

SOCIOLOGICAL MATERIALS IN VERMONT CONSTITUTIONAL INTERPRETATION

INTRODUCTION

The Vermont Constitution “is the highest law of our state,” and thus its interpretation is a matter of importance to Vermonters and to those interacting with Vermont law.¹ Development of Vermont constitutional jurisprudence is more important than ever given the recent renaissance of state constitutional law.² The Vermont judiciary, headed by the Vermont Supreme Court, is the branch of government charged with the task of interpreting the state’s charter.³ While the court is to some extent isolated from politics,⁴ it does not make decisions in a vacuum.⁵ Yet the universe of information available to a court is substantially smaller than the universe of all available information.⁶ This Note discusses the types of information the Vermont Supreme Court should consider when interpreting the Vermont Constitution and, in particular, the role of sociological materials in the court’s constitutional jurisprudence.

The Vermont Supreme Court has itself stated on numerous occasions the types of information it considers when deciding a question on state constitutional grounds. To resolve constitutional questions, the court considers its own precedents, “the text [of the constitution], historical analysis, sibling state constructions of similar provisions, and . . . economic and sociological materials.”⁷ While most of these elements of constitutional

1. *State v. Jewett*, 146 Vt. 221, 223, 500 A.2d 233, 235 (1985) (quoting Marshall J. Tinkle, *The Resurgence of State Constitutional Law*, 18 ME. BAR BULL. 257, 257 (1984)).

2. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) (“[M]ore and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.”).

3. See VT. CONST. ch. II, § 30 (granting the Vermont Supreme Court “appellate jurisdiction in all cases”); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803) (describing the power of judicial review and requiring courts to defeat laws which are “repugnant to the constitution”).

4. E.g., Victor J. Consentino, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 403 (1991) (stating that courts are “relatively isolated from . . . political pressure”). But see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1076 (2001) (arguing that courts are not isolated from politics, but only “from a certain form of political discipline—reelection”).

5. See Lawrence Friedman, *Reckoning with Dissonance: Thoughts on State Constitutional Law and Constitutional Discourse*, 40 NEW ENG. L. REV. 437, 437 (2006) (describing state constitutional law as a “continuing discussion among judges, lawyers, and commentators about the meaning of our constitutional commitments”).

6. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 6 (1982) (suggesting some types of arguments that do not appear in constitutional jurisprudence: arguments based on kinship or religion, or arguments “to let the matter be decided by chance or by reading entrails”).

7. *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 169 Vt. 310, 320, 738 A.2d 539, 547 (1999)

interpretation are familiar, an important caveat and an important question arise from this formulation. The caveat is that the list is not exclusive of other considerations or forms of argument.⁸ The question is the focus of this Note: What are the meaning, scope, and proper role of sociological materials in Vermont constitutional decision-making? This Note concludes that the Vermont Supreme Court has been inconsistent—or at least not entirely clear—in its use of sociological materials and suggests that the court consider carefully the difference between permissible and impermissible uses of sociological materials when interpreting the Vermont Constitution.

Part I of this Note puts the question in context by discussing briefly the historical approaches to judicial decision-making and by exploring the origins of sociological materials. Part II seeks to determine the meaning of sociological materials by analyzing their use in Vermont Supreme Court cases and concludes that the Vermont Supreme Court has been inconsistent in its use of sociological materials. Part III widens the discussion by examining how other courts use sociological materials and highlighting the divergent courses other jurisdictions have taken. Part IV addresses when it is appropriate to consider sociological materials in resolving constitutional questions.

I. LEGAL FORMALISM, LEGAL REALISM, AND THE ORIGINS OF SOCIOLOGICAL MATERIALS

A. A Brief Survey of the Historical Approaches to Judicial Decision-Making

While state constitutional law offers excellent opportunities for innovation,⁹ the debate over the proper methodology for judicial decision-making is not new.¹⁰ Early American legal theory rested upon natural law, a belief “that judicial decisions were derived from rules of law which were

(citing *State v. Jewett*, 146 Vt. 221, 225–27, 500 A.2d 233, 236–37 (1985)).

8. See *Jewett*, 146 Vt. at 228, 500 A.2d at 237 (“The imaginative lawyer is still the fountainhead of our finest jurisprudence.”).

9. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Of course, Justice Brandeis’s laboratory metaphor arose in the context of state action through its legislature, but commentators have noted that the “experimental function . . . need not be confined to state legislatures or executive branches.” Dennis NettikSimmons, *Towards a Theory of State Constitutional Jurisprudence*, 46 MONT. L. REV. 261, 281–82 (1985).

10. See Richard Langone, *The Science of Sociological Jurisprudence as a Methodology for Legal Analysis*, 17 TOURO L. REV. 769, 773 (2001) (describing how the evolution of American legal training “has corresponded with the scientific and philosophical *zeitgeists* of the time”).

derived from first principles.”¹¹ Legal positivists rejected natural law and any value considerations in legal methodology¹² in favor of a view that the law is “a logically coherent and utterly closed system of rules derived predominantly from appellate opinions.”¹³ Unlike natural law theorists, legal positivists found no need for a “conceptual connection between law and morality.”¹⁴ While the positivist system was supposed to be virtuous in its attempt to be scientific and internally consistent,¹⁵ it suffered the vice of being so “mechanical” that it “lacked indicia of fairness.”¹⁶

Under the influence of legal positivism, American legal scholars produced a “formalist approach to the study of law.”¹⁷ Legal realists criticized legal formalism “for being too narrow and technical in approach and for failing to cultivate the relations between law, ethics, and social science.”¹⁸ The realists “recogniz[ed] that a value choice is implicit in all decision-making,”¹⁹ but their philosophy was imbued with cynicism.²⁰ The realists observed that

judges were overwhelmingly from the privileged class; thus, their attitudes reflected the attitudes of that class. Therefore, the Legal Realists perceived justice as incorporating the values of the dominant group in society. Laws are made and enforced to

11. *Id.*; see also *Calder v. Bull*, 3 U.S. (3 Dallas) 386, 388 (1798) (“The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.”). See generally Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993) (discussing the early American understanding of natural law and natural law’s role in the drafting of constitutions).

12. See Langone, *supra* note 10, at 773–74 (noting that the positivists “rejected the notion that judicial decisions were components of immutable [sic] first principles” as well as “value consideration in judicial thinking”).

13. Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 124–25 (2003).

14. DAVID A. REIDY, ON THE PHILOSOPHY OF LAW 11 (2007).

15. Zick, *supra* note 13, at 124–25.

16. Langone, *supra* note 10, at 774; see also Peter Read Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073, 1102 (1986) (noting that the jurisprudential writer Lon Fuller rejected positivism because it was based on a false dichotomy between “a language of ‘is’ (or ‘fact’ or ‘being’) on the one hand, and a language of ‘ought’ (or ‘value’) on the other”).

17. REIDY, *supra* note 14, at 82.

18. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 15 (1995).

19. Langone, *supra* note 10, at 774; see also BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 133–34 (1921) (“[T]he judge is under a duty within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.”).

