THE POWER OF WORDS: AN ANALYSIS OF SUPREME COURT JURISPRUDENCE RELATED TO EDUCATION, RACE, AND EQUALITY

by

JEAN LEE

A Dissertation Submitted to the Graduate

Faculty of the University of West Georgia in Partial

Fulfillment

of the Requirements for

the Degree of

Doctorate of Education in School Improvement

CARROLLTON, GEORGIA

2018

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by

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ABSTRACT

JEAN LEE: The Power of Words: An Analysis of Supreme Court Jurisprudence Related to Education, Race, and Equality
(Under the Direction of Dr. Dianne Hoff)

A core value of the United States was defined long ago within the second paragraph of the Declaration of Independence, which states that all men are created equal. Until *Brown v. Board of Education* was decided in 1954, the separate but equal doctrine was applied to education throughout the South, effectively disadvantaging African Americans' educational opportunities. This study investigates the dialectical relationship between education, race, and equality in *Brown* and 14 other Supreme Court decisions. Critical Discourse Analysis (CDA) and Critical Race Theory (CRT) were used to analyze Supreme Court discourse over six decades in order to determine if minorities' interests in educational equality were ever truly a focal point for the Court.

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DEDICATION

First, I dedicate this dissertation to my parents, Solomon and Janice Ferguson, without whom I could never have finished this process. Thank you for believing in me and for your unwavering support. I also dedicate this dissertation to my children, Phillip and Nina. I did this for you as much as I did it for me. I want you to know that I never gave up, even when it seemed like I wouldn't finish. I hope that when life throws you challenges that you will work through them, even when you feel as if you want to give up. Finally, I dedicate this dissertation to Walter Ruffin, my soulmate and life partner. Your support of my endeavors during these last two years will never be forgotten. You carried me across the finish line. The work is now complete.

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ACKNOWLEDGEMENTS

To Drs. Hoff, and Varga, thank you for your unwavering support of my efforts through this process. Your willingness to walk with me through this journey will never be forgotten. You are all true scholars and your belief in my research and the importance of it kept me from giving up. I also offer a special thanks to Dr. Lara Willox for beginning this journey with me and stepping in at the end. Thank you for believing that I could finish the journey.

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CHAPTER 1

Introduction

Context

As a young, African American law student in the late 1990s, I became intrigued with the landmark *Brown v. Board of Education* (1954) decision. The Supreme Court's determination that the separate but equal doctrine espoused by *Plessy v. Ferguson* (1896) was unconstitutional began an era of change aimed at making the United States live up to its creed that all men are created equal. The very idea that nine Supreme Court Justices were able to overturn what had been established law and practice throughout the southern United States for 58 years was fascinating, and I found myself wondering how the words of nine individuals were powerful enough to reshape the political and social structure of an entire nation.

Prior to *Brown*, hereafter referred to as *Brown I*, the southern United States had operated under *Plessy's* separate but equal doctrine. On one hand, the separate but equal doctrine provided that African Americans must be afforded the same educational opportunities as whites, which meant that a basic education should have been available to African American children (Connally, 2000). However, African Americans had little political power, and lived under the strict Jim Crow segregation laws of the south. The enforcers of the Jim Crow laws were the same individuals who were charged with upholding the separate but equal doctrine. Throughout the south, public K-12 schools were separate but never equal, leaving African Americans with a second-class education characterized by dilapidated buildings, poorly paid teachers, shorter

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school years and outdated resources (Bell, 1973a, 2004; Black, 2012; J. Jones & C. R. Hancock, 2005; Levine & Levine, 2014) The poor quality of schools for African American children was so evident that the NAACP's litigation team began laying the foundation for federal lawsuits challenging the separate but equal doctrine throughout the south during the 1930s and 1940s (Levine & Levine, 2014; Ware, 2001). It was not until 1954 that the Supreme Court overturned *Plessy*. The *Brown I* decision was proclaimed a legal and political success by proponents of desegregation but was viewed negatively by the southern states on which the decision would have the greatest impact.

The implementation of *Brown I* proved to be complicated. Southern states fought the decision, passively through stalling techniques, and aggressively by actively preventing African Americans from integrating after the Supreme Court's ruling. One year after *Brown I*, all parties from the original decision returned to the Supreme Court to determine how to ensure that the southern states would move forward with the desegregation process (*Brown v. Board of Education of Topeka*, 1955). In that decision, known as *Brown II,* the Supreme Court did not provide a specific timeline for desegregation; instead, they determined that federal District Courts would be responsible for ensuring good faith compliance with the *Brown I* mandate.

In the decades following *Brown I* and *Brown II*, the federal court system faced the challenge of balancing compliance with *Brown I* with the realities of southern resistance to K-12 school desegregation. The Supreme Court was called upon to rule and issue opinions related to desegregation in the context of busing, re-districting, and a host of other issues concerned with remedying the effects of segregation in schools. Each ruling built upon the last, creating a body of law that continued to shape and reshape public education over time.

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Despite southern resistance, desegregation persisted and by the mid 1970s, throughout the south, K-12 schools were integrated (Siegel-Hawley, Frankenberg, & University of California, 2012). As social conditions improved for African Americans in the south, integration spread. More African American students applied to public colleges that had once only admitted white students, but many of the African American applicants, due to the historical remnants of segregation, did not have the requisite academic history for admission to these institutions of higher education (Bunzel, 1996). Colleges and universities, seeing the value in a more diverse student population in light of the changes taking place in society, sought to initiate various means of ensuring that African American students would still be eligible for admission despite the variances in academic history. Quotas, set-asides and racially inclusive admission policies were brought to national attention when *Regents of the University of California v. Bakke* (1978) was brought to the Supreme Court of the United States. Just as in *Brown I* and the K-12 cases that followed it, the Supreme Court was called upon to answer a question related to race and education. *Bakke* involved a white student who claimed that he was denied admission to the University of California due to the university's set aside program. The Supreme Court in *Bakke* held that race could be considered a factor in college admissions but could not be the sole determining factor.

Brown I, Brown II, and *Bakke* both demonstrate that the Supreme Court has played an important role in the enacting social change in America's educational system, particularly where it relates to race and access to public education. Public schools are charged with providing the best possible educational opportunities for their students, but their actions must still be constitutionally sound. The Supreme Court, as the ultimate authority on constitutionality has the

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power to overturn laws that are found to be in violation of the U.S. Constitution, and in this way shapes what society is able to do. The Supreme Court's decisions on race and education have altered society a great deal in the last sixty years (V. P. Franklin, 2005; K. H. Smith, 2005).

Public school integration gave educators and researchers the opportunity to observe the value of educating students in a diverse environment. There is an abundance of scholarly research that addresses the positive effects of diversity on students and society as a whole (Engl, Permuth, & Wonder, 2004; Garda, 2007; Orfield, 2005). Scholars such as Garda (2007) tout school integration as a powerful means of remedying past inequities brought about segregation. Others note the intangible benefits that occur when students have the benefit of learning in a diverse environment (Bell, 2004; Rust, 2013). Racially isolated schools tend to suffer from a lack of educational resources as compared to more diverse schools (Black, 2012; Orfield & Harvard Civil Rights Project, 2001). Democratic citizenship is enhanced when students have an opportunity to interact with those outside their racial and social backgrounds (Cornwell & Guarasci, 1997; Guarasci, 2001; Gurin, Nagda, & Lopez, 2004). A lack of diversity can lead to close-mindedness and poor preparation for our increasingly multi-cultural world (Rabin,2013).

Despite the positive changes brought about by *Brown I* and the cases that followed it, there is growing research that indicates that gains that African Americans saw as a result of the these decisions were short lived. Recent research indicates that there is a decline of diversity in K-12 schools, and that re-segregation has emerged as a threat to diversity in public education since the early 1990s (Siegel-Hawley et al., 2012). Housing patterns, high poverty levels among minorities, and white Americans' migration to the suburbs have led to a distinct trend toward the re-segregation of schools (Glenn, 2012; Orfield, 2005). A 2004 Harvard Civil Right Project

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study identified the trend toward re-segregation, noting that schools in 2004 were more segregated than in 1984 (Orfield, Lee, & Harvard Civil Rights Project, 2004).

During the 1990s, the Supreme Court relaxed the standards that school districts had to meet in order to show compliance with the requirements of desegregation orders (*Board of Education of Oklahoma City Public Schools v. Dowell* (1991), *Freeman v. Pitts* (1998), and *Missouri v. Jenkins* (1995). *Dowell*, *Freeman*, and *Jenkins* are the three Supreme Court decisions from the 1990s that have been termed *re-segregation* cases by proponents of the *Brown* decisions (Holley, 2005). Pro- *Brown* scholars have expressed a concern that these cases represent a distinct negative turn in the Court's treatment of school desegregation (Haddon, 2013; Holley, 2005; D. Parker, 2005).

Decades of Supreme Court decisions about race and education have provided us with thousands of pages and millions of words dedicated to determining how school districts and public universities should approach racial issues while remaining constitutionally sound. The Supreme Court's power rests in its ability to use words to uphold or strike down laws. The idea of language being used as a powerful social and political tool began to take shape in my mind. If the Court, I wondered, has the power to shape society with its words, what happens when the composition of the Court changes? What happens when society's expectations change? What happens when those who hold power determine that enough has been done to remedy past discrimination?

All of these questions above, along with my experiences traveling the United States as an educational consultant, led to the following observations and piqued my interest in exploring this topic further. 1) Failing schools tended to be full of poor minority students. 2) White students

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had all but disappeared from failing schools, and 3) It mattered little whether I was in rural Mississippi, suburban North Carolina, or urban New York, poor, minority students always made up the majority in failing schools. The power of the Supreme Court's landmark *Brown I* decision seemed to have diminished over time.

Link to School Improvement

Public educational institutions in the United States are charged with providing the best possible education for the students of our nation. Research indicates that racial and cultural diversity in classrooms can lead to richer educational experiences that promote tolerance in our multicultural society (Garda, 2007; Gurin et al., 2004; O'Hara & Pritchard, 2008). In our ever-changing multi-cultural society, it is very important that students develop the skills to interact and work with those who are different racially and culturally.

Current trends in educational data indicate that racial demographics in U.S. public schools can no longer be viewed in binary, black-white terms (Glenn, 2012). The number of Asian and Hispanic students in public education has risen. However, more minority students have not equated to less segregation. In fact, recent data that suggests that American K-12 schools are becoming more segregated by race at levels in some parts of the country similar to segregation prior to *Brown.* (NAACP Legal Defense and Educational Fund, 2008; Orfield & Harvard Civil Rights Project, 2001; Siegel-Hawley et al., 2012). This trend is alarming, and school districts have struggled to address this issue.

Higher education institutions have sought to implement measures that would ensure that their students would have the benefit of a diverse student body. In contrast to K-12 integration efforts, higher education affirmative action plans have been voluntary, and were not the result of

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desegregation lawsuits. These measures, however, have come under fire by white students who argue that racial preferences for minorities violate their rights to equal protection under the law.

Before attempting to develop desegregation or affirmative action admissions initiatives, it is important that K-12 school districts and institutions of higher education understand that the Supreme Court has played an important role in determining how these initiatives may be legally implemented. The Supreme Court's precedent, along with society's values and public opinion should be considered as school districts and institutions of higher education attempt to address diversity and segregation problems as they arise. The present study will provide valuable insight into how the Supreme Court, through its decisions, has attempted to balance the values of society with the law.

Statement of the Problem

Public schools in the United States have experienced rapid racial and ethnic changes in the last 30 years (Fiel, 2013; Glenn, 2012; Orfield & Harvard Civil Rights Project, 2001). Schools across the country have seen a rise in Hispanic, Asian, and Caribbean students. However, many of our public schools do not reflect the rich racial and cultural diversity present in the United States (Glenn, 2012). Nearly 40% of African American and Hispanic students attend schools that are at least 90% African American while the average white student attends a school that is approximately 80% white (NAACP Legal Defense and Educational Fund, 2008; Orfield & Harvard Civil Rights Project, 2001).

These percentages indicate that despite the fact that sixty years that have passed since the Supreme Court's decision in *Brown I*, segregation, though no longer legal, remains a real threat to educational progress in the United States. Schools with high populations of minority students

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still suffer from higher poverty levels, inadequate resources, and poorly trained teachers (Black, 2012; Orfield & Harvard Civil Rights Project, 2001). The same problems that African Americans faced in the separate but equal era of American education still plague minorities today. The intended outcomes of *Brown I* and the cases after it have not been fully realized, and as a result, schools with high minority populations continue to produce students who are less prepared than their white counterparts.

Research Questions

The following questions guide the research into the intersection of race and education in Supreme Court jurisprudence.

> **Research question 1:** What is the dialectical relationship between education, race, and equality in Supreme Court judicial discourse from 1954-2007?
>
> **Research question 2:** How have the changes in the members of the Supreme Court affected the judicial discourse regarding education, race, and equality since 1954?

Methodology

Unlike some studies of sociological phenomenon, this study does not use human subjects as the primary data source. Here, the data source is the written text of 15 Supreme Court decisions. The analysis of the data in this study requires a methodological approach appropriate for studying language in social institutions. Although this study examines cases from both K-12 and higher education, the focus of the inquiry is on the effects of Supreme Court's jurisprudence on K-12 education.

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Critical Discourse Analysis (CDA) is the methodological approach selected because CDA is used to examine social and political issues through language, focusing on the discourse within the context of the social structures, such as race, gender, and sexuality (Fairclough & Candlin, 1989, 1995; Wodak & Meyer, 2001; Wood & Kroger, 2000). CDA involves more than language description; it is used to analyze language within the context of social and political issues involving power and subordination. Critical Discourse analysts also seek to root their apply their work to the world in some fashion (Gee, 1999).

CDA is an appropriate methodological approach for this study for several reasons. This study involves race, education, and Supreme Court decisions. Race is a social structure. Education involves social institutions. The Supreme Court uses language to make determinations regarding fairness, equity, and equality. As a methodological approach, CDA provides a framework to examine these social constructs and institutions in terms of the language the Supreme Court uses to describe and interpret the law that governs them.

There have been numerous studies that used Critical Discourse Analysis to analyze the media's discourse regarding educational methods and policy (Ardinger, 2013; C. Cohen, 1996; J. L. Cohen, 2010; Piazza, 2014). Likewise, there have also been studies that used Critical Discourse Analysis to examine racial and educational discourse through the media and cinema (Pimentel, 2010; Rogers, 2011; Villenas & Angeles, 2013). There is, however, a distinct gap in the literature regarding how the Supreme Court's use of language has affected K-12 efforts to promote or hinder educational opportunities for children of color. This study will examine the specific language used by the Justices in 15 separate Supreme Court decisions that involve race and education. Twelve of these cases originated in public K-12 school districts, which is why

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the analysis focuses on the K-12 education. The remaining 3 cases analyzed involved racial issues in higher education.

Theoretical Framework

This study uses Critical Race Theory as a theoretical framework. Critical theories provide an overarching lens that examines marginalized groups and questions of race, class, gender, and sexuality (K. Crenshaw, 1995; K. W. Crenshaw, 2011; Delgado & Stefancic, 2012). Critical Race Theory (CRT) began as a movement among scholars who sought to challenge the way that race and power are constructed and represented in within American society (K. Crenshaw, 1995). CRT emerged from the field of Critical Legal Studies (CLS) during the 1970s in an attempt to address the need for different strategies to retain and continue the advances made during the Civil Rights Movement of the 1950s and 1960s (Bernier, 2014; D. A. Brown, 2003; K. Crenshaw, 1995; Delgado & Stefancic, 2012).

Critical Race Theory (CRT) is an appropriate theoretical framework for this study because it allows the researcher to approach the work from a transformative perspective with the intent to critique a social phenomenon, take a stand, and issue a call to action. The present study examines the Supreme Court's discourse on race and education over time in an attempt to discover the underlying tensions between the law and society. My study seeks to uncover the underlying themes present in the Supreme Court decisions, examine how those themes shift over time and to offer an overall critique of the Supreme Court's treatment of race in the educational arena. I've chosen to use CRT as my epistemological stance in an attempt to analyze the power struggles that exist within the language of Supreme Court decisions that examine race and education.

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My critique will unveil the inherent tensions that the Supreme Court faces when it addresses racial subornation in an educational context. The goal of this research is to analyze the powerful role that Supreme Court discourse has played in determining whether minority interests in having an equal education have truly been considered since 1954.

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CHAPTER TWO

Review of Related Literature

Introduction

This literature review traces the chronological progression of Supreme Court jurisprudence regarding race and public education in the United States from the 1800s to 2006. The literature review is divided into nine distinct sections, aimed at examining the literature associated with Supreme Court jurisprudence related to race and education. Section one examines early systems for public education and the separate but equal doctrine espoused by *Plessy v. Ferguson* (1896). Section two explores the 58 years of the separate but equal doctrine and its impact on the southern United States. Section three examines the literature around the landmark *Brown I* decision and its role in school desegregation. Section four examines the implementation of *Brown I* and the South's response to the Supreme Court's ruling. Section five reviews the Freedom of Choice Era of the 1960s. Section six discusses the Supreme Court's shift away from judicial activism from the 1980s to the present. Section seven reviews the Supreme Court's responses to the use of race in college admissions. Section eight will introduce Critical Discourse Analysis as a research methodology, and Section nine will introduce this study's Theoretical Framework.

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Race and Education in Early America

The need to educate the nation's children has been an important idea since the colonists settled North America in the 17th century. Before public school systems were developed, the types and quality of education available to children differed greatly based on wealth, geography, religion and race (Kober & Center on Education Policy, 2007). Most early American educational progress was made in the northern states (Connally, 2000). The types of educational settings available varied greatly and were greatly influenced by the financial position of parents. Private tutors and tuition-based schools were available to the wealthy (Watson, 2012). Religious institutions and townships sponsored some early educational institutions while apprenticeships were available for young men to learn trades such as blacksmithing and carpentry (Middlekauff, 1961). Young wealthy women were sometimes afforded opportunities to attend dame schools that taught basic reading, writing, and social graces, while poor white women usually received no education at all (Long, 1975).

The southern states were slower to embrace the idea of education for all of its citizens (Connally, 2000). Wealthy southern plantation owners saw little value in providing an education for poor whites and were generally opposed to educating African American slaves (Connally, 2000; J. H. Franklin & Moss, 1988; Rucker & Jubilee, 2007; Watson, 2012). The strict social hierarchy of the south during slavery did not encourage education among the lower social classes, and slaves, being the lowest class of all, were rarely given any education beyond what was absolutely necessary to serve the plantation (Levine & Levine, 2014).

Watson (2012) states that wealthy southerners were deeply embarrassed by a 1840 census report that revealed that though the slave states only comprised 40% of white Americans, nearly 66% of the white illiterate population were in the South. The census report of 1840 helped to fuel

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the need for educating poor whites in the southern states (Watson, 2012). However, poor illiterate whites found themselves at odds with the wealthy landowners who sometimes sought to educate them, believing that their race made them inherently superior to all blacks and that they needed no help or education (Watson, 2012). These social attitudes were deeply engrained in southern culture, and complicated efforts to provide quality education for both students of color and poor whites (Watson, 2012).

Levine & Levine (2014) note that during the early1800s, the largest number of African Americans lived in the southern colonies as slaves. Slaves received minimal education. It was illegal in most parts of the southern United States to teach slaves to read and write (Levine & Levine, 2014). However, some slaves were taught skilled trades in order to serve as artisans on plantations. The amount of training slaves received was completely at the discretion of the slave owner, and in most instances, slaves were illiterate and unskilled (Levine & Levine, 2014). The denial of a basic education throughout the south during slavery forms an important backdrop for chronicling the Supreme Court cases that arose out the quest for racial equality in the educational setting.

According to Jackson (1923), Low (1952) and Parker (1954), the end of slavery brought serious implications for the newly freed slaves. The southern economy was destroyed by the Civil War. Millions of former slaves were freed without a basic education or any employment skills beyond manual labor (Jackson, 1923; Parker, 1954). Congress established the Freedman's Bureau in 1865 to assist blacks and poor whites throughout the war-torn south (Jackson, 1923; Levine & Levine, 2014; Parker, 1954). Despite opposition from white southerners, the Freedman's Bureau managed to feed millions of displaced African Americans, build hospitals, and assist with the legal needs of the newly freed slaves (Parker, 1954). However, the

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Freedman's Bureau's most lasting contribution to the Reconstruction era was its development of schools for African Americans throughout the south, thus providing thousands of African Americans with their first chance at an education (Jackson, 1923; Low, 1952; Parker, 1954; Richardson, 1963). Obtaining an education was one of the universal things that freed slaves sought (Rucker & Jubilee, 2007).

The Freedman's Bureau's educational initiatives were met with great resistance throughout the south (Jackson, 1923; Low, 1952; Parker, 1954). Along with the general opinion of white southerners that northerners still had no business meddling in the affairs of the south, white attitudes toward the education of freed slaves was generally negative (Connally, 2000; Rucker & Jubilee, 2007). Despite the negative response of southern whites, institutions for blacks grew even though the Freedom Bureau was officially disbanded in 1872 (Levine & Levine, 2014). Howard University and Tuskegee Institute were two institutions influenced by the Freedmen's Bureau's ideals and supported by northern white benefactors (Levine & Levine, 2014). These institutions and others provided educational opportunities for African Americans, particularly in secondary and post-secondary studies (Levine & Levine, 2014).

The separate but equal doctrine. The end of the Civil War brought many changes to the South. Slavery was abolished by the 13th Amendment in 1865 (U.S. Const. amend XIII). Millions of African Americans, most of whom had no formal education, were freed from slavery (Jackson, 1923; Low, 1952; Parker, 1954). This post-war period, known as Reconstruction, lasted until 1877, when federal troops were withdrawn from the South (Black, 2012). Despite the constitutional amendments granting citizenship and the right to vote, the de facto situation in the southern United States was that African Americans were not allowed to participate in the social,

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legal, or political worlds of whites (S. J. Caldas, 2007; S. J. Caldas & Bankston, 2005; Garda, 2007).

Legalized (*de jure*) desegregation arose out of the Supreme Court's 1896 decision in *Plessy v. Ferguson*, (1896). The issue in *Plessy* was whether a Louisiana state statute that required equal but separate accommodations for white and colored races was constitutional (*Plessy,* 1896). The plaintiff, Homer Plessy, broke the Louisiana statue when he entered a railroad compartment designated for whites, rather than the compartment that he was assignedby the railway officials (*Plessy,* 1896). The Supreme Court determined that the Louisiana statute was constitutional, because it was within the state's police power to regulate public transportation and accommodations (*Plessy,* 1896). The Court held that the state of Louisiana's enactment of the statute was an appropriate use of the state's police power and did not conflict with the protections of the 13th and 14th Amendments of the Constitution (*Plessy v. Ferguson*, 1896).

In examining the rationale in *Plessy,* Maidment (1973) notes that "the courts had always recognized a certain authority called the police power, under which a state has the right to make regulations for the benefit of the health, welfare, and moral well-being of its citizenry" (p.126). Police power is specifically given to states, and the Supreme Court was reluctant to tamper with the state's power without clear evidence that the power had been abused (Maidment, 1973).

Modern commentators are nearly uniform in their assertions that *Plessy* represented a low point in American legal history (Golub, 2005; Greene, 2011; Maidment, 1973). The Court's affirmation of the *Plessy* doctrine resulted in legislation across the south serving the dual purpose of disenfranchising and separating blacks from whites socially (Guthrie & Springer, 2004). *Plessy* allowed states and localities to legally segregate individuals and institutions based on race

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under the auspices of equality (S. J. Caldas, 2007). *Plessy* specifically gave state legislatures the power to allow separate facilities for blacks and whites in public transportation, but the Supreme Court implied that the power could be broadened to encompass all facets of social life, including education (Casas, 2006; Rathbone, 2010).

Three years after *Plessy*, the United States Supreme Court decided *Cumming v. Richmond County Board of Education* (1899). *Cumming* was the first education case that challenged *Plessy*. *Cumming* arose out of an Augusta, Georgia school board's decision to close Ware High School, the only secondary education institution in Georgia for blacks at that time (Kousser, 1980; Rucker & Jubilee, 2007). The school board voted to hire new primary school teachers with the Ware High School budget appropriation rather than continue to fund the secondary school (Kousser, 1980). The school board's argument was that local black elementary schools served more children, needed more teachers and represented a greater need than the secondary school(J. D. Anderson, 1988; Connally, 2000).

Rucker and Jubilee (2007) suggest that there was strong opposition throughout the South to the education of blacks at the secondary level. Sharecropping was the dominant labor system in the South after slavery, and whites of the planter class saw no need to educate black children beyond the rudimentary basic skills (E. Anderson & Moss, 1999). Secondary education for blacks was viewed as a waste of money, and the Richmond County school board preferred to provide a primary education to more black students rather than a secondary education to a few (Connally, 2000).

The plaintiffs in *Cumming* asserted that the decision to close Ware High School represented an explicit violation of the Fourteenth Amendment's Equal Protection Clause and a violation of the *Plessy v. Ferguson* doctrine, since there was no separate black high school after

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Ware High School closed (Connally, 2000; Kousser, 1980). The defendants, on the other hand, argued for judicial restraint, asserting that the matter was a local issue that involved no constitutional violation. Despite the fact that there was no separate high school for blacks, the Supreme Court rejected the plaintiff's argument and ruled in favor of the defendants. The plaintiffs were unable to convince the Court that the *Cumming* case violated *Plessy's* "separate but equal doctrine" or the Fourteenth Amendment. Rucker and Jublilee (2007) argue that this ruling allowed white school boards across the south deny black youth the right to a secondary education.

The Post-Plessy Era: 1900-1953

For fifty-five years after *Cumming*, the separate but equal doctrine provided the legal justification for factual inequality in school districts throughout the south (Bell, 1973b; Wishon, 2004). Legal scholars note that in almost all cases, although separate, the educational opportunities for black students were very rarely equal to those of white students (Bell, 1973b; Furlow, 2012; Levy, 1999; Wilson, 1947). Charles Wilson, a white schoolteacher from Mississippi noted that the education of blacks during the 1920s and 1930s was inferior to that of white children (Wilson, 1947). Black students had a shorter school year, poorly paid teachers, and fewer resources (Wilson, 1947).

In 1927, the U.S. Supreme Court heard another challenge to the separate but equal doctrine in *Gong Lum v. Rice*, (1927). The litigation in *Gong Lum* arose after Martha Lum, a girl of Chinese descent, was denied access to a Mississippi school because of her race (Gong Lum, 1927). Her father sued, arguing that since there was no school in the district for students of Chinese descent, that Martha was denied equal protection under the 14th Amendment and therefore was entitled to attend the all-white school (Casas, 2006). The Mississippi state

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Supreme Court found that the Mississippi constitution of 1890 required that separate schools be provided for the education of the white and colored children (Gong Lum, 1927). The Mississippi Supreme Court reasoned that since Martha was not white, she would have to attend the black public school. Her father, concerned about the quality of education Mississippi schools provided for black children, appealed the decision to the U.S. Supreme Court (Casas, 2006).

The U.S. Supreme Court unanimously rejected Gong Lum's argument. Writing for the majority and relying on the precedents of *Plessy* and *Cumming*, Chief Justice Taft, considered the matter within the scope of the state's power:

> The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. Were this a new question, it would call for very full argument and consideration which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the Federal courts under the federal constitution…The decision is within the discretion of the state…(*Gong Lum v. Rice*, 1927, pp. 85-86)

The Court's unanimous decision in *Gong Lum* extended the separate but equal doctrine to include all non-white races. If an individual was not classified as white, they had to attend the schools for blacks, with no regard to their actual racial makeup. Casas (2006) suggests that the *Gong Lum* decision is indicative of white society's disregard for the struggles of all nonwhite races during the 1920s.

One of the unforeseen effects of *Plessy* and its progeny was the rise of black social activists and organizations who mobilized to end segregation (S. J. Caldas, 2007; Garda, 2007; Guthrie & Springer, 2004; Lavergne, 2012; Willis, 2004). The National Association for the Advancement of Colored People (NAACP) was founded in 1909 and became prominent in the

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fight for equality throughout the 1930s and 1940s (Guthrie & Springer, 2004; Ware, 2001). The NAACP gave African Americans an organizational structure that was dedicated and willing to address the widespread needs of oppressed African Americans (Guthrie & Springer, 2004).

Ware (2001) explores the effect of World War II on the fight against segregation. He states that when thousands of black men returned from World War II with government benefits that could be used to finance their education, the NAACP realized that there was a greater demand for higher education (Ware, 2001). As a result, during the 1930s and 1940s, the NAACP laid the groundwork to completely end segregation by fighting for integration in graduate programs throughout the South (Garda, 2007; Ware, 2001; Wattley, 2010). The NAACP's strategy involved litigating in cases where candidates were turned away fromgraduate schools based on their race. In most southern states, there were no graduate schools for black students, so there were no separate schools to meet *Plessy's* separate requirement (Lavergne, 2012; Willis, 2004). The NAACP used the separate but equal doctrine to its advantage and was able to achieve victory in four notable cases that ultimately led to *Plessy* being overruled in 1954 (S. J. Caldas, 2007; Lavergne, 2012; Willis, 2004).

