

IN THEIR HANDS: AN ANALYSIS OF SUPREME COURT INTERPRETATION OF THE
FOURTEENTH AMENDMENT AND THE FATE OF SCHOOL DESEGREGATION,
1954-2007

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Through its judicial interpretation of the fourteenth amendment and equal protection clause, the U.S. Supreme Court has profoundly impacted racial diversity in the nation's public schools. This study found four shifts in judicial interpretation that align with actual changes in racial-make up of students. Second, this study examined the 2007 *Parents Involved* decision and the future of desegregation student assignment policies. The Supreme Court's initial endorsement of segregation during the time period 1899-1938 resulted in widespread legally sanctioned school desegregation. The second phase of judicial interpretation is marked by the Court's eventual move towards ending K-12 segregation by first outlawing racial segregation in institutions of higher education during the time period 1938-1954. In 1954 the Court entered its third phase of interpretation as marked in the iconic *Brown v. Board* decision thus, beginning a nearly two decade phase wherein racial segregation in public schools sharply declined. However, by 1974 the Court began a fourth phase of interpretation wherein it refused to expand its interpretation of the equal protection clause to further promote methods of desegregation. This fourth phase parallels an increase in school segregation through present day. Second, this study examined the ways in which the recent *Parents Involved* (2007) Court decisions will influence future student assignment policies. Schools districts seeking to pursue racial integration face barriers such as patterns of intense residential and economic segregation. Because the *Parents* decision held race cannot be used as the deciding factor in student assignment policies, schools and districts wishing to promote integration must do so through assignment plans that do not violate the 2007 holding. Several methods of legally permissible integration plans are reviewed. Recommendations for how future policies can withstand judicial scrutiny are made.

BIOGRAPHICAL SKETCH

Ranjini Govender grew up in the Finger Lakes region of central New York. After completing her undergraduate education at William Smith College she taught in an urban preschool in Cambridge, Massachusetts. After two years teaching, she entered law school with an interest in urban education at Syracuse University. Subsequent to her studies at SU Ranjini practiced law and most importantly, taught high school social studies in two school districts. Her interest in understanding how the law affects education, and particularly access to equal educational opportunity and issues of race in schools, has driven her doctoral work at Cornell.

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Chapter 1: Introduction

I. Overview

In June 2007, the United States Supreme Court handed down its opinion in *Parents 551* U.S. 701 (2007) - the Court's most recent decision directly impacting school desegregation issues. Reaction to the decision among parents, administrators, policy makers, and academics was diverse and highly charged. Many scholars, policy-makers, and school administrators accused the Court of disregarding precedent set forth in *Brown v. Board of Education* 347 U.S. 483 (1954) and making the goal of integrated public schools impossible (Sneed, 2007). However, schools were required to immediately follow the law as set forth in the lengthy opinion: race cannot be considered as the deciding factor in school assignment policies even when the ultimate goal is racial balancing within districts. In 1954 *Brown* was a symbol of change and progress, but it also marked the beginning of over half a century of litigation centered on the issue of school desegregation. It remains no secret that now more than 50 years after the monumental Supreme Court opinion in *Brown v. Board of Education*, the nation continues to struggle with issues of equal educational opportunities and racial integration in public schools. Now more than ever it is important to consider the ways in which the Supreme Court has influenced the path of desegregation given the recent growth of resegregation in the nation's schools and the Court's most recent school desegregation decision in *Parents*.

Because schools must work within the bounds of the law when structuring desegregation plans, major desegregation issues turn on how the Supreme Court, the High Court of the nation, interprets the Constitution. In particular, judicial interpretation of the 14th amendment directly impacts the ways in which schools can achieve integration because historically, the Court has

applied the equal protection clause of the 14th amendment to evaluate desegregation cases.

Access to education is not guaranteed under the Constitution but the Court has invoked the equal protection clause to rule racially segregated schools unconstitutional and to subsequently evaluate methods of integration.

In this study, I first analyze the ways in which the Court's judicial interpretation of the fourteenth amendment has evolved over time and how the current law will influence future integration efforts. My second research analysis aligns the evolution of judicial interpretation with national changes occurring in racial make-up of public school enrollment during the period from 1954-2007. My research questions were based on the hypothesis that because the Supreme Court directly influences the ways in which schools can legally implement methods of desegregation, an examination of the Court's interpretation method would reveal a correlation between the Court's approach to interpreting the fourteenth amendment and actual racial makeup in schools during roughly the last fifty years. After conducting my research, I found that shifts in the Court's interpretation do indeed influence the racial makeup of schools. The Court has shifted its interpretation four times over the course of the time period studied. These shifts parallel distinct changes in school enrollment. When I examined specific modes of already defined modes of constitutional interpretation (i.e., constructivist, originalist) I found no relationship exists between school enrollment and methods of interpretation as commonly defined and established under constitutional law tenant. Further, I found the *Parents* decision will greatly influence the ways in which schools can integrate. Schools are currently implementing diverse assignment plans within the bounds of the law but the widespread effects of the 2007 decision are great.

Through examining these issues, this study seeks to build upon and contribute to scholarship that has addressed the impact of *Brown* and subsequent Court decisions on schools and students. Analysis of desegregation cases has focused on evaluating outcomes of Supreme Court decisions with respect to student achievement or school composition. Central to the questions already currently examined in current literature is whether or not the original goals of *Brown* have been met. This study seeks to push the evaluation of desegregation issues further by examining how the Court's interpretation of the Constitution and changes in schools align to improve understanding of the path desegregation has taken since 1954. Further, this study provides a framework of where desegregation law, as promulgated by the Supreme Court stands today, thus helping schools address the problem of de facto segregation within the bounds of the law.

II. Importance of the Research

The Supreme Court and its interpretation of the Constitution with respect to school desegregation has been the subject of heightened attention and analysis since the controversial *Parents* case. In 2004 much attention was given to the 50th anniversary of the *Brown* decision (Clotfelter, 2004; Ferguson and Mehta, 2004; Friedman, 2004; Gay, 2004; Ladson-Billings, 2004). Much discussion surrounds the nation's struggle with racial integration in public schools. However, current literature stresses the role of the Supreme Court through individual cases, sometimes grouping opinions into different 'eras' for desegregation. However, little work has been conducted evaluating judicial interpretation of the 14th amendment as basis for Court opinions, that which, at its heart, has driven all the desegregation cases. At this time, linking the

Court to the actual issues schools are and have been battling serves the important purpose of evaluating where desegregation stands today.

Second, after the *Parents* decision, schools have been left to structure integration plans in compliance within the bounds of the law as dictated by the Court. By considering the ways in which the Court's 2007 interpretation of the 14th amendment may or may not allow for the implementation of student assignment policies, schools can evaluate legally permissible plans for integration. This dissertation will provide a clear picture of the Court's interpretation of the 14th amendment as it juxtaposes actual changes in racial make-up of public schools. Establishing an understanding of this juxtaposition will show the extent to which the Supreme Court has influenced actual changes in schools over the time period studied. Further, in order to avoid lengthy and costly litigation schools must focus on legal integration plans. These plans must conform with federal law as promulgated by the Supreme Court thus, making a clear understanding of the law paramount to the successful future of school integration. This study will provide a clear framework of current federal law as promulgated by the Supreme Court thus allowing schools the ability to confidently structure legal assignment plans.

Third, this research builds upon current research on desegregation litigation by broaching the topic from a new perspective: judicial interpretation. Judicial interpretation is the way in which the Court interprets the law, and in this study specifically how the Court interprets the fourteenth amendment. While current literature does address desegregation cases and the Supreme Court's role, little attention is paid to examining changes in 14th amendment judicial interpretation over time specifically in the desegregation case law. While much research and literature exists closely surrounding my two major areas of inquiry (Supreme Court and

desegregation), I believe a gap exists between the literature that addresses the Supreme Court and its role in desegregation and literature on judicial interpretation. This research adds to foundational work on segregation in schools, desegregation and the law, and current evaluations of federal law by considering the role interpretation of the 14th amendment plays within the broader scheme of desegregation literature. The intended audience for my research is three-fold. First, I intend to speak to scholars in law who focus on constitutional law and Supreme Court judicial interpretation. Second, I intend my research to be relevant to scholars in both law and education focusing on analyzing and commenting on school desegregation. Lastly, this research will serve those involved in crafting school assignment policies including school administrators and parents.

III. Current Context of the Problem

The nation's schools have experienced wide-spread resegregation in recent years. This has occurred at the same time as public school enrollment in the aggregate has become as racially diverse as it ever has been (Frankenberg, 2007). Latinos are the largest minority group among public school students and by 2050, more than half of the nation's students will be 'minority' (Orfield & Lee, 2005). African-American students are now more racially isolated than in 1960, a time before the Civil Rights Act or major Supreme Court decisions such as *Swann* or *Green* wherein the Court approved integration methods such as bussing or ruled several aspects of the school must be fully integrated beyond simply allowing African-American students to enroll (Orfield, 2001).

This reality is also reflected in the racial make-up of schools themselves. A total of 70.2 percent of African-American students attend predominantly minority schools, up from 62.9

percent in 1980 (Orfield, 2001). Since 1990, the percent of African-American students attending schools with over 50 percent minority student enrollment has increased from 66 percent to 72 percent (Orfield and Lee, 2004, p.20). Further, African-American students attending schools with over 90 percent minority students rose from 34 percent to 38 percent, showing an increase in intensely segregated minority schools (*Ibid*). A study by Frankenberg and Lee (2002) commissioned by the Civil Rights Project¹ in 2002, examined the Department of Education's National Center for Education Statistics Common Core of Data (CCD). The CCD collects fiscal and non-fiscal data from all public schools, districts, and state education agencies in the United States. The study (2002) found that levels of inter-racial exposure had declined since 1986 in virtually all of the 239 largest districts in the country (enrollment over 25,000). Districts showing the least amount of resegregation were mainly in the south. Orfield and Lee (2004) cite supporting evidence:

The four most segregated states in 2001 for black students by two different measures (Black Exposure to White and Percent Black in Majority White Schools) were New York, Michigan, Illinois and California. In California and New York, only one black student in seven was in a majority white school and the typical black student was in a school with 82 percent nonwhite students in New York and 77 percent in California. (p.26)

The most pronounced trends in segregation affect Latino students. While segregation is often highlighted as the separation between African-American and White students, important to note is that Latino students are also segregated in public schools. In 1973 the Supreme Court in *Keyes* ruled that Hispanic students are not only constitutionally entitled to desegregation

¹ The Civil Rights Project/ Proyecto Derechos Civiles is a University of California Los Angeles-based group of scholars, lawyers, policy-makers and education whose mission is to help in renewing the civil rights movement to achieve equity across society. Led by Gary Orfield, the Project is widely respected and conducts numerous studies and analyses on inequities in education.

remedies, but that schools must help Hispanic students be proficient in English. Wells (1989) examines the situation of Hispanic students in today's schools:

Gaps in educational attainment and earning between Hispanics and non-Hispanics continue to widen, offering strong evidence that segregated schools are not preparing the rapidly growing Hispanic student population to succeed in a predominantly non-Hispanic society... Many Hispanic students attend school districts with low per-pupil expenditures, high pupil-teacher ratios and limited resources. If current practices continue, Hispanics are not only destined to become the nation's largest minority group, but also the most disadvantaged. (Wells, 1989, pp. 2-4).

In 1998, 36.6 percent of Latino students attended schools with a minority enrollment above 90 percent (Orfield, 2001). In addition, Native American students attend schools in which more than a third of their peers are also Native American (Ibid).

Impossible to ignore is the link between school segregation by race and segregation by poverty in the nation's schools. Racially segregated schools are also schools with high concentrations of poverty, the exception being racially segregated schools with majority white students (Orfield, 2001). Similarly, Darling-Hammond (2007) cites inequities based on funding:

African-American and Hispanic American students continue to be concentrated in central city public schools, many of which have become 'minority' in the past decade while their funding has fallen further behind that of the suburbs... The continuing segregation of neighborhoods and communities intersects with the inequities created by property tax revenues, funding formulas, and school administration practices that create substantial differences in the educational resources made available in communities serving White and minority children... Not only do funding policies create a situation in which urban *districts* receive fewer resources than their suburban neighbors, but *schools* with a high concentration of minority students receive fewer resources than other schools within these districts (pp. 320-321, emphasis added).

However, important to note is that residential segregation and school desegregation do not always go hand in hand. A study released by Logan (2002) of the Mumford Center for

Comparative Urban and Regional Research indicates that segregation by race in schools is increasing while residential segregation for African-American students is slightly declining. In addition, the study found that segregation works to benefit White students. Lee (2004) supports these findings and concludes:

there is strong evidence that districts where desegregation orders have been weakened or vacated show a trend towards resegregation that is over and above what would be expected by demographic [and residential] changes alone (p.9).

Logan (2002) also examines the link between race and poverty in schools. Logan (2002) found that during the 1999-2000 school year,

the average poor student attended a school that was 63 percent poor, while the average nonpoor student attended school that was only 27.5 percent poor. White students were in schools that were 30 percent poor, black students were in schools that were 65% poor, Hispanic students were in school that were 66 percent poor, and Asian students were in school that were 42 percent poor. This suggests that racial segregation works to the benefit of white students, placing them in very different schools from minority students.

Further, Logan (2002) found that the national average level of segregation of African-American elementary school children from their White peers increased by 2 points during the 1989-1990 school year whereas residential segregation declined by 3-4 points the same year (Logan, 2002, p.4).

The following table illustrates the relationship between segregation and poverty through showing schools with high percentages of minority students are those where the majority of students receive free and reduced lunch:

Public School Enrollment Data in Schools with High Minority Populations,
2007-2009 Academic Year, McNeal (2009)

Public School District	Ethnicity (%)					Total (%)	Total (%)
	Black	Latino	Asian	Native American	White	Students of Color	Free & Reduced Lunch
Atlanta	86	4	1	1	8	92	75
Boston	41	35	9	1	14	86	71
Chicago	49	39	3	1	8	92	85
Detroit	90	5	1	1	3	97	70
Los Angeles	11	73	4	3	9	91	76
St. Louis	82	2	2	0	14	86	82

Student achievement has been influenced by both the resegregation of schools and the standards-based and market-based reforms of recent years. Graduation rates are declining - down from 77 percent in 1969 to 69 percent in 2000 (Barton, 2005 as cited in Darling-Hammond, 2007, p.318). Further, while graduation rates were increasing from the 1950s to a high of 75 percent for African-American students during the 1980s, rates have not risen since (Darling-Hammond, 2007, p.321). Further, dropout rates have increased as graduation rates actually declined in some states in the wake of standards-based reforms (Ibid). Recent resegregation in schools is linked to student achievement, poverty, and racial isolation for both white and minority students.

IV. Research Questions

This study builds upon past and current research focused on the Supreme Court's role in desegregation issues in America's public schools. This analysis centers on chronicling the path of judicial constitutional interpretation as employed by the Court and as administered to desegregation cases with specific attention paid to interpretation of the 14th amendment. In addition to this major research question, analysis of judicial interpretation is then applied to established research on how desegregation and subsequent resegregation actually occurred in the nation's schools from 1954-2007 by using student enrollment data from secondary sources. Using both the basic analysis of Supreme Court constitutional interpretation and the currently established research on the racial make-up of school enrollment, this study will provide current and legally permissible frameworks for how schools can structure plans through which integration can occur today given the most recent Court decision affecting K-12 desegregation in *Parents*.

Research Questions:

1. What were the shifts, if any, of the United States Supreme Court's judicial interpretation of the 14th amendment as shown in Court case law relating to desegregation in public schools from the period of 1954-2007?
2. How, if at all, did these shifts parallel general changes in racial make-up of student populations in public schools from 1954-2007?
3. Given the most recent 2007 decision, what is the current state of federal desegregation law and how can schools structure legally permissible integration plans? What, if any, are the effects of the *Parents* decision both on schools and institutions outside of K-12 education?

V. Historical Context of Supreme Court Cases: *Brown I* and *II*

The significance of current resegregation cannot be understood without considering the critical role *Brown* played not only in the context of education, but also in American history. Historical contexts within which Supreme Court decisions are issued play a crucial part in evaluating goals and outcomes of the Court of the Schools, especially in the highly-charged area of school desegregation. This overview is meant to be an introduction to Supreme Court desegregation case law; Chapter IV will include a detailed discussion of this topic.

The end of Jim Crow laws began with the Court's decision in *Brown*, marking a turning point not only for integration in schools, but integration in all aspects of society. It is for this reason that *Brown* is one of the most famous cases ever decided by the Court (Friedman, 2004).

Friedman writes,

From the end of Reconstruction to the 1950s, a vast legal structure was in place that effectively kept the black population in a second-class status. Laws segregated schools, parks, libraries, and public facilities, as places of public accommodation. It was a crime for a black person to go into places that the laws preserved for whites. Placing blacks in such an inferior position made it virtually impossible for them to use political power to correct their situation. Education was clearly the heart of the problem. First, segregation in education affected the largest number of black citizens—the tens of millions of children of school age. Second, segregation and lack of political power by blacks necessarily led to inferior schools with few books or teachers, and no science labs or other teach tools. It made it difficult or impossible for the black population to acquire then necessary skills to raise itself from its second-class status. (Friedman, 2004, p.viii)

Friedman (2004) makes an important connection between schools and society. School segregation was simply one facet of discrimination African-Americans suffered pre-*Brown*. Jim Crow laws, the laws upholding de jure segregation in public facilities, were powerful tools used to maintain the status of African-Americans as 'second-class' citizens.

It would be incorrect to think, however, that *Brown* was decided quickly. A long struggle fought by activists to end school segregation began as early as the late 1800s. The Supreme Court ruled in favor of state's rights to implement racial segregation in public facilities as long as these facilities were 'equal' in *Plessy v. Ferguson* (*Plessy v. Ferguson*, 163 U.S. 537 [1896]). In 1899 the Court upheld a Georgia school board's right to close an African-American school while still collecting taxes from all to support the white schools citing the state's reserved power to control schools. (*Cumming v. Board of Education of Richmond County*, 175 U.S. 528 [1899]). Further, in 1908, the Court upheld racial segregation in institutions of higher education (*Berea College v. Commonwealth of Kentucky* 211 U.S. 45 [1908]).

Several cases to reach the Supreme Court pre-*Brown* dealt with issues of segregation in higher education and were headed by the NAACP Legal Defense Fund. The NAACP's legal strategy was to challenge segregation in higher education, first with law schools, and then other colleges or professional schools (Friedman, 2004, p.ix). In *Missouri ex rel Gaines v. Canada* (305 U.S. 377 349 [1938]) the Court ruled that the University of Missouri policy, one that offered no law school for African-American students, thus requiring them to seek a law degree outside the state, was unconstitutional. The Court ruled the state must provide a law school for African-Americans. This was the first in a series of Court opinions striking down segregation in higher education (*Sipuel v. Bd of Regents of the University of Oklahoma* (332 U.S. 631 [1948]), *McLauren v. Oklahoma State Regents Board of Higher Education* (229 U.S. 336 [1950])). The most progressive of these cases was decided four years before *Brown* wherein the Court ruled an African-American student be admitted to the University of Texas Law School on the same terms as white students (*Sweat v. Painter* (339 U.S. 629 [1950])).

In the mid-1950s, parents and students began to challenge K-12 public school segregation, shifting direction from the Defense Fund's initial strategy. The case commonly known as *Brown v. Board of Education* is actually a set of five cases all challenging the same issue of segregation by race in the nation's public schools. The cases originated in Kansas, Delaware, Virginia, South Carolina, and the District of Columbia. As Kluger (1975) recounts, the South Carolina case originated from a lawsuit filed by African-American parents demanding a school bus for their children citing the white students had more than 30 buses for transport to school. The case soon became a challenge to the basic idea of segregated schools and unequal education in general. Similarly, the case in Virginia challenged inadequate educational facilities for African-American students. The Court issued one opinion in *Brown* because all five of the cases challenged the same fundamental issue: desegregation in K-12 public schools. The opinion is brief, uses simple language, and is clear in its impact on public education:

In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal...School children irrespective of race and color shall be required to attend the school in the district in which they reside and that color or race is no element of exceptional circumstances warranting a deviation of this basic principal (347 U.S. 483 [1954])

The Court's decision in *Brown* was brief but resonated as a symbol of change and progress. The Court ruled segregation unconstitutional based on the 14th amendment which states that,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const., Fourteenth Amendment, sec. 1)

The Court's legal rationale rested on the 14th amendment's equal protection clause and centered on the fact that segregated schools denied African-American children equal protection of the law as guaranteed by the clause.

Important to note, however, was the absence of a time-line for desegregation or a mandate for how long schools had to comply with the opinion. Lack of any articulation by the Court concerning either a practical directive or time-line for desegregation allowed for massive resistance on the part of those schools, communities, and states opposed to desegregation. The decision was met with resistance by the Southern states and school districts through methods such as closing schools (e.g., in VA), or simple inaction. When it was clear Southern schools would resist the original decree in *Brown*, the Supreme Court issued a second opinion commonly called *Brown II* in 1955 (349 UC. 294 [1955]) wherein it mandated schools to integrate with 'all deliberate speed.' The Court recognized the need to implement a flexible standard - the method and speed of integration would be determined locally. Peter Moran (2005) examines *Brown II* in relation to the original decision:

The implementation decree was handed down in May 1955 and bore a striking resemblance to the style and language of the original decision. The decree invested district courts with the authority to determine 'whether the action of school authorities constitutes good faith implementation of the governing Constitutional principles.' Furthermore, it ordered segregated school districts to 'make a prompt and reasonable start towards compliance' with the 1954 decision. Again, the language was exceedingly vague, and no definitive timeline was established. In one respect the 1954 and 1955 *Brown* decisions marked the culmination of more than two decades of NAACP litigation challenging the legitimacy of 'separate but equal' On the other hand, the *Brown* decisions marked only the beginning of another protracted series of legal campaigns to define the standards of 'all deliberate speed,' 'earliest practicable date,' and 'compliance.' The reactions to the ruling ranged from immediate compliance and desegregation to complete intransigence. (Moran, 2004, p.9)

Moran references here the continued resistance by many Southern schools against integration. Many Southern members of Congress signed the Southern Manifesto, denouncing the Supreme Court's decision (Clotfelter, 2004, p.23). The Supreme Court did not hear any cases relating to public school integration for the better part of the decade post-*Brown* and *Brown II*. During this time integration occurred slowly (p.25).

Many argue that it was not until the passage of the Civil Rights Act in 1964 that any real progress was made in achieving integration, a full 9 years after the Court's opinion in *Brown* (Friedman, 2004, p.xiii). The Civil Rights Act prohibits recipients of federal financial assistance from discriminating against individuals because of their race, color, religions, sex, or national origin. In addition, Title VI of the Act grants authority to the United States Attorney General to investigate all public and most private schools and colleges.

VI. Historical Context of Supreme Court Cases: Green-Parents

Given widespread resistance to integration across the nation, the Supreme Court turned to an era of supporting specific methods of integration such as bussing. After *Brown II* to the passage of the Civil Rights Act in 1964 many schools resisted integration. These years included National Guard deployment to oversee the integration of Little Rock High, and Price Edwards County, Virginia schools, which had closed down for five years in order to avoid integration mandates. In 1968 the Court made clear its support for integration methods in *Green*.

In *Green* the Court ruled 'freedom of choice' plans unconstitutional based on the precedent set in *Brown*. Freedom of choice plans allowed students to choose which schools within the district they wanted to attend. There was no barrier to African-American students

attending previously white schools but the schools implemented no plans to support or push for integration. In many cases, schools remained segregated even though these plans were put in place. Often times, African-American students enrolled in ‘white schools’ were intimidated and harassed (Caldas & Bankston, 2005, p. 24). The Court ruled these plans operated to “burden students and their parents with a responsibility which *Brown II* placed squarely on the School Board” (*Green v. County School Board of New Kent County* [1968]). The Court writes,

Where a "freedom of choice" plan offers real promise of achieving a unitary, nonracial system, there might be no objection to allowing it to prove itself in operation, but where there are reasonably available other ways, such as zoning, promising speedier and more effective conversion to a unitary school system, "freedom of choice" is not acceptable. (*Green v. County School Board of New Kent County* [1968])

Green also required schools to come forth with a plan to integrate schools until it was clear ‘state-imposed’ integration had ceased. Lastly, *Green* required integration must be achieved in several aspects of the schools: facilities, staff, extracurricular activities, and transportation.

Caldas and Bankston (2005) identify a period of litigation marked by the Court’s ruling on specific methods of integration (p.24). In *Swann* (*Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1 [1971]) the Court ruled that bussing in the Charlotte school districts was constitutional even when the school districts were segregated not through deliberate action on the part of the school districts, but was a result of a student’s geographical proximity to the school. 14,000 African-American students in the Charlotte, North Carolina school district attended schools that were over 99% black even though de jure segregation had ended fifteen years earlier. This was largely due to geographical segregation in the city. This decision was crucial because the Court also recognized there were limits to judicial oversight in dismantling segregated schools. Along with approving bussing, the Court also ruled that,

neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished. *Swann v. Charlotte-Mecklenburg Board of Education* 403 U.S. 1 [1971])

The period between 1970 and 2000 is marked by the Court's willingness to release districts from court-ordered desegregation if they had made reasonable efforts to integrate their schools.² This release from court-ordered segregation is called being granted 'unitary status,' meaning a dual system of 'black and white schools' had ended and a unified school system implemented (*Swann* (1971)).

In the 1974 case of *Milliken*, the Court ruled that cross-district bussing was unconstitutional. This was a pivotal case as it was an illustration of the Court's intent to return power to the localities in which segregation existed. In *Milliken* the Court ruled that bussing of Detroit City School district students to one of Detroit's 51 suburbs was unconstitutional. The Court wrote,

Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must be first shown that there has been a Constitutional violation within one district that produces a significant segregative effect in another district; *i.e.*, specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. (*Milliken v. Bradley* 418 U.S. 717 [1974])

The Court here implicitly recognized residential segregation and again, its own limits on authority in local schools.

² Important to note is an exception to the series of cases wherein the Court began to release schools from court-ordered desegregation mandates. In *Keyes* (1973), the Court ruled that the City of Denver, Colorado school district was operating an intentional de facto segregated school district, and thus, even though not segregated by law, the segregation was unconstitutional. The Court's decision recognized that the neighborhood school districts in Denver were segregated by race due to district rezoning policies. The Court recognized that these policies resulted in the establishment of de facto segregated schools and that the African-American schools were largely inferior to the White schools. *Keyes v. School District No. 1*, 413 U.S. 189 (1973)

Many believe the Court began its most obvious abandonment of integration efforts in the 1990s. (Orfield and Eaton, 1996). Orfield and Eaton (1996) argue that

After decades of bitter political, legal, and community struggles over civil rights, there was surprisingly little attention to the new school resegregation policies spelled out in the Court's key 1992 decisions in *Board of Education of Oklahoma v. Dowell*, *Freeman v. Pitts*, and *Missouri v. Jenkins*. The decisions were often characterized as belated adjustments to an irrelevant, failed policy. But in fact, these historic High Court decisions were a triumph for the decades-long powerful, politicized attacks on school desegregation. The new policies reflected the victory of the conservative movement that altered the federal courts and turned the nation from the dream of *Brown* toward accepting a return to segregation. (p.1)

In *Dowell* (1991) the Court ruled that once a school district had achieved 'unitary status' and had shown 'good faith compliance' the district was released from its obligation to maintain desegregation. The Court identified 'good faith compliance' as the school's showing of its reasonable effort to adhere to federally mandated desegregation. Here, the Court continues its line of reasoning from *Swann* (1971), wherein it reaffirms the idea that judicial intervention can only go so far and that reasonable efforts on the part of a district to integrate should be acknowledged. In *Freeman* (1992), the Court ruled that unitary status could be granted to a district even when integration had not yet been achieved in all previously mandatory areas spelled out in *Green* (1968) (facilities, staff, extracurricular activities, and transportation). In *Missouri* (1995) the Court ruled that states could not be mandated by law to pay for implementing state-wide remedial programs or teacher salary increases to resolve racial inequities in schools through tax increases. *Missouri v. Jenkins* (515 U.S. 70 [1995]). In the 2007 *Parents* decision the Court ruled race cannot be used as the deciding factor in student assignment

plans within districts³. This study will unpack the ambiguity around this decision thus providing a current legal framework for integration.

VII. Overview of Policy Initiatives and Empirical Evidence 1954-2007

Black's law dictionary defines policy as 'a course of action adopted or pursued by a government' (Black's Law, 2006). While this study will not focus on federal policy as pursued by the executive or legislative branch, it is important to consider ways in which federal policy as adopted by these branches outside the judiciary have influenced school desegregation. The three branches together in totality comprise federal law and policy on school desegregation and therefore a brief review of policy initiatives will help understand how school segregation has evolved over time beyond the Supreme Court. Additionally, a major basic tenant of this study and of desegregation law is based on the general fact that integrated schools are a beneficial and worthy goal in K-12 schools. Here, empirical evidence on how and why racial integration is beneficial to students, schools, and student achievement levels is discussed. The widening present-day achievement gap highlights the gross disparities in educational opportunity between races, socioeconomic status, and between urban and suburban education. From a policy perspective, the nation's schools are currently facing an overwhelming task: raising academic achievement and evening the playing field in terms of educational access in the face of growing economic and residential inequalities.

Brown represented a marker of social progress and was an important part of the Civil Rights Era. The case sparked a new wave of policy: "education reform, integration, and social

³ Note because in depth discussion of the *Parents* decision will occur in Chapter IV, only a brief summary of the Court's holding is provided here.

progress” (Pitre, 2008, p.552). Although schools resisted, the Court insisted on desegregation through a continued commitment to legal support for integration plans through court-orders and a growing body of case law. In addition, policy after *Brown* was also influenced heavily by federal legislation and the Executive Branch. Policy initiatives were fueled by empirical evidence supporting integration, though the two were not always harmoniously aligned. Need for action arose because while the Court is endowed as being the highest and most powerful court in the nation, it has no power of enforcement. The Court does not have the power to implement the law, but must simply rule on Constitutional issues brought before it on appeal.

Social science research during the 1960s and 1970s influenced political support for general desegregation efforts but did not justify specific methods of integration such as busing. Evidence showed benefits for African-American students in several areas of achievement. Attainment of higher education for African-American students was a factor supporting integration. By the early 1970s research revealed African-Americans in racially mixed schools were more likely to complete high school and go onto college (Crain, 1970). Crain and Mahard (1978) found African-Americans students in the North who graduated from predominantly white high schools were more likely to reach their third year of college. Research at the K-12 level also supported integration. African-American first graders who transferred from metropolitan to suburban schools had math scores three grade levels higher than their peers remaining in segregated schools (Zdep, 1971). Release of Coleman’s report “Equality of Educational Opportunity” in 1966 fueled the integration policy movement. The report focused on equality in opportunity as measured by educational outputs (achievement) rather than resource input (money spent on the school). Using data from over 600,000 students and teachers in 3,000 school districts, Coleman found that achievement was more tied to the social composition of the school than to educational

resources available to students (such as per pupil expenditure and size of school library). That is, school quality did not influence achievement of students from comparable social backgrounds as much as factors such as the background of a student's peers. One message summarized the movement for integration: African-American students could achieve more if put in white schools. Further, the Report supported the conclusion that it was school composition, not school resources that influenced achievement. While the report and relevant research was unequivocal in this, the means to achieve such integration was unclear.

The use of busing as an effective and reasonable method by which to achieve integration was the subject of much research. While research supporting the positive outcome of integration itself was widespread, research specifically on busing produced mixed conclusions (Schoefield, 1976). A 1971 report released by the Department of Health, Education, and Welfare (HEW), analyzed the effect busing would have on 39 urban districts and found that busing seemed a reasonable solution to the barriers of neighborhood segregation because it did not exceed practical budget or reasonable travel time limitations. The study also showed that in most of the 29 districts substantial decreases in racial isolation could occur without transporting students who lived within walking distance of their neighborhood schools. The report emphasized the effective use of existing levels of busing instead of employing additional busing and reviewing the assignment of those already bused to school. The increase in transportation time was found to be trivial when compared to time spent in pickup for neighborhood school systems. In contrasting findings, a 1971 report issued by Syracuse University's Research Center did not support the conclusion that busing was an effective solution to the problem of segregated schools, citing further problems with research methods such as inaccurate busing routes leading

to inconclusive findings. Coleman released another report in 1975 showing busing had failed as an integration method due to the massive ‘white flight’ from desegregating districts.⁴

During the 1960s and early 1970s, executive branch influence on the issues of integration and busing was notable while the Court decided several cases showing its approval and support of integration (*Cooper, Griffin, Green*). President Johnson oversaw several key pieces of legislation centered on school desegregation and educational equity as part of his ‘Great Society’ agenda for social reform during his time in office from 1963-1969. Johnson was known as the ‘Education President’ and highlighted education reform as a major issue facing America during his 1964 campaign (Boone, 1992). Humphrey, Johnson’s VP, described Johnson as an ‘education nut’ who felt that education was the best thing he could provide the American people, often believing in miracle cures to education problems (Boone, 1992, p. 4). Johnson appointed the Gardner Commission in 1965 with the purpose of evaluating the issue of federal education aid to the states. Ultimately, the Commission recommended federal aid be linked to Johnson’s War on Poverty and recommended targeted aid to help poor children (Thomas & Brady, 2005, p.52). The War on Poverty articulated three main goals: to prevent entry into poverty, provide exits from poverty, and provide support for those who could not benefit from funding for the first two goals (Vinovskis, 2005). Johnson viewed education as a crucial mechanism by which to aid in achieving goals, especially at the secondary school level (Vinovskis, 2005).

The Elementary and Secondary Education Act (ESEA) of 1965 grew out of this push for equal educational opportunity (Vergon, 1990, p.5) and has remained the single largest financial support legislation for educationally vulnerable children (Thomas & Brady, 2005). The overall

⁴ White flight to be further discussed in relation to Swann.

purpose was to improve educational opportunities for poor children and provided states with the funds to implement plans aimed at improving the teaching of reading and other subjects (Pub.L. 89-10, 79 Stat. 27, 20 U.S.C.). Title I of the ESEA provided funds for aid in math and reading to schools with disproportionate numbers of low-income students and was “to provide financial assistance to local educational agencies serving areas with high concentrations of children from low-income families to expand and improve their education programs by various means” (cited in Thomas & Brady, 2005, p. 52). Because the South was one of the poorest regions of the country, Southern schools had much to gain through compliance with federal legislation and desegregation laws.

Important to note is the explicit role of the federal government as articulated in the language of the ESEA. The federal government was not to exercise any “direction, supervision, or control over the curriculum, program of instruction, administration, or personnel, or over the selection of any instructional materials in any educational institution of school system” (as cited in Thomas & Brady, 2005, p.52). Many argue that this language allowed for the initial misuse of ESEA appropriated funds (Vinovskis, 2005; Thomas & Brady, 2005).

In the first four years after passage of the ESEA, Congress appropriated \$4.3 billion to schools, but was widely criticized for allowing funds to be inappropriately distributed and misused (Martin & McClure 1969). Immediately subsequent to passage of the legislation, Congress debated heavily on whether or not funds should be restricted to only poor students, or if aid should also be distributed to academically vulnerable students (Thomas & Brady, 2005). Due to ambiguity in language of the ESEA, funds were legally able to be distributed to both types of students. In the 1970s, 94% of schools received some form of ESEA aid (Ibid). In the

1969 report “Title I of ESEA: Is It Helping Poor Children?” authors Martin and McClure found about 15% of ESEA funds had been misused because funding had not reached eligible children nor were they given to the areas most in need. Common examples of federal money being misused included supplanting local tax efforts and the building of swimming pools and other facilities that would benefit all students.

National policies and initiatives for implementing bussing began in earnest with the Court decision in *Swann*. Writing for the majority, Chief Justice Burger cited the inadequate measures taken to integrate schools to date including freedom-of-choice plans (see *Green*) or deliberate resistance and the now-common use of bussing to transport children to school. Burger recognizes that 39% of the school children nation-wide were transported to school by bus and identifies bus transportation as “perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school district” (*Swann*). From 1921 to 1971 the number of students transported to schools by bus rose from 600,000 to nearly 20 million. The number of vehicles had grown from about 60,000 to over 250,000 (Commission on Civil Rights, 1972). In many cases, desegregating schools reduced the amount of busing. For example, the practice of busing black children past white schools to a faraway black school ended. Between 1965 and 1969, 42 districts in Georgia saw a decrease of 173,000 in total student miles travelled as a result of bussing to desegregate (Commission on Civil Rights, 1972). Similar numbers were seen in Mississippi. Specific to the Charlotte school district, Justice Burger recognizes the average bused student travelled more than an hour a day even before the desegregation busing plan was implemented.