20. See Teachout, *supra* note 16, at 1103 (noting Lon Fuller’s criticism of realists for their “cynical and destructive view that in the end it all comes down to mere ‘intuition,’ ‘fiat,’ ‘power,’ or some form of arbitrary preference”).

uphold the values of the dominant class. But the dominant class does not necessarily reflect the majority of the population; rather, it reflects the most politically powerful group in society.²¹

Finding legal science to be “unscientific,” the realists sought to bring “the notion of science as an empirical inquiry if not into, then at least up against, law.”²² While realists rejected formalism just as positivists had rejected natural-law theory, each school of thought seemed to assert that it had brought “science” into the law.

This theme also appeared in the “sociological jurisprudence” movement spearheaded by Roscoe Pound.²³ Pound was himself a scientist, and was admitted to the bar between earning undergraduate and doctoral degrees in botany.²⁴ Pound’s scientific approach to the law is evident in his definition of jurisprudence: “the science of law.”²⁵ “The basic idea of sociological jurisprudence was to bring the insights of the social sciences—economics, history, sociology, and the like—to bear on the law, in order to make the law conform to the needs and aspirations of an industrializing, urbanizing society.”²⁶ This form of jurisprudence necessarily expanded the universe of available information in constitutional interpretation.²⁷

B. *The Origins of Judicial Use of Sociological Materials*

Perhaps the most famous, although not the first, example of this expanded realm of judicially cognizable information is the “Brandeis brief, a document advanced at the appellate level to persuade the court and that may include, *inter alia*, economic and social scientific studies, reports of public committees, and evaluations of issues by scientific experts.”²⁸ Attorney Louis D. Brandeis (later Justice Brandeis) submitted his famous brief in *Muller v. Oregon*,²⁹ in which he discussed at length, and with

21. Langone, *supra* note 10, at 774.

22. SCHLEGEL, *supra* note 18, at 1.

23. Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 518 (2006).

24. *Id.* at 518 n.13.

25. 1 ROSCOE POUND, JURISPRUDENCE 7 (1959).

26. Tidmarsh, *supra* note 23, at 519.

27. See Zick, *supra* note 13, at 145 (noting that “Pound and other early realist scholars suggested that courts should look behind legislative enactments, to the predicates supporting legislative decisions”).

28. Shawn Kolitch, *Constitutional Fact Finding and the Appropriate Use of Empirical Data in Constitutional Law*, 10 LEWIS & CLARK L. REV. 673, 675 n.3 (2006); see also David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1505 (2005) (suggesting that “the idea of presenting relevant data to the Court was actually pioneered not by Brandeis but by Field and Weismann in the appendix to their *Lochner* brief”).

29. *Muller v. Oregon*, 208 U.S. 412 (1908).

numerous citations to experts and laypersons, the deleterious effects of long work hours on women in the laundry business.³⁰ The brief contained only a short discussion of law and consisted primarily of “mountains of empirical and statistical evidence in support of the legislative conclusion.”³¹

Muller v. Oregon was argued and decided during the so-called *Lochner* era,³² during which the United States Supreme Court took it upon itself to determine whether various statutes were reasonable and used the Due Process Clause to strike down legislation of which it disapproved.³³ The Court’s approach in *Lochner* and its progeny has since been soundly rejected.³⁴ But the *Lochner* era was important, in part, because it invited advocates to submit sociological materials to courts.³⁵ The now-repudiated *Lochner* inquiry into the reasonableness of a legislature’s enactment practically begged for the presentation of sociological materials.³⁶

The demise of *Lochner* signaled the end of a line of jurisprudence that permitted a court to substitute its own judgment for that of the legislature, but not the end of the use of sociological materials in constitutional interpretation. The Vermont Supreme Court in *State v. Jewett* characterized the Brandeis brief as the “classic example” of “the use of economic and sociological materials in constitutional litigation,”³⁷ signaling its receptiveness to the use of sociological materials in its own constitutional

30. Brief for Defendant in Error at 18–55, *Muller*, 208 U.S. 412 (No. 107), 1908 WL 27605.

31. Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 990 (2006).

32. Named for *Lochner v. New York*, 198 U.S. 45 (1905), which was overruled by *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963). See Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 28 n.78 (1998) (“The era in which the Classical Legal Thinkers held sway (about 1895 until 1937) is commonly called the *Lochner* era named after *Lochner v. New York*, 198 U.S. 45 (1905), the case which read the ‘freedom-of-contract’ into the Fourteenth Amendment.”).

33. See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 493 (1997) (describing the Court’s use of substantive due process during the *Lochner* era).

34. E.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (declining to follow *Lochner* and asserting that “[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions”); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

35. See David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 560 (1991) (stating that *Muller v. Oregon* is “the case generally associated with the onset of sociological jurisprudence”).

36. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 889 (1997) (noting that *Lochner* was the origin of “the notion of a synoptic, constitutional inquiry dependent on ‘legislative facts’”).

37. *State v. Jewett*, 146 Vt. 221, 227, 500 A.2d 233, 237 (1985).

interpretation. However, not all uses of sociological materials for that purpose are legitimate.³⁸ The Brandeis brief was legitimate on one level because the Supreme Court's methodology during the *Lochner* era invited the presentation of sociological materials. This approach is now recognized as illegitimate. Therefore, if the Vermont Supreme Court is going to consider sociological materials, it must articulate some legitimate reason that does not rely on the flawed jurisprudence of the *Lochner* era.³⁹

II. THE MEANING OF SOCIOLOGICAL MATERIALS IN VERMONT AND THE VERMONT SUPREME COURT'S INCONSISTENT USE OF THOSE MATERIALS

Since its decision in *Jewett*, the Vermont Supreme Court has repeatedly stated that it considers, or is at least willing to consider, "sociological materials" in cases raising questions of state constitutional law.⁴⁰ The court's repeated references to "sociological materials" as elements of its constitutional analysis suggest those materials have meaning for the court. However, the court has been inconsistent in using them. Sociological materials fit within the broader category of what have been termed "non-legal materials" or "legislative facts."⁴¹ Legislative facts "include science, empirical studies, social and psychological theory, history, and current events."⁴² While courts can only consider legal materials (or "adjudicative facts") if they survive the evidentiary and adversarial processes, they may take "judicial notice" of legislative facts even if they were not subjected to those processes.⁴³ The propriety of judicial notice of legislative facts is open for debate, but, at least for now, it appears that "for good or ill, courts are using non-legal, extra-

38. See discussion *infra* Part IV.B.

39. See discussion *infra* Part IV.A.

40. See, e.g., *Baker v. State*, 170 Vt. 194, 206, 744 A.2d 864, 873 (1999); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 169 Vt. 310, 320, 738 A.2d 539, 547 (1999); *State v. Ely*, 167 Vt. 323, 330, 708 A.2d 1332, 1336 (1997) (quoting *Benning v. State*, 161 Vt. 472, 476, 641 A.2d 757, 759 (1994)); *State v. Morris*, 165 Vt. 111, 132, 680 A.2d 90, 104 (1996); *Hunt v. Hunt*, 162 Vt. 423, 435, 648 A.2d 843, 852 (1994); *Benning*, 161 Vt. at 476, 641 A.2d at 759; *In re* Petition of Twenty-Four Vt. Utils., 159 Vt. 339, 362, 618 A.2d 1295, 1308 (1992) (quoting *State v. DeLaBruere*, 154 Vt. 237, 263, 577 A.2d 254, 268 (1990)).

41. Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 198, 201 (2000).

42. *Id.* at 198; see also 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.2, at 566 (4th ed. 2002) ("The most useful sources of data for resolution of disputes concerning legislative facts often are contained in the published literature of the social or natural science disciplines relevant to the legislative fact at issue."). For a thorough discussion on the uses of historical materials in constitutional interpretation, see CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

43. Margolis, *supra* note 41, at 203.

record factual material in developing new rules of law.”⁴⁴

Sociological materials encompass a broad range of types of information and may reach appellate courts, like the Vermont Supreme Court, in a variety of ways. Perhaps the highest quality sociological materials come from social scientists (broadly defined),⁴⁵ who “can offer general principles of behavior and data based on the behavior of many individuals or groups.”⁴⁶ In order to bring their conclusions before a court, social scientists “participate at all levels [of the judicial process]—as evaluators of particular reforms or programs, as expert witnesses providing assessments of particular instances or general states of affairs, as lobbyists or authors of amicus briefs.”⁴⁷ An examination of Vermont Supreme Court cases helps elucidate what sorts of materials are “sociological materials” and demonstrates the court’s inconsistent—or at least somewhat unclear—use of sociological materials.

A. Cases in Which Sociological Materials Played a Prominent Role

1. *Baker v. State*

The Vermont Supreme Court’s decision in *Baker v. State*⁴⁸ has been the subject of extensive discussion and debate among courts, commentators, and the public.⁴⁹ This is in part because it led to “the first state ‘civil union’ law in the United States.”⁵⁰ But *Baker* is also important because it demonstrates the use of sociological materials in the Vermont Supreme Court’s constitutional interpretation. The question in *Baker* was whether the common benefits clause of the Vermont Constitution⁵¹ permits “the

44. *Id.* at 201.

45. See Phoebe C. Ellsworth & Julius G. Getman, *Social Science in Legal Decision-Making*, in *LAW AND THE SOCIAL SCIENCES* 581, 583 (Leon Lipson & Stanton Wheeler eds., 1986) (defining “social scientist” “to include people who have some training in social science and who routinely use the products of social science in making or influencing decisions that have legal consequences, but who do not participate in advancing the science itself”).

46. *Id.* at 605.

47. *Id.* at 582.

48. *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999).

49. See, e.g., David Ross & Heather Rider, *A Symposium on Vermont’s Civil Unions: A Note from the Editors: A Vermont Law Review Milestone, a Landmark Case, and a Vermont Election*, 25 VT. L. REV. 1, 1 (2000) (introducing a symposium of authors and scholars commenting on the *Baker* decision).

50. Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 264 (2006).

51. VT. CONST. ch. I, art. 7 (“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community . . .”).

State of Vermont [to] exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples.”⁵² In answering no, the court relied in part on nonlegal materials, including sociological materials.

The *Baker* court referred to several psychological and social studies to help prove that the statute, which denied marriage to same-sex couples, does not “further[] the link between procreation and child rearing” because “a significant number of children today are actually being raised by same-sex parents, and . . . increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques.”⁵³ The parties in *Baker* each presented “extra-pleading facts and materials” at trial, including “sociological and psychological studies.”⁵⁴ While the court could have taken notice of such facts sua sponte,⁵⁵ it would have opened itself up to error if it relied on nonlegal materials without the benefit of argument. Thus, for the benefit of the court as well as their clients, advocates are well advised to gather and present sociological materials to the court so as to explain how those materials support their theories.⁵⁶

2. *State v. Morris*

The Vermont Supreme Court held in *State v. Morris* “that the Vermont Constitution protects persons from warrantless police searches into the contents of secured opaque trash bags left at curbside for garbage collection and disposal.”⁵⁷ In so holding, the court said it was “informed by the language of Article 11, as interpreted in our case law, by the case law of other jurisdictions interpreting similar constitutional provisions, and by *economic and sociological considerations that result, in part, from our experience as judges and human beings.*”⁵⁸ This statement provides important insights into the meaning of “sociological materials.” First, it

52. *Baker*, 170 Vt. at 197, 744 A.2d at 867.

53. *Id.* at 217–18, 744 A.2d at 881 (alteration in original).

54. *Id.* at 198 n.1, 744 A.2d at 868 n.1.

55. See VT. R. EVID. 201 reporter’s note (“Judicial notice of legislative facts—those more general propositions relied upon by a court in determining the existence or scope of a rule of law—remains, as formerly, within the court’s inherent and absolute discretion, unrestricted by the rules.”) (citing *State v. Mastaler*, 130 Vt. 44, 47, 285 A.2d 776, 778 (1971); *State v. Solomon*, 128 Vt. 197, 201, 260 A.2d 377, 380 (1969); *Strong v. Strong*, 123 Vt. 243, 244, 185 A.2d 924, 924 (1962); *Emerson v. Carrier*, 119 Vt. 390, 392, 125 A.2d 822, 824 (1956)).

56. See Margolis, *supra* note 41, at 206 (“In the same way that a lawyer should want to present a relevant case in a brief, so that the court understands the lawyer’s ‘take’ on it and how it fits into the theory of the case, a lawyer should want to present relevant non-legal material for the same purpose.”).

57. *State v. Morris*, 165 Vt. 111, 114, 680 A.2d 90, 92 (1996).

58. *Id.* at 127, 680 A.2d at 101 (emphasis added).

suggests that the justices are willing to draw on their own personal and professional experiences when evaluating the sociological or economic implications of a case. This position seems to parallel the legal realist position “that law is not ‘discovered’ and that judges are required to exercise judgment.”⁵⁹ The Vermont Supreme Court has adopted a constitutional methodology that admits the constitution cannot be considered in a vacuum.⁶⁰

Second, and perhaps more important for the advocate, the court’s economic and sociological considerations result only “in part” from the justices’ own experience.⁶¹ Here a door is open for the advocate to help inform the court’s understanding of the economic and sociological impacts of its decisions. Thus, the wise advocate should not turn down the opportunity to present sociological materials to the court in a fashion that will advance his or her client’s case.⁶²

3. *Benning v. State*

In *Benning v. State*, the court found no constitutional difficulties with a statute that required persons operating or riding motorcycles on highways to wear protective headgear and affirmed a decision against the plaintiffs.⁶³ The court characterized the plaintiffs’ principal argument as follows: “Vermont values personal liberty interests so highly that the analysis under the federal constitution or the constitutions of other states is simply inapplicable here.”⁶⁴ The court noted that the plaintiffs did “rely on political theorists, sociological materials and incidents in Vermont’s history” to support their contention, but found it unpersuasive

not because it overvalues Vermont’s devotion to personal liberty
and autonomy, but because it undervalues the commitment of

59. Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 732 (2006); see also CARDOZO, *supra* note 19, at 112–13 (noting that in balancing the social interest in the uniformity of the law against the social interest in social welfare, a judge “must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself”).