The first of these cases was *State of Missouri ex rel. Gaines v. Canada* (1938). Lloyd Gaines was a Missouri resident who wanted to attend law school in his own state (Tushnet, 1994). Missouri had one law school, and it was for white students only. Gaines applied and was rejected by university officials (Willis, 2004). Citing the public policy and state laws that supported segregation, the law school gave him two alternatives: He could either consent to leave the state with a scholarship to attend a black law school elsewhere, or he could apply to Lincoln University, his undergraduate institution, where Lincoln would develop a law program upon his admission (Willis, 2004). Neither option was acceptable to Gaines, and with the

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assistance of the NAACP, he filed a petition against the University of Missouri and asked that the school be ordered to admit him. Charles Hamilton Houston, General Counsel for the NAACP, was invested in the *Gaines* case because it was the first educational lawsuit involving the separate but equal doctrine that Houston and the NAACP were prepared to litigate all the way to the Supreme Court (Lavergne, 2012). Houston's argument had its roots in *Plessy*; if no separate schools existed to serve black students, the only remedy was integration (Lavergne, 2012).

Gaines' argument was rejected at the Missouri State Supreme Court (*Gaines v. Canada,* 1937). The court, relying on *Plessy* and *Gum Long*, found that the University of Missouri had not violated Gaines' constitutional rights under the 14th Amendment of the U.S. Constitution (*Gaines v. Canada,* 1937). Gaines appealed in federal District and Appellate Courts. Willis (2004) notes that both courts concluded that the state was not in violation of the federal Constitution because Gaines was offered alternative opportunities to attend law school. Gaines appealed the appellate court's decision to the U.S. Supreme Court, and the Court agreed to hear the case.

The Supreme Court, in a vote of 6-2 reversed the decision of Missouri Supreme Court, holding that the university was required to admit Gaines under the Equal Protection Clause of the 14th Amendment (*Gaines v. Canada,* 1938). The Court's decision rested on four distinct arguments. First, Missouri's statement that they would have Lincoln College establish a law school for Gaines was called "a mere declaration of purpose," that had not "yet ripened into an actual establishment" (*Gaines v. Canada*, 1938, p.345). Second, the Court rejected Missouri's plan for educating black students interested in studying law through its scholarship program to other states, reasoning that the scholarship program was an insufficient remedy to combat discrimination because "a state can only provide equal protection in its own jurisdiction" (*Gaines*

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v. Canada, 1938, p.347). The Supreme Court also found the University of Missouri in violation of the Equal Protection Clause because the university extended the privilege of attending law school to white citizens while denying that privilege to blacks (*Gaines v. Canada*, 1938).

Finally, the Supreme Court rejected Missouri's argument that the limited number of blacks who wanted to attend law school in the state released the state from its responsibility of providing that opportunity. The Court stated Gaines' right was a personal one; ultimately it did not matter that Gaines was the only black person to request admission to the law school, the state had a duty to provide the opportunity and had violated the Fourteenth Amendment because it failed to do so (*Gaines v. Canada*, 1938). The U.S. Supreme Court determined that Missouri had violated *Plessy v. Ferguson*, which mandated "separate but equal facilities" for blacks and whites by failing to provide a law school within the state that Gaines could attend (Willis, 2004, p.5). *Gaines* did not overrule *Plessy's* separate but equal doctrine; instead, it made the test for constitutionality when it was applied more difficult. (Lavergne, 2012; Willis, 2004).

After the *Gaines* decision, the NAACP sought a test case in Oklahoma to challenge segregation at the state's white's only law school (Willis, 2004). In *Sipuel v. Oklahoma* (1948), Ada Sipuel was denied admission to the University of Oklahoma's law school. Although the Dean of Admissions confirmed that Sipuel met all the requirements for admission, the university presented Sipuel with a statement from the Oklahoma Board of Regents which stated that the President was not allowed to admit any student to the university with Negro blood since the laws of Oklahoma prohibited the admission of blacks (Fisher, 1996). Sipuel and the NAACP's Legal Defense Fund filed for relief in Oklahoma state district court (*Sipuel*, 1947).

Like Gaines, Sipuel and the NAACP argued that the Oklahoma law used to deny Sipuel admittance of the university violated the Equal Protection Clause of the Fourteenth Amendment

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(Wattley, 2010; Willis, 2004). Sipuel's lawyers argued that the case was similar to the facts in *Gaines* and that the Oklahoma Supreme Court should use the United States Supreme Court's rationale in *Gaines* to decide the case (*Sipuel*, 1947). The Oklahoma Supreme Court disagreed (Sipuel, 1947). "From the outset of its opinion, the Oklahoma Supreme Court justified the University of Oklahoma's decision not to admit Sipuel" (Willis, 2004, p. 6). The court distinguished *Sipuel's* facts from *Gaines* by noting that in Oklahoma, there was a criminal statute that made it illegal for the University of Oklahoma to admit blacks (*Sipuel*, 1947). There was no such law in Missouri. The Oklahoma Supreme Court found in favor of the University of Oklahoma and denied Sipuel's petition for admission (*Sipuel*, 1947). Sipuel appealed to the U.S. Supreme Court (*Sipuel,* 1948).

Attorney Thurgood Marshall argued on Sipuel's behalf at the U.S. Supreme Court (Willis, 2004). In its short opinion, the Supreme Court, citing *Gaines*, ordered the state university to admit her to the law school, holding that "The state must provide 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 (*Sipuel*, 1948, p. 633). Lavergne (2012) notes that the Supreme Court's decision in *Sipuel* added to the holding in *Gaine*s. *Gaines* required that states provide for equality within their own borders, while *Sipuel* added that in complying with the separate but equal doctrine, the state must provide for the education as soon as it would for any otherstudent.

After *Sipuel*, the NAACP continued its quest for test cases against the separate but equal doctrine. Although Gaines and Sipuel had successfully challenged the states' denial of equal education opportunities, the NAACP wanted to see how Oklahoma would balance the holdings of those decisions with state laws that prohibited the co-mingling of black and white students (Willis, 2004). George McLaurin, a middle aged professor, was chosen by Thurgood Marshall as

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a test case (Willis, 2004). McLaurin's age and status as a married man appealed to Marshall and the NAACP since it deprived Oklahoma of the ability to use the fear of interracial marriage and miscegenation as an argument against his admittance (Dailey, 2004). McLaurin applied to the University of Oklahoma to pursue a doctorate in school administration but was denied admission, citing state laws that made integration a crime (Okla. Stat. tit.70. §§455-457, *overruled*). McLaurin sued the University of Oklahoma in federal district court (*McLaurin* , 1948). The federal District Court agreed with McLaurin and held that he was entitled to obtain a degree from the university (*McLaurin,* 1948).

Following the decision, the University of Oklahoma admitted McLaurin, but put limitations on his attendance. Initially, McLaurin was not allowed to sit in the same classroom as the white students, but while litigation was pending, he was assigned to a section of the classroom, and was given a specific seat in the cafeteria and the library (Lavergne, 2012). Attorneys for McLaurin urged the trial court to review the conditions that the university imposed on McLaurin and find that the University was out of compliance with the court's previous order (Willis, 2004). The court disagreed and could not "find any justifiable legal basis for the mental discomfiture which the plaintiff says deprives him of equal educational facilities here." *(McLaurin,*1949, p. 531). McLaurin appealed to the U.S. Supreme Court. (*McLaurin,*1950).

The issue before the Supreme Court in *McLaurin* was whether segregation within a university violated the Fourteenth Amendment (*McLaurin,*1950). The Court reviewed the facts of *McLaurin* and noted that the isolation imposed upon McLaurin denied him the right to study and interact with other people, which the court reasoned was a part of the educational process (*McLaurin,*1950). The Court held that the University of Oklahoma had deprived McLaurin of a

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right guaranteed under the Equal Protection Clause and ordered the University of Oklahoma to remove all elements of segregation (*McLaurin,* 1950).

While the *McLaurin* litigation traveled through the courts on appeal, the NAACP became involved in the final pre-*Brown* desegregation case, *Sweatt v. Painter* (1950). Herman Sweat applied to the University of Texas law school, though at the time, the Texas Constitution and state law prohibited the University of Texas's law school and graduate schools from admitting African Americans (Furlow, 2012). He was denied admittance, despite the fact that there was no law separate law school in Texas for African Americans (Ware, 2001). Sweatt and the NAACP sued (Sweatt, 1946).

The trial court gave the state six months to establish a law school for black students. In order to comply with the court's order, the state rented several rooms and hired black lawyers to teach at the law school for black students (*Sweatt,* 1946). The trial court found that the facility was sufficient enough to satisfy the requirements of *Plessy*. Sweatt appealed the trial court's finding (*Sweatt*, 1946). However, while the appeal was pending, Texas attempted to bolster its claim of equality by giving students access to a law library, appropriating $100,000 to the new black law school, and assigning University of Texas professors to teach in the law school (Ware, 2001).

Sweatt's attorney, Thurgood Marshall, understood that his argument regarding physical inequality had been weakened by Texas' appropriation of funds and other measures to create the black law school (Ware, 2001). He began a new approach to the case that involved the use of expert testimony (Finkelman, 2010). Ware (2001) describes Marshall's approach as being a powerful tool in *Sweatt* and the cases that followed it:

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> His new approach became critical to the Supreme Court's decision in the final series of graduate school cases and would provide the foundation for the decision in *Brown*. Marshall presented expert testimony of an array of expert witnesses who testified that segregation had no scientific basis in public schools. Other experts testified about the relative learning abilities of black students and white students. The dean of the law school at the University of Pennsylvania testified about the importance of interaction among students in the learning process. A professor, he explained, however well qualified, could not provide the elements of the educational experience that are derived from interaction of students. Another witness, Robert Redenfield, who held doctorates in anthropology and law, testified that there was no scientific basis for the general assumption concerning the inherent intellectual inferiority of black students (p.17)

Despite this expert testimony, the trial court did not find for Sweatt, and the case was appealed to the Texas Civil Court of Civil Appeals (*Sweatt*, 1948).

Upon review of the record, the appeals court reasoned that the state had appropriated $100,000 for the development of a law school that would open "immediately" and that the state had acted in a "sincere and earnest bonafide effort to afford every reasonable and adequate facility and opportunity guaranteed…" (*Sweatt*,1948). The appeals court affirmed the ruling of the trial court (Sweatt,1948). In examining the reasoning of the Texas Court of Appeals in *Sweatt* (1948), Finkelman (2010) notes that the Court failed to consider that the importance of having a critical mass of students in a law school setting. He argues that:

> Classes are not possible without discussion and interaction. Many of the key programs of law school-moot court, law review, clinical programs-require a

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> significant number of students. Many of the key programs of law school-moot court, law review, clinical programs-require a significant number of students. A one-on-one Socratic dialog could not be maintained, day-in day-out. If only Herman Sweat were in the class, who could the professor call on after he had interrogated Mr. Sweatt? Only by attending classes with other law students, could Sweatt get a modern legal education… Sweat was not asking to go with a law school with a future- he wanted to study a great law school that already existed (p.10)

Sweatt appealed to the Texas State Supreme Court, but they refused his petition and did not hear his case (Ware, 2001). The Supreme Court of Texas's refusal to hear his case allowed Sweatt to appeal to the U.S. Supreme Court (*Sweatt,* 1950). The Supreme Court granted certiorari and agreed to hear the case.

In *Sweatt*, the U.S. Supreme Court determined that the Texas University for Negroes did not provide Sweatt with a legal education that was comparable with the education that white students received at the University of Texas School of Law and required the University of Texas School of Law to admit him (*Sweatt v. Painter*, 339 U.S.629, 636 (1950)). In writing for the unanimous Court, Chief Justice Vinson stated:

> The University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that

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> one who had a free choice between these law schools would consider the question close him (*Sweatt*, 1950, p.636)

Lavergne (2012) notes that *Sweatt* represented a shift in judicial discourse regarding equality. "Until *Sweatt*, American jurisprudence had used tangible, objective measures such as wages, budgets, buildings, books, and student-teacher ratios to quantify "equality" (Lavergne, 2012, p.1). The Court's opinion in *Sweatt*, however, for the first time, emphasized the "intangible" measures of equality such as ideas (Adams, 2012; Lavergne, 2012). Finkelman (2010) states that *Sweatt* was the first case to truly undermine the *Plessy* doctrine. By finding that "the system of "separate but equal" at issue in *Sweatt* was inherently and irredeemably unequal," the Supreme Court undermined southern segregation (Finkelman, 2010, p.7).

Sweatt and *McLaurin* reached the Supreme Court at the same time in 1950, even though the litigation in *Sweatt* began in the Texas courts in 1946 before *McLaurin's* litigation began in Oklahoma in 1948 (Ware, 2001). Legal scholars often consider the two cases companion cases, and their holdings are often viewed together (Levy, 1999; Thompson, 1950; Ware, 2001). In *Sweatt*, the Supreme Court in its unanimous decision determined that the Texas University for Negroes did not provide Sweatt with a legal education that was comparable with the education that white students received that the University of Texas School of Law (*Sweatt v. Painter*, 339 U.S. 629, 636 (1950). In *McLaurin*, the Court held that admitted students could not be treated differently within the university setting because of their race (Levy, 1999). Ware (2001), asserts that when viewed together, the Supreme Court's holdings in *Sweatt* and *McLaurin*, along with their holding in *Sipuel* indicate that the *Plessy* doctrine had been damaged, even though the Supreme Court had not yet overturned *Plessy v. Ferguson*.

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The End of *Plessy: Brown v. Board of Education of Topeka (1954)*

The NAACP was the force behind the legal campaign to end school desegregation (S. J. Caldas, 2007; Ware, 2001). *Gaines*, *Sipuel*, *McLaurin*, and *Sweatt* were all used to attack the equal notion of the separate but equal doctrine by showing that separate graduate schools for African Americans were inherently unequal (Furlow, 2012; Levy, 1999; Ware, 2001; Wattley, 2010; Willis, 2004). While none of these cases overturned *Plessy*, the NAACP was encouraged about their progress toward ending segregation (Henderson Jr, 2004). Fueled by the *Sweatt* and *McLaurin* victories, the NAACP, under the leadership of Thurgood Marshall, began assembling cases to attack primary school segregation at the Supreme Court (J. H. Jones & C. R. Hancock, 2005).

Brown v. Board of Education (1954) consolidated Court of Appeals cases that arose out of litigation in Kansas, South Carolina, Delaware, the District of Columbia, Virginia, and South Carolina (Guthrie & Springer, 2004; Henderson Jr, 2004). All cases involved African American children who attended segregated primary schools. The *Brown I* plaintiffs challenged state statutes that required segregated public schools for black and white students. The Supreme Court, in its unanimous decision, declared that segregation in educational facilities was unconstitutional and overturned *Plessy v. Ferguson*. However, the Chief Justice and the Court did not issue a decision on what form of relief for the plaintiffs was appropriate, citing the fact that the cases arose out of different jurisdictions with different circumstances (*Brown*, 1954, p. 495). The Court delayed the ruling on remedies until the following year, giving all parties an opportunity to brief the Court again and provide recommendations for remedies (*Brown*, 1954, p. 495). Kelly (2012) suggests that perhaps Chief Justice Warren was concerned that a debate

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regarding what states should have to do to remedy segregation would destroy the unanimous decision and felt that the delay would be beneficial to all parties.

Kelly (2012) examined the court's rationale in *Brown I* and observed that rather than focus on the property law notion that two separate places cannot be equal, the Supreme Court chose instead to view *Brown I* from the standpoint that segregation itself harms the minds of minority students and results in an impact on their future academic prospects. The tangible resources such as salary differences, facilities, educational supplies, and course offerings were not of major concern to the Supreme Court's decision. Instead, the Court chose to focus on the intangible harms of segregation (Kelly, 2012). The Court, according to Kelly (2012), viewed segregation as a societal evil that hindered the emotional, social, and academic development of minority children and used the ill effects of segregation to rationalize their decision.

As expected, the decision evoked tremendous reaction on all sides of the segregation debate (Guthrie & Springer, 2004; Henderson Jr, 2004; Schmidt, 2008). The NAACP and northern liberals cited *Brown I* as a major milestone in the fight against segregation, while southern segregationists predicted violence and turmoil as a result of the decision (Baker, 1996; Schmidt, 2008). The Supreme Court had overturned the arguments justifying segregation that had long shaped social and public opinion throughout the south, and southerners vowed to resist the Supreme Court's decision (S. H. Brown, 2011; Dailey, 2004; Driver, 2014). Shortly after *Brown I* was decided, politicians, housewives, and religious leaders throughout the south called for resistance. Billboards across the south painted members of the Supreme Court as communist, un-Christian villains and called for their immediate impeachment (King, 2004).

Dailey (2004) explores the segregationist's resistance to desegregation through the lens of sex and religion. Her research indicates that throughout the south, white ministers used

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biblical references to support their stance on segregation. White ministers, she argues, managed to link “all the significant tragedies of human history, from the Fall and the Flood through the Holocaust, in terms of race relations” (Dailey, 2004). Integration, therefore, was viewed as one more tragedy that would lead to destruction. Likewise, Dailey (2004) notes that segregationists also argued that the integration of schools would lead to miscegenation, which they saw to be in direct conflict with the will of God. For many white southerners, it was sex that lay at that heart of their resistance to *Brown I*, despite the fact that sexual relations in no way factored into the NAACP’s legal argument or the Supreme Court’s ultimate decision (Dailey 2004). The fear of the potential for miscegenation was a leading argument against integration (Dailey, 2004).

In examining the socio-political global aspects of *Brown I*, Minow (2013) concludes that even before *Brown I* was issued, the United States was already poised to begin the process of ending segregation. In the post-World War II 1940s and 1950s, the United States was engaged in the Cold War and competed with the Soviet Union for world dominance (Minow, 2013). The State Department during President Dwight Eisenhower’s administration was concerned that the segregation policies throughout the south helped to perpetuate a negative image of the United States to other countries, particularly those that had communist governments (Dudziak, 2002). The Soviet Union used America’s treatment of minorities to develop and spread a negative critique of the United States throughout the world (Dudziak, 2002). To combat the negative image, the State Department was already in talks with the Justice Department, which supported the termination of segregation through its amicus brief in *Brown I* (Dudziak, 2002).

Scott (1980) states that the outcome of *Brown I* was inevitable from an economic standpoint. Noting that that the federal courts play an important role in harmonizing the law with society, Scott (1980) argues that social, economic, political, and global pressures influence

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judicial decisions (Scott, 1980). The *Brown* decisions represented the Court's understanding that segregation left African Americans out of mainstream American society as either consumers or producers, thus leaving the country unable to reach its full economic potential. *Brown I* was a first step toward integrating African Americans into the mainstream economy of America (Scott, 1980).

Burns (1981) suggests that *Brown* served as both a beginning and an end, in that it illustrated a creative use of the law to evoke social change. The NAACP's strategy that began with *Gaines* and culminated with *Brown I* served as careful preparation for the next decades of social activism and change. On the other hand, Caldas (2007), argues that the Court's decision to ignite social change in *Brown I* ignored the fact that schools are social environments and are developed by the value systems of their communities over time. Segregation was deeply rooted in the southern culture and psyche, and *Brown I's* implementation would be a struggle (S. J. Caldas, 2007).

Implementing *Brown I: Brown II*

In its initial *Brown* decision, the Supreme Court did not address the question of how schools across the south were to comply with its ruling (*Brown,* 1954). Instead, it reserved the question for a later time and invited all interested parties to submit briefs that outlined ideas about how to effectively implement the ruling. In order to address the issue of remedies for the 58 years of segregation, the Supreme Court issued a second decision in *Brown v. Education of Topeka* (1955) (S. J. Caldas, 2007; Guthrie & Springer, 2004; J. Jones & C. R. Hancock, 2005; Schmidt, 2008). This case is referred to as *Brown II* to distinguish it from the original decision.

In examining the briefs from the southern states, Kluger (1976) notes that polls and survey results were used to argue that immediate implementation of *Brown I* would be virtually

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impossible due to the social climate. The state of Florida, for example, spent $10,000 on an opinion poll whose results showed that 75% of the state's white leaders supported *Brown I* and that only 13% of policemen would enforce the law (Kluger, 1976). The southern states argued both against immediate desegregation and a timeline for implementation. Rosenberg (2006) characterizes the South's position as extraordinary since they were very blunt in their responses to the Supreme Court at oral argument. As an example, Rosenberg (2006) points to the response of S.E. Rogers, attorney for South Carolina, who when questioned by the Chief Court Justice Warren about whether South Carolina would make a serious attempt to comply with a desegregation decree, simply stated that the south would absolutely not conform to a decree and would refuse send their children to black schools.

In its brief to the Supreme Court for *Brown II*, the NAACP argued for a clear directive for southern states to desegregate (Kluger, 1976). The NAACP, taking a position that they described as generous, was willing to hold off on immediate desegregation if the Supreme Court would provide a deadline for implementation no later than 1956 (Klarman, 2004). The NAACP, fearing that the stalling tactics of the southern states would slow progress, argued for specific timelines for desegregation (Schmidt, 2008).

Schmidt (2008) states that the Supreme Court was deeply divided on the question of the Court's role in *Brown I's* implementation. Many argued that given the strong opposition to *Brown I* throughout the south, a strong remedial order for desegregation had the potential to provoke unpredictable social and political outcomes if the south revolted, as many argued that it would (Guthrie & Springer, 2004; T. Jones, 2006; Schmidt, 2008). Therefore, in crafting its opinion in *Brown II*, the Court decided to proceed cautiously (T. Jones, 2006; Pfander, 2006). Rather than accept the NAACP's recommendation for a specific timeline for implementation, the

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Supreme Court sent the cases back to the Federal District Courts with the mandate to admit African American students to public schools with "all deliberate speed" (Pfander, 2006).

Numerous scholars have criticized the Supreme Court's "all deliberate speed" direction to the Federal District Courts. (Holley, 2005; T. Jones, 2006; Klarman, 2004; D. D. Parker, 2005; Pfander, 2006; Rosenberg, 2006). Pfander (2006) indicates that the decision allowed southern states to continue to resist *Brown I's* mandate since it lacked specificity and provided no timelines for desegregation. Jones (2006) describes *Brown II* as a serious mistake and argues that the Court sent a message to African Americans that the concerns of white southerners were placed above remedying the wrong done to African American schoolchildren for decades across the south (Jones, 2006). Klarman (2004) states that the decision was "misguided" and that it embraced vagueness rather than specificity (Klarman, p.320, 2004). Ogletree (2004) argues that the "all deliberate speed" standard gave the southern states the ability to hinder desegregation, since there was no direction or timeline for integration included in the decision (Ogletree, 2004). Parker (2005) views the *Brown II* decision as undermining *Brown I* by allowing southern school districts the option of non-compliance.

Rosenberg (2006) however, contends that criticism of the *Brown II* decision often ignores the social and political factors that were in place at the time of the decision and places an unfair expectation on the Supreme Court to overcome a legacy of racism and suppression in the south. There were seven factors, according to Rosenberg (2006) that were present that would have rendered any decision that the Court made in *Brown II* difficult to implement: Congress, the President, state legislation, local courts, southern governors, private groups, and violence.

Rosenberg (2006) argues that neither Congress nor the President truly embraced the *Brown I*. In 1956, 101 members of Congress signed *A Declaration of Constitutional Principles,*

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which has become known as the Southern Manifesto (Driver, 2014; Rosenberg, 2006). The Southern Manifesto outlined a plan for southern states to do all that was possible to resist implementing *Brown I*. Rosenberg (2006) notes that President Eisenhower was not vocally opposed *Brown I*. However, he did not believe that the law could truly change the prejudices held by those in the south (Schmidt, 2008).

State legislators, local courts, and southern governors also would have also made any ruling in *Brown II* difficult to implement (Rosenberg, 2006). Many state legislators, local judges, governors, and judges were members of private organizations that vowed to resist the Supreme Court's mandate (S. H. Brown, 2011). State legislators and local courts were at the forefront of the desegregation battle and could either ignore the Supreme Court or pass other segregation laws that would be challenged in court and take years to resolve, resulting in more delaying tactics (Rosenberg, 2006). Guthrie & Springer (2004) describe Arkansas Governor Orval Faubus's activation of the Arkansas National Guard to prohibit African American students from desegregating the Central High School as an example of the power that southern governors had to delay the process of desegregation. These groups and others rallied segregationists throughout the south and in some instances resulted in violence (Guthrie & Springer, 2004; Rosenberg, 2006).

According to Rosenberg (2006) private groups and violence were the final two factors that would have made any decision in *Brown II* difficult to implement. After *Brown I*, organizations throughout the south organized massive resistance to desegregation (Guthrie & Springer, 2004; McMillen, 2007; Richardson Walton, 2009; Schmidt, 2008). Both poor southern whites and wealthy white elites were involved in the resistance (S. H. Brown, 2011; K. Crenshaw, 1995). Poor white southerners feared loss of control of their schools, and felt

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abandoned by white elites for failing to do more to protect their superior status to African Americans (K. Crenshaw, 1995). Elite whites formed the Federation for Constitutional Government shortly after *Brown II* and pledged to preserve segregation (S. H. Brown, 2011). Robert "Tut" Patterson, a former football player at Mississippi State University and World War II war hero formed the first chapter of the White Citizens' Council in Mississippi (Walton, 2009). The White Citizens Council had community leaders in its leadership, thus giving the Council an air of respectability and influence (Walton, 2009). These groups used bomb scares, verbal threats, physical intimidation and other violent tactics were to intimidate those in support of school integration (Guthrie & Springer, 2004; Rosenberg, 2006; Schmidt, 2008).

While the decade after *Brown I* and *Brown II* saw tremendous efforts in the quest for social justice, school desegregation in the south remained minimal (S. J. Caldas, 2007; D. Parker, 2005). The Supreme Court's decision in *Brown II* to not develop specific timeline for school districts throughout the south to end segregation resulted in focused resistance to integration. (Daniel & Walker, 2014; Holley, 2005; D. Parker, 2005; R. C. Smith, 1997). The first challenge to the Supreme Court's authority to get nationwide attention came from Arkansas in *Cooper v. Aaron* (1958).

Freyer (2008) asserts that the first legal test of states' rights versus the Supreme Court decisions in *Brown I* and *Brown II* occurred when *Cooper v. Aaron* (1958) reached the Supreme Court of the United States. In *Cooper,* the Little Rock, Arkansas Board of Education developed a plan for integration of Little Rock High School, even though desegregation was widely opposed socially and politically throughout the state (Cooper v. Aaron, 1958). Governor Faubus, a vocal opponent of desegregation, became involved and vowed that schools in Arkansas would not desegregate and activated the Arkansas National Guard to keep the nine black students from

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integrating Little Rock High School (Cooper v. Aaron, 1958). When the federal court enjoined Governor Faubus from preventing the black students from attending, he withdrew the national guard and allowed the black students to be attacked by mobs of angry segregationists as they attempted to desegregate (Epperson, 2014). Governor Faubus argued that the Supreme Court had exceeded its authority in *Brown I*, and that states were not required to comply with federal court rulings (Freyer, 2008).

The Supreme Court rejected Arkansas' arguments. The Court, citing the precedent of *Marbury v. Madison* (1803), reaffirmed that the Constitution is the supreme law of the land, and that Article III of the U.S. Constitution allows the federal judiciary to review constitutional challenges and interpret the law. While states are vested with police power, and are generally responsible for the education of children, those powers must be carried out constitutionally. In short, the Supreme Court may review and strike down any unconstitutional state law.

Faubus's use of law enforcement to prevent desegregation "represented law as repression" (Epperson, 2014, p. 694). Epperson (2014) argues that when the nine black students, were violently prevented from exercising their constitutional right by state action, they became "objects of the law" and lacked "agency or authority" (Epperson, 2014, p. 694). *Cooper* was the first, but not the last of states' attempts to resist the Supreme Court's decision in *Brown I*.

In contrast to the violent tactics employed by Arkansas in *Cooper*, June-Friesen (2013) notes that the approach was different in Virginia. She posits that Virginia represented the heart of southern aristocracy and supported segregation but shunned the type of violence seen in the deep south. Rather than comply with the *Brown I* mandate to desegregate, a Virginia school district closed its schools in 1959. (June-Friesen, 2013; R. C. Smith, 1997; Waugh, 2012). In that case, a white, private, tuition-based school opened to serve white students, while African American and

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poor whites either had to move or received no formal education at all (June-Friesen, 2013). This school closure lasted for five years until the Supreme Court heard the case in 1964 and ruled against the school district (*Griffin v. County Sch. Bd. Of Prince Edward County*, 377 U.S. 218, 234 (1964).

