesome* court saw the potential capaciousness of intangible factors, and recognized that wading into networks territory constituted a new entry for the judiciary into what had long been considered private arenas like social relationships. The court also expressed understandable confusion about the constitutional relevance of these intangible factors, and exactly how formally they should be incorporated into case adjudication. In just a few lines, the *Lonesome* court captured many of the difficulties of this new legal area – it questioned how “constitutional” these intangible factors were, it recognized how transformative embracing this logic at its fullest could really be, given the need to engage in the private sphere to see real change, and it interrogated what precisely these new intangible factors were.

Some decisions specifically critiqued the intangible underpinnings of *Brown*. In *Boman*,<sup>97</sup> for example, the court was extremely critical of *Brown*’s invocation of social science, holding that “The evidence of these intangibles consisted of one quotation from the Kansas court which had ruled against the Negro plaintiffs below, and a footnote listing a number of works on psychology and sociology,”<sup>98</sup> referring to *Brown*’s famous Footnote 11 that included several social science citations about the harm Black children experience in segregated schools. *Brown*, the *Boman* court concluded, struck down “a constitutional doctrine which had endured for fifty

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<sup>96</sup> 123 F. Supp. 193, 198–99 (D. Md. 1954), rev’d sub nom. *Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), aff’d, 350 U.S. 877, 76 S. Ct. 133, 100 L. Ed. 774.

<sup>97</sup> 292 F.2d 4, 24 (5th Cir. 1961).

<sup>98</sup> *Id.*

years . . . on the authority of sociological writings which were accepted as beyond dispute.”<sup>99</sup> Relying on these sources in resolving constitutional questions was, the *Boman* court argued, misplaced. Even early on, attempts to evade or erode intangible thinking existed alongside the acceleration of intangible thinking.

In addition to the general relevance of intangible inequalities, courts post-*Brown* also recognized the specific relevance of alumni social networks to student success. In *Hunt v. Arnold*, the district court struck down the University of Georgia system’s alumni-driven admissions scheme.<sup>100</sup> In addition to meeting academic requirements, candidates had to “submit certificates from two . . . alumni of the institution he desires to attend, which shall certify that each of such alumni is personally acquainted with the applicant and the extent of such acquaintance; that the applicant is of good moral character, bears a good reputation in the community in which he resides, and in the opinion of such alumnus is a fit and suitable person for admission to the institution.”<sup>101</sup> Candidates had to submit a third letter from their county clerk, or could submit a third alumni letter from “a list of alumni designated by the President of the Alumni Association of the institution to assist the institution in its efforts to select students of character and aptitude and ability.”<sup>102</sup>

Two Black candidates, of strong academic backgrounds, were denied admission because they did not have the requisite alumni letters. The court held that “the effect of the alumni certificate requirement upon Negroes has been, is, and will be, to prevent Negroes from meeting this admission requirement”<sup>103</sup> because the Black plaintiffs did not have access to the white

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<sup>99</sup> *Id.*

<sup>100</sup> 172 F. Supp. 847, 852–53 (N.D. Ga. 1959).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 853.

<sup>103</sup> *Id.* at 856.

alumni network of the university. The parties had stipulated that there were no Black alumni of the school, and the court took judicial notice “of the fact that it is not customary for Negroes and whites to mix socially or to attend the same public or private educational institutions.”<sup>104</sup>

Segregated “social patterns” ensured that Black students had no opportunity to know white alumni.<sup>105</sup> Because Black students were functionally unable to meet this requirement given their lack of alumni networks, the requirement violated the Equal Protection Clause.<sup>106</sup>

In the immediate post-*Brown* period, courts had to wrestle with what the ruling meant and its reach. Many courts recognized and embraced intangible thinking, including the broad policy corollary it demanded: actual integration. In local contexts throughout the country, they noted the ways alumni, prestige, and reputation could dictate life outcomes. They took from *Brown* the idea that intangible factors were a relevant dimension to successful desegregation; that was part of the *Brown* holding. Other courts waffled or resisted the new regime, including specific resistance to intangible thinking. In several decisions, there was a recognition of the dramatic impact a real embrace of intangible factors could have, requiring courts to wade into matters long thought to be within the private sphere.

### *Later Cases*

Through the 1970s and 1980s, there were still references to intangible factors, but with less frequency than in earlier periods, and the concurrent rise of a doctrinal test rooted in intentional racial discrimination. This period makes clear that intangible factors would not coalesce into a doctrinal test. Instead, they were invoked less frequently, and at a more general or abstract level, rather than really grappling with the nuanced ways inequality operates, as earlier

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<sup>104</sup> *Id.* at 849.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 857.

cases had. While there was still some recognition of the role of networks, connections, and social relationships, the references were more fleeting and dismissive. Particularly in the 1970s, after formal desegregation was gone, busing remained prominent. In several high profile busing cases, judges invoked intangible factors, even if not as part of a doctrinal test.

One example is *Oliver v. Kalamazoo Bd. of Educ.*, where the court held that segregation is “economically damaging to [Black students’] ability to perform in an adult world,”<sup>107</sup> acknowledging the reality that occupational networks are dominated by whites, and that Black students would be professionally limited without access to those networks. In another busing case, the court held that integration makes possible “that acquaintance and companionship necessary to break down racial stereotypes and prevent racial prejudice.”<sup>108</sup> Petitioner briefs adopted similar ideas, noting that “it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students,”<sup>109</sup> prefiguring a research area in the economics of education widely known as “peer effects.”

Occasionally courts recognized the connection between intangible factors, integration, and the labor market. In *Hart v. Cmty. Sch. Bd. of Ed., N.Y. Sch. Dist. No. 21*, the court wrote that integration gives children a chance to “widen their horizons through the interplay of ideas and the absorption of diverse sub-cultural attitudes.”<sup>110</sup> Many of the problems of racial segregation could be attributed to “comparative social class levels of the average predominantly Negro and the average predominantly white school.”<sup>111</sup> These differences dictated school

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<sup>107</sup> 346 F. Supp. 766, 771 (W.D. Mich. 1971).

<sup>108</sup> *San Francisco Unified Sch. Dist. v. Johnson*, 3 Cal. 3d 937, 949–50 (1971).

<sup>109</sup> *Keyes v. School Dist. No. 1*, 1972 WL 137533 (U.S.), 18-20.

<sup>110</sup> 512 F.2d 37, 54 (2d Cir. 1975).

<sup>111</sup> *Id.*

quality, which could not be ameliorated without integration. Schools are essential in “awakening the child to cultural values” and “helping him to adjust normally to his environment,” noting that cultural knowledge is essential to full education. Segregated education leads to a “handicapped ability to participate in the social, cultural, and political activity of our society.”<sup>112</sup> The court recognized the elevated job prospects for students from integrated schools. “Racial isolation also appears to have a negative effect upon the job opportunities of Negroes,” in part “due to the fact that *association* with whites often aids Negroes in competing more effectively in the job market” (emphasis added).<sup>113</sup>

The court in *United States v. Jefferson Cty. Bd. of Educ.*, again invoked intangible thinking, holding that “factors incapable of objective measurement”<sup>114</sup> but crucial to a good education were not available in segregated schools. Black students needed to have “normal contacts and association with white students”<sup>115</sup> to maximize their chances of long-term success. Similarly, the court rejected a student assignment plan in *Smith v. Concordia Par. Sch. Bd., No. 11*, because it promoted segregation, which would “deprive the black children of Concordia Parish one further opportunity to develop relationships with members of the dominant class.”<sup>116</sup>

In this brief comment, we see engagement with the idea that Black children need exposure to white children because of white supremacy; white children and families are the “dominant class.” This troubling recognition reflects a problem inherent in attempts to combat inequality by focusing on social capital – the idea that Black children’s success depends on access to white children is itself a form of racism. Social integration, per se, is not attempting to

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<sup>112</sup> *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 950

<sup>113</sup> 383 F. Supp. 699, 745 (E.D.N.Y. 1974).