Given the emphasis on the role of bussing in *Swann*, the decision resulted in over a decade of forced bussing though resulted in even more racial isolation in the nation's schools (Reynolds, 1984). The Court had approved bussing as a constitutional means for combatting racial imbalance in schools, though many parents resisted the bussing methods. This resulted in what they deemed to be 'unnecessary' traveling to schools by enrolling their students in private schools or moving outside of the city to avoid forced bussing (see *Milliken*). Public resistance to bussing was widespread: in 1971 two buses were overturned and buses were burned in Denver and Pontiac, MI (Commission on Civil Rights, 1972). White-flight resulting from this resistance created increased racial residential and therefore increased school segregation.

The majority of those in Congress also disagreed with the *Swann* decision. Congress considered an anti-busing amendment to the Constitution as a way to combat the Court's decision (McKay, 1975). In 1972 President Nixon voiced his opposition to bussing and called for a stop to forced bussing in the long run and constructive alternatives to it in short term (McKay, 1975). No such amendment was ever realized, but Congress' long opposition to bussing can be seen in its decision to prohibit federal funds to be used for student transportation to overcome racial imbalance through mandates within the ESEA.

Despite this, the *Brown* decision and subsequent pieces of legislation led to progress in academic achievement and school desegregation (Orfield, 2001) Academic progress as measured by college attendance as well as access to resources improved post-*Brown* (Arrington, 1981). Student access to qualified teachers increased as did racial gaps in student achievement (Darling-Hammond, 2007, p. 271).

By 1971, the Department of Health, Education, and Welfare statistics showed that the South had become the most racially integrated region in the nation. Research from the last decade now documents that dropout rates declined by two to three percent post- *Brown* nation-wide and graduation rates increased as a result of desegregation orders and legislation (Ashenfelter, Collins, & Yoon, 2006). The percentage of African-American students in majority White schools rose from two to thirty-three percent between 1964 and 1970. By 1968, the number of African-American attending majority white schools had risen to 32% (Arrington, 1981). By the late 1980s the number had reached an estimated 44% (Epperson, 2008, p.5).

The early 1990s stands out as a turning point in the progress made post-*Brown* in terms of progress towards integration and policy shifts. The Supreme Court heard and decided three desegregation cases during the early 1990s that may have been contributing factors to lower academic achievement because the cases made it is easier for schools to achieve unitary status and is considered a general shift away from school desegregation by the Court (Orfield, 2001). Simultaneously, academic achievement has slowed and in some ways regressed since the 1990s. The widening achievement gap is evidence of inequitable educational opportunity and access to resources for the nation's public schools students. Disparities between races and students of different socioeconomic backgrounds in academic achievement are now evident in college enrollment, grades, test scores, drop-out rates, and course curriculum (Harris & Herrington, 2006).

The Reagan administration also played a major role as an obstacle to desegregation during the 1980s. During his time in office, Reagan continued to implement policies resulting in road blocks specific to progress towards integrated schools. Reagan opposed enforcement

proceedings against desegregating schools by the Executive Branch and also supported the abolishment of the Department of Education altogether (Epperson, 2008, p.6). The Reagan administration opposed desegregation orders and research came to a halt. As Vergon (1990) argues, the Reagan administration sought to turn control over education to the states and local communities. The federal role was cut back through limiting federal funding for research and the revocation of federal government regulations governing educational program (Vergon, 1990, p.7). Important to note is that the Reagan administration did support one area of research in regard to desegregation in schools. However, this small area of research centered on ‘white-flight’ and was used by the Reagan administration to justify opposition to integration (Frankenberg & Orfield, 2007, p.4).

Obstacles to school desegregation continued during the presidency of George H.W. Bush. Under the direction of Bush I’s administration, the OCR released eight states from any obligations under Title VI of the Civil Rights Act of 1964. Under Bush I, *Dowell* was decided making it easier for schools to gain unitary status. This was the first time the Justice Department argued against mandatory school desegregation and succeeded (McAndrews, 2009).

After the Reagan administration, standards-based policies became known as the America 2000 Program under Bush I. Under Clinton the Program became federal law known as Goals 2000 and then reauthorization of the ESEA in 1994 propelled the standards movement ahead by requiring all states to adopt a system of standards and accountability to measure achievement in order to qualify for federal funding (Frankenberg & Orfield, 2007). Under President Clinton, the number of investigations conducted by the Office of Civil Rights doubled. The OCR targeted overrepresentation of minorities in special education programs and their underrepresentation in

gifted and talented programs (McAndrews, 2009). The Supreme Court showed its intention to proceed against Clinton's focus by deciding *Jenkins* in 1995 by rejecting both compulsory busing and court-mandated implementation of magnet schools.

In 2001 the ESEA was again reauthorized as the No Child Left Behind Act with a school choice component under Bush II. Although Bush did not specifically focus on issues of race in public schools, education was a major theme on which he often spoke out publically (McAndrews, 2009). For Bush, schools were not separated by race but rather by quality:

“In Bush's color-blind vision of American education, there are not Black schools or White schools. There are only “failing” and “succeeding” schools. When he unveiled his No Child Left Behind Act, the only statistic Bush cited did not allude to the public schools of Chicago, St. Louis, Cleveland, Detroit, and Baltimore, where over eight percent of the students were Black or Latino, or to the seventy percent of African-American children in the country who attended predominately minority schools, but to the high-poverty schools where nearly seventy percent of fourth-graders are unable to read at a basic level (McAndrews, 2009, p.70).

Bush spent as much in the first two years of his administration on public education as had been spent in the eight years prior to his presidency (McAndrews, 2009). NCLB focused on vouchers and transfer out options for students in failing schools. *Parents* was decided during the Bush administration and the Court's interpretation of the fourteenth amendment as intolerant of any racial distinctions parallels Bush's attitude towards issues of race in schools.

VIII. Researcher Orientation

This study rests at the intersection of law, policy, and education because of my background in both education and law. I approach this research with a strong law and policy background given my previous practice as an attorney. My research interest is also founded

in my teaching experience as a former high school classroom teacher. My true interest has always lied with education and specifically with issues of race and equity in schools. I became interested in these issues because throughout my own K-12 education I was the only person of color not only in my grade or school, but in the entire school district. At a very early age I was aware of the role race plays in education. From my own experience grew a desire to understand why schools remain segregated, how segregation is tied to equity, and what legal factors influence progress towards racial integration.

While pursuing my law degree with a focus on public policy, I simultaneously earned my teaching certification. After earning my law degree I taught social studies at an urban school outside of Boston, Massachusetts and then at a suburban school in Syracuse, New York. My experience teaching in these two districts coupled with my knowledge of policy drove me to seek further understanding of how the law influences education through pursuing a doctorate degree in education with a focus on social policy. This research study is influenced by my own experience in a racially segregated school district, my experience teaching in K-12 classrooms, and my training and understanding of the law and the ability it has to profoundly influence education.

IX. Limitations

This study focuses on the legacy of desegregation-related Supreme Court cases through the intersection of law and educational policy and practice. State and lower federal court cases have been excluded from this analysis as I am primarily concerned with the role of the United States Supreme Court. The case law analysis draws from cases within the specific time period 1954-2007, only those dealing with desegregation in K-12 schools and, where

appropriate, higher education issues. Further, this study considers only secondary sources to provide student enrollment statistics, mainly from the work of Clotfelter (2004). Secondary sources will include periodicals, journal articles, and sourcebooks of historical documents (Cohen, 1985, p.6). A study of primary sources to ascertain the racial make-up of student enrollment during the time period falls outside the scope of this study. Further, I align Court interpretation with student enrollment data for African-American students throughout the time period studied. While other racial groups are undoubtedly important to consider in issues of equity, race, education, and integration, I chose to focus only on African-American students as student enrollment data throughout the time period studied is most complete for this racial group. Additionally, I have positioned myself primarily in the field of education although this is a study of how law and education align. Therefore, while literature within the field of law will be consulted especially regarding judicial interpretation, the major focus will be literature in the field of education on the topic of desegregation.

Chapter II: Literature Review

I. Overview

In addition to massive commentary on the legacy of *Brown* in the year of its 50th anniversary, recent literature addresses the impact of the 2007 *Parents* decision. Fundamental to issues of integration in schools is literature examining the basic goal of integration and its benefits to school-aged children. Therefore, in this chapter I review the three main areas of scholarship within the wide breadth of literature addressing desegregation in K-12 education.

Literature citing both empirical evidence and the theory supporting integration will be reviewed. Second, there exists much scholarship evaluating the great impact of *Brown* and subsequent integration policy. This literature evaluates the extent to which the decision and the series of desegregation cases subsequent to it actually resulted in progress and is well established in the field of education. Third, the recent 2007 Court decision resulted in speculation on the future of racial integration in the nation's schools. This third section of the literature review will be advanced in Chapter IV given that my third research question will require an analysis of where the future of desegregation is headed post *Parents*.

II. Literature in Support of Integration: Empirical Evidence and Theory

Despite recent resegregation, the benefits of school desegregation are well established in education research and literature. Research supports the fact that integration helps students in many ways while segregation produces negative results on student achievement. Rothstein (2004) found that while family income level does indeed affect achievement, even when income level is equal, African-American students still fare worse than their white peers if enrolled in racially segregated schools. Further, Kurlaender & Yun (2006) found that desegregation can help achievement as measured by individual ability to interact and feel comfortable with peers from different ethnic and racial backgrounds. Further, Orfield and Lee (2004) identify three primary categories of student outcome in relation to desegregation: higher achievement (as measured by test scores), greater educational or occupational aspirations and attainment, and increased social interaction among members of different racial and ethnic backgrounds. Additionally, Martinez & Klopott (2005) found three of the five strongest predictors of minority student college attendance

are directly related to school environment. More than 70 of the largest schools districts in the county are majority minority students (Pitre, 2009). Minority students are aware of the inequities in educational opportunity (Sortz, 2008). Sortz (2008) found that urban middle school students were angry about and aware of the shortcomings in their education due to lack of proper materials, lack of permanent teachers, and lack of funding.

Wells and Frankenberg (2007) identify two major themes in the literature on negative impact of segregation on schools and students: the first strand focuses on inequitable inputs to schools (i.e, resources), the second on the outcomes of segregation (p. 180). The author's conclude that

Within the first strand, four characteristics of segregated schools stand out: concentrated poverty, poor teacher quality and high turnover, inadequate curriculum and supplies, and limited aspirations and social networks. The second strand emphasizes low academic achievement and graduation rates as well as instability and lack of support. Taken together, all of these factors demonstrate the layered, all-encompassing nature of racial inequality and its impact on separate public schools (p. 182).

The authors go on to reason that despite some arguments citing the need for socio-economic integration instead of racial integration in schools, race is a strong predictor of where students live regardless of socioeconomic status. The authors point to the fact that black and Latinos with relatively high incomes are far more likely to live in poor communities than whites with similar incomes: "Race is a strong predictor of whether or not a child will live in a mostly poor community and attend a mostly poor school" (p. 181).

Further, in a qualitative study examining the long-term affects of attending racially diverse schools on adult graduates confirms the basic and logical conclusion that students who attend racially integrated high schools prepare young people for participation and inclusion in a

diverse society (Wells, Duran, & White, 2008). The researchers concluded that graduates of racially mixed schools felt they were more accepting and comfortable with people of other racial backgrounds. Second, they felt such schooling prepared them for a global economy and society. Third, and interestingly, most adult graduates of mixed schools felt they would have grown up in racial isolation but for their experience in mixed schools.

A major theme in education theory has been support for integrated schools based not only on empirical evidence but also notions of equity, justice, and the intrinsic value of mixed-race classrooms. Wells, Duran, & White (2008) cite the goal of eradicating structural inequality. This theme is founded on the notion that there exists a legacy of racism and racial inequality in the nation's schools. Second, inherent in the goal of integrated schooling is the theory that students benefit from being in diverse classrooms. Not only is this supported by empirical research, as just discussed (see Wells, Duran, & White, 2008), but in multicultural education theories as well.

Multicultural education theory supports the implementation of racially mixed schools and classrooms on two fundamental levels. While multicultural education and its goals is not a major focus of this study, it is beneficial to survey basic tenants within multicultural education as they provide further support for the benefits, both empirical and theoretical, of racially integrated schooling. First, the multicultural literature connects equal opportunity to racial integration. Second, multicultural literature emphasizes the need to end institutionalized racism evident in schools and to promote diversity as a democratic principle. A basic tenant in multicultural literature is equal educational opportunity for students of all races. Banks (1997) writes,

Multicultural education incorporates the idea that all students- regardless of their general and social class and their ethnic, racial, or cultural characteristics- should have an equal opportunity to learn in school. (p.3)

Banks also emphasizes the idea that educators should envision schools as having a microculture similar to other social systems. Banks calls for interaction between students and teachers of different backgrounds:

Almost all classrooms in the United States are multicultural because White students, as well as Black and Brown students, are socialized within diverse cultures....The school should be a cultural environment in which acculturation takes place; teachers and students should assimilate some of the views, perspectives, and ethos of each other as they interact. Teachers and students will be enriched by this process, and the academic achievement of students from diverse groups will be enhanced because their perspective will be legitimized in the school. Both teachers and students will be enriched by this process of cultural sharing and interaction. (Banks, 1997, p. 26).

Here, Banks' vision for teacher and student enrichment is based on the expectation that such classrooms are racially integrated. He is clear in his inclusion of "White students, as well as Black and Brown" (p.26) in classrooms across the country.

The second major theoretical focus in multicultural literature is the link between integration and basic principles of democracy. Multiculturalists often connect the ideas of multicultural education and democracy, asserting that democracy calls for an acknowledgement of diverse voices, including those of different races. Christine Bennett (1995) also makes a clear connection between multicultural education and democracy. She writes,

Multicultural education is an approach to teaching and learning that is based upon democratic values and beliefs, and seeks to foster cultural pluralism within culturally diverse societies and an interdependent world. (Bennett, 1999, p.13)

Amy Gutman (2007) also discusses multicultural education within the ideals and goals of democracy. She is ultimately concerned with furthering civil equality through tolerating and recognizing difference. Gutman argues, "[t]olerance and recognition of cultural differences are both desirable parts of multicultural education" (Gutman, 2007, p. 27). Gutman's arguments rest

on the fundamental premise that the nation's democratic ideals are founded on the idea that 'individuals should be treated and treat one another as equal citizens, regardless of their gender, race, ethnicity, or religion' (p. 71). Yet, she is most concerned with achieving civil equality for all children. Gutman characterizes a central reason why desegregation as a policy issue is subject to controversy: "[t]he issue that immediately arises is that citizens often reasonably disagree about what constitutes an education adequate to equal citizenship" (p. 74). The politics of education cannot go unnoticed for it exists and is recognizable in practices of schooling.

Major themes in multicultural education literature also stress the importance of integration as means to combat broader negative issues in overall race relations. Both Sonia Nieto (2004) and Carl Grant (2006) consider institutional racism. Grant argues that there exist three main reasons why racial inequity persists. He writes,

The first reason is that a dual structure has historically existed and continues to exist, which causes and facilitates different treatment of America's White and non-White people. The second reason is that Americans for the most part live in plural society, which can be defined as racially/ethnically segregated communities within cities and states....The third reasons is the marginalization of multiculturalism and race in society and multicultural education in schools as they are situated within a struggle between the democratic ideals of the country and the U.S. Constitution and the affirmation of these ideals (Grant, 2006, p. 158).

Grant goes on to argue that racism is 'resilient' (p.158) in American institutions themselves.

Sonia Nieto (2004) discusses race relations within the context of discrimination. She acknowledges the persistence of discrimination on an institutional level. As she points out, schools are often the sites of institutionalized racism historically in the form of *de jure* (by law) segregation and currently through *de facto* (in practice) segregation policies. Nieto defines institutional racism within the context of equity. She writes of institutional discrimination:

Too often prejudice and discrimination are viewed by many people as located in the negative perceptions of *individuals* towards members of other groups. Consequently, most definitions of racism and discrimination obscure the institutional nature of oppression....Institutional racism generally refers to how people are excluded or deprived of rights or opportunities as a result of the normal operations of the institution. (Nieto, 2004. p. 37)

Through citing the current day situation of de facto segregation Nieto points out that most students in the nation's public schools are not likely to interact with those of different racial backgrounds. Because schools are often a reflection of larger society, it is no surprise racism has infiltrated into the classroom through overt discrimination and seemingly benign practices. Nieto (2004) is rigid in her belief that schools are a reflection of the larger society and in this way schools duplicate and perpetuate racism. She argues that discrimination in school practices and policies continue to discriminate against minority students. These embedded practices are reflected in the fact that minority students are disproportionately represented in lower ability groups and special education programs (Reglin, p.45). Although de jure desegregation is obsolete, de facto methods of separating students persist in forms such as tracking, curriculum variation, and teacher quality (Ibid).

Multicultural literature and theory also emphasizes the fundamental role of the law in integration. Critical race theorists emphasize racism as a fundamental in crafting in the law and how the law is interpreted. Delgado and Steffancic (2001) define the critical race movement as:

a collection of activists and scholars interested in the relationship among race, racism, and power. The movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up, but places them in a broader perspective that includes economics, history, context, group-and self-interest, and even feelings and the unconscious...Today, many in the field of

education consider themselves critical race theorists who use CRT's ideas to understand issues of school discipline and hierarchy, tracking, controversies over curriculum and history, and IQ and achievement testing. (p.3)

The authors stress the importance of recognizing the role of power in establishing educational institutions. Born out of critical legal studies, critical race theory seeks to examine, in part, the role of race in American discrimination and as such, in the law. As Gloria Ladson-Billings (2006) writes,

it is difficult to 'get past race' when it remains constitutive of what it means to be an American. Thus, CRT is becoming a mature and vibrant epistemological stance that scholars through the world can employ to understand persistent inequity, injustice, and oppression (xii).

Critical race theory can be used to understand both social and schooling inequities. Ladson-Billings & Tate (2006) propose three propositions from critical race theory to evaluate race as a critical factor in equity and argue that class-based or gender-based explanations are incomplete when considering inequity:

1. Race continues to be a significant factor in determining inequity in the U.S.
 2. U.S. Society is based on property rights.
 3. The intersection of race and property creates an analytic tool through which we can understand social (and, consequently, school) inequity.
- (p.12)

For many, *Brown* paved the way for the multicultural education movement (Gay, 2004). As Chapman (2008) explains,

As people of color demanded that the promise of *Brown*, equal and equity education for all citizens, be fulfilled, the multicultural education movement gained momentum and became intrinsically linked with the promotion of issues of access and equity in educational reform (Chapman, 2008, 44).

However, several critical race theorists point out that the original goals of the *Brown* decision have yet to be realized. First and foremost, many cite the institutionalization of racism in schools, the resegregation of the public schools, and experiences of minority students to illustrate how the goals of *Brown* have failed to come to fruition. CRT argues institutional racism is furthered by the current state of the law. Saddler (2005) argues that racism in schools is “institutionalized, systematic, and cumulative” (p.53).

Literature in education supports several important reasons underlining discrimination both empirically and theoretically. As discussed, current literature links integration with higher student achievement for minority students. The theory-based literature reflects underlining themes of social justice, combating institutionalized racism, and a need for realizing democratic ideals all as strong reasons to pursue desegregation in the nation’s public schools. Important to note is while multicultural theory is an important part of why my research is relevant to the field of education, and thus, important to briefly review here, it is not the focus of my research nor central to my specific research questions in law and constitutional interpretation.

III. Literature Evaluating Desegregation Legislation and Policy

Legislative and political contexts within which Supreme Court decisions are issued play an important part in evaluating the decisions themselves, especially in the highly-charged area of school desegregation. Current literature acknowledges the pivotal role *Brown* played in American history as well as within education. The literature also emphasizes that the Supreme Court alone is not the only driving force in school desegregation. The other

branches of government are charged with enforcement and legislation. As Epperson (2008) writes,

...the Executive branch has become a dominant force in shaping civil rights policy in education over the last four decades. This presidential power has grown in direct proportion to federal legislation granting the Executive Branch a more prominent role in the development of civil rights policy. President Johnson became known as one of the strongest civil rights advocates to ever serve in the White House (p.4)

President Johnson oversaw education reform as part of his 'Great Society' agenda. Legislation such as the Elementary and Secondary Education Act (ESEA) of 1965 grew out of a push for equal educational opportunity (Vergon, 1990, p.5). The literature in education and law concludes the Civil Rights Act was a turning point for the implementation of *Brown*. In fact, several scholars call the Civil Rights Act the most important tool to help implement the decision. As *Brown* (2005) writes,

Prior to the Act, it was difficult to secure plaintiffs in hundreds of racially segregated school for fear of reprisals by southern communities. To bring a suit against a southern school to desegregate, plaintiffs also needed to employ a local state attorney, which was difficult in most cases. The plaintiffs and the local attorney could suffer a loss of employment and suffer physical harm. The Acts granting the Attorney General the authority to bring suits solved these problems for many school suits in small rural communities." (Brown, 2005, p.182).

Literature in both law and education also acknowledge the short-comings of *Brown* due to lack of an implementation decree from the Court. Further, general themes across the literature acknowledge major turning points in how the Court has ruled on desegregation issues. Importantly, the literature views 1954-through the early 1990s to be a time of Supreme Court support of desegregation (Orfield and Lee, 2001; Caldas and Bankston, 2005). However, the

early 1990s stand in stark contrast to earlier legal leaps in support of desegregation. For example, Orfield and Lee (1996) consider the decisions ‘a triumph for the decades-long powerful, politicized attacks on school desegregation. The new policies reflected the victory of the conservative movement that altered the federal courts and turned the nation from the dream of *Brown* toward accepting a return to segregation.’ (p.1). Caldas & Bankston (2005) also view the early 1990s as a change in the way the Supreme Court ruled on desegregation issues. Lutz (2005) calls this the ‘resegregation’ (see also Orfield and Eaton 1996; Frankenberg, Lee and Orfield, 2003) of American schools and identifies the early 1990s as a shift from integration to gradual, moderate increases in resegregation of schools and an increase in African-American dropout rates for schools outside the South as well as increases in African-American private school enrollment across the country.

Current literature speaks widely on recent policy issues such as market-based reforms and the standards movement. The reauthorization of the ESEA in 1994 as the Improving America’s Schools Act, or IASA, drove the standards movement ahead by requiring all states to adopt a system of standards and accountability to measure achievement in order to qualify for federal funding (Ibid.). The Civil Rights Project argues that the goal of integrated schools is actually harmed by the standards movement:

The effects of segregated education cannot be cured by merely enacting strong demands for achievement gains and changing nothing else in schools that are usually unequal in every major dimension relating to student achievement, including the quality of teachers, curriculum offered, and the level of competition (peer group). In fact, enforcing rigid standards without equalizing opportunity can exacerbate the inequalities by stigmatizing minority schools as failures, narrowing their curriculum to endless testing drills, and leading strong, experienced teachers to transfer to less pressured situations. The massive publicity given to test scores may also help destabilize residentially integrated communities, as realtors use test scores to steer White buyers to outlying White communities. Thus, the ironic

impact of ignoring the inequality of segregated schools in the name of standards is to worsen them (Frankenburg & Orfield, 2005, p.6).

In 2001, the ESEA was reissued again as the No Child Left Behind Act. Some argue that the Act, although it imposed demanding goals for equalizing achievement among all students, actually hurt minority schools and teachers because of the sanctions imposed on lower-achieving, often minority schools (Sunderman, Kim & Orfield, 2005). Orfield, writing the introduction to the 2005 book, writes of his view on NCLB:

I believe that the first phase of implementation of NCLB shows very limited capacity at the federal level to understand either the reality of schools or the basic traditions of federal-state and professional relationships in educational policy. Though the reforms are enormously demanding for state and local educators and the many provisions of the law seem contradictory and infeasible to many educators, we find that the states are making a serious effort to comply. Unfortunately the federal role has not been either constructive or adaptive—it has been rigid and often hectoring toward state and local officials raising serious issues.

Market-based reforms are a relatively new area of education reform and current research is mixed on conclusions as to their success. Orfield (2004) argues the market-based approach NCLB takes to education reform has been ineffective. Market-based education reforms are founded in the idea that schools have been overrun by bureaucracy and inefficiency and that bringing competitive market principles to schools will force schools to become more effective (Orfield, 2004, p.7). Mickelson, Bottia, & Southworth (2008) characterize market-based reforms as applying competition, choice, deregulation, accountability, and individual pursuit of rational self-interest (p.3). Mickelson, Bottia, & Southworth (2008) consider theoretical outcomes of the market-based approach:

Various choice options, along with efforts to privatize educational services and school management, reflect ideologies that seek to diminish the role of the state in

public and private domains, to reassess the distinctions between private and public realms, and to advance market forces in the provision of essential social services including education. In theory, school choice will empower parents to match the needs of their students with an array of educational options, thereby maximizing the quality of their child's education. Deregulation and competition will foster innovation and reform among choice and non-choice schools, and market forces ultimately will eliminate school that do not provide the high quality education that parents demand. (p.3)

The authors (2008) found that school- choice programs often result in student enrollment in schools which are more segregated than other schools in their local communities. Reasons for this include findings that many choice programs cater to selective populations such as gifted or special-needs students, informal and formal selection of students by the schools themselves, and a lack of choice options in metropolitan communities (Mickelson, Bottia, & Southworth, 2008).

Two NCLB market-based provisions are first, the classification of schools as 'in need of improvement', thus giving students an option to transfer out of schools, and with them taking the per pupil funds each school receives for every student and second, provisions that mandate parents should be given school budget money to purchase supplemental services for their children (Orfield, 2004). The assumptions of these two policies was that loss of funding resulting from transfers and money to parents would spur schools to operate more effectively and successfully. Sunderman and Kim (2004) found that these market-based reforms were first, used only by a small number of families and second, that the options did not provide beneficial transfer options because transfer schools were often weaker than the original school (Sunderman & Kim, 2005). The study (2005) also points out that there existed no true accountability requirements for the market-based reforms.

McEwan (2002) evaluates current voucher programs, another market-based reform implemented since the 1990s. McEwan (2002) defines the voucher program as "government-

funded tuition coupons, redeemable by parents at the public or private school of their choice” (p.102). There is no single voucher program as programs differ by state and district. The Supreme Court, in 2002, held school voucher programs constitutional (*Zelman v. Simmons-Harris*, 536 U.S. 639 [2002]). Again, the idea here is market-based, based on the assumption that schools will improve through implementation of a competitive system for funding. Some believe implementing market-based reforms do present a win-win situation for schools. McEwan (2002) asks the question: what happens to students left behind in under-performing, low-funded schools? Similarly, Levin and Belfield (2003) point out that ‘few markets are perfectly competitive’ (p. 192). When presented with market-based choice policies, parents’ choice will be the determining factor in school enrollment. Levin and Belfield (2003) warn that educational outcomes of this will likely hurt the primary goal of education. Schools will be forced to cater to specific desires of parents for their children’s schooling:

That is, they [schools] will compete by matching their appeal to particular educational preferences of parents rather than trying to produce a standardized educational product. The problem is that serving well a wide variety of different values and preferences is likely to undermine the social goal of providing a unifying educational influence around societal institutions and values.

Levin and Belfield (2003) found that while competition does have a positive effect on test scores, the effects are modest, with about three fifths of the programs studied finding no correlation between competition and test scores. Those that do show a correlation show only a modest positive relationship: the effect of competition is about 10 points on the verbal section of the SAT exam (p. 202). As Levin and Belfield (2003) discuss, true indications of the impact voucher systems will have on achievement have yet to be researched because there is a lack of market experience given these programs are relatively new and the limited number of policies in place. Second, the authors (2003) identify a type of ‘chicken and egg’ problem wherein more research

is needed before more policies are implemented but policies will not be implemented until more research shows voucher program success (p.212).

In a 2008 study, Bifulco, Ladd, & Ross studied how public school choice affects integration. The study analyzed schools in the Durham, North Carolina school district where about 40 percent of students have opted out of schools in their attendance zones to enroll in other area schools. The researchers (2008) compared racial composition resulting from choice with the racial composition that would have resulted if students attended their neighborhood schools. Both racial and class segregation was higher with implementation of the choice plan (Ibid). Further research on choice includes a study by Cobb and Glass (2003). Cobb and Glass (2003) found that charter schools in Phoenix, Arizona enrolled more white students than did the nearby traditional public schools. Cobb and Glass (2003) argue that this is likely due to de facto segregation, self-selected segregation on the part of parents and students, and that selective admissions policies or targeting of a specific population by the charter schools should be reevaluated. One possible solution offered is to require charter school admissions to mirror the demographics of the communities from which students are drawn (Cobb & Glass, 2003).

Magnet schools provide another form of school choice. Magnet schools emerged in the 1970s as a way to combat school segregation. These schools are specialty schools that offer unique programs for students. Enrollment in these schools is voluntary rather than through a traditional neighborhood attendance zone. Magnet schools were formed in an attempt to compact desegregation and were explicitly established under this goal. These desegregation efforts are voluntary because student enrollment is based on parental choice and not mandatory assignment. Theoretically, students will be drawn outside of their normal attendance zones because of what the special programs have to offer thus increasing diversity.

Magnet schools began through legislative act in 1972 when President Nixon sponsored, and Congress passed, the Emergency School Aid Act. Following the *Brown* decision many white parents resisted desegregation efforts. The resistance increased when the Court outlawed freedom of choice plans (*Green*, 1968) and endorsed busing (*Swann*, 1971). Schools were in desperate need of funds to cope with the new desegregation mandates. The Emergency School Aid Act provided federal aid to assist schools districts conform to court-ordered desegregation.

Initially magnet schools were successful and many districts viewed magnet schools as a more viable alternative to busing plans. The Supreme Court implicitly approved the implementation of magnet schools by refusing to hear cases on the issue. (Frankenberg and Le, 2008, p. 1048). Magnet schools were a political compromise between those who were opposed to forced busing and those who saw magnets as a way to achieve integration and promote school choice.

However, although magnet schools gained popularity in the early 1970s, the costs associated with opening such schools became a burden on school districts. In 1976 Congress amended the Emergency School Aid Act to provide specific aid for magnet school planning and operation. The Act also continued to provide grants to schools to help with compliance with desegregation mandates and voluntary integration plans. Through the 1970s into the early 1980s Emergency School Aid Act grants were the primary source for school districts opening magnet schools. In 1976 fourteen schools applied for magnet school grants through the Emergency School Aid Act. By 1980 over one hundred schools had applied (Frankenberg & Le, 2008). However, in 1981 President Reagan drastically cut Emergency School Aid Act funding. Reagan, a proponent of school choice, reinstated funding for magnet schools in 1984 through the Magnet

Schools Assistance Program. The program funded the founding of magnet schools to promote voluntary integration.

Between 1976 and 1982 an average of 275 of the largest urban school districts had implemented 138 magnet schools. Less than half of the magnet schools were federally funded. As Frankenberg & Le (2008) report,

Between 1982 and 1992, the number of magnet schools more than doubled to 2,433, and the number of students they served in magnet programs more than tripled, to 1.2 million. By the turn of the century, there were more than three thousand magnet schools with explicit desegregation standards educating about 2.5 million students (p. 1051).

Despite the large increase in the number of magnet schools, the success of magnet schools is mediocre at best. In 1996, the U.S. Department of Education issued a report examining their success. The report found only 396 of 1068 schools in the 119 districts receiving grants for magnet school funding had explicit desegregation objectives. Overall, only 58% of federally funded magnet schools identified desegregation as part of its purpose in their mission statements.

In 2003 a subsequent Department of Education report concluded schools in receipt of federal funds for magnet schools made only modest progress in reducing minority group racial isolation. Just one out of six schools had a decrease in minority student isolation of more than 5%, and a mere one in twenty successfully prevented or eliminated minority group isolation.

Frankenberg & Le (2008) argue there are several reasons magnet schools have failed to achieve their original goals of promoting desegregation and avoiding racial isolation. First, over the evolution of forms of federal aid and federal standards for magnet schools, schools were required to conform to other education objectives. At the passage of the Emergency School Aid

Act the objectives as set forth by the federal government for magnet schools were clear. Magnet schools were to reduce, eliminate, or prevent racial isolation, and promote equity (Frankenberg & Le, 2008, p. 1056). With each change to the federal magnet school program, new objectives were added to the original goals to include goals relating to knowledge of academic subjects and the strengthening of vocational skills. The insertion of these goals came, for example, immediately after the Nation at Risk report publicized the stark state of American schools. Further, reauthorization of the Magnet School Assistance Program in 1994 as the Improving America's School Act articulated further objectives for magnet schools including ones relating to magnet school roles in promoting district reform and developing new educational methods and practices. With a growing number of objections, magnet schools grew further away from the original goals of promoting voluntary desegregation efforts. Most recently, No Child Left Behind included objectives for magnet school to expand the capacity of school districts so that the schools would be able to continue to operate after federal funding ends and to make sure magnet school students were ready for college or productive employment. While all these added objectives over the years are undoubtedly all worthy and important goals, with the increasing burden of meeting new goals, it is possible the original goals of magnet schools were lost as federal objectives changed. Additionally, magnet schools are the flagship of the nation's school choice options, a movement that has grown with the increasing number of charter schools, voucher programs, and other market-based school choice programs. Frankenberg & Le (2008) argue there is now no discernible distinction between magnet schools and other special school choice programs and schools (p. 1063).

Second, with the changing landscape of desegregation and student enrollment, magnet schools, simply because of the way they are formed, cannot keep up with the changing issues

within the school segregation as a whole. Frankenberg & Le (2008) argue dynamics of school segregation have changed in conjunction with an evolution in the barriers to integration (p. 1059). The significance of attendance zones and shifting district demographics has contributed to a shift from segregation within each school district to segregation between school districts. Intra-district (within school district) magnet schools are ill-equipped to address segregation that exists between school districts on a whole because there is little federal incentive for school districts to pursue inter-district (between district) magnet school implementation. With regard to issues outside of integration such as student achievement, magnet schools have been found to increase achievement. Studies confirm average test scores of students in magnet schools are higher than scores for students attending non-magnets (Guerrero & Gretchen, 1999).

The fate of magnet schools post-*Parents* is another important consideration given the fundamental relationship between the original purpose of magnet schools and desegregation. Frankenberg & Le (2008) offer six ways in which magnet schools can pursue their original goal with the support of the federal government and local school districts post-*Parents* in legally permissible ways. First, the authors suggest that because a majority of Justices in *Parents* recognized diversity at the K-12 level to be a compelling interest, Congress should restore and reaffirm the original mission of charter schools by reenacting the Magnet School Assistance Program. The Program should articulate the specific goal of desegregation as the Program's highest objective (p. 1064). The other goals that have been added to the original goals should be kept in order to attract students to magnet schools, and schools should develop new programs to distinguish magnets from traditional public schools within the district. Second, magnet schools should expand their boundaries to include students from surrounding districts. Federal programs should provide funding for intra-district cooperation. Along these same lines Congress should

integrate magnet programs with programs promoting housing integration (p. 1066) to further address the link between school and residential segregation. Lastly, because funding for magnet schools has remained constant and not adjusted for inflation or rising costs associated with beginning new schools, Congress should increase funding for magnet school programs specifically as entities separate from school choice programs. Magnet schools should be distinguished from other school choice programs to keep focus squarely on their desegregation goals. As Frankenberg and Le (2008) argue, this distinction would

have the effect of reintroducing parental choice not as an end in and of itself but as a means to an end: to achieve integration and reduce racial isolation. Indeed, Congress could go further to influence school authorities by withholding or simply eliminating funding for those grantees who operate choice plans at the cost of further racial and economic stratification, not just among MSAP funding recipients but for grantees of any of the DOE's other relevant programs. The DOE, too, can play a role in this redefinition: rather than putting magnet schools under the umbrella of school choice, the DOE should turn the relationship on its head, placing school choice, in the form of magnet schools, under the umbrella of integration and equity (p. 1069).

These methods are ways magnet schools can progress towards their original goal post-*Parents* given their potential to improve racial integration in the nation's public schools.

Finally, the literature highlights the current intersection of desegregation, demography, and achievement. Important to note, again, is that there has occurred a demographic shift in the United States in recent years wherein the West has become the country's first area experiencing predominantly minority public school enrollment. Orfield and Lee (2004) argue further that,

most recent initiatives in assessment, accountability, and choice purport to solve the problems of minority children while ignoring or even intensifying segregation. Achievement gaps have grown. (Orfield and Lee, 2004, pp.4-5).

Student achievement has been influenced by both the resegregation of schools and the standards-based and market-based reforms of recent years as well the evolution of magnet schools since their inception in the 1970s.

IV. Literature on Shifts in Judicial Interpretation of the 14th amendment

The main focus of this research study is tracing the ways in which the Supreme Court has interpreted the 14th amendment with regard to the desegregation cases. However, while current literature does address the overall issues surrounding Court interpretation of the 14th amendment (Chemerinsky, 1991; Berger, 1977), there remains an area ripe for inquiry specifically in the area of judicial interpretation and desegregation Supreme Court cases post-*Brown* to 2007.