60. See Langone, *supra* note 10, at 781. “In the context of constitutional law analysis, sociological jurisprudence requires an interpretivist jurisprudential philosophy. Contemporary community mores and values implies an ‘evolving standards of decency’ philosophy. Accordingly, the meaning of the words in a Constitution must evolve as we evolve.” *Id.*

61. *Morris*, 165 Vt. at 127, 680 A.2d at 101.

62. See *supra* Part II.A.1.

63. See *Benning v. State*, 161 Vt. 472, 487, 641 A.2d 757, 765 (1994) (concluding that Vermont’s motorcycle headgear statute “in no way violates any of the provisions of our state and federal constitutions” (quoting *State v. Solomon*, 128 Vt. 197, 202, 260 A.2d 377, 380 (1969))).

64. *Id.* at 479, 641 A.2d at 761.

other governments to those values. The Vermont material is “only loosely connected to the issues before the Court.” It does not differentiate our concern for personal liberty from that prevailing elsewhere in any way that should influence this case.⁶⁵

This case illustrates the limits of the persuasiveness of sociological materials. First, materials that are “only loosely connected to the issues” are less persuasive. Second, sociological materials—at least when they are not strongly connected to the issues—do not trump analysis of the values identified by “other governments” (state or federal). The latter observation is consistent with other commentators’ conclusions about the utility of sociological materials.⁶⁶

B. Cases in Which Sociological Materials Appeared to Play Little or No Role

1. Chittenden Town School District v. Department of Education

In *Chittenden Town School District v. Department of Education*, the court faced the question of “whether the [state] tuition reimbursement scheme transgresses the Compelled Support Clause of the Vermont Constitution, which speaks not to establishment of religion but to state support of religious worship.”⁶⁷ The court carefully noted that “[i]n construing our constitution, we have available a number of approaches in addition to [A] our own precedents: [B] examination of the text, [C] historical analysis, [D] sibling state constructions of similar provisions, and [E] analysis of economic and sociological materials.”⁶⁸ The court then divided its constitutional analysis into four sections: “A. Prior Case Law,”⁶⁹ “B. Text of the Constitutional Provision,”⁷⁰ “C. Historical Context,”⁷¹ and

65. *Id.* (citation omitted) (quoting *State v. DeLaBruere*, 154 Vt. 237, 270, 577 A.2d 254, 272 (1990)).

66. *See, e.g.*, John A. Nelson, *Adequacy in Education: An Analysis of the Constitutional Standard in Vermont*, 18 VT. L. REV. 7, 22 (1993) (“Sociological and economic materials are less useful for the purpose of determining constitutional meaning, but they can be extremely important when attempting to determine whether a given constitutional standard has been met.”).

67. *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 169 Vt. 310, 311, 738 A.2d 539, 541 (1999) (citation omitted).

68. *Id.* at 320, 738 A.2d at 547.

69. *Id.* at 321, 738 A.2d at 547.

70. *Id.* at 324, 738 A.2d at 549.

71. *Id.* at 328, 738 A.2d at 552.

“D. Decisions of Other States.”⁷² While the court gave subheading-level treatment to precedent, text, history, and sibling-state constructions, its only mention of “sociological materials” appeared at the beginning of the case where it outlined its analytical methodology.

2. *State v. DeLaBruere*

In *State v. DeLaBruere*, the Vermont Supreme Court had to determine, among other things, whether Vermont’s compulsory-education statute, as applied to defendants who cannot reconcile values taught in public schools with their own religious values, violated defendants’ constitutional right to free exercise of religion.⁷³ Citing *Jewett*, the court noted that it has “a number of approaches available in construing our constitution including historical analysis, examination of the text, constructions of identical or similar provisions in other state constitutions, and use of sociological materials.”⁷⁴ The court recognized that “[t]he parties have used all these approaches in this case,” but only gave treatment to “some of these approaches” in its opinion.⁷⁵ In particular, the court spent a substantial amount of time discussing its own decisions construing the relevant constitutional provision, and analyzed “in some detail cases from other states since such analysis has been particularly helpful on other state constitutional questions.”⁷⁶

After discussing its own decisions and decisions from other states, the court announced: “We will dispose more briefly of the textual and historical arguments.”⁷⁷ The court spent about one half of one page discussing the textual and historical arguments, but failed even to mention the sociological arguments.

Of course, the court need not give treatment to every type of constitutional argument in its written opinions.⁷⁸ Not every case is amenable to each of the methods of analysis announced in *Jewett*. And, of course, it is always possible—perhaps even likely—that the court considered the sociological arguments in *DeLaBruere*, but rejected them

72. *Id.* at 337, 738 A.2d at 559.

73. *State v. DeLaBruere*, 154 Vt. 237, 262, 577 A.2d 254, 268 (1990).

74. *Id.* at 262–63, 577 A.2d at 268.

75. *Id.* at 263, 577 A.2d at 268 (emphasis added).

76. *Id.* at 263–66, 577 A.2d at 268–70.

77. *Id.* at 270, 577 A.2d at 272.

78. *See, e.g.*, *State v. Kirchoff*, 156 Vt. 1, 5, 587 A.2d 988, 991 (1991) (noting that “the Vermont Constitution was adopted with little recorded debate” and concluding that “[t]he paucity of historical record prompts us to look elsewhere when determining the breadth of those individual rights the Vermont Constitution was drafted to protect”).

without mentioning them in its written opinion.⁷⁹ Thus, explicit discussion of sociological materials is not necessary for the Vermont Supreme Court to decide a constitutional issue. Still, it seems the sociological arguments in *DeLaBruere* were left out in the cold, not mentioned in the court's brief treatment of the other more minor historical and textual arguments, or even recognized and summarily dismissed in a footnote.

The cases discussed above suggest the following conclusions. First, sociological materials are nonlegal materials derived from the field of the social sciences. Second, the court, if it is to use sociological materials, demands that they be of high quality and relevance.⁸⁰ Third, while the Vermont Supreme Court has been very consistent about including sociological materials in its analytical framework,⁸¹ it has been less than clear in discussing those materials in its opinions.⁸² Fourth, even though the court has not been entirely consistent in discussing sociological materials in its opinions, advocates before the court should never miss the opportunity to present relevant sociological materials.⁸³

III. SOCIOLOGICAL MATERIALS IN OTHER COURTS

A. *The United States Supreme Court*

The Vermont Supreme Court is not the only appellate court to have difficulties with the application of sociological materials. Commentators have found that even the United States Supreme Court has had trouble using nonlegal materials.⁸⁴ Perhaps this should come as no surprise, since

79. See, e.g., Langone, *supra* note 10, at 770–71 (lamenting the lack of training in judicial methodologies in law schools and quoting Judge Aldisert, who decried the “naivete [among law students] that the written opinion represents not only a justification for the stated conclusion, but also a true account of the process by which that conclusion was reached”) (quoting RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS: READINGS, MATERIALS AND CASES*, at XVII–XVIII (1976)).