Regardless of the position they take with regard to whether the Supreme Court should have given more guidance and whether *Brown II* would have been better implemented if they had, scholars agree that desegregation efforts in the south were stalled during the years immediately after *Brown I* and *Brown II* (S. H. Brown, 2011; S. J. Caldas, 2007; Driver, 2014; Guthrie & Springer, 2004; T. Jones, 2006; Pfander, 2006; Rosenberg, 2006; Schmidt, 2008). Throughout the 1960s and 70s, the Supreme Court would hear numerous desegregation cases as desegregation gradually spread throughout the south and the south continued to violently resist the desegregation efforts.

Caldas (2007) suggests that the images of southerners violently opposing desegregation had a powerful impact on the psyche of white Americans who had never been exposed to the entrenched racism of the south. The 1963 March on Washington, where Dr. Martin Luther King, Jr. gave his famous *I Have a Dream* address attracted Americans of all races and religions who sought a more inclusive society for all (S. J. Caldas, 2007). The foundation for federal legislation had been laid.

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The Civil Rights Act of 1964 and Freedom of Choice

By the summer of 1963, the evidence that a plan for a civil rights bill was taking shape was found in the contents of numerous speeches made by President John F. Kennedy (Wright, 2005). President Kennedy's assassination left a brief uncertainty for the bill's passage; but shortly after his death, President Lyndon B. Johnson asked that the bill be passed (Wright, 2005). The Civil Rights Act of 1964 gave desegregation proponents a tool against the stalling tactics employed by the southern states (S. J. Caldas, 2007; Orfield, 1969). The Civil Rights Act of 1964 provided serious financial consequences for those school districts and states who continued to refuse to comply with *Brown I*; federal education funds could be withheld from any school found to discriminate on the base of race, religion, or national origin (S. J. Caldas, 2007). The passage of the Elementary and Secondary Education Act (ESEA) in 1965 provided more financial incentives for states to desegregate schools. ESEA provided funds for educational programs, all of which could be withheld from schools found to be in violation of the Civil Rights Act of 1964 (S. J. Caldas & Bankston, 2005).

Scholars who study the history of school desegregation refer to the decade of the 1960s as the Freedom of Choice Era (S. J. Caldas, 2007; Daniel & Walker, 2014; Raffel, 1998). Freedom of Choice refers to the early desegregation plans developed by school districts in the South that allowed minority families to choose between the segregated school to which the child had been assigned and another desegregated school in the same attendance zone (Raffel, 1998). Caldas (2007) states that the Freedom of Choice plans did very little overall to affect the desegregation process, particularly in light of the fear and uncertainty associated with attending a desegregated school. Raffel (1998) indicates that intimidation and transportation challenges also kept the Freedom of Choice plans for having any significant impact on desegregation.

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Freedom of Choice was brought to the attention of the Supreme Court fourteen years after *Brown I* in *Green v. New Kent County School Board*, (1968). In *Green*, the Supreme Court was faced with New Kent County, Virginia's freedom of choice desegregation plan. While the plan did allow for desegregation, 85% of the school district's children were still attending segregated schools (Cheatham & Everett, 2014; Choi, 2009).

The Supreme Court, dissatisfied with New Kent County's progress toward desegregation found that the freedom of choice plan was unconstitutional, noting that the *Brown II* decision requiring *all deliberate speed* had been decided 10 years before New Kent County even attempted to develop the desegregation plan (Choi, 2009). The Court charged that school districts had an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" (*Green,* 1968, pp. 437-438). The court identified six elements of school operation that are used to determine whether a school desegregation plan was acceptable: student body composition, faculty, staff, transportation, extracurricular activities, and facilities (S. J. Caldas & Bankston, 2005; Cheatham & Everett, 2014; Choi, 2009; Holley, 2005; Kelly, 2012).

Scholars have highlighted the importance of the *Green* decision as a turning point in school desegregation (S. J. Caldas, 2007; Cheatham & Everett, 2014; Holley, 2005; D. Parker, 2005). *Green* marks the beginning of the era of federal court supervision over local school districts (Holley, 2005). Caldas (2007) opines that *Green* was nearly as important as *Brown I* because the modern discourse around race and public education stems from the Supreme Court's analysis of that case. Likewise, Cheatham & Everett (2014) agree that *Green* is significant in desegregation jurisprudence, citing the "theoretical guidance" that the Supreme Court gave the lower courts and the structure laid out by the *Green* factors (p. 223). Parker (2005) notes that the

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Court in *Green* formally acknowledged many of the ways that racial discrimination could take place in the context of school desegregation and used the *Green* factors as a means to examine a school district's progress towards actual desegregation.

Kelly (2012) asserts that *Green's* success was short-term, and ultimately served to disable *Brown I* by limiting the number and types of remedies that lower courts had at their discretion to use in desegregation cases. Kelly's (2012) argument is predicated on the idea that the Court in *Green* ignored three critical principals of *Brown I*: First *Green* failed to account for the principle that segregated as defined in *Brown I* is a broad term that refers to both the physical separation of students by color and the state's classification and assignment of students by race. Second, it was silent on the moral rationale for desegregation-to increase the quality of education for minority students. Third, *Green* ignored *Brown I's* acknowledgement that given the complexity of the desegregation process, district courts were in the best position to issue desegregation decrees that responded to the unique circumstances facing each individual school district.

Kelly (2012) goes on to argue that the Court placed too much emphasis on the physical separation of students and failed to consider the overarching moral rationale for *Brown I*, which was to provide all students with a high-quality education. In focusing on access to integrated facilities, the Court left out the moral rationale for *Brown I*, thus divorcing the purpose of the remedy from the remedy itself (Kelly, 2012). Kelly (2012) also criticizes the Supreme Court for demanding immediacy of desegregation, noting that forcing school assignments could, and did lead to white flight, thus rendering the demands of *Green* impossible to meet.

Green initiated a period of ongoing desegregation efforts across the nation (Holley, 2005). The challenges of desegregating urban school districts were first brought to the Supreme Court's attention in *Swann v. Charlotte Mecklenburg Board of Education* (1971). In *Swann,* the

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plaintiffs claimed that the zoning scheme that the school board initiated to desegregate the school district had failed. The trial court, as a remedy, had ordered the school district to redraw its neighborhood school district zones so that it could bus African American students living inurban areas to the suburbs, and white students living in the suburbs to urban areas to attend school (*Swann v. Charlotte,* 1971). The school district appealed, arguing that the busing scheme posed an undue burden on the school district and the students (*Swann,* 1971).

The Supreme Court upheld the busing plan but recognized that it did impose a burden on the school district (Holley, 2005; Kelly, 2012). Addressing this burden, the Court found that as soon as segregated schools had achieved racial balance, the school district was not required to make year to year adjustments in order to maintain it (*Swann,* 1971). Kelly (2012) indicates that this detail of the holding released school districts from any duty to continuously revisit and redraw school district lines in order to maintain racial balancing.

The *Swann* decision allowed district courts great flexibility in crafting school desegregation remedies in cases where de-jure segregation once existed (Cheatham & Everett, 2014; Choi, 2009; D. Parker, 2005). *Swann* was the first time the Supreme Court had explicitly endorsed busing as a remedy for segregation (S. J. Caldas, 2007). Caldas (2007) suggests that the momentum and morality attached to the Civil Rights Movement played a role in the Court's affirmation of using a wide variety of tools to achieve desegregated schools.

The first desegregation case to reach the Supreme Court that dealt with a school district outside of the south was *Keyes v. School District No.1* (1973). The Denver, Colorado school district had never had de jure segregation; there had never been any laws enacted separating the races in the school district. However, parents of Black and Latino children filed suit claiming that the school district engaged in discriminatory zoning practices that led to segregation of the

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races in the school district. The case was also unique in that it involved a tri-racial school district: Black, White, and Latino (Casas, 2006). The Supreme Court found that the school district had violated the 14th Amendment by its pattern of actions that resulted in a segregated school district.

The Shift Away from Judicial Involvement: 1970s and Beyond

Daniel & Walker (2014) identify a distinct shift in the Supreme Court's willingness to enact broad based remedies after the *Green* and *Swann* decisions, pointing to the Court's holdings in *San Antonio Independent School District v. Rodriguez* (1973) *and Milliken v. Bradley* (1974). In *Rodriguez* (1973) the plaintiffs were a group of Mexican American parents whose children attended primary and secondary public schools in San Antonio, Texas (Saleh, 2011). Though there was evidence that the funding disparities had a greater impact on minority students, the plaintiffs in *Rodriguez* alleged that the state of Texas' property-taxed based funding structure created an unequal educational system based on the property wealth of the district, rather basing their legal claim on race(Darby & Levy, 2011).

The plaintiffs provided the court with detailed evidence supporting their allegation that the wealth based funding structure severely impacted rural and low property wealth districts, many of which were largely minority (Saleh, 2011). At the time of *Rodriguez*, the state of Texas was responsible for 80% of schools' funding with the remainder coming from the local school district. The districts with low wealth found it impossible to make up the other 20% without a strong property tax base (*Rodriguez,* 1971, pp. 9-10). As a result, higher wealth districts were able to have per pupil expenditures many times higher than the per pupil expenditures in poorer districts.

In its 5-4 decision, the Supreme Court in *Rodriguez*, held that wealth was not a suspect class, and that education was not a fundamental right under the U.S. Constitution. The Court

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used the lowest level of scrutiny, the rational basis test, to analyze the disparity in funding (Underwood & Sparkman, 1991). While the Court acknowledged that there was widespread inequality in the Texas funding scheme, the Court was willing to overlook these flaws in the school funding context (Saleh, 2011).

Milliken v. Bradley (1974) arose out of litigation brought by parents of African American children in Detroit (N. R. Jones, 1992). In *Milliken*, parents sued, alleging that housing patterns and racially discriminatory zoning lines had been drawn that created an inequitable and racially isolated school districts (N. R. Jones, 1992). In a departure from its previous willingness to remedy the effects of discrimination, the Supreme Court held that the power of federal courts to demand integration was limited to those school districts that had a previous record of discrimination (Daniel & Walker, 2014).

Scholars note that *Rodriguez* and *Milliken* represent a distinct shift in the Supreme Court's discourse regarding remedying social wrongs (Daniel & Walker, 2014; D. Parker, 2005). Up until *Milliken* and *Rodriguez*, the Court had been willing to cure social wrongs through broad equitable relief (Millhiser, 2005). Parker (2005) suggests that *Rodriguez* betrayed the values laid out in *Brown I* regarding all children having access to a quality education. While *Green* and *Swann* focused on the harm done to students of color by discrimination, *Rodriguez* and *Milliken* shifted that focus to the need for local school districts to maintain local authority over the schools that they controlled (D. Parker, 2005).

Despite the legal efforts of the 1960s and 1970s, many school districts throughout the country remained under federal desegregation court orders well into the 1990s. (Reardon, Grewal, Kalogrides, & Greenberg, 2012). Beginning in 1991, the Supreme Court's decisions in three key cases signaled growing judicial restraint, and arguably outright hostility toward

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remedying local school desegregation issues (Crawford & O'Neill, 2011; Daniels, 2015; Holley, 2005; Holley-Walker, 2012; D. Parker, 2005) Three cases, *Board of Education of Oklahoma v. Dowell* (1991), *Freeman v. Pitts* (1992), and *Missouri v. Jenkins* (1995), collectively referred to as the "Re-segregation Trilogy" all involved school districts that had been under federal desegregation orders for many years, and sought to be released from them (Crawford & O'Neill, 2011, p.513).

Board of Education v. Dowell (1991) was the first of these decisions. In *Dowell,* the Supreme Court held that desegregation orders were meant to be temporary, and that returning to local control was preferable when a school district had made a good faith effort to comply with the desegregation order and desegregate its schools (Reardon et al., 2012). A year later, the Supreme Court decided *Freeman v. Pitts* (1992). In *Pitts*, the Supreme Court held that local control could be gradually given back to the school district as they complied with various parts of the desegregation order, rather than waiting for the full implementation of the order (Daniel & Walker, 2014). Finally, in 1995, the Supreme Court decided *Missouri v. Jenkins.* In *Jenkins*, the Supreme Court held that the remedies for past discrimination must only bring the victims to the point that they would have been had the discrimination not occurred; there was no duty for offending school districts to do more (Reardon et al., 2012).

Dowell, *Pitts*, and *Jenkins* have been collectively referred to as the end of the *Brown* era and the beginning of re-segregation (Daniel & Walker, 2014; Siegel-Hawley et al., 2012). For over 25 years, *Brown I* and its progeny saw the Supreme Court approve the use of race conscious methods and wide judicial latitude to ensure that local boards complied with *Brown's* mandate (S. J. Caldas, 2007; Holley, 2005). *Dowell*, *Pitts*, and *Jenkins* eased the requirements for release

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from desegregation court orders, allowing local boards of education to regain control of their school districts (Reardon et al., 2012; Siegel-Hawley et al., 2012).

Educational researchers indicate that the Supreme Court's return to judicial restraint in the 1990s has led to the re-segregation of schools (Fiel, 2013; Holley-Walker, 2012; Orfield & Harvard Civil Rights Project, 2001; Reardon et al., 2012). While the Southern schools still remain the most desegregated in the country, recent data shows that gains made during the desegregation decades of the 1960s and 1970s are waning (Siegel-Hawley et al., 2012). Trend data that suggests that American schools are becoming more segregated by race at levels in some parts of the country similar to segregation prior to *Brown* (NAACP Legal Defense and Educational Fund, 2008; Orfield & Harvard Civil Rights Project, 2001; Siegel-Hawley et al., 2012). African American students across the south have become more concentrated insegregated minority schools since 1991 (Siegel-Hawley et al., 2012). Orfield and Lee (2006) link these trends to the relaxation of judicial remedies for segregation.

Reardon et. al (2012) investigated whether school districts under court order remained desegregated once the court order ended. Their study indicated that federal desegregation orders were effectively used to desegregate schools, but once the federal court oversight ended, segregation returned. Reardon et.al (2012) show that segregation increases within a few years of a court order release and continues to rise over the next decade. "Within 10 years of release, the white/black dissimilarity index grows by an average of 0.064 in southern districts." (Reardon et.al, 2012, p.899). While this increase in segregation is still not at pre-*Brown* levels, the numbers represent a distinct upward shift in segregation levels once a federal court order has ended.

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In 2007, the Supreme Court issued its opinion in *Parents Involved v. Seattle School District No.1*. This case arose out of litigation involving a racial balancing plan that the school district enacted. The district had never been under a federal desegregation order and had not engaged in de jure segregation (*Parents Involved v. Seattle School District No.1, 2007*). However, the school district opted to develop a racial balancing plan to increase diversity in its schools. Under the plan, all rising 9th graders were allowed to select their choices for the high schools they wished to attend in order of preference (p.518). If too many students selected the same high school, the school implemented a tiebreaker system to determine who would fill the available seats at the school. One of the tiebreakers involved giving preference to a student whose race would help balance the racial composition of the school (p.518). The Supreme Court found this use of race impermissible and determined that diversity was not a compelling interest in K-12 education.

Love (2009) and Welsh (2009) argue that the Supreme Court erred in in deciding *Parents Involved*. Rather than upholding the legacy of *Brown I,* the Court opted to hold that K-12 school districts could not voluntarily pursue diversity or the benefits of diversity in assigning students to particular schools (Love, 2009). Love (2009) argues that the Court has taken away school districts' ability to combat residential patterns that result in *de facto* segregation and has made it very difficult for K-12 districts to pursue integration policies on their own initiative. Althoughde jure desegregation has been eliminated, the Supreme Court in *Parents Involved* refused to allow a school district to address de facto segregation through its student assignment policy (Welsh, 2009).

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Affirmative Action in Higher Education

While the immediate impact *of Brown v. Board of Education* (1954) and the school desegregation cases that followed were focused primarily on public, K-12 institutions, *Brown I's* desegregation mandate would not be limited to primary and secondary schools (Stallion, 2013). The first case involving higher education admissions to reach the Supreme Court after *Brown I* and *Brown II* was *Florida ex rel. Hawkins v. Board of Control of Florida*, (1956). *Hawkins* involved the University of Florida Law School's refusal to deny admission to an applicant based on his race. The Supreme Court refused to decide the case; instead, the case was remanded to the Florida state courts with the specific instruction that Florida was required to apply the law as announced in the *Brown I* and *Brown II* decisions thus indicating that the *Brown* holdings were not limited to secondary and primary schools.

In seeking to comply with the all deliberate speed mandate in *Brown II*, previously segregated universities began to change their admissions policies (Stallion, 2013). In many cases, universities began to take affirmative action to increase minority student enrollment, which usually involved consideration of race in the admissions process (Edwards, 2004; Stallion, 2013; Swink, 2003). Edwards (2003) argues that entrenched racism against African Americans made integration very difficult, despite *Brown I's* mandate; thus, race conscious actions became the government's tool to remedy discrimination.

The term *affirmative action* has its roots in orders issued by the Executive Branch of the United States government (Choi, 2009; Naff, 2004; Parry & Finney, 2014; Stallion, 2013; Swink, 2003). In 1961, President Kennedy's Executive Order 10,925 required federal contractors to take affirmative action to prevent discrimination to federal applicants and employees (Choi, 2009; Naff, 2004; Parry & Finney, 2014; Stallion, 2013; Swink, 2003). By 1965, Congress had created

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the Equal Employment Opportunity Commission (EEOC) to provide oversight and review of federal affirmative action policies (Stallion, 2013). Swink (2003) notes that the early efforts of affirmative action were primarily aimed at federal employment and industry, however, affirmative action soon moved into admissions programs in higher education.

Baldwin (2009) suggests that court decisions regarding affirmative action programs in colleges should be viewed in the context of the time period and social climate in which they are rendered. By the late 1960s, the Supreme Court had lost patience with minimal compliance of school desegregation mandates at the K-12 level (Choi, 2009). The Supreme Court in *Green* (1968) had both provided a structure for determining whether a desegregation plan was acceptable, and made it clear that local school boards had an affirmative duty to convert to a unitary system in which discrimination had been eliminated (Choi, 2009). The Civil Rights Law of 1964 had been passed, and the United States was working toward diminishing segregation.

By the late 1970s, most colleges and universities had instituted some type of affirmative action programs for minority students and women (Stallion, 2013). According to Kim (2005), there are three dominant rationales for the need for affirmative action in higher education. The compensatory rationale justifies affirmative action by considering it a form of compensation for the centuries of exclusion experienced by minorities by taking affirmative steps to create opportunities for disadvantaged populations (Kim, 2005). The redistributive rationale seeks to have a more equal distribution of society's resources, focusing on racial disparities brought about by segregation and income inequalities (Kim, 2005). Finally, the derivative rationale justifies affirmative action because of the benefit to society as a whole, believing that those exposed to diversity make better citizens (Cornwell & Guarasci, 1997; Gurin et al., 2004; Kim, 2005).

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The first serious challenge to a university's affirmative action measure was brought to the United States Supreme Court *in Regents of the University of California v. Bakke* (1978). Allan Bakke, a white applicant to the University of California at Davis School of Medicine was denied admission twice, in 1973 and 1974 despite the fact that he had better test scores, interview scores, and grade-point averages than a number of minority students who were admitted under a special admissions program (*Bakke*, 1978, pp. 276-277). Bakke claimed that the special admissions program for minority students violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (*Bakke*, 1978).

The University of California at Davis School of Medicine had opened in 1968 with 50 freshman seats and expanded those seats to 100 by 1971(*Bakke*, 1978, p.272). However, there was no special enrollment for minority students, and the entering class of 1968 contained 3 Asian American students and no other minorities (*Bakke*, 1978). In order to increase numbers of minority applicants and students, the University of California at Davis School of Medicine developed a special admissions program aimed at assisting disadvantaged students. This program consisted of a separate admissions committee consisting of a majority of minority members. Sixteen seats of the 100 total seats were set-aside for minority students only (*Bakke*, 1978, p.273). Applicants were pre-screened by the special admissions committee before being sent to the general admissions committee. Minority applicants were allowed to compete for any of the 100 seats, including the 16 set aside for minority applicants. White students competed for the remaining 84 seats, with no opportunity to be considered for the 16 minority seats (*Bakke*, 1978, pp. 288-289).

When Bakke applied in 1973, his composite admissions score was too low to qualify for admissions under the general admissions program (*Bakke*, 1978). However, his composite score

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was higher than that of some of the individuals who had been admitted under the special minority program in place for the 16 seats (*Bakke*, 1978). Furthermore, at the time of his application, there were still 4 of the 16 special minority seats open, but the university would not consider admitting Bakke under the minority program (*Bakke*, 1978). Bakke reapplied a year later and was rejected again, although his scores were higher than some of the students admitted under the special admissions program (*Bakke*, 1978). Bakke sued, presenting the issue of whether the consideration of race in higher education admissions to enhance the opportunities for minority applicants violates the Equal Protection Clause of the U.S. Constitution for Caucasian applicants (Choi, 2009; Stallion, 2013; Swink, 2003).

According to Robertson, Franklin, & Epermanis (2007), the original purpose of the Equal Protection Clause was to prevent state and local governments from enacting laws that would treat citizens differently based on the citizen's race. While the Equal Protection Clause represents the general rule regarding the treatment of citizens based on race, there are certain circumstances under which the federal courts have allowed state governments to treat certain citizens preferentially (Robinson, Franklin, & Epermanis, 2007a).

When the government seeks to treat its citizens differently based on race, the courts apply strict scrutiny, a close examination that involves a two-part test to determine constitutionality (Choi, 2009; Robinson et al., 2007a; Stallion, 2013). First the government must prove that the differential treatment of its citizens based on race is necessary to further a *compelling government interest* (Choi, 2009; Stallion, 2013). How the court establishes that there is a compelling interest is "a political decision and has been modified periodically" (Robinson et. al., 2007, p. 37).

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Once the government has shown that its use of race does accomplish a compelling interest, then it must satisfy the second part of the strict scrutiny test (Choi, 2009; Robinson et al., 2007a; Stallion, 2013). The government must show that the differential treatment is narrowly tailored to pursue the government's interest (*Stuart v. Roache* 95 F.2d 446, 453-454 (1991); *Fullilove v. Klutznik*, 448 U.S. 448, 479 (1980); *United States Supreme Court in Regents of the University of California v. Bakke*, 438, U.S. 265 (1978)). In other words, the government must show that it has taken steps to limit the effects of the preferential treatment for those who are not members of the group receiving the preferential treatment (Robinson et al., 2007a). If the program does not serve a compelling state interest or is not narrowly tailored, then it is an unconstitutional and serves as a violation of the Equal Protection Clause of the Fourteenth Amendment (Choi, 2009).

In *Bakke*, the medical school at U.C. Davis gave a four-pronged rationale for its minority admissions program: (1) To increase the number of minorities in the medical profession and medical schools, (2) To counter the effects of past discrimination, (3) To increase the number of physicians to serve underserved communities, (4) To promote a diverse student body (Stallion, 2013). The four judges with the most liberal records found that the plan was valid (Naff, 2004). The four judges with the most conservative records found that the minority admissions plan violated Title VI of the Civil Rights Act (Naff, 2004). Also at issue was the question of whether the standard of strict scrutiny should apply (Naff, 2004). The liberal justices did not believe that strict scrutiny should apply, arguing that whites did not constitute a "suspect class" since there was no history or legacy of discrimination and lack of access to the political process (Naff, 2004). Rather than holding programs that were designed to help minorities to the requirement that they serve a compelling government interest, Justice Brennan and the liberal judges argued

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that these programs should be subjected to the "important governmental interest" standard, a lower threshold of review (Naff, 2004, p.408). Justice Powell held the swing vote, and was left to break the tie and announce the Court's decision (Dixon Jr, 1979).

In crafting the *Bakke* opinion, Justice Powell agreed with the conservative block of justices that the U.C. Davis minority admissions process was unlawful (C. Cohen, 1996). He disagreed, however, with their position that no constitutional questions need be considered in the matter (C. Cohen, 1996; Swink, 2003). Justice Powell also found that the standard used in reviewing admission policies involving race was strict scrutiny, requiring a compelling government interest and narrow tailoring to achieve its goal (Baldwin, 2009; Naff, 2004). He found that U.C. Davis' rationale of achieving diversity in an educational setting was a compelling government interest, but that the program was in actuality a quota system and was not narrowly tailored to achieve diversity (C. Cohen, 1996; Naff, 2004; Stallion, 2013). So, while the particular U.C. Davis affirmative action program was found unconstitutional, affirmative action in higher education admissions was permissible, provided that race was considered as one of many factors, rather than the only factor (C. Cohen, 1996; Dixon Jr, 1979).

The *Bakke* decision has been widely criticized, in part, due to the divided Court that issued it (Burns, 1981; Carcieri, 2001; Dixon Jr, 1979; T. Jones, 2006; Kim, 2005; Naff, 2004; Swink, 2003). The resulting opinion has been described as "fragile" (Dixon, 1979, p. 70) and "notorious" (Naff, 2004, p.408), largely because of how fractured the decision appeared (Moses, Yun, & Marin, 2009). Unlike the unanimity the Supreme Court displayed in *Brown I* and *Brown II*, the *Bakke* decision was far from agreed upon (Crider, 2013).

Critics on either side of the *Bakke* decision have found the decision problematic (Baldwin, 2009; Carcieri, 2001; C. Cohen, 1996; James, 2014; T. Jones, 2006; Kim, 2005; Naff,

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2004; Stallion, 2013; Swink, 2003). Jones (2006) notes that in *Bakke*, the Court chooses to focus on the concerns of white applicants with no history of systematic discrimination rather than on the situations of the minority applicants admitted to the program. *Bakke*, and the affirmative action cases that follow it, "demonstrate that instead of being proactive and responding aggressively to racism and its continuing effects on people of color, the Supreme Court has been consumed with the effects of affirmative action on Whites." (Jones, 2006, p. 21). Baldwin (2009) suggests that the Supreme Court created a means for whites to suggest that their race should be considered a factor in race-based policies when it allowed race to be considered an admissions factor without connecting race to historical discrimination.

James (2014) takes issue with Justice Powell's consideration of diversity as a compelling governmental interest. "The diversity rationale has a negative impact on white understanding of race and racial inequality…the rationale does not actually contribute to positive thinking about race and identity." (James, 2014, p. 2). He argues that the value of diversity must be examined alongside "white privilege" or whites will reject the diversity rationale and perceive diversity initiatives as a form of discrimination against whites (James, 2014). His analysis suggests that the diversity rationale, taken without the proper context, can lead to more charges of reverse discrimination.

Another criticism of *Bakke* is that it does not contain a clear rule or instructions for applying race as a factor in college admissions (Kim, 2005; Stallion, 2013; Swink, 2003). Carcieri (2001) argues that the absence of a bright line rule in *Bakke* has allowed colleges to use race as a predominant factor in the admissions process, rather than one factor among many. Cohen (2001) cites the higher acceptance rates of blacks than whites at top tier universities to

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support the idea the race remained the predominant factor in admissions in absence of a *Bakke* bright line rule.

The open-endedness of *Bakke* was not only problematic to those criticizing the decision. Lower courts found it challenging to apply *Bakke* to other cases and to determine how much weight race should be given in the admissions process (Stallion, 2013). It would be 25 years before the Supreme Court would address the issue of affirmative action in higher education admissions. Between 1978 and 2003, lower federal courts would struggle to address the issue of affirmative action in higher education, leading inconsistent and often conflicted decisions from circuit to circuit throughout the United States.

The 5th Circuit Court of Appeals, which governs Texas, Louisiana, and Mississippi, addressed the issue of affirmative action in higher education in 1996 in *Hopwood v. State of Texas* (1996). *Hopwood* was the result of litigation involving a white female student who had been denied admission to the University of Texas at Austin School of Law. Hopwood argued that the school's affirmative action program violated her equal protection rights by allowing preferential treatment for minority applicants (*Hopwood,* 1996).

The 5th Circuit Court of Appeals determined that the affirmative action program in question was unconstitutional despite the Supreme Court's precedent in *Bakke*. The law school argued that the program was needed in light of the University of Texas' historical record of discrimination against minorities and that there was a compelling governmental interest in having a diverse student body. The 5th Circuit rejected all of the University's arguments, despite their reliance on the *Bakke* decision as binding precedent (*Hopwood,* 1996). In its departure from *Bakke*, the 5th Circuit found that no compelling state interest was great enough to justify the race-based admissions program at the University of Texas (*Hopwood,* 1996). The Supreme Court

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declined to hear the *Hopwood* appeal, thus making *Hopwood* the law in Texas, Louisiana and Mississippi, ending affirmative action in higher education in those states (Stallion, 2013). *Hopwood* was the first successful challenge to an affirmative action admissions program since *Bakke* (Moses et al., 2009).

Choi (2009) indicates that *Hopwood* was polarizing, despite being an appellate decision with limited applicability. Opponents of affirmative action applauded *Hopwood* as a step toward completely ending racial preferences on college campuses (C. Cohen, 1996). Supporters of affirmative action criticized the failure of the 5th Circuit to accept *Bakke* as precedent. (Kim, 2005; Stallion, 2013). Research conducted in Texas after *Hopwood* was decided indicated that the end of affirmative action programs had a chilling effect on minority high graduates applying to colleges in Texas (Dickson, 2006).