<sup>114</sup> 372 F.2d 836, 870–72 (5th Cir. 1966).

<sup>115</sup> *Id.*

<sup>116</sup> 1970 U.S. Dist. LEXIS 13431, at \*11 (W.D. La. Sep. 3, 1970).

upend white advantage, but rather to expose children of color to white power, and ideally, in the long-run, lead to reductions in inequality. As unsettling as this idea is, the alternative, resource fortification within hyper-segregated contexts, is also limited.

In a series of cases, courts reaffirmed that the intangible ideas in *Sweatt* and *McLaurin*, “apply with added force to children in grade and high schools.”<sup>117</sup> The court in *Frasier v. Bd. of Trs.* used the same logic, holding that nothing the Supreme Court had suggested implied that the *Sweatt/McLaurin* “reasoning does not apply with equal force to colleges as to primary schools,” and that “it is fair to say that they apply with greater force to students of mature age in the concluding years of their formal education as they are about to engage in the serious business of adult life.”<sup>118</sup> In *Jackson v. Pasadena City Sch. Dist.*, the court held that “intangible considerations relating to the ability to learn and exchange views with other students, segregated professional schools have been held not to provide equal educational opportunities, and such considerations apply with added force to children in grade and high schools.”<sup>119</sup> These cases import intangible thinking into the K-12 context.

Several cases discussed the relevance of intangible factors, but how difficult it would be to design policy accordingly, or to establish judicially manageable standards for assessing them in practice. Recognizing that “many intangible factors help to make up an educational institution in its totality” and that the Supreme Court had “indicated that such factors are highly pertinent,” the court in *Parker v. Univ. of Del.* held that “these intangible factors, such as the reputation of the school, the prestige of the faculty, the beauty of the campus, etc., are difficult to measure on the scales of justice.”<sup>120</sup> Similarly in *Gila River Pima-Maricopa Indian Cmty. v. United States*,

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<sup>117</sup> 338 F. Supp. 67, 114 (E.D. Va. 1972).

<sup>118</sup> 134 F. Supp. 589, 592–93 (M.D.N.C. 1955).

<sup>119</sup> 59 Cal. 2d 876, 880 (1963).

<sup>120</sup> 31 Del. Ch. 381, 392–93 (1950).

the court held that the standard for “intangible factors” would be “different” and “difficult to establish,” though that was not a reason for courts not to try.<sup>121</sup> Courts here recognized the dramatic paradigm shift a full engagement with intangible factors would entail – to “constitutionalize” social capital and networks would require dramatic legal intervention in schools and neighborhoods, and an acceptance that public policy is limited in its ability to ensure equal opportunity and mobility – personal networks are also deeply important to life outcomes. While this idea is potentially transformative, there was language supporting it from decades before *Brown*, and the thinking ran through the *Brown* opinion.

Perhaps recognizing the difficulty in guaranteeing equality in intangible factors, compared to the relatively easy measurement of tangible ones, in *Hobson v. Hansen*, Judge J. Skelly Wright prefigured the school financing litigation movement that occurred in the decades after *Brown*. These subtle recognitions of the difficulties for courts in forcefully engaging on the intangible front are indicators of a turn toward judicial abandonment of these ideas. Wright argued that “the minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools be run on the basis of real equality.”<sup>122</sup> This statement implicitly acknowledged that the objectively measurable aspects of school quality were limited in their ability to ensure equal schooling, invoking the same language as *Sweatt*. But, given the difficulty of integration and the search for intangible resources, equality in tangible resources would have to suffice. The court here was asserting that objectively measurable factors are the constitutional floor. This notion, though, ignores the large crop of cases and thinking that constitutionalized intangible factors as relevant components of equal schooling. In this case, the subtle erosion of intangible factors as judicially relevant is at play. The education reform

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<sup>121</sup> 190 Ct. Cl. 790, 796 (1970).

<sup>122</sup> 327 F. Supp. 844, 845 (1971).

movement ultimately took this direction, largely abandoning integration as a goal in favor of per-pupil financing equalization.<sup>123</sup>

Citing *Hobson*, the appeals court in *Keyes v. Sch. Dist. No. 1, Denver, Colo.*,<sup>124</sup> adopted a similar tone: “If we allow the consignment of minority races to separate schools, the minimum the Constitution will tolerate is that from their objectively measurable aspects, these schools must be conducted on a basis of real equality, at least until any inequalities are adequately justified.”<sup>125</sup> The “consignment” here was not dictated by a segregation ordinance, but by the variety of present and historical factors that dictate residential living patterns and school assignment. The question posed in the quote suggests that the relinquishment of intangible thinking (acknowledging that objectively measurable factors are but one piece of the education puzzle) “consigns” children to segregated schools. Noting that limitation, the bare minimum is equality of objective factors, even if that does not equal the substantial equality *Brown* demanded. It is not the segregation ordinance that was the issue, but rather the intangible factors, which are still alive and present.

In this period, courts explicitly imported the pre-*Brown*, higher education intangible logic into K-12 desegregation cases, as well as the deployment of intangible language to justify busing. Juxtaposed with this, however, emerges the idea that school financing must be a “rights floor,” of sorts, because the ramifications of full-scale adoption of intangible equality as constitutional would be prohibitively transformative.

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<sup>123</sup> See Orley Ashenfelter, William J. Collins & Albert Yoon, *Evaluating the Role of Brown v. Board of Education in School Equalization, Desegregation, and the Income of African Americans*, 8 AMERICAN LAW AND ECONOMICS REVIEW 213–248 (2006).

<sup>124</sup> 445 F.2d 990, 1003–04 (10th Cir. 1971), judgment modified and remanded, 413 U.S. 189, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973)

<sup>125</sup> *Id.* at 1004.

### *Beyond Social Capital and Networks*

The interpretive analysis of these cases yielded several other ideas beyond the core of what intangible factors represented: the relevance of social networks for equal schooling. Three other primary ideas emerged: 1) school financing, 2) feelings of inferiority and stigma, and 3) American ideals and values.

### *School Financing*

In an interesting and surprising turn, intangible language was invoked in cases about school financing. As the judicial appetite for aggressive desegregation waned, litigants turned to school financing litigation, seeking to equalize per-pupil funding across schools, usually under state constitutional protections. In several cases, courts invoked the intangible line of thinking as a reason to *not* equalize school funding: we all know that intangible resources matter in education, ergo, equal funding is of secondary concern. This presents a somewhat cruel irony of school inequality: as courts tired of the racial integration required by intangible factors, these very same arguments were appropriated as reasons for refusing to require school systems to provide all students equal funding.