80. See *supra* Part II.A.1 (noting that the court was willing to rely on sociological *studies* because they helped to disprove the State's legal assertions); *infra* Part III.A (noting the importance of peer-reviewed empirical studies); *infra* Part II.A.3 (discussing an example of the court finding certain sociological materials unpersuasive because they were not strongly connected to the legal issues).

81. See cases cited *supra* note 40.

82. Compare *supra* Part II.A (discussing cases where sociological materials figure prominently), with *supra* Part II.B (discussing cases where sociological materials play little or no role). This is not to suggest that the court does not consistently consider sociological materials—only that it does not consistently analyze them in its written opinions. See *supra* note 78 and accompanying text.

83. See *supra* notes 61–62 and accompanying text.

84. See, e.g., Kolitch, *supra* note 28, at 673 (remarking that while “empirical data, such as data compiled by social scientists, may be highly relevant to the Court's analysis,” the Supreme Court of the United States “has been inconsistent in its consideration of empirical data, often misinterpreting available data, and frequently making assertions of fact without any empirical support at all”).

“[m]embers of the Court are not scientists.”⁸⁵ While the Vermont Supreme Court currently has at least one member with some formal scientific training,⁸⁶ it might benefit from the advice scholars have offered to the United States Supreme Court.

One commentator suggests three ways for the United States Supreme Court to ensure consistent and proper use of empirical information in its constitutional analysis:

1) the Court should clearly articulate the areas of law in which it believes empirical data is relevant; 2) the Court should consider only peer-reviewed empirical studies and should have access to a scientific advisory committee to help evaluate the reliability of studies under consideration; and 3) a selective relaxation of the Court's stare decisis doctrine is an appropriate mechanism for overcoming the inherent conflict between the scientific method—which requires an evolving understanding of empirical data—and the judicial preference for finality.⁸⁷

The most important suggestion is the first one. The Vermont Supreme Court has not been consistent about its use of sociological materials,⁸⁸ perhaps, in part, because it has not articulated when it is appropriate to use them.⁸⁹ As for the second suggestion, since the Vermont Supreme Court may not have access to the kinds of resources that might enable the United States Supreme Court to retain a scientific advisory committee, and because there are serious questions about who might be on such an important committee, the case for relying only upon exclusively peer-reviewed material is even stronger.⁹⁰ The final suggestion seems difficult to justify given that our fundamental constitutional liberties might change with whatever happens to be the scientific theory du jour.⁹¹

85. *Id.* at 698.

86. See Vermont Supreme Court Justices, <http://www.vermontjudiciary.org/courts/supreme/jbiog.htm> (last visited Dec. 2, 2006) (noting that Justice Dooley holds a degree in electrical engineering).

87. Kolitch, *supra* note 28, at 673.

88. See *supra* Part II.

89. For a preliminary discussion of permissible and impermissible uses of sociological materials, see *infra* Part IV.

90. In some cases, the Vermont Supreme Court can appoint special masters. See, e.g., VT. STAT. ANN. tit. 17, § 1909(d) (2002) (providing that the Supreme Court may appoint a master in reapportionment appeals). Such appointments might be a solution in cases involving difficult nonlegal data.

91. See Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955) (suggesting that it would be intolerable to have “our fundamental rights rise, fall, or change along with the latest fashions of psychological literature”).

B. Other State Courts

An introduction to the approaches other state supreme courts take with respect to the use of sociological materials in constitutional interpretation helps elucidate the Vermont Supreme Court's approach. This Part aims merely to provide an introduction; a comprehensive examination of the use of sociological materials in every state is beyond the scope of this Note. Indeed, "[t]he ways in which social science data are used in legal decision-making have rarely been systematically studied."⁹² Instead, this Part focuses on a few states to highlight their various approaches.

1. Utah

The Utah Supreme Court has remarked favorably on the analytical framework for constitutional interpretation employed by Vermont's Supreme Court.⁹³ The Utah Supreme Court has outlined its methodology for constitutional interpretation as follows:

In interpreting the state constitution, we look primarily to the language of the constitution itself but may also look to "historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist us in arriving at a proper interpretation of the provision in question."⁹⁴

Thus, while the Utah Supreme Court seems to place more emphasis on plain language than does the Vermont Supreme Court, its methodology is, at least on its face, the same as Vermont's.

Closer inspection, however, reveals substantial differences between the Utah and Vermont approaches. The Utah Supreme Court has recently suggested that the role of sociological materials should be more limited than Vermont's approach allows. In *American Bush v. City of South Salt Lake*, the court recast its methodology, asserting that "prior case law guides us to analyze [the Utah Constitution's] text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of

92. Ellsworth & Getman, *supra* note 45, at 581.

93. *State v. Earl*, 716 P.2d 803, 806 (Utah 1986) ("We cite with approval the summary of scholarly commentary and analytic technique set forth by the Supreme Court of Vermont in *State v. Jewett* . . ."); Ralph Dellapiana, *Preserving State Constitutional Issues in the Trial Court*, UTAH B.J., May–June 2006, at 12, 12.

94. *State v. Gardner*, 947 P.2d 630, 633 (Utah 1997) (quoting *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 n.6 (Utah 1993)).

drafting.”⁹⁵ In a footnote, the court noted that it had “intentionally excluded the consideration of policy arguments,” reasoning that its “duty is not to judge the wisdom of the people of Utah in granting or withholding constitutional protections but, rather, is confined to accurately discerning their intent. Policy arguments are relevant only to the extent they bear upon the discernment of that intent.”⁹⁶ Justice Durrant highlighted this point in his concurrence: “When looking beyond the language in question, we consider historical evidence regarding textual development, sister state law, and policy arguments *relied upon by the framers* in the form of economic and sociological materials.”⁹⁷ Thus, for the Utah Supreme Court, sociological materials—and apparently any policy arguments—are not at all persuasive unless they shed light on the founders’ intent.

2. Iowa

The Iowa Supreme Court focuses primarily on textual and historical arguments when interpreting its state constitution. For the court, the purpose of any constitutional inquiry is “to ascertain the intent of the framers.”⁹⁸ To accomplish that task, the court focuses on plain text and “give[s] the words used by the framers their natural and commonly understood meaning.”⁹⁹ The court will “also examine the constitutional history and consider ‘the object to be attained or the evil to be remedied as disclosed by circumstances at the time of adoption.’”¹⁰⁰ Thus, while the Iowa Supreme Court does appear amenable to policy arguments—and maybe even sociological materials—it limits its discussion to the time of the constitution’s adoption and, like Utah, seems primarily concerned with the framers’ intent.