In 2000, the 9th Circuit Court of Appeals, which governs Alaska, Arizona, California, Hawaii, Idaho, Montana, Oregon, and Washington addressed the issue of affirmative action in the context of higher education admissions in *Smith v. University of Washington Law School* (2000).Though the facts were similar to those in *Hopwood*, the 9th Circuit arrived at a different result, ruling in favor of the law school, recognizing the compelling governmental interest in diversity, and finding that the plan was narrowly tailored (Choi, 2009; Moses et al., 2009). The 9th Circuit considered the 5th Circuit's rationale in *Hopwood* faulty for failing to consider the Supreme Court's decision in *Bakke* as precedent, though it did acknowledge that the *Bakke* decision was confusing (Cheatham & Everett, 2014).

In 2001, the 11th Circuit Court of Appeals, which governs Alabama, Florida, and Georgia, addressed the issue of affirmative action in the context of higher education admissions in *Johnson v. Board of Regents of the University of Georgia* (UGA). UGA had implemented a

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point-based system that automatically awarded bonus points to minority applicants. Three white women sued, stating that the plan violated their rights under the Equal Protection Clause of the U.S. Constitution (Firestone, 2001). The 11th Circuit found in favor for the applicants, stating that the UGA admissions policy violated the Equal Protection Clause of the U.S. Constitution.

In contrast to the 5th Circuit's rationale in *Hopwood*, the 11th Circuit Court did not find that diversity was not a compelling interest. Instead, it focused on the UGA's point based system as a failure of the narrowly tailored requirement of strict scrutiny, regardless of whether there was a compelling government interest in having a diverse student population (Cheatham & Everett, 2014). In its opinion, the 11th Circuit noted the confusion left among the Circuit Courts after *Bakke* and suggesting to the Supreme Court that the compelling interest question needed to be settled (*Johnson*, 2011).

Moses et. al (2009) suggests that the 11th Circuit's opinion in *Johnson* was a signal to the Supreme Court that the issue of whether diversity constituted a compelling governmental interest in higher education admissions cases would have to be addressed in order to provide guidance to the Circuit Courts, which had split on the issue. Scholars argue that the conflict among the Circuit Courts led to the Supreme Court's decision to address affirmative action in higher education admissions cases again in 2003, 25 years after *Bakke* was decided (Cheatham & Everett, 2014; Choi, 2009; Moses et al., 2009; Rabin, 2013).

In 2003, the Supreme Court again took up the question of affirmative action in higher education admissions (*Grutter v. Bollinger*, 2003; *Gratz v. Bollinger*, 2003). At issue this time were two separate affirmative action admission plans in use by the University of Michigan. *Grutter* involved the affirmation action plan used in law school admissions, while *Gratz* dealt with the affirmative action admission plan that the undergraduate College of Arts and Sciences

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used. Both cases involved white students who had been denied admission to the University of Michigan, and sued, stating that the affirmation action policies were a violation of the Equal Protection Clause of the Fourteenth Amendment.

The plaintiff in *Grutter* was a white female student who was denied admission to the University of Michigan's School of Law, although her LSAT score and grade point average were higher than those of minority applicants (*Grutter*, 2003). She challenged the University of Michigan's use of race as a predominant factor in admissions as a violation of her rights under the Equal Protection Clause of the Fourteenth Amendment (Choi, 2009).

The University of Michigan's School of Law used a combination of objective and subjective criteria in its admissions process (Robinson, Franklin, & Epermanis, 2007b). An applicant's undergraduate transcript, grade point average, and LSAT score were all objective criteria considered for admission (Robinson et al., 2007b). The law school gave subjective consideration to each applicant's strengths or characteristics such as work experience and personal background (Choi, 2009). An applicant's race was considered as one part of a holistic evaluation in the admissions process (Choi, 2009; Naff, 2004). The University argued that an ethnically diversity student body would strengthen the law school and make it a better environment for learning (Cheatham & Everett, 2014; Johnson, 2004; Robinson et al., 2007b). While there was no specific number of seats allotted for minority students, the law school did indicate that each year, it attempted to enroll a *critical mass* of minority students (*Grutter v. Bollinger,* 2002). This number varied each year, but admissions officials indicated that the university considered critical mass to be a "number sufficient to enable underrepresented minority students to contribute to classroom dialogue without feeling isolated" (*Grutter v. Bollinger,* 2002, p.737). Stallion (2013) brings attention to the fact 83 briefs were filed in support

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of diversity as compelling governmental interest, thus bolstering the University's argument. Leaders from government, business, and industry indicated that exposure to diversity better prepared students for the global market.

In issuing the majority opinion, Justice Sandra Day O'Conner specifically mentioned that the Supreme Court decided to hear *Grutter* in order to settle the discord among lower courts regarding the question of whether the attainment of diversity in a student body was a compelling government interest that would warrant the use of race in admissions (*Grutter v. Bollinger*, 2003). The Supreme Court agreed with Justice Powell's *Bakke* opinion and found that diversity is a compelling government interest that could justify the use of race in university admissions (*Grutter v. Bollinger*, 539 U.S. 306, 325, 2003). With the first part of the strict scrutiny test met, the Supreme Court then examined the question of whether the admission policy used by University of Michigan's School of Law was narrowly tailored.

Everett and Cheatham (2014) examined the Supreme Court's use of strict scrutiny of *Grutter*, noting that the Court reviewed the following five elements of the admissions policy in order to determine whether it was narrowly tailored: 1) individualized consideration for each application, 2) the absence of a quota system, 3) consideration of race-neutral alternatives, 4) lack of undue harm to other racial groups, and 5) time limitations of the program. The first two elements of the admissions policy were of particular importance to the Court's determination that the policy was narrowly tailored (Cheatham & Everett, 2014; Johnson, 2004). The Court found that the University demonstrated that each applicant was evaluated individually, and that race was but one factor in the entire admissions process (*Grutter v. Bollinger*, 539 U.S. 306, 335 (2003). As to the question of whether the admissions policy constituted a racial quota, the Court found that the critical mass rationale used by the University was not a racial quota process

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(*Grutter v. Bollinger*, 2003). The fact that there was no defined number of seats to constitute critical mass and that race was only one factor in the process convinced a majority of the Court that the admissions policy did not involve the use of quotas in its process (*Grutter v. Bollinger*, 2003).

Proponents of the *Grutter* decision were pleased that the Court's decision settled the compelling interest question that lingered through circuit courts in the 25 years after *Bakke* (Johnson, 2004; Moses et al., 2009; Park, 2015; Robinson et al., 2007b). *Grutter* overruled *Hopwood* and provided clarity for the Circuit courts on the compelling interest question (Moses et al., 2009). Park (2015) applauds *Grutter* for reaffirming that the positive outcomes of exposure to diversity are very important on college campuses. Johnson (2004), suggested that *Grutter* would strengthen affirmative action measures at universities around the country, thus helping some minorities obtain admission to colleges and universities. Robinson et al. (2007) suggest that *Grutter's* importance lies in the fact that the Supreme Court has now legitimized diversity as a compelling governmental issue, thus reinforcing the overall foundation of affirmative action.

Grutter, however, has been criticized for producing similar ambiguities as *Bakke* (Kim, 2005) Like *Bakke*, *Grutter* was decided by a highly divided court with several dissents and concurrences by justices, suggesting that there was still a wide variety of opinions regarding the issues surrounding affirmative action (Crider, 2013). According to Crider (2013), there was still a great deal of polarization on the issue of what constitutes a quota system and how strict scrutiny should be applied to affirmative action. The court's acceptance of the university's use of critical mass has been also been viewed as vague and ambiguous (S. Caldas, 2008; Kim, 2005). Caldas (2008) is critical of the use of critical mass, stating that the concept is "vague,

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woefully inadequate and largely indefensible and has essentially no solid empirical underpinning" (S. Caldas, 2008, p. 32).

Gratz v. Bollinger (2003) was decided during the same Supreme Court term as *Grutter*, and involved admission policies at the University of Michigan's undergraduate College of Liberal Arts. Plaintiffs Jennifer Gratz and Patrick Hamarcher, Caucasian applicants to the University of Michigan's undergraduate program, brought the case as a class action lawsuit after both were denied admission while minority students with lower grade point averages and test scores were admitted instead (*Gratz,* 2003). The plaintiffs challenged the admissions policy, alleging racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment (*Gratz,* 2003).

The admission policy at issue in the College of Literature involved a 150 point based scale, with 100 points needed for unconditional admittance. (Robinson et al., 2007b). A total of 12 points could be awarded for performance on the ACT or SAT (Robinson et al., 2007b). Grade point average was worth up to a total of 80 points. High school curriculum and the high school itself could garner 8 and 10 points respectively. However, minority applicants automatically received 20 points as a bonus, 1/5 of the total points needed for admission (Choi, 2009).

In its 6-3 decision, the Supreme Court found that although there was a compelling interest in having a diverse student body, the affirmative action program was not narrowly tailored to achieve that goal (*Gratz,* 2003). Although the 6-3 decision represented the most unified opinion in an affirmative action college admissions case, the decision still had numerous concurrences and dissents, still indicating a distinct divide in the justices' rationales (Crider, 2013). Choi (2009) indicates that in rendering the *Gratz* decision, the Supreme Court made clear

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that point-based systems that automatically awarded points for race, along with set-asides, and separate admissions tracks were not constitutional.

Robinson et. al, (2007) state that when considered together, *Grutter* and *Gratz* seem to indicate that the more subjective the criterion for using race in the selection process, the more likely that the use of race can withstand strict scrutiny in the context of university admissions. *Bakke* and *Gratz* indicate that objective weighted processes are much less likely to withstand strict scrutiny (Robinson et al., 2007b). Gratz reinforces the notion that race can only be considered as a factor, and may not carry more weight in admissions requirements (Stallion, 2013).

Naff (2004) urges caution with respect to assuming that the question of affirmative action has been answered for all time (Naff, 2004). She notes that both *Gratz* and *Grutter* were closely decided, and any change in the high court might result in future changes to affirmative action (Naff, 2004). Kim (2005) states that affirmative action post-*Grutter/Gratz* is no more certain than it was after *Bakke*.

Critical Discourse Analysis

Discourse Analysis is the study of "language in use" (Gee, 1999). Discourse Analysis had its beginnings in the rhetoric, text linguistics, anthropology, philosophy, socio-psychology, cognitive science, literary studies and the socio linguistic disciplines (Wodak & Meyer, 2001; Wood & Kroger, 2000). Wood & Kroger (2000) note that discourse analysis is concerned with the ways that individuals think about discourse as well as ways that discourse can be used as data. "Discourse analysis is thus, not simply an alternative to conventional methodologies; it is an alternative to the perspectives in which those methodologies are embedded" (Wood & Kroger, 2000, p. 3). Paul Gee (2011) argues that language is more than using words for verbal and

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written communication. Language, or discourse, according to Gee (2011) is a means for human beings to say, be, and do things. Similarly, language may be should be examined as a social practice that has power, and constitutes action (Wood & Kroger, 2000). Further explaining this view, Wood & Kroger (2000) argue that language can be viewed in terms in three defining features: what they are about, what the speaker does with them, and what effect they have on the hearer.

Discourse Analysis, therefore is the study of "language in use" (Gee, 2011, p.8). There are many approaches to discourse analysis, and as a result, Discourse Analysis has evolved into several sub-branches (Fairclough & Candlin, 1995; Gee, 1999; Wodak & Meyer, 2001; Wood & Kroger, 2000). Despite the different types of Discourse Analysis, Gee (2011) takes the position that all discourse analysis falls into two basic categories; descriptive and critical. He describes the purpose of descriptive discourse analysis as describing how language works in order to understand it. The purpose, however, of Critical Discourse Analysis goes beyond simply describing language. The Critical Discourse analyst seeks to speak to political and social issues and apply their work to the world in some fashion. (Gee, 2001).

The emphasis of Critical Discourse Analysis (CDA) is on understanding discourse within the context of social structures such as race, gender and class (Wood & Kroger 2001, p. 21). CDA is used to examine social and political issues through language, focusing on the discourse within the context of the social structures, such as race, gender, and sexuality (Wood & Kroger, 2000). CDA seeks to go beyond the surface level of language and expose the underlying meaning of the written and spoken word. (Chaney & Robertson, 2014). Wood & Kroger (2000) also note that an important concern of CDA is the way that objects and subjects are constructed through language.

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One characteristic of CDA is that it seeks to illuminate ideology and power through the careful analysis of semiotic information whether it is written, spoken, or visual (Wodak & Meyer, 2001). The analysis of power is of particular concern to researchers who use CDA (Fairclough & Candlin, 1989; Wodak & Meyer, 2001). Those who employ CDA often examine the way discourse allows dominant groups to gain and maintain power over non-dominant, or minority groups (Wodak & Meyer, 2001).

Wodak & Meyer (2001) stress that CDA does not rely on or present one single theory or methodology. Various disciplines and theories may intersect, thus requiring an interdisciplinary approach (Fairclough & Candlin, 1995). The interdisciplinary approach required of CDA has led researchers to develop and refine methods of CDA that are particularly suited to the types of discourse that they analyze (Fairclough & Candlin, 1995; Reisgl & Wodak, 2009; Wodak & Meyer, 2001; Wood & Kroger, 2000). For example, Reginald Oh (2005) used critical linguistics to examine the Supreme Court's concept of discrimination using desegregation cases; however though related to Critical Discourse Analysis, critical linguistics is more concerned with demonstrating how grammar is connected to power and control rather than the social and political effects of all aspects of language (Wood & Kroger, 2000).

Theoretical Framework

Critical Race Theory (CRT) began as a movement among scholars who sought to challenge the way that race and power are constructed and represented in within American society (K. Crenshaw, 1995). CRT emerged from the field of Critical Legal Studies (CLS) during the 1970s in an attempt to address the need for different strategies to retain and continue the advances made during the Civil Rights Movement of the 1950s and 1960s (Bernier, 2014;

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D. A. Brown, 2003; K. Crenshaw, 1995; Delgado & Stefancic, 2012). The CRT movement began in the study of the intersection between race and the law, but since 1995 has been begun to find application in the field of education (Bernier, 2014; Closson, 2010; Delgado & Stefancic, 2012; Ladson-Billings & Tate, 1995). CRT provides an encompassing lens that examines marginalized racial groups. (K. Crenshaw, 1995; K. W. Crenshaw, 2011; Delgado & Stefancic, 2012).

CRT has several common thematic concerns. First, CRT seeks to understand how systems of subordination in America have been maintained against persons of color (K. Crenshaw, 1995). This concern is viewed against the backdrop of the supposed American principals of equality, equal protection, and the rule of law. CRT attempts to both identify and change inherent tensions between racial subordination and American ideals (Brwon, 1973b; K. Crenshaw, 1995; K. W. Crenshaw, 2011).

Critical Race Theory also examines the idea that racism is ordinary, and therefore "difficult to address or cure because it is not acknowledged" (Delgado & Stefancic, 2012, p.8). The ordinariness of racism may be examined to inform a variety of fields of research, including education and law. CRT's interest in the ordinariness of racism is particularly suited to questions of how equality can be achieved when society has difficulty seeing inequality.

CRT differs from other research on race because of its deep discontentment with traditional civil rights discourse (Crenshaw, 1995). Critical race theorists argue that the accomplishments of the civil rights movements did not take into account the systematic and deeply rooted nature of racism in America (Bell, 2004). As such, Critical Race Theory attempts to both "examine the terms by which race and racism have been negotiated in American consciousness…" (Crenshaw, 1995, xiv).

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To date, very little research exists that examine Supreme Court cases from the perspective language shifts regarding race and education over time. The present study examines Supreme Court cases related to race and education and compares, contrasts, and examines the specific language used to by the Supreme Court to guide K-12 schools in their efforts to comply with the desegregation mandate brought about by *Brown* in 1954. This is a fresh approach focused on how the language of Supreme Court's rulings on race and education have shifted over time.

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CHAPTER THREE

Theoretical Framework & Research Methodology

Qualitative analysis must be grounded in the examination of specific phenomenon. The purpose of this inquiry is to examine how the Supreme Court's discourse on race as it relates to education has changed since *Brown v. Board of Education* (1954). The following research questions guided the inquiry:

Research Question 1: What is the dialectical relationship between education, race, and equality in Supreme Court judicial discourse from 1954-2007?

Research Question 2: How have the changes in the members of the Supreme Court affected the judicial discourse regarding education, race, and equality since 1954?

Theoretical Framework

This study uses Critical Race Theory as a theoretical framework. Critical theories provide an overarching lens that examines marginalized groups and questions of race, class, gender, and sexuality (K. Crenshaw, 1995; K. W. Crenshaw, 2011; Delgado & Stefancic, 2012). Critical Race Theory (CRT) began as a movement among scholars who sought to challenge the way that race and power are constructed and represented in within American society (K. Crenshaw, 1995). CRT emerged from the field of Critical Legal Studies (CLS) during the 1970s in an attempt to address the need for different strategies to retain and continue the advances made during the

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Civil Rights Movement of the 1950s and 1960s (Bernier, 2014; D. A. Brown, 2003; K. Crenshaw, 1995; Delgado & Stefancic, 2012). The CRT movement began in the study of the intersection between race and the law, but since 1995 has been begun to find application in the field of education (Bernier, 2014; Closson, 2010; Delgado & Stefancic, 2012; Ladson-Billings & Tate, 1995).

CRT has several common thematic concerns. First, CRT seeks to understand how systems of subordination in America have been maintained against persons of color (K. Crenshaw, 1995). This concern is viewed against the backdrop of the supposed American principals of equality, equal protection, and the rule of law. In short, CRT attempts to identify and understand inherent tensions between racial subordination and American ideals. Critical Race Theory, however, attempts both to understand and change systems of subordination (Bell, 1973b; K. Crenshaw, 1995; K. W. Crenshaw, 2011).

In my study, I explore the way the Supreme Court's discourse regarding race and education is balanced with the American notions of equality and equal protection. Court cases are inherently contentious, but when the Court is called upon to determine fairness in the context of racial subordination, it is important to examine the layers of conflict that are potentially at play beyond the plaintiff and defendants. My study examines the Supreme Court's concern for balancing the states' and local interests with the interest of minority children whose educational opportunities had been limited due to systematic racism.

Another concern of CRT is the notion that racism is ordinary, and therefore "difficult to address or cure because it is not acknowledged" (Delgado & Stefancic, 2012, p.8). The ordinariness of racism may be examined to inform a variety of fields of research, including education and law. CRT's interest in the ordinariness of racism is particularly suited to questions

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of how equality can be achieved when society has difficulty seeing inequality. CRT attempts to unveil racism and racial tensions in an effort to try to change them. My study seeks to discover how the Supreme Court addresses ordinary racism in the context of education, and how the way that racism is addressed changes over time. The cases examined here span seven decades. When *Brown I* was decided in 1954, African Americans in the southern U.S. were still unable to vote, had to use separate bathrooms, and attended legally segregated schools. The Supreme Court recognized that segregation in public education in the south was ordinary, accepted, and had aided in the subordination of African Americans by limiting their access to a quality education.

In the decades after *Brown I*, African Americans began achieving social and political gains unheard of during the 1950s. *Parents Involved in Community Schools v. Seattle School District No. 1* was decided by the Supreme Court in 2007, a few months before the United States elected its first African American president. *Parents Involved* has been viewed by some scholars as the death knell for the *Brown I* decision because the Supreme Court limited the ability of a school district to ensure that students would not attend segregated schools. This research will also attempt to determine whether the political gains attained by African Americans in the late 20th and early 21st century contributed to a belief by the Supreme Court that racism is no longer ordinary and therefore there is no need to address it.

CRT differs from other research on race because of its deep discontentment with traditional civil rights discourse (Crenshaw, 1995). Critical race theorists argue that the accomplishments of the civil rights movements did not take into account the systematic and deeply rooted nature of racism in America (Bell, 2004). As such, Critical Race Theory attempts to both "examine the terms by which race and racism have been negotiated in American consciousness…" (Crenshaw, 1995, xiv). It is important to note that Critical Race Theory rejects

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the notion that scholarship must be neutral or detached. Crenshaw explains this CRT perspective on neutrality in scholarship by stating:

> We believe that legal scholarship about race in America can never be written from a distance of detachment or with an attitude of objectivity. To the extent that racial power is exercised legally and ideologically, legal scholarship about race is an important site for the construction of that power, and this is always a factor… (Crenshaw, 1995, p.xiv).

Critical Race Theory (CRT) is an appropriate theoretical framework for this study because it allows the researcher to approach the work from a transformative perspective with the intent to critique a social phenomenon, take a stand, and issue a call to action. The present study examines the Supreme Court discourse on race and education over time in an attempt to discover the underlying tensions between the law and society. My study seeks to uncover the underlying themes present in the Supreme Court decisions, examine how those themes shift over time and to offer and overall critique of the Supreme Court's treatment of race in the educational arena. I've chosen to use the CRT as my epistemological stance in an attempt to analyze the power struggles that exist within the language of Supreme Court decisions that examine race and education.

My critique will unveil the inherent tensions that the Supreme Court faces when it addresses racial subornation in an educational context. The goal of this research is to analyze the powerful role that Supreme Court discourse has played in determining whether minority interests in having an equal education are considered since 1954. Chapter 5 will discuss the socio-political implications of a liberal versus a conservative Court and will offer a call of action to minorities to engage fully in the political process.

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Methodology

Unlike some studies that use CRT to study a sociological phenomenon, this study does not use human subjects as the primary data source. This study examined text from U.S. Supreme Court cases and required a methodological approach appropriate for studying language in social institutions. Critical Discourse Analysis (CDA) is the methodological approach selected because CDA is used to examine social and political issues through language, focusing on the discourse within the context of the social structures, such as race, gender, and sexuality (Fairclough & Candlin, 1989, 1995; Wodak & Meyer, 2001; Wood & Kroger, 2000). CDA involves more than language description; it is used to analyze language within the context of social and political issues involving power and subordination. Critical Discourse analysts also seek to root their apply their work to the world in some fashion (Gee, 1999).

CDA is an appropriate methodological approach for this study for several reasons. This study involves race, education, and Supreme Court decisions. Race is a social structure. Education involves social institutions. The Supreme Court uses language to make determinations regarding fairness, equity, and equality. As a methodological approach, CDA provides a framework to examine these social constructs and institutions in terms of the language the Supreme Court uses to describe and interpret the law that governs them.

There are a number of approaches to CDA(Fairclough & Candlin, 1995; Jóhannesson, 2010; Reisgl & Wodak, 2009; Wood & Kroger, 2000). Norman Fairclough's general methodological framework of inquiry was selected for data analysis because it allows flexibility within its framework. (Fairclough & Candlin, 1989). Fairclough identifies three stages of analysis: description, interpretation and explanation. The first stage of analysis is primarily focused on describing each individual text. The second stage concerns itself with the relationship

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between text and interaction. The third stage seeks to explain the relationship between interaction and social context (Fairclough & Candlin, 1989).

Fairclough's broad framework of inquiry is appropriate for this study for several reasons. First, in order to understand and identify dialectical relationships within and across Supreme Court decisions over 7 decades, I needed to adequately describe each decision in terms of vocabulary, structure, and general language use. Each text had to be coded and deconstructed so that patterns and themes could emerge and be examined during every phase of analysis. Fairclough's framework allows for flexible coding at the early phases, which is essential as a study of this magnitude progresses through interpretation and explanation phases.

After the description stage, each text needed to be interpreted. According to Fairclough (1989), interpretations of a text are produced through a combination of what is in the text and the background knowledge drawn upon while interpreting or producing the text. Fairclough identifies 4 levels of interpretation: surface of utterance, meaning of utterance, local coherences, and text structure and point (Fairclough & Candlin, 1989). Surface of utterance involves how sounds are converted into words and will not be addressed in this research. The meaning of utterance level of interpretation involves ascribing meaning to the various parts of a text. The third level of interpretation is called local coherence. In this level of interpretation, the analyst examines the connection between what is written and notices sequences or patterns within particular parts of a text (Fairclough & Candlin, 1989).

In this study, every Supreme Court case is different in terms of the author, the overall composition of the court, the facts of the case, the issue decided, the date it was decided, and the number of concurrences and dissents to the opinion. In order to fully answer the research questions, all of these factors must be examined closely during the interpretation phase in order

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to gain an understanding of the language within each Supreme Court case and how each case fits with every other case. The interpretation phase allows the researcher to determine how each text fits together in totality and to determine the patterns that exist between cases and over time periods.

The final stage of analysis involves explaining the link between discourse and social structures in order to develop a critique. Each text is analyzed to determine the power relations that exist at the situational, institutional and societal levels that help shape the judicial discourse. A further discussion of this stage will occur in Chapter 5.

Data Collection

From the outset of the research, I wanted to examine the Supreme Court's treatment of race and education over time, so it was important to include cases across decades. I also sought to have a data set that included both K-12 cases and higher education cases in order to determine whether the dialectical relationship between race and education in Supreme Court jurisprudence differed if the educational level of the school changed. Fifteen cases were ultimately selected for the data set.

I used the Landmark U.S. Legal Cases database through LexisNexis Academic to determine the landmark Supreme Court decisions for school desegregation and for affirmative action. The database *listed Brown v. Board of Education* (1954) and *Parents Involved in Seattle Schools v. Seattle School District No. 1* (2007) as the landmark cases for school desegregation, so they both were added to the data set. Since *Brown I* was the earliest case, I then ran a query in 10-year increments for other Supreme Court decisions that followed the Court's rationale in *Brown*. I consulted the Headnotes of each case to determine whether the case involved

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desegregation in K-12 schools. Cases that did not involve desegregation in K-12 schools were eliminated immediately from consideration. Summaries of the remaining cases were read with the following questions in mind:

1. Does the case logically and seamlessly connect to *Brown I*?
2. Does the case involve addressing the changing socio-political climate in the United States as it pertains to remedying the vestiges discrimination of the "separate but equal" school era?
3. Does the case contain dissents and concurrences that indicate different rationales of the Court that might be indicative of societal tensions?

A total of 12 Supreme Court decisions related to school desegregation were ultimately selected for the data set.

I then consulted the Landmark U.S. Legal Cases database through LexisNexis Academic to determine the landmark Supreme Court decisions for affirmative action in higher education. The database listed *Regents of the Univ. of Cal v. Bakke* (1978), *Gratz v. Bollinger* (2003), and *Grutter v. Bollinger* 2003 as landmark cases. These three cases were included in the data set. I then ran a query in 10 -year increments for other Supreme Court decisions that followed the Court's rationale in *Bakke*. I consulted the Headnotes of each case to determine whether the case involved affirmative action in higher education. Cases that did not involve affirmative action in higher education were eliminated immediately from consideration. Summaries of the remaining cases were read with the following questions in mind:

1) Does the case logically and seamlessly connect to *Bakke*, the earliest case in this section of the data set?

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2) Is there a connection between the case and the school desegregation cases emanating from *Brown I*?

The majority of cases returned in the query for higher education cases that followed *Bakke* were employment discrimination cases and of no interest to the present inquiry. The body of Supreme Court case law addressing the issue of affirmative action in higher education is much smaller than the case law addressing the issue of desegregation of public K-12 schools. The only cases selected were Bakke, Gratz, and Grutter, bringing the total number of cases in the data set to 15. All of the cases examined in this study are listed in Table 1, along with other pertinent case information.