The Supreme Court is the supreme and most powerful interpreter of the Constitution. In fact, as Chief Justice Marshall declared in *Marbury v. Madison*, “It is emphatically the province and duty of the judicial department to say what the law is” 5 U.S. 137 (1803). As Wolcher (2005) observes,

Supreme Court interpretations of the United States Constitution have enjoyed a very high level of immunity from revision by legislation and executive action...it is widely accepted as a matter of custom and legal culture that only the cumbersome and lengthy amendment processes specified in Article IV of the Constitution can overturn a Supreme Court decision that renders a specific and unqualified Constitutional interpretation” (p. 244).

Specific methods of Constitutional interpretation are clearly defined and accepted in both law and education literature. As such, ways in which the Court has interpreted the 14th amendment can be characterized by method of interpretation. Often, members of the Court are defined by the ways in which he or she is known to interpret the Constitution in order to reach a conclusion on issues before the Court.

The Fourteenth Amendment was proposed on June 13, 1866 and ratified by the states on July 9, 1868. *Plessy v. Ferguson*, heard in 1899, held constitutional the separate but equal doctrine that would remain in place and be applied to public schools for more than half a century. The Supreme Court did not enforce equal protection violations until *Brown*. As a result, the Court began to hear more cases in which alleged violations of the equal protection clause had taken place.

Specific methods of interpretation have been thoroughly addressed and defined by literature in the field of law and will be further discussed in regard to methodology in Chapter 3. In addition to examining the affect of specific methods of interpretation I also examine the case law to determine if shifts in interpretation existed. There are three main recognized methods of judicial decision-making: textual, originalism, and non-originalism/constructivist. (Wolcher, 2005). While there is some overlap between the methods of interpretation, each is distinguishable (see chapter 3). Further, in addition to considering shifts as framed by specific methods of interpretation, I also consider how general interpretation methods of the equal protection clause have evolved over time. That is, I move beyond considerations of specific modes such as constructivist or originalist to consider general phases of interpretation as defined by the Court's attitude towards equal protection as evidenced through Court majority opinions.

The ways in which the Supreme Court has historically interpreted the 14th amendment and specifically the equal interpretation clause has been studied in legal literature but more so in a broad sense, not specifically in regard to desegregation case law. Chemerinsky (1991) recognizes the 14th amendment as one of the most important changes to the Constitution. However, he argues, the Supreme Court has made mistakes in interpreting the amendment and

specifically the equal protection clause to the extent that the original promise of the amendment has not been realized. Chemerinsky (1991) points to what he calls missteps in Supreme Court interpretation of the 14th amendment. While he does recognize great victories such as *Brown*, he believes the outcome of cases is a direct result of “who is on the Court, what they believe, and how they are influenced by current events” (p. 1155).

Shaman (2000) considers the 14th amendment with regard to education cases but does not focus on desegregation cases. Shaman (2000) defines the primary focus of the equal protection clause as the classification of individuals and unjust discrimination (p.237). He argues the framers of the Constitution envisioned the central purpose of the Clause was to eliminate racial discrimination against newly freed slaves. In 1944 the Court declared racial classifications are suspect and subject to the highest level of scrutiny (see Chapter 3). The equal protection clause has been the main way to challenge desegregation cases. However, the clause has also been applied to education cases challenging inequitable funding in public schools as well. Shaman (2000) considers the important role of the equal protection clause in school funding cases. In *Rodriguez*, the plaintiffs brought suit against a Texas school district arguing the school funding system based on local property taxes violated the 14th amendment’s equal protection clause because there was great disparity in funding between poor and wealthier school districts. The Court ruled the plaintiffs were not a suspect class because the tax system was not a race-based or other suspect classification and therefore the tax system called for only minimal constitutional scrutiny. Shaman (2009) comments,

By ruling that even gross disparities in school funding do not violate the Constitution, the Court allowed the continuation of public school systems that are riddled with inequality. On the poor side of those systems, untold numbers of students throughout the nation are denied an education that by any genuine

standard could be called adequate. As far as the Court was concerned, if it was not in the Constitution, it is not fundamental. The Court simply became unwilling to further expand the concept of fundamental rights. Those fundamental rights already recognized under the equal protection clause would retain their Constitutional protection, but no longer would they be extended beyond their own reach; new fundamental rights certainly would not be ordained by the Supreme Court (p. 247).

While the field of education has not focused on the issues of judicial interpretation and its affects on education to the extent necessary to address fully the research questions in this study, the literature in education does provide a solid foundation regarding factors the Court has historically considered when interpreting the 14th amendment in the series of desegregation cases. The literature points to the Court's consideration of scientific evidence on desegregation issues beginning in the *Brown* decision (Russo, Harris & Rosetta, 1994). It was this evidence that led the Court to overturn the separate but equal doctrine from *Plessy* and consider that segregation in schools did violate the 14th amendment's equal protection clause.

While clear phases of interpretation are not widely accepted in law literature (this is part of what makes my research important and necessary) law scholars do consider civil rights and constitutional interpretation as implemented by the Court. Shaw (2001) argues the beginning of the Court's separate but equal rule in *Plessy* is 'promotion' of racial segregation and mark's the Court's endorsement of unequal treatment even when measured against the words of the equal protection clause. Similarly, Shaw (2001) argues a shift occurred in the Court's interpretation of equal protection when it decided the pre-*Brown* higher education cases because the Court began to move away from 'separate but equal' to a focus on protecting individual rights. Shaw (2001) calls the 'modern Civil Rights Era' as beginning with the *Brown* case and broadened the applicability of the equal protection clause to include public K-12 education. Shaw (2001) points

out an important point: the equal protection clause does not require all people must be treated equally at all times. For example, constitutional discrimination occurs when people under the age of 18 are prohibited from voting. The key question for the Court, then, is when discrimination violates the equal protection clause.

Similarly, Nelson (1993) argues *Brown* marked a time of progress but the Court has shown a shift in recent years towards what he calls the concept of ‘decontextualization’ (p.682). This Court, Nelson (1993) argues the Court, whereas it had been considering the realities of American life, has now moved towards ignoring facts of American life such as gross disparities in educational opportunity for minority students. He argues the Court has created an ‘independent jurisprudential reality’ (p.683) by taking the reality of race relations out of current and historical settings. This phase, he believes, began in the early 1990s with *Dowell* wherein the Court ruled unitary status can be granted even if the result is resegregation. Others agree the Court has failed to consider the current realities of racism in their current methods of interpretation (Lively, 1992). Although he argues *Brown* ‘rechartered’ (p.650) and redefined use of the equal protection clause because of the deep racial discrimination of the time, he recognizes a shift in interpretation not even two decades later in the *Milliken* case (desegregation across district lines was unconstitutional). This case ushered in a new phase of ‘restrictive’ (p.660) interpretation. Lively (1992) points out, however, the decisions and subsequent cases wherein the Court implemented a more restrictive use of the equal protection clause, did not vacate the desegregation principle. The cases did mark a new phase of interpretation, however, where the Court began to restrict support of specific segregation remedies.

Foate (2007) argues the recent Court opinion in 2007 suggests a new shift in interpretation of the Constitution with regard to the definition of ‘compelling interest’ under the 14th amendment. If racial balancing is not seen as constitutionally permissible, then the Court must recognize another compelling interest regarding race in schools. With the current make-up of the Court, Foate (2007) speculates this type of judicial interpretation of the 14th amendment is unlikely. Thro and Russ (2009) also conclude that this kind of judicial constitutional interpretation limits the pursuit of diversity. The authors write,

In refusing to allow racial preferences in order to achieve racial balances, the Court rejected racial balancing in K-12 education as a compelling interest, limited the pursuit of diversity in higher education, demanded that racial classifications actually work, and directed educational officials to consider nonracial alternatives in student assignment. In this way, the Court made it more difficult for governmental agencies to pursue racial balancing” (p.536).

Literature in law outlines changes and trends in judicial interpretation while literature in education explores the pivotal role has played in school desegregation, but neither addresses how shifts in interpretation of the equal protection clause specifically correlate with broader changes in school enrollment. This study will address this gap and broaden understanding of these issues.

V. The Color-Blind Constitution

Important to note are the ways judicial interpretation is considered with respect to the ‘color-blind’ notion of the Constitution as it was this interpretation that the majority relied on in the *Parents* opinion. The color-blind view of the Constitution was first articulated by Justice Harlan in the dissenting opinion in *Plessy*. He stated, “Our Constitution is color-blind and neither knows nor tolerates classes among citizens” (*Plessy v. Ferguson*, 163 U.S., 537, 1896, p. 559).

Wells and Frankenberg (2007) argue the color-blind interpretation of the Constitution has recently become a method by which to justify the opinion put forth by the majority in *Parents*: a color-blind Constitution means race cannot be used in student assignment policies. To do so would be to interpret the Constitution in a way that recognizes the race of a student. The authors (2007) argue that

The color-blind ideology has been a work in progress by conservative judges since the 1970s, when the courts became less willing to consider the broader effects of historical and societal discrimination on students of color who were applying to universities or trying to gain access to more integrated public schools. (p.184).

Similarly, Keith Sealing (1998) advocates that courts should not read the Constitution as color-blind. He argues the framers never intended for the use of color-blind readings of the Constitution because constitutional interpretation cannot take place outside the context of society. Sealing (1998) believes Courts “should not use the myth of a color-blind Constitution to perpetuate the racial problems of a society that itself has failed to reach color blind status” (p.159). Further, he argues that trying to fight a color-conscious society with a color-blind interpretation of the Constitution is a misaligned solution to problems of racism (p. 198). Sealing (1998) parallels the sentiment Anderson (2007) discussing the term ‘color-blind’ in Constitutional interpretation. Anderson (2007) argues against a color-blind interpretation given the historical context of the fourteenth amendment. Anderson consults the historical context in which the fourteenth amendment was negotiated in Congress before it was ultimately

immortalized in the Constitution. He concludes the writers purposely left out direct reference to race but never intended to imply decisions of government should be irrespective of race.

Anderson (2007) argues the Congressmen involved in the drafting purposely omitted reference to race in an act of political strategy. Reconstruction was a time when federalism was a constant political issue: states' rights and state politics were a constant consideration. Consequently, cognizant of the fact that many states would bar ratification of the Amendment if not given the freedom to consider race in individual state affairs, the writers intentionally excluded race. However, as Anderson argues, the framers of the fourteenth amendment intentionally used race-neutral language to achieve a specific purpose. The purpose was to leave a legacy of neutrality for the future and a door open to governmental interpretation of the language. Concluding the writers of the Amendment intended it to be 'color-blind' is incorrect. Indeed, interpretation is essential to the Amendment's application in the current day. Therefore, Anderson warns against present-day interpretation of the Fourteenth Amendment ignoring historical context. He writes,

[w]e may argue for or against the use of racial classifications to pursue issues of school desegregation and affirmative action, but we should not pretend that we are constrained by a color-blind Constitution created by the Reconstruction Congress (Anderson, 2007, p. 248).

Further, the notion of a 'color-blind' constitution is often viewed as being prohibitive to achieving true equality. Scutari (2009) argues the changing ways in which the Court has interpreted the equal protection clause pivot on a changing definition of 'equality'. Indeed, the Court in *Parents* clearly states that the Court in *Brown* would support the 2007 decision citing

the phrase, “the fourteenth amendment prevents states from according differential treatment to American children on the basis of their color or race” (*Parents*, 2767). Scutari (2009) argues the way the Court in *Parents* interpreted the fourteenth amendment to be ‘color-blind’ makes it impossible to apply the notion of equality as a judicial principle. Further, he argues the ‘color-blind’ interpretation may actually perpetuate inequality because a true idea of equality cannot function without consideration of current social context. Literature in both law and education provide insight as to what the words ‘color-blind’ actually mean within the context of Supreme Court decisions and how the meaning has changed over time.

VI. Literature Post-*Parents*

After the 2007 Supreme Court decision striking down student assignment plans in Kentucky and Washington, many scholars reacted to the decision by evaluating where integration efforts would go given the Court’s ruling that a student’s race cannot be used as the deciding factor in student assignment policies nation-wide. I offer here a brief introduction to the issue with which I will deal with more deeply in Chapter IV in response to my third research question.

Broadly speaking, however, the central literature in the education and law literature post-*Parents* is clear: many scholars consider the decision a set back in the road to true integration. Brown (2009) considers the 2007 Court decision and believes it will prompt a move back to neighborhood schools as schools begin to eliminate their student assignment plans. He argues that this will mean more single-raced schools and neighborhoods (p.526). Thro & Russo (2009)

note that discussion of educational opportunity and access to it was absent from the opinion in *Parents*. In fact, the Court, as the authors point out, explicitly states that the end goal of integration has never been the priority of the Court. Rather, the Court's goal is to prohibit segregation and as Justice Thomas in his concurring opinion writes, mere racial imbalance is not segregation (p. 54). The authors (2009) speculate that when the problem of education inequality is solved, it will be solved without using race as a factor by which to address problems given the decision in *Parents*. First, an increased consideration of school finance issues and how districts raise revenue will result. Second, schools will focus more on student socioeconomic status. The authors point out that assignment plans based on socio-economic status do not result in constitutionality problems as plans based on race will face. Similarly, McNeal (2009) concludes that integration will be slow because of the limits placed on assignment plans.

The confusing nature of the opinion in *Parents* is widely recognized and speculated upon in law and education literature. Wells and Frankenberg (2007), writing just months after the decision state,

The irony and thus confusing reality for school districts after the *Parents decision* is that although five justices agreed that there is a compelling interest in having racially integrated schools, a different set of five justices declared unconstitutional the means that Seattle and Louisville used to accomplish that goal, which included the racial classification of students and guidelines for racially balancing each school. (p. 185).

Literature in education concludes the implications of the decision will be expansive, reaching beyond K-12 education. Orfield and Lee (2007) also acknowledge the potential confusion created by a decision wherein "a majority of a divided Court told the nation both that the goal of integrated schools remained of compelling importance but that most of the means now used voluntarily by school districts are unconstitutional" (p. 3). Much of the literature

focusing on the *Parents* case argues the Supreme Court has opened the door to resegregation in the nation's schools (Orfield & Lee, 2007). Many believe the barriers to integration have been strengthened given the new restrictions on the use of race in assignment policies.

However, a prevalent theme in the literature post-*Parents* urges schools to continue to seek diversity, pointing out the Supreme Court has not completely barred such goals (Pitre, 2009). Pitre (2009) also points out the Supreme Court was clear in its assertion that integration is indeed important, but also that integration must be achieved through means that they believe are Constitutionally permissible. Major themes in the literature focus on integration plans through socioeconomic-based assignment plans such as those in Wisconsin and North Carolina (McLean, 2009; Goodwin, Leland, Baxter, & Southworth, 2006; Mickelson & Southworth, 2005). Increasing focus on magnet schools is also projected (McLean, 2009).

Similarly, Wells and Frankenberg (2007) urge educators, policy makers, lawyers, and research to work together to help achieve integration within the bounds of the law now carved by the Court. They acknowledge there is not 'one path' (p. 185) through which integration can be achieved. One approach is using what they define as 'multiple characteristics that coincide with race' (p. 185) such as the neighborhood in which a student lives, native language, or parental education level to structure student assignment plans. Another path is identified as school choice options as is targeted recruitment for diversity

It is important to note that *Brown* and *Parents* were decided in two very different historical and social contexts. As Brown and Hunter (2009) acknowledge,

Brown came about in the 1950s in a much different environment; America was less diverse racially and ethnically, and economic competition on a global scale

was less than in today's economy. Today, America's future is closely tied to the large pool of minority children enrolled in its public schools. (Brown and Hunter, 2009, p.560)

Further, Wells and Frankenberg (2007) point out that now over 40% of school-aged students are minority children while Orfield and Lee (2007) cite a major decline in the number of white students over the last decade. Regardless of historical context within which the decision was made, many believe *Parents* has begun a time of resegregation in the nation's schools. Because school integration issues so closely mirror race issues in society, many view the *Parents* decision as a sign of a regression in the struggle for equal civil rights. As Dorsey (2008) writes,

It is not surprising that the Supreme Court decided that the school districts' race-conscious policies to encourage racial integration and to prevent school resegregation were determined to be unconstitutional in *Parents*. Thus, legalized school segregation will likely re-appear on all education levels, kindergarten to 12th grade and higher education. Unfortunately, the struggle for equity and equal opportunities for Black people and other racial minorities is coming full circle. (Dorsey, 2008, p.17).

Others consider the large legal implication of the decision given the continued inequities in education. The Civil Rights Project (2008) calls the decision in *Parents* a 'threat to equitable educational opportunity' because the Court outlawed the use of race as a deciding factor in student assignment policies.

Chapter III: Research Methods

I. Overview

In this study, I implement a qualitative analysis asking the question of how the U.S. Supreme Court's interpretation of the 14th amendment changed over the last 60 years in cases affecting school desegregation in the K-12 educational system. I include court cases addressing

racial segregation in institutions of higher education when the case affects issues within K-12 education. In conjunction with this first research question, I also analyze the associated general racial make-up of student enrollment in the public educational system during the period 1954-2007. Third, I establish guidance for public school leaders about how to integrate schools in light of the *Parents* decision in 2007 which disallowed the use of race as a primary motivation for desegregation. I also examine the widespread effects of the *Parents* decision on institutions outside K-12 education such as higher education.

Research methodology used to conduct this study is centered on legal analysis of Supreme Court opinions but draws on relevant social science and policy literature to make an argument for how they are intertwined intellectually and practically. This study is an exercise in Constitutional Law, an analysis of judicial shifts, and examination of what was occurring on the ground in schools due to these judicial shifts during the time period 1954-2007.

II. Legal Analysis

Legal analysis for this study is guided by the work of Wren & Wren (1986). The purpose of legal research “is to ascertain the legal consequences of a specific set of actual or potential facts. It is always the facts of any given situation that suggest, indeed, dictate the issues of law that need to be researched” (Wren & Wren, 1986, p.29). Analysis of Supreme Court desegregation case law occurs through five steps: (1) gather of facts, (2) analyze the facts, (3) identify the legal issues raised by the facts, (4) arrange the legal issues in a logical order for research (Wren & Wren, 1986).

Beyond the ways in which the Court has applied the 14th amendment rest the legal meaning and significance of the decisions. By analyzing the case law as a whole, this study will

develop a picture of the evolution of interpretation since 1954. To identify and organize the legal meaning of the decisions, I use Wolcher's framework (2005). The formula, according to Wolcher (2005, p. 246), for devising meaning from court decisions is:



Wolcher (2005) explains that

In the United States, primarily because of the general acceptance of judicial supremacy on matters of Constitutional interpretation, the subject of judges' interpretive practices in construing the Constitution looms large both in political discourse and legal theory. (p.246).

Good faith judicial work refers to the outcome based methods Wolcher (2005) argues judges apply to judicial interpretation. This is the consideration of the totality of circumstances. These circumstances, in this case, the state of desegregation in schools, inform decision-making and impose legal meaning to judicial interpretation. After all, each case before the Supreme Court stems from a situation wherein a plaintiff sues a particular defendant on Constitutional grounds, therefore interpretation cannot be viewed in a vacuum but rather, as part of the whole of 'judicial work.'

To each individual case I apply the five steps articulated by Wren and Wren (1986) to understand the specific situation of each piece of case law. In each case analysis I include a background and statement of facts as well as an examination of the ways in which the Court employed the fourteenth amendment and equal protection clause in reaching the holding of the case. Next, I will categorize each case by the method of judicial interpretation specifically with

regard to the Court's interpretation of the 14th amendment (Wolcher, 2005). I conduct this analysis within the context of the whole series of cases so that the legal meaning can be defined and analyzed over time. After these first two steps of examination I align each case or set of cases with its impact on desegregation in schools using secondary sources that chronicle of the path of desegregation in schools during the time period.

To answer my second research question secondary resources are used to determine the current state of law and the impact of *Parents* on both K-12 education and institutions beyond K-12 education such as institutions of higher education and the workplace. Secondary sources will be obtained in both the education and law literature.

III. Categorizing by Constitutional Interpretation

A. Methods of Interpretation

Several well-defined methods of Constitutional interpretation are recognized in academic work. In addition to specific methods I also consider shifts in judicial interpretation. I analyze each case according to a general method of interpretation: originalist, constructivist, or strict textualist. Second, each case will be evaluated as to whether the equal protection clause was directly or indirectly employed as part of the Court's reasoning. Meaning, whether or not the Court discusses the fourteenth amendment directly in its opinion, citing phrases or words, or simply mentions the basic tenants of the amendment as opposed to indirect interpretation. In such cases where the Court does not explicitly cite or discuss the fourteenth amendment I categorize the interpretation as indirect. Strict textualist, originalist, and constructivist are three ways in which I group the cases. In addition to considering specific methods of interpretations I

examine shifts in the ways the Court has interpreted the 14th amendment. Guided by the legal literature I reviewed in Chapter II, I consider each case within the overall set of cases to discover trends or shifts in interpretation.

The way in which the Court interprets the equal protection clause and fourteenth amendment is crucial in understanding the evolution of desegregation litigation and its subsequent impact on racial make-up of student enrollment, and ultimately, the current state of desegregation law as defined by the Court. Wolcher (2005) argues that legislative and executive officials have accepted the Supreme Court's decisions as authoritative, as if they are extensions of the Constitution itself (p. 246). It is clear the way in which the Court interprets the law is essential in understanding its decisions and therefore the impact on society. There exist three main methods of interpretation. Strict textualism is a method of interpretation that posits there should be little interpretation of the words of the Constitution. Judges who adhere to this method of interpretation believe there is no occasion to interpret Constitutional language. As Wolcher (2005) describes,

“the words of the Constitution mean exactly what they ‘tell’ the strict textualist they mean...it follows the explicit words written down by the framers of the Constitution rather than attempting to alter the meaning of those words by an act of interpretation that by definition supplements the language of the Constitution with language written by unelected judges.” (p.248).

Originalism is a combination of two basic criteria for interpretation: the literal text of the Constitution and second, the specific intent of those who drafted and ratified the text.

For the originalist the surest guide to authorial intent is to read the words of the Constitution for the norms that they state or clearly imply and in this respect the most strict originalists are also strict textualists. However, as for those provisions

of the Constitution that are vague or ambiguous, the strict originalist looks solely at the written historical record of the context in which the text in question was proposed and ratified in order to determine what the framers must have had in mind as its specific purpose” (Wolcher, 2006, p.248)

Originalists believe the only way appropriate way to interpret the Constitution is through the process of formal amendment to the document itself.

In direct contrast to textualism and originalism is non-originalism (or constructivism). Non-originalists believe it is impossible to know the intent the framers meant to establish when ratifying the Constitution. Judges who adhere to this method of interpretation search for a fair outcome within the bounds of the law. This interpretation is outcome-based rather than textual based. Lastly, constructivist methods of interpretation posit that the Constitution gains meaning not only from its text but from the current context within which it must be interpreted. Non-originalists (constructivists) believe the Constitution is a living document, capable of changing over time in response to new conditions (Wolcher, 2005). Dworkin (1986) describes the process of constructive interpretation as a recognition of law as a social practice on a general level that should consider precedent and external factors relevant to the relevant legal issues (p.87). Various consideration such as the morals of current society, democratic processes and results that are generally thought to be ‘good’ come into play under a constructivist interpretation. Dworkin (1986) believes interpretation should weigh social factors, not simply the text of the constitution, and that these social factors should be developed into a coherent overall purpose (1973, p.511). Constructivists respond to criticism that that this method leaves too much to judicial discretion by citing the common law method whereby judges must rely on earlier precedent thereby putting constraints on discretion (Dworkin, 1973, p.511). Constructivist interpretation does not equate to

relativism because the purpose or objective of the law is unfaltering and objective (Dworkin, 1973, p.513). Dworkin writes,

The constructive model insists on consistency with conviction as an independent requirement, flowing not from the assumption that these convictions are accurate reports, but from the different assumption that it is unfair for officials to act except on the basis of a general public theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do, and not allow appeals to unique intuitions that might mask prejudice or self-interest in particular cases. The constructive model requires coherence, then, for independent reasons of political morality. (p.513).

As previously discussed, the ways in which the Court interprets the Constitution, specifically its interpretation and application of the 14th amendments' equal protection clause, is important in analyzing the evolution of desegregation case law. Cases will be analyzed further according to levels of, and ways in which Constitutional scrutiny is applied by the Court. In general, the Court has applied strict scrutiny in recent years in order to reach decisions on school desegregation.

B. Strict Scrutiny Test

'Strict scrutiny' is a legal test that may be applied in determining the Constitutionality of a federal law under the equal protection clause of the 14th amendment. A hierarchy of scrutiny tests is applied when determining legality; the strict scrutiny test is the most stringent test to determine Constitutional validity.

The three-tiered hierarchy begins with a rational basis review, the lowest form of judicial scrutiny, and the middle is intermediate scrutiny. In order for a law to pass the rational basis review, the court must determine if the law is rationally related to a reasonable governmental interest. (*McCulloch v. Maryland*, *United States v. Carolene Products Co.*, 304 U.S. 144 [1938]).

The rational basis test, then, is the less strict of the levels of scrutiny used to evaluate the Constitutionality of a federal law. Classifications invoking use of the rational basis test are age, disability, political preference, political affiliation, or sexual orientation.

The intermediate scrutiny test is the next level of scrutiny and requires a law to first, not only be related to a reasonable government interest, but to also further an important government interest. Second, not only does it require a law to be rationally related to this interest, but even further, to be substantially related to the interest. Classifications by gender require use of the intermediate scrutiny test. The test was set forth by the Supreme Court in 1976 in *Craig v. Boren* and applies to laws concerning gender discrimination. (*Craig v. Boren*, 429 U.S. 190 [1976]) The Court reasoned, "classifications" by gender must serve *important* governmental objectives and must *be substantially related* to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190 [1976]) In the case, an Oklahoma statute prohibited the sale of 3.2% beer to males under 21 but did allow for females over the age of just 18 to purchase the beer. The Court ruled that the law did not meet the 'important government' interest standard nor that was the law substantially related to any potential interest.

Lastly, the strict scrutiny test is used when laws relating to 'suspect' classification Constitutional rights are being challenged.

The Supreme Court has identified the right to vote, the right to travel, and the right to privacy as fundamental rights worthy of protection by strict scrutiny. In addition, laws and policies that discriminate on the basis of race are categorized as *suspect classifications* that are presumptively impermissible and subject to strict scrutiny (Valetta, 1998).

Strict scrutiny requires a law to be narrowly tailored to a compelling government interest. The Court applied the strict scrutiny test in *Roe v. Wade* (410 U.S. 113 [1973]), in which it held that

even though the Texas law outlawing abortion involved a legitimate state interest, it was not a compelling one. The Court held that a state may outlaw abortion after the point of viability but that the Texas law prohibiting all abortion was unconstitutional based on its failure to be narrowly tailored to the objective. Method of interpretation coupled with level of scrutiny will provide the broad categories within which I analyze each piece of case law.

IV. Data Collection

The information for this study consists of Supreme Court case law directly affecting K-12 school desegregation in the form of its majority and dissenting opinions. Such cases include decisions on desegregation plans and, where appropriate, case law on affirmative action in higher education. Next, secondary sources are used to consider how the Court's Constitutional interpretation aligns with what is occurring in schools and communities. Secondary sources include current and past scholarship evaluating the evolution of desegregation issues during the specified time period. Sources include appropriate articles in legal treatises, law review articles, and education journals, or books (Wren & Wren, 41). Cohen (1985) identifies secondary sources as a major component of legal research (p.4). Research on how integration programs were implemented, and evaluation of these programs' successes and failures is already established in the field of education. The work of Clotfelter (2004) offers the most comprehensive evaluation of desegregation and student enrollment. I build upon this research by analyzing how integration in schools paralleled judicial interpretation used by the Court in order to evaluate how interpretation correlates with actual student enrollment in schools.

The decisions of the Supreme Court are published in the United State Reports and can be found in most law libraries around the country. The *United States Reports* started in 1790 and is

the official publication of United States Supreme Court decisions (Cohen, 1985, p.13). These reports are published annually and contain all majority, dissenting, and concurring opinions from the Court. This source will be used to obtain the desegregation case law that will be the subject of legal analysis. Occasionally I will refer to the Supreme Court Reporter, Lawyer's Edition as it contains summaries of the arguments of counsel and thus, may offer a better understanding and some level of interpretation of the Court's decision (Cohen, 1985, p.20).

By far the fastest and most commonly used method of case law research is computerized legal research (Wren & Wren, 133). The two leading research services are Lexis and Westlaw. In both services, Supreme Court cases are grouped into 'general federal library.' A library is made up of a related set of authorities. For example, Wren & Wren (1986) describe 'general federal library' as containing sub-libraries of Supreme Court decisions, U.S. Court of Appeals decisions, and U.S. Claims Court decision. Wren & Wren (1986) recognize that computerized searching in both Lexis and Westlaw allows for highly specialized searches that would not be possible without electronic databases. For example, a legal researcher can search only specific dates or all opinions of a particular judge or set of judges. For my research, I use the search term function. This function allows general searches within Supreme Court law containing specific terms. My search terms include: education, desegregation, race, segregation, integration, and bussing. Case selection is guided by those cases widely acknowledged as being among those dealing directly with desegregation issues in K-12 education. These cases are established in law and education literature as it is already a topic of much research. In addition, the digests of the West Publishing group provide the most comprehensive compilation of Supreme Court case law (Cohen, 1985, p.2). I will be using the descriptive word method to identify case law to reaffirm those already identified as influential in desegregation issues. As Cohen writes,

The most efficient procedure for case finding in the digest relies on the use of specific factual catch words derived from an analysis of the problem in question. This approach allows common words rather than more difficult legal concepts to be used as access points. There are six relevant search word topics: parties, places and things, basis of action, defense, and relief sought. With this analysis the researcher can look up the most specific words and phrases in the descriptive word index and thereby locate relevant key numbers and cases covering the problem” (1985, p.76).

To address the second research question, I will consider the current state of federal desegregation law and how schools can structure integration plans within such legal framework. Based on analysis of the case law as a whole I will draw conclusions on what exactly the current legal bounds are as set by the Supreme Court. The body of case law as it has evolved post *Brown* through *Parents* will provide an understanding and examination of what the Court has set as the legal parameters for integration plans and methods.

V. Definitions

Because this study is situated foremost in the field of education, it is important to clarify potentially unfamiliar legal terms used in and relating to this study. Terms used in this study are:

Affirmative action: A set of actions designed to eliminate existing and continuing discrimination, to remedy the lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination. (Black’s Law, 2006)

Case Law: The collection of reported cases that form the body of law within a given jurisdiction. (Black’s Law, 2006)

De Facto Segregation: Segregation by virtue of reality of behavior incorporated into everyday life. Results without purposeful action by government officials. Real or actual segregation which occurs concurrent to social and psychological conditions as they exist. (Barron’s Law, 1996).

De Jure Segregation: Refers to segregation directly intended and sanctioned by law or otherwise issuing for an official racial classification. (Barron's Law Dictionary, 1996)

Executive Order: An order issued by the head of a government, such as the President of the United States or a governor of a state, and which has the force of law. An executive order must find support in the Constitution, either in a clause granting the President specific power, or by delegation of power to the President. (Barron's Law Dictionary, 1996)

Holding: Any ruling or decision of a court.

Judicial Review: A court's power to review the actions of other branches or levels of government. The court's power to invalidate legislative and executive actions as being unconstitutional. (Black's Law Dictionary, 2006)

Opinion: A court's written statement explaining its decisions in a given case. (Black's Law Dictionary, 2006).

Remand: To send back. An appeals court may remand a case to a trial court in order to conduct further proceedings consistent with the appellate court's ruling.

Respondent: A term used instead of defendant of appellee to identify the party who is sued and must respond to the petitioner's complaint.

Chapter IV: Findings

I. Introduction

While a brief overview of the series of cases in school desegregation litigation was provided as an introduction in Chapter I, the findings presented here are the result of detailed textual analysis of the opinions and oral arguments themselves. Given the topic has been the subject of much literature, the important and milestone cases are routinely acknowledged (Clotfelter, 2004). I also use the Court opinions themselves as indicator of which cases, perhaps less well-known, should be included as part of the analysis. Often times the Court will refer to previous cases for precedent or legal reasoning. I found twenty five cases to be relevant to K-12 school segregation issues. These twenty five cases are comprehensive of those cases directly dealing with the issue including several higher education cases that have impacted K-12 school segregation. My comprehensive textual analysis allows for the examination of how the Court interpreted the equal protection clause of the fourteenth amendment over the last 60 years. Each case is divided into the framework provided by Wren & Wren (1986) discussed in Chapter 3. A background and statement of the facts for each case is presented. Following presentation of this data, I offer a comprehensive analysis of judicial interpretation. Further conclusions such as how the interpretation builds on past application of the equal protection clause by the Court are drawn when possible.

The cases are arranged in a logical order for research- chronological order, given the lengthy time span of school segregation litigation cases. Additionally, given the Court is obligated to follow precedent, chronological ordering of the cases is most logical to facilitate a coherent analysis of the issues. The analysis of judicial interpretation for each case is guided by Wolcher (2005) as discussed in Chapter 3. Where appropriate, analysis of method of

interpretation is grouped together by companion cases or series of closely related cases. Textual analysis allowed determination of a method of interpretation decision tree (see Figure 1a). This method of interpretation was classified as either direct or indirect and either constructivist or originalist. From these broader categories further analysis was conducted on the specifics of how the fourteenth amendment was interpreted within these four categories to determine shifts or era of interpretation. Major and pivotal cases were presented in further detail based on their status as being a milestone in the series of cases. Given the amount of research evaluating and discussing the 50th anniversary of the *Brown* decision, monumental cases have been routinely acknowledged in education and law literature (Orfield, 2001; Clotfelter, 2004). Less pivotal or milestone cases are not presented in great detail. Analysis of the legal meaning of the case occurred within the context of overall Court judicial interpretation of the fourteenth amendment based on an overall assessment of how judicial interpretation has evolved (Wolcher, 2005), thus addressing the main research question. The second and third research questions of the study are addressed using secondary sources.

II. Summary of Findings

I determined Supreme Court judicial interpretation of the fourteenth amendment has impacted racial make-up of student enrollment during the time period studied. Further, I found *Parents* greatly impacts school desegregation remedies and also impacts areas outside K-12 education. I found four shifts in judicial interpretation occurring at four different times during the time period studied. While I did not find a direct relationship between mode of interpretation and racial make-up of school enrollment, I determine four distinct phases of interpretation that impacted school enrollment. The Court has interpreted the equal protection clause in the school

desegregation cases studied here in four distinct phases: endorsing segregation, holding segregation unconstitutional in higher education, expanding interpretation of the equal protection clause to support K-12 integration, and finally, a plateau wherein the Court stopped the expansion of what constituted segregative practices in K-12 schools. Figure 1 provides a short reference guide for the series of cases and the Court's holding. I do not find a relationship between mode of interpretation when categorized as constructivist or originalist and direct or indirect. I do find a relationship between shifts in interpretation and racial make- up of schools which is the most significant finding of my research.