The Iowa Supreme Court has also decided to follow closely the analysis of the United States Supreme Court when a state constitutional provision appears to mirror a provision of the U.S. Constitution. While the Iowa Supreme Court has been careful to note that “[d]ecisions interpreting the federal constitution . . . are not binding on us with respect to the Iowa Constitution,”¹⁰¹ it often resorts to federal analysis on state constitutional

95. Am. Bush v. City of S. Salt Lake, 140 P.3d 1235, 1240 (Utah 2006).

96. *Id.* at 1240 n.3 (citation omitted).

97. *Id.* at 1259 (Durrant, J., concurring) (emphasis added).

98. Redmond v. Ray, 268 N.W.2d 849, 853 (Iowa 1978).

99. Howard v. Schildberg Constr. Co., 528 N.W.2d 550, 553 (Iowa 1995) (citing *Redmond*, 268 N.W.2d at 853).

100. *Id.* (quoting *Redmond*, 268 N.W.2d at 853).

101. State v. Hoskins, 711 N.W.2d 720, 725 (Iowa 2006).

issues.¹⁰² Of course, the decisions of the United States Supreme Court are valuable persuasive authority for state supreme courts, but even the highest court in the land has had difficulties with sociological materials, suggesting that state supreme courts might be able to find equally valid solutions to constitutional questions by diverging from the federal analysis.

3. Connecticut

Connecticut, like Iowa, “often look[s] to United States Supreme Court precedent,”¹⁰³ but seems more willing than Iowa to consider contemporary policy and sociological arguments when determining whether it should diverge from that precedent and find that the state constitution affords its citizens more protection than its federal counterpart. Connecticut uses six approaches to constitutional interpretation, all of which track Vermont’s closely:

To determine whether our state constitution affords greater rights than the federal constitution, we consider the following “tools of analysis”: (1) the “textual” approach—consideration of the specific words in the constitution; (2) holdings and dicta of this court and the Appellate Court; (3) federal precedent; (4) the “sibling” approach—examination of other states’ decisions; (5) the “historical” approach—including consideration of the historical constitutional setting and the debates of the framers; and (6) economic and sociological, or public policy, considerations.¹⁰⁴

The court does not limit its analysis of sociological materials to any particular time period. Instead, the court has noted the need to look on Connecticut’s charter with modern eyes: “The Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens.”¹⁰⁵ In this sense, then, Connecticut’s constitutional methodology is similar to Vermont’s.

102. *E.g.*, *State v. Allen*, 690 N.W.2d 684, 690 (Iowa 2005) (“[P]ast construction of the federal constitution . . . is persuasive in our interpretation of the corresponding provisions of the Iowa Constitution.”).

103. *State v. Linares*, 655 A.2d 737, 753 (Conn. 1995).

104. *Id.*

105. *State v. Dukes*, 547 A.2d 10, 19 (Conn. 1988).

4. Louisiana

Louisiana's Supreme Court appears openly hostile to the use of sociological materials in constitutional decision-making. In upholding as constitutional Louisiana's "crime against nature" statute,¹⁰⁶ the court stated:

Neither the Louisiana nor United States Constitution empowers this court to second guess the legislature in its heavy responsibility of weighing competing interests. We are not asked to decide whether legislation is wise or best fulfills relevant social and economic objectives that the state might ideally espouse. Courts do not rule on the social wisdom of statutes nor their workability in practice. If a crime or a penalty is not defined to reflect current societal values, it is for legislature, not the courts, to reflect this change. It is not a court's role to consider wisdom of the legislature in adopting a statute; it is a court's province to determine only the applicability, legality, and constitutionality of the statute.¹⁰⁷

Citing *Lochner* (disapprovingly), the court concluded that it "is not inclined, and does not intend, to discover new constitutional rights in the Louisiana Constitution. Judge-made constitutional law having little or no basis in the constitution is dangerous and questions the legitimacy of the court."¹⁰⁸ Finally, the court said, "Our constitution is not intended to embody a particular sociological theory. . . . '[I]t is not a proper function for any court to judicially repeal laws on purely sociological considerations'"¹⁰⁹

Louisiana's approach to constitutional interpretation is perhaps the most critical of the use of sociological materials of any of the states discussed in this Part. Yet the Louisiana Supreme Court makes some good points. Much of what Louisiana's high court has said comports with the United States Supreme Court's decisions disapproving of *Lochner*.¹¹⁰ In addition, few would argue that sociological materials should often be, by themselves, sufficient to justify a court's decision.¹¹¹ Louisiana's approach may have the virtue of ensuring the Louisiana Supreme Court's legitimacy

106. LA. REV. STAT. ANN. § 14:89 (2004).

107. *State v. Smith*, 766 So. 2d 501, 511 (La. 2000) (citations omitted).

108. *Id.* at 512.

109. *Id.* (alteration in original) (quoting *Griffith v. State*, 504 S.W.2d 324, 326 (Mo. Ct. App. 1974)).

110. See cases cited *supra* note 34.

111. See Margolis, *supra* note 41, at 233–34 ("[I]t is rare that a court will render a decision based solely on non-legal information.").

by adhering strictly to the text in the Louisiana Constitution, but it suffers from the vice of insufficient attention to the real-world effects it may produce.¹¹² In any case, proper consideration of sociological materials and other empirical evidence in addition to text and history may, in fact, add to a court's legitimacy by showing that its decision is grounded not only in law but also in empirical fact.

The discussion in this Part suggests that state supreme courts have adopted varying approaches to state constitutional interpretation, with varying levels of approval for the use of sociological materials.¹¹³ Furthermore, the role of sociological materials in some courts remains indeterminate.¹¹⁴ The state supreme courts that have eschewed consideration of sociological materials, however, sound an important cautionary note for the courts, like the Vermont Supreme Court, that have embraced such consideration. Courts that consider sociological materials cannot use them as the primary justification for their legal conclusions and must use caution to avoid crossing into the impermissible realm of "Lochnerizing."¹¹⁵

IV. PERMISSIBLE VERSUS IMPERMISSIBLE USES OF SOCIOLOGICAL MATERIALS

Even though the Vermont Supreme Court is willing to use sociological materials in constitutional interpretation, there is a distinction between proper and improper uses of those materials. More specifically, there appears to be a range of permissibility when it comes to the use of sociological materials in the Vermont Supreme Court. This Part briefly explores that spectrum by discussing examples of permissible and impermissible uses of sociological materials in state and federal constitutional law.

112. See, e.g., Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 656–57 (1988).

At times it seems that the law's ignorance of its actual impact is one of the most severe threats to basic civil liberties. When justice is blind to the fruits of scientific and social scientific research, and to the demonstrable effects of a statute in operation, rules of law are divorced from the empirical world.

Id.