Table 1

Table of Cases

Case Name	Year	Issue	Holding	Vote	Concurrences	Dissents
Brown v. Board of Education	1954	Does segregation of children in public school solely on the basis of race even if facilities and all tangible things are equal, deprive minority children of equal education opportunities?	Separate education is inherently unequal.	9-0 Unanimous	No	No
Brown v. Board of Education	1955	Given the issues in Brown I, how should relief be accorded?	District Courts will review desegregation plans and ensure that the defendants are making a prompt and reasonable start toward desegregation.	9-0 Unanimous	No	No

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Table 1 (continued)

Case Name	Year	Issue	Holding	Vote	Concurrences	Dissents
Cooper v. Aaron et.al.	1958	Whether state officials have to obey federal court orders arising out of the Supreme Court's interpretation of the US Constitution?	Yes. There is a duty to obey federal court orders arising out of the Supreme Court's interpretation of the Constitution.	9-0 Unanimous	1 Concurrence	No
Griffin et.al v. County School Board of Prince Edward County et.al.	1964	Does the closing of the Prince Edward County schools deny African American students in the county equal protection under the 14th Amendment?	The closing, of public schools in one county, while and contributing to the support of the private segregated white schools that took the place of the public schools, deprives Negro students of the equal protection of the laws.	Unanimous in the general opinion	No	1 partial dissent on the matter of the Supreme Court having the ability to reorder the schools to reopen
Green et.al. v. County School Board of New Kent County	1968	Whether a Freedom of Choice plan that allows a student to choose his own public school is adequate compliance with the School Board's responsibility to develop a non racial system of determining admission to public schools?	The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school.	9-0	No	No
Swann et.al. v. Charlotte-Mecklenburg Board of Education et al.	1971	What is the scope of duty of school authorities and district courts in implementing Brown I and eliminate dual systems and establish unitary systems at once?	Once violations of mandates to desegregate occurred, the district Courts have broad, flexible equitable powers to address the constitutional violation.	9-0	No	No

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Table 1 (continued)

Case Name	Year	Issue	Holding	Vote	Concurrences	Dissents
Keyes v. School District No. 1 Denver Colorado	1973	1) Did the segregation in Denver involve all of the city's schools and violate the Equal Protection Clause of the 14th Amendment? 2) Should Negroes and Hispanos be separated for the purpose of defining a segregated school?	1) When part of a school district is found to be segregated, a prima facie case for segregation is made. 2) No. Negroes and Hispanos suffer identical discrimination in treatment with compared with Anglo students.	7-1 1 justice abstained	1 Full Concurrence 1 Partial Concurrence	1 Partial dissent 1 dissent
Milliken v. Bradley	1974	Did federal courts exceed their authority when they imposed a multi school-district remedy to address school segregation within the city of Detroit?	The federal courts exceeded their authority because there was no evidence of multi-district violations. The remedy must match the scope of the violation.	5-4	1 Concurrence	3 Dissents
Regents of the University of California v. Bakke	1978	Does an admission policy that uses racial quotas violate the equal protection clause of the 14th amendment?	Yes. Race may be used in admission criteria but quotas are impermissible	Plurality opinion 2 separate opinions 5 justices agreed that any use of racial quotas was impermissible, 4 disagreed. 5 justices agreed that race may be used as a factor in admission criteria, 4 disagreed.	2 partial concurrences	2 partial dissents

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Table 1 (continued)

Case Name	Year	Issue	Holding	Vote	Concurrences	Dissents
Board of Education of Oklahoma City Public Schools, Independent school district v. Dowell	1991	Can a federal court permanently remove an injunction once there's a determination that the injunction has achieved desegregation goals?	Yes. Federal oversight of desegregation orders was never meant to be permanent.	5-3 1 justice abstained	No	1 dissent
Freeman v. Pitts	1992	Is it permissible for a District Court to withdraw its supervision of parts of a federal desegregation order if all of the requirements of the order have not been met?	Yes. The District Court is only required to supervise those parts of the order that have not been met. Incremental release of supervision is permissible.	8-0 1 justice abstained	3 concurrences	No
Missouri v. Jenkins	1995	Whether the District Court has the authority to order a school district to implement salary increases and funding for programs in order to remedy segregation?	No. Ordering salary increases is beyond the scope of the violation the District Court originally sought to remedy.	5-4	2 concurrences	2 dissents
Gratz v. Bollinger	2003	Did the university's use of racial preferences in its admission policy violate the 14th amendment and Title VI of the Civil Rights Act?	Yes. The admission criteria was not narrowly tailored and did not look at students individually.	6-3	3 concurrences	3 dissents

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Table 1 (continued)

Case Name	Year	Issue	Holding	Vote	Concurrences	Dissents
Grutter v Bolinger	2003	Did the university's use of racial preferences in law school admissions violate the 14th amendment and Title VI of the Civil Rights Act?	No. The law's admission policy was narrowly tailored to promote the compelling interest of diversity. Race is one of many factors included in the determination for admissions.	5-4	1 full concurrence 2 partial concurrences	2 full dissents 2 partial dissents
Parents Involved in Community Schools & Seattle School District v. Jefferson County Board of Education	2007	Do the Grutter and Gratz opinions apply to secondary schools? Is racial diversity a compelling interest for a public k-12 school?	No and no. Grutter and Gratz do not apply because there is no specific admission criteria for public high schools like there are for college admissions. Also, the Seattle plan was related to demographics rather than an educational benefit	5-4	2 concurrences	2 dissents

Data Analysis

Data Analysis was conducted using Fairclough's steps for CDA. Cases were first organized chronologically and given a unique identifier consisting of the first two letters of the case name and the last two numbers of the case year. If a case had the same two first letters and decision year, the first three letters of the case name was used along with the last two numbers of the case year. Once the unique identifier was assigned, the cases were coded for description, interpretation, and explanation.

Saldaña (2009) defines a code as "a short phrase that symbolically assigns a summative, salient, essence-capturing, and/or evocative attribute for a portion of language-based or visual data" (p.3). Codes are constructed by researchers to interpret meaning, identify patterns and to

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characterize data during the research process (Saldaña, 2009). While coding is a recursive process, it can be organized into two distinct cycles of data processing: First Cycle Coding and Second Cycle Coding.

The purpose of First Cycle Coding is to begin the process of describing the data. Three types of codes are used in the First Cycle Coding process: descriptive, values, and versus. In the present study, First Cycle Coding was done by hand. I chose to begin the process with hand coding, because it gave me an opportunity to interact with each individual text without the organizational confines of ATLAS.ti. I wanted the option to highlight, underline, and make notes fluidly as I read each text. I printed each case and assigned colors to each type of code used. The purpose of the color-coding system was to keep the types of codes used separate and identifiable at a glance. Descriptive codes were noted with the color green. Values codes were noted with the color pink, and versus codes were noted with the color blue. A brief description of each code type follows, along with the rationale for use in this study.

Descriptive codes are usually noun-based and topic driven. The researcher uses them to identify the topic inside a selection of data (Saldaña, 2009). Descriptive codes are appropriate in the present study because they are flexible and allow the researcher to characterize the data in a such way that will allow for classification, interpretation, and deeper analysis during the Second Cycle of Coding. Since this study involves Supreme Court cases over seven decades, I constructed descriptive codes during coding in order to capture the changing discourse as society changed as well. Descriptive codes are not complex and are appropriate for initial inquiry into the data. However, according to Saldaña (2009), descriptive coding may not be enough in and of itself to prepare the data for the Second Cycle of coding. At the end of First Cycle Coding, there was a total of 75 descriptive codes that had been applied to the data.

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Values codes represent a world-view consisting of the author's values, beliefs, or attitudes (Saldaña, 2009). Values codes require a positionality or a perspective. Every Supreme Court opinion, concurrence, or dissent involves the values of the individual justice as well as values that are attributed to our nation as a whole. Fourteen values codes were developed *in priori,* or prior to the coding process, because it was important to have a set group of codes that could capture the Supreme Court's values, regardless of the time period in which the decision was written.

The final type of codes used in the First Cycle Coding are versus codes. Versus codes identify people, institutions, ideas, or concepts that are in direct conflict with each other (Saldaña, 2009). Given that legal cases always have at least 2 parties in conflict, this type of coding was very appropriate for the present study. Another reason that this type of coding was used here is that versus coding can help to identify and organize power struggles within the data.

During the First Cycle Coding process, analytical memos and comments were developed and written directly onto each Supreme Court decision. The purpose of these comments and memos was to keep a running record of thoughts regarding the data. These were revisited when I moved into Second Cycle Coding.

Once hand coding was completed, each document was uploaded into ATLAS.ti. and the hand coding was transferred into the system. Color codes remained the same. While transferring the data into ATLAS.ti, I reread every case and checked for coding gaps in the data during the initial stages of coding. This allowed me reconsider all of the data after every case had been read at least once. More descriptive codes and versus codes were added during the second reading process.

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After the completion of First Cycle Coding, I began the process of Second Cycle Coding. The initial data was from First Cycle Coding was analyzed through ATLAS.ti. to determine word count and frequency. This information was used to categorize the codes around frequency of use. Second Cycle Coding methods are designed to give the researcher an opportunity to engage in deeper analysis aimed at interpreting the documents individually and collectively. Two types of coding were used in the Second Cycle Coding process: pattern coding and longitudinal coding. A brief description of each follows, along with the rationale for using this type of coding in the present study.

Pattern codes are used to develop major themes from first cycle and search for explanations in the data (Saldaña, 2009). The purpose of pattern coding is to analyze and interpret the data so that patterns and themes can emerge. The sheer number of codes that were developed and used during First Cycle coding must be categorized so that deeper and meaningful further analysis can occur. The codes identified were then categorized into themes. Codes that were similar were combined, and codes that were stand alone or did not repeat were eliminated. ATLAS.ti was used to keep track of all of the codes, and I used the program to combine codes. The combined codes were analyzed to determine themes, and themes were interpreted to determine patterns.

The second method of Second Cycle Coding in the present study is longitudinal coding. Since I have a corpus consisting of 15 cases over 7 decades, it is essential that the data is organized so that it may be analyzed and interpreted over time. Longitudinal coding allows the researcher to examine change processes and compare them over time (Saldaña, 2009). In longitudinal coding, the data is reviewed "categorically, thematically, and comparatively across time" through the use of a series of matrices (Saldaña, 2009). This study involves two related,

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but different categories of case law; desegregation and affirmative action. Using longitudinal coding allowed me to analyze the cases from both these tracks of law, while considering the time frames in which they were decided. Code and document co-occurrence tables were generated using ATLAS.ti and are discussed in latter chapters.

Data Interpretation and Representation

All cases were analyzed to determine common themes and patterns throughout the discourse. I conducted both within case and cross case analyses. Beginning with *Brown*, each case was examined alone to determine commonly cited words and rationales within the case. I used ATLAS.ti to develop a word cloud for each case in order to have a visual representation of the most common codes words used. I then combined codes that were similar into common themes within each case to aid in determining the Supreme Court’s underlying concerns and dialectical patterns. The themes that were found within each case were used to determine dialectical patterns within each case. The patterns were used to determine the dialectical relationship between race and education within that individual case. Each case was also examined for themes that demonstrated the Supreme Court’s underlying concern with equality in public education. Those themes were analyzed to determine whether there were patterns within each case that dealt with equality.

Once every case had been analyzed for patterns and themes, I organized all of the cases by decade in order to determine if the patterns and themes within each case were similar to those of other cases decided within the same decade. Close attention was paid to the words race and equality in order to adequately address Research Questions 1 and 2. Similarities and differences in patterns by decades were recorded and will be discussed in Chapter 4.

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Once the cases had been analyzed by decade, I then organized the cases into those that involved K-12 education, and those that involved higher education admissions. The cases were analyzed to determine whether there were significant similarities and/or differences between the discourse in the two areas of case law. This analysis was aimed at determining whether there are differences in the Supreme Court's treatment of race and education when the case involves higher education concerns rather than primary and secondary schools.

Finally, I reviewed every case to determine who the individual justices were that decided and whether they agreed with the majority opinion in order to address the third Research Question, carefully noting which justices concurred and dissented in each case. This information was used along with the themes and patterns to interpret whether individual justices may have been responsible for shifts in the discourse regarding race and education. All of the data was synthesized and will be reported in Chapter 4, with a discussion of conclusions in Chapter 5

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CHAPTER FOUR

Findings

The purpose of this study was twofold: 1) To determine the dialectical relationship between education, race, and equality in Supreme Court judicial discourse from 1954-2006 and 2) To explore how changes in the makeup of the Supreme Court has affected the judicial discourse regarding education, race and equality since 1954. Chapter 4 will examine the findings from these inquiries.

The findings from the research methodology Chapter 4 is organized into two sections, aimed at presenting these research findings chronologically by the date of each case. Section 1 will report the findings from each case chronologically, beginning with *Brown v. Board of Education* (1954). Each case will contain word counts and other descriptive information regarding race and education. Descriptive and values code tables will be included for each case, along with an analysis of specific sections of text. In section Section 2, I will report findings related to patterns and themes across cases. Cases are organized by decades, and findings are reported for each decade. Emerging patterns are organized by decades along with references to social conditions, vocabulary shifts in regard to race, equality, and education.

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Section I: Case-by Case Chronology

Brown v. Board of Education (1954). *Brown v. Board of Education* (*Brown I*) was decided in 1954. There were 9 Supreme Court justices who took part in the Court's decision. All 9 Supreme Court Justices were white males. Justice Earl Warren delivered the opinion of the Court. The Court's decision was unanimous; there were no concurrences or dissents. The *Brown I* opinion is 7 pages long and contains 4,917 words, including footnotes. The document has a total of 79 paragraphs, organized into 6 sections. Section 1 of the opinion begins with an overview of the procedural posture of the case. Section 2 describes the legal arguments asserted by the plaintiffs and defendants in the case based on the 14th Amendment and a brief review of the public education during the time the 14th Amendment was ratified. Section 3 references *Plessy v. Ferguson* (1896). Section 4 describes the importance of education. Section 5 restates the question before the Court and reviews the separate but equal doctrine. Section 6 announces the Court's decision.

The most commonly used word outside of prepositions, conjunctions, and articles was the word education. Education was used 22 times. The word school(s) was used 21 times. When combined, there are 43 direct references to education, representing 2% of the total word count. The word equal(ity) was used 19 times in the opinion.

Since this study also seeks to understand the Supreme Court's treatment of race, it is important to note that the Supreme Court used the word "negro" to refer to African Americans, and the word "white" was used to refer to those of European descent, as was common in the 1950s. The Court mentioned the word negro(es) 6 times, the word white 7 times, and the word race 6 times.

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Descriptive codes. As shown in Table 2, there were 8 descriptive codes developed during the coding process for *Brown I*. Descriptive codes are usually noun-based, topic driven and serve to provide a foundation from which to determine overarching themes and patterns. Education was the most commonly occurring descriptive code, indicating that the Supreme Court considered that education of paramount importance in its rationale and opinion.

Table 2

Descriptive Code Occurrence in Brown I

Code	Number of Occurrences
Education	13
Segregation	7
Past Practice	3
Race	3
Uncertainty	3

An example of the Supreme Court's focus on education is evident from the entirety of Section 4 on page 493 of the opinion:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child

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> may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Here, Justice Warren uses the adjective “important” to describe the education as a governmental function. He links education to democracy, citizenship, and the development of cultural values. In building the justification to end segregation, Justice Warren argues that lack of an education limits a child’s ability to succeed as an adult. It is notable that this section contains no direct reference to race, although the plaintiffs seeking relief in the case are Negro school children. In his effort to argue the importance of education for all children, Justice Warren purposely omits race from this part of the Court’s argument, likely in an effort to persuade his audience to focus on the importance of education to the country as a whole rather than focusing on the race of the children effected.

Segregation appears as a code 7 times in the document. In section 5 of the opinion, the Court revisits its opinion in *McLaurin v. Oklahoma State Regents* (1950) which examined segregation within the higher education context. In that citing *McLaurin*, the Court stated:

> In *McLaurin* v. *Oklahoma State Regents, supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *Brown v. Board of Education* 347 U.S. 483, 493 (1954).

Writing for the Court, Justice Warren then states:

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of

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> their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.
>
> *Brown v. Board of Education* 347 U.S. 483, 494 (1954).

When examined together, these two paragraphs are indicative of the Court's focus on the impact of segregation in the educational context. In *McLaurin*, the Supreme Court ruled that a separate graduate school could not be equal due to a host of intangible qualities. Justice Warren then applies that rationale with "added force" to the K-12 context. By citing *McLaurin* first, and then applying the Court's own rationale into the K-12 context, Justice Warren further develops the argument that separate schools are inherently unequal.

Values codes. Values codes represent a world-view consisting of the author's values, beliefs, or attitudes (Saldaña, 2009). Values codes require perspective. Every Supreme Court opinion involves the values of the individual justice as well as values that are attributed to our nation as a whole. Fifteen values codes were developed *in priori,* or prior to the coding process, because it was important to have a constant set of codes that could capture the Supreme Court's values, regardless of the time period in which the decision was written. The *in priori* values codes are as follows: adequacy, choice, citizenship, diversity, duty, equality, equity, inequality, opportunity, progress, reasonable(ness), responsibility, and unitary. Table 3 shows the *in priori* values codes assigned to *Brown I*.

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Table 3

Values Code Occurrence in Brown I

Code	Number of Occurrences
Equality	5
Citizenship	2
Responsibility	1

Equality emerged as a strong value code in *Brown I*. The question of whether racially segregated schools could be equal was of paramount importance and was the main discussion point in the Court's opinion. The Court used its prior decision in *Sweatt* v. *Painter* (1950) to argue that equality involves more than having equal facilities and equally qualified teachers and then applies the same argument to K-12 education. The Court states:

> Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.
> *Brown v. Board of Education* 347 U.S. 483, 492 (1954).

The Court argues that equality in education involves much more than the access to equal school buildings and other tangible resources. Instead, it focuses on the impact that segregation itself has on equality in the K-12 setting as a whole, indicating its concern with whether racially segregated schools could ever be equal. Ultimately, the Court found that "separate but equal" schools were unconstitutional, and clearly state its final decision in one short sentence: "We

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conclude that in the field of public education the doctrine of "separate but equal" has no place." *Brown v. Board of Education* 347 U.S. 483, 495 (1954).

Citizenship also emerged as an important value to the Supreme Court in *Brown I*. The Court states that education "is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship." *Brown v. Board of Education* 347 U.S. 483, 493(1954). By describing the importance of education as the "foundation of good citizenship" the Court implies that when children of color are denied access to the same kind of education that their white peers have, then their ability to become good citizens is hampered, which potentially negatively impacts all of society.

Versus codes. Versus codes identify people, institutions, ideas, or concepts that are in direct conflict with each other (Saldaña, 2009). There were two versus codes used in *Brown I*: black versus white and past versus present. These codes were used throughout the opinion and pointed to the direct tensions inherent in the discussion around the laws supporting segregation.

The Court described the plaintiffs in the *Brown I* litigation as "minors of the negro race" but makes no mention of the defendants, which were states operating segregated schools (p. 487). Although the defendants were not individuals, the fact that the Court referred to the plaintiffs as "minors of the negro race" is indicative of an awareness of inherent racial tension between the negro plaintiffs and the states which were defending their operation of racially separate schools.

Likewise, the Court devotes significant discussion to past practices versus present circumstances. In its determination that the original intent of the 14th Amendment was inclusive as it relates to public education, the Court states:

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> An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world….Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.
>
> *Brown v. Board of Education* 347 U.S. 483, 490 (1954).

Here, the Court acknowledges several things related to prior practices. First, in 1868 when the 14th Amendment was adopted, public education was virtually nonexistent in the south. There was no state supported education in the south for white children, and the newly freed slaves were still denied education in some states.

Second, the Court acknowledges that public education in 1868 was very different from those present in 1953 when the case was granted certiorari. The Court draws specific contrasts between the conditions of the newly freed slaves and the accomplishment of Negroes in various fields during the present time. Illiteracy is contrasted with outstanding success in an effort to support the Court's argument against using prior practices to guide the Court's decision on the

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issue of segregation. The Court notes that in the present day, circumstances are quite different and argues that prior history and past practices have little relevance given the societal changes that have taken place since that time in public education.

Themes. The two overarching themes that emerged from *Brown I* were equality and the importance of education. The most frequently used descriptive codes, values codes, and versus codes were linked to equality and education. Equality and education codes co-occurred a total of 12 times in the opinion. The Court's concern with equality was examined in terms of whether equality in the educational setting should be determined only by tangible, measurable factors. Ultimately, the Court rationalized that there were intangible components of education that made equality impossible if Negro children were required to attend segregated schools.
Likewise, the Court's description of the past conditions of public education in the south, compared with the present focus on compulsory education was a prime example of the importance of education. In its discussion, the Court linked education to citizenship, democracy and the overall development of children.

Although the Court determined that segregated public schools were unconstitutional, the question of what was to be done to remedy segregation was not addressed in *Brown I*. The Court acknowledged that remedying segregation would be complicated and ordered all parties to submit briefs and return to the Supreme Court within the next year in what would becomeknown as *Brown II*.

Brown v. Board of Education (1955). *Brown v. Board of Education* (1955) (*Brown II)* was decided one year after *Brown I*. There were 9 Supreme Court justices who took part in the Court's decision. All 9 Supreme Court Justices were white males. Justice Earl Warren delivered the opinion of the Court. The Court's decision was unanimous; there were no concurrences or

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dissents. Eight of the justices were the same as those who decided *Brown I*. Justice Jackson was a member of the Court in 1954, but by the time the *Brown II* decision was issued in 1955, he had been replaced by Justice Harlan.

Brown II is 5 pages long and contains 2573 words, including footnotes. The entire document contains a total of 63 paragraphs. The decision was not organized into sections as was *Brown I*. The most commonly used words outside of prepositions, conjunctions, and articles were the words cases and courts. Both cases and courts were used 10 times each during the opinion. The word school(s) was used 13 times and the word education was used 4 times. When education and school are combined, there are 17 direct references to education, resulting in 1% of the total word count. There are no references to Negro or colored in the text of the opinion. There is one direct reference to "white children," and that was in affirming a decision made by a lower Delaware Court.

Descriptive codes. As shown in Table 4, the most commonly occurring descriptive codes applied during the coding process for *Brown II* were remedy, time, and transition. Remedy was the most commonly occurring descriptive code, indicating that the Supreme Court was determining how and who should develop the appropriate remedies for the segregation that had been overturned in *Brown I.* Time and transition were applied as codes 3 times. When combined, time and transition indicate that the Court was focused on what constituted an appropriate time frame for remedying the public school segregation found unconstitutional in *Brown I.*

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Table 4

Descriptive Code Occurrence in Brown II

Code	Number of Occurrences
Remedy	4
Time	3
Transition	3

The Court's opening at pages 298-299 of the opinion acknowledges that it considered the positions of the states affected by the *Brown I* decision of paramount importance:

> 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. *Brown v. Board of Education* 349 U.S. 294, 298-299 (1955).

It is understandable for the Court to allow the southern states to present their view on the question of remedies. However, it is important to note that the Court was giving the very states that perpetuated racial segregation an opportunity to weigh in on how segregation of public schools should be eradicated. The Supreme Court uses the terms "local conditions" and "local problems" to describe the widespread segregation that it had condemned in *Brown I*. The Court then states:

> These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial

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> discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as *amici curiae*, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.
>
> *Brown v. Education* 349, U.S. 294, 299 (1955).

By characterizing the presentations of the southern states involved as "informative and "helpful," the Court indicates that it finds merit in the arguments these states provided against immediate, full implementation of *Brown I*. The Court acknowledges the "complexities" involved with desegregating schools. These "complexities" were brought forth in the presentations by southern states affected by the *Brown I* decision. The Court appears to give deference to their characterization of the desegregation process, while giving credit to states who have made "substantial progress" to end desegregation. Notably, there is no mention of what constitutes substantial progress.

Time and transition are critical components of the *Brown II* decision even though the Supreme Court opted not to put a definite timeframe on when schools had to be desegregated. The Court states:

> While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and

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is consistent with good faith compliance at the earliest practicable date.

Brown v. Board of Education 349 U.S. 294, 300 (1955).

The Supreme Court uses the words “prompt and reasonable” to describe its expectations for remedying public school segregation. There is no concrete timeline. There is no specific guidance from the Court aimed at preventing states and local school districts from stalling to implement *Brown I*. The Court does not define start. Instead, the language related to time is decidedly vague. Rather than give specific guidance related to a specific timeline for implementation, the Court insists on giving the states that were responsible for perpetuating racial inequality and inequity the ability to slow progress toward desegregation as long as the states can show that their actions are in good faith.

The Court goes on to state that the District Courts can enter orders to “admit to public schools on a racially nondiscriminatory basis with all deliberate speed” (p.300). This is another vague reference to time. While on the surface, “all deliberate speed” may appear to indicate a preference toward a fast implementation of *Brown I*, there is nothing else in the opinion that defines “all deliberate speed.” The Court’s decision to not verbalize a timeline for implementation is one of the most important features of the *Brown II* decision.

Values codes. Table 5 shows the *in priori* values codes applied in *Brown II*. Equity, progress and

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Table 5

Values Code Occurrence in Brown II

Code	Number of Occurrences
Equity	4
Progress	2
Reasonable(ness)	2
Adequacy	1
Responsibility	1

reasonableness emerged as the most prevalent values codes in *Brown II*. All references to equity in *Brown II* are linked directly to the District Courts, which the Supreme Court determined to be the appropriate courts to address the question of remedies for segregation. The Court's rationale and definition of equitable principles is noted below:

> Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts. In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a

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> systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. *Brown v. Board of Education* 329 U.S. 294, 299-300 (1955).

Rather than craft remedies for school desegregation on its own, the Court decided to send the cases back to the District Courts. The Court's rationale was that local conditions varied from place to place, and since the District Courts are local federal trial courts, they would be best equipped to assess and determine whether desegregation remedies were appropriate. In the first few sentences, it appears that the Supreme Court ignores any potential of personal conflict of interest of the southern District Court judges, most of whom are products of the southern states. However, the last sentence of the passage represents the Court's attempt to warn District Courts that their personal disagreement with constitutional principles laid out in *Brown I* should not outweigh their responsibility to uphold the law. That sentence begins with the phrase "But it should go without saying." This phrase is indicative of the Court's belief that the District Court judges should already know that they are required to hold the rule of law above their own personal considerations. The fact that the Supreme Court felt the need to include the sentence does suggest some concern with the District Court judges' ability to place the law ahead of their personal opinions.

Versus codes. The overarching versus code applied to this case was public versus private interests. The Supreme Court sought to ensure that public and private interests were balanced during the process of desegregation. Arguably, this is a shift from the Court's pronouncement in *Brown I*. Here, the Supreme Court challenges the District Courts to balance public and private interests in their examination of desegregation decrees. The interest of black school children is

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not directly referenced in *Brown II*. Instead, the focus has shifted to ensuring that local conditions and concerns are considered throughout the legal process.

Themes. The theme that the emerged from *Brown II* is balance. The Court's concern with local conditions and the District Court's power to determine if states are making substantial progress toward desegregation can be summed up to balancing the time needed to implement *Brown I* with the realities of deconstructing decades of segregation at the local level. The Court recognizes that every segregated school district is different and makes a point to allow the lower courts to consider all those factors. However, the Court does not seem as concerned with the possible effect that delaying desegregation might have on the educational prospects of negro children who will still be forced to attend segregated schools as the process runs its course. There appears to be a greater concern attached to balancing the interests of the segregationists with the practicality of desegregation rather than a concern about the individual school children who remain effected by segregation.

***Cooper v. Aaron* (1958)**. *Cooper v. Aaron* was decided in 1958, four years after *Brown I*. There were 9 Supreme Court justices who took part in the Court's decision. All 9 Supreme Court Justices were white males. Justice Earl Warren delivered the opinion of the Court. The Court's decision was unanimous; there were no concurrences or dissents. Six of the justices were the same justices that had decided *Brown I*. Seven of the Justices were the same justices that had decided *Brown II*.

Cooper is 8 pages long and contained 6,141 words, including footnotes. The entire document contains a total of 73 paragraphs, and is not organized in sections, but occurs as a running document. The most commonly occurring word outside of prepositions, conjunctions, and articles was the word school(s). School(s) was appeared 99 times. The word education

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occurred 6 times. When combined, there are 105 direct references to education representing 2% of the total word count in *Cooper*.

In *Cooper*, the Supreme Court primarily used the word Negro to refer to African Americans. However, the Supreme Court also uses the word colored to refer to African Americans. The Court mentioned the word negro 20 times, the word colored 3 times, the word white 1 time, and the word race twice.

Descriptive codes. As shown in Table 6 there were 13 descriptive codes that emerged during the coding process. State action was the most commonly occurring descriptive code, indicating that the state's actions were of major importance to the Court. Good faith and resistance also emerged as commonly occurring codes within the discourse.

Table 6

Descriptive Code Occurrence in Cooper

Code	Number of Occurrences
State Action	8
Good Faith	6
Resistance	4
Race	3
Time	3

At issue is whether states are bound to follow court orders emanating from the Supreme Court's *Brown I and II* decisions. *Cooper* is the first post-*Brown I* case involving a state's outright refusal to comply with the Supreme Court's mandate for desegregation. The ultimately Court found that states were required to follow the Supreme Court's interpretation of the law.

The Court recites the facts that gave rise to the litigation in *Cooper*, carefully detailing all of the actions that the Arkansas state officials engaged in to stall the implementation of *Brown I*. First, the Court describes the actions that the state legislature took in regard to *Brown I*:

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> First came, in November 1956, an amendment to the State Constitution flatly commanding the Arkansas General Assembly to oppose "in every Constitutional manner the Un-constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court," Ark. Const., Amend. 44, and, through the initiative, a pupil assignment law, Ark. Stat. 80-1519 to 80-1524. Pursuant to this state constitutional command, a law relieving school children from compulsory attendance at racially mixed schools, Ark. Stat. 80-1525, and a law establishing a State Sovereignty Commission, Ark. Stat. 6-801 to 6-824, were enacted by the General Assembly in February 1957.
>
> *Cooper v. Aaron* 358 U.S. 1,9 (1958).

Here, the Court first cites the amendment to the Arkansas Constitution used to defy *Brown I* and *II*. The Court uses the word "flatly" to emphasize the blatant command to resist the Supreme Court's authority. The Court then references the statute that Arkansas enacted to allow children to opt out of attending racially mixed schools and follows that reference with another statute passed asserting Arkansas as a sovereign state. All of these direct references are used by the Supreme Court to lay out the concerted actions of the state legislature's refusal to implement the Supreme Court's mandate in *Brown I* and *II.* After this paragraph, then uses the same structure to expose the state action perpetrated by Governor Faubus:

> On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school "off limits" to colored students.
>
> *Cooper v. Aaron* 358 U.S. 1,9 (1958).