Figure 1a:

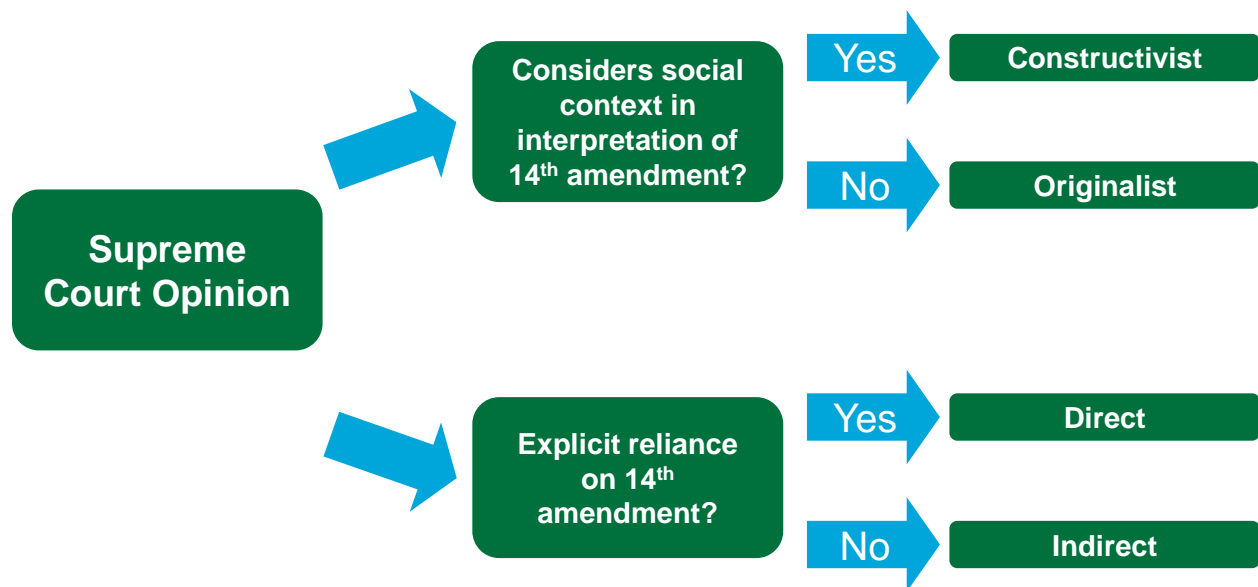


Figure 1

Case	Year	Fourteenth Amendment Issue and Holding
<i>Plessy</i>	1899	Does state law requiring segregated railway cars violate the equal protection clause? No.
<i>Cumming</i>	1899	Can a school district shut down a black high school due to funding constraints when the white high school remained open? Yes.
<i>Gong Lum</i>	1927	Does the segregation of Chinese K-12 students violate the equal protection clause? No.
<i>Missouri ex rel Gaines</i>	1938	Does the equal protection clause require a state to provide a state-funded education to both black and white residents? Yes
<i>Sipuel</i>	1948	Must a state provide for the legal education of a black student when no black law school exists? Yes.
<i>Sweatt</i>	1950	Even if a state maintains law schools for blacks and whites, is it a violation of the equal protection clause when the education at the black law school unequal to that at white law school? Yes.
<i>McLaurin</i>	1950	Do state policies mandating a black student be segregated from his peers in a School of Education violate the equal protection clause? Yes.
<i>Brown</i>	1954	Does de jure segregation in K-12 public education violate the equal protection clause? Yes.
<i>Brown II</i>	1955	Does the equal protection clause call for the desegregation of school to occur with all deliberate speed? Yes
<i>Cooper</i>	1964	Is it a violation of the equal protection clause to ignore desegregation mandates and prohibit black students from

		attending integrated schools? Yes.
<i>Griffin</i>	1964	Does closing public schools in Prince Edwards County violate the equal protection clause? Yes.
<i>Green</i>	1968	Do ‘freedom of choice’ plans violate the equal protection clause? Yes
<i>Alexander</i>	1969	Does the continual operation of segregated schools violate the ‘all deliberate speed’ mandate of <i>Brown II</i> ? Yes.
<i>Montgomery School Board</i>	1969	Does the equal protection clause mandate the racial integration of faculty in K-12 public schools? Yes.
<i>Swann</i>	1971	Is bussing constitutional? Yes. Are schools responsible for racial balancing reflecting demographic racial make-up? No.
<i>Keyes</i>	1973	Even if no de jure segregation exists, do intentional acts on the part of school boards to discriminate and maintain segregation violate the equal protection clause? Yes.
<i>Milliken</i>	1974	Is it constitutional to mandate inter-district bussing? No.
<i>Pasadena</i>	1976	Is a return to neighborhood schools due to factors other than de jure segregation a violation of the equal protection clause? No
<i>Bakke</i>	1978	Is use of a racial quota a violation of the equal protection clause? Yes
<i>Dowell</i>	1990	Should a school district be granted unitary status if its student reassignment plan will result in increased segregation? Yes
<i>Freeman</i>	1992	Is the equal protection violated when changing residential patterns, not governmental actions are the cause of school segregation? No
<i>Jenkins</i>	1995	Must a state provide remedial education classes and increased salaries to correct de facto segregation? No

<i>Grutter</i>	2003	Is affirmative action absent a racial quota constitutional under the equal protection clause? Yes.
<i>Gratz</i>	2003	Is affirmative action under a point system constitutional? No.
<i>Parents</i>	2007	Do student assignment policies using race as a deciding factor violate the equal protection clause? Yes

From *Plessy* through *Gong Lum* the Court interprets the equal protection clause in a manner allowing de jure segregation in public schools to be constitutional. Further, during this phase, the Court makes no distinction between unequal educational opportunity and segregated schooling. Making its intention clear in *Plessy* and *Gong Lum*, the Court does not equate separate with unequal. Further, the Court found no constitutional violation when black schools were shut down while white schools remained open (*Cumming*) showing the Court's unwillingness to equate unequal opportunity with segregated schooling. This first phase of interpretation is categorized by the Court's endorsement of segregation and holding the equal protection clause did not require either equal or desegregated educational facilities.

The second phase is categorized by a shift of interpretation in four higher education cases showing the Court's willingness to consider segregation as violation of the equal protection clause. The Court took smaller steps in the cases *Missouri* and *Sipuel* leading up to *Sweatt* and *McLaurin*. In the beginning cases the Court edged towards the ultimate conclusions and holdings of the latter two cases. *Missouri* and *Sipuel* held a state must provide a legal education to both black and white students even if no black law school existed. *Sweatt* and *McLaurin* take these holdings a step further by holding a state must provide an equal education to both blacks and whites in addition to maintaining that even if a school of higher education is integrated itself, individual classrooms must be integrated as well. The Court begins to consider

the idea of inequality as associated with segregation at the higher education level in this phase of interpretation.

A third phase of integration is categorized by the Court's interpretation of the equal protection clause as prohibitive of segregation in K-12 education. In this phase the Court expands its interpretation to not only rule segregation is unconstitutional but then to include specific modes of integration as permitted by the equal protection clause while simultaneously holding inequality and delay to integration in violation of the clause. From 1954 in *Brown I* to *Keyes* in 1973 the Court's interpretation of the equal protection clause supported first, a basic holding that segregation was unequal and unconstitutional and further, expanded its interpretation to hold several segregative methods used by school boards during the time period as unconstitutional. *Brown I* and *II* spoke clearly on the Court's intention and marked a new phase of interpretation for the Court. No longer was separate and equal constitutionally permissible. The Court clearly interpreted the equal protection clause to rule separate schooling was inherently unequal in theory and practice and schools should integrate with all deliberate speed. These two first cases mark a clear shift from the first two phases of interpretation. While the Court stayed silent on the issue for the next nearly 10 years, the next seven cases the Court heard on K-12 segregation issues were a clear continuation of the foundation for new interpretation laid out in the *Brown* cases.

First, *Cooper*, *Griffin*, and *Green* were clear signs to states and districts ignoring desegregation mandates that the Court intended to be active in its continued support of integration and in its assertion of itself as the Highest Court of the nation. The Court interpreted the equal protection clause to hold states ignoring desegregation mandates by prohibiting black students from attending white schools or closing all public schools were acting

unconstitutionally. Next in *Green* the Court's interpretation of the equal protection clause holding freedom of choice plans unconstitutional was further sign the Court would continue its third phase of interpretation when ruling on specific segregative policies which may not have been outwardly discriminatory. The holding in *Alexander* expanded the interpretation of the equal protection clause to hold schools accountable for proving their practices were nondiscriminatory. In further expansion of what practices constitute violations of the equal protection clause, the Court held schools maintaining segregated faculty were also acting unconstitutionally. *Keyes* expanded the definition of de jure segregation to include intentional discriminatory acts on the part of the school board even if no clear law or segregative policies overtly existed.

However, beginning in 1974 under *Milliken*, the Court enters its fourth and current phase of interpretation marking a clear departure from its initial support of integration. While the Court did not retract its expansion of what practices and policies were in violation of the equal protection clause, it did refuse to expand further. The Court, since and including *Milliken*, has plateaued in its interpretation of the equal protection clause resulting first in prohibiting inter-district remedies for segregation (*Milliken*) and second, in a refusal to hold schools accountable for remedying school segregation caused by residential segregation (*Pasadena*).

Several cases in this series of cases are illustrative of the color-blind interpretation of the equal protection clause. For example, the holding in *Bakke* ruling the use of racial quotas in higher education as unconstitutional under the equal protection clause was based on Justice Powell's assertion that interpretation of the equal protection clause should be color-blind. This method of interpretation would reappear again in *Parents*. Subsequent to *Bakke* the Court remained silent on racial issues in both higher education and K-12 schools for over twelve years

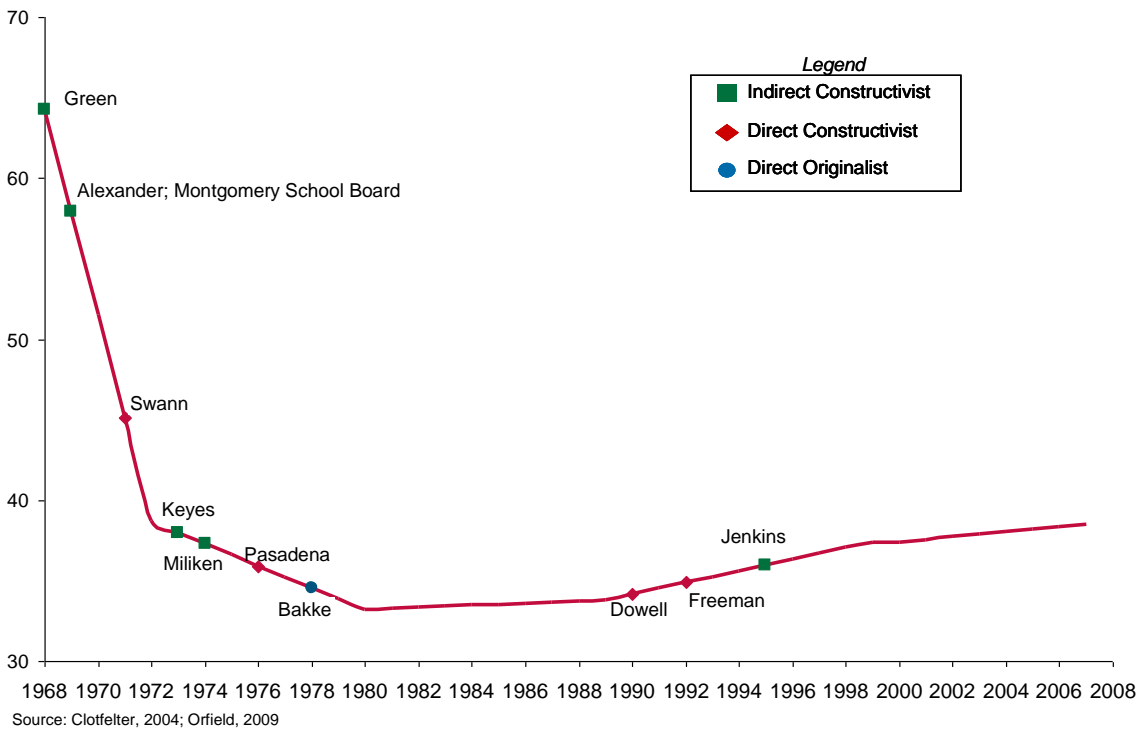
until the series of early 1990s cases where the Court released schools from segregation mandates by making it easier for school to achieve unitary status. In *Dowell*, *Freeman*, and *Jenkins* the Court endorsed the granting of unitary status even when a school's proposed policies will result in increased segregation. Similarly in *Freeman* and *Jenkins* the Court interpreted the equal protection clause to release schools from any duty either to employ integrative practices in the face of school segregation caused by residential segregation or hold states should provide funding to schools for the purpose of remedying de facto segregation.

In this phase of continued plateau of interpretation the Court heard *Grutter* and *Gratz* and spoke to issues of affirmative action in higher education. The Court, while holding affirmative action permissible under the equal protection clause (*Grutter*), did not approve racial quotas as such under the clause (*Gratz*). Tying over this line of interpretation to K-12 education in *Parents* the Court held using race as the deciding factor in student assignment policies in order to combat racial segregation unconstitutional. This case marks the most recent case in the series of Court cases relating directly to or influencing K-12 education. The Court entered a fourth phase of interpretation in 1974 that has lasted over 30 years and is marked by the Court's reluctance to expand interpretation of the equal protection clause to further segregation in schools. Although the Court did not retract its previous holdings from the second or third phase of interpretation, it certainly reached a plateau wherein support for integrative methods declined.

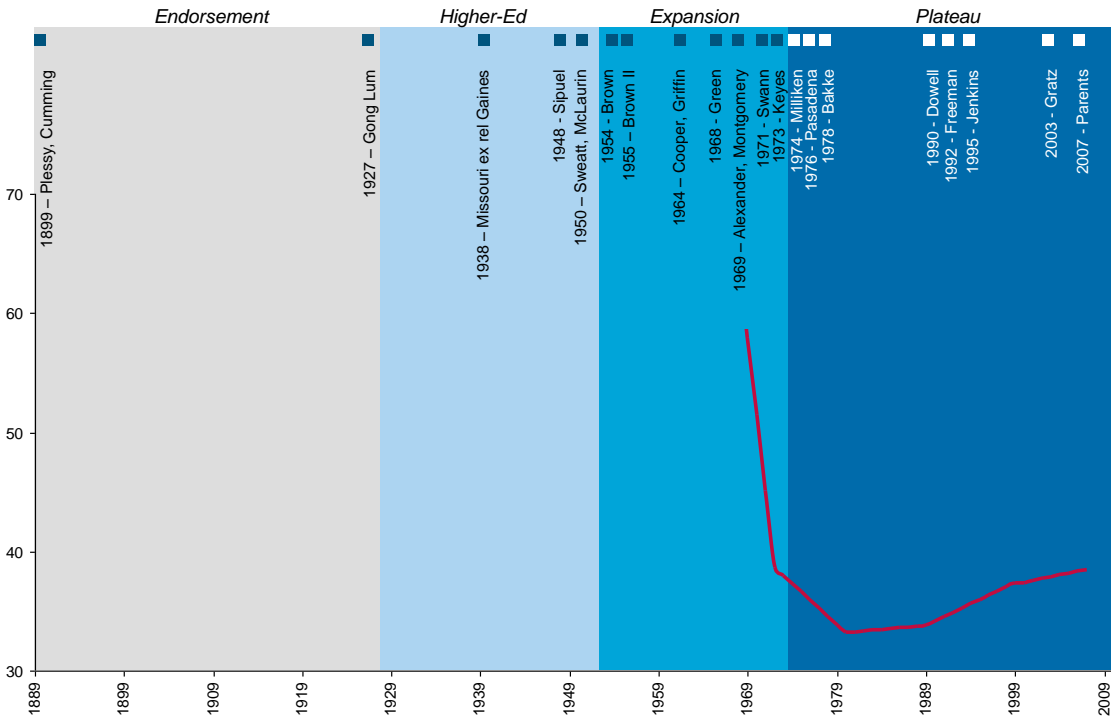
Desegregation as shown in racial make-up of public school enrollment for black students paralleled the phases of interpretation employed by the Court. Figure 2 shows lack of relationship between indirect or direct interpretation and constructivist or originalist interpretation. Figure 3 shows a relationship between shifts of interpretation and racial make-up

of schools. Figure 3 also illustrates how segregation declined during the third phase (the expansion phase).

**Figure 2: Percentage of Black Students in 90-100
Percent Nonwhite and Majority Nonwhite Public Schools**



**Figure 3: Percentage of Black Students in 90-100
Percent Nonwhite and Majority Nonwhite Public Schools**



Source: Clotfelter, 2004; Orfield, 2009

Red line indicates percentage of Black students in 90-100% nonwhite schools. Data prior to 1968 is hard to analyze and compare to data subsequent to 1968 as the Office of Civil Rights began to collect consistent data on national school enrollment in 1968.

III. Data: Supreme Court School Desegregation Litigation

A. The Cases

The following is the data used to examine and analyze the ways in which methods of judicial interpretation of the fourteenth amendment have changed over time. While the time period primarily studied begins in 1954 it is important to consider cases prior to this date in order to examine the history of the equal protection clause and the Court's interpretation of the fourteenth amendment. This is because the Court's initial approval of school segregation was based on precedent laid out in the early cases pre-1954.

i. Phase I: Endorsement of Segregation

Plessy v. Ferguson

Background and Statement of Facts

This case is widely accepted as being the beginning of Supreme Court approved segregation plans is *Plessy v. Ferguson* 163 U.S. 537 (1899). The majority of the Court held constitutional a law providing for separate railway carriages for the ‘white and colored’ races. (p.538). The opinion of the Court considers the law in light of the facts of the case: Plessy was a passenger between two stations within Louisiana who insisted on riding the passenger car not assigned to his race.

Judicial Interpretation of the Fourteenth Amendment

The Court considered the 1890 Louisiana law under both the thirteenth and fourteenth amendment. Interestingly, the Court itself articulates how it views the purposes of the two amendments:

The constitutionality of this act is attacked upon the ground that it conflicts with both the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth amendment, which prohibits certain restrictive legislation on the part of the States.” (p.542).

While the intent of Congress in ratifying the 14th amendment is not specifically discussed in the opinion, the Court does rely on legislative action requiring racial separation in schools in the District of Columbia and the then current social context of segregation. The Court considers the reasonableness of the Louisiana legislature and clearly considers both school segregation and social norms:

In determining the question of reasonableness, it [the Louisiana legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order. Gauged by this standard we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questions, or the corresponding acts of state legislatures (p.551)

Because the Court considers the intent of the amendment and relies on Court sanctioned segregation of schools as precedent for the ruling, the social context of the law in question is a foundation for the decision upholding segregation on railway cars. Both the intent of the amendment and the current context provide strong justification for the ruling as the Court saw fit.

The equal protection clause, while not directly discussed at length in the opinion, is also a part of the Court's decision in *Plessy*. The Court reasons the clause was meant to enforce the 'absolute equality' (p.544) of the two races before the law, but that the clause could not be viewed as calling for the abolishment of distinctions based on color. The Court is clear in making a distinction between 'social' equality and 'political' equality (p.544).

In the dissenting opinion, Justice Harlan opposes the majority based on readings of the thirteenth and fourteenth amendments. He argues that the amendments, if read according to their 'true intent and meaning will protect the civil rights that pertain to freedom and citizenship' (p.555). Harlan also considers the social context but comes to an opposite conclusion from the majority's consideration of the distinction between political and social equality. For Justice Harlan, there is no distinction and further, there is no constitutional basis for such a distinction. He asks,

If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one

side of a street and black citizens to keep on another? Why may it not, upon like grounds, punish whites and blacks who ride together in streetcars or in open vehicles on a public road or street? (p.557).

Justice Harlan dismisses the majority's consideration of the 'reasonableness' of the Louisiana law. He argues the question of reasonableness should be left to the legislature and the question of Constitutionality to the courts.

The essence of Harlan's dissent centers not only on constitutionality but also on morality. He predicts the majority decision will stimulate aggression upon the rights of blacks and will encourage the belief that states can defeat the purposes of the recently passed thirteenth and fourteenth amendments. He writes, that the 'real meaning' (p.560) of the Louisiana law is the distrust between the races and the belief that 'colored citizens are so inferior and degraded' (p.560) that they are forbidden by law to sit in the same trains cars as whites. This is the social context Harlan chooses to consider rather than the social context justifying segregation upon which the majority relies upon.

Cumming v. Richmond County Board of Education

Background and Statement of Facts

In the same year, the Court in *Cumming v. Richmond County Board of Education* 175 U.S. 528 (1899) applied similar reasoning to public education. The Court in this case sanctioned de jure segregation in K-12 public education in the nation's school- a decision that would stay in effect until more than fifty years later in *Brown I*. The facts of the case stipulated the plaintiffs, Cumming, Haper, and Ladeveze, were 'persons of color' (p. 175) suing on behalf of themselves and others of their race against not only the Board of Education of Richmond County, Georgia but the county tax collector. The plaintiffs were all residents, property owners, and tax payers of

the county and the defendant school board regulated public education and also had the power to levy taxes as it deemed necessary for public school purposes.

The plaintiffs took no issue with the tax structure but with the issue that the levied taxes went to support an all-white high school system. What seems particularly egregious was the fact that the County had previously operated a segregated school system but on July 19, 1897 denied the minority students participation in any high school. The School Board asserted it had made the decision to close the minority high school based on their belief that the County did not have enough funds to educate all of the minority elementary school-aged children (about 300) in addition to the 60 minority students of high school age. The Board then made a choice between educating 300 children or 60 high school aged children. The decision to close the minority high school, the Board, alleged, was one based on a reasonable conclusion that it was better to provide basic education to 300 children rather than high school level education to 60 students.

Judicial Interpretation of the Fourteenth Amendment

The Supreme Court agreed:

We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the board to discriminate against any of the colored school children of the county on account of their race. But if it be assumed that the board erred in supposing that its duty was to provide education facilities for the 300 colored children who were without an opportunity in the primary schools to learn the alphabet and to read and write, rather than to maintain a school for the benefit of the 60 colored children who wished to attend a high school, that was no an error which a court of equity should attempt to remedy by an injunction that would compel the board to without all assistance from the high school maintained for white children....Under the circumstances disclosed, we cannot say that this action was, within the meaning of the Fourteenth Amendment, a denial by the state to the plaintiffs and to those associated with them of the equal protection of the law or of any privileges belonging to them as citizens of the United States. (p.176)

The Court ultimately concluded that the decision to collect taxes from everyone but educate only white students was constitutional because it was not based in a desire to discriminate. The Court sanctioned use not only of de jure segregation in schools, but also the unequal education provided to the races. To operate a high school for whites and no such equal facility for African-Americans was constitutional and would remain so for decades after the decision. Not only were separate educational facilities in K-12 schools legal under the fourteenth amendment, but unequal education was as well.

Gong Lum v. Rice

Background and Statement of Facts

In 1927 segregated schooling was again sanctioned by the Court in *Gong Lum v. Rice* 275 U.S. 78 (1927). This case does not deal directly with the constitutional issues of segregated schooling, but rather, with whether or not a student of Chinese ancestry could be denied education at an all-white school under the fourteenth amendment. The Court held such denial did not violate the fourteenth amendment and illustrates the Court's support for de jure segregation in K-12 schools.

Judicial Interpretation of the Fourteenth Amendment

Chief Justice Taft delivered the majority opinion of the Court. The essence of the Court's constitutional test is again based on the equal protection clause of the Fourteenth Amendment. The Court chooses to interpret the constitutional language in favor of the school board and not the Chinese student seeking education at the all-white schools. The Court reasons,

“...she is not denied, under the existing school system, the right to attend and enjoy the privileges of a common school education in a colored school. Had the petition alleged specifically that there was no colored school in Martha Lum's

neighborhood to which should conveniently go, a different question would have been presented. The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry, born in this country and a citizen of the United States, the equal protection of the law by giving her the opportunity for a common school education in a school which received only colored children of the brown, yellow, or black races. (p.273).

The Court goes on to cite both *Plessy* and *Cumming* as justification for its holding and reasons that even though most of the cases before it arose from the establishment of a separate school for blacks and whites, that they ‘cannot think that question is any different where the issue is as between white pupils and the pupils of the yellow races’ (p.275).

ii. Higher Education Cases

Missouri ex rel Gaines v. Canada

Background and Statement of Facts

As previously discussed, the Constitutionality of segregation in education was first challenged at the higher education level. In a series of three High Court cases in the decade leading up to *Brown I*, segregation in higher education, primarily in state law schools and one state school of education, was struck down. Using the equal protection clause as the constitutional basis for striking down segregated education, the Court foreshadowed the eventual use of the 14th amendment in public, K-12 education as well. In all three cases the Court reasoned the segregated system violated the equal protection clause because either no legal education was available for black students or that the legal education provided was not indeed equal.

Equal education facilities in higher, not K-12 education, was the subject of subsequent Court decisions into the early 1900s. Higher education was the platform under which much of the progress that would be seen later in K-12 education was gained. The beginnings of which can

be seen forty years after *Cummings* in 1938 when the Court heard and decided *Missouri ex rel Gaines v. Canada* 305 U.S. 337 (1938) wherein Gaines, an African-American, was refused admission to the Law School at the State University of Missouri. Gaines challenged the refusal under the 14th amendment and in particular, the equal protection clause.

Judicial Interpretation of the Fourteenth Amendment

The Court's opinion turned on consideration of the equal protection clause and the refusal of admission as a violation of the clause. The Court considers Gaines' right to admission a personal right, and as an individual he was entitled to equal protection of the laws. Further, the State of Missouri was bound to provide legal education 'substantially equal' (p.351) to those afforded whites even if no other African-Americans desired admission to the Missouri law school. However, important to note is the Court does not address the issue of segregated law schools in the state, simply whether or not it was constitutional for the State of Missouri to operate a whites-only law school with no substantially equal opportunity for African-Americans. The last line of the opinion emphasizes this distinction:

We are of the opinion...that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State. (p.353)

The Court does not go so far as to overturn the 'separate but equal' doctrine of *Plessy* but rather reasons that the State must either open a black law school or admit him to the white law school. Whether or not the decision would have remained if Gaines had challenged a segregated system versus the lack of means by which he could attend law school remains unclear given the Court ruled only on the issue before it.

Justice McReynolds issued a brief separate opinion disagreeing with the majority conclusion. Neither the fourteenth amendment nor the equal protection clause is discussed in the dissenting opinion. Justice Reynolds relied on the fact that no other African-American had sought admission to the law school and the fact that Missouri did provide assistance to Gaines should he want to attend a minority law school out of state. Justice Reynolds believes through this, the State had upheld its duty and that by requiring Gaines' admission to the law school, the only ever African-American applicant, the state was being unduly burdened.

Sipuel v. Board of Regents of University of Oklahoma

Background and Statement of Facts

Ten years later, the Court heard *Sipuel v. Board of Regents of University of Oklahoma* 332 U.S. 631 (1948). The facts of the case stipulate that in January 1946 Sipuel applied to law school at the University of Oklahoma, at the time an all-white law school, but was denied admission due to her race.

Judicial Interpretation of the Fourteenth Amendment

The Court opinion is brief, all Justices joined in the majority opinion and the Court reasoned Sipuel was entitled to a legal education and concluded,

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State, The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment, and provide it as soon as it does for applicants of any other group. (p.332).

The Court goes on to reason that segregating black students, no matter how ‘equal’ the separate education may be, is a violation of the equal protection clause. The opinion is very brief and was decided just four days after oral arguments concluded in January 8, 1948.

Sweatt v. Painter

Background and Statement of Fact

Similar both in fact and Court reasoning to *Sipuel*, the Court tackled segregation in higher education in *Sweatt v. Painter* (339 U.S. 629) decided in 1950. Based on the equal protection clause, the Court struck down a segregated law school system in Texas. Sweatt, an African American was denied admission to the University of Texas Law School for the February 1946 term. He was denied admission solely based on his race. In response to lower court decisions, the University of Texas opened a black law school and the issue on appeal to the Supreme Court was the issue of whether or not the segregated system violated the fourteenth amendment’s equal protection clause.

Judicial Interpretation of the Fourteenth Amendment

The Court considers at length the quality of legal education at the separate law schools.

The Court writes,

...we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of the number of the faculty, variety of courses and opportunity for specialization, size of student body, scope of the library, availability for law review and similar activities, the University of Texas law school superior...It is difficult to believe that one who had a free choice between these law schools would consider the question close (p.634).

Ultimately the Court concludes the difference in quality of education as illustrated in several of ways violated Sweatt’s rights under the fourteenth amendment and compels admission to the law school.

McLaurin v. Oklahoma State Regents

Background and Statement of Facts

Sweatt and the next case *McLaurin*, 339 U.S. 637 (1950) was decided by the Court on the same day of its summer 1950 term and echoed the Court's reasoning that segregated education violates the equal protection clause because of the unequal education offered to minority students. The facts of the case center on McLaurin, an African-American who had been admitted to the Doctorate in Education at the University of Oklahoma. Because Oklahoma had no such program for African-Americans, McLaurin was admitted to the program. However, he was forced to endure differential treatment such as a separate lunch table and a classroom chair just outside the classroom.

Judicial Interpretation of the Fourteenth Amendment

The Court concluded that,

The result is the appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair or inhibit his ability to study, engage in discussions and exchange views with other students, and, in general, to learn his profession (p.641).

Ultimately the Court concluded the conditions under which McLaurin was made to receive his education deprived him of his personal and 'present right to the equal protection of the laws'(p.642). The Court further held that the fourteenth amendment prohibits differences in treatments by state based on race and that McLaurin was entitled to receive the same treatment in the State's education facilities as students of other races.

iii. Expansion of Interpretation

Brown v. Board of Education of Topeka (Brown I)

Background and Statement of Facts

Beginning with *Brown v. Board of Education* the Court declared de jure segregation in public schools unconstitutional based on the equal protection clause of the Fourteenth Amendment. This case overruled the Court's previous ruling in *Plessy v. Ferguson* where it was previously held that separation of physical facilities for blacks and whites was constitutional if the facilities were equal.

Judicial Interpretation of the Fourteenth Amendment

Here with *Brown* begins the Court's administration of the equal protection clause to education despite its acknowledgement that the Amendment is inconclusive as to its application to education. This point is of great importance as nowhere in the Constitution is there a protected right to an education. To apply the 14th amendment to the facts in the *Brown* case was an important fundamental acknowledgement that although equal education is not an constitutionally protected right the 14th amendment could and would be used by the Court to justify its holding that segregated schools violates the 14th amendment.

The facts in the *Brown* case heard by the Court actually came from five separate cases litigated contemporaneously in front of the Court because of the common theme: the issue of desegregation by race in public schools. Parents and community members in Clarendon County, South Carolina commenced a suit to demand equality of treatment and were joined with four other suits from Prince Edward County, Virginia, Topeka, Kansas, Delaware, and the District of Columbia. Justices on the Court who heard the original argument in 1952 were Chief Justice Vinson, Justice Black, Justice Reed, Justice Frankfurter, Justice Douglas, Justice Jackson, Justice

Burton, Justice Clark, and Justice Minton. Subsequent to Justice Vinson's retirement, oral arguments in 1953 were heard additionally by Justice Warren. Additionally, subsequent to Justice Jackson's retirement, Justice Harlan heard the 1953 oral arguments.

The first oral argument was heard in 1952 under Chief Justice Vinson who was known to be in opposition to integration (Friedman, 2004, xi). The Court was divided on the issue of integration after the 1952 argument and when reargument was heard a year later, 1953, the Court was headed by Chief Justice Warren.

This marked a clear change in direction for the Court but the application of the constructivist method of judicial interpretation continued. This approach, rather than an originalist approach, is quite evident in the opinion itself,

....we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws" (p. 492-493).

Key to the Court's interpretation is its recognition of education as a right which must be available to all students regardless of race. Basic to its interpretation is the fact that 'segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities' (p.493). Important to note is the Court's acknowledgement that it chooses to view the facts of the case "in the light of the full development of public education and its present place in American life throughout the Nation" (p. 492-493). This decision was decided unanimously by the Court. There are no dissenting or concurring opinions.

Brown v. Board of Education of Topeka (Brown II)

Background and Statement of Facts

Given the reaction to the first *Brown* decision as previously discussed, it was necessary for the Court to provide further detail about the timeline for desegregation. In 1955, a year after the initial *Brown* decision the Court considered the issue of relief in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), also known as *Brown II*. The defendant school districts were required to make a ‘prompt and reasonable start’ to compliance (p.349). The *Brown I* case had left several constitutional questions unanswered and the Court requested further argument on the issues surrounding implementation of the original integration decree in *Brown I*.

The Court reasoned that because the original cases were a combination of several cases, each from different localities around the nation, it should enlist the help of federal officials,

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief. In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument (p.299).

The Court found substantial progress towards desegregation had been made in the District of Columbia, Kansas, and Delaware school districts (parties to the original case) but that South Carolina and Virginia had been delaying efforts. Given the tension between the national issue of desegregation and local control over school districts, the Court reasoned it needed to find a solution that would be applicable across the nation. The Court was careful to leave judgment to

local courts to decide, whether the action of school authorities constitutes good faith implementation “because of their proximity to local conditions and the possible need for further hearings, the court which originally heard these cases can best perform this judicial appraisal” (p.299).

Judicial Interpretation of the Fourteenth Amendment

The specific holding by the Court is that the defendant school districts made a ‘prompt and reasonable’ start towards full compliance with *Brown I* and from there local courts should rule on what additional time was necessary in carrying out full compliance.

Important to note is the absence of any discussion of equal protection or fourteenth amendment issues in *Brown II*. The only mention of the amendment is in a footnote to the opinion acknowledging the Court’s decision in *Brown I* and its declaration that segregation in public schools does violate the equal protection clause. Further, reasoning for the ‘prompt and reasonable’ start towards ‘good faith compliance’ is not based on equal protection principles in the case of *Brown II*, or at least no such basis is found in the words of the Court’s opinion, but more so on a necessary reaction to massive school district rebellion against the decision. In fact, the Court does not base its holding in *Brown II* on any constitutional principles (as can be seen in the words of the brief opinion).

Cooper v. Aaron

Background and Statement of Facts

Three years later the Court faced the issue of resistance directly in *Cooper v. Aaron* 358 U.S. 1 (1958). The case was argued on September 11, 1958 and decided just a day later, the product of a unanimous decision by the Court. The facts of the case are as follows: The public

schools of Little Rock, Arkansas were ordered to admit African-American students at the beginning of the 1957-1958 school year. However, both the State Legislature and Governor of Arkansas were opposed to integration and due to threats of mob violence, nine new African-American students were unable to attend the school until federal troops were sent to protect the students.

The School Board petitioned to the District Court that desegregation be suspended for two and a half years. The District Court granted the request but the Court of Appeals reversed and the case was appealed to the Supreme Court. The Supreme Court affirmed the Court of Appeals decision and ordered the Board's plan for desegregation begin again immediately.

Interesting to note is that the Court could have simply denied certiorari to the case thereby letting the Court of Appeals decision stand given the Court simply approved the holding again. However, because the Governor and State of Arkansas publically condemned the Court decisions in *Brown I* and *Brown II* the Court felt compelled to address the Governor's contention that desegregation should be suspended until its holdings in the *Brown* cases had been further challenged and tested in the Court system (p.11). The Court squarely rejected the contention that desegregation should be suspended until further judicial conclusions were reached (p.11). Further, the actions of the State Legislature were directly opposed to the Court's *Brown* holdings. The Court recalls the actions of the Legislature despite School Board preparation for desegregation,

While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. First came, in November, 1956, an amendment to the State Constitution flatly commanding the Arkansas General Assembly to oppose "in

every Constitutional manner the Unconstitutional segregation decisions of May 17, 1954, and May 31, 1955, of the United States Supreme Court," (p.11).

Despite the change to state law, the School Board continued with plans to desegregate. The day before the African-American students were to enter Little Rock's Central High School, the Governor dispatched units of the Arkansas National Guard to prevent the new students from entering the school. Over the next several days, violence, protest, and unrest surrounded the High School and on September 25, 1957 President Eisenhower dispatched federal troops to Little Rock while at the same time federalizing the Arkansas National Guard thus, taking those troops out of the Arkansas Governor's control. The federal troops remained at the school until the end of the school year. However, the School Board sought a petition to postpone desegregation due to the 'extreme public hostility' (p.13) on the part of the Governor, State Legislature, and locals. Again, the District Court granted the petition while the Court of Appeals reversed.

Judicial Interpretation of the Fourteenth Amendment

Ultimately the Court relied on the essence of the equal protection clause and fourteenth amendment to reach its holding that desegregation in Little Rock should continue immediately despite the opposition of State officials and even in the face of violence and unrest. The Court acknowledges that education, primarily a state responsibility, is still bound by the equal protection clause⁵,

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they

⁵ *Bolling v. Sharpe* The Court's opinion references *Bolling*, a prior decision wherein the Court ruled segregation in the District of Columbia schools unconstitutional (1954). Because the Fourteenth Amendment applies only to states, the Court's decision was based on the due process clause of the Fifth Amendment.

apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth. (p.20)

Further, the Court exerts its own power by stating, "the federal judiciary is supreme in the exposition of the law of the Constitution" and further that an "interpretation of [the Constitution] enunciated by the Court ... is the supreme law of the land." (p.18)

Griffin v. School Board of Prince Edward County

Background and Statement of Facts

Ten years after the *Brown I* decision the Court addressed ongoing resistance from schools across the country against desegregation. The case, *Griffin v. School Board of Prince Edward County* 377 U.S. 218 (1964), addressed the massive resistance to desegregation in the Prince Edwards County schools. The facts of the case are as follows: in 1959, faced with an order to desegregate, the County Board of Supervisors closed the public schools in the County while a private foundation operated schools for white students only. A year later the law was amended so the private foundation could receive county and state funds. In 1961 the federal District Court prohibited the County from paying grants to the private foundation as long as public schools remained closed. The Court of Appeals reversed the decision and the case was appealed to the Supreme Court. Oral arguments began in May 1964.

Judicial Interpretation of the Fourteenth Amendment

The Court reaffirmed the District Court's ruling. The Court reasoned,

closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment (p. 226).

The Court considers the equal protection clause in further depth in relation to the question of whether or not the issue of Prince Edward County closing their public schools while other schools in Virginia remained open was a violation of the equal protection clause. The Court ruled this inconsistency by itself was not a violation of the equal protection clause, arguing equal protection under the law applies to applicability of the law between persons, not between geographic areas. Further, the Court argues different people being treated differently as an act in of itself is not a violation of the equal protection clause but rather, a show of unequal treatment must be shown. The Court does find that Virginia had 'unquestionably' (p.23) treated the school children of Prince Edward County different from the way it treated school children in other Virginia counties. While the Court does acknowledge states are afforded wide discretion in deciding their own laws, and are employed even with the ability to decide whether some laws should operate statewide or only in certain counties, the Court does not equate the actions regarding the school closure as falling within state discretion. The Court reasons,

the record in the present case could not be clearer that Prince Edward's public schools were closed, and private schools operated in their place with state and county assistance, for one reason and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional (p.231).