113. Compare *supra* Part III.B.3, with *supra* Part III.B.4.

114. See discussion *supra* Parts III.A, III.B.1.

115. See *supra* Part III.B.4.

A. *Permissible Uses of Sociological Materials*

Louis Brandeis's famous brief in *Muller v. Oregon* is the most famous example of appropriate use of sociological materials in constitutional interpretation.¹¹⁶ On one level, the materials in the brief were permissible because the Supreme Court's jurisprudence at the time called for their use.¹¹⁷ But the materials would have been appropriate even outside the *Lochner* regime because they were being used to argue that the Oregon Legislature had a reasonable basis for its legislation.¹¹⁸

*Brown v. Board of Education*¹¹⁹ supplies a second example of the permissible use of sociological materials. There, faced with "inconclusive" historical materials,¹²⁰ the Court was forced to "consider public education in the light of its full development and its present place in American life throughout the Nation."¹²¹ The Court went on to describe "the importance of education to our democratic society."¹²² This sort of evaluation of the role of education in modern society is permissible because it allows courts to understand changed social realities. As the Court reasoned, only by recognizing education's place in society could it "determine[] if segregation in public schools deprives these plaintiffs of the equal protection of the laws."¹²³

The Vermont Supreme Court's decision in *State v. Morris* also exemplifies the permissible use of sociological materials.¹²⁴ There, in evaluating the constitutionality of warrantless searches of closed trash bags, the court's task was "to discover and protect the core value of privacy embraced by Chapter I, Article 11 of the Vermont Constitution."¹²⁵ The court went on to state that "[i]n determining whether persons have a privacy interest in any given area or activity, we examine both private subjective

116. *See supra* Part I.B.

117. *See supra* Part I.B.

118. *See* Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 667–68 (1966) (noting that the Brandeis brief remains useful in constitutional law, not to "prove the validity of the conclusions drawn by the legislature . . . but simply to show that the legislature had a reasonable basis for arriving at its conclusion").

119. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

120. *Id.* at 489. Like the loss of one of the human senses, the fact that one form of analysis is inconclusive or unavailable makes the remaining forms that much more important. Interestingly, the historical form of analysis is very often inconclusive or unavailable in Vermont. *See supra* note 78. Thus, sociological materials could have a somewhat enhanced role in Vermont constitutional interpretation.

121. *Brown*, 347 U.S. at 492–93.

122. *Id.* at 493.

123. *Id.*

124. *State v. Morris*, 165 Vt. 111, 680 A.2d 90 (1996); *see also* discussion *supra* Part II.A.2.

125. *Morris*, 165 Vt. at 115, 680 A.2d at 93.

expectations and general social norms.”¹²⁶ Like the Brandeis brief, the Vermont Supreme Court’s use of sociological materials in *Morris* was permissible because the constitutional inquiry called for their use. The court did not attempt to substitute its judgment for that of the legislature, but rather attempted to determine whether there was a reasonable basis for the legislature’s actions.¹²⁷ Consequently, unlike the impermissible *Lochner* inquiry, the Vermont Supreme Court’s inquiry into the expectations of privacy remains valid and thus permits the use of sociological materials.

B. Less Permissible and Impermissible Uses of Sociological Materials

An example of an impermissible use of sociological materials appears in *Plessy v. Ferguson*.¹²⁸ In refusing to strike down a Louisiana statute that provided for racially segregated rail cars, the United States Supreme Court made the completely unsupported sociological determination that “[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences.”¹²⁹ The Court’s highly dubious sociological assertion was completely devoid of any solid basis in expert testimony.¹³⁰ The Court’s decision in *Plessy* rested in part on an impermissible use of sociological materials and led to more than a half-century of state-sanctioned racism.¹³¹

Brown v. Board of Education overruled *Plessy*,¹³² and although *Brown* contains an example of permissible use of sociological materials,¹³³ it also contains an example of an arguably more suspect use of those materials. In support of its conclusion that racial segregation harms black students, the Court relied on a number of psychological studies.¹³⁴ This conclusion is not

126. *Id.* at 115, 680 A.2d at 94.

127. *Id.* (“The manifested privacy interest must be a reasonable one . . .”).

128. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (rejecting the “separate but equal” doctrine).

129. *Id.* at 551.

130. The assertion is easily rebuttable. As Martin Luther King, Jr. said, “It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that’s pretty important.” Martin Luther King, Jr., Sermon at St. Paul’s Church, Cleveland Heights, Ohio (May 14, 1963), available at <http://www.stpauls-church.org/archives/sermons/king05141963.html>.

131. See Emmanuel O. Iheukwumere, *Judicial Independence and the Minority Jurist: The Shining Example of Chief Justice Robert N.C. Nix, Jr.*, 78 TEMP. L. REV. 379, 392–93 (2005) (describing the disastrous results of the *Plessy* holding and noting that it “remained the supreme law of the land until it was overruled fifty-eight years later”).

132. See *Brown*, 347 U.S. at 495. “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” *Id.*

133. See *supra* Part IV.A.

134. *Brown*, 347 U.S. at 494 n.11.

indisputable,¹³⁵ but even if it were, the Court's reliance on psychological studies raises some questions. As one commentator put it:

It is one thing to use the current scientific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the findings as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature.¹³⁶

If a state legislature were to establish or permit racially identifiable schools based on the conclusion that such segregation was beneficial to students, then the Court's use of sociological materials to reach the opposite conclusion would be much closer to the realm of the clearly impermissible, since the Court would arguably be substituting its judgment for that of the legislature. If the legislature's conclusion were based on exhaustive legislative hearings and testimony of sociological experts, then almost any attempt by the Court to reach the opposite conclusion based on sociological materials would seem to be a facial attempt to substitute its judgment for that of the legislature.¹³⁷ Of course, the state legislatures that permitted or required racial segregation seemed unconcerned with the subtleties of the possible benefits of voluntary segregation and were instead acting out of a desire to maintain the racist status quo of "separate but equal."¹³⁸

In sum, it seems there is a range of permissible uses of sociological materials to interpret a constitution. On one end of the scale is the entirely permissible use of uncontroversial sociological materials to argue that the

135. Voluntary segregation based on gender or race is permissible in educational institutions, presumably because it is in fact beneficial for some. See Sharon Elizabeth Rush, *Diversity: The Red Herring of Equal Protection*, 6 AM. U. J. GENDER & L. 43, 55 (1997) (arguing that "voluntary segregation by minority groups like women and people of color should be constitutional . . . because they empower minority groups who can then compete as equal citizens with their majority counterparts and they do not threaten the equal citizenship rights of privileged groups"). Voluntary segregation based on ability to speak English is also arguably constitutionally permissible. See Note, *Federal Funding for Newcomer Schools: A Bipartisan Immigration Education Initiative*, 120 HARV. L. REV. 799, 809 (2007) (discussing schools designed specifically to accommodate non-English-speaking immigrants and noting that "[t]he Supreme Court has indicated that voluntary segregation does not pose a constitutional problem").

136. Cahn, *supra* note 91, at 167.

137. This is especially true in light of the relative institutional competencies of courts and legislatures. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 374–75 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (raising questions in the context of common carrier liability about the competencies of courts to collect, weigh, and rule upon legislative facts).