Often, James Coleman's research was invoked, particularly the famous 1968 Coleman Report, which recognized how the "quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students."<sup>126</sup> The report found that the characteristics of peers were profoundly important for the performance of students, and that students from "impoverished backgrounds will be most affected by a school situation which has a--which is more linguistic, particularly the rich or different educated

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<sup>126</sup> Coleman, James S. Equality of Educational Opportunity Study (EEOS), 1966. Inter-university Consortium for Political and Social Research [distributor], 2007-04-27.

environment” (quoting oral testimony).<sup>127</sup> Invoking Coleman, opponents of equal financing argued that “that increased spending on schools had little effect on the educational performance of either lower class children or other children.”<sup>128</sup> Christopher (Sandy) Jencks’ follow-up studies of the Coleman Report further argued that “the least promising approach to raising achievement is to raise expenditures since the data gives little evidence that any widely used school policy or resource has an appreciable effect on achievement scores.”<sup>129</sup> A more promising approach was thinking holistically about neighborhoods and schools, poverty, and the class and race composition of children and families in schools.

Yet this logic was deployed by courts not to build out non-financial resources in schools, but to *reject* financing suits. Rejecting the “rigid assumption” that per pupil funding determined educational outcomes, the court in *McInnis v. Shapiro*,<sup>130</sup> cited Coleman for the idea that “Expenses are not... the exclusive yardstick of a child’s educational needs,” given the variety of intangible factors that influence educational attainment and promotion. Education “presents a myriad of intractable economic, social, and even philosophical problems” of which money is a small piece.<sup>131</sup> The relationship between “cost and quality” has been “questioned,” embracing in a brief the Coleman/Jencks view that “factors positively correlated to measurable educational outputs have, to date, failed to support any findings of affirmative correlation between expenditure levels and education outputs.”<sup>132</sup>

Yet what this thinking leaves out is the Coleman Report’s intangible focus – the thrust of its argument was not that tangible resources did not matter, it was that intangible resources also

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<sup>127</sup> *Keyes v. School Dist. No. 1*, 1972 WL 137533 (U.S.), 18-20.

<sup>128</sup> *San Antonio Independent School Dist. v. Rodriguez*, 1972 WL 136551, 58 (U.S., 2004)

<sup>129</sup> *San Antonio Independent School Dist. v. Rodriguez*, 1972 WL 136551 (U.S.), 58 (U.S., 2004) (citing Jencks).

<sup>130</sup> 293 F. Supp. 327, 335–36 (N.D. Ill. 1968), *aff’d sub nom. McInnis v. Ogilvie*, 394 U.S. 322, 89 S. Ct. 1197, 22 L. Ed. 2d 308 (1969)

<sup>131</sup> *Dandridge v. Williams*, 397 U.S., at 487, 90 S.Ct. at 1163 (internal quotations omitted)

<sup>132</sup> *San Antonio Independent School Dist. v. Rodriguez*, 1972 WL 136441 (U.S.), 23-24 (U.S., 2004).

did. Opposing briefs sought a reconciliation between tangible and intangible resources, noting that “While we subscribe wholeheartedly to the relevance and importance of intangible factors in education, see *McLaurin v. Oklahoma State Bd. of Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 639 (1950); Coleman, J., et al., *Equality of Educational Opportunity* (1966), we are equally cognizant of the enormous impact of resource allocation upon educational offering and opportunity.”<sup>133</sup> Resources mattered, alongside intangible forces.

Relatedly, the interpretive analyses pointed to cases stressing the idea that desegregation was a route to *tangible* resources for Black students, and that only through integration would Black children receive the same financial resources as white children, an idea sometimes called “green [money] follows white [children].” Segregation has always resulted in “separate and unequal facilities for minority peoples,” implying tautologically that the only route to fair resource provisioning is integration.<sup>134</sup> “The record has shown that gross inequalities exist whenever segregation is practiced,<sup>135</sup> emphasizing the resource disparities flowing from segregation. In *Sweatt*, the plaintiffs brought in an expert witness to testify about this reality: “I am unable to think for the moment of [any] colored institutions and white institutions which do have equal facilities with which I have been associated.”<sup>136</sup> Again, this argument was not that schools with predominantly Black students need more resources per se; it was that Black children will never get those resources absent integration.

### *Stigma & Inferiority*

Famously, *Brown* discussed the “feelings of inferiority” that segregation created for Black children. This line of thinking was present in the cases studied here, with evidence that

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<sup>133</sup> *San Antonio Independent School Dist. v. Rodriguez*, 1972 WL 136434 (U.S.), 7 (U.S., 2004).

<sup>134</sup> *McLaurin v. Oklahoma State Regents for Higher Educ.*, 1950 WL 78679 (U.S.), 3 (U.S., 2006).

<sup>135</sup> *Sweatt v. Theophilus Shickel Painter*, 1950 WL 78681 (U.S.), 74 (U.S., 2006).

<sup>136</sup> *Id.* at 70-71.

feelings of inferiority were another intangible consideration motivating desegregation. But it was not overwhelming. Inferiority logic does not fully explain intangible thinking. Often, inferiority and stigma, or the idea that a person or group can be disapproved of by society based on perceived undesirable characteristics that make them different from a social mainstream,<sup>137</sup> language appeared together, suggesting the concepts were connected for judges. This thinking appeared frequently in cases relying on survey research, with one party or the other introducing evidence of school reputation as evidence of ongoing stigma attached to certain, largely minority schools. Intangible language also included this idea.

In *Norwalk Core v. Norwalk Bd. of Educ.*, the court rejected the district's attempts to close a school because of its "bad reputation" and "the belief that the attitudes and fears of parents concerning attendance of their children at this school would be carried over to and reflected by their children, thus interfering with the attainment of a high quality educational experience."<sup>138</sup> The court rejected the idea that the stigma attached to formerly segregated schools in Black neighborhoods should be allowed to continue to inform educational decision making in the wake of *Brown*.

*Davis*, one of the cases leading up to *Brown*, noted that "Virginia's separation of the Negro youth from his white contemporary stigmatizes the former as an unwanted."<sup>139</sup> This stigma "prejudices the colored child in the sight of his community."<sup>140</sup> Stigma is a powerful force, "depriv[ing] him of the equal opportunity with the Caucasian of receiving an education unmarked."<sup>141</sup> This then impacts the minds of white children, families, and the general public.

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<sup>137</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

<sup>138</sup> 298 F. Supp. 213, 218 (D. Conn. 1969).

<sup>139</sup> ***Davis v. County School Board*, 103 F. Supp. 337, 338 (E.D. Va. 1952).**

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

The briefs in *Brown* built on this thinking; segregation makes Black children “confused and [] personally insecure.”<sup>142</sup> This stigma’s impact is “greater when it has the sanction of law.”<sup>143</sup> Black children “learn the inferior status to which they are assigned—as they observe the fact that they are almost always segregated and kept apart from others who are treated with more respect by the society as a whole—they often react with feelings of inferiority and a sense of personal humiliation.”<sup>144</sup> Black schools are “stigmatized as inferior in the community.”<sup>145</sup> Black children develop an “inferiority complex by not being allowed to sit in white classes in the school room.”<sup>146</sup> The depth of the stigma is reflected in how white families would feel sending their children to segregated schools. Doing so would be “considered to be degrading and a loss of caste.”<sup>147</sup>

But this thinking outlasted the removal of formal segregation ordinances, for “there is evidence that adventitious segregation is accompanied by a stigma which has comparable effects” on children as segregation imposed by law did.<sup>148</sup> In cases like *Hart*, courts made the claim that segregation even divorced from legal formality is problematic because of factors like stigma. The court noted that despite a school’s “fine facilities, faculty and program,” parents have “antipathy” sending their children there because it “is situated in a slum area.”<sup>149</sup> “The children have learned from their parents or gotten from their parents certain attitudes about going to a school of this type, where there are a preponderance of minority group children,”<sup>150</sup> the court

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<sup>142</sup> *Brown v. Bd. of Educ. of Topeka*, 1951 WL 82600 (U.S.), 3-4 (U.S., 2006).