The Court also holds on the issue of relief for the students, that the case be remanded to the District Court to decide how the students will be afforded an education that does not deny them of their constitutional rights and to provide them with an education equal to the one given to the other public students in Virginia.

Green v. County School Board of New Kent County

Background and Statement of Facts

The Court next confronted desegregation issues in 1968 in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). When determining the constitutionality of the ‘freedom of choice’ plans primarily by evaluating their ‘effectiveness’ (p.437). The case stems from a plan in New Kent County, Virginia beginning in 1965 wherein the students are permitted to choose annually between one of the County’s two schools. During the plan’s three years of operation not a single white student had chosen to attend the all-black school and although 15% of black students had opted to attend the white school, most were continuing schooling in the segregated school (391 U.S. 430).

Judicial Interpretation of the Fourteenth Amendment

The Court, in deciding the case, once again considered the ‘end’ outcome of the plan in light of the *Brown II* decision. Further, the Court reasoned that if a freedom of choice plan offered a ‘real’ promise of an integrated system that there would presumably be no constitutionality issues. However, whereas the current system was not effective, choice plans were not constitutional. The Court also noted that the School Board had burdened students and

their parents with the ‘responsibility’ placed on them through the *Brown II* with all deliberate speed instruction (p.431).

The Court’s attention to the outcome of the plan is evident in the opinion as its reliance on the intention of both *Brown* cases:

“The pattern of separate ‘white’ and ‘Negro’ schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws.” (391 U.S. 430, p.432).

The Court goes on to reason that the current freedom of choice plan must be considered in light of the ‘background’ (p.437) of the two previous cases. The consideration of the ‘end’ outcome of the plan is a main focus of the Court’s reasoning. In fact, the Court argues that the freedom of choice plan is ‘not an end in itself’ (p.440) although the plan in and of itself may not be unconstitutional. Rather, it is the outcome of the plan, one that results in continued segregation in the County that is the true indicator of the plan’s unconstitutionality, and its violation of the decrees based on the 14th amendment set forth in *Brown I* and *II*. The Court relies on the facts of the case, as stated, that most black students remain in the all black school. This outcome does not adhere to the goals of *Brown*. The Court calls for the use of plans that work, plans that begin to work immediately, thus again showing its concern with the outcome of the issue. The Court considered the freedom of choice plan to simply be another form of state-imposed segregation because of segregated outcome, even after three years, on the New Kent County school system.

Alexander v. Holmes County Board of Education

Background and Statement of Facts

In 1969 the Court issued an opinion addressing the issue of noncompliant school districts. The case, *Alexander v. Holmes County Board of Education* 396 U.S. 1218 (1969) shifted the burden of proof from the plaintiffs to the school board for showing school district compliancy with the previous desegregation decrees handed down in the prior desegregation cases. Even though *Brown II* had issued the directive of ‘all deliberate speed’ schools were taking the advantage of the vagueness of the language to delay desegregation.

Judicial Interpretation of the Fourteenth Amendment

Justice Black, writing for a unanimous Court reasoned the schools in Mississippi were engaged in the practice of delaying desegregation along with many other schools across the nation. The decision is brief and is clear in its holding:

Continued operation of racially segregated schools under the standard of "all deliberate speed" is no longer constitutionally permissible. School districts must immediately terminate dual school systems based on race at once and operate only unitary school systems. (p.1218).

The opinion was so brief not many facts of the case are included in the opinion itself. The schools of Mississippi were still operating under a segregated school system, and the litigation came to the Court on appeal from the Court of Appeals for the 5th circuit.

United States v. Montgomery County Board of Education

Background and Statement of Facts

The same year the Court addressed the issue of desegregation of faculty and staff of public schools. The Court heard *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969) wherein the Court held desegregation among the faculty and staff of Montgomery County be integrated in accordance in *Brown I*, *Brown II*, and *Green*. The facts of

the case are as follows: In May 1964 black students and parents sued the Montgomery County School system for operating a dual system. While both the District Court and the Court of Appeals confirmed the schools had been operating an unconstitutional dual system. However, the Court of Appeals reversed a District Court holding that the teachers are assigned to schools according to race in order to achieve faculty desegregation. The District Court found that,

the teachers are assigned according to race; Negro teachers are assigned only to schools attended by Negro students and white teachers are assigned only to school attended by white students (p. 229).

Judicial Interpretation of the Fourteenth Amendment

The Court voiced its intention that the approval of the District Court ruling will ‘carry Alabama a long distance on its way toward obedience of the law’ (p. 237).

Swann v. Charlotte-Mecklenburg Board of Education

Background and Statement of Fact

Two years later the Court confronted the constitutionality of specific methods of integration in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Court further illustrated its support for integration by articulating the objective of the decision was to ‘eliminate from the public schools all vestiges of ‘state-imposed’ segregation that was held in violation of the 14th amendment’s equal protection clause by *Brown I*. The Court’s opinion illustrates the case’s important role in defining the ways in which implementation of integrating schooling would occur (p.6) and acknowledge the ‘trial and error’ process school desegregation had taken since *Brown I* (p.6).

The facts of the case are as follows: the Charlotte-Mecklenburg school district was the 43rd largest school system in the nation comprised of the City of Charlotte, North Carolina and the surrounding Mecklenburg County. The area spans 550 square miles and in the 1968-1969 school year served more than 84,000 students in 107 schools. 71% of the students were white and 29% black. 21,000 of the 24,000 black students attended schools within the city lines of Charlotte. About 14,000 of those black students attended schools where the student population was more than 99% black. Both the plaintiffs and the school district agreed that in the 1969 school year the school did not operate a unitary system as was mandated by the Court under *Green*.

The federal District Court found that the racial segregation found in the school system resulted from both residential patterns and also in part from discriminatory school board action. For example, the District Court found the school district fixed the size of the school to result in a segregated school system. Upon appeal to the federal Court of Appeals this finding was affirmed. In 1969 the District Court ordered the school board to propose a plan for both faculty and student desegregation. However, by December 1969 the District Court found no acceptable plan had been submitted and appointed Dr. John Finger, an expert education administrator, to prepare an appropriate desegregation plan. Three months later in February 1970 the school board presented the District Court with two plans: the board plan and the "Finger plan". Under the board plan seven schools would be closed and their student reassigned. School attendance zones would be restructured, the bus system would be integrated and a free-transfer plan (majority to minority) would be implemented. The Finger plan differed from the board plan in a major way: the fate of the school system's 76 elementary schools. Rather than geographic and residential school zones, the plan proposed a combination of zoning techniques that would result in student bodies in the

elementary schools ranging from 9%-38% black. The District Court adopted the board plan for the middle and high schools and accepted the Finger plan for the elementary schools.

The case was appealed to the Court of Appeals wherein the Court of Appeals vacated the District Court ruling to implement the Finger plan in the school system's elementary schools. The Supreme Court granted certiorari and oral arguments were heard in October 1970.

Judicial Interpretation of the Fourteenth Amendment

Justice Burger delivered the unanimous opinion of the Court. The basis of the Court's holding begins with an affirmation that de jure school segregation violates the equal protection clause of the fourteenth amendment because it denied black student equal protection of the laws under the constitution (p.11). Further, the Court goes back to the holding in *Brown II* that the school authorities have the responsibility of dismantling segregated school systems and the court system will judge whether school actions constitute a good faith implementation towards integration. The Court goes on to acknowledge the current state of school segregation to be critical. Over the 16 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race:

Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.

By the time the Court considered *Green v. County School Board*, 391 U.S. 430, in 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws (p. 13). The Court goes on to use the equal protection clause as the constitutional justification for defining the responsibilities of school boards in working towards dismantling the dual system (p. 18). In fact the Court reasons the equal protection clause ‘must’ be by way of the fourteenth amendment (p.18). The Court tackles specific methods of desegregation included in the Charlotte plans and identifies four separate issues to consider and on which to issue its holding:

(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system; (2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation; (3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and (4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation (p.22).

The Court ruled the limited use of racial quotas was constitutional because the school system plan used ratios as ‘no more’ (p.25) than a starting point in shaping a remedy to address segregation rather than impose an inflexible quota requirement. Second, the Court recognizes that the complete dissolution of single-race schools may, in some circumstances, be unavoidable so that the existence of a small number of one-race or mostly one-race schools is not by itself a symptom of de jure practices. The Court charges lower local courts with the duty to scrutinize local school districts to be sure the existence of one-race schools is not the result of discriminatory action. With respect to the school system’s majority-to-minority transfer policy, the Court approved the plan, and further stipulated that transportation and space must be made available to students desiring to use the transfer policy. The third issue in *Swann* ruled on by the

Court was the existence of school attendance lines through the use of pairing or grouping as under the Finger plan for the elementary schools. The Court affirmed the constitutionality of the attendance zone strategies under the Finger plan but acknowledged ‘conditions in different localities will vary widely that no rigid rules can be laid down to govern all situations’ (p. 29).

The Court reasons,

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court(p.10).

Finally, the transportation of students has become the most well-known outcome of the Court’s holding in *Swann*. The Court acknowledged that the transportation of students to remedy segregation had not been yet addressed and that the transportation of students varies so widely by district and school system that no one hard and fast strategy can be applied in every one.

However, the Court does address the issue of bus transportation. As discussed in Chapter I the Court acknowledges busing as primary mode for transportation of students was the most important factor in consolidating school systems. The Court summarizes its basic finding quite simply by reasoning, ‘desegregation plans cannot be limited to the walk-in school’ (p.30). The Court points out that in the specific case of the Charlotte schools, the time students spent on average before the implementation of the attendance zone plans was actually greater than the estimates given should the plan be implemented. Here, the Court steps away from using the equal protection clause as direct constitutional basis for justification of its decision. However, the Court, as discussed, does build the foundation of the opinion on fourteenth amendment grounds

and the reasoning in *Brown I*. It is on this foundation that the holdings in *Swann* were handed down.

Keyes v. School District No. 1

Background and Statement of Facts

Highlighting segregation in northern districts was the Court's hearing of *Keyes v. School District No. 1* 413 U.S. 189 (1973). The facts of the case are as follows: The Denver, Colorado school system had never been under a court-order to segregation. The plaintiffs in the case, parents of students in the Denver school system, alleged that by various race-neutral policies, the school district had created a racially segregated school district through intentional policies. In the 1969 school year the school district ran 119 schools enrolling a total of 96, 580 students. For that school year the School Board adopted three new resolutions implemented to desegregate an area of the city called Park Hill. After a School Board election the resolutions were repealed and replaced with a voluntary student transfer program. Plaintiffs filed suit, requesting an injunction against rescission of the resolutions and an order directing the Board to desegregate and provide equal educational opportunity to all district students.

The federal District Court found the school had, through race-neutral measures such as gerrymandering of school attendance zones, engaged in the unconstitutional policy of deliberately continuing and fostering racial segregation in the Park Hill schools. The District Court ordered the resolutions to be reinstated. Segregation in the Denver schools was not limited to the Park Hill area and the District Court ruled that because deliberate segregation had been found to be implemented in Park Hill, the Board did not necessary employ this practice in the surrounding areas. Further, the District Court ruled the plaintiffs bore the legal burden of proving

that de jure segregation was occurring in each area of the city where they sought integration. Therefore, the District Court ruled that it was the plaintiff's responsibility to provide evidence the School Board had employed intentionally discriminatory practices. The case was appealed and the Tenth Circuit Court of Appeals upheld the District Court's decision that de jure segregation existed in the Park Hill schools but reversed the holding that the other school systems were not subject to an unconstitutional policy of deliberate racial segregation. The school board appealed to the Supreme Court and certiorari was granted with oral arguments beginning in October 1972.

Judicial Interpretation of the Fourteenth Amendment

The fundamental question presented to the Court was the standard to which the school board should be held in determining if the board engaged in the 'unconstitutional policy of deliberate segregation in the core city schools' (p.198). The school board asserted the burden of proving intentional discriminatory practices fell on the plaintiffs but the Court ruled as follows,

we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a *prima facie* case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions (p.208)

The Court here affirms the plaintiff's argument that the school board bears the burden of proving the segregation resulted from factors other than intentional acts on the part of the school board. If a school board is found to engage in discriminatory practices resulting in segregation in one school, a presumption can be made for all schools within the district.

The Keyes case thus expanded the definition of de jure segregation to include school systems across the entire United States, provided it could be proven that "school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities with the school system" (p.201)

Important to note is the lack of direct judicial interpretation of the fourteenth amendment but again, a reliance on the basic premise that the equal protection clause has been violated in this case. Interpretation of the fourteenth amendment does not directly occur in *Keyes* but the Court does rely on the fundamental notion that segregated schooling does violate the equal protection of minority students. From this the Court reasons schools bear the burden of proving their acts are nondiscriminatory and further, in the case of a district where deliberate discriminatory action has been shown in one school, discriminatory action will be assumed for all schools within the district shows how far the Court had stretched application of the equal protection clause to the series in desegregation litigation.

iv. Plateau of Interpretation

Milliken v. Bradley

Background and Statement of Facts

In 1974 the Court heard *Milliken v. Bradley*, 418 U.S. 717 (1974), a case questioning the constitutionality of cross-district busing. The facts of the case were as follows: plaintiffs were residents of Detroit and brought an action against the state and city officials alleging the Detroit public school system was racially segregated as a result of the official policies and actions of the state and its officials. The plaintiffs sought to eliminate the segregation and implement a unitary nonracial school system. The case was admitted on appeal from federal District Court. The District Court had found the Detroit Board of Education had created and perpetuated school

segregation in Detroit. The Court ordered the Board to submit desegregation plans including a Detroit-only plan as well as a plan including the three-county metropolitan area comprised of 85 school districts. The Supreme Court noted in its opinion that the District Court had included these three counties and 85 districts despite lack of finding that any of the schools had been found in violation of the constitution, nor were they parties to the suit (p.717). The District Court ruled the Detroit-only plan submitted by the Board was insufficient to remedy segregation and that the cross-district plan was more appropriate. As the Supreme Court noted, the District Court required use the cross-district plan even though there was no evidence the suburban school districts implemented de jure segregation plans. The District Court ordered a plan encompassing 53 of the 85 suburban school districts as well as the City of Detroit school system and ordered the Detroit City School districts to acquire at least 295 school buses to provide transportation for the 1972-1973 school year.

Judicial Interpretation of the Fourteenth Amendment

The Supreme Court ultimately held that the District Court erred in its judgment and ruled that District Court could not

impose a multidistrict, area wide remedy for single-district de jure school segregation violations where there is no finding that the other included school districts have failed to operate unitary school systems or have committed acts that effected segregation with the other districts, there is no claim or finding that the school district boundary lines were established with the purpose of fostering racial segregation, and there is no meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of the constitutional violations by those districts (p.737).

The majority did not mention the fourteenth amendment or equal protection clause in its opinion. However, the Court does point to the standard set forth in *Brown* in which of course the Court relied heavily on the fourteenth amendment. In addition, Justice Stewart in his concurring

opinion does consider the equal protection clause thus, echoing the majority's reasoning that the mere existence of racial segregation in the suburban districts does not constitute a violation of the clause because it does not necessarily show racial segregation in the school systems was "imposed, fostered, or encouraged by the state" (p.756).

The dissenting opinions do rely on the equal protection clause and assert the majority erred in its holding because the Court had articulated in *Keyes* there is no difference between de jure and de facto segregation. The dissenting opinion also goes on to chastise the majority opinion arguing the City of Detroit school district had been allowed to usurp its fourteenth amendment duties because the majority did not want to burden the surrounding school districts.

The dissent writes,

The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts. If this is the case in Michigan, it will be the case in most States (p.763).

The dissent argues the equal protection clause warrants the inclusion of the suburban districts in the desegregation plans because as the District Court concluded, desegregation could not occur within the City of Detroit district alone.

Pasadena Board v. Spangler

Background and Statement of Fact

In 1976 the Court heard and decided Pasadena City Board v. Spangler (427 U.S. 424 1976) and can be viewed as an indication of the Court's gradual movement away from endorsement of integrative methods. This was the first desegregation case heard after the passage of the 1974 Civil Rights Act, specifically section 902 which provides the United States is entitled to the same relief as the plaintiff in the case. This section is significant if only because the original plaintiffs in the case had graduated from the Pasadena schools and the defendants alleged were therefore no longer entitled to have standing in the case.

Fourteenth amendment issues stemmed from the desegregation plan endorsed by the school district. Pasadena Schools submitted a plan for desegregation that included a stipulation that in the 1970-1971 school year no school would have a 'majority of any minority students'. This plan was commonly called the Pasadena Plan. In the 1970-1971 school year no school within the district violated this plan. However, in the years following, several schools were in violation of the provision. The change was not caused by any deliberate action by the school board but was instead a result of racial population shifts in the district.

Judicial Interpretation of the Fourteenth Amendment

The issue before the Court, then, became whether or not the Board could, under the Fourteenth Amendment terminate the 'no majority minority' stipulation. The Court held the Board could not hold schools accountable under the stipulation if changes were the result of population shifts rather than a school's deliberate action. The Court declared, "[t]here are limits beyond which a court may not go in seeking to dismantle a dual school system." (p.424).

Regents of the University of California v. Bakke

Background and Statement of Fact

The importance of three higher education cases was discussed in Chapter I of this study. Here specific attention will be given to the Court's judicial interpretation of the fourteenth amendment as these methods of interpretation are relied on by the Court in subsequent K-12 cases.

The first of these cases was heard and decided during the Court's 1978 term. *Regents of the University of California v. Bakke* 438 U.S. 265 (1978) resulted in both majority and plurality opinions. The Medical School of the University of California at Davis was designed to insure a specified number of students from certain minority groups. There existed two admissions systems. Under the regular admissions system a candidate could submit an application in the July of the year proceeding the academic year for which admission was sought. About one of every six applicants was invited for an interview and each was then rated on a scale of 1 to 100 by the interviewer and four other members of the admissions teams. This rating took into consideration the applicant's grade point average, score on the standardized Medical College Admissions Test, recommendations, and other biographical data. The second admissions process operated with a separate committee and oversaw the applications of mostly minority applicants. The ratings process was similar and about one in every five minority applicants was given an interview in during the 1973-1974 academic year. The second special admissions process did not rate or compare candidates with applicants from the regular admissions process. The special committee then recommended special applicants until the maximum number, as agreed upon by faculty, was

reached. In a class of 100, 16 was the maximum number of admissions from the second special application process.

Bakke was a white male who applied to the Medical School in both 1973 and 1974. Bakke's application was considered under the primary admissions program and he was offered an interview. The interviewer concluded Bakke was a 'desirable' (p.438) applicant. Despite an overall high rating, he was rejected from the medical school. After his second denial from admission, Bakke initiated litigation against the Medical School arguing the special admission program operated to exclude him from admission in violation of his rights under the fourteenth amendment's equal protection clause.

Judicial Interpretation of the Fourteenth Amendment

Justice Powell's opinion is based on interpretation of the equal protection clause. The Court reasons while racial diversity is a compelling interest, the secondary special admissions policy is not narrowly tailored enough to justify its use by the Medical School. Powell writes that racial diversity,

is a constitutionally permissible goal for an institution of higher education...Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity (p.316).

Further, the majority recognizes African-American physicians could be better suited to address the medical needs of a diverse patient population (p.314).

Ultimately, however, the Court found, after an application of the strict scrutiny test when applied to the admissions procedures of the medical school, the admissions policies were not the

least restrictive means to achieve the worthy goal of racial diversity both in higher education as a whole and specifically in the Davis Medical School.

The plurality comprised of Justices Brennan, White, Marshall, and Blackmun ruled race could be used a factor when admissions policies were used for the purpose of remedying underrepresentation of minorities in medicine. Justices Berger, Steward, Rehnquist, and Stevens argued the issue in the case was not one calling for interpretation of the Fourteenth Amendment but rather was an issue under Title VI of the Civil Rights Act because Bakke was excluded from admission because of his race given had he been a minority applicant, he would have scored high enough to be admitted. Title VI prohibits racial discrimination in any institution receiving federal funding and using a strict interpretation of the text, the plurality favored Bakke. Because none of the plurality decision materially differed from Justice's Powell opinion, his reasoning stood. Further, five of the four Justices agreed the admissions program was unconstitutional; the ultimate legal conclusion was that the Medical School must admit Bakke. The plurality differed in reasoning on other secondary issues but Powell's opinion resulted in the presiding law on this main issue.

Similar issues were the subject of litigation fifteen years later in *Grutter* and *Gratz* which will be discussed after the K-12 cases *Dowell*, *Pitts*, and *Jenkins*.

Board of Education v. Dowell

Background and Statement of Facts

The series of cases in the early 1990s often referred to as the beginning of the Court's lack of support for integration (Orfield, 2001) began with *Board of Education v. Dowell* 498 U.S. 237 (1990). The facts before the Court centered on the issues of court-ordered desegregation and

the granting of unitary status. The facts of the case stipulate that the Board of Education of Oklahoma had originally been under court-ordered desegregation but was granted unitary status in 1977. In 1984 the school board adopted what it deemed a “Student Reassignment Plan” (SRP) under which a number of previously integrated schools would return to one-race status, neighborhood schools due to residential segregation patterns.

Judicial Interpretation of the Fourteenth Amendment

The majority opinion discussed the specifics of the Student Reassignment Plan under which 11 of the district’s 64 elementary schools would be greater than 90% black, 22 would be greater than 90% white and 31 would be racially mixed. The Court acknowledges the series of cases beginning almost 30 years ago when in 1961 black students and their parents sued the Board under the 14th amendment, asserting the Board was in violation of the constitution because of the segregated nature of the District’s schools. The District Court ordered the Board to adopt a plan wherein bussing would be used as method to integrate the district’s schools. After complying with the decision for 5 years, the Board moved to conclude the court-ordered desegregation and the District Court agreed to grant the district unitary status. The Supreme Court quotes the District Court’s reasoning,

the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the plan or any affirmative action by the Board to undermine the unitary system so slowly and painfully accomplished...the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court (p.242).

In 1984 the district demographics had changed so that black children were being bussed for longer amounts of time in order to maintain the unitary system. The Student Reassignment Plan

was in response to this change and the parents of the black students appealed to the Supreme Court to have unitary status revoked and a court-ordered desegregation plan to be reinstated.

The first constitutional issue the Court tackles is the concept of unitary status. The Court points out the term is not found in the constitution but rather is based on protected rights under the fourteenth amendment. The Court summarizes the meaning of the term unitary to describe a school system which has been brought into compliance with the 14th amendment that had previously been in violation of the 14th amendment by maintaining a dual, segregated system. Ultimately the Court ruled the case should be sent back to the District Court to determine whether or not the Board had met all necessary requirements to be granted continued unitary status. In essence, the Supreme Court directed the District Court to decide whether or not unitary status was appropriate when it was granted. If so, the Court gave the District Court authority to evaluate the Student Reassignment Plans only under the 14th amendment, and not the mandates of court-ordered desegregation. Essentially, if a school district is under court-ordered segregation, a plan must be followed under the supervision of a district court. When unitary status is granted, the school is then allowed to pursue integration on its own, bound not by the court-ordered plan but solely by the 14th amendment, as are all school systems in the nation.

Because the Supreme Court remanded the decision to the District Court to decide whether or not unitary status had been properly granted, the Court failed to mandate a more stringent test, one that would require districts to stay under court ordered segregation orders when patterns of residential segregation led to segregation in the school system because bussing would no longer be required. In a sense, the Court was waving its hands at the issue rather than issuing an affirmative decree that the School Board's Student Reassignment Plan was in violation of the 14th amendment and that unitary status should not have been granted.

The dissenting opinion characterizes the issue in the case under a whole different set of considerations. Whereas the majority remanded to the District Court, the dissenting Justices argue the question before the Court is whether or not,

13 years after injunction was imposed, the same School Board should have been allowed to return many of its elementary schools to their former one-race status. The majority today suggested that 13 years of desegregation was enough (p.252).

The dissent points to the de jure segregation implemented by the School Board and the history of racism in Oklahoma City as evidence that if unitary status is granted, the Board would be more likely to implement a return to a dual system in practice. The dissent points to the intention of *Brown* and the Court's history of maintaining school districts must have worked to extinguish all vestiges of school segregation. Because the School Board's Student Reassignment Plan would mean a return to many segregated schools, the dissent argues the majority ignores the intention of *Brown*. The dissent refers to the 'milder standard' (p.261) articulated by the majority because the majority remands to the District Court the issues at hand and reasons the school board is unlikely to return to its former ways. The dissent advocates for the continuance of court-ordered desegregation in the district. Again relying on the intention of *Brown*, the dissent writes,

Consistent with the mandate of *Brown I*, our cases have imposed on school districts an unconditional duty to eliminate any condition that perpetuates the message of racial inferiority inherent in the policy of state-sponsored segregation. The racial identifiability of a district's schools is such a condition. Whether this 'vestige' of state sponsored segregation will persist cannot simply be ignored at the points where a district court is contemplating the dissolution of a desegregation decree. In a district with a history of state-sponsored school segregation, racial separation, in our view, remains inherently unequal' (p.268).

The dissent here, relies more so the spirit of *Brown* and the Court's interpretation of the 14th amendment in the series of cases following *Brown* wherein the Court endorsed bussing and ruled

against freedom of choice plans. The majority, however, fails to issue a mandate enforcing the continued use of bussing in the school district even if failure to bus will result, as discussed above, in racial segregation in the schools.

Freeman v. Pitts

Background and Statement of Facts

A similar early 1990s case was *Freeman v. Pitts* (1992) wherein the Court ruled segregation in the City of Atlanta school district was due mostly to changing residential patterns and not local government action on the part of the school board. The Court ruled, in another step away from its continued support for integration, that because the segregation in the school system was not due to the type of segregation outlawed in *Brown*, the school district was not legally obligated to continue integration efforts. The majority ruled the court system cannot exceed its remedial power by enforcing court ordered desegregation when the segregation is caused by factors that do not constitute a constitutional violation.

Justice Kennedy delivered the opinion of the Court, there were no dissenting opinions. The facts of the case were as follows: DeKalb County School System (DCSS) is located in a major suburban area of Atlanta. At the time, DCSS served 73,000 students and was the 32nd largest school system in the country. As Justice Kennedy writes,

DCSS's initial response to the mandate of *Brown II* was an all-too-familiar one. Interpreting "all deliberate speed" as giving latitude to delay steps to desegregate, DCSS took no positive action toward desegregation until the 1966-1967 school year, when it did nothing more than adopt a freedom of choice transfer plan. Some black students chose to attend former *de jure* white schools, but the plan had no significant effect on the former *de jure* black schools (p.472).

Freedom of choice plans were struck down in *Green* and two months after the Court's opinion was issued, black students and their parents sued DCSS in the District Court. DCSS did begin to work with the Department of Health, Education, and Welfare to implement a plan for desegregation to be implemented in the 1969-1970 school year. The plan, approved by the District Court, included abolishment of the freedom of choice plan and implementation of a neighborhood school plan. Under the plan all former de jure black schools were closed and the students assigned to neighborhood schools. The District Court oversaw implementation of the program between 1969 and 1986 wherein the plaintiffs refrained from intervening in the DCSS plan. No request was made to change student attendance zones or student assignment policies.

DCSS had, since 1969, implemented a student transfer option called the Minority-to-Majority student transfer program, allowing students who were in the majority race in their original school to transfer to a school where they would be in the minority. The District Court approved this policy. In 1986 DCSS filed to dismiss the litigation against it, asserting it had met its duty to eliminate the dual segregations system, and had achieved a unitary school district. The District Court evaluated their motion for dismissal under the criteria set forth in *Green* as well as an additional factor: "the quality of education being offered to the white and black student populations" (p.474). Based on its finding that DCSS was not unitary in every respect, the Court ruled the 'vestiges of the dual system' (p.474) remained in the areas of teacher and principal assignments, resource allocation, and quality of education. DCSS took the case to the Federal Court of Appeals and asserted that changes in the racial composition of the county, not direct discriminatory actions taken by DCSS, resulted in de facto segregation in DCSS. As the Court summarizes,

During the relevant period, the black population in the southern portion of the county experienced tremendous growth, while the white population did not, and the white population in the northern part of the county experienced tremendous growth, while the black population did not. (p.476).

On appeal to the U.S. Court of Appeals for the Eleventh Circuit, the Court of Appeals ruled DCSS had not achieved unitary status and that all the *Green* factors had not yet been met. The Supreme Court granted certiorari and oral arguments began in October, 1991.

Judicial Interpretation of the Fourteenth Amendment

The Court reasoned it is the ‘duty and responsibility’ (p.485) of a school, once segregated by law, to take all steps necessary to eliminate the vestiges of the dual, de jure, system. This is required under the law, according to the Court, because the principal wrong, the ‘injuries and stigma’ (p.485) under the de jure system should no longer be present. Ultimately the Court held the racial imbalance in the student enrollment and in the broader student attendance zones did not equate with noncompliance with desegregation decrees on the part of the school board. The Court held,

Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors....the population changes which occurred in DeKalb County were not caused by the policies of the school district but rather by independent factors. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a de jure violation and the law need not proceed on that premise. As the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system (p.495).

The Court’s holding is important because of the distinction it makes between residential housing segregation and school segregation. As the Court reasons, residential segregation, and thus school segregation in a neighborhood school system, is not subject to constitutional scrutiny.

The second major issue upon which the Court ruled was continued judicial oversight of DCSS. The District had motioned to dismiss litigation based on the argument that the dual system had been dismantled, a unitary system had been achieved, and all vestiges of de jure segregation had been removed. Going back to the language used in *Brown II* the Court reasoned a district showing good faith compliance with a desegregation plan should be considered when releasing a school from judicial control. The Court here reasons DCSS had in fact made a good faith effort to comply,

throughout the period of judicial supervision, [the Court] has been impressed by the successes DCSS has achieved and its dedication to providing a quality of education for all students, and DCSS has travelled the often long road to unitary status almost to its end. With respect to areas where compliance has not been achieved, the Court does not find that DCSS acted in bad faith or engaged in further acts of discrimination since the desegregation plan went into effect. (p.499).

Missouri v. Jenkins

Background and Statement of Facts

Missouri v. Jenkins 515 U.S. 70 (1995) is often pooled with *Dowell* and *Pitts* because it is seen as further evidence the Supreme Court was less willing to take a hard stand promoting integration efforts in schools (Orfield, 2001). The issue here was whether or not it was constitutional to require the State of Missouri to correct de facto segregation by offering remedial “quality education” programs and increased funding to schools. The facts of the case are as follows: In 1977 the Kansas City, Missouri School District and district students filed a complaint against the State of Missouri alleging the state and other school districts surrounding the school were operating a segregated school system. The District Court found the State was operating a segregated school system in violation of the constitution and ordered a remedy that

all vestiges of segregation as well as outlined the funding to implementation of a new unitary system. The total estimated cost of the remedy was estimated to be about 88 million over three years. The burden of paying for the efforts rested about \$68 million with the State and about \$20 million with the School District itself. However, the District Court also found that because of local tax laws, the District would not be able to pay for all of the desegregation efforts. Therefore, the Court ordered the School District to submit to local voters a proposal for an increase in taxes sufficient to pay for the District share of the desegregation remedy. The case was appealed to the Court of Appeals for the Eighth Circuit and while the holding regarding the District's operating of a dual system was reaffirmed, the Court of Appeals disagreed with the District Court finding that the majority of the desegregation cost should be the State's responsibility. The Court of Appeals ordered the costs to be shared equally between the State and the District. The United States Supreme Court granted certiorari and oral arguments began in October 1998.

Judicial Interpretation of Fourteenth Amendment

The major constitutional issue before the Court turned on whether the tax increase imposed on the District Court violated the Tenth Amendment. The Court found the District Court did overstep constitutional limitations on reserved state powers under the Tenth Amendment. While the equal protection clause is never explicitly discussed, the Court does reason previous precedent does not hold schools and states accountable for segregation absent intentional discriminatory action.

Grutter v. Bollinger

Background and Statement of Facts

In 2003 the Court once again considered use of race as a factor in admissions processes at institutions of higher education in *Grutter v. Bollinger* 539 US 306 (2003). The Law School at the University of Michigan implemented an admissions policy wherein each applicant's academic record as well as his or her diverse 'background and experience' was considered in admissions decisions. The Court in *Grutter* articulated that achieving racial diversity in public institutions of higher education was a compelling interest and that the Michigan policy was narrowly tailored to meet this interest. The case was heard along with a companion case, *Gratz v. Bollinger* 529 US 244 (2003) in which the Court struck down a University of Michigan undergraduate admission system it deemed to be a quota system.

The facts of the case in *Grutter* were as follows. The University of Michigan Law School followed an admission policy adhering to the Court's decision as handed down in *Bakke*, fifteen years earlier. By focusing on academic ability along with an applicant's talents, experience, and potential as evidenced through personal information such as personal statement, recommendations, undergraduate GPA, and Law School Admissions Test (LSAT) score. The policy did not define diversity solely in terms of racial or ethnic status but it does state the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students who might not otherwise be represented in the student body.

Grutter was a white law school applicant with a 3.8 GPA, 161 (of 170) LSAT score, and was a resident of Michigan. Grutter was denied admission to the law school and filed suit against the University alleging her denial resulted in a violation of her rights under the fourteenth

amendment's equal protection clause because she was denied admission because the Law School used race as a predominant factor in its admissions policies and because the University had no compelling interest to justify its use of race in its admissions policies.

Judicial Interpretation of the Fourteenth Amendment

The Court's opinion relied heavily on its past reasoning and precedent as set forth in *Bakke*. Justice O'Connor delivered the opinion of the Court in which Justices Stevens, Souter, Ginsburg, Breyer, Scalia, and Thomas joined. As previously discussed, Justice Powell's opinion in *Bakke* represented the ruling of the Court wherein it reaffirmed that obtaining a diverse student body in institutions of higher education was a compelling interest under the strict scrutiny test mandated by the equal protection clause. The Court reasons Justice Powell's decision has been the 'touchstone for constitutional analysis of race conscious admissions policies' (p. 310) and that countless admissions policies across the nation have based their admissions programs on his opinion. The Court in *Grutter* endorsed Powell's view in that it recognized student body diversity as a compelling state interest. Further, the Court deferred to the Law School's educational judgment that diversity is essential to its own educational missions. The policy requires the admissions officials 'look beyond' (p.311) test scores and consider achievement of its goal of diversity to enrich the law school class as a whole. The Court also points out the admissions policy does not restrict the types of diversity eligible to have weight in the admissions process even though it does make specific reference to the inclusion of African-Americans, Hispanics, and Native Americans. The Court relies on testimony offered by the Director of Admissions at the Law school wherein he affirms he did not direct his staff to admit a particular percentage or number of minority students but rather to consider race along with other factors. The Director of Admissions also testified he monitored daily the number of

admitted applicants according to race but he continued to stress the admissions team did not seek to admit any particular number or percentage of minority students. Rather, the goal was to achieve a meaningful number of minority students which to the admissions team means the number of underrepresented minority students would encourage such students to participate in the classroom and not feel isolated.

The Court goes on to provide a brief history of its use of the strict scrutiny test to evaluate racial classifications as directed by the fourteenth amendment. The Court explicitly writes that “context matters when reviewing race-based governmental action under the Equal Protection Clause” (p.311) because

Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context. (p.311)

Here the Court indicates its clear and explicit use of constructivist interpretation of the equal protection clause. In its application of constructivist judicial interpretation, the Court upholds in the use of race in admissions policies in order to obtain the educational benefits resulting from a diverse student body in institutions of higher education. Yet, the Court acknowledges it must still consider whether or not the admissions plan is narrowly tailored to meet the compelling interest.

The Court again relies on the precedent set forth in *Bakke* and reasons a race-conscious admissions policy cannot use a quota system. Instead, a University must consider race or ethnicity as a plus factor. Race must be used in a ‘flexible, nonmechanical’ (p.310) way. The Court ultimately concludes the Law School admissions policy does not operate as a quota system because it does not reserve a certain amount of class seats to minority students. The Court also reasons the admissions policy of achieving a ‘meaningful’ number of underrepresented minority

students is not a quota because it does not articulate a certain and rigid number of students, but rather considers the overall composition of the class. However, the Court points out, the school must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes the applicant's race or ethnicity the defining feature in the admissions decision.

Because the Law School,

engages in a higher individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single soft variable (p.311)

Additionally, there is no predetermined amount of a 'bonus' number of points awarded based on race or ethnicity (see discussion below of *Gratz*). The Court also points to the fact that the Law School admissions plan also gives substantial weight to diversity factors besides race to show the plan does not equate to a quota system. The Court points out the Law School frequently accepted white students with grades and test scores lower than underrepresented minority applicants who are rejected in an effort to increase diversity of background and experience, and not necessarily of race.