138. *Brown*, 347 U.S. at 495.

legislature has not acted unreasonably. On the other end of the scale is the impermissible use of sociological materials in a court's attempt to substitute its own assessment of controversial sociological materials for the legislature's assessment. While it is beyond the scope of this Note to examine or establish criteria that might justify or caution against a court's use of such evidence, the Vermont Supreme Court should, at the very least, examine carefully in each case whether reliance on nonlegal sociological materials is proper or improper.

CONCLUSION

The Vermont Supreme Court is open to many forms of analysis in cases requiring interpretation of the Vermont Constitution, including sociological materials. Many commentators agree that appellate courts should use sources of legislative facts like sociological materials.¹³⁹ While courts may take judicial notice of such materials on their own, advocates should present sociological materials in their briefs so they can explain why such materials are relevant and how they support the advocate's case.

The Vermont Supreme Court, like the United States Supreme Court, has not been entirely consistent in its application of sociological materials to constitutional issues. The court has repeatedly stated that it will consider sociological materials in cases raising state constitutional issues, yet has not always discussed—or even noted the presence of—sociological arguments in such cases. The court should consider adopting some or all of the recommendations offered to the United States Supreme Court regarding the use of empirical information, but most importantly, it should articulate when sociological materials are appropriate for consideration in constitutional cases.¹⁴⁰ The Vermont bench and bar should also strive to give consistent treatment to relevant sociological materials when available, and if no such materials are available or relevant to the issue, to so state.

While the Vermont Supreme Court has consistently included sociological materials in its list of constitutionally relevant sources of

139. *E.g.*, Alfange, Jr., *supra* note 118, at 640 (“Conscious consideration of legislative facts is often nothing less than essential to the proper accomplishment of judicial tasks.”); Kolitch, *supra* note 28, at 677 (concluding that “fact-finding supported by statistical empirical data is inherently relevant and vital to a well-grounded decision in many areas”); Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 12 (1998) (lamenting “the unfortunate consequences of judicial ignorance of the social realities behind the issues” and remarking that “I would like to see the legal professoriat redirect its research and teaching efforts toward fuller participation in the enterprise of social science, and by doing this make social science a better aid to judges’ understanding of the social problems that get thrust at them in the form of constitutional issues”).

140. *See supra* Part III.A.

information, it has consistently listed them last among the other considerations. Whether or not this is intentional, it seems to comport with the cases that suggest that sociological materials play a secondary role in the court's state constitutional analysis. Other commentators have noted this as well.¹⁴¹ Indeed, sociological materials seem to be neither a necessary¹⁴² nor sufficient¹⁴³ basis upon which to rest a constitutional decision.

Nevertheless, sociological materials have an important role to play in Vermont state constitutional methodology. In some cases, accurate and relevant sociological materials can lend weight to an argument or decision. Where other forms of analysis are insufficient, sociological materials may have an increased role to play.¹⁴⁴ Thus, in light of the fact that the Vermont Supreme Court has specifically stated that it is open to arguments based on sociological materials, advocates should take the opportunity to make such arguments.

Finally, advocates and judges should let the facts speak for themselves and not attempt to torture them to achieve certain results. As the *Jewett* court cautioned:

The development of state constitutional jurisprudence will call for the exercise of great judicial responsibility as well as diligence from the trial bar. It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented. Justice Pollock of the New Jersey Supreme Court expressed his concern this way: “[s]tate courts should not look to their constitutions only when they wish to reach a result different from the United States Supreme Court. That practice runs the risk of criticism as being more pragmatic than principled.”¹⁴⁵

In the context of sociological materials, the court's words of caution address a familiar fear that courts might misuse those materials to achieve a

141. See *supra* note 66.

142. See *supra* Part II.B.

143. See *supra* Part III.B.4.

144. See *supra* notes 120–22 and accompanying text.

145. *State v. Jewett*, 146 Vt. 221, 224–25, 500 A.2d 233, 235–36 (1985) (alteration in original) (quoting Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983)); accord *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 661 (Mass. 2006) (Ireland, J., dissenting) (noting that “an appellate court must attempt to employ a well-reasoned and principled approach to each case it decides”).

certain result.¹⁴⁶ In addition, since judges are not generally trained in sociology, they may “lack the competence to evaluate scientific and social science research and . . . use it appropriately.”¹⁴⁷

By including sociological materials in its methodology for determining questions of state constitutional meaning, however, the Vermont Supreme Court has indicated that it does not find these problems insurmountable. Sociological materials add value to the court’s analysis of constitutional issues and can be employed in judicial decision-making provided the bench exercises “responsibility” and the bar exercises “diligence.”¹⁴⁸ The court’s admonition to practice responsibility and diligence coincides well with the “safeguards” that ensure proper use of sociological materials: (1) “lawyers and judges can acquire sufficient knowledge of research methods to make basic judgments about most research studies”; and (2) “lawyers have an ethical obligation not to perpetrate a fraud on the court.”¹⁴⁹ Perhaps due in part to these high burdens on lawyers and judges, the Vermont Supreme Court believes sociological materials make a valuable addition to its constitutional jurisprudence.

In sum, while paying attention to the limits and potential dangers of using sociological materials to help inform the meaning of the Vermont Constitution, advocates as well as judges should, where permissible, possible, and advantageous, take up the Vermont Supreme Court’s offer and render decisions or present arguments based in part on sociological materials. The court has wisely decided that more information is better than less information and that sociological materials can provide valuable information about the meaning of Vermont’s Constitution. Thus, in a sense, the court has left its options open and adopted a kind of “jurisprudential pluralism”¹⁵⁰ that permits it to approach constitutional problems from different angles using different types of information. Such

146. See Richard A. Epstein, *The Monopolistic Vices of Progressive Constitutionalism*, 2005 CATO SUP. CT. REV. 11 (2005) (asserting that “science” and “expertise” are dangerous because “[t]hey allow for a degree of discretion in government behavior that can be put to bad as well as good purposes”); Margolis, *supra* note 41, at 232 (“A commonly expressed fear about the use of non-legal information introduced at the appellate level is its potential for misuse.”).

147. Margolis, *supra* note 41, at 232.

148. *Id.* (asserting that “the use of nonlegal information is too valuable to give up, and there are a number of safeguards to mitigate the danger”).

149. *Id.* at 234.

150. Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: A Theoretical Framework*, 26 OKLA. CITY U. L. REV. 547, 614 n.96 (2001); see also Honorable Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405, 409 (2004) (describing an approach that includes the kinds of considerations that the Vermont Supreme Court considers when interpreting the Vermont Constitution as one of “blended methodologies”).

an approach, while complex, ensures thorough treatment of constitutional issues and increases the likelihood that constitutional interpretation will be correct on multiple levels.

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[†] I would like to thank Professor Peter Teachout for his guidance and insight on the subject matter of this Note. My thanks also to Lisbeth Freeman, Micaela Tucker, Christopher Walker, and Evan Meenan of the *Vermont Law Review* for their meticulous editorial work, and to Michael Donofrio for his encouragement and feedback.