<sup>143</sup> *Id.*

<sup>144</sup> *Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmanuel, et al., Appellants, v. Board of Education of Topeka, Shawnee County, Kansas, et al.*, 1952 WL 47265 (U.S.)

<sup>145</sup> *San Francisco Unified Sch. Dist. v. Johnson*, 3 Cal. 3d 937, 949–50, 479 P.2d 669, 675–76 (1971).

<sup>146</sup> *Borders v. Rippy*, 195 F.Supp. 732, 733 (D.C.Tex. 1961).

<sup>147</sup> *Sweatt v. Theophilis Shickel Painter*, 1950 WL 78684 (U.S.), 35-37 (U.S., 2006).

<sup>148</sup> 383 F. Supp. 699, 728–29 (E.D.N.Y. 1974), *aff’d sub nom. Hart v. Cmty. Sch. Bd. of Ed., N.Y. Sch. Dist. No. 21*, 512 F.2d 37 (2d Cir. 1975)

<sup>149</sup> 383 F. Supp. 699, 714 (E.D.N.Y. 1974).

<sup>150</sup> *Id.*

noted, citing testimony from the school chancellor. A “contributing element to the damage arising from racially isolated schools” is that “they often are regarded by the community as inferior institutions and students and teachers sense that their schools are stigmatized.”<sup>151</sup> Part of the project of desegregation was overcoming the stigmatic harms suffered by Black schools.

Combating stigma as a reason for desegregating was evident in *Hobson v. Hansen* as well. “The entire community, white and black, whose own attitude toward Negro schools is what stigmatizes those schools as inferior, must be disabused of any assumption that the schools are still officially segregated, an assumption it might cling to if after supposed ‘desegregation’ the schools remained segregated in fact,” the court held.<sup>152</sup> Actual integration was the only way to convince people that schools were no longer officially segregated. Courts had a role to help destigmatize Black schools, and that was part of the integration project.

In *Boman*, the court held that “The intangible factors relied upon by the Court were the presumed feeling of inferiority by those who were educated separately and the detrimental effect segregation had upon their educational and mental development,” directly conflating intangible factors with inferiority logic.<sup>153</sup> In *Dawson v. Balt. City*, which struck down segregation of recreational parks and beaches, the court held that it could not “base its decision on the tangible factors only of a given situation, but must also take into account the psychological factors recognized at this time, including the feeling of inferiority generated in the hearts and minds of Negro children, when separated solely because of their race from those of similar age and qualification.”<sup>154</sup> Also in the recreational segregation context, in *Fayson v. Beard*, the court asked if equal tangible facilities did not eliminate “intangible or psychological discrimination” in

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<sup>151</sup> *Id.* at 745.

<sup>152</sup> 269 F. Supp. 401, 494–95 (1967).

<sup>153</sup> 292 F.2d 4, 24 (5th Cir. 1961).

<sup>154</sup> 220 F.2d 386, 387 (4th Cir. 1955).

public schools, how could “it reasonably be said that equality in tangibles in the field of public recreation eliminates psychological factors so clearly involved in segregation based upon the color of a man’s skin?”<sup>155</sup> The *Fayson* court found these psychological factors relevant even in the recreational context, writing that “If the reasoning in the School Segregation Cases concerning psychological factors is sound as it relates to public education, then it must necessarily apply to the field of public recreation.”<sup>156</sup>

### *American Ideals*

A final theme emerging from these cases is the idea that desegregation promotes a set of lofty American ideals: human flourishing, egalitarianism, liberal arts education, democratic participation, and moral fortitude, and that racial segregation is antithetical to these goals. Various cases discuss segregation as a “loss of human values and a waste of the resources of the spirit that results from such a system.”<sup>157</sup> Intangible factors were these values.

Segregation, because it “prevents the interplay of ideas, personalities, information and attitudes . . . prevents a working democracy.”<sup>158</sup> This is especially damaging for young children. “The sine qua non of education in a democratic society is the teaching of a belief in and loyalty to democratic ideals,” and this goal cannot be achieved in a context where “students of both the majority and minority groups are not only limited in a full and complete interchange of ideas and responses.”<sup>159</sup> Because “[e]ducation cannot be separated from the social environment in which

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<sup>155</sup> 134 F. Supp. 379, 381-82 (E.D. Tex. 1955).

<sup>156</sup> *Id.*

<sup>157</sup> *Spottswood Thomas Bolling, et al., Appellants, v. C. Melvin Sharpe, et al., Appellees.*, 1952 WL 47283 (U.S.), 6.

<sup>158</sup> *Id.* at 11.

<sup>159</sup> *Id.*

the child lives” children cannot “learn the meaning of equality” in the context of segregation.<sup>160</sup> Segregated schools “block the attainment of the broader goals of democratic education.”<sup>161</sup>

Invoking Horace Mann, the *Hobson* court emphasized the historical role of schools as engines of social mobility and guarantors of democracy: “the public school, by drawing into the close association of the classroom students from every social, economic and cultural background, would serve as an object lesson in equality and brotherhood and undermine the social class divisions which he and his colleagues felt were inimical to democracy.”<sup>162</sup> Only through schools being “democratic communities wherein children live natural, democratic lives”<sup>163</sup> can children grow into adults who know how to practice good citizenship. Schools give children the opportunity to “practice” democracy, by experiencing “harmonious cooperation between members of various ethnic and religious groups and thus produce attitudes of tolerance and mutual sharing that will continue in later life.”<sup>164</sup> This practical approach is “the most important instrument for teaching democracy to all people.”<sup>165</sup> Dedication “to equality and the proposition that people of diverse backgrounds can live together in peace and harmony” are fundamental values of our society that require integration to be realized.<sup>166</sup>

Schools are the “primary institutions through which our society can promote interracial tolerance and understanding and, therefore, multi-racial harmony.”<sup>167</sup> They ensure the “development of citizenship, loyalties and devotion to democratic beliefs, and the development

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<sup>160</sup> *Brown v. Bd. of Educ. of Topeka*, 1951 WL 82600 (U.S.), 5-8 (U.S., 2006).

<sup>161</sup> *Hobson v. Hansen*, 269 F. Supp. 401, 406 (1967).

<sup>162</sup> *Id.* at 505.

<sup>163</sup> *Spottswood Thomas Bolling, et al., Petitioners, v. C. Melvin SHARPE, et al., Respondents.*, 1952 WL 47257 (U.S.), 15-16.

<sup>164</sup> *Id.* at 130.