The narrowly tailored requirement of the strict scrutiny test also requires consideration of other race-neutral means to achieve the recognized compelling interest. The Court points out that narrow tailoring does not require an exhaustive consideration of every single race-neutral alternative but rather a serious, good faith consideration of workable race-neutral alternatives. The Court concluded the Law School did consider other alternatives such as the use of a lottery system or decreasing the importance of LSAT and GPA scores for all applicants. The Court agreed with the Law School that these alternatives would require a 'dramatic sacrifice of diversity, the academic quality of admitted students, or both' (p.310). The lottery system, the

Court reasons, would not allow the admissions team to consider diversity beyond race in admissions decisions. Lowering of admissions standards would ‘sacrifice a vital component of its educational missions’ (p.312). The Court ultimately concludes it is satisfied that the Law School had adequately considered race-neutral alternatives. Important to note is the Court’s recognition of the importance of plans that are not infinite in duration but rather are implemented for a limited time. There must be a logical end point to racial classifications. The Court reasons this durational requirement can be met by ‘sunset’ provisions in admissions policies and periodic reviews to determine whether racial preferences are still necessary. The Law School asserted it would terminate its race-conscious admissions program as soon as was ‘practicable’ and with this, has satisfied the equal protection clause’s durational requirement. The Court reasoned that it was entirely reasonable to assume that the use of racial preferences in admissions policies would no longer be necessary 25 years from its decisions in the case.

Gratz v. Bollinger

Background and Statement of Facts

The companion case *Gratz v. Bollinger*, 539 U.S. 244 (2003) was decided also in the 2003 term and further addressed affirmative action in higher education. The plaintiffs in the case, Gratz and Hamacher, both applied for admission to the University of Michigan’s College of Literature, Science, and the Arts. Both were residents of Michigan and were white applicants to the College in the fall of 1995. Both applicants were denied admission and were told that although they were well-qualified, they were either less competitive than other applicants or not at the level needed for admission. The Office of Undergraduate Admissions office oversaw the admissions process and issues admissions guidelines each year by which admissions decisions

are made. The Admissions office evaluated several factors throughout the admissions process including high school GPA, SAT scores, geography, alumni relationships, and high school quality. During the period wherein the plaintiffs sought admission, African-Americans, Hispanics, and Native Americans were considered unrepresented minorities and the University admitted during litigation that virtually every qualified applicant from these groups were admitted. The admissions process also included a point system wherein each application could score a maximum of 150 points. 20 points were awarded to an applicant based on his or her membership in one of the underrepresented racial or ethnic minority group. Guidelines also provided that qualified applicants from unrepresented groups be admitted as soon as possible due to the University's belief such applicants may have been more likely to enroll if notified of their admission promptly. Because the University's admissions process was rolling, a certain amount of 'protected seats' were reserved for applicants of specific groups who might have applied later in the year. These protected seats included athlete applicants, foreign students, ROTC candidates, and other underrepresented minorities group. If these spaces were not filled toward the end of the admissions season, seats were offered to qualified applicants remaining in the applicant pool or those applicants on the waitlist.

The plaintiffs in the case contended the admissions process and its use of race as a factor in admissions decisions violated the equal protection clause in part, due to the precedent set forth in *Bakke*. However, the University also relied on *Bakke* in claiming using race as a factor in admissions decisions serves the compelling government interest of remedying past and current discrimination against underrepresented minority applicants. The University also claimed the admissions process was narrowly tailored to serve the interest.

Judicial Interpretation of the Fourteenth Amendment (*Grutter* and *Gratz*)

In considering the arguments in the case, the Court examined the admissions policy in light of *Bakke* and relied heavily on the holding in the decision. The Court references Powell's opinion wherein he reasons using race or ethnic background as a plus factor in an admissions policy would be legally permissible. The Court further reasoned,

Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity.

Further, the Court relied on *Bakke* to point out each applicant will be viewed as an individual, and his or her race being a factor as part of the entire application. The Court ultimately concluded the admissions policy at the University of Michigan did not provide the individual consideration Powell promoted in *Bakke* because the admissions guidelines automatically awarded 20 points to every applicant from an underrepresented minority group. The University admitted the automatic award of 20 points to underrepresented minority applicants was outcome determinative; meaning in virtually all the cases of minority applicants, the award of the 20 points was decisive in the admissions decision. Additionally, the Court found problematic the automatic award of the 20 points rather than an individualized consideration of each underrepresented minority application. Lastly, the University argued it was impractical for them to employ admissions guidelines as mandated in both *Bakke* and *Grutter* because of the volume of applicants the University received each year. The Court struck down this reasoning arguing this was not a legally permissible way to avoid the 'narrowly tailored' requirement under the strict scrutiny test. The Court concluded,

that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. *Gratz v. Bollinger*, 539 U.S. 244 (2003)

Parents in Community Schools v. Seattle School District No. 1

Background and Statement of Facts

Finally, the most recent case involving K-12 desegregation heard by the Supreme Court is *Parents in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). This decision was viewed by many as yet another sign the Supreme Court has, and will continue to move away from explicit support of desegregation in public schools. Previously discussed in Chapter I were the facts of the case. Here, the Court's reasoning specifically concerning interpretation of the fourteenth amendment will be examined.

The Court's 187 page decision mentions the equal protection clause numerous times and considers previous precedent, the words of the fourteenth amendment, and ultimately, what the plurality concluded was the intent of the framers of the amendment in reaching its ultimate conclusion that the Seattle and Louisville plans did violate the equal protection clause because each failed the strict scrutiny test. Historically, as previously discussed, the Court has recognized just two compelling governmental interests when evaluating the use of racial classifications in educational contexts. Because this case is the most recent of the cases and a major focus of this study, this presentation of the case will be in greater detail and include discussion of the concurring and dissenting opinions.

Chief Justice Roberts along with Justices Thomas, Scalia, and Alito wrote the plurality decision. Plurality decisions are issued when no majority opinion (five or more of nine Justices

agreeing) can be reached. In this specific case, Justice Kennedy tipped the scales in favor of the plaintiffs in his concurrence. In cases where no majority is reached a plurality decision is issued and a concurring Justice agrees in part, the parts of disagreement (what are called the ‘narrower’ holdings) are made law. In this case, Kennedy agreed with the plurality in most of the issues- therefore making most of his plurality decision the actual law, but did disagree on the issue of what constitutes a compelling state interest. The dissent written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg (additional dissent written by Stevens) vehemently objects to the decision. The four dissenting justices accuse the plurality of disregarding precedent and abandoning the promises of *Brown*.

Judicial Interpretation of the Fourteenth Amendment

In the plurality decision, Justices Roberts, Thomas, Scalia, and Alito found the student assignment policies of the Seattle School District and Jefferson County Schools to be unconstitutional. After recounting the specifics of the assignment policies in the two cases, the Justices acknowledge that strict scrutiny must be applied, as is the case with all race-based classifications. As stated in the plurality opinion, the Justices believed that the student-assignment policies were not aimed at achieving racial diversity, but rather was a means of racially balancing the districts. Neither racial balancing in general nor racial diversity at the K-12 level has been recognized as a compelling interest by the Court. Thus racial balancing in high schools, as interpreted by the plurality, is not a recognized compelling state interest. According to Justice Roberts, writing for the plurality,

...accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our

repeated recognition that ‘at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.’ *Parents in Community Schools vs. Seattle District No. 1* and *Meredith v. Jefferson County* (551 U.S. 701 [2007])

Further, Roberts also reasoned that the schools had not considered other means of achieving compelling state interests (remedying past discrimination, for example) and that because of this the use of race as a factor to assign students is not narrowly tailored to the end purpose. Because of these factors, the student assignment policies in both districts failed the strict scrutiny analysis.

The plurality also justifies its dismissal of racial diversity in schools as a compelling state interest by referring to *Grutter v. Bollinger*. *Grutter* upheld an affirmative action law school policy because achieving a diverse student body was a compelling interest. The Court further held that the policy was narrowly tailored to the interest and thus, did pass the strict scrutiny test. The plurality in *Parents* argues the precedent set forth in *Grutter* does not apply because of the distinction between higher education and K-12 education and that racial diversity at the high school level has never been recognized as a compelling interest. Seattle contended the interests being served by their student assignment policies was first to decrease racial concentration in its schools, and second to assure access to the best schools for its nonwhite students, despite racially segregated residential patterns. Jefferson County contended that it had a compelling interest in providing an integrated learning environment for its students.

The foundational argument Roberts puts forward is based first on the idea that the holding in *Brown* forbids the use of the Seattle and Louisville plans and second, that the Court

must interpret the fourteenth amendment as color-blind. He asks, ‘What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?’ (p.40) and compares this viewpoint to the one put forward by the plaintiffs in the *Brown* case: that the state has no authority under the equal protection clause to use race as a factor in affording equal educational opportunity to its citizens (p.40).

In addition to the plurality, Justice Thomas wrote a concurring opinion in which racial diversity does in fact have a positive effect on student achievement and educational outcomes. Thomas cites several studies in which results show black students can succeed in homogenous learning environments. Thomas writes that,

The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites certain social science research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits; much less that integration is necessary to black achievement. *Parents in Community Schools vs. Seattle District No. 1* and *Meredith v. Jefferson County* (551 U.S. 701 [2007])

Further, not only does Thomas disagree with the dissenting opinion that the plurality is abandoning the promise *Brown* made to the nation that the Court would support integrated schools, he goes a step further in arguing that it is *Brown* itself that compels the Court to strike down the Seattle and Jefferson County policies. He writes, “[w]hat was wrong in 1954 cannot be right today... In place of the color-blind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart.” *Ibid.*

Thomas zealously points out what he perceives to be the dissenting Justices’ inappropriate use of judicial power:

Consequently, regardless of the perceived negative effects of racial imbalance, will not defer to legislative majorities where the Constitution forbids it. It should escape no one that behind Justice Breyer's veil of judicial modesty hides an inflated role for the Federal Judiciary. The dissent's approach confers on judges the power to say what sorts of discrimination are benign and which are invidious. Having made that determination (based on no objective measure that I can detect), a judge following the dissent's approach will set the level of scrutiny to achieve the desired result. Only then must the judge defer to a democratic majority. In my view, to defer to one's preferred result is not to defer at all. *Ibid.*

Ultimately, Thomas concurs with Roberts, disagreeing in no major way with the views of the plurality opinion and offers further rationale to support the holding.

Justice Kennedy, however, does disagree with the plurality opinion in important ways in his own concurring opinion. Kennedy argues that achieving racial diversity in public schools is a compelling interest not recognized by the plurality. He writes,

The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race...A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. *Ibid.*

Yet, he does argue the policies in both district plans are not narrowly tailored to this interest. He believes the districts failed in using race as a deciding factor to achieve diversity when other factors such as a particular student's special talents or interests. There are, he argues, other ways of achieving the compelling interest of diversity. It is here where the assignment policies fail the strict scrutiny test.

It is important that a major point of Kennedy's division from the plurality is based on the precedent set forth in *Grutter*. He disagrees that the compelling interest of achieving racial diversity cannot be applied to the facets in *Parents*. Avoiding racial isolation, he argues, can

indeed be a compelling interest even in K-12 education. However, Kennedy believes the assignment policies fail because they are not narrowly tailored, as were the policies in *Grutter*. He writes, "In the present cases, by contrast, race is not considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas and viewpoints;' race, for some students, is determinative standing alone." *Ibid*.

Justice Breyer, writing for the dissent, zealously disagrees with the plurality. His opening words set the tone for the entire dissent, arguing the plurality has made several mistakes:

It [the plurality] misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause. *Ibid*.

Breyer's belief that the plurality has ignored precedent rests in his comparison of the facts of the *Parents case* to other cases with similar facts such as. He then goes on to discuss the resegregation of schools since the 1980s and provides statistical support for his claim that school districts are within their rights to extend their integration efforts. Breyer suggests that Seattle and Louisville were simply setting forth integration plans in an effort to combat the resegregation of their schools.

A major part of Breyer's argument rests on the premise that the segregation occurring in the two school districts was similar to statistics seen pre-*Brown* and that therefore the assignment plans are appropriate and constitutional. Again using statistical analysis, he compares racial composition of both school districts from the *Brown* era to the segregation in the districts today. In 1954, the Seattle school district was comprised of only 3% minority students. However, the

minority elementary students attended schools that were 60%-80% black. Further, the central city high school was more than 80% black. Clearly, the schools did not reflect the racial composition of the city but instead showed a highly segregated school district. Breyer points out that in 1996, when the school began using the racial tie-breaker, the Central High School would have been 80% minority had the tie-breaker not been used- similar to the pre-*Brown* numbers.

The situation was very similar in the Louisville district. In 1954 nineteen of the district's forty-nine elementary schools were between 80% and 100% black. In the 1995-1996 school years, the year the school district began the new assignment plan, 30% of the student population was minority. The new assignment plan was designed to insure no school was more than 50% and no less than 15% minority.

Justice Breyer goes onto attack the major premise put forth by the plurality that the school plans are not narrowly tailored to a compelling government interest and therefore do not pass the strict scrutiny test. Breyer points out the Court in *Grutter* approved racial balancing policies that were far less narrowly tailored to the goal of racial diversity than the plans in Seattle and Louisville. He writes,

Here, race becomes a factor only in a fraction of students' non-merit-based assignments- not in large numbers of students' merit-based application. Moreover, the effect of applying race-conscious criteria here affects potentially disadvantaged students *less severely*, not more severe than the criteria at issue in *Grutter*. Disappointed students are not rejected from a State's flagship graduate program; they simply attend a different one of the district's many public schools, which in aspiration and in fact are substantially equal. *Ibid*.

Breyer goes onto argue that plans that are less explicitly race-based will not achieve racial diversity.

B. Analysis of Judicial Interpretation of the Fourteenth Amendment

Beginning with *Plessy* the Court initially, as early as the late 1800s, approved the separate but equal doctrine. The Court in *Plessy* employs a constructivist interpretation of the fourteenth amendment. The use of contextual analysis is quite clear in the Court's consideration of 'established usages, customs, and traditions of the people' (p. 551). Given the Court considers the intent of the amendment as written, clearly it is not relying solely on the text of the equal protection clause. When the Court reasons the clause was meant to enforce equality and not necessarily distinctions based on color it considers the overall purpose of the law, a major factor in constructivist interpretation. *Plessy*, although employing a constructivist interpretation of the fourteenth amendment, resulted in justification of segregated public facilities, including schools, across the nation and would not be reversed until *Brown*. Important is the Court's employment of a supposed intent of the fourteenth amendment, one it would go onto challenge in *Brown*. This case is especially important not from a school enrollment and racial make-up perspective but instead from a historical legal perspective as it marked the basis on which the equal protection clause was to justify separate but equal as policy and law in the United States for decades to come.

Again, as in *Plessy* the Court in *Cumming* employs a constructivist interpretation of the equal protection clause to justify segregated, and in this case, unequal educational facilities. The basic holding that segregation is not a violation of equal protection follows the general reasoning of *Plessy* but applies the interpretation to schooling. While *Cumming* signaled the Court supported racially segregated schooling, *Plessy* was the backbone on which the holding was justified. While there were issues of fair taxation, the basic issues surround the constitutionality

of implementing a dual, racially-segregated system was the official beginning of court-sanctioned segregated schooling.

Interestingly, the Court does include discussion of the reasoning of the school board resulting in the segregated schooling. The Court does consider discriminatory intent and may hint that discriminatory intent would violate the equal protection clause. However, the Court does not explicitly state this was used as part of its reasoning and interpretation of the fourteenth amendment but rather implies discriminatory intent may have made the school board's actions unconstitutional. Instead, however, the Court relies on an outcome based interpretation. In agreeing with the board's decisions that there would be no high school for black children, yet one for whites based on financial restraints the Court interprets the equal protection clause to allow for unequal, segregated education (in this case at the high school level) because of what the outcome would have been if the board had opted to run a black high school: namely the closing of the black elementary school. When the Court employs this method of interpretation, it is clearly applying a constructivist interpretation of the equal protection clause, one that would justify segregated schooling for over half a century until *Brown*. Similarly, In *Gong Lum* the Court again follows the precedent and methods of interpretation set forth in *Plessy* and *Cumming* by relying on reasoning that segregated school does not violate the equal protection clause. Here, the Court simply makes clear the inclusion of 'yellow and brown' races in segregated school systems.

The series of four higher education cases, beginning with *Missouri* are important milestones in the pathway the Court paved to apply the equal protection clause to school segregation in the way it was eventually interpreted and applied in *Brown*. The case is of further importance because of the discussion surrounding the right to equal education. In this regard the

Court departs from its original conclusion in *Cumming* (that a school board failing to run a black high school violated the fourteenth amendment) although the circumstance is different here within the context of higher education rather than K-12 education. While it is important to note Court interpretation applied here, in a case when the lack of a separate law school provided evidence enough to prove unequal protection under the laws, it is unclear as to whether the Court would have considered unequal education facilities, should that have existed in Missouri at that time, also a violation of Gaines' equal protection rights.

The Court here departs from a clear constructivist or originalist interpretation because it does not explicitly and clearly consider either only the words of the amendment or the intent of those who wrote neither the amendment nor the social context of the situation it. However, given the Court's reasoning that no black law school constitutes a violation of Gaines' personal rights as guaranteed under the equal protection clause would be more in line with a constructivist interpretation because the Court considers the educational context within which the state was operating its law school system.

Sipuel is similar to *Missouri* and once again reaffirmed the Court's dedication to equal education opportunity at the higher education level for students of all races. *Sipuel* builds on the holding in *Missouri* by reasoning that a segregated law school is a violation of the equal protection clause. In contrast, *Missouri* held importantly, yet simply, that the inability for black students to receive a legal education within a State was a violation of the clause- there was no discussion, as mentioned, of segregated law schools. This case foreshadows the reasoning the Court will use in *Brown* by applying its holding to K-12 public schools. In building upon the precedent set forth in *Missouri*, the Court, here, considers the social context of the law school

and interprets the fourteenth amendment based on this social context. The Court continues to apply a constructivist interpretation of the fourteenth amendment.

However, *Sweatt* is to be importantly distinguished from *Missouri* (1938) because, as previously discussed, the Court in *Missouri* could rule simply on the issue of whether or not admission to a white law school was proper when no other law school for African-Americans existed. Further, the Court builds on its holding in *Sipuel* to take an explicit stand on segregated facilities. Neither in *Missouri* or *Sipuel* did the Court decide on an established dual system. Here, however, there existed a dual system. This dual system was not found to provide equal education at the minority law school as it did the white law school, and thus violated the equal protection clause. As in *Sipuel*, further foreshadowing of the *Brown* decision can be seen here in this case (see findings: *Brown v. Board of Education*). The Court again relies on an outcome-based contextual analysis of the fourteenth amendment and continues its application of constructivist interpretation.

McLaurin is the final of the High Court cases pre-*Brown* dealing with issues in higher education. The Court reaches an apex in its application of the fourteenth amendment. Starting in *Missouri* through to *Sweatt* the Court gradually, in small steps, sets precedent to make the ultimate conclusion: even when integration has occurred, segregation cannot occur within an institution of higher education. Such segregation, the Court, concluded is a violation of the fourteenth amendment. The Court considers the context in which McLaurin was receiving his education- mainly, the differential treatment. Without question these series of higher education cases considers the current fundamental social context in which segregation was occurring. This consideration, not consideration of the original intent of the equal protection clause set the stage for the decision in *Brown*.

Important to note was the attention given to the intent of the 14th amendment. Ultimately the Court concluded the history of the amendment was inconclusive as to its impact on the *Brown* case. Therefore, it reasons that a strict originalist interpretation of the fourteenth amendment is impossible to apply to the facts of the case.

The series of higher education cases paved the way for *Brown* to be decided by the Court being the same principles decided in the higher education cases were transferred to *Brown*. The obvious importance and impact of *Brown* cannot be overstated. With regard to judicial interpretation specifically this case is a milestone because the equal protection clause, once used to justify racially segregated schooling in *Cumming* was interpreted here to hold such schooling unconstitutional. The gradual progression from cases such as *Gong Lum* and *Cumming* to the higher education cases pre-*Brown* show a shift in judicial interpretation.

Importantly, the Court goes beyond the ‘tangible’ factors such as school facilities and teacher quality that may be considered equal to the actual educational opportunities experienced by students. The Court argues children of minority groups are deprived of equal educational opportunities because of the detrimental effect on the ‘colored’ children. Clearly, the Court goes beyond looking at the actual words on the equal protection clause, but to its meaning, and ultimately considers the social context of the segregation laws. The Court in *Brown* relied heavily on a direct constructivist interpretation of the 14th amendment. So much is evident in their reliance on the ‘affect’ of segregation on minority students and both the specific discussion of the fourteenth amendment as well as the reliance on the social context of de jure school segregation.

Although the Court did not explicitly discuss the fourteenth amendment or equal protection clause in *Brown II*, it is clear the Court relies on its initial application of both from

Brown I. This is the first case in the desegregation litigation to employ an indirect method of interpretation. Given the brevity of the decision and the lack of explanation from the Court, it can be inferred the Court was clearly and unanimously aligned in its decision, based more so on constructivist principles guiding their interpretation of the fourteenth amendment, rather than a lengthy consideration of whether or not the equal protection clause justified the decisions. This marks the beginning of a trend in several subsequent cases wherein indirect interpretation is employed as a method of interpretation (*Green, Alexander, Montgomery School Board*) and is arguably a sign the Court was becoming more comfortable in its application of the clause to the desegregation cases. The Court was confident that the equal protection clause called for the end of de jure segregation in schools and thus continued application of the fourteenth amendment to education cases.

Next in *Cooper* the Court took an important stance on resistance on the part of school districts to intentionally delay integration. The Court does consider the intent of the amendment but does not mention the original intent of the framers. Rather, the Court considers the fourteenth amendment's underlining theme of social justice, citing a constitutional 'ideal' (p.20) and an 'indispensible' notion of justice. Further, this case employs a direct interpretation of the equal protection clause and in doing so addresses the massive resistance problem occurring in many schools. This is an important milestone in displaying how far the Court was willing to go to defend desegregation and reaffirm its power as a judicial body given the flagrant resistance to its prior decisions. This case solidified the Court's willingness to exert its power. The Court took *Marbury* one step further by not only asserting its judicial authority as the High Court of the nation but also by enabling them to exceed any previous limits on its enforcement authority. This

was, most likely, not the original intent of the equal protection clause but the Court used it as means to reach the holding in this case (Fenton, 769).

Griffin is a classic example of how the Court continued to consider the current social context of education for black students. Because the Court reasons the refusal of the County to provide an education is a violation of the equal protection rights of the black students the Court applies a constructivist interpretation. Further, the Court looks to the intent of the County- in this case, an action with discriminatory intent. The Court discusses the fourteenth amendment and ultimately articulates a requirement that unequal treatment be present rather than simply differential treatment.

Green was an important case because the Court tackles the issue of the popular 'freedom of choice plans' and is a continuation of the Court's indirect interpretation begun in *Brown II*. Important to note is that the language of the 14th amendment, further, even the 14th amendment itself is not mentioned in the *Green* decision. This may be further evidence the Court was growing comfortable with invoking the equal protection clause without lengthy discussion of the words, intent, or spirit of the clause or fourteenth amendment. This case begins a series of three cases where indirect interpretation is employed. Yet, it is undeniable that the amendment's influence is at the heart of the decision. The Court points to the spirit of the two previous *Brown* decisions and the insistence that a segregated system by law or in practice is unconstitutional. Therefore, the *Green* decision also relies on a constructivist interpretation of the 14th amendment although the words of the amendment were not debated or included in the opinion. Because the Court considers the end outcome of the freedom of choice plans, there is clearly a constructivist interpretation.

The brevity of the decision in *Alexander* signals the Court's unanimous conclusion that the equal protection clause placed the burden of proof with the school board. Further, the Court took further the 'all deliberate speed' directive from *Brown II* by requiring schools to dismantle dual systems 'at once' (p.1218). The Court relies on indirect interpretation because neither the equal protection clause nor fourteenth amendment is discussed explicitly. The Court, as illustrated here, was becoming increasingly confident and comfortable in employing the equal protection clause without lengthy discussion or reasoning. In this case the Court provided no reasoning but rather simply held desegregation with 'all deliberate speed' to be unconstitutional.

With *Montgomery* the Court enters a new area of desegregation within schools beyond student enrollment. Still based on the foundation laid out in the previous cases, the Court reaffirms its dedication to desegregation, acknowledging faculty desegregation is an important part of the social context of integration. The Court employs an indirect constructivist method of interpretation of the fourteenth amendment.

Swann was undoubtedly a landmark case among those included in the series of desegregation Supreme Court litigation. The fourteenth amendment served as a backbone for this case as evident in Justice Burger's reference to the equal protection clause and the reassertion that segregation denies black student equal protection of the laws. The Court notes the complexity of the issue and the vast number of previously unchartered legal questions school desegregation and its complications had created since *Brown*. Although *Swann* is often referenced in regard to its approval of bussing as means to desegregate schools, it was also the beginnings of legal exploration of the term 'racial quotas'. This is important considering subsequent discussion of quotas in the higher education cases and ultimately in *Parents* as well.

This was also the first time transfer policies became subject to Supreme Court judicial evaluation.

While the case was a landmark case in that it shows the Court's willingness to support bussing, it can be argued that *Swann* marks the beginning of a move away from holding schools 100% accountable for desegregation. The Court acknowledges that schools cannot be held responsible for implementing policies that result in student enrollment racial ratios that are equal to the district as a whole. While the Court acknowledges schools are certainly within their constitutional rights to implement such policies, they are not bound, absent a constitutional violation to do so.

The Court in *Keyes* employs an indirect constructivist method of interpretation of the equal protection clause and fourteenth amendment. The Court continues to justify its holding based on the foundational conclusion that de jure segregation violates the equal protection of black students without including a discussion or direct explanation of how the clause justified its holding. The Court leaves with schools the responsibility of burden of proof (as in *Alexander*). Most importantly, the Court expands the definition of de jure segregation to include not only segregation by law but also that by discriminatory action on the part of school boards. By expanding this definition, the Court made it easier for challenges to segregative practices occurring not by law, but through other less obvious yet still discriminatory and direct acts of segregation. The Court makes an important distinction between de jure and de facto segregation in that de jure indicates intent to segregate. This new interpretation of de jure segregation and the Court's ruling that such segregation violates the fourteenth amendment opened the door for the

Court's ruling to affect schools who were employing intentional discriminatory methods but did not employ de jure segregation as it had been previously defined by the Court .

Milliken is a landmark case in the series of desegregation cases because it served as clear indication of the Court's unwillingness to endorse intra-district desegregation remedies. As previously discussed, many believe this case indicates the Court's intention to return power to the States and individual school districts even though segregation still existed (Orfield & Eaton, 1996). Further, this case signaled the Court's unwillingness to extend its definition of de jure segregation as newly defined in *Keyes* to situations in which residential segregation inevitably created school segregation. In doing so the Court indicated its intent to not address issues of residential segregation within the school segregation issue. While the Court did not directly interpret the equal protection clause but rather relied on indirect interpretation, the fourteenth amendment was clearly the foundation for the Court's constructivist interpretation. The Court ultimately found school districts that have not been found to be acting with discriminatory intent outside of the city school district cannot bear the burden of desegregation remedies. Important to note is that had the Court ruled otherwise in *Milliken*, it would have established a precedent allowing cross-district desegregation remedies such as inter district bussing. This in turn would have had a profound effect on how city schools look today. It is now apparent city schools experience severe racial segregation (Orfield, 2001). If *Milliken* has been decided in the reverse, the nation's city schools could have experienced a very different student enrollment. Of course it is also possible the white flight resulting from the *Milliken* decision could have spread beyond suburbs thus changing the way residential segregation looks today as well. Whatever the possible repercussions of a reverse decision would and could have been, *Milliken* is undoubtedly one of the major turning points for the Court's interpretation of the fourteenth amendment. The Court's

indirect constructivist interpretation relied on the spirit of *Brown* and also considered the current state of the Detroit school system. The Court also affirmed its support of district-level control of desegregation, not state-wide or regional wide control of desegregation efforts.

In *Pasadena* the Court does not go into a lengthy and in depth discussion on its application of the fourteenth amendment, but it does directly interpret the amendment and considers the social context of the residential segregation within the school district. The Court continues its line of reasoning from *Swann* and can be considered a foreshadowing of the cases wherein the Court grants unitary status to schools that have made a good faith effort to comply with desegregation because it holds districts are not constitutionally required to make year-by-year adjustments to account for the changing racial composition of student bodies once a duty to desegregate has been met.

Bakke's importance among the series of these desegregation cases is tremendous. Although the case centers on higher education this case greatly impacts K-12 desegregation issues. First, the Court first applied the use of the strict scrutiny test to education issues. Second, the compelling interest of diversity in higher education was identified. Being Justice Kennedy in *Parents* acknowledges this compelling interest may be applied to K-12 education (even though the Seattle and Louisville plans were not narrowly tailored enough to pass the strict scrutiny test even if such an interest would be recognized). Third, the Court employs, for the first time, an originalist method of interpretation of the Constitution.

The use of strict scrutiny in school desegregation cases began with *Bakke* because the use of racial classification is a suspect class. This case set the foundation for racial classifications, even if their intent was to remediate past discrimination. While racial diversity in higher education is a compelling interest, racial balancing is identified as not so. This will become

important as the Court in *Parents* relies on this distinction. The originalist method of interpretation directly relies on the ‘color-blind’ constitution premise. The ‘color-blind’ constitution refers to, as discussed in Chapter II, the notion and method of interpretation promoting an originalist view of the fourteenth amendment: that the words of the equal protection clause should be taken literally and with regard to the intent of the writers of the amendment.

The early 1990s cases *Dowell*, *Freeman*, and *Jenkins* are grouped together not only chronologically but also because they signify a series of cases signifying the Court’s increasing reluctance to endorse desegregation in the wake of residential segregation, its willingness to grant unitary status even when desegregation has not been fully achieved, and its lack of support for holding states accountable through forcing increased funding in an effort to achieve desegregation. While the Court had stayed silent on the issue of K-12 school desegregation through the 1980s, it is clear the 1990s serve as an indication of a shift in judicial interpretation of the equal protection clause that started as early as 1974 in *Milliken*. The Court, in deciding both *Dowell* and *Freeman* employ a direct constructivist interpretation of the fourteenth amendment and equal protection clause. In *Dowell* the Court expands their previous use and interpretation of the fourteenth amendment to justify and define the term ‘unitary’ status based, in part, on the social context of residential segregation. Similarly, the Court uses the fourteenth amendment to justify its holding in *Freeman* by arguing the equal protection clause does not hold schools accountable for segregation resulting from demographic change rather than from discriminatory action on the part of the school board. In both these cases the line of reasoning from *Milliken* is repeated. The Court in these two cases refrained from interpreting the equal protection clause in a way that expands the definition of de jure segregation as it did in *Keyes*,

thus making it extremely difficult for constitutional challenges to de facto segregation caused by residential segregation patterns to succeed. While the Court in *Jenkins* does directly interpret the fourteenth amendment, it continues the use of constructivist interpretation and its willingness to conclude certain instances of de facto segregation are not constitutional violations nor are worthy of remedial action. In this case, remedial actions including supplying more funding and resources to schools experiencing de facto segregation was not mandatory under the fourteenth amendment.

The Court did not address K-12 segregation again until over a decade later in *Parents* but did face affirmative action in higher education in the early 2000s in two companion cases, *Grutter* and *Gratz*. *Grutter* reaffirms the Court's recognition of diversity in higher education as a compelling interest under the equal protection clause. The Court's interpretation of the fourteenth amendment is clearly direct constructivist because, as it reasons, "context matters" when evaluating a governmental action under the equal protection clause. The Court also foreshadows its future consideration of less-restrictive race-neutral means to achieve the compelling interest as part of the narrowly tailored prong of the strict scrutiny test. In *Parents* the Court stressed one of the reasons the assignment plans did not pass the scrutiny test was because it did not feel the Districts considered an adequate number of other race-neutral alternatives. Similarly in *Gratz*, the Court stresses the narrowly tailored requirement of the strict scrutiny test. The point system used in *Gratz* did not meet the requirement and was not considered the least restrictive means to achieve the compelling governmental interest of diversity in higher education. Because the Court explicitly considers the fourteenth amendment as well as the context of the point system within higher education the Court employs a direct constructivist interpretation of the equal protection clause.

Finally, the Court's decision in *Parents* represents a return to the originalist interpretation the Court used in *Bakke*. Justice Roberts, writing for the plurality does not consider a broad social context, and in fact, explicitly dismisses such consideration. He writes, allowing racial balancing as a compelling end in itself would 'effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decision-making such irrelevance as a human being's race will never be achieved' (p.718).

IV. Data: General Desegregation Statistics

The second research question addressed in this study analyzes the ways in which judicial interpretation actually impacted racial makeup in the nation's public schools from the 1954 *Brown* decision to the 2007 *Parents* decision. Data on racial make-up of schools was obtained through several secondary sources. While it would have been possible to use raw data on school enrollment statistics available from several databases such as the Office of Civil Rights, a statistical analysis would have been cumbersome and time consuming considering analysis can be found in secondary sources.

An interesting first finding as I searched for studies offering a wide-spread longitudinal analysis of school segregation on a national-level was that such a comprehensive study or studies does not exist. While there are many studies focusing on a specific topic within school segregation (for example, segregation in urban schools from 2000-2006) there are no major general studies on school segregation at the national level as I had hoped. As Clotfelter (2004) acknowledges,

It will quickly become clear that nothing like a complete accounting [of racial shifts over time] is possible, owing to a lack of enrollment data covering all schools over the entire period. The best that can be done is to describe the trends and patterns using available data (p. 44).

Therefore, while I am unable to draw a year-by-year link between judicial interpretation and school segregation from 1954-2010, I am able to make general conclusions on how the Court's interpretation did affect school enrollment. This general analysis is crucial in understanding overall trends in school segregation and how they are linked to the Court's application of the equal protection clause to the school segregation cases, the major research question of this study.

An important prelude to a presentation of segregation and school enrollment data is a discussion of the ways in which segregation is typically measured. Two common ways of measuring segregation have emerged: the percentage of students in racially isolated schools and the amount of interracial exposure students experience (Massey & Denton, 1988). The former describes the percent of minority students in schools where 90% or more students are minority. The latter measure describes the percent of white students in the school that a 'typical' student of another race attends. For example, across the nation in 2005-2006, African-American student exposure to white students was 30% (Orfield & Lee, 2004, p.24). This means the typical African-American student attended a school with 30% white students. The exposure index is a weighted average of the percentage of other race students. It can also describe the reverse situation-the percentage of students of another race that white students are exposed to (Frankenberg & Le, 2008)

Prior to *Brown* the general absence of school enrollment data results in the inability to make clear conclusions about segregation statistics pre-1950s (Clotfelter, 2004, p.17). However, prior to *Brown* high levels of racial segregation existed within individual school districts (*Ibid*). In the early days of desegregation efforts, then, most attention was paid to intra-district remedies (Frankenberg and Le, 2008, p. 1027). According to Clotfelter, documentation exists suggesting

Northern schools were extremely segregated in the years leading to *Brown*. Most of this was de facto segregation resulting from small, neighborhood schools following patterns of residential segregation (2004, p.17). An estimated 85 to 90 percent of blacks attended schools where at least 90% of the school enrollment was black (p.19). At this time segregation is often reported and examined in terms of the level of segregation of black and white students. However, Hispanic and other minority students experiences severe segregation at this time as well. An estimated 85% of Mexican American students in the Southwest attended school in segregated classrooms or schools (p.22).

In the years immediately following *Brown* segregation did not decrease significantly. During the 1959 school year only 0.2 percent of the South's black students were attending schools with white students (p.24). By the early 1960s and estimated nine percent of black public school students were attending schools with white students. The Office of Civil Rights reported segregation data for the 1963-1964 school year and concluded just more than nine percent of black students were attending schools with whites. The OCR also reported 92.4% of schools in border states (Delaware, DC, Kentucky, Maryland, Missouri, Oklahoma, West Virginia) were desegregated by some degree but only 19.7 of the Southern schools (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia) had begun desegregation . (Office of Civil Rights 1964 staff report submitted to the US Commission on Civil Rights.

The first Coleman Report (1966) was the first widespread study on desegregation and the first study commissioned by Congress with the specific purpose of influencing federal government policy. Data was collected from students in the first, third, sixth, ninth, and twelfth grade. Racial data on these students was part of the administered survey. In 1966, according to

Coleman, almost 80 percent of all white students in first and twelfth grade attend schools that were more than 90% white. 97% attended schools that were over 50% white. Segregation was highest in the Southern states (Coleman, 1966). Coleman (1966) also found that more than 65% of black students in the first grade attended schools that were over 90% black. In the South most students attended schools that were single-race schools only.