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These two paragraphs examined together are used by the Supreme Court to define state action in *Cooper*. The Court takes time to specifically detail what legislative and executive actions have been committed by Arkansas officials in effort to resist the Supreme Court's power to interpret the Constitution and to thwart the implementation of *Brown I* and *II*.

Along with state action, resistance was another descriptive code that emerged in *Cooper*. State action and resistance co-occurred 4 times in *Cooper*. Both the state legislature and the governor perpetuated actions that were in direct defiance of the Supreme Court's pronouncement in *Brown I and Brown II*. Since *Cooper* was the first case arising out of a southern state in defiance of mandated desegregation, it is likely that the Court sought to be clear in is description of activities considered to be state action in resistance to the implementation of *Brown I*.

Good faith also emerged as a descriptive code in *Cooper*. The Supreme Court stated that one of the uncontroverted facts in *Cooper* was that three days after *Brown I* was decided in 1954, the Little Rock, Arkansas school board took measures to comply with *Brown I* by issuing a public statement of policy in which it recognized its duty to comply with the Supreme Court's decision and its intention to do so. Again, the Court takes time to reveal, in detail, the actions that the Little Rock School Board took in order to comply with *Brown I*:

> Thereafter the Board undertook studies of the administrative problems confronting the transition to a desegregated public school system at Little Rock. It instructed the Superintendent of Schools to prepare a plan for desegregation, and approved such a plan on May 24, 1955, seven days before the second *Brown* opinion. The plan provided for desegregation at the senior high school level (grades 10 through 12) as the first stage. Desegregation at the junior high and elementary levels was to follow. It was contemplated that desegregation at the high school level would commence in the fall of

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1957, and the expectation was that complete desegregation of the school system would be accomplished by 1963. *Cooper v. Aaron* 358 U.S. 1,8 (1954).

The detail with which the Court recites these facts is indicative of the Court's attention to the school district's efforts to comply with *Brown I and II*. The plan is laid out in order to show the good faith efforts that the school made toward desegregation even though the legislature had passed a statute deemed to nullify the constitutional requirements of *Brown I*. In short, the Court determined that the despite the resistance of the state legislative and executive branches of government, local the school district was showing a good faith effort to comply with *Brown I's* mandate.

Values codes. Table 7 shows the *in priori* values codes applied to *Cooper*. The Court was very concerned with the duty and responsibility of the states to comply with the requirements of *Brown I*. In *Cooper*, the Court's concern with duty and responsibility are tied directly to the concept of federalism. The Court begins the opinion by stating that Cooper "raises questions of the highest importance to the maintenance of our federal system of government" (*Cooper v. Aaron* 358 U.S. 1, 4 (1958). This sentence sets the tone for the rest of the opinion and underscores the importance the Court attaches to the concept of federalism, which requires states to recognize the Supreme Court as the ultimate source for interpretation of all state and federal laws.

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Table 7

Values Code Occurrence in Cooper

Code	Number of Occurrences
Duty	4
Equality	4
Responsibility	1

Equality is applied as a value code in the final five paragraphs of the opinion where the Court provides its rationale for its determination that a state cannot refuse to implement a mandate of the Supreme Court. The Court admonishes Arkansas, and by extension all other states attempting to thwart equality:

> 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. *Cooper v. Aaron* 358 U.S. 1, 19 (1958).

In this paragraph, the Court clearly and concisely develops its argument around the importance of equality and makes clear its expectation that states are acting in a manner consistent with the principle of equality set forth in the Constitution and affirmed by the Supreme Court.

Versus codes. The overarching versus code applied to *Cooper* was states' rights versus federal law. Much of the descriptive and values codes applied to Cooper pointed to an overarching concern with states' rights and responsibilities versus federal mandates. Arkansas state officials not only refused to comply with the Supreme Court's decision in *Brown I*, they knowingly took actions that were in direct conflict with the decision. The Court showed a deep

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concern with the lack of respect shown to its role in the system of government. In the following passage, the Court makes a point to defend its position in *Brown I*, *Brown II* and in *Cooper*:

> The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. 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. *Cooper v. Aaron* 358 U.S. 1, 19 (1958).

Though not directly stated, the Court is asserting its own power here. The use of the word "obedience" indicates an expectation that the states recognize the power that the Constitution conferred upon the Supreme Court. The Court asserts its power to interpret and proclaim the law and sets a clear expectation that all states follow the law as interpreted. The reference to the changes in sitting justices and their adherence to the principles set forth in *Brown I* are further evidence of the Court's proclamation of supremacy and thoroughness in its decision making. In *Cooper*, the Court's power has been threatened by Arkansas' refusal to comply and taking overt legislative and executive action to thwart the *Brown I* decision. The Supreme Court is concerned with its own power and crafts its decision so that its power is clearly stated as an underpinning of our system of government.

Themes. Two major themes emerged from *Cooper's* coding processes: power and equality. The Court makes it exceedingly clear that states cannot override or nullify rulings made

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by the Supreme Court simply because they disagree with them. The Court's presentation of the facts that gave rise to the litigation in Cooper is designed to show all of the ways that Arkansas state officials sought to nullify the *Brown I* ruling. In its holding, the Court makes clear that states are not allowed to nullify Supreme Court decisions and attempting to do so is a blatant disrespect for our system of government.

Likewise, equality emerges as an overarching theme in *Cooper*. The phrase "equal justice under the law" is used twice, and the Court's insistence that the Constitution be followed is directly tied to equality. The Court is direct in its assertion that state sponsored school segregation is in conflict with the constitutional mandate of equality under the law. In this way, education and equality are linked together by the Court in its efforts to ensure compliance with *Brown I's* mandate.

Griffin v. County School Board of Prince Edward County (1964). *Griffin v. County School Board of Prince Edward County* was decided in 1964, 10 years after the Brown I decision. There were 9 Supreme Court justices who took part in the Court's opinion. All 9 Supreme Court Justices were white males. Justice Black, delivered the opinion of the Court. Of the 9 justices, 4 were a part of the Supreme Court when *Brown I* was rendered. The Court's decision was unanimous; however, Justices Clark and Harlan disagreed with the portion of the holding that stated that federal courts have the power to reopen a local public school. Neither justice wrote a dissent from the opinion, but they did note their disagreement with one segment of the holding.

The *Griffin* opinion was 8 pages long and contained 5696 words, including footnotes. The entire document contained a total of 81 paragraphs, organized into 3 sections. Section 1 of the opinion addresses a number of procedural matters brought forth by the respondents in the

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case. Section 2 outlines the legal history and facts of the case. Section 3 addresses the appropriate remedy for the discrimination perpetuated by the respondents.

The most commonly used word outside of prepositions, conjunctions, and articles was the word school(s). School(s) occurred in the opinion 125 times. The word education occurred 10 times. When combined, there are 135 direct references to education, which equates to 2% of the total word count in *Griffin*.

In *Griffin*, Supreme Court used both "colored" and "negro" interchangeably to refer to African Americans. The word negro(es) was used a total of 6 times, and the word colored was used a total of 10 times, indicating a slight shift toward the word colored as the preferred reference to those of African descent.

Descriptive codes. Table 8 shows the most commonly occurring descriptive codes in *Griffin*. Education was the most commonly occurring descriptive code, indicating that the Court was very concerned with the condition of education in the Prince Edward County School District. Resistance also emerged as a common code during the coding process, indicating that the Court was examining the actions of the Prince Edward County School District critically for evidence of resistance to the *Brown I* and *II* mandate. Time, power, race, and state action also emerged as codes.

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Table 8

Descriptive Code Occurrence in Griffin

Code	Number of Occurrences
Education	7
Resistance	7
Time	4
Power	3
Race	3
State Action	3

As noted in the word count and the coding, education was a major concern of the Court in *Griffin*. The facts of the case showed that the school district had not only failed to implement the Court's mandate in *Brown I*, but instead engaged in a massive resistance effort that involved closing all public schools in the district and providing public funds to children attending private schools. The Court described the situation in Prince Edward County in the following paragraph:

> Prince Edward children must go to a private school or none at all; all other Virginia children can go to public schools. Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient. Apart from this expedient, the result is that Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support. *Griffin v. County School Board* 377 U.S. 218, 230-231(1964).

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Here, the Court makes a point to describes the educational conditions in the county in terms of race and notes that the Prince Edward County's actions deprived children of access to public education while the rest of Virginia has not. In its recitation of the facts, the Court is careful to state that from the outset of the resistance in Prince Edward County, white children had accredited private schools to attend, while colored children did not. The county and state provide funding for these private schools, but the Court notes that the state funded private schools are segregated. This passage is an example of how the court positions its concern for education alongside its concern for equality in the administration of educational opportunities.

Another example of the Court's concern with education can be found in the concluding paragraph of the opinion. The Court directs the case to be remanded to the District Court so that it can "enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools." (*Griffin* p. 234). Although not directly stated, it can be inferred that the Supreme Court found that the failure to provide public education of colored children in Prince Edwards County was intolerable.

Time was also a frequently occurring code in *Griffin.* Sections I and II of the opinion review the procedural history and facts of the *Griffin* litigation. One of the procedural arguments set forth by the respondents was that the Supreme Court should wait to allow the litigation to travel through the Virginia state courts before hearing the case. The Court's response to this argument shows a frustration with the resistance tactics employed by the respondents:

> The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing

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> the constitutional rights which we held in *Brown* v. *Board of Education, supra*, had been denied Prince Edward County Negro children. *Griffin v. County School Board* 377 U.S. 218, 229 (1964).

The Court references its *Brown II* decision when it charges that there has been too much deliberation and not enough speed. *Brown II* called for "all deliberate speed" in transitioning to a desegregated system of education. The paragraph above also shows the Court's frustration with the amount of time that has elapsed since its pronouncement in *Brown I*. Here, the Court plays on its own words, indicating 10 years have elapsed since *Brown I* and Prince Edward County has made no movement toward a desegregated system of public schools.

Values codes. Table 9 shows that equality was the most common value code applied in *Griffin*. Equality co-occurred 5 times with the descriptive code education, indicating that the Court was carefully considering the equality in the educational context. Perhaps the most telling quote of the entire opinion as it relates to equality is the following:

> The time for mere "deliberate speed" has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia. *Griffin v. County School Board* 377 U.S. 218, 234 (1964).

The Court makes a direct reference to the Prince Edwards County school children and their right to equal education. The court does not mention the race of the children in this quote, but it can be inferred from earlier segments of the opinion that the concern is strictly for the colored children who have not received an equal public education in Prince Edwards County.

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Table 9

Values Codes Occurrence in Griffin

Code	Number of Occurrences
Equality	6
Choice	1
Duty	1
Fairness	1
Responsibility	1

Versus codes. The overarching versus code used in *Griffin* is state rights versus federal law. In Section I, the Court addresses a number of procedural issues all related to the state vs federal conflict. This conflict resides in Prince Edwards County's refusal to recognize the Supreme Court's authority and its ongoing efforts to resist the Supreme Court's ruling in *Brown I.*

Themes. The main theme in *Griffin* is that long term resistance to the Court's power will not be tolerated. From the outset of the opinion, the Court refers to all the methods that local and state officials used to stall the implementation of the Court's ruling in *Brown I*. It succinctly answers all prior arguments by the Respondents, and boldly declares that the time has come for the mandate for racial equality in education to be implemented. The Court's references to the timeline since *Brown I*, along with references to how the children in Prince Edward County have been denied equal protection of the laws is evidence of the Court's frustration with the lack of progress toward desegregation.

Green v. School Board of New Kent County (1968). *Green v. School Board of New Kent County* was decided in 1968. There were 9 Supreme Court justices who took part in the

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Court's decision. For the first time in the body of cases examined in this study, all of justices in Green were not white. Justice Thurgood Marshall, one of the African American lawyers for the petitioners in *Brown I* and *II* had be appointed to the Supreme Court. Justice Brennan delivered the opinion of the Court. The Court's decision was unanimous; there were no concurrences or dissents. Green was 7 pages long and contained 4,590 words, including footnotes. The entire document contained a total of 70 paragraphs and is not divided into sections.

The most commonly used word outside of prepositions, conjunctions, and articles was the word school. School(s) was occurred 84 times in the text of the opinion. The word education was occurred 9 times. When these are combined, there are 93 direct references to education, equating to 2% of the total word count in *Green*.

The Supreme Court used the word Negro to refer to African Americans in *Green*. The word colored is not used at all in the opinion. The word white was used to refer to those of European descent. The Court mentioned the word negro(es) 17 times and the word race(s) 2 times.

Descriptive codes. Table 10 shows the most commonly occurring descriptive codes that emerged during the coding process for *Green*. The most commonly occurring codes were desegregation, nonracial, and past practice. *Green* is the first case examined in this study that the Court heard after Congress passed the Civil Rights Act of 1964 which outlawed discrimination based on race, color, religion, sex, or natural origin. For the first time in the study, desegregation and nonracial emerged as codes, likely in response to the force added to *Brown I* and *II* by the Civil Rights Act of 1964.

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Table 10

Descriptive Code Occurrence in Green

Code	Number of Occurrences
Desegregation	4
Nonracial	4
Past Practice	4
Transition	4
Burden	3
District Courts	3
Resistance	3
Segregation	3

On page 438 of the opinion, the Court states that "there is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case." Here, the Court discusses desegregation in terms of the challenges associated with it while acknowledging that every situation involving desegregation is different. and that those differences must be considered in determining the type of remedy to enact. There are three direct references to the complexities of desegregation in *Green*, indicating its understanding of the difficulty of developing a realistic, workable remedy for segregation.

Values codes. Of the 15 in priori codes developed, nine are assigned to *Green,* as shown in Table 11.

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Table 11

Values Code Occurrence in Green

Code	Number of Occurrences
Unitary	5
Duty	3
Reasonable(ness)	2
Responsibility	2

Unitary was the most commonly occurring value code, followed by duty, reasonableness and responsibility. I defined unitary as the state of being completely unified as a school district operating on a nonracial basis, free from racial segregation. In determining whether New Kent County School District had done so by implementing its freedom of choice plan, the Court stated on page 437 that:

> In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system.

The Court was not convinced that the fact that the school district had developed a freedom of choice plan at issue in *Green* constituted sufficient compliance with the goal of achieving a unitary school district. In determining whether the school board was operating a dual school district, the Court chose to look beyond the racial makeup of the student body and examine "but to every facet of school operations -- faculty, staff, transportation, extracurricular activities and facilities." *Green v. New Kent School District* 391 U.S. 430, 436 (1968). This was the Court's first time providing a concrete list of factors to look for in determining whether a

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district was operating a dual system. These factors are referenced in later cases as the *Green factors*. Ultimately, the court found no evidence of a unitary system after examining all of these factors in *Green*. In fact, the Court specifically stated that the school district was operating a dual district. In arriving at this conclusion, the Court noted that no white children had opted to attend the predominately Negro school, and stated "85% of the Negro children in the system still attend the all-Negro Watkins school." *Green v. New Kent School District* 391 U.S. 430, 442 (1968). Along with unitary, duty was also another value code assigned to *Green.* The Court's was clear in its assertion that:

> School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. *Green v. New Kent School District* 391 U.S. 430, 438 (1968).

Here, the Court is expressive in its expectation that school boards take the responsibility for transitioning from segregated dual systems. The Court uses the phrase "eliminated root and branch" to emphasize its expectation that school boards do all in their power to end racial discrimination in the public school setting. In the next paragraph, on page 438 the Court notes that the school board waited 11 years after *Brown I* to develop its freedom of choice plan and characterizes that timeframe as a "deliberate perpetuation of the unconstitutional dual system." *Green v. New Kent School District* 391 U.S. 430, 438 (1968). The Court's frustration with the school board's lack of progress is also evident from its assertion that "the burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work now." *Green v. New Kent School District* 391 U.S. 430, 436 (1968).

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Versus codes. The versus code applied the *Green* is state vs federal. As in all of the desegregation cases that came before it, *Green* involves the inherent tension between the actions of the state and the federal mandate to desegregate. The tension is heightened in *Green* due to the passage of the Civil Rights Act of 1964, which allowed the federal government to withhold federal aid to states engaged in discriminatory practices. The Court notes on page 433 of the opinion that the "freedom of choice" plan was implemented 1965 in order to retain eligibility for federal funds. The Court does not go into great detail about this, but it can be inferred that the Civil Rights Act of 1964 added strength to the mandates set out in *Brown I* and *II*.

Themes. The overarching theme in *Green* is that despite the complication involved, school districts bear the burden of ensuring that they are transitioning to unitary, nonracial districts. The court makes clear that its expectation is that the burden of transition rests on the districts, and that the plans for transition must be practicable and involve more than the racial makeup of the schools.

Swann v. Charlotte-Mecklenburg Board of Education (1971). *Swann v. Charlotte-Mecklenburg Board of Education* was decided in 1971. There were 9 Supreme Court justices who took part in the Court's decision. Eight of the Supreme Court Justices were white males, one was an African American male. Justice Burger delivered the opinion of the Court. The Court's decision was unanimous; there were no concurrences or dissents. Of the 9 justices who decided *Brown I*, only two remain on the Court for *Swann.* opinion is 14 pages long and contains 9,934 words, including footnotes. The document has a total of 161 paragraphs, organized into 6 sections. Section 1 of the opinion begins with an overview of the procedural posture of the case and a general description of the two desegregation plans considered by the lower court. Section 2 offers a review of the relevant desegregation case law and the challenges faced by District Courts

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attempting to remedy past segregation. Sections 3 and 4 restates the objectives of *Brown I* and *II* and outlines the role of the local school district and the role of the courts in assuring compliance with *Brown I* and *II*. Section 5 discusses the issue of student assignment. Section 6 announces the Court's decision.

The most commonly used word outside of prepositions, conjunctions, and articles was the word school(s). School(s) was used 294 times. The word education was used 23 times. When combined, there are 337 direct references to education, representing 3% of the total word count in *Swann*. The Court used the words "negro" and "black" to refer to African Americans. *Swann* is the first case in this body of research that uses the word black to refer to African Americans. The word equality does not appear in the *Swann* opinion at all.

Descriptive Codes. Table 12 shows the descriptive codes assigned to *Swann* during the coding process. Remedy, which includes busing and zoning, was the most frequentlyoccurring descriptive code in *Swann*, followed by District Courts, power, segregation, and demographics

Table 12

Descriptive Code Occurrence in Swann

Combined Codes	Number of Occurrences
Remedy	30
District Courts	12
Power	12
Segregation	19
Demographics	9

Remedy is the most frequently occurring code in *Swann*. The issue in *Swann* deals with how school districts should craft remedies to address past segregation, which is the reason it is

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the most frequently occurring code. District Courts and power are the second most frequently occurring codes. District Courts were responsible for the initial determination of whether a remedy crafted by a school board was appropriate, so like remedy, it is understandable that District Courts appear as a frequently occurring code.

Power appears as a descriptive code a total of 12 times in the *Swann* opinion. Throughout *Swann* and other desegregation opinions, southern states and school boards questioned the scope of power asserted by the federal courts to remedy past segregation in schools by asserting that issues related to the administration of educational services are generally within the purview of local school districts. In its lengthy discussion of power, the Court in *Swann* attempts to clarify the powers of local school boards and the federal courts. On page 16 of *Swann*, the Supreme Court states:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to preparestudents 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.

A careful analysis of this passage shows the Court recognizes that under normal circumstances, local school boards have the power to enact educational policy to benefit the students under their care. The Court uses the adjective broad to describe the power of a local school board, indicating that this power is expansive, “absent a constitutional violation”. The

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phrase "absent a constitutional violation" provides notice that there are limitations on the school board's power that come into effect once a constitutional violation is found.

Likewise, on page 10 of *Swann*, the Supreme Court responded to the question of scope of power of the federal courts by stating that "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Here, the Court's use of the adjective broad to describe the district court's power is a reaffirmation of the federal court's ability to address the vestiges of segregation. Then analyzed together, these two passages show the Court's attempt to balance the power of the local school authorities with the power of the federal courts. Simply put, the Court's remedial powers do not become active until there's a constitutional violation.

The descriptive code demographics appears for the first time in *Swann*. *Swann* is the first desegregation case post-*Brown* that involves a metropolitan area. In its recitation of the facts surrounding the *Swann* litigation, the Court provides the following description of the Charlotte-Mecklinburg school district on page 7:

> The Charlotte-Mecklenburg school system, the 43d largest in the Nation, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina. The area is large -- 550 square miles -- spanning roughly 22 miles east-west and 36 miles north-south. During the 1968-1969 school year the system served more than 84,000 pupils in 107 schools. Approximately 71% of the pupils were found to be white and 29% Negro. As of June 1969 there were approximately 24,000 Negro students in the system, of whom 21,000 attended schools within the city of Charlotte. Two-thirds of those 21,000 -- approximately 14,000 Negro students -- attended 21 schools which were either totally Negro or more than 99% Negro.

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The Court makes a point to specifically state that Charlotte-Mecklingburg is the 43 largest district in the nation and gives very detailed information about the size and racial makeup of the district. This is likely to distinguish the case from others that came before it; Swann represents a very different set of desegregation concerns and circumstances due to its sheer size the number of students potentially effected by any desegregation remedy enacted by the school district.

The size and urban nature of much of the Charlotte Mecklenburg school district are important demographics to the Supreme Court, because of their potential impact on remedying or promoting segregated practices. The Court notes that it is within the power of local school districts to open and close new schools, but that these decisions have the potential to shape the racial makeup of schools and residential patterns, particularly in the inner cities (p.20). The Court expresses its concern by stating that:

> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with

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> "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

Here, the Court is verbalizing its concern with the potential for school districts to maintain segregated practices through zoning and the building of new schools. The Court uses the phrase "local the school system into the mold of separation of the races" to indicate its acknowledgement of school district's ability to maintain segregation through zoning and school facility building practices.

Values codes. Of the 15 values codes developed *in prioi*, 8 of those are assigned to *Swann* as shown in Table 13. Equity is the most commonly occurring value code and is assigned 8 times. In *Swann*, equity is directly associated with the power of the district courts to enact remedies for desegregation. The district courts are described as "courts of equity" and their powers are described in detail by the Supreme Court.

Table 13

Values Code Occurrence in Swann

Code	Number of Occurrences
Equity	8
Duty	6
Unitary	6
Responsibility	4
Adequacy	2
Equality	2
Reasonable(ness)	2
Progress	1

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Duty was assigned as a value code 6 times during the coding process. The Court's concern with duty is directly related to question of what the duties of the federal courts and local school boards in remedying past segregation are. The Court states this succinctly at the beginning of the opinion on page 6: "These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once."

Likewise, the code unitary was assigned 6 times during *Swann's* coding process. Unitary is used to describe a school district free of the vestiges of segregation. Unitary is linked to the *Green* decision, since *Green* laid out the factors involved in determining whether a school district's desegregation plan to attain unitary was acceptable. While the link between *Green* and *Swann* will be discussed in a later section of Chapter 4, here, it is important to note that the Court was very specific in its determination of what should happen when a school district fails to develop an acceptable remedial plan to address segregation. The Court states that a District Court has "broad power to fashion a remedy that will assure a unitary school system."(p. 17). Again, the Court used the adjective broad to describe the Court's power, and couples that with the Court's duty to assure a unitary school system.

Versus codes. The versus code applied to *Swann* was federal courts vs. local school boards. The entire revolved around the question of how and when a federal court could impose a desegregation remedy on a school district.

Themes. The overarching theme in *Swann* was the power of the federal court to remedy desegregation when the local school board fails to do so. Throughout *Swann*, the Court was careful to define the duties of the local school district and the duties of the federal court.

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However, the Court is clear in its determination that when the local school district fails to act or acts unconstitutionally to remedy segregation, the federal courts have "broad" power to address the constitutional violations.

Keyes v. School District No. 1 (1973). *Keyes v. School District No. 1* was decided in 1973. There were 8 Supreme Court justices who took part in the Court's decision. Justice White did not take part in the opinion. Seven of the eight Supreme Court justices were white males; one was an African American male. Of the nine justices who decided *Brown I*, only one remained on the Court for *Keyes.* Justice Brennan delivered the opinion of the Court. For the first time in the body of cases examined in this study, the decision was fractured; Justice Douglas filed a separate opinion. Justice Powell filed a partial concurrence and a partial dissent. Justice Rehnquist filed a dissent. *Keyes* was 34 pages long and contained 24,093 words, including footnotes. The entire document contained a total of 396 paragraphs. The opinion is divided into four sections. The first section reviewed the lower court's determination of what constituted a racially segregated school. In Section 2, the Court determines whether the District Court applied the correct legal standard in determining whether the school district engaged in deliberate segregation. In Section 3, the Court examines whether segregative actions in part of a school district creates a presumption of segregation in other parts of the school district. Section 4 announces the judgement of the Court. Justice Douglas' separate opinion is two pages and contains 10 paragraphs. Justice Powell's partial concurrence/partial dissent is 16 pages and contains 82 paragraphs. It is divided into four separate sections. Justice Rehnquist's dissent is five pages and contains 35 paragraphs. It is divided into three sections.

The most commonly used word outside of prepositions, conjunctions, and articles was the word school. School(s) was occurred 560 times in the text of the opinion. The word education

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was occurred 56 times. When these are combined, there are 616 direct references to education, equating to 6% of the total word count in *Keyes*.

Keyes is the first post *Brown I* decision to involve three races. All prior cases involved African American students and white students. The Supreme Court used the words Negro and black to refer to African Americans in *Keyes*. The word Negro(es) occurred 43 times in the opinion. Black occurred 8 times. The word colored is not used at all in the opinion. The word Hispano is used to refer to Hispanic Americans and occurred 16 times in *Keyes*. The word anglo was used interchangeably with white to refer to those of European descent and appeared 12 times in the opinion. The word race(s) appears 15 times in the opinion.

Descriptive codes. As shown in Table 14 there were 13 descriptive codes that emerged during the coding process. Segregation was the most commonly occurring descriptive code. Since *Keyes* involved a Denver, Colorado school district that had never operated under segregation laws, the discourse involved centered around how *Brown I* and *II* applied to districts that never practiced *de-jure* segregation, but whose policies and procedures resulted in *de facto* segregation. State action also emerged as a code, indicating the Court’s concern with what constituted state action when the alleged violation was *de-facto* as opposed to *de jure*. Integration appears for the first time in this study as a descriptive code in *Keyes*. Prior to *Keyes*, the word desegregation was used exclusively when examining the process of transitioning to racially mixed schools. Minority also emerges as a code in *Keyes.*

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Table 14

Descriptive Code Occurrence in Keyes

Code	Number of Occurrences
Segregation	27
State Action	21
Transportation	16
Integration	15
Burden	13
Education	11

In *Keyes*, the Supreme Court specifically points out two things that make the case different from previous post-*Brown* cases. First, the court notes that Denver has never operated under segregation laws (p.191). This case is the first post-*Brown* case arising in a school district that did not adhere to the pre-*Brown* separate but equal legal standard. Second, on page 195 the Court states that "Denver is a tri-ethnic, as distinguished from a bi-racial, community. The overall racial and ethnic composition of the Denver public schools is 66% Anglo, 14% Negro, and 20% Hispano." The racial composition in *Keyes* is presented as percentages, indicating the Court's concern with the overall makeup of the district. Both of these facts were important threads in the within case discourse in Keyes' opinions, concurrences and dissents. The Court finds that the lower Court erred when it failed to consider Negroes and Hispanos together for purposes of determining segregation. On pages 197-198 of the opinion, the Court is careful to draw similarities between the treatment of Hispanos in the southwest and Negroes in the south:

> …there is also much evidence that in the Southwest Hispanos and Negroes have a great many things in common. The United States Commission on Civil Rights has recently

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> published two Reports on Hispano education in the Southwest. Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians. In fact, the District Court itself recognized that "one of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination." 313 F.Supp., at 69. This is agreement that, though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated" schools.

Here, the Court presents evidence that the plight of Hispano students in the southwest mirrors the plight of Negro students in the south. While noting that the origination of blacks and Hispanics are different, the Court acknowledges that he discrimination faced by both groups has resulted in their being treated more poorly than their white counterparts. This is important, considering that this is the first time the Court has had to consider desegregation in location that has two minority groups. The code minority was assigned five times in this opinion. This code's occurrence reflects the Court's recognition that segregation could and did involve racial groups other than blacks.

After its discussion of Hispano students and its determination that Hispano and Negro students can be counted together when considering segregated schools, the Court moves to the question of whether evidence that a part of a school district engaged in segregative practices can be used to establish a prima facie case of unlawful segregation for the whole district. The Court

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found that it could and indicated that the burden then shifted to the school district to disprove that there was no segregative intent.