<sup>165</sup> *Id.*

<sup>166</sup> *Hart v. Cmty. Sch. Bd. of Brooklyn, New York Sch. Dist. No. 21*, 383 F. Supp. 769, 775 (E.D.N.Y. 1974), *aff'd sub nom. Hart v. Cmty. Sch. Bd. of Ed., N.Y. Sch. Dist. No. 21*, 512 F.2d 37 (2d Cir. 1975)

<sup>167</sup> *Hart v. Cmty. Sch. Bd. of Brooklyn, New York Sch. Dist. No. 21*, 383 F. Supp. 699, 730 (E.D.N.Y. 1974), *aff'd sub nom. Hart v. Cmty. Sch. Bd. of Ed., N.Y. Sch. Dist. No. 21*, 512 F.2d 37 (2d Cir. 1975).

of an individual as a personal and national asset.”<sup>168</sup> Only through racial integration can we hope to reduce the racial tensions so deeply powerful in American history.<sup>169</sup> Schools are the first experience most people have with the state. When they see the principle of segregation practiced in school, they come to understand race as essential to our political system, and racial discord follows. Our world “increasingly demands interracial and inter-ethnic cooperation and understanding at all levels” that only comes through integration.<sup>170</sup> Integration “set[s]the stage for meaningful and continuous exchanges between the races, educates white and Negro students equally in the fundamentals of racial tolerance and understanding.”<sup>171</sup> Only with this learning in school will children learn to “live interracially.”<sup>172</sup> Segregation “precludes the kind of social encounter between Negroes and whites which is an indispensable attribute of education for mature citizenship in an interracial and democratic society.”<sup>173</sup> In a segregated context, white children “tend to lose sight of those fundamental values of our constitutional system which, while respecting individual differences, favor free access and wide social mobility to all persons regardless of race, creed, or national origin, and which thereby promote a healthy interchange among persons of different backgrounds.”<sup>174</sup> Racial isolation promotes “racial conflicts and divisiveness in the country and thus adversely affects the domestic tranquility the Constitution was designed to promote.”<sup>175</sup> Children in segregated schools are “ill-prepared to deal with the pluralistic society” of the real world.<sup>176</sup>

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<sup>168</sup> *McLaurin v. Oklahoma State Regents for Higher Educ.*, 1950 WL 78675 (U.S.), 37 (U.S., 2006).

<sup>169</sup> 383 F. Supp. 699, 729 (E.D.N.Y. 1974), *aff'd sub nom. Hart v. Cmty. Sch. Bd. of Ed.*, N.Y. Sch. Dist. No. 21, 512 F.2d 37 (2d Cir. 1975).

<sup>170</sup> *Id.* at 730.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*, 730–32.

<sup>175</sup> *Id.*

<sup>176</sup> *Oliver et al. v. Kalamazoo Board of Education*, 368 F.Supp. 143, 155-156 (W.D.Mich.1973).

Our pluralistic democracy could not function without some degree of racial harmony, and part of the goal of integration was to promote cross-racial exchange. “Racial prejudice is something that is acquired”<sup>177</sup> in childhood, wrote the dissenting judge in *Briggs*. “Let the little child’s mind be poisoned by prejudice of this kind and it is practically impossible to ever remove these impressions however many years he may have of teaching by philosophers, religious leaders or patriotic citizens.”<sup>178</sup> Allowing these racial attitudes to cement in children perpetuates permanent inequality. Similarly, in *Hobson*, “actual integration” allowed “meaningful and continuous exchanges between the races” educating students “in the fundamentals of racial tolerance and understanding.”<sup>179</sup> Children from different racial groups are the “primary liberating promise in a society imprisoned by racial consciousness.”<sup>180</sup> School segregation precludes interracial social encounters that are an “indispensable attribute of education for mature citizenship in an interracial and democratic society.”<sup>181</sup> Schools promote “the tolerance and understanding essential to harmony.”<sup>182</sup>

## **Discussion**

The intangible language in *Brown* is puzzling. What were these intangible factors that made separate schools inherently unequal? The analysis above sought answers in the case law that led to *Brown*, and the saturated desegregation cases that followed it. Findings illustrate that intangible factors included a robust, constitutionally inflected acknowledgment of a variety of sociological, non-financial forms of inequality. These findings are summarized in Table 5, which

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<sup>177</sup> *Briggs v. Elliott*, 98 F. Supp. 529, 547 (D.S.C. 1951) (dissenting opinion).

<sup>178</sup> *Id.*

<sup>179</sup> *Hobson v. Hansen*, 269 F. Supp. 401, 419 (1967).

<sup>180</sup> *Id.*

<sup>181</sup> 269 F. Supp. 401, 504–05 (1967).

<sup>182</sup> *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699, 729 (E.D.N.Y. 1974).

catalogs the variety of meanings intangible factors language represented for the courts, and reveals the deeply sociological thinking present in desegregation case law.

This language began nearly 100 years ago in the 1930s, with a cluster of higher education cases, rooted in law schools, that recognized that there are inequalities that only racial integration can hope to overcome. *Brown* was decided in the context of dozens of intangible cases that came before it, and the briefs in the case emphasized intangible factors as well. It borrowed the logic from higher education and imported it into the K-12 context. Courts across the country recognized that equal schooling demanded access to intangible resources that could only be gained through integration. This idea, and its relevance to constitutional law, *Brown's* story, and explanations for the changes in desegregation law and policy, has been overlooked. It is an under-appreciated social context for the case, and an under-appreciated idea baked deeply into desegregation's core logic, one that clearly bears out in its legacy.

Judges recognized the power of intangible factors for life outcomes, and the ways social capital and related concepts could be converted into economic capital and bear on long-term outcomes. Judges incorporated intangible factors as part of their assessments of desegregation plans and used them as justifications for busing programs. While not incorporated into formal doctrinal tests, their embrace in the case law shows real judicial reckoning with the role of sociological ideas about inequality, and that these ideas should bear on legal analysis under the Equal Protection Clause. Prestige of institutions attended, alumni networks, professionalization, and the social ties that are made at school are real inequalities that cannot be addressed with money alone. In many instances, courts emphasized these factors as even more powerful than financial resources.

**Table 5. The Meaning of Intangible Factors to Judges Authoring School Segregation Court Cases**

Dimension	Resource (Non-Pecuniary but Instrumental)
<b>School Resources</b> Inequities in:	Experience of the school administration Influence of the school's alumni Prestige, heritage, traditions, reputations of schools Reputation of the faculty School's standing in the community Spatial location of schools
<b>Social Capital</b> Ability to:	Access the other group's social networks, social spaces Adjust oneself personally, socially to settings comprising members of the other group Anticipate needs in college and cultivate students' career interests by school staff Benefit from the knowledge of the peers in the other group (peer effects) Co-participate in extracurricular life, activities with the other group Engage in debate with the other group Enjoy companionship, friendship, cooperation with the other group Exchange ideas, attitudes, opinions, perspectives with the other group Experience competition with members of the other group Gain exposure to varied personalities, abilities, propensities of the other group Obtain knowledge about the habits and manners of the other group Obtain knowledge about the ways of thought, cultural attitudes of the other group Secure acceptance by the other group based on one's own merits Sit, stand, play, work physically next to members of the other group
<b>Civic Participation</b> Segregation:	Aborts children's development into adults who know how to practice good citizenship Conflicts with American ideals of human flourishing, egalitarianism, democratic participation Diminishes individual's skill at participation in sociopolitical activities of larger society Hinders children's preparation to deal with a pluralistic society Impairs association with others from different backgrounds that is inimical to democracy Impairs opportunity to practice democracy via intergroup cooperation Precludes the kind of social interactions required for mature citizenship in a democracy Prevents the interplay of ideas, personalities, information required of a working democracy Removes an important instrument (racial mixing) for teaching democracy to all people
<b>Social Psychology</b> Segregation:	Blocks the enlargement of personal experience that is essential for human development Constrains subordinate group exposure to positive role models Inculcates a sense of defeatism in members of the subordinate group Inculcates feelings of inferiority in the subordinate group Makes members of the subordinate group feel a sense of personal humiliation Makes members of the subordinate group feel confused and insecure Makes members of the subordinate group feel stigmatized and unwanted Reduces the level of aspirations of members of the subordinate group

This helps explain how desegregation got so big – the only way to see improvements in inequality in intangible factors was through racial mixing, with demographic racial integration via busing as a clear remedy. However, the cases also revealed a wariness in judges at the scope of intangible factors, with the potential to erode the state action doctrine and have judges intervening in areas long thought to be within the private sphere. There were also early judges dubious about the relevance of intangible factors for desegregation, harkening to some of the narrower, legalistic visions of desegregation presented in Chapter 1.