Between 1968 and 1972 the percentage of black students going to schools with 90-100 percent minority enrollments fell from 78 to 25 percent in the South, by far the biggest change in any region (Orfield, 1983, p. 4). By 1972-1973, 91% of Southern schools were desegregated, meaning had some minority students. More accurately however, the large majority of black students, 62%, attended predominantly minority schools. In fact, 32.7% of blacks during that year attended schools that were 90% or more minority (Friedman, 2004, xiii).

In 1975 Coleman released his second report. He reported his findings on trends in segregation and found by 1973 all de jure segregation had been eliminated. De facto segregation, however, remained. Evidence of this shown partly in the finding that racial segregation was also pronounced between city school districts and suburban school districts. Coleman also found schools experienced loss of white students when integration efforts increased. In addition, loss of white students was most prominent in the year desegregation efforts began.

Beginning in 1968, the Office of Civil Rights of the United States Department of Health and Human Services maintained well-detailed records on school enrollment figures broken down by race and segregation indexes for a sample of the nation's public schools districts. For every year between 1968 and 1976 the Office of Civil Rights compiled data to look at issues of school desegregation. Wilson (1985) looked at two different outcomes:

First, enrollment trends in districts that de-segregated and districts that did not desegregate were compared. Second, enrollment trends in desegregated districts before, during, and after the implementation of a desegregation program were compared. (p.151).

Using this analysis, Wilson (1985) made four primary findings concerning white enrollment and desegregation between 1968-1976. First, the greatest declines in white enrollment occurred during the year in which implementation of desegregation occurred in schools. Further, districts in which black enrollment exceeded one third of total student population experienced twice the enrollment loss than in other districts. Wilson (1985) ultimately concludes that involvement of the court system in desegregation efforts 'did not lead to greater white enrollment' (p.152) over the time period in public elementary schools using National Center for Educational Statistics (NCES).

Also using the National Center for Education Statistics Common Core of Data, Logan, Oakley, and Stowell (2008) analyzed school desegregation using enrollment data for 1970, 1990, and 2000. They found segregation declined over the thirty year period. They argue by 1990 districts were largely conforming to court mandates and federal desegregation policy. The study showed average levels of school segregation was 82.6 in 1970 for all metropolitan schools. By 1990 the average was 64.2 and by 2000 the average was 65.7. In the 1968-1969 school year, although there were court orders in place and some districts were desegregating, no 'overall impact' (p. 1638) of court orders on levels of segregation were apparent. This was in contrast to levels of desegregation nationwide between 1990 and 2000. The authors argue further that while court orders were important, it is important to note the widespread resistance to desegregation during the two decades subsequent to *Brown I*. However, important to note is the slowed level of desegregation occurring between 1990 and 2000 when compared to between 1970 and 1990.

Logan (2002) argues there was a 'rollback' (p.2) after 1990 when compared to progress made prior to 1990. Logan (2002) writes,

In many metropolitan regions, desegregation evident in the 1989-1990 school year has given way to substantial increases of black-white segregation. In most of these, Supreme Court action in 1991 that relaxed the criteria for rescinding desegregation orders has freed school officials to pull back their previous steps to achieve racial balance. New national data for 1999-2000 show that segregation from whites has edged upwards not only for black children, but also for Hispanic, and Asian children." (p.2).

Overall, school segregation has been on the rise in the last twenty years (Frankenberg and Le, 2008). Since data first began to be collected about Latino students in 1960s, segregation has continually risen for these students in the last 50 years. Today, Latino students are more racially segregated than their African-American peers (Orfield & Lee, 2008). While segregation for African-American students declined in the mid-to late-1960s, by 1970 these students were more desegregated than in any other region of the country.

In 1988 about one-third of African-American and Latino students attended intensely segregated school and some experts argue the late 1980s saw the peak of desegregation for black students (Orfield, 2009, p.13). During the 1988-89 school year just one-third of black students were in intensely segregated schools.

Orfield and Lee (2007) found in the 2005-2006 school year, when there were more than ninety thousand public schools enrolling more than 48.6 million students, 57% of these students were white, 20% Latino, 17% Black, 5% Asian, 1% American Indians. White students are the most racially isolated students of any racial group (Orfield & Lee, 2007). This is important for two reasons: first, not only does such isolation result in limited exposure for white students but also because it limits the exposure of students of other races to white students (Frankenberg,

2008). During the 2005-2006 school year 28.7% of all public schools were racially isolated white schools (Frankenberg, 2008).

During the 2006-2007 school year, Latinos and African American students attended the most severely racially segregated schools. About 40% of these students attended intensely segregated schools, where the population is 90-100% minority (Orfield, 2009, p. 12). Most recently, a study released by researchers at Northeastern University revealed

V. *Parents*

The final set of sub-questions of this study considers the current state of integration and how the Court's decision in *Parents* has affected school integration efforts as they actually occur at the school and district level. While a brief introduction to the issue was provided in Chapter II, the issue will be comprehensively addressed here in response to this study's third research question. While the major research question for this study focuses on new analysis of judicial interpretation, the primary goal in answering the third question is to present an overarching summary of current plans and effects of the *Parents* decision. There will be little new analysis but rather a presentation of the various important considerations of which schools should be aware as new plans are designed and second, an examination of the far-reaching implications of the decision.

First, alternatives schools are implementing in the wake of the *Parents* decision will be presented. Where appropriate how these plans may fare if legally challenged under the new federal law is addressed. Included here is an examination of the current state of the law post-*Parents* including explicit rules of law found in the decision as well as small nuances that those structuring integration plans will want to consider. Second, commentary on how the decision will

affect future integration efforts will be presented and will include literature and commentary from scholars in both the legal and education literature. Third, this section will address how the decision in *Parents* may have profound effects on federal legislation such as NCLB and on current education reform movements such as charter schools. Finally, an examination of the other institutions (such as institutions of higher education) outside K-12 education that may be affected by the 2007 decision will be presented to illustrate the decision's far-reaching implications. Included in this discussion is consideration of how the Court's decision is likely to affect even the nature of broad social science research. In all this section will address the second and third research questions: What is the current state of federal desegregation law and how can school structure legally permissible integration plans? What, if any, are the effects of the *Parents* decision both on schools and institutions outside of K-12 education?

Now, more than three years after the 2007 decision, schools continue to restructure integration plans. However, given the confusion that arose after the decision as well as the hesitation on the part of many districts to implement assignment plans aimed at integration for fear of costly litigation, among other factors, many argue desegregation efforts will slow (Frankenberg, 2008). The immediate aftermath of the *Parents* decision in both Louisville and Seattle reflects the confusion felt after the decision was issued and foreshadows potential problems schools will face in attempting to craft legally permissible student assignment plans that will pass constitutional scrutiny under the fourteenth amendment.

In order to assess the effect of the decision on schools and the future of integration in schools, it is beneficial to consider the immediate aftermath of the decision both in schools involved in the litigation as well as schools which may not have been the subject of litigation but who are affected by its holding nonetheless. This serves to show how *Parents* immediately and

drastically affected many schools nation-wide who were employing integration plans, even those not identical or even similar to the Seattle and Louisville plans.

Along with all other schools employing integration plans, Louisville was forced to evaluate its assignment plan and eliminate all provisions not in line with the Court decision. Immediately following the decision, the case was remanded to federal Judge Heyburn in Louisville. School officials voiced an optimistic attitude, using Justice Kennedy's concurrence to justify the continued use race as a factor in student assignment plans and affirming the holding that race can be used as a factor, however not the deciding factor, in student assignment policies. Therefore, the Louisville schools stopped using race in deciding whether to accept or deny entrance to schools but did continue to use other factors such as space, grades, attendance, and behavior as deciding factors in student assignment decisions. The district began to develop a new student-assignment plan conforming to the Court's holding for the 2009-2010 school year. However, the school district was forced to redraw its attendance zones for the 2008-2009 school year, in the months immediately following the decision because the school was administering different attendance zones for black and white students. Because these attendance zones were based solely on race the *Parents* decision was prohibitive to their continuance.

School officials in Louisville proposed plans to fulfill diversity goals. These plans are based on redrawing attendance zones that are not solely dictated by race. These lines will take into consideration family income and family educational attainment level. Area A will be composed of students and families who fall below the county's median education attainment level and median household income. Area A's population would be composed of about 48 percent minorities, a term which the District defines as encompassing all racial minority groups, not just black families. Area B would be comprised of families with higher than the median

educational attainment and household income. Schools would be obligated to enroll at least at last fifteen percent and no more than fifty percent of student from the low-income, low-education area. The Superintendent of schools believes this plan withstands constitutional scrutiny because it is based in geography. The new Louisville plan also included a definition of diversity beyond the simple black, white distinction. However, projections show that under this plan students will remain de facto segregated in the Louisville schools (Wilson, 2009, p.223).

Schools and other individual plans were greatly affected by the Court's holding in *Parents*. I provide one example of another state not involved in the litigation to provide illustration of the wide array of plans, all across the country, that were affected by the 2007 decision. For example, Wisconsin's Chapter 220 is example off a student assignment program now prohibited under the holding in *Parents*. The program, which began in 1976, is a special-transfer program allowing students to transfer to different school districts if the transfer will increase racial diversity in both school districts. The program classifies students according to race and its official goal was to promote school integration on a voluntary basis. The students in the program are classified as minority or nonminority. In order for a minority student to qualify for a transfer, the student must transfer from a school with greater than 30 percent minority student enrollment to one with less than 30 percent minority enrollment. Similarly, a nonminority student must transfer to school with greater than 30 percent minority enrollment to one with less than 30 percent minority enrollment. Minority students under the program are defined as students who are African-American, Hispanic, American Indian, Alaskan native, or Pacific Islander. Students not in these categories are considered nonminority. Under the program students are allowed to attend any public school in the state. School districts may reject students on account of space in the school overall or in specific classes or grades, and because of the

student's disciplinary history. Greene (2008), writing for the Wisconsin Law Review addresses the issues surrounding racial balancing in the 220 program,

A racial-balancing provision in the open-enrollment program contains a rejection clause that requires Chapter-220-eligible districts to reject transfers into or out of the district if the transfer increases racial imbalance in the district, and a priority clause that requires districts to accept or reject all Chapter 220 applications before accepting any open-enrollment applications. Students who transfer through Chapter 220 have the right to finish their educations at their current schools as long the program is funded. Statewide, 33,576 students participated in Chapter 220's intradistrict component in 2006-07. The same year, only 125 student transfers, all in Madison, were rejected because their transfers would increase racial imbalance. (p. 1219)

Through the Chapter 220 program, minority enrollment in suburban districts has more than doubled (Greene, 2008, p. 1221).

The Chapter 220 plan will not hold up to the decision in *Parents* even though it was legal when it was began in 1976. First, because the program was voluntary, it was not implemented to remedy past de jure segregation. Only schools administering voluntary plans, not schools who have not yet been granted unitary status and still under court-ordered desegregation plans, were affected by the *Parents* decision. Therefore, without an active court-ordered desegregation plan, the Wisconsin 220 plan will not be able to prove its goal is to remedy the past effects of discrimination. Additionally, because there exist only two categories for students: minority and nonminority, the Chapter 220 will not hold up the Court's mandate that binary classifications, such as in Seattle's student assignment plan, will not withstand constitutional scrutiny.

Wisconsin can alter its program to adhere to the framework identified in *Parents*. First, the new program should explicitly state promotion of student diversity as its goal, thus keeping in line with Justice Kennedy's concurrence. Race, then should be considered as one of several factors, and not the only factor in the new transfer plan. Next, the new transfer plan must exclude

the binary definition of minority (either minority or nonminority). Considerations for student transfers should not only include consideration of a student's race as the one and only factor but should also include multiple factors to promote diversity. Greene (2009) eloquently summarizes the fundamental effect the *Parents* decision will have on the Wisconsin program,

The effects of *Parents* on Chapter 220 and the school-integration movement in Milwaukee are devastating and tragic. The parts of the majority opinion joined by Kennedy will undermine relationships between MPS and the surrounding suburban school districts, resulting in either new waves of costly and acrimonious litigation, or new levels of complacency and resentment. While Kennedy's concurrence offers a small chance to save some shreds of Chapter 220's initial purpose of school integration, overall, desegregation efforts in Wisconsin will be hampered on the judicial, practical, and administrative levels. If there is a silver lining, Kennedy's concurrence in *Parents* gives Wisconsin lawmakers the chance to avoid joining the plurality's colorblind principles and keep school integration alive in Wisconsin, even if just by a thread. Without Kennedy's concurring opinion, *Parents* would have doomed Chapter 220 and undone fifty years of desegregation in Wisconsin schools with one stroke. (p. 1236)

These examples, one from Louisville, a school party to the litigation and one from Wisconsin provide illustration of the way in which two very different plans were affected immediately by the *Parents* decision. Having provided a small snap shot of how these two schools, in different parts of the nation, with two very different plans, a discussion of how schools can actually structure plans while still keeping cognizant of the Court's decision follows here.

A. Alternative Plans Promoting Integration

i. Socio-economic status based plans

Alternative plans considered by many schools are assignment policies wherein students are evaluated and assigned to schools not solely on account of their race but by the socioeconomic status of their families. Such plans have been subject of much attention because

in theory they provide a wonderful alternative to assignment plans based on race that will no longer pass constitutional scrutiny under current federal desegregation law as promulgated by the Court. Because socioeconomic status has not been identified by the Supreme Court as a suspect class under the levels of scrutiny review, schools implementing these plans will not be subject to strict scrutiny analysis. Such plans group students based on the socio-economic status of their families and assign students to schools within the district based on this student characteristic.

The benefits of socioeconomic integration include combating negative outcomes associated with concentrations of low-income students as well as additional benefits above and beyond the previously discussed benefits of racial integration alone. A concentration of low-income students in one school is associated with several negative affects income-level integration would address. For example, poor children often start school with an average two year disadvantage compared to their peers from higher income families. (Rosenello, 2009, p. 551). When concentrations of low-income students are divided among several schools, the burden of implementing special programs to help these students, often with lower academic skills, is also divided among schools. Additionally, just as with racial integration, students who attend school with peers from higher income families show improvement in test scores (Rosenello, 2009, p. 553). Further, students in socioeconomically integrated schools are less likely to drop out, enroll in college prep classes and are more likely to attend college (Rosenello, 2009, p.553). Additionally, integrating students by socioeconomic level yields better results than simply allocating more money to schools with high numbers of poor students. When school composition remains poor increases in school funding do not have as much effect on student achievement as when compared to the socioeconomic integration of student populations (Rosenello, 2009, p. 554).

Further benefits of socioeconomic based plans consider social context. On a broader societal level, some (Rosenella, 2009) argue increasing the amount of socioeconomic integration plans advances the societal goal of moving towards a post-racist society. While this may not be a realistic goal to meet immediately or in the near future given the deep seeded roots of racism in the nation, this is undoubtedly a worthy goal. As Rosenella (2009) writes,

Using socioeconomic integration rather than racial integration would answer the concerns of both sides: those who are not comfortable continuing to use racial classifications and those who argue the work of integration is not done. (p.558).

While socioeconomic integration often parallels racial integration because of the link between race and poverty, an added benefit of socioeconomic integration is its potential to include poor white students in integration efforts. Evidence shows poor white students are also in dire need of educational support and score lower on math and English standardized tests than their white peers from higher income backgrounds (O'Connell, 2007).

An examination of schools implementing these plans shows varying success rates. In Cambridge, Massachusetts the school district has implemented a student assignment plan based on socioeconomic status. A previous plan using race in student assignment policies was eliminated in 2002. The goal of the Cambridge program was to implement a plan that would result in all district schools having similar proportions of students eligible for the free and reduced lunch program. The result of the program in its early years has been mixed. Student achievement for students in the Cambridge district is higher when compared to others across Massachusetts. However, the schools within the district are resegregating. Shortly after, the Cambridge School District Superintendent announced socioeconomic diversity was an insufficient goal for the school system.

The Minneapolis public schools implemented the Choice Is Yours program to increase socioeconomic integration in the city school district as well as the surrounding suburban schools. CIY is a voluntary program and from the 2001-2002 school year to the 2005-2006 school year, the number of participating students has gone from 558 to 1,680. In addition a report commissioned by the Minnesota Department of Education revealed gains in student achievement among those students participating in the CIY program. The majority of students in the program came from the most racially isolated areas in the city.

Important to consider then, are potential problems with plans based on socioeconomic status. First, problems with any student assignment plans based on race or race-neutral factors always put the implementing school district at risk to experience ‘flight’ on the part of groups who see these plans as threatening to their education. Caldas and Bankston (2002) affirm this potential negative outcome of implementing student assignment plans, even race-neutral plans, which result in an increased number of blacks in traditionally white schools,

[W]e now know that beyond a certain threshold percentage of African American (which statistics show translates to a high concentration of children from single-parent, poor families) both whites and blacks with the financial means are likely to pull their children from such schools . . . the challenge will be to [integrate] . . . in a manner that does not surpass a threshold that will trigger white flight--and higher-SES black flight. (p.204).

Many are skeptical socio-economic level based plans and neighborhood schools will result in the integration necessary to achieve true racial diversity or help raise achievement. Dickinson (2009) writing for the Minnesota Law Review argues while plans in the wake of *Parents* have been inventive and within the legal limits set by *Parents*, these plans ultimately ‘insufficiently counter the dangerous rise in school segregation’ (p.1410). Socio-economic plans

assign students to schools based on their families' socio-economic status so that all schools have a balanced student population including students from low, middle, and high SES. Dickinson (2009) acknowledges this may prove an attractive solution to schools post *Parents* because plans of this nature have not been ruled in violation of the constitution.

Again, important to note is level of scrutiny for classifications based on socio-economic status are not subject to the same strict scrutiny test wherein a law must be narrowly tailored to fit a compelling governmental interest. Rather, classifications based on amount of wealth or socio-economic statuses are subject to the lowest level of scrutiny, wherein the rational basis test is applied. As previously discussed the rational basis test requires a classification be rationally related to a legitimate government interest. Historically, this test has been easier to 'pass' than the strict scrutiny test. Dickinson (2009) urges the law not to force schools to choose between defending race-conscious policies through costly litigation or turn to other less successful student assignment policies. Again, it is important to note that despite early reactions of the media and scholars to the *Parents* decision, the Court did not 'destroy' (p.1436) all race based solutions to achieving the compelling interest of racial diversity in K-12 education. Indeed, it is a positive outcome of *Parents* that racial diversity in K-12 education became a compelling interest (as previously discussed the only two compelling interests historically recognized by the Court in relation to educational segregation was to remedy past discrimination and achieve racial diversity in higher education only). Dickinson (2009) urges schools to continue to use race as a factor among others in student assignment plans such as those based on socio-economic status.

ii. Controlled Choice Plans

Another option for schools dedicated to integration is the implementation of controlled-choice plans. A controlled-choice student assignment plan relied on personal choice of the

student, potential to increase diversity, and potential for school improvement through the assignment (Wilson, 2009, p.220). The benefits of a controlled choice plan for students include striking a balance between student choice and creation of diversity. Students are freed from constraints contained in a neighborhood school model because they rank and select schools they want to attend within the district. Neighborhood schools, because of residential segregation, often constrain students to schools where their peers are often from the same race, socioeconomic status, and at a basic level, from their immediate residential neighborhood.

The school improvement aspect to controlled-choice plans are arguably the most beneficial to the school system as a whole because it is focused on school improvement for all schools (Wilson, 2009, p.226). Struggling schools are identified by those schools least chosen by the students. Once the least chosen schools are identified, targeted efforts for school improvement begin. The means by which schools can be improved under controlled-choice plans is outside the scope of this study but such plans will at the very least expose less desirable schools and in their most positive outcome, result in a efforts to upgrade and improve these schools.

iii. Plans based solely on family income

Other options schools may consider in the wake of *Parents* are disadvantage-based student assignment policies. The connection between race and poverty, as previously discussed is clear and reflected in both median income data and education level. For example, in 2006 the median income of white families was \$62, 712 where as black families' median income was \$38,385. Similarly, 18% of whites over the age of 25 have a college degree and 10.5% have a

graduate degree when compared to 11.2% and 5.7% for blacks. Low-income students now comprise 54% of the South's school children (Shamblin, 2009, p.241). There are a few potential legal complications of disadvantage-based student assignment policies. While the Court in *Parents* did not speak directly to classifications based on socioeconomic status, future plans may fail if thought to be simply a 'cover-up' for plans really based on racial classification (Shamblin, 2009, p.241). Writing for the Louisiana Law Review, Shamblin (2009) points out that because Justice Kennedy's concurrence became the holding in *Parents*, schools would be prudent to consider his current and past reasoning on racial classifications that disguise themselves as otherwise,

In *Grutter*, Justice Kennedy joined Justice Rehnquist's dissent, which argued that the law school's goal to enroll a "critical mass" of racial minorities was a "sham" to disguise racial balancing rather than an effort toward broad student body diversity. Justice Kennedy's separate dissent called the school's plan "a delusion . . . to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas." Since Justice Kennedy's swing vote can determine the constitutionality of a district's assignment plan and he has shown suspicion of schools' methodologies, a district cannot confuse the integration benefits of a disadvantage-based plan with a singular purpose of allotting preferences to a specified number of African-American students. (p.243)

The Court originally articulated its intolerance for classifications that simply masked their focus on race in the case *Shaw v. Reno* (1993). The Court ruled plans that appear to be racially neutral but operate in practice as racial classification may also violate the equal protection clause. These cases did not deal with student assignment plans but rather voting districts. The standard articulated by the Court applies to all governmental classifications whether education-based or beyond. However, this is cause to be optimistic these types of plans may pass constitutional scrutiny because Justice Kennedy did specifically mention factors such as level of family educational attainment level, income level, family structure, and parental contact with the

criminal justice system to be legally permissible factors to consider in student assignments. Additionally, because the disadvantage-based programs do not classify students by race on their face, challengers to the plans bear the added burden of proving these plans are merely a ‘sham’ to mask racial classifications. Even if more black students than white student qualify for assignment preferences under disadvantage-based plans, these plans may be shielded from successful legal challenges.

iv. Grade Configuration Plans

Glenn (2010) advocates for schools to consider grade reconfiguration as means for appropriate education for all grade level students within a school. Some, such as Glenn (2010) propose specific methods by which schools can formulate legally permissible integration plans. Glenn proposes plans based on grade level as a viable alternative to more racially explicit student assignment plans. Glenn describes the plans:

Grade reconfiguration changes the composition of schools by reducing the number of grades offered at each school, thereby reducing the number of schools with competing grades. Grade reconfiguration operates on the assumption that the demographics of each grade level in a district typically vary on slightly from the demographics of the district as a whole. This fact explains why small school districts offering each grade in only one school tend to have low values of school segregation. In these districts, the attendance zone for each school (and consequently grade) aligns with the boundaries of the entire districts, eliminating the largest factor in intra-district segregation: residential segregation. Intra district school segregation can be all but eliminated if a district has one attendance zone that is coextensive with the boundaries of the district (p.1104).

Glenn (2010) modeled grade reconfiguration in several Virginia school districts and concluded reconfiguration can eliminate segregation in small school districts and reduce segregation in larger districts. When the model was applied to the Falls Church, Virginia school district, a small suburban school district, school segregation declined dramatically and his study reflected the school district has virtually no school segregation.

Grade reconfiguration has been attempted in several districts with mixed results. The Houston schools reconfiguration was unsuccessful but in part, Glenn (2009) argues, because Hispanic students were counted as White students. The Tampa Florida Hillsborough County schools applied a grade reconfiguration approach and while school segregation declined, parents complained about increased bussing times and students have to attend different schools each year. Eventually the Board dropped the plan and moved to a new desegregation plan favoring magnet schools (Glenn, 2009, p.1109).

Glenn acknowledges both the strengths and weaknesses of grade reconfiguration plans. Transportation issues such as bussing arise when a district moves from neighborhood schools to a reconfiguration plan. The plans also work better in elementary and middle schools rather than high schools because high schools often serve as important local community centers and resist efforts to consolidate with nearby schools. Further, districts that are racially homogenous as a whole do not benefit from grade configuration on the district level because of overall district racial isolation. Overall, grade reconfiguration has the potential to pass constitutional scrutiny because districts do not have to consider race of each individual student in assignment plans.

v. Neighborhood Schools and Site Selection

Student assignment policies based on neighborhood schools employ plans that send students to the school nearest their home. These plans withstand constitutional scrutiny and avoid controversial busing issues. However, with the connection between residential segregation, achievement, and school segregation, these plans have little chance of promoting diversity in schools. The process of redistricting as part of neighborhood school student assignment policies may be a viable solution. Redistricting is a redrawing of school district boundaries to increase

racial diversity in the neighborhood school model. Two major problems with this method of student assignment plans is the potential to result in white flight and potential legal challenge.

The neighborhood school model has proven unsuccessful in the area of raising student achievement. Because this model has historically resulted in increased school segregation and given the direct relationship between segregation and lower levels of student achievement, it may not be an attractive solution in the wake of *Parents*. In fact, districts such as Charlotte-Mecklenburg, North Carolina, who returned to neighborhood schools after being granted unitary status rapidly showed declines in student achievement. Other metropolitan districts such as Denver and San Francisco report similar results as an outcome of a neighborhood school plan. Another approach for student assignment policies includes several race neutral factors.

Further permissible integration plans could also include the strategic site selection of where districts choose to open new schools. Methods of new site selection could include locating new schools in areas designated as areas of growth or areas where school renovation can take place in an effort to improve the education of students in these locations which often coincide with low-performing schools (Hines, 2008, p.2212).

vi. Other Policies to Promote Integration

Beyond overhauling current assignment plans and school configuration, schools can also consider other ways to integrate through smaller school and district policies. The targeted allocation of resources for special programs can also increase diversity in segregated schools and districts. Districts can consider new magnet schools, Advanced Placement programs, or bilingual education program (Hines, 2009, p.2213). These programs could potentially attract minority students. The directed recruiting of students through open houses, disbursement of school information, door-to-door outreach, and mailings can also reach more minority students. Further,

other ways to integrate include multiple approaches. In 1999 the San Francisco school district implemented a student assignment policy where several factors contribute to an overall process of school placement for each student. These factors include socioeconomic status, geographic proximity to the school, and academic achievement among others. The results have not been successful given those schools who were rated highly diverse under the student assignment plan were also, unfortunately, found to be the least racially diverse schools within the San Francisco school district. Schools that had resegregated showed the lowest student achievement. Florida and Texas have implemented plans that reserve space in state university for students graduating in the top of their high school class.

Further resources to promote integration efforts come from the federal government and leading civil rights organization. Contributing to federal support of integration efforts is Secretary of Education Arne Duncan's announcement that the Office of Civil Rights would become more active in investigating schools than it had been under the Bush administration. Further, the federal government has sponsored several grant opportunities providing support to school districts seeking to promote integrative practices. In July 2009 the Obama administration announced the availability of assistance in formulating assignment policies that are legally in-line with the *Parents* decision. Eleven districts were awarded funding and are using the funds in several ways ranging from assistance to crafting integration policies after being granted unitary status to implementing new student assignment policies. Organizations such as the Civil Rights Project, housed at UCLA, provide practical assistance to schools looking to continue or begin legally permissible integration plans. The CRP's manual, *Still Looking to the Future* promotes strategies for schools in promotion of integration and diversity. Other resources include *The*

Integration Report which issues monthly reports on racial diversity in the nation's schools and highlights local, state, and federal desegregation issues.

B. General Considerations for Future Integration Plans

Future assignment plans before the Court will face the precedent set in *Parents* and schools should be aware of the legal questions future litigation may raise. First, schools should consider the compelling interest standard of the strict scrutiny test. Justice Kennedy and a majority of the Justices did recognize diversity at the K-12 level a compelling interest. This was a monumental recognition given historically there were only two compelling interests ever recognized by the Court relevant to race in education. However, there remains to be illumination on the issue of just what the term diversity means in the K-12 sense. There is litigation on diversity in higher education and the Court has spoken extensively on what diversity and racial balancing is in higher education (see *Bakke*, *Grutter*, *Gratz*). However, the Court has asserted that diversity has both racial and nonracial aspects as Justice Kennedy explained in *Parents*. These aspects include economic background, special talents and needs, as well as demographic factors.

Dickinson (2009) points out the Court had three main problems with the two specific plans before them and if current and future assignment plans address these concerns, there is reason to believe these plans will pass constitutional scrutiny. The first 'problem' the Court identified with the two plans was the 'binary concept of race' (p. 25). As previously discussed, the racial make-up of today's public school student is more racially diverse than it ever has been. The Court did not accept the racial classifications in both plans in part because it was a simple white/nonwhite or black/other classification. Second, as Dickinson (2009) points out, both

Seattle and Louisville implemented the student assignment policies with the goal of representing the racial demographics of the districts as a whole. Being their stated goal was proportionality rather than racial diversity, the Court concluded the plans were not narrowly tailored enough to a goal. Dickinson (2009) acknowledges this is a problem easy to correct,

school systems must abandon the use of strict district-wide percentages of minority enrollment that drove the invalidated plans at issue. In place of these arguably irrational percentages, the school board may cite any number of studies that support the proposition that students achieve greater academic gains in diverse educational settings (p.25).

The last problem identified by Dickinson (2009) is the duration of racial classifications used in student assignment plans. The Court noted that the student assignment plans used by both districts had no timeline for the eventual phase-out of the racially based classifications. The Court also noted plans that developed periodic reviews of the student assignment plans could possibly survive constitutional scrutiny. Because both plans had the goal of meeting demographic proportions of race, there was no goal or end-point for when diversity was met but rather an infinite time period for which the plans must be used because demographics within the districts is constantly changing. The easy ‘fix’ to this is simply crafting an assignment policy with a definite duration. Further, period reviews of progress of the plans would limit the infinite duration problem as well as would articulate a certain goal for the plan such as a certain level of academic achievement within the district such as reading levels or test scores.

From broad analysis of the decision to case-studies legal scholars consider *Parents* to be the beginning of a new era marking a new shift in the way schools will be able to legally pursue integration. Smith (2010) also points out that the role of lawyers is important in the post-*Parents* era. Lawyers have an important role in educating school districts and aiding Board of Education

in crafting legally permissible plans, and should be cognizant that crafting policies that leave way for constitutional challenge have the ability to affect the whole nation if the subject of litigation, as in the *Parents* case.

Another important consideration when thinking of the future of integration plans and legal challenge is the now antiquated way in which integration issues often are discussed. The segregation issue in public schools has historically been discussed in terms of a biracial, black and white student context. However, the issue today is not solely a biracial one. *Parents* raises the important issue of the increasingly diverse student body enrollment in the nation's public schools. In the future, schools must pay attention to multiracial issues when crafting plans. As the majority concluded in *Parents*,

We are a Nation not of black and white alone, but one teeming with divergent communities knitted together with various traditions and carried forth, above all, by individuals. *Parents* 551 U.S. 701 (2007)

Here, the Court makes clear future assignment plans based solely on the biracial white, black distinction will not pass constitutional scrutiny. While the Court did not elaborate on acceptable classifications for racial categories or how many categories would be suitable for future assignment plans to be legally permissible, it is clear definitions of minority must include other racial groups. Because the Court can only rule on the issues before it (in the *Parents* case, on the constitutionality of the student assignment plans) no guidelines were set for future plans. However, given the Court was not entirely silent on the issue, schools would be prudent to consider a definition of racial diversity as more than encompassing only the simple black and white distinction.

Schools should also beware of using justification that student assignment plans bear benign rather than malicious motives as such reasoning will not stand up to future constitutional challenge. The Court articulated its belief that motive is irrelevant in a strict scrutiny analysis of racial classification. As Chief Justice Roberts explained,

The reasons for rejecting a motives test for racial classifications are clear enough. The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility... 'Benign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable. *Parents* 551 U.S. 701 (2007)

Schools can avoid this issue by simply refraining from asserting plans are benign in nature and rather focus on the ways in which the plans do conform to strict scrutiny standards during future litigation.

While it is clear the Court did limit integration plans, it is possible to consider the potentially beneficial outcome of the decision on future integration efforts. Le (2010) views the post-*Parents* climate to be one conducive to a renewed opportunity for federal support of integration. Le (2010) argues the federal government has abandoned integration for the last three decades but that now, given, the recent Court decision, the issue has once again been highlighted as one in dire need of clarification and support. Le (2010) believes governmental policy will be able to achieve more than judicial support of integration.

Robinson (2010) echoes Le's (2010) sentiment in arguing courts will be little help, but that the executive branch and the Department of Education will be able to provide policy options for schools looking to promote racial balancing.

Others, such as Holley-Walker (2010) believe *Parents* will have little effect on school integration because the Courts and schools abandoned desegregation as a priority decades ago.

Holley-Walker (2010) found since 2004, eighty-seven Southern districts have been granted unitary status, thereby increasing the number of schools mandated, under *Parents*, to abandon student assignment plans echoing those of Seattle's and Louisville's. Schools have begun to turn to policies highlighting socioeconomic status and attendance zones to further diversity (Holley-Walker, 2010).

C. Implications Affecting Charter Schools and NCLB provisions

Charter school racial balancing plans also fall under constitutional scrutiny and in the wake of *Parents* must be aware of the legal guidelines along with their traditional public school counterparts. Today, forty states and the District of Columbia have charter schools. In April 2009, there were 4253 charter schools in the country with a total student enrollment of 1,186,659. (Oluwole and Green, 2008). Charter schools enroll more African-American students, low-performing students, and a greater percentage of students who qualify for free and reduced lunch program (Ibid, p.6). Student enrollment in the 199801999 school year was evenly divided between white and minority students but by the 2001-2002 school year enrollment had shifted to one-third white, two-thirds minority (p.6). Charter school enrollment is racially isolated from traditional public schools (Frankenberg & Lee, 2000). Enrollments in at least six states is over 50% black and are located mostly in urban areas and the enrollment of six states is over 50% white. On average, black charter school students attend charter schools with majority black students (Ibid).

Fourteen states have enacted racial-balancing provisions as part of the state's charter school statute. These states are California, Connecticut, Florida, Hawaii, Kansas, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina,

and Wisconsin (Oluwole & Green, 2008). For example, California's racial balancing provisions is as follows,

the governing authorizer shall not deny a petition for the establishment of a charter school unless it makes written factual findings, specific to the particular petition, setting forth specific facts to support one or more of the following findings...reasonably comprehensive description of the means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general populations residing within the territorial jurisdiction of the school district to which the charter petition is submitted. Cal. Educ. Code section 4760 (b)(5)

The other states employ similar language regarding racial balancing and can be divided into two types of racial balancing provisions. Hortatory racial balancing provisions urge racial balancing rather than require specific racial balancing numbers (Oluwole & Green, 2008) whereas mandatory racial balancing provisions require charter schools within the state to go beyond identifying means for racial balancing but rather mandate specific racial balancing percentages or ones that are reasonably reflective of the school district as a whole (Ibid). In the aftermath of *Parents* racial balancing provisions in state charter school statutes should be considered given the ruling and its wording on racial balancing in K-12 schools.

Hortatory provisions will likely pass constitutional scrutiny because these provisions urge means to achieve balancing rather than identify specific means to achieve balancing. Unlike the Seattle and Louisville plans struck down by the Court, that specifically require racial balancing within the schools, the hortatory plans are likely to remain constitutional because only the identification of means to achieve racial balancing is required, nothing further. (Oluwole & Green, 2008). However, the states mandating specific racial balancing percentages or numbers reflective of the district at large may encounter legal problems. First, the plurality ruling in *Parents* clearly states that racial balancing in K-12 schools is not recognized as a compelling

interest under the strict scrutiny test. While Kennedy's concurrence does leave a door open for the recognition of racial balancing as a compelling interest, state charter statutes requiring either percentage balancing or balancing reflective of overall school district enrollment may be subject to valid legal challenge. Additionally, as previously discussed, the fact that statutes using either percentage or reflective standards for racial balancing in charter schools have not articulated a stopping point for integration efforts, these plans may further violate the standards handed down in *Parents*.

The *Parents* decision is also likely to have an effect on the efficient and productive implementation of the No Child Left Behind Act. Olwuole and Green (2008) argue given the close tie between race and the achievement gap as well as race and low-performing schools, the sanction and federal funding provisions of No Child Left Behind are fundamentally race conscious provisions focused on improving academic achievement. As previously discussed, a government action can be subject to the strict scrutiny analysis even if race-conscious measures are not explicitly identified as such. Because No Child Left Behind has two measures potentially seen as race-conscious (funding and sanction on low-performing schools), states should consider how the recent *Parents* decision and the Justices' reasoning behind the decision has the potential to impact the constitutionality of parts of the No Child Left Behind Act.