Values codes. The main value code that was found in *Keyes* was duty as shown in Table 15. Duty co-occurred with segregation 5 times, indicating the Court's concern with the what duty the Denver school district had to desegregate in light of the fact that it had never operated a dual school system under the law.

Table 15

Values Code Occurrence in Keyes

Code	Number of Occurrences
Duty	12
Reasonable(ness)	4
Equality	3
Equity	3
Fairness	3

The Court acknowledges that a duty exists to eradicate segregation in situations where dual school systems exists, and explains how the duty applies in some situations where de-jure segregation did not exist. In its explanation of the Court's duty in a situation where de-jure segregation was never in place, the Court states at p. 200:

> This is not a case, however, where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense

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> to conclude that there exists a predicate for a finding of the existence of a dual school system.

Here, the Court is willing to extend the duty to desegregate to a situation where a de-facto segregation is the cause of the dual system. Despite the fact that there were no state laws requiring segregation, local authorities created their own rules that allowed segregation to create a dual system. The Court recognized this, and allowed for desegregation despite the fact that there was no statutory segregation in the history of Colorado.

Versus codes. The versus code applied to Keyes is de-jure vs de-facto segregation. Since Colorado never had school segregation laws as did prior Supreme Court cases from the south, the segregation alleged in Keyes is de-facto. Since prior cases reaching the Supreme Court on the school segregation issue had occurred in areas that had prior de-jure segregation, this is a new issue, and the Court discussion revolves around the differences in de facto and de jure segregation.

Themes. There overarching theme that emerges from *Keyes* is that any historically oppressed group may be considered a minority. As mentioned above, the Court was willing to combine Hispanos and blacks for the purposes of the case. The Court draws comparisons in the treatments of blacks in the south and Hispanos in the southwest and appears to define minority in the context of school segregation as those groups of people who have been historically discriminated against.

Milliken v. Bradley (1974). *Milliken v. Bradley* was decided in 1974. There were 9 Supreme Court justices who took part in the Court’s decision. Seven of the eight Supreme Court justices were white males; one was an African American male. Of the 9 justices who decided *Brown I*, only Justice Douglas remained on the Court for *Milliken.* Justice Burger delivered the

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opinion of the Court. The decision was fractured; Justice Stewart filed a concurrence. Justices Douglas, White, and Marshall each filed separate dissents.

Milliken was 38 pages long and contained 31,129 words including footnotes. The entire document contained a total of 328 paragraphs. The opinion is divided into four sections. The first section contains a statement of the facts. In Section 2, the Court reviews the case law from Brown and other desegregation cases and applies that law to the facts of *Milliken.* In Section 3, the Court reviews the District Court's findings. Section 4 announces the judgement of the Court. Justice Stewart's concurrence is 3 pages and contains 9 paragraphs. Justice Douglas's dissent is 3 pages contains 10 paragraphs long. It is divided into four separate sections. Justice White's dissent is 7 pages and 34 paragraphs long. Justice Marshall's dissent is divided into 3 sections. His dissent is 13 pages and contains 72 paragraphs.

The most commonly used word outside of prepositions, conjunctions, and articles was the word school. School(s) occurred 596 times in the text of the opinion. The word education occurred 107 times. When these are combined, there are 703 direct references to education, equating to 3% of the total word count in *Milliken*.

The Supreme Court used the words Negro and black to refer to African Americans in *Milliken*. The word Negro(es) occurred 86 times in the opinion. Black occurred 43 times. The Court does not use the word colored to refer to African Americans in this opinion. The word white(s) is used to refer to those of European descent and appeared 89 times in the opinion. The word race(s) appears 19 times in the opinion.

Descriptive codes. As noted in Table 16, remedy was the most commonly occurring descriptive code in *Milliken*.

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Table 16

Descriptive Code Occurrence in Milliken

Code	Number of Occurrences
Remedy	47
Power	23
State Action	15
Segregation	14

The entire case centered around what types of remedies a District Court could impose on a school district. The Supreme Court framed the issue as follows:

> We granted certiorari in these consolidated cases to determine whether a federal court may impose a multidistrict, areawide remedy to a single-district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a 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 constitutional violations by those neighboring districts.

The statement of the issue uses the phrase "absent any finding" 3 separate times, indicating a concern that the lower courts may have erred in the multi-district remedy imposed.

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Embedded in the text of the statement of the issue is the concern that the remedy imposed did not give affected surrounding school districts an opportunity take part in the legal process that led to the remedies imposed on them.

Like *Keyes*, *Milliken* involved a school district outside the southern U.S. The Detroit Branch of the NAACP along with parents of students in the Detroit City School District brought the original action against the Governor and other executive level officials within the state of Michigan and the city of Detroit alleging that policies and actions of state authorities perpetuated a segregated school system. Ultimately, the lower courts found that the Detroit school segregation could only be remedied by extending desegregation order to the suburban area outside of Detroit, which consisted of 53 outlying school districts. None of the 53 outlying school districts were included as parties in the original case, but the lower courts included them in the remedy.

Remedy and power co-occur 22 times in *Milliken*. At the heart of the Court's reasoning is deep concern that lower federal courts have overstepped the boundaries of their power in crafting a remedy that goes beyond the school district specifically involved in the litigation. The Supreme Court's concern with the application of an inter-district remedy for the segregation found specifically in the Detroit City Schools is exemplified in a series of questions the Court posed aimed at challenging the reasoning of the lower courts and illuminating the challenges with implementing an inter-district remedy:

> Entirely apart from the logistical and other serious problems attending l large-scale transportation of students, the consolidation would give rise to an array of other problems in financing and operating this new school system. Some of the more obvious questions would be: What would be t

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> the status and authority of the present popularly elected school boards? Would the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts? What board or boards would levy taxes for school operations in these 54 districts constituting the consolidated metropolitan area? What provisions could be made for assuring substantial equality in tax levies among the 54 districts, if this were deemed requisite? What provisions would be made for financing? Would the validity of long-term bonds be jeopardized unless approved by all of the component districts as well as the State? What body would determine that portion of the curricula now l left to the discretion of local school boards? Who would establish attendance zones, purchase school equipment, locate and construct new schools, and indeed attend to all the myriad day-to-day decisions that are necessary to school operations affecting potentially more than three-quarters of a million pupils? (p.743)

The Court's decision to list its concerns as questions points to a frustration with the reasoning of the lower federal courts. All of these questions are generally the types of issues addressed by the state legislature and local school boards. The Court's concern is that the lower Courts have created potential separation of powers issues by imposing a remedy that requires decisions that are beyond the normal purview of the judicial branch. In no other case examined in this study has the Court listed a series of questions this long in reference to a decision of a lower court.

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Values codes. As noted in Table 17, duty was the most frequently occurring value code in *Milliken*. Duty and responsibility were combined during the second cycle of coding due to the similarity of the various contexts in which they were used.

Table 17

Values Code Occurrence in Milliken

Code	Number of Occurrences
Duty	18
Equity	9
Unitary	5
Equality	4

The Court makes several statements regarding duty of the state, the legislature, and the federal courts throughout the opinion, likely to build its rationale against the lower Court's development of the inter-district remedy. For example, the court states "school district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies" (p 744). The Court makes clear that the federal courts have a responsibility to develop remedies to violations of the 14th Amendment. However, the Court qualifies the statement through the use of the adjective "appropriate," because it ultimately found that the inter-district remedy was inappropriate.

Versus codes. Federal judicial power vs states was the prevailing versus code in *Milliken.* There was a deep concern with the potential overreach of judicial authority. The tension between the federal courts and individual states is evident in *Milliken*. This tension is the result of the federal courts' ability to craft remedies for state violations of the U.S. Constitution. Unlike

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previous cases, *Milliken* involves overreach by the federal Courts in crafting remedies for Constitutional violations and the Supreme Court's response involves detailed discourse around the power and duty of the states and the Courts.

Themes. The overarching theme in *Milliken* is a resistance to punishing innocent parties. The crux of the Court's problem with the lower federal Courts is that the remedy imposed would potentially burden school districts who were never even involved in the litigation. At no time during the decision does the Court shrink from remedying the segregation in the Detroit City Schools where the Constitutional violation occurred. However, the Court refuses to approve of a remedy that goes beyond the boundaries of where the violation occurred; even if that means that the violation won't be completely remedied.

Regents of University of California v. Bakke (1978). *Regents of University of California v. Bakke* was decided in 1978. There were 9 Supreme Court justices who took part in the Court's decision. Eight of the Supreme Court justices were white males; one was an African American male. None of the 9 justices who decided *Brown I* remained on the Court for *Bakke*. Justice Powell delivered the opinion of the Court; however, there was no true majority opinion. Instead, the Court produced a plurality opinion, where a majority of the Court agreed with the decision but disagreed with the rationale behind the decision.

Bakke was 71 pages long and contained 54,948 words, including footnotes. The entire document contained a total of 568 paragraphs. The opinion is divided into five sections. The first section provides a history and overview of the admissions program at University of California Davis' Medical School and information about Alan Bakke, the original Petitioner in the case. Section 2 examines whether there is a private right of action under Title VI of the Civil Rights

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Act of 1964. Section 3 provides a historical analysis of Supreme Court jurisprudence related to racial classifications and the 14th Amendment. Section 4 examines whether the specific race based classification used by UC Davis supports a compelling state interest. Section 5 explores alternatives to the quota system the Court found unconstitutional.

The most commonly used word outside of prepositions, conjunctions, and articles was the word school. The word race occurred 181 times in the text of the opinion. The word discrimination was occurred 170 times. The word admissions occurred 119 times. The word school(s) occurred 90 times. The word education occurred 47 times. When combined, there were 137 direct references to education.

Descriptive codes. As shown in Table 18, the most commonly occurring descriptive codes that emerged during the coding process for *Bakke* were race, discrimination, remedy, classification, and minority.

Table 18

Descriptive Code Occurrence in Bakke

Code	Number of Occurrences
Race	35
Discrimination	20
Remedy	11
Classification	10
Minority	9

Bakke is the first case examined in this study that involves higher education attempts to ensure a diverse study body. All prior cases reviewed involved K-12 school and districts that were engaged in remedying constitutional violations of the 14th Amendment.

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Race emerges as a highly used code in *Bakke*, but generally does not appear in a standalone fashion. Race appears with various descriptive and values codes throughout the opinion, indicating the complexity arising in the *Bakke* facts and the Court's attempt to grapple with them. In its analysis of the way that the Supreme Court has interpreted the 14th Amendment in the 30 years prior to *Bakke*, the Court states:

> Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[over] the years, this Court has consistently repudiated '[distinctions] between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." The clock of our liberties, however, cannot be turned back to 1868. It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. (Bakke, 294-295).

In this passage, the Court first acknowledges that the major decisions involving the 14th Amendment and race involve Negroes being denied rights by a white majority. However, in the next sentence, the Court suggests that the majority-minority dichotomy is not the only way to

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view the denial of rights. The Court states that it has rejected distinctions among citizens based on their ancestry as being against the tenets of equality. These two sentences set up the Court's argument against U.C. Davis' contention that discrimination against the white majority can not be suspect if the harm to the white majority is minimal. The Court outright rejects this argument, stating that equal protection does not function to accord greater protection to one group than another.

While on its face, the Court's argument appears to be reasonable and well- reasoned, the Court's rationale opens a gateway for white litigants to use the same legal arguments that people of color used although there is no body of history indicating a concerted effort to discriminate against them. The Court here appears to be leaning toward an interpretation of racial equality that ignores centuries of racial segregation and discrimination against people of color and confers upon white the same level of protections as those who have been historically disadvantaged based on their race.

The Court continues this line of reasoning when it explicitly rejects the notion of a Negro vs White "two class theory" of it references on page 294 -296 of *Bakke:*

> Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms

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> of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude " and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups.

Here, the Court describes the notion of a two-class racial theory as being “artificial.” Again, the Court ignores the reality that since the country’s beginnings, black people were the only minority group captured, stolen, sold, and enslaved on American soil. The Court goes on to state that the concepts of minority and majority populations are “temporary”, and arrangements based on political judgement. While it is possible that over time, minority and majority populations can and do shift, at the time *Bakke* was decided, African Americans were only 24 years post *Brown I* and only 14 years post-Civil Rights Act of 1964. The Court’s rationale ignores the reality that by and large, racial discrimination had been perpetuated against blacks by whites and not vice versa.

The Court argues that the white majority is actually composed of minorities, most of whom can claim that they were discriminated against at some point in the past. While this is true, the Court does not consider that the widespread generational discrimination experienced by blacks from the time of slavery was at the hands of white individuals, state governments, and a federal government. The Court makes the argument in order to promote a colorblind idea of equality that has never been able to exist due to systematic racism. In the final sentences of the passage, the Court shows a clear concern for individuals who might be injured if they’re outside

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of the preferential class. Again, the Court's rationale ignores that there would be no need for a preferential class had blacks not have been discriminated against in the first place.

Although the *Bakke* Court was unwilling to acknowledge that there are differences in how discrimination has been perpetuated against blacks as opposed to whites who claim discrimination, it was willing to acknowledge that "The State certainly has a legitimate and substantial interest in ameliorating, or eliminating, where feasible, the disabling effects of identified discrimination." (p.308). The Court reasons that in *Brown I* and the cases that came after, the states were required to address the results of specific acts of discrimination that were committed by states and local school districts. The Court distinguishes those cases from *Bakke* when it states "That goal was far more focused than the remedying of the effects of "societal discrimination," and amorphous concept of injury that may be ageless in its reach into the past." (p. 307) These words serve as a reference to U.C. Davis' attempt to craft an admissions policy that would counteract the challenges faced by black and other minority student applicants to the medical school. The use of the word "amorphous" points toward a concern that remedying societal discrimination is too big and loose a concept for consideration. While the Court does not deny the existence of societal discrimination, it does little to diminish its relevance to the situation at hand.

Classification emerged as a frequently occurring code as well, largely due to the Court's concern with the construction of the special admissions program and its potential impact on white students. In summarizing its opinion of the special admissions program, the Court states that the program:

> tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter

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> how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the change to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class. (p.320).

Here, it appears that the Court's greatest concern is related to how U.C. Davis structured the admissions program. The Court viewed the special seats set aside for minorities as an infringement on the rights of those white students who were not allowed to compete for those particular seats. The Court found exclusion of white students from even competing for the set-aside seats blatantly unfair and unconstitutional.

Values codes. As shown in Table 19, of the 15 values codes developed in priori, 5 were assigned to *Bakke*. Equality was assigned as a code 18 times, double the number of the second most commonly occurring code, diversity.

Table 19

Values Code Occurrence in Bakke

Code	**Number of Occurrences**
Equality	18
Diversity	9
Citizenship	2
Fairness	2
Responsibility	2

Equality co-occurred 12 times with race, indicating the Court's concern with racial equality within the context of *Bakke* facts, given that this was the first higher education case that

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dealt with a white individual claiming racial discrimination based on admissions factors. The 14th Amendment and its promise of equal protection were of major importance to the Court. As mentioned previously, the Court's decision was fractured. There were deep divisions among the justices in regard to the question of whether equality is affected by race-conscious admission policies.

In his explanation of the purpose of the 14th Amendment, Justice Powell writes the following:

> The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal. Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as the respondent are not a discrete and insular minority requiring extraordinary protection from the majoritarian political process. (p.290).

This passage is a response to the argument that strict scrutiny should not be applied in cases where the individual claiming racial discrimination was not the member of a racial minority. Bakke, as a while male, was not the member of a racial class that had been the target of historical racism. The Court outright rejects that argument when it asserts that the 14th Amendment's

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guarantee of equal protection are guaranteed to all citizens, regardless of race. Under the Court's rationale, any race based classification is subject to strict scrutiny, not just those involving minorities.

While on its face, the Court's rationale appears fair and rooted in equality, its willingness to treat white individuals claiming discrimination in the exactly the same ignores the reality of racism and ongoing inequality perpetuated against people of color. The Court is promoting a notion of colorblind justice. While a lofty goal, it does not take into account systematic racism or the privileges of individuals who, by virtue of their birth, are free from the inequities brought about by inferior schools and housing discrimination. By allowing white males to assert discrimination without considering the historical backdrop, the Court is creating a situation where any perceived action to help minorities who have been historically disadvantaged can be viewed as disadvantaging white Americans.

Diversity was the second most commonly occurring code in *Bakke*. In order for any race based classification to survive strict scrutiny, there must be a compelling state interest in the classification. The Court makes this clear on page 312 of the opinion when it states that the attainment of diversity "clearly is a constitutionally permissible goal for an institution of higher education." However, the Court also asserts on page 313 that "ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body." Here, the Court is attempting to broaden the definition of diversity beyond race.

In supporting its broader definition of diversity, the Justice Powell points to the Harvard College admissions program as an example of how other factors, along with race, can result in a

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diverse student body. He writes that "race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." This sentence shows a willingness by the Court to have race considered, but not as the only factor in an admissions decision.

Versus codes. There were two overarching versus codes that emerged in *Bakke*: Minority vs. Majority and Higher Education v. K-12. The Court's concern with equality is closely tied to balancing the interests of minority students with those of majority students. U.C. Davis sought to diversify its student population through the special admissions program. However, the Court found that the admission program was a quota that unfairly disadvantaged white students. While the Court appeared to approve of the goal of diversity, it was very clear that the rights of white students could not be compromised in order to promote that goal.

The Court was also careful to point out the distinctions between the K-12 desegregation cases and the facts of *Bakke*. K-12 vs higher education emerged as a code as a result of this distinction. According to the Court, the K-12 cases involved findings of specific instances of racial discrimination by the state, whereas the admissions policy in *Bakke* was developed to promote diversity rather than address specific acts of discrimination. This distinction, which first appears in Bakke, severely limits universities from asserting the case law associated with the K-12 cases as the legal basis for finding admissions policies aimed at promoting diversity.

Theme. There were two themes that emerged from *Bakke*. First, is that equality should be colorblind. Throughout the opinion, the Court shows its concern with the 14th Amendment being applied equally to all people, regardless of race or ethnicity. This is both explicitly stated and implied in the opinion. The Court's unwillingness to find that white individuals constituted a

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class whose discrimination claims should not be held to strict scrutiny is evidence of this theme within Bakke's discourse.

The second theme that emerged was that diversity in college admissions is a valid and valuable goal. The Court devoted section IV-D to the discussion of the value of diversity in a university setting. The Court went into great detail to describe the Harvard admissions program and the way that race along with other factors could be used to promote a diverse student population.

These two themes are full of tension. If we are to apply the law and our admissions policies in a colorblind fashion, then how is diversity to be achieved? *Bakke* was decided in 1978, only 24 years after *Brown I.* As noted in prior sections of Chapter 4 and in Chapter 2 of this study, many school districts throughout the south persisted in discriminatory practices well into the decades after *Brown* I. Likewise, as evident in *Keyes, de facto* discrimination and segregation occurred in states that never had segregation laws. The African American schoolchildren who grew up during this era were denied the opportunity for an equal education to their white peers and may not have benefitted from an educational history that would allow them to be as competitive as their white counterparts. This disparity is what U.C. Davis was attempting to correct with its admission program.

Board of Education v. Dowell (1991). *Board of Education v. Dowell* was decided in 1991. There were 8 Supreme Court justices who took part in the Court's decision. Justice Souter did not take part in the decision. For the first time in the body of cases examined in this study, all of justices in *Dowell* were not male. Justice Sandra Day O'Conner had been appointed to the Supreme Court. Chief Justice Rehnquist delivered the opinion of the Court. There were no concurrences, and one dissent written by Justice Marshall, the only African American justice on

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the bench. *Dowell* was 15 pages long and contained 11,709 words. The entire document contained a total of 148 paragraphs, and is divided into 3 sections.

The most commonly used word outside of prepositions, conjunctions, and articles was the word school. School(s) was occurred 201 times in the text of the opinion. The word education was occurred 31 times. When these are combined, there are 232 direct references to education, equating to 3% of the total word count in *Dowell*.

The Supreme Court used the word black exclusively to refer to African Americans in *Dowell*. The word Negro appears only in quotations from prior cases. The word colored does not appear at all in the opinion. The word white was used to refer to those of European descent. The word race(s) appears 17 times throughout the opinion.

Descriptive codes. As shown in Table 20, compliance, good faith, remedy, and temporary emerged as descriptive codes. Since the facts of the case involved good faith compliance with a desegregation remedy, the discussion here will deal with temporary as a code.

Table 20

Descriptive Code Occurrence in Dowell

Code	Number of Occurrences
Compliance	4
Good Faith	4
Remedy	4
Temporary	4

The litigation in *Dowell* was originally filed in 1961 when a group of black students and parents sued to end de jure segregation in schools (p.241). This litigation dragged on until 1972, when the District Court ordered the Court to adopt a desegregation plan that involved

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neighborhood schools, busing, and some parental choice. The school district complied with this plan for 5 years and then petitioned the District Court to close the case. The District Court granted the motion to close the case. (p.241).

By the mid 1980s, demographic shifts led the Board to adopt a Student Reassignment Plan that sought to address the fact that black children were being bused further from their homes in order to maintain integration (p.242). In 1985, the respondents filed a motion to reopen the original case, stating that the SRP was a move backwards toward segregation. The District Court disagreed and found that the school board had acted ingood faith, and that the present residential segregation was not related to the former school segregation. The Court of Appeals reversed, and the Supreme Court granted certiorari to resolve the conflict.

In its rationale, the Court was adamant that "from the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination" (p.247-248). This Court's use of this sentence serves as an initial caution that the federal supervision of local school systems was not supposed to continue into perpetuity. The Court's majority leans heavily toward returning schools back to local control, stating "local control over the education of children allows citizens to participate in decision-making, and allows innovation so that school programs can fit local needs" (p. 248).

The return to local control appears to outweigh the reality of students now effected by residential segregation. At page 249, the Court states the following in reference to dissolving a desegregation decree:

> Dissolving a desegregation decree after the local authorities have operated incompliance with it for a reasonable period of time properly recognizes that necessary concern for the important values of local control of public school systems dictates that a federal court's

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regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.

There are several dialectical features in this passage. First is the use of the word "reasonable." Here, reasonable is an adjective used to describe a period of time that local authorities have complied with a desegregation decree. There is no specificity as a to what "reasonable" means. Since the Court is the ultimate decision maker, it has the power to determine reasonableness, with little to no consideration of the effects on the black school children actually effected by the decree. Additionally, the Court reiterates its preference for control of school districts be turned back over to local authorities as soon as past discrimination is remedied. Absent from this discussion is how long it can or should take to remedy decades of segregation. There is an undercurrent of hurry in *Dowell*, indicative of a Court that has shifted greatly since *Brown I* and *II.*

Values codes. As shown in table 21, the most commonly occurring values code in *Dowell* is unitary. The Court is openly critical of the lower courts' use of the word unitary, in part due to the various definitions that have been assigned to it.

Table 21

Values Code Occurrence in Dowell

Code	**Number of Occurrences**
Unitary	7
Adequacy	1
Duty	1

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The Court argues that some lower courts define unitary as any school district that has been desegregated, regardless of whether that desegregation is a part of a desegregation decree. Other lower courts define unitary as the complete eradication of past segregation (p.635). The Court describes the differences in definition as confusing and states:

> We think it is a mistake to treat words such as "dual" and "unitary" as if they were actually found in the Constitution. The constitutional command of the Fourteenth Amendment is that "no State shall . . . deny to any person . . . the equal protection of the laws.

Here, the Court refers us to the Constitution for clarity while ignoring that prior decades of Supreme Court litigation used the terms as well as the lower courts.

Versus codes. The versus code assigned to *Dowell* was local control v. federal oversight. The Court's concern in *Dowell*, from beginning to end was preserving or returning schools to locally controlled conditions once the vestiges of state-imposed segregation had been removed. The tension between past segregated practices and new residential patterns that lead to further non-state imposed segregation is evident, but the Court draws its own line between state imposed segregation of the past and the new segregation that is being perpetuated through residential patterns. The Court is reluctant to view residential and demographic shifts as remnants of past segregation.

Themes. *Dowell's* overarching theme is the return to local control. As noted above, throughout the decision, the Court's discussion turns to the need for school districts to be controlled locally once state imposed segregation is eradicated. There appears to be little interest in the Court's majority in addressing the segregation that is emerging in the 80s and 90s due to residential patterns. The Court's position is that residential patterns are the result of private

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decisions, not state action. While on its face, this may be true, discriminatory real estate and lending practices have been long documented as drivers of the racial makeup of cities.

Freeman v. Pitts (1993). *Freeman* was decided in 1993. There were 8 Supreme Court justices who took part in the Court's decision. Justice Clarence Thomas, the one of the African American justice on the bench, did not take part in the decision. Justice Kennedy delivered the opinion of the Court. There were 3 concurrences to the opinion and no dissents. *Freeman* was 22 pages long and contained 17,995 words, including footnotes. The entire document contained a total of 185 paragraphs.

The most commonly used word outside of prepositions, conjunctions, and articles was the word school. School(s) was occurred 350 times in the text of the opinion. The word education was occurred 47 times. When these are combined, there are 397 direct references to education, equating to 3% of the total word count in *Freeman*. The word equality appeared twice in the opinion.

The Supreme Court used the word black to refer to African Americans in *Freeman*. The word Negro is only used in quotations from earlier cases. The word colored is not used at all in the opinion. The word white was used to refer to those of European descent. The Court uses the word race(s) 16 times, and the word racial 94 times resulting in a total of 110 direct references to race.

Descriptive codes. As noted in Table 22, remedy and local control were the most commonly occurring descriptive codes in *Freeman*.

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Table 22

Descriptive Code Occurrence in Freeman

Code	Number of Occurrences
Remedy	11
Local Control	9
Balance	8
Race	8

The Court in *Freeman* was faced with the question of whether a district court could discontinue its control over parts of the school district in which there had been compliance with a desegregation order even if other aspects of the district were still in noncompliance (p.485). The Court ultimately found that "a federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control" (p.489). The Court strongly disagreed with the rationale of the Court of Appeals, which found that a school district must meet all six of the factors laid out in *Green* before the district could be found in compliance with the decree:

> To say, as did the Court of Appeals, that a school district must meet all six *Green* factors before the trial court can declare the system unitary and relinquish its control over school attendance zones, and to hold further that racial balancing by all necessary means is required in the interim, is simply to vindicate a legal phrase.

Here, the Court is unwilling to require full compliance with a desegregation order in order to relinquish control of the parts of the order with which the district has complied. This approach

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is directly tied to the Court's preference for returning control of school districts to the local authorities.

Local control is the second most commonly occurring code in *Freeman*. As in *Dowell,* the Court is very clear in its assertion that schools should return to local control as soon as they are found in substantial compliance to the desegregation decree:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course. (p.490)

The Court's rationale is that it is more important to begin to withdraw federal oversight, even if the authorities have not complied with every aspect of the desegregation decree. The incremental approach to withdrawal gives control back to the local school district, regardless of how egregiously they have failed to comply with some aspects of the school district. Ultimately, if any aspect of the desegregation order is not followed, black children are the ones who suffer, but this is not a consideration for the Court.

Values codes. As noted in Table 23, the most commonly occurring values codes in *Freeman* are unitary and duty.

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Table 23

Values Code Occurrence in Freeman

Code	Number of Occurrence
Unitary	8
Duty	6
Equity	4
Responsibility	3

In Freeman, the Court continues the rationale that it laid out in *Dowell*, asserting that the concept of unitariness "does not have fixed meaning" (p. 487). The Court argues for flexibility in carrying out equitable principles but seeks to distance itself from a definition of unitariness that would require the District Court to hold school districts accountable for full implementation of desegregation orders. This is indicative of a shift in the Court's view of the role of federal judicial intervention in the desegregation process.

Duty was the next most commonly occurring value code in *Freeman*. The Court began Section II of its opinion by reviewing the duty of a school district previously engaged in de jure segregation:

> The duty and responsibility of a school district once segregated by law is to take all the steps necessary to eliminate the vestiges of the unconstitutional de jure system. This is required in order to ensure that the principal wrong of the de jure system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present. This was the rationale and objective of *Brown I* and *Brown II*… The objective of *Brown I* was made more specific by our holding in *Green* that the duty of a former de jure district is to "take whatever steps might

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> be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch (p.485-485).

It is notable that the Court evokes *Brown I* and *Brown II,* at the outset of *Freeman*. In reviewing the goals of *Brown I* and *II*, the Court positions itself as an adherent to the *Brown* doctrine and rationale, though its ultimate decision to allow the withdrawal of federal intervention before the district has complied fully with the desegregation order appears to be in conflict with the original intent of *Brown I* and *Brown II*. The Court goes further and cites *Green*, which laid out clear and specific factors that should be considered in determining whether a school district had attained unitary status. Arguably, *Brown I, II*, and *Green* are the strongest cases for judicial intervention, and the Court's citation of them here appears to be in conflict with their ultimate decision in *Freeman*.