In addition to the networks cases, the cases yielded three other main themes: school financing, inferiority and stigma, and American ideals. This was another strength of combining text analysis and traditional hermeneutic techniques – the quantitative dictionary analysis of other research (Biblarz, chapter 2) pointed to cases and concepts beyond the initial hypothesis, but that were related and proximate. At the same time it missed important meanings of intangible factors like inequalities in citizenship and training for democracy. While the intangible idea included much discussion of networks and social capital, it was also present in these other topical areas. In school financing cases, judges acknowledged the relevance of intangible factors when arguing that tangible resource equality is insufficient. Yet in these cases, there was no parallel effort to address the disparities observed in tangible resources. Inferiority language appeared in a smaller handful of cases than the networks language, despite often being used to explain why segregation was inherently unequal, and why *Brown* was decided the way it was. This language often appeared alongside discussions of stigma, a deeply sociological idea about the failure to be recognized as a full person in social life. Lastly, the intangible concept captured the idea that segregation challenged the American ideal of egalitarianism and democratic participation, and that only through integration could these ideals be fully realized.

Importantly, the interpretive analysis revealed that language does not always equal law. Put differently, statistical text analysis of school desegregation cases (Biblarz, Chapter 2) has shown a decline, but not a complete erasure, of intangible thinking in case law. This study shows that as intangible language was declining, the tenor with which it was deployed changed as well. No longer was it about embracing intangible factors as legally relevant; it was about recognizing intangible factors as influential for educational and life outcomes, but beyond the appropriate (or even possible) reach of the judiciary. Intangible factors are still invoked to mean roughly the same thing – that non-financial forms of inequality bear on life outcomes. But their deployment was defanged, with contemporary judges not baking these ideas into adjudication decisions the way some of their predecessors did, despite their presence on the page. Law, then, is not just about the words, but the inter-locking ways words work together, build on past precedent, and situate within a larger narrative. Detecting this shift would only be possible with interpretive analysis in conjunction with quantitative text methods – the text methods revealed an interesting set of ideas present in the texts, the interpretive analysis showed how that language operated. Text analysis alone (e.g., the study in Chapter 2) has a difficult time capturing this reality of law; grasping the interstitial ways law “hangs together” requires interpretation.

From a doctrinal perspective, one might argue that the waning of this language represents legal settling. Before *Brown*, these intangible aspects were relevant to the question of whether school segregation is constitutional. *Brown*, of course, held that segregation is categorically unconstitutional, even if tangible aspects of education have been equalized, in part because the intangible aspects are never equal. But after *Brown*, why would lower courts have had to deal with the intangible aspects? The emergent, winning doctrine asked courts to determine if a jurisdiction maintained a de jure segregated system or one motivated by racially segregative

intent. After liability was established, lower courts also had to determine at what point all the vestiges of the original constitutional violation had been extirpated. Neither of these inquiries seems to require analysis of intangible educational aspects – intangible factors never became a doctrinal dimension. Perhaps references to intangible educational aspects peaked right around *Brown* because that's when these intangibles had the most potential to be doctrinally relevant—when the question of segregation was itself most pressing for the courts.

This argument, though, presents two problems. First, the argument of this chapter is not that intangible factors became the dominant doctrinal test. Rather, the argument is that they represent a road not taken – a major, alternative, far more comprehensive view of constitutionally relevant school inequality factors, and that this alternative was well-developed and present in a sizable portion of the case law particularly before *Brown*, but also in the decades after it. These cases do not represent a majority of the desegregation cases. Yet they represent an important alternative to the narrow, tangible-focused doctrinal test that did emerge, one in which judges and policymakers grappled more fully with the non-financial dimensions of inequality that often dictate equal opportunity and social mobility.

Additionally, it is well known that the reach of desegregation extended far beyond the narrow doctrinal confines of vestigial factors, much to the chagrin of conservative judges. Desegregation became a massive project, impacting nearly every school district in the United States in one way or another. A narrow, hyper-legalistic vision of *Brown* misses the reality that this social project upsets how we typically think about legal rulings, and became far bigger than a narrow attempt to strip Black and white school signs, or even to remove the legacies of intentional discrimination. Intangible factors partially explain how this project got so “big.” Part of the motivation for demanding demographic integration was a recognition that intangible

factors prevented schools from being made equal. The early recognition of the potency of intangible factors for inequality helps explain why we kept *doing* integration, even fifty or more years after *Brown*. It helps to explain why the integration accordion expanded so widely in the mid-1970s, as demonstrated in other research (Biblarz, Chapter 1). We know that segregation was not a settled term throughout legal history. An overly-doctrinal explanation that overlooks the relevance of intangible factors fails to consider the unsettled nature of segregation since *Brown*. Part of the initial interrogation of *Brown* included a real engagement with the idea of intangible factors as relevant, that got baked into the thinking, and it helps explain the profound push for demographic integration throughout the 1960s and 1970s. We can have an education policy regime guided by a broad notion of what equal schooling demands that is far more sociological in its approach than the one at play at present.

Lastly, it remains important to recognize the problematic nature of intangible factors. This troubling recognition reflects a problem inherent in attempts to combat inequality by focusing on social capital – the idea that Black children’s success depends on access to white children is itself a form of racism. Social integration, per se, is not attempting to upend white advantage, but rather to expose children of color to white power, and ideally, in the long-run, lead to reductions in inequality. As unsettling as this idea is, the alternative, resource fortification within hyper-segregated contexts, is also limited, potentially ignoring the tremendous power social capital and networks have for mobility and life outcomes.

## Dissertation Conclusion

Chapter 1 investigated how the meaning of segregation and related terms has changed at the Supreme Court over time, utilizing the tools and methods of interpretive sociology. Sociologists have long studied the indeterminacy and instability of law, supposedly an institution rooted in fixity and slow moving change. This Chapter revealed an under-explored reality: that segregation's meaning has been contested since before *Brown*, and continues to be at the highest levels. Because segregation's meaning has fluctuated so widely over time, its substantive commitments, in terms of actionable policy and/or legal remedies, have also remained unstable. Segregation's meaning moved like an accordion, from a narrow definition focused on the legal segregation ordinances on the books in 1954, to a broad one defined by racial imbalance, and back to an exceedingly narrow definition where only intentional state action constitutes impermissible segregation. Time did not ensure that segregation's meaning settled into a fixed legal category.

I argue, then, that segregation is an incompletely institutionalized concept, and this slipperiness is important given the power judges have on daily life, particularly in the context of school integration policy. Despite tremendous amounts of legal precedent in the area, the wide fluctuations in meaning reveal the limits of legal anchoring tools for ensuring clear and permanent definitions. Thinking about legal meaning-making as a manifestation of the broader concept of social institutionalization helps us understand how legal actors develop patterns of interpreting and justifying legal rules.