The No Child Left Behind Act, as discussed briefly in Chapter I is the 2002 reauthorization of the Elementary and Secondary Education Act. No Child Left Behind focuses, in part, on the racial achievement gap in American schools. While there are no specific race-conscious policies in NCLB such as mandated student assignment policies according to race or redistricting to address racial segregation, there are provisions that consider race. First, states must report data on student achievement broken down by multiple demographic groups including

race in order to receive federal funding. Second, schools must meet or exceed level of academic achievement for all students, including students of all races. Schools also face sanctions and penalties if proficiency levels are not yet. Schools with high concentrations of minority students are likely to be at risk of these sanctions. *Parents* may have left the door open to challenges of the sanction and progress provisions of NCLB. The first reason *Parents* may be influential is the plurality's reasoning that the Louisville and Seattle plans had a minimal impact on the assignment of students. Meaning, the Court did not find the number of students affected by the policy to have a great enough effect to warrant the plans to be narrowly tailored enough to meet a compelling interest. For example, the Court reasoned that because "Jefferson County estimates that the racial guidelines account for only 3% of assignments" (*Parents*, p. 2760) the plans was minimally effective. Similarly, the Court reasoned,

Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools...the tiebreaker's annual effect is this merely to shuffle a few handfuls of different minority students between a few schools" (p. 2759)

The Court made clear that both the Seattle and Louisville plan would have benefited, under strict scrutiny analysis, from showing a greater impact on the actual student assignments. Therefore, race-conscious provisions within NCLB focused on sanctions for school districts who do not meet progress requirements or race-conscious funding calculations that are not minimally effective may be vulnerable to strict scrutiny test failure (Oluwole & Green, 2008).

NCLB may be vulnerable post-*Parents* because of the Court's articulation and focus on the fact that in order to further prove race-conscious policies are narrowly tailored a serious, good faith consideration of race-neutral alternatives must first occur. Therefore, states issuing sanctions or funding based on race-conscious measures should have strong evidence race-neutral alternatives had been considered. As Oluwole and Green (2008) argue,

Therefore, states must consider race-neutral alternatives before implementing the Act's sanctions and remedies or funding with a consciousness of race. Because student achievement gaps continue to have a strong black-white racial component not entirely explained by race-neutral factors (such as socio-economic status), race-conscious measures under NCLB seem logically necessary. Moreover, various studies demonstrate a positive relationship between race-conscious targeting of financial resources and outcomes for racial minorities. In essence, substantial evidence shows that race-conscious measures are necessary to closing the racial achievement gap. However, to pass narrow tailoring muster, before pursuing race-conscious measures, states must document their consideration of race-neutral alternatives and their reasons for concluding that these alternatives would not accomplish the ends desired. (p. 300).

States would be prudent to consider ways in which the *Parents* decision may affect certain provisions such as sanctions and targeted funding because such provisions may be thought to be race-conscious. The Court in *Parents* made clear the importance of governmental policies to have a greater than minimal effect in achieving a compelling interest in order to be considered narrowly tailored enough to meet the scrutiny test. Further, the Court made clear its requirement that any race-conscious measures should not be implemented before a good faith effort has been made to explore other race-neutral alternatives. States and the federal government should be aware of the potential strict scrutiny problems that could arise from continuing to implement NCLB provisions that could be considered and argued to be race-conscious because of the link between low-performing schools and high percentages of minority students.

A further consideration of the role NCLB will play post *Parents* is a possible increased emphasis on student transfer options available to students under NCLB provisions. Schools are likely to feel the influence of the *Parents* decision not only on ongoing or proposed student assignment policies but also parallel pressure to increase academic achievement under NCLB (Holley-Walker, 2008, p.932). NCLB mandates schools failing to attain an adequate (as defined

by the Act) amount of yearly progress (AYP) for two consecutive years will be identified as ‘in need of improvement’. Schools failing to meet yearly progress standards will face sanctions or school closure. These measures have already greatly impacted schools, especially in urban areas with high percentages of minority students. A disproportionate number of these schools are facing sanctions or closure under NCLB (Holley-Walker, 2008). There is a clear link between racially isolated minority schools, often in urban areas, and NCLB sanctions. For example, in California, the average Latino and African American student attends a school where over 80% of their peers are nonwhite. Less than 40% of Latino and African American students meet fourth grade proficiencies in reading. 2,204 of California schools have been labeled in need of improvement under NCLB (U.S. Department of Education, 2008, p.1). These numbers reveal a tension between the provisions of NCLB and the holding in *Parents*: because some of the racially isolated urban districts facing NCLB sanction are using race conscious student assignment plans to combat segregation, these schools face a new wave of litigation post-*Parents*. A return to neighborhood schools is likely given the new constraints on using race in student assignment plans. As Holley-Walker (2008) summarizes,

Due to the persistence of residential segregation, especially in large urban areas, neighborhood schools will mean increased racial isolation. If there is corresponding low performance on test scores schools in these racially isolated minority schools, we will see more school facing sanctions. (p. 9.34).

This tension for low-performing, racially isolated schools is an issue districts will need to consider in moving forward with both crafting new assignment plans and addressing federal guidelines for progress.

The transfer policy may be a positive avenue for schools to pursue racially integrated schools. For example, in Greensboro, North Carolina, black students have transferred out of

racially isolated low-performing schools to majority white schools will higher levels of achievement under the student transfer provision of NCLB (Dillon, 2007, A1). However, being that the United States Department of Education reports that of over 5 million students who are eligible for the student transfer option, only about 120,000 actually transfer, this option will not likely replace student assignment plans previously in place before the *Parents* litigation (U.S. Department of Education, 2008, p.1). There is the option of inter-district transfers under NCLB: a policy wherein students from failing schools may apply to enter a school outside their district on a voluntary basis. It is easy to see, however, why schools would be hesitant to accept students from lower-performing districts on a voluntary basis given the increased pressures NCLB places on all schools to meet yearly progress standards. As previously discussed, this provision may be at odds with the Court's decision in *Milliken* wherein the Court made clear its position on inter-district transfers to combat desegregation. Because desegregation efforts cannot be compelled beyond an individual district (as in the case of *Milliken*, between urban and suburban districts), the inter-district voluntary transfer provision may present further constitutional issues given the increased spotlight on assignment plans post-*Parents*.

D. Implications Beyond K-12 Education

In addition to its obvious effect on K-12 education, the *Parents* decision could implicate other institutions such as colleges and universities, affirmative action in the work place, and even the way in which desegregation research is conducted and subsequently considered by the Court.

When considering the far-reaching implications of the *Parents* decision, it is worthwhile to move beyond examination of how schools can and have been structuring integration plans in legally permissible ways to a consideration of how the Court will consider scientific evidence in

school desegregation in the future given the important role social science research has played in Court reasoning. The Court has historically relied on scientific evidence of unequal educational opportunities throughout the school desegregation cases. For example, in *Brown* the Court relied on evidence that de jure segregation resulted in psychological harm to minority students. The Court cited the adverse effects on minority children to support its consideration of scientific evidence,

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system *Brown* p.494

The Court in *Brown* did not articulate how much it relied on this evidence but the inclusion of the information in the opinion itself does illustrate the Court felt the evidence important enough to include in its brief opinion as justification for its holding. Even though the Court need not rely on social science research in reaching its legal conclusions, clearly the detrimental effects of de jure segregation on minority children played a role in its constructivist interpretation of the equal protection clause.

The Court also considered evidence and expert testimony in *Grutter* and *Gratz* to further help clarify the educational benefits of diversity in higher education (Frankenberg & Garces, 2008) and to justify recognition of student diversity in higher education as a compelling interest. Justice O'Connor, writing for the majority in *Grutter*, cited the benefits of diversity in higher education,

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In

addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals. p.330

This important consideration of scientific evidence on the Court is illustrative of how influential such research has been on the desegregation cases. Being that the Court has historically identified only two compelling interests relating to race and education, (again, the diversity of the student body in higher education and remedying past discrimination in both K-12 and higher education) O'Connor's reasoning is a sign of how influential research can be on justifying the Court's holdings. Here, the Court recognizes the educational benefits resulting from student body diversity and how these benefits impact the workforce and society at large. These constructivist considerations show first, how the Court justifies its holding under the equal protection clause and strict scrutiny test and second, how research is able to influence on the Court on important issues. While the Court is not legally obligated to consider social science evidence, indeed the Court, being the Highest Court of the nation, is obligated only to follow its own reasoning and precedent, clearly such research can be influential on important issues such as justification for compelling interests and fundamentally, for the fact that segregation is harmful for minority children.

However, the issues surrounding the use of social science research in judicial conclusion is not without controversy. Social science evidence can be bias, inconsistent, and unreliable. Therefore, disputes arise over whether or not such research should be relied on by the Court (Frankenberg & Garces, 2008, p.706). Regardless of this consideration, the fact remains the Court has historically considered social science research and continued to do so in the *Parents* case. Of the sixty-four amicus briefs submitted to the Court for consideration in the *Parents*

litigation, twenty-seven include substantial discussion of social science evidence (Frankenberg & Garces, 2008, p.707). The briefs were submitted for consideration by individual researchers, research centers, and civil rights organizations (Ibid). Most of the briefs were filed in defense of the Seattle and Louisville student assignment plans. Two briefs of these argue research has not justified the addition of K-12 diversity as a compelling interest under the strict scrutiny test.

If social science research should be used by the Court, it is reasonable to argue its use should be used properly, with due attention paid to potential biases, conflict, and inherent issues of validity present in every research study. Both the Justices joining in the plurality and the dissenting opinion cite research but come to differing overall conclusions. Frankenberg and Garces (2008) argue the Justices misused research findings in the *Parents* case and further argue the way in which research was considered will result in long-lasting implications for researchers hoping to meaningfully influence Supreme Court reasoning in future desegregation cases. First and most obviously, researchers must be aware of the legal parameters of the Court's most recent decision if they hope to influence future policy and future Court decisions. Researching methods of integration that are now not legally permissible would be a wasteful pursuit. Future research must be conducted mindful of the Court's holding in *Parents*. It is also important for social science researchers submitting briefs to the Court (and other lower courts) to remember the Justices may not be trained in reading research findings and or skilled at understanding the methods behind the research. Frankenberg and Garces (2008) argue the three most important things for researchers submitting briefs to the Court to be sure are clear are:

- (1) the findings; (2) the strength of the research; and (3) how particular findings relate to an issue under consideration. Social scientists and/or lawyers can better communicate these points to the courts by increasing their own understanding of the ways in which judges approach cases. For example, researchers might help frame how their findings illuminate some of the

elements of narrow tailoring or how findings that relate to a compelling interest speak to the purposes of schooling recognized by the Court. Researchers might also help demonstrate the persistence of de jure segregation to address the legal distinction between de facto and de jure segregation. Researchers could be cognizant of communicating their findings to audiences outside the social science community by publishing their work in venues intended to reach broader audiences, such as in law or policy journals; presenting research talks to a legal or interdisciplinary convening; or working with advocates regarding a particular topic to ensure that relevant social science is appropriately incorporated into the legal or policy debate. (p. 746).

In light of the way research was included in the *Parents* decision, Frankenberg and Garces (2008) recommend school board craft their student assignment policies with the help of studies conducted at the local level, and ones tailored to evaluating the specific methods used in their plans. Both Justice Breyer in the dissent and Justice Roberts in the plurality note the value of studies conducted at the local level as they are more indicative of effectiveness of the specific plans and fault the studies presented by the schools because they did not present studies linking the compelling interest of diversity in K-12 education to their specific plans (p.746).

Also relevant for social science researchers to note moving forward given *Parents* is the Justices' foreshadowing that race-neutral plans may be able to pass strict scrutiny analysis. Additionally, researchers should consider the legal distinction between de jure and de facto segregation. Researchers should investigate the efficacy of race-neutral assignment plans. With regard to the difference between de jure and de facto segregation, the law makes a significant distinction between the two. In fact one of the only two recognized compelling interests in education stem from remedying past direct acts of de jure segregation. This distinction is so important that cases may hinge directly on this issue before any other considerations are made on the narrowly tailored prong of the strict scrutiny test. For example, Justice Roberts discusses the lack of evidence showing de jure segregation in the two school

districts to justify the plans failure to meet the strict scrutiny test. Researchers hoping to submit research to the Court in hopes of promoting future compelling interests should point out the negative effects of school segregation do not change whether or not segregation is due to purposeful act on the part of laws or the school board when compared to segregation due to non-direct action such as residential housing segregation.

Some legal scholars argue *Parents* will also have an effect on use of race in higher education admissions policies. Some legal scholars argue that even though the *Parents* decision applied only to K-12 education, the ruling would suggest the Court was open to revisiting its holding in *Grutter* and *Gratz*. Even though the *Parents* decision did not ultimately contain any mention of impact on higher education, the majority did rely heavily on the previous higher education cases and some scholars believe the decision is important to higher education and could have set a trend towards revisiting the 2003 decisions (Pohorylo, 2009, p.696).

The Court in *Parents*, as previously discussed, did rely on the holding in *Grutter* to justify that while race can be used as a factor in assignment plans, it cannot be the deciding factor in such plans. Therefore, the Court has acknowledged a gray line separating higher education and K-12 education. While it is clear *Grutter* is still controlling law in the realm of affirmative action in higher education, it is important to note that colleges and universities should consider the *Parents* decision because of the potentially blurred line between K-12 school and institutions of higher education (Pohorylo, 2009, p. 716).

The first area that may impact higher education is the requirement that school student assignment policies must exhibit substantial success rates in maintaining a diverse student body or plans may fail the strict scrutiny test. While the defendant school board in *Parents* argued the assignment plans were necessary to maintain a diverse student body, the Court was not

convinced that the effect had a substantial enough effect to warrant the policies. In fact, the Court found that because using race as the deciding factor in the assignment policies resulted in what it considered only minimal diversity, the schools did not prove that other factors other than race would have been better to consider when evaluating the overall goal of achieving diversity. The Court referred back to *Grutter* to point out that the plan at the University of Michigan law school was highly effective because it had tripled the number of minority students in the law school. In the future, following the ruling in *Parents* higher education institutions should be aware of this potential requirement. Although it is, of course, not a hard and fast requirement that colleges and universities are now required to show when implementing affirmative action plans, it is important to potential foreshadowing on how the Court will handle future challenges to such plans. (Pohorylo, 2009, p. 717).

Additionally, in order to satisfy the narrowly tailored requirement colleges and universities would be prudent to make sure other race-neutral alternatives have been considered before implementing an affirmative action plan. One of the reasons why the Seattle and Louisville plans failed the strict scrutiny test was because other race-neutral plans were not seriously considered. The Court found Seattle rejected other race-neutral plans after giving little or no consideration to these plans while Louisville did not consider any alternatives. As previously discussed, the Court in *Grutter* did articulate this requirement but *Parents* was a clear indicator that the Court will continue to consider this requirement very seriously in future higher education or K-12 cases. It would also be wise for colleges and universities to document consideration of these alternative plans so that they may provide evidence of their considerations if plans are legally challenged. (Pohorylo, 2009, p. 718). Examples of other race-neutral affirmative action plans that increase the number of minority students in institutions of higher

education are partnerships with traditionally low performing secondary schools to broaden the applicant pool of those who are made aware of higher education opportunities. Partnership strategies include after-school tutoring programs offered by college student organizations and offering faculty to aid in teaching shortages at low-performing secondary schools. The benefit of these programs is two-fold. In addition to increasing the number of minority applicants to colleges and universities because such students are made more aware of the existence and availability of institutions of higher education, by improving academic opportunity through partnerships, colleges increase the number of applicants who qualify for admission.

Yet another way in which colleges and universities may be affected by the ruling in *Parents* is through the renewed focus of the Court on prohibiting the use of predetermined ranges for minority student enrollment. As previously discussed, the Court in *Grutter* ruled the Michigan plan was permissible because the goal for the number of minority students to be admitted was not a set number, but rather a meaningful number so that the diversity of the student enrollment would be enhanced. While quota systems have been prohibited by the Court, (*Gratz*) the Court has allowed for this meaningful number standard. In the *Parents* case the student assignment plans did not employ a quota method but a rather the use of a predetermined range that would conform with the demographics of the student enrollment across the districts as a whole. Because the Court struck down the predetermined range, one very similar to that in *Grutter* the Court may have foreshadowed its future intolerance of both the predetermined range and meaningful number consideration in both K-12 and higher education cases (Pohorylo, 2009, p. 721).

Although the impact of *Parents* on higher education may be nuanced and subtle, colleges and universities would be prudent to take note of the reasoning provided by the Court on these

important issues. Because the *Parents* decision relied on *Grutter* to some extent, it is reasonable to consider that K-12 decisions such as *Parents* may similarly influence future higher education cases. The line between K-12 and higher education policies may be blurred in the future and given the strong stance the Court took in prohibiting the use of race as a deciding factor in K-12 student assignment policies, the future impact may be significant on affirmative action cases in higher education.

Although the scope of this study is limited to the effects of *Parents* on schools and education, it is interesting to note some scholars have considered the decision's impact not only on higher education, as just discussed, but also on affirmative action in the workplace. Planer (2008) discusses the potential impact on workplace affirmative action within the context of the equal protection clause, Title VII of the Civil Rights Act, and the *Parents* decision. She argues Title VII and the fourteenth amendment have historically worked in different ways to protect affirmative action. Title VII has been interpreted to allow employers wide flexibility to engage in affirmative action whereas the equal protection clause was less permissive on how and why employers could engage in certain hiring practices (Planer, 2008, p.1334). Therefore, if the Court considered a compelling interest justifiable under the equal protection clause, it would surely be acceptable under VII. The decision in *Grutter* gave employers more flexibility under equal protection than it had before because for the first time the Court had acknowledged the benefits of diversity in of itself rather than diversity only to remedy past discrimination. The Court in *Grutter* relied, in part, on sociological factors that included the workforce. For example, the majority in *Grutter* reasoned,

These benefits [of diversity] are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global

marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints (p.330)

Because affirmative action plans in both higher education and the workplace are subject to strict scrutiny under the equal protection clause, the way in which the Court interprets the fourteenth amendment in education cases has the potential to impact affirmative action programs in the workplace. Just as *Grutter* expanded Court recognized compelling interests to include promotion of diversity, the decisions in *Parents* and its holding on compelling interest can limit the use of affirmative action in the workplace because a majority of the Court did not agree that achieving racial diversity in K-12 schools was compelling. While it is true Kennedy's concurrence did in fact articulate his belief diversity in K-12 education was indeed a compelling interest, his view was not shared in Justice Robert's plurality opinion and given the confusion surrounding the decision, it is possible future challenges to affirmative action in the workplace will be subject to a stricter interpretation of what diversity as a compelling interest means as defined by the Court. As Planer (2008) argues, the definition offered by Kennedy is more restrictive than the one recognized by the Court in *Grutter* because he argues race-conscious measures cannot be used to achieve the compelling interest. Rather, Kennedy reasons race-neutral alternatives must be used in order to achieve the compelling interest of diversity in K-12 education. Further, Kennedy does not mention the 'social benefits' realized as an important aspect to diversity to which much attention was paid in the *Grutter* opinion. As Planer (2008) concludes,

Although the decision in *Parents* is far from straightforward in terms of making a clear assertion about the future of diversity, both the plurality's and Justice Kennedy's close, careful analysis of the school district's actual ends, as opposed to accepting the purported ends of diversity at face value, limits diversity as a goal of affirmative-action programs. While diversity is not forever restricted only to the realm of higher education, the message of the plurality, and of Justice

Kennedy in particular, is that diversity cannot be a broad term applied to programs in which racial considerations are factors. (p.1353).

Lastly, workplace affirmative action programs would be wise to note the Court in *Parents* explicitly acknowledged the holding in *Grutter* to apply specifically to higher education and lower courts that applied the strict scrutiny analysis upheld in *Grutter* to realms outside higher education were incorrect (*Parents* at p. 2754). While the reasoning in *Grutter* placed great emphasis on the benefits of diversity for the sake of societal progress as a whole, including the workplace, *Parents* moved away from broader considerations and focused more on a definition of diversity as discussed in *Grutter* to apply to higher education and little else.

Chapter V. Conclusion

I. Resegregation and the Benefits of Integration

Given that students attending public schools have experienced increased segregation in the last two decades, issues surrounding racial make-up of student enrollment are important to examine. In this study I analyzed the ways in which the Supreme Court has historically influenced desegregation in schools and considered specifically how the Court's interpretation of the fourteenth amendment continues to affect such issues.

The problem of school resegregation is of crucial importance given the documented benefits of integration and the longstanding relationship between impoverished students and segregated schools. Since the early 1990s segregation has increased (Orfield, 2001). At the same time, schools with majority minority student enrollments are experiencing high levels of poverty. About 90 percent of majority minority schools serve populations with high levels of poverty (Orfield, 2001). Student achievement is also a serious problem in the nation's schools and is

often linked to mostly minority-segregated schools. Students attending segregated, majority minority schools experience poor teacher quality, inadequate curriculum, and limited social networks in addition to concentrated poverty (Wells & Frankenberg, 2007). Graduation rates among students in these schools are declining while dropout rates rise (Darling-Hammond, 2007).

The benefits of racial integration were supported through social science research during the time of *Brown* and continue to be documented through current research as well. Such benefits included increased rates of high school graduation and college attainment for African American students (Crain, 1970). Documented advantages to the integration of K-6 students also supported school desegregation efforts during the Civil Rights Era. For example, African-American elementary school students in integrated schools had better math skills than their peers in segregated schools (Zdep, 1971). Current research supports integration and its link to student achievement and increased social skills. A 2006 study by Kurlaender & Yun found students in integrated schools show an increased ability to interact and feel comfortable with peers from backgrounds different than their own. Similarly, Orfield & Lee (2004) found students in integrated schools, score higher on tests, are more likely to go onto higher education, and are better at socially interacting with members of different backgrounds.

In addition to the empirical evidence, multicultural theory also supports the benefits of integration. Fundamentally, notions of equal opportunity and the importance of integrated schooling is crucial to social progress and equity. Although multicultural education is not a focus of this study, literature and research in the field serve as even further support of integration. There are two main themes connecting multicultural education and school desegregation: 1) commitment to the ultimate goal of equitable educational opportunity for all students, and 2) the

link between integration as a tool to promote democratic ideals through working towards as well as an end to deeply entrenched institutionalized racism (Banks, 1997). Civil equality through tolerance and appreciation of diversity are important goals of education (Gutman, 2007). Critical race theorists argue the law in general has been fundamental in perpetuating institutionalized racism (Billings & Tate, 2006).

II. Desegregation Cases

The Supreme Court examined such issues as early as 1899, in *Cumming* (wherein the Court endorsed racially segregated schools reasoning such segregation was constitutional when interpreted by the equal protection clause), and most recently in 2007 in *Parents*. Throughout the over 100 years between these cases the Court has addressed desegregation in K-12 education in a series of over 20 cases. After the Supreme Court extended its approval of segregated schooling (from segregation between black and white students to segregation between other minorities and white students) in *Gong Lum* (1927), the Court considered segregation of institutions of higher education. In this series of four cases, the Court hinted at a gradual move away from its endorsement of segregation. First in *Missouri* (1938) the Court ruled it was unconstitutional for a state to require a black student seeking legal education to find education out of state because no black law school in the state had been established. In *Sipuel* (1948) the Court ruled a state has a constitutional obligation to provide a legal education to black students. In *Sweatt* (1950) the court went further in requiring states not only to provide a legal education to black students (*Sipuel*) but also an education equal to that afforded the white students. Pushing the concept of equality in higher education a step further the Court required institutions of higher

education to integrate not only the entire university itself but also individual classrooms within such universities in *McLaurin* (1950).

These cases were a prelude to the Court's monumental decisions in *Brown I* and *Brown II*. The Court held segregated schooling unconstitutional and subsequently held school must integrate "with all deliberate speed." In response to delay tactics the Court responded firmly in *Cooper* (1959) again asserting its authority over state and local issues, and again in *Griffin* (1968) by ruling public schools cannot be closed in an attempt to avoid integration.

The Court then ruled on specific integration policies, ruling freedom of choice plans unconstitutional in *Green* (1968) and mandated faculty integration in *Montgomery* (1969). Further, in *Swann* (1971) the Court approved bussing and placed the burden of proving nondiscriminatory practices with school districts when they had been found to be acting in intentionally discriminatory ways in *Keyes* (1973).

Beginning with *Milliken* (1974) and *Pasadena* (1976) the Court began to change its course by refusing to extend its support of integration. This was marked by its ruling that inter-district bussing was unconstitutional as well as the holding that districts are not held constitutionally responsible for segregation caused by residential segregation patterns. During this series of cases decided in the 1970s, the Court moved back to issues of higher education, ruling racial quotas unconstitutional in *Bakke* (1978).

In the series of early 1990s cases, the Court made it easier for school districts to gain unitary status thereby making it easier to end court ordered integration (*Dowell*, *Freeman* *Jenkins*). In the early 2000s, the last time the Court would deal with issues of race in education (in these instances higher education) before 2007, the Court ruled affirmative action to be constitutionally permissible in *Grutter* but held point systems in admissions policies to be

unconstitutional in *Gratz*. Finally, in 2007 the Court held race cannot be the deciding factor in student assignment policies in *Parents*.

III. Phases of Interpretation

Supreme Court interpretation of the fourteenth amendment and equal protection clause has had a direct impact on school desegregation and student enrollment. While no direct relationship was found between specific mode of interpretation, direct or indirect, constructivist, originalist or strict textualist (no opinions were found to employ strict textualist interpretation), the Court's interpretation does change over time in an explicit way. This study found four distinct phases of interpretation. First, the Court interpreted the equal protection clause to permit segregation both in public life as well as K-12 education. Beginning in the late 1930s the Court entered a second phase wherein there was a shift towards a less permissive interpretation of the equal protection clause. In a series of four higher education cases between 1938 and 1950 the Court gradually held racial segregation and unequal educational opportunity in institutions of higher education impermissible under the fourteenth amendment. This intolerance for segregation crossed over from the higher education to K-12 in the series of cases beginning with *Brown I* and ending with *Keyes* nearly twenty years later. During this time segregation in public schools sharply declined. The Court continually expanded what was defined as impermissible under the equal protection clause with regard to segregated and unequal K-12 education. However, in 1974 beginning with *Milliken* through present, as shown in the Court's most recent opinion on the issue in *Parents*, the Court stopped expanding definitions of de jure segregation as well as showed a tolerance for school segregation occurring because of residential segregation

patterns. Beginning in 1974 the Court reached a plateau of interpretation wherein it neither expanded nor retracted its interpretation of the equal protection clause.

The four phases of interpretation do parallel racial make-up of student enrollment in K-12 education. During the first phase of interpretation, segregation was at historically high levels given the Court's holdings allowing for de jure segregation. These high levels continued into the second phase of interpretation when the Court slowly chiseled away at segregation in higher education. Desegregation of schools occurred during the third phase of interpretation when the Court no longer permitted de jure segregation and when it expanded the definition of de jure segregation as well as what was held impermissible under the fourteenth amendment. Levels of desegregation declined during the fourth phase of interpretation. Over the next few years it will be apparent whether or not school segregation will increase because of the decision in *Parents*. Findings of this study suggest if the Court does not change its method of interpretation again, levels of desegregation will continue to decline. However, schools do have the opportunity to promote alternative methods of integration.

IV. Current State of Law

While the Court's interpretation of the fourteenth amendment has undoubtedly affected school desegregation, the current state of federal desegregation law may not be as complicated as many think. The Court has been quite clear in its assertion that although promotion of diversity in K-12 education is a compelling interest, using race as the deciding factor in assignment plans will not pass legal scrutiny. Specifically, the two plans subject to litigation were not sufficiently 'narrowly tailored' to pass the strict scrutiny test. However, future student assignment plans such

as those based on socio-economic status, poverty level, residential neighborhoods, grade configuration, or controlled choice do not trigger the strict scrutiny test. Further, important to note is the Court's major problems with the Seattle and Louisville plans was that they were not narrowly tailored to the extent necessary to prove to the Court that they used the least restrictive means necessary to achieve the end goal of diversity.

This study contributes to the already established research and literature on issues of school desegregation in K-12 education. By focusing specifically and solely on how the Court's judicial interpretation of the fourteenth amendment has evolved over time, this study will contribute to the overall understanding and analysis of how the law affects education in a broad sense and specifically how the Court has influenced school desegregation. The Supreme Court, being the highest court of the nation, is instilled with the authority to greatly influence the daily operations of schools and decisions made by policy makers and school administrators. An understanding of where the Court has come from and where it may go in its interpretation of the fourteenth amendment is immensely useful in understanding how the racial make-up of schools has been affected, and how integration can be achieved within the legal bounds set by the Court.

V. Implications for Theory and Policy

This study's findings show how powerful an impact the Court's interpretation can have on school segregation and specifically, on how schools can implement plans for integration. The theoretical purpose of this study was to understand the ways in which the Court has influenced these issues and in turn must be considered as one of the most influential factors impacting student enrollment in K-12 schools. I have drawn conclusions on how the Supreme Court has changed its approach to desegregation, desegregation remedies, and student assignment plans over the course of school desegregation litigation.

The findings of this study show the limitations of theories promoting integration as an end without considering how the law places constraints on integration methods and plans. While multicultural theory emphasizes integration as a way to promote democratic ideals, missing from the literature is recognition of how the Supreme Court's judicial interpretation affects such promotion (Gutman, 2007). Further, multicultural theory must go a step further in its assertion that segregation has been perpetuated as part of institutional racism and consider how the Supreme Court may have historically played a role in such racism (Nieto, 2004; Grant, 2006). Critical race theorists argue racial discrimination is central to judicial proceedings and crafting of both the intent and language of the law. However, I believe critical race theorists fail to recognize the true place of the law within broader social goals.

Although both general multicultural education theorists and more, specifically, critical race theorists, believe integrated classrooms are necessary, little attention is given to the realities of law-making and the judicial process. CRT stops short of presenting a well-crafted plan for integration within the bounds of the law and does not offer substantial legal analysis beyond pointing out the law's failure in dealing with issues *Brown* hoped to address. CRT offers little help to law-makers whose ultimate decisions must rest within the bounds of Supreme Court precedent. Further, critical race theorists have not showed a true sense of understanding of the parameters within which the Supreme Court promulgates the law surrounding desegregation. CRT articulates the problems surrounding segregation in the public schools and offers discussion of what the goals should be in more of a historical context rather than focusing on the current and future legal framework. I believe there is little helpful discussion of how racial integration should be addressed post- *Parents* in current CRT literature. That is, I believe CRT does not help discussions focused on how schools can actually achieve legally permissible integration plans

now and in future years within the bounds of Supreme Court precedent. As, Posner (1997), a federal Judge, articulates,

What is most arresting about race theory is that...it turns its back on the Western tradition of rational inquiry, forswearing analysis for narrative. Rather than marshal logical arguments and empirical data, critical race theorists tell stories-fictional, science-fictional, autobiographical, anecdotal-designed to expose the pervasive and debilitating racism of America today (p.42).

Posner (1997) goes on to attack critical race theorists as ‘poor role models’ and who are ‘deeply misinformed.’ It is my hope this study will offer multicultural education and critical race theorists an understanding of how the Supreme Court is likely to view student assignment plans in the future.

Further, this research reveals the great extent to which the Court influences how the goals of multicultural education can be attained. During the first phase of interpretation (1899-1938), hopes of achieving the goals of multicultural education were stifled during the time of Court-sanctioned school segregation. However, during the second (1938-1954) and third (1954-1974) phases of interpretation, multicultural education was at the forefront of the Court’s reasoning in support of racial integration in the schools. While the Court may not have identified the benefits of school desegregation using the term ‘multicultural education,’ it is clear the Court’s support of integration grew from recognition of goals similar to those found in the basic goals of multicultural education such as equal opportunity and a promotion of democratic ideals. While the fourth phase (1974-present) of interpretation directly impacts and often reverses student assignment plans, it should not imply the basic goals of multicultural education cannot be achieved.

On the level of policy the findings of this study will influence school, state, and federal integration action plans. Schools hoping to promote equity, equal educational opportunity, and democratic ideals must make sure their policies and plans fall within the bounds of the law. This study's findings offer an understanding of how schools can legally craft policies promoting integration. Further, this study's findings implicate state and federal policy in that policy makers must consider how the Court evaluates integration plans. Understanding the evolution of Supreme Court interpretation will help policy makers recognize potential fourteenth amendment issues and, as this study demonstrates, must be aware of how the Court applies equal protection clause analysis to policies and integration plans. Much of the literature post-*Parents* viewed the decision in a negative light. I believe many have misunderstood the Court's ruling. As I have clarified here, the Court ruled race cannot be the deciding factor in student assignment policies. However, race can still be used as one of several factors. Further, given socio-economic assignment policies do not trigger strict scrutiny, plans based on SES are likely to remain legal and effective given the relationship between SES and race. While schools do need to be sure their policies are in line with the holding in *Parents* I believe the reaction to the decision was much more negative than necessary. While some may argue the Court, now headed by conservative Justice Roberts, signaled their unwillingness to be supportive of integration, it by no means the Court has repealed its recognition that some methods of integration are legal. I argue the present Court is not hostile to integration as some argue, but rather, have forced schools to consider race among many factors in student assignment policies. This may make it harder for purely race-based assignment policies to operate but it does not make it impossible for race to be considered as an extremely important factor.

Even a superficial analysis of Supreme Court desegregation case law would reveal an obvious connection between social progress and Court interpretation of the equal protection clause. I believe the phases of interpretation are deeply influenced by social progress. For example, the Court, perhaps fully aware of the upheaval the holding in *Brown* would create, decided the series of higher education cases pre-*Brown* as a way to lay the groundwork for the 1954 decision. Arguably the Court was waiting for signs of a society able to sustain the change *Brown* marked. As the country experienced resistance to desegregation, the Court supported integration efforts throughout the third phase of expansion. I believe the Court responded during the third phase of segregation wherein it was continually expanded its interpretation of the equal protection clause. With each new case in this phase the Court expanded its interpretation of the clause to include specific remedies such as bussing. I believe this was in direct response to the massive delays to integration many schools and communities implemented. During this time period the Court reinforced its judicial authority by responding to resistance with further support. However, in the phase I have identified as the fourth plateau phase I believe the Court backed away from further expansion because the realities of implementation became clear. Schools, faced with residential segregation, faced the difficult task of achieving integration. I believe the Court began to make it easier to grant unitary status because they recognized social challenges the Court could not address. In the fourth phase, the one in which *Parents* was decided, the Court continued its refusal to expand the equal protection clause to include student assignment policies that use race as a deciding factor. I believe, over the course of desegregation litigation, the Court has responded to social progress. At the same time, however, the Court has also been aware of its limited role. While the four phases of interpretation reflect a change in the Court's approach to the equal protection clause, there are several possible external reasons these shifts occur. I

believe the phases are also influenced by the views of those sitting on the Court (Chemerinsky, 1991). This is an area where future research would be beneficial. More closely tied to the issues explored in this study, I believe these four phases are simultaneously influencing and being influenced by social trends.

By design the Supreme Court can only decide issues before it on a case by case basis and therefore cannot choose the social issues it wishes to address. However, again and by design, the Court often hears cases of the utmost social importance. Historically, school desegregation has been the subject of numerous Supreme Court cases. I believe the Court in the future will address this issue again. Now, it is up to schools to pursue integration methods within the framework of *Parents* cognizant of how the Court is likely to rule in the future.

While it is clear the executive branch has influenced the promotion of integration (Epperson, 2008), this study shows how influential the Court has been regardless of presidential policy. Future administrations should promote policies promoting desegregation through alternative plans such as socio-economic integration as such plans do not present the same challenges race-conscious policies have faced. Second, on the level of legislative policy, future law makers must consider crafting plans that withstand Supreme Court scrutiny. For example, market-based reforms such as vouchers and opt-out provisions under NCLB have not yet been the subject of Supreme Court litigation. Laws promoting integration using market-based reforms may escape equal protection clause problems.

VI. Further Research

Further research on how the Supreme Court has influenced school desegregation would benefit from an expansion of the data analyzed in this study. It would be beneficial to consider

judicial interpretation as it has changed according to political views of the Court Justices (Chemerinsky, 1991). This analysis would allow for an increased understanding of how school desegregation is affected by the make-up of the Court and would allow for an analysis of the importance and impact of the political views of the Justices on student enrollment in schools. In addition, future research considering the effects of *Parents* on student enrollment is important in understanding the long-term effect of the decision. Such future research will be based on desegregation statistics post-2007. Additionally, given the increasingly large Latino student population in the nation's public schools, examining the effects of judicial interpretation on Latino student segregation is important and relevant to K-12 school desegregation issues overall.

While the Supreme Court has historically exerted great influence on the ways in which schools can address racial segregation in K-12 public schools, there may be reason to be hopeful about new integration plans that do fall within the bounds set by the Supreme Court. The Supreme Court's interpretation of the equal protection clause influences the racial make-up of student enrollment and most recently correlates with increasing rates of segregation. Future interpretation will continue to influence student enrollment post-*Parents* but schools can be confident plans based on factors other than race do not currently require strict scrutiny analysis under the fourteenth amendment.

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