As importantly, this chapter has implications for how we should conceptualize the "success" of desegregation, and on whose terms we are measuring that success. Meaning matters! In social science, the success of desegregation is typically measured in two ways: 1) the degree to which a judicial desegregation order actually produced demographic integration (racial

mixing), and 2) the degree to which that racial mixing is associated with an outcome of interest, usually test scores, with varying degrees of causal inference possible. This chapter challenges that notion, and argues that to evaluate desegregation, we need to engage with the meaning and intentions of the primary architects of desegregation: judges. Only for a brief period was desegregation intended to demographically integrate schools. To assess judicial desegregation's success, though, requires "taking law seriously," and developing a clear understanding of desegregation's goals at different moments in time. For much of the early desegregation era, success meant eliminating a system of explicitly or implicitly racist segregation laws. That idea, that desegregation was about a legal system rather than demographics on the ground, remains the most prominent definition today, despite a brief period of domain expansion where desegregation meant something else. While desegregation is often considered a failure given its limited enduring impact on school integration rates, from one perspective, the Court accomplished a massive change in the social structure – the deinstitutionalization of "segregation" by extinguishing laws separating groups, helping to end Jim Crow.

Champions of school integration can find some solace in this chapter. While today the Court's majority rejects the racial balance view, there was a time when mandatory racial balance was accepted by the Supreme Court. It is possible for this view to re-emerge; this should not be overlooked by those interested in social change, particularly large-scale racial integration.

Out of Chapter 1 emerged a set of questions that formed the basis of Chapter 2. While reading about the scope of desegregation in early cases, I was struck by repeated invocations of sociological ideas about inequality – social networks, social capital, prestige, reputation, and related concepts – as a substantive basis for desegregation. These concepts felt different in kind from explanations rooted in social psychology, most especially the famous Clark doll study and

the “badge of inferiority” that segregation laws marked Black children with. I had never seen these ideas in historical or legal studies seeking to explain why *Brown* and later desegregation cases came out the way they did. Furthermore, I was struck by an easy to discount footnote in *Brown*: that a set of “intangible considerations” prevented separate schools from ever being made equal (*Brown v. Board*, n. 4). This seemed to beg the question – why? I hypothesized that these sociological ideas could be the “intangible considerations” *Brown* was referencing. Furthermore, I felt that these intangible considerations could help explain how desegregation swelled as widely as it did in the late 1960s and early 1970s. I wanted to provide an additional, under-explored basis for the *Brown* decision and desegregation thinking writ-large, and to provide a possible explanation for the changing scope of desegregation over time.

I used a series of emergent computational text analysis methods to study these questions. Based on pre-existing knowledge, in conjunction with computational techniques, I constructed a novel terminological dictionary of 41 “intangible” related concepts, meant to capture sociological ideas about inequality. I then searched for these terms in the full corpus of school desegregation cases (roughly 2000).

Findings demonstrate that sociological ideas were prevalent in a sizable portion of the desegregation case law (roughly a third of the opinions). This is a significant and meaningful amount that has been overlooked in the literature about desegregation. As importantly as demonstrating that these ideas did exist in a wide set of the case law, a finding in and of itself, is the time trend. When controlling for case length (they got markedly longer over time), the presence of these ideas in school desegregation court opinions markedly *decreased* over time, with one exception (diversity). This finding suggests that the window available for doing

anything serious about inequality via the courts has shrunk, and the legal relevance of sociological, intangible ideas about inequality has waned.

These findings provide an important additional explanation to *Brown* – segregation was unconstitutional in part because access to social capital and networks was relevant for children’s constitutional rights. This thinking hit its peak alongside the judicial moment when busing was more aggressive and segregation was defined most broadly (demographic isolation). This makes sense – if part of the right to attend desegregated schools means access to social capital and networks held by white children and families, the only policy solution to vindicate those rights is actual integration. The decline of these ideas in judicial thinking parallels a declining commitment to forceful, affirmative racial mixing. This is an under-appreciated element of the desegregation and *Brown* story.

These findings are important for the history of sociology’s influence in law. The “intangible” concept, though mentioned in *Brown*, has not been studied in any meaningful way; this is the first paper to mine that concept through the full set of desegregation case law, demonstrating the presence of sociological ideas through desegregation history. Additionally, analyzing how important legal and political actors think about what equality means and requires is important for scholars of stratification. In the American political system, constitutional rights are a floor; if those rights included a broader, more sociological conception of Fourteenth Amendment-guarantees, the possibilities for social policies to reduce stratification are wider. Beliefs about how inequality works, and subsequent framings around those beliefs, show us that ideological commitments can be important determinants of the contours of policy history.

Chapter 2 was rooted in text analysis – the construction and implementation of a theoretically and computationally determined set of terms, and then determining their

prevalence. Chapter 2 established the utility of this method – it was able to produce a coherent set of terms, and show how they varied in a text corpus that would have been incredibly cumbersome to read. It pointed to cases most saturated with concepts of interest. Chapter 2 also demonstrated difficulties with text analysis in the legal context. Bounding the proper corpus, especially in legal doctrine, where issues cross topical boundaries and citations vary widely, proved difficult. Constructing the dictionary required several theoretical decisions at the outset. How to “weight” cases according to their legal influence proved challenging.

More substantively, Chapter 2 was limited in its ability to show the role these ideas had in cases, their situational context, and the facts of the specific cases they appeared in. The presence or absence of dictionary terms is only so effective in establishing that this thinking, as I imagined it, was important to the cases. Strong text analysis projects are almost always accompanied with hermeneutic analysis of a slice of the text data. I performed that analysis in Chapter 3.

Chapter 3 established that the dictionary methods effectively captured the sociological concepts of interest imagined. In the pre-*Brown* era, a series of higher education cases invoked intangible factors as reasons for mandating integration at mostly law schools. This was the legal context *Brown* was decided in. Courts across the country recognized that equal schooling demanded access to intangible resources that could only be gained through integration. This idea, and its relevance to constitutional law, *Brown's* story, or explanations for the changes in desegregation law and policy, has been overlooked. I would argue that these judges should be brought into sociological history as early thinkers about the power of social networks, relationships, and capital for life outcomes.

Judges across the country adopted sociological thinking about inequality - the ways intangible factors can impact life outcomes via conversion to economic capital. Judges instituting busing decisions invoked intangible factors as justification. These ideas were never codified as doctrinal tests, but there was real judicial reckoning with the role of sociological ideas in inequality, and that these ideas should bear on legal analysis under the Equal Protection Clause.

But these ideas were never universal, and as quantitative analysis showed, waned over time. Judges were wary of the scope of intangible factors for the judiciary. Taken to their logical conclusion, if part of children's rights under the Equal Protection Clause includes access to equal social networks, that would mean widespread mandating of racial mixing in housing and schooling. Some even sympathetic judges bristled at that approach. Others rejected the enterprise of intangible factors altogether, arguing that desegregation was about removing formal legal ordinances, not judicial analysis of the input factors that determine life outcomes or social mobility.

Further demonstrating the importance of using interpretive, hermeneutic techniques alongside computational techniques: While my initial hypothesis about the presence of intangible factors like social capital, networks, and the like as relevant to why desegregation proceeded the way it did proved true, the dictionary pointed to other non-financial ideas underpinning desegregation. In the school financing context, I observed judges deploying intangible logic when rejecting equal per-pupil financing cases. This argument is insidious – we know intangible factors matter so we won't demand equality in tangible ones (money), but have also abandoned efforts to try to equalize intangible factors. Additional emergent ideas were stigma, or the idea that segregation unconstitutionally stigmatized Black children, and the idea that desegregation was essential to protecting American democratic ideals.

One limitation of text analysis that the interpretive methods revealed is the idea that language does not equal law. Looking at the quantitative analysis in isolation could mischaracterize how these terms mattered for judicial decisions. They appeared in nearly a third of cases – that must mean they were part of legal tests, right? Careful reading, from a legal perspective, showed that was not quite true. While the language was present and pronounced, it was never formally incorporated as part of any doctrinal test. Accordingly, its legal impact was questionable. While judges clearly cared about these factors, they never solidified in constitutional doctrine. This was an important realization from the interpretive methods. The quantitative methods risk over-stating the power of these ideas in our legal order.

### Concluding Thoughts

The study of school and neighborhood segregation is foundational to sociology, bridging race, stratification, and public policy. Too often, though, these studies overlook meaning-making processes around desegregation and law in favor of empirical studies of student achievement or school diversity. Engaging seriously with law, on its own terms, reveals for sociologists pronounced meaning divides around the goals, contours, and trajectories of school desegregation. Furthermore, mining legal texts for hard to see meaning provides new insight into the possibilities for bringing sociological ideas about inequality into legal and political arenas.

This project has important insights into the past, and future, of school integration. Its interventions show that desegregation has long been an unsettled concept, and to measure its substantive commitments solely by student achievement or the degree of racial mixing in schools obscures a far messier set of debates about why desegregation mattered. “Intangible factors” represents an overlooked explanation for why *Brown* was decided the way it was, the ideas that justified desegregation, and how desegregation swelled to such a massive movement. With

judges adopting sociological ideas about inequality, you see arguably the widest recognition of the diverse forces that bear on inequality and social mobility ever by the courts. This overlooked motivation behind desegregation helps to explain why racial mixing via busing became a widespread remedy – because the only way to give students of color a fighting chance at access to intangible resources was exposure to white children and families. Champions of the view that desegregation was a squarely legal project would be wise to recognize this early history, and its prominence throughout later cases.

As much as I believe in the power of intangible factors for determining life outcomes, both from my own educational experience and my study of sociology, it remains important to remember the unpleasant realities they represent. Derrick Bell (1980) and others famously lost interest in desegregation when they saw its uneven implementation and the efforts white families would go to avoid Black children. Bell argued, implicitly, that any gain in access to social capital or networks integration brings was outweighed by the trauma Black children had to go through in integrated schools, and that the promise of intangible factors was overstated. Instead, he argued, resource fortification within hyper-segregated contexts was a preferable strategy for mobility and opportunity. He rejected the idea that Black children needed, or perhaps should need, exposure to white children and families to succeed.

As right as Derrick Bell and others in his tradition are, intangible factors remain a powerful dictator for life outcomes. High performing charter schools and contemporary educational reform organizations often adopt the view that resources like teacher quality, per-pupil funding, and school culture are the real determinants of social mobility, not the class and racial composition of student bodies. The erosion of intangible thinking has not just happened at the courts – integration is off the policy agenda entirely, with few school districts or prominent

education policy makers actually trying to use school diversity as a tool for school improvement. This is ironic, as sociologists have never been more focused on the ways non-financial forms of inequality bear on life outcomes.

As much as I tried to keep my own views out of this project, my sympathies lie with intangible factors. As I think about my own educational and professional trajectory, social capital and network access have been pivotal to every major opportunity and decision I've had. I believe deeply that massive education reform requires a full-throated engagement with the ways social capital, prestige, reputation, recognition, and the like bear on real life. I am heartened that judges recognized this over 100 years ago, yet disheartened that these ideas have fallen out of legal thinking. I believe fully that this "path not taken" in legal history, one that forces judges, the constitutional arbiters, to engage with intangible factors as a real part of constitutional rights, would have presented a greater opportunity for transformative social change than the narrow desegregation regime that emerged.

Intangible factors represent real judicial engagement with how inequality works on the ground and in school. Desegregation was led by judges, with hundreds of judges all over the country actively monitoring, and often writing, school assignment plans. These judges had to work with communities, families, activists, school personnel, and children to design these plans. They were engaging with real life, not just legal abstractions. I hope for a future where judges are expected to grapple with social realities and recognize not just the formal laws being adjudicated, but the lived realities of the people before them.

A real embrace of intangible factors was scary to many judges, for it meant upending a narrow view of equality based on formal legal codes. I think our country would be wise to have that conversation these judges were having, and to sit with the discomfort of what a real embrace

of “social matters” by the government could mean. Desegregation was a moment of reckoning about the input factors relevant to equality. While intangible factors did not win the day, even the rigorous engagement with and recognition of these factors was powerful, and this project serves to remind scholars and lawyers of that. A public conversation that recognizes it is not just money – it is neighborhood, peers, prestige, inherited social capital – and the variety of other harder to see forces sociologists know matter – is the only way we’ll have a fighting chance at doing anything serious about racial inequality.

Interestingly, the results from Chapter 2 showed an uptick in diversity language as intangible language fell away. The Harvard admissions case presently at the Supreme Court hinges on whether diversity in higher education is an appropriate use of race by the state, whether “diversity” is a compelling governmental interest justifying the state’s employment of racial categories. As important as diversity is, it is a different justification for integration or affirmative action than intangible factors is. As Berrey (2015), Kymlicka (1995) and others have argued, diversity is an abstract concept championed as yielding widespread social and emotional benefits to all. Berrey argues it is nearly race neutral. Intangible factors, rather, recognizes the dramatic racialized disparities in the resources that exist within social relationships, and how those resources lead to disparities in economic capital and power. Policymakers ought to remember that distinction in contemporary discourse on school diversity, and to re-engage with intangible factors as an additional reason for championing demographically integrated classrooms and communities.

Lastly, I would urge policymakers to think more deeply about the intersection of school and neighborhood. Part of the reason school desegregation achieved limited success was segregated housing patterns – busing would always be a crude tool when it required such

massive travel by young children. White flight exacerbated this pre-existing reality. Bonastia (2006) and others have argued that early desegregation efforts did recognize the power of housing for any desegregation project, but these efforts were quickly abandoned because of suburban resistance. Intangible factors do not just exist in schools. Neighborhood effects, as sociologists know, are powerful dictators of long-term life outcomes. Social capital and networks are built into neighborhoods as well as schools. A public policy regime that takes intangible factors seriously would engage with residential segregation patterns, and work to create more racial mixing in both schools and housing.

I hope that these findings excite activists and scholars seeking to bring integration back to the policy agenda. We know how important intangible factors are for life outcomes. We also know that they helped motivate *Brown* and structure the desegregation regime that defined the twentieth century, despite little recognition of their potency in legal history. Intangible factors can come back to the policy agenda. The fact that this window existed, that this recognition existed, is a powerful motivator. As we think about what policies to advocate, I urge every reader of this project to think about their own lives – the big opportunities, the big moments, were they the result of a tangible resource, or a phone call, a connection, a subtle bit of know-how? For me, it has always been the latter, and I bring that honest assessment of my own life trajectory to my work in public policy, law, and sociological research.



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## **Conclusion**

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