After positioning itself with *Brown* and *Green*, the Court then shifts its attention to justifying its decision to allow the withdrawal of judicial intervention prior to the full implementation of a desegregation order. At page 489, the Court states that "partial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities." The Court selects the adjectives significant and important to describe the Court's duty to return school districts to local control. Two sentences later, at page 490, the Court states the following:

> Just as a court has the obligation at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of its decree, so too must a court provide an orderly

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> means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance.

On its face, the Court's rationale appears reasonable. There was never any intent through the courts to have federal intervention in local school matters last infinitely. However, school districts that were under federal court orders had engaged in decades of systematic civil rights violations against black school children. The Court does not appear to acknowledge this reality, and is willing to return control of some school governance prior to the districts having complied completely with the desegregation order.

Versus codes. The main versus code assigned *to Freeman* is federal intervention vs local control. As in *Dowell*, there is tension between the role of the federal district court and the local school districts.

Theme. The overarching theme present in *Freeman* is the idea that it is time for federal intervention to end and for schools to be returned to local control. *Freeman* takes place in 1993, 39 years after *Brown I* was decided. When considered alongside *Dowell*, which was decided in 1991, there appears to be a shift in the Court's thinking about segregation and federal intervention.

Missouri v. Jenkins (1995). *Missouri v. Jenkins* was decided in 1995. There were 9 Supreme Court justices who took part in the Court's decision. *Jenkins* is the first case in which two of the Supreme Court Justices are female. Justice Ruth Bader Ginsburg and Justice Sandra Day O'Conner were the 2 female justices on the bench. Justice Clarence Thomas was the only African American Justice on the bench. There were 2 concurrences to the opinion and 2 dissents. *Jenkins* was 45 pages long and contained 37,177 words, including footnotes. The entire document contained a total of 343 paragraphs and is divided into 3 sections.

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The most commonly used word outside of prepositions, conjunctions, and articles was the word district. District occurred 543 times in the text of the opinion. The word school(s) occurred 320 times. The word education occurred 70 times. When schools and education are combined, there are 390 direct references to education, equating to 1% of the total word count in *Jenkins*. The word equality appeared one time in the opinion.

The Supreme Court used the word black to refer to African Americans in *Jenkins.* The word Negro is only used in quotations from earlier cases. The word colored is not used at all in the opinion. The word white was used to refer to those of European descent. The Court uses the word race(s) 22 times, and the word racial 44 times resulting in a total of 66 direct references to race.

Descriptive codes. As noted in Table 24, remedy and District Courts were the most commonly occurring descriptive codes in *Jenkins.* At issue in *Jenkins* was whether the district court exceeded its remedial power when it sought to improve the "desegregative attractiveness" of Kansas City Metropolitan School District(KCMSD) as compared to surrounding suburban districts. Remedy and district courts as the most commonly occurring codes is indicative of the Court's analysis of this primary issue presented in the case.

Table 24

Descriptive Code Occurrence in Jenkins

Code	Number of Occurrences
Remedy	20
District Courts	12
Authority	8
State Action	8
Black	7

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In its examination of the plan that the District Court approved, the Supreme Court first acknowledges that District Courts have broad authority to remedy constitutional violations, as it stated in *Swann,* but then goes on to cite *Milliken*, which examined the limitations to remedial power. The Court states that "proper analysis of the District Court's orders challenged here, then, must rest upon their serving as proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct…"(p.89). With this sentence, the Court seeks to link the remedy tightly to the specific de jure discrimination that was found. In this case, the District Court had found that there was low student achievement and 25 racially identifiable schools with over 90% black students (p.90). The Supreme Court's analysis indicates that the remedy implemented should seek to decrease the racially identifiable nature of the 25 schools and improve student achievement.

Rather than simply address those issues, the plan approved by the district court sought to improve the desegregative attractiveness of the district. In its rationale that the District Court exceeded its authority, the Supreme Court states at 91-92:

> Instead of seeking to remove the racial identity of the various schools within the KCMSD, the District Court has set out on a program to create a school district that was equal to or superior to the surrounding SSD's. Its remedy has focused on "desegregative attractiveness," coupled with "suburban comparability." Examination of the District Court's reliance on "desegregative attractiveness" and "suburban comparability" is instructive for our ultimate resolution of the salary-order issue. The purpose

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> of "desegregative" attractiveness has been not only to remedy the systemwide reduction in student achievement, but also to attract nonminority students not presently enrolled in the KCMSD. This remedy has included an elaborate program of capital improvements, course enrichment, and extracurricular enhancement not simply in the formerly identifiable black schools, but in schools throughout the district.

This analysis removes some of the flexibility to remedy ancillary problems that emerged as a result of de-jure segregation. The Respondents in the case argued that white flight from KCMSD was related to the prior de jure segregation and that increasing the attractiveness of the district through salary increases, increased course offerings, capital improvements, and other measures included in the plan would help to remedy the district's segregation issues by making the district more attractive to white students. The Court rejected this argument and found that the Court had exceeded its power by instituting measures not directly tied to the violation found. Arguably, this type of limitation can hinder the process of restoring the injured class of individuals to the condition they would have been in had the discrimination not occurred. In reiterating this line of reasoning, the Court adds weight to *Milliken*, *Dowell*, and *Freeman*, which all involved limitations on the District Court's remedial power.

Values codes. The most commonly occurring value code in Jenkins was reasonableness as shown in Table 25. While the word reasonable was rarely used in the opinion, the concept of reasonableness of the desegregation remedy approved by the District Court was a common thread throughout the opinion. Remedy is linked the reasonableness, because of the expectation that the Court impose a reasonable remedy for constitutional violations.

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Table 25

Values Code Occurrence in Jenkins

Code	Number of Occurrences
Reasonable(ness)	5
Equity	3
Equality	1
Fairness	1

In describing the remedial plan laid out by the District Court, the Court states that the District Court "created a magnet district of the KCMSD in order to serve the interdistrict goal of attracting nonminority students from the surrounding SSD's and redistributing them within the KCMSD. The District Court's pursuit of "desegregative attractiveness" is beyond the scope of its broad remedial authority" (p. 95). While the adjective reasonable is not used, the Court's analysis indicates that it found the remedy unreasonable, and therefore beyond the scope of the Court's power.

Versus codes. The versus code that emerged in Jenkins is the District Court intervention vs local control. As is evident in Dowell and Freeman, the Court continues to deal with the tension between federal court intervention and local control. In this case, the Court examines the question of whether the District Court exceeded its remedial power when it approved a cadre of measures aimed at improving the school district's attractiveness to white suburban families. The Court viewed these measures as an overreach of federal judicial power and insisted that the remedies for past de jure segregation be directly tied to the specific remnants of discrimination that were still occurring.

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Theme. As in the Dowell and Freeman, the overarching theme of Jenkins is the limitation of the District Court's involvement in local school districts. The Court appears to have little interest in addressing the remnants of past segregation that continue to drive inequality in school the KCMSD. Rather the approving the District Court's broad remedy specifically aimed at improving the district and making schools more attractive to white families, the Court opts to limit the remedy to the specific violations found.

Gratz v. Bollinger (2003). Gratz v. Bollinger was decided in 2003. There were 9 Supreme Court justices who took part in the Court's decision. Six of the Supreme Court justices were white males, one was an African American male, and two were white females. Justice Rehnquist delivered the opinion of the Court, and Justices O'Conner, Scalia, Thomas, and Kennedy joined in the opinion. Justice O'Conner filed a concurring opinion, which Justice Breyer joined in part. Justice Thomas filed a concurring opinion. Justice Breyer filed a concurring opinion. Justice Stevens filed a dissenting opinion in which Justice Souter joined. Justice Souter filed a dissenting opinion in which Justice Ginsburg joined as to Part II. Justice Ginsburg filed a dissenting opinion in which Justice Souter joined, and Justice Breyer joined as to Part II.

Gratz was 26 pages long and contained 21,853 words, including footnotes. The entire document contained a total of 213 paragraphs. The majority opinion is divided into two sections. The first section outlines the facts of the case and procedural history. Section two of the case is the Court's analysis and holding.

The most commonly used word outside of prepositions, conjunctions, and articles was the word admissions, which occurred 163 times in the opinion. The word race occurred 122 times in the text of the opinion. The word school(s) occurred 30 times. The word education occurred 11

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times. When combined, there were 41 direct references to education. The word black is used to refer to African Americans, and Caucasian and white are used interchangeably to refer to those of European ancestry.

Descriptive codes. As noted in Table 26, admissions was the most commonly occurring descriptive code, followed closely by race and minority. At issue in *Gratz* was the University of Michigan's College of Literature, Science and Arts in 1995 and 1997. The university had developed an admission process that sought to attain students from underrepresented minority groups. The overall admissions process was based on a 100-point system for all students. However, minority students (African American, Hispanic, and Native American) were awarded an automatic 20 points. Petitioners filed a class action lawsuit alleging numerous civil rights violations for the use of race in the admissions process.

Table 26

Descriptive Code Occurrence in Gratz

Code	Number of Occurrences
Admissions	13
Race	12
Minority	11
Individual	9
Admissions Factors	8
Discrimination	6

In its analysis of the case, the Court relied heavily on the plurality opinion Bakke, which had been decided 25 years prior to *Gratz*. As in *Bakke*, the Court applied the strict scrutiny test for race-based classifications. The classification must be based on a compelling state interest and

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must be narrowly tailored to achieve that interest. In the majority opinion at page 271, the Court refers to the rationale in Bakke as it frames the rationale for its holding in Gratz:

> 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 current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups.

Here, the Court acknowledges that under certain circumstances, race may be used as a factor in the admissions process as long as every applicant is considered as an individual. The Court finds fault with the university's automatic distribution of 20 points to minority students for no other reason than that they are members of a minority group. The automatic distribution of points led the Court to its determination that the admissions policy was not narrowly tailored to further a compelling state interest.

Values codes. As noted in Table 27, diversity and equality were the most commonly occurring values codes in *Gratz*. As noted above in the descriptive code section, diversity was found to be a compelling state interest. However, beyond that statement, diversity is only examined within the context of whether the compelling state interest was narrowly tailored. The

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Court opts in the majority opinion to focus on the limitations of employing measures to increase diversity as opposed to the importance of diversity itself.

Table 27

Values Code Occurrence in Gratz

Code	Number of Occurrences
Diversity	7
Equality	5
Equity	1
Reasonable(ness)	1

Equality did not appear as a value code in the majority opinion. It emerged as a code only in the dissent filed by Justice Ginsburg. In her dissent from the majority decision, Justice Ginsburg states the following at pages 301-302:

> The Constitution instructs all who act for the government that they may not deny to any person . . . the equal protection of the laws. In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated… Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classification, but because it Is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. But where race is considered "for

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> the purpose of achieving equality," id., at 932, no automatic proscription is in order.

Unlike the justices in the majority opinion, Justice Ginsburg draws a distinction between measures enacted to perpetuate inequality and those that are enacted to remedy it. She takes issue with the majority's decision to group all race-based classifications together without considering the purpose of the classification. The classification in Gratz was intended to increase diversity, not to burden white students. The majority does not consider this a relevant argument, but Ginsburg points out several factors at page 303 that the majority opinion ignores. First, " every applicant admitted under the current plan, petitioners do not here dispute, is qualified to attend the College." Second, "the racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day." Finally, "there is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race." These three sentences serve to counter the majority's rationale that the admissions plan was unconstitutional.

Versus codes. The most commonly occurring versus code in *Gratz* is majority vs. minority. In *Gratz*, the Court is faced with a college's attempt to create a diverse student body through a points system. The students who sued were members of a white majority alleging that the university violated equal protection with its admission system that assigned points to minority students. This code was present throughout the opinion and ultimately emerged as an overarching theme for the case.

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Theme. The overarching theme in *Gratz* was a concern with minority rights at the expense of majority (white) rights. As noted in previous sections, there was great concern from the Court's majority with the ensuring that the Constitution's equal protection clause was applied equally, regardless of historical context. Though the majority of judges disagreed, Justie Ginsburg in her dissent argued that historical context was essential to race-based classifications, and that the fact that minority students benefitted from the admission system did not automatically mean that white students were unduly burdened by it.

Grutter v. Bollinger (2003). *Grutter v. Bollinger* was decided in 2003. There were 9 Supreme Court justices who took part in the Court's decision. Six of the Supreme Court justices were white males, one was an African American male, and two were white females. Justice O'Conner delivered the opinion of the Court, with Justices Stevens, Souter, Ginsburg, and Breyer joining the opinion. Justice Justice Ginsburg filed a concurring opinion, in which Justice Breyr joined. Justice Scalia filed a partial concurrence, partial dissent, which Justice Thomas joined. Justice Thomas filed a partial concurrence, partial dissent, which justice Scalia joined as to section I-VII. Justice Rehnquist filed a dissenting opinion in which Justices Scalia, Kennedy, and Thomas joined. Justice Kennedy filed a dissenting opinion.

Grutter was 37 pages long and contained 30,599 words including footnotes. The entire document contained a total of 526 paragraphs. The majority opinion is divided into four sections. The first section outlines the admission policy for the University of Michigan's Law School and the procedural history of the case. Section II re-examines *Bakke*, and formally announces the Court's determination that student body diversity is a compelling state interest that can be used

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in university admissions. Section three gives the Court's rationale for finding that diversity is a compelling state interest. Section four states the Court's holding.

The most commonly used word outside of prepositions, conjunctions, and articles was the word school, which occurred 263 times in the opinion. The word education occurred 75 times. When combined, there were 335 direct references to education. The word race occurred 214 times in the text of the opinion. The words black and African American are used interchangeably to refer to Americans of African descent, and Caucasian and white are used interchangeably to refer to those of European ancestry.

Descriptive codes. In *Grutter*, the Court attempts to clarify the law that emerged from *Bakke*. There was no clear majority in *Bakke*, and for the 25 years between *Bakke* and *Grutter*, the lower appellate Courts remained fragmented in their use of *Bakke* as precedent. In section II A, the Court notes that *Bakke* "produced six separate opinions, none of which commanded a majority of the Court" (p.322).

Table 28

Descriptive Code Occurrence in Grutter

Code	**Number of Occurrences**
Race	27
Education	15
Admissions	13
Critical Mass	12

As noted in Table 28, the most commonly occurring descriptive codes that emerged during the G*rutter* coding process were race, education, and admissions. The case involved higher education admissions and whether diversity was a compelling state interest to allow the

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use of race as a factor in the law school admissions. Race and education co-occurred 8 times in the opinion. Race and admissions co-occurred 10 times in the opinion.

In its rationale for finding that diversity is a compelling state interest, the Court states:

> Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogenous society may participate in the educational institutions that provide the training and education necessary to succeed in America. (p.332).

Here, the Court argues that all Americans, regardless of race should have access to a legal education. The Court uses the adjective "heterogenous," to describe our society, focusing on the diverse nature of society as a whole. Though not directly stated, the Court suggests that the law school population should reflect the richness of diversity of our society. The Court also stresses that success is tied to access to proper training and education for all races and ethnicities.

As a final point regarding the importance of a racially diverse student population, at page 331, the Court cites *Brown I*, and states that "this Court has long recognized that education is the very foundation of good citizenship. For this reason, the diffusion of knowledge and opportunity must be accessible to all individuals regardless of race or ethnicity." The Court does two things with this statement. First, it reminds us of the importance of education, as described in *Brown I*, and secondly, it affirms that individuals should have equal access to knowledge and opportunity.

Values codes. As noted in Table 29, diversity emerges as the most commonly occurring values code in *Grutter*. In its discussion of the merits of a diverse student body, the Court at page 331 notes that the benefits of diversity are "not theoretical but real," and references the supporting briefs from General Motors and other Amicus Curae in support of the diversity as a compelling state interest. In citing these supporting briefs from American businesses, the Court

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recognizes the validity of the global marketplace and the importance of an education that involves people from a variety of races, ethnicities, and other backgrounds.

Table 29

Values Code Occurrence in Grutter

Codes	Number of Occurrences
Diversity	32
Equality	6

Versus codes. The most common versus code applied to *Grutter* is majority v. minority. As in *Gratz*, and *Bakke* before it, there is tension between the perceived benefit conferred upon minorities by race-conscious admissions policies, and white students who do not receive admission under these admissions policies. While the focus of *Grutter* is on diversity, the underlying tension is between the minority beneficiaries of the admissions policies and white students.

Theme. The overarching theme in *Grutter* is that diversity is a valuable American principle when applied appropriately. The Court uses arguments by the business community, the military, and the University itself to explain the importance of diversity in the American workplace. The Court is clear that a quota system is an inappropriate scheme to achieve diversity (p. 334), but still supports the benefits of diversity.

Parents Involved in Community Schools v. Seattle School District No. 1 (2007). *Parents Involved in Community Schools v. Seattle School District No. 1* was decided in 2007. There were 9 Supreme Court justices who took part in the Court's decision. Seven of the justices were white males, one was a black male, and one was a white female. Justice Roberts delivered the opinion of the Court. The Court's decision was fractured; Justices Scalia, Kennedy, Thomas

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and Alito joined with respect to Parts I, II, II-A and III-C of the opinion. Parts III-B and IV were joined by Justices Scalia, Thomas, and Alito. Justice Thomas filed a concurring opinion. Justice Kennedy filed a partial concurrence and a concurrence in the judgement. Justice Stevens filed a dissenting opinion. Justice Breyer filed a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined.

Parents Involved was 74 pages long and contained 62,717 words. The entire document contained a total of 990 paragraphs, and is divided into four sections. The most commonly used word outside of prepositions, conjunctions, and articles was the word school. School(s) occurred 937times in the text of the opinion. The word education occurred 75 times. When these are combined, there are 1012 direct references to education, equating to 2% of the total word count in *Parents Involved*.

The Supreme Court used the words black and African American to refer to Americans of African descent in *Parents Involved*. The word white was used to refer to those of European descent. The word equality was used 9 times in the opinion.

The litigation in *Parents Involved* emerges from two separate cases; one from Kentucky, and the other from Seattle, Washington. The issue in both, however, involved plans developed voluntarily by public K-12 school districts that use race to determine which schools students will attend. Section I outlines the legal history of the cases. Section II discusses jurisdiction. Section 3 reviews Supreme Court jurisprudence regarding race based classifications in the educational context. Section 4 argues against Justice Breyer's dissent.

Descriptive codes. As noted in Table 30, race and balance were the most commonly occurring descriptive codes in *Parents Involved*.

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Table 30

Descriptive Code Occurrence in Parents Involved

Code	Number of Occurrences
Race	43
Balance	15
Remedy	8

At page 730, the Court rejects the argument that voluntary racial balancing of schools in a K-12 context is a compelling state interest:

> 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.

The Court opts to take an approach to its analysis of racial balancing that ignores the role that racism and de-facto discrimination have had on the residential patterns that led the school districts in the case to create the attendance plans at issue. The focus on individualism as opposed to a historically oppressed racial class shows a distinct move away from the Court's previous discourse in K-12 cases. In the present case, the school districts were attempting to ensure that the school populations remained mixed and diverse, in recognition that many schools' racial makeup was influenced by residential patterns. While there was no evidence that the districts were attempting to remedy past discrimination, the attempt to balance student

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population was a nod to an understanding that residential patterns affected the racial makeup of local schools.

Values codes. As noted in Table 31, the two most commonly applied values codes in Parents Involved were diversity and equality. The Court did not accept the argument that the attendance plans employed by the schools were an attempt to increase diversity, nor did it accept the argument that diversity led to educational benefits in the K-12 setting (p.761). The Court was concerned that the attendance plans at issue were not aimed at diversity, but simply amounted to racial balancing. The Court states that "racial balancing is not transformed from patently unconstitutional to a compelling state interest simply by relabeling it racial diversity." This sentence indicates that the Court does not believe in the argument for diversity under these circumstances, even though only four years prior, the Court had found that diversity was a compelling state interest.

Table 31

Values Code Occurrence in Parents Involved

Code	Number of Occurrences
Diversity	11
Equality	8

Versus codes. The most commonly applied versus code in *Parents Involved* was K-12 vs higher education. The school district Respondents used the Grutter diversity argument as part of the foundation of their argument. However, the Court specifically limits the context of that holding to higher education (p.722). The Court distinguishes higher education from K-12 when it states, "the Court in *Grutter* expressly articulated key limitations on its holding--defining a

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specific type of broad-based diversity and noting the unique context of higher education" (p.725). In stating this, the Court refuses to acknowledge the value of diversity in the K-12 context and forecloses the use of the diversity argument by K-12 schools.

Theme. The overarching theme in Parents Involved is the unwillingness to allow K-12 school districts to seek diversity in their school attendance plans. Every argument the school districts brought forth to explain the value of diversity and the reasons for attempting to keep the students populations from becoming racially skewed was eliminated. Regardless of residential trends, poverty, or any other factor that could impact where children attend school, the Court is determined to limit the use of race in K-12 attendance policies, even with evidence presented that shows that K-12 schools are becoming more segregated.

Section 2: Patterns and Themes by Decade and by Research Question

The body of cases examined in this study span 5 decades. *Brown I* serves as the beginning point in this study. This case was decided in 1954 and struck down the separate but equal doctrine. *Parents Involved* serves as the ending point in this study. *Parents Involved* was decided in 2007. In between are 13 cases that show the evolution of discourse regarding race, education, and equality. One of the inquires of interest in this study was whether the Court's composition at a given time had an impact on the overall discourse around race, equality, and education within the Supreme Court's jurisprudence. The next sections will present the findings associated with the changes in the discourse and Supreme Court composition by decades.**1950s**. There were three cases examined in this study that were decided during the 1950s: *Brown I*, *Brown II*, and *Cooper*. All three of these cases were decided unanimously. *Brown I* set forth the ruling that separate but equal was unconstitutional, but did not address the remedy to the constitutional violation. *Brown II* stated that the *Brown I* decision should be implemented with

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"all deliberate speed," but allowed the District Courts to determine the remedy on a case by case basis. Cooper v. Aaron was the first case after the two *Brown* decisions to reach the Supreme Court that involved a state's refusal to implement the *Brown* mandate.

As shown in Table 32, education emerged as a code in all three cases. The importance of education was most fully discussed in *Brown I*, where the Court linked education to citizenship and the development of the nation's children. *Brown II* and *Cooper*, however, were less concerned with education, and more concerned with the actual implementation of the mandate laid out by *Brown I*, which is indicated by the high incidence of education occurring in *Brown I* and the low occurrence of education as a code in *Brown II* and *Cooper*. *Brown I* established a principal that had to be clarified in the cases that followed.

Table 32

1950s Code Occurrence

Code	BR54	BR55	CO58
Education	13	2	2
Equality	3	0	4
Race	3	0	3

Equality occurred as a code in *Brown I* and in *Cooper*. *Brown I* boldly asserted that the when states provide education, it must be provided to all persons on equal terms (p.493). *Cooper* references *Brown I*, and states that state sponsored segregation cannot "be squared with the [14th] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws (p.19). In both cases, the Court is adamant that the 14th Amendment's mandate does not allow for the segregation of black schoolchildren.

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The term used to refer to black children in *Brown I* was Negro as was common during the 1950s. However, by the time that *Cooper* was decided in 1958, colored began to appear in the texts of the Supreme Court opinions. As a descriptive code, race appears both in *Brown I* and *Cooper* 3 times. In *Brown I*, the Court is adamant in its declaration that the racial separation of children for the purposes of education is harmful (p.494-496).

The overarching theme of the 1950s cases is equality. Each case was focused on ensuring that black school children had equal access to education. *Brown I* laid the foundation for a focus on equality through its arguments regarding the importance of education and the damaging effects of segregation on black children. Although *Brown II* was more concerned with the remedy for decades of state-sanctioned segregation, the goal was still to ensure that black school children had equal access to education. *Cooper* reiterated the goals of *Brown I* and *Brown II* and reaffirmed the Court's dedication to equality when it held that states have a duty to comply with the *Brown* mandate.

When considered together, the cases show a consistency in discourse, largely due to the unanimous nature of the cases and all cases having been written by Chief Justice Warren. It is also important to note that of the cases examined, *Cooper* ushered in a period of resistance to the *Brown* mandate. As will be noted in later sections, southern states fought desegregation through active tactics such as keeping black students from entering schools as in *Cooper*, and from stalling tactics such as creating desegregation plans that were designed to keep the schools segregated.

Court composition. Table 33 and 34 shows each case, the year decided, the case length, and the members of the Court at that time. During the 1950s, the Court consisted of all white men. Five of the Supreme Court Justices who decided *Brown I* were appointed to the Court by

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President Franklin D. Roosevelt, a northern democrat well known for liberal politics. Three of the *Brown I* justices were appointed to the Court by President Harry Truman, a Missouri democrat with a record of Civil Rights reforms. One of the *Brown I* justices was appointed to the Court by President Eisenhower, a staunch advocate for Civil Rights.

Table 33

Supreme Court Justices: 1954-1978

Case and Year	***Brown I 1954***	***Brown II 1955***	***Cooper 1958***	***Griffin 1964***	***Greene 1968***	***Swann 1971***	***Keyes 1973***	***Milliken 1974***	***Bakke 1978***
Length	*7 pages*	*5 pages*	*8 pages*	*8 pages*	*7 pages*	*14 pages*	*16 pages*	*38 pages*	*71 pages*
Decision	*Unanimous*	*Unanimous*	*Unanimous*	*Unanimous*	*Unanimous*	*Unanimous*	*7—1*	*5--4*	*Plurality*
Justices	*Warren**	*Warren**	*Warren**	*Black**	*Brennan**	*Burger**	*Brennan**	*Burger**	*Powell**
	Black	*Black*	*Black*	*Warren*	*Warren*	*Black*	*Douglas*	*Stewart*	*White*
	Reed	*Reed,*	*Frankfurter*	*Douglas*	*Black*	*Douglas*	*Stewart*	*Blackmun*	*Brennan*
	Frankfurter	*Frankfurter*	*Douglas*	*Clark*	*Douglas*	*Harlan*	*Marshall*	*Powell*	*Marshall*
	Douglas	*Douglas*	*Burton*	*Harlan*	*Harlan*	*Brennan*	*Blackmun*	*Rehnquist*	*Blackmun*
	Jackson	*Burton*	*Clark*	*Brennan*	*Stewart*	*Stewart*	*Powell*	*Douglas*	*Stevens*
	Burton	*Clark*	*Harlan*	*Stewart*	*White*	*White*	*Rehnquist*	*White*	*Stewart*
	Clark	*Minton*	*Brennan*	*White*	*Fortas*	*Marshall*	*Burger*	*Brennan*	*Rehnquist*
	Minton	*Harlan*	*Whittaker*	*Goldberg*	*Marshall*	*Blackmun*	*White+*	*Marshall*	*Burger*

**Chief Justice*
+Abstained

Table 34

Supreme Court Justices: 1991-2007

Case and Year	***Dowell 1991***	***Freeman 1992***	***Jenkins 1995***	***Gratz 2003***	***Grutter 2003***	***Parents Involved 2007***
Length	*15 pages*	*22 pages*	*45 pages*	*26 pages*	*37 pages*	*74 pages*
Decision	*5--3*	*8—0*	*5--4*	*6--4*	*5--4*	*5--4*
Justices	*Rehnquist**	*Kennedy**	*Rehnquist**	*Rehnquist**	*O'Connor**	*Roberts**
	White	*Rehnquist*	*O'Connor*	*O'Connor*	*Stevens*	*Scalia*

(continued)

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Table 34 (continued)

Case and Year	*Dowell 1991*	*Freeman 1992*	*Jenkins 1995*	*Gratz 2003*	*Grutter 2003*	*Parents Involved 2007*
	O'Connor	*White*	*Scalia*	*Scalia*	*Souter*	*Kennedy*
	Scalia	*Scalia*	*Kennedy*	*Kennedy*	*Ginsburg*	*Thomas*
	Kennedy	*Souter*	*Thomas*	*Thomas*	*Breyer*	*Alito*
	Marshall	*Blackmun*	*Stevens*	*Breyer*	*Scalia*	*Stevens*
	Blackmun	*Stevens*	*Ginsburg*	*Stevens*	*Thomas*	*Souter*
	Stevens	*O'Connor*	*Breyer*	*Souter*	*Kennedy*	*Ginsburg*
	Souter+	*Thomas+*	*Souter*	*Ginsburg*	*Rehnquist*	*Breyer*

**Chief Justice*
+Abstained

The Chief Justice for *Brown I*, *Brown II*, and *Cooper* was Justice Earl Warren, appointed to the Court by President Eisenhower. Chief Justice Warren issued all three opinions. Between *Brown I* and *Brown II*, Justice Jackson was replaced by Justice Harlan, who had been appointed by President Eisenhower. This means that 8 of the 9 justices that decided *Brown I* also decided *Brown II.* By 1958, two more Supreme Court Justices that decided *Brown I* had been replaced. Justice Brennan, appointed by President Eisenhower, had replaced Justice Minton, and Justice Whittaker, appointed by President Eisenhower, had replaced Justice Reed. It is notable that the three presidents who appointed the justices involved in *Brown I, II*, and *Cooper* were all liberal, and two of them, Presidents Truman and Eisenhower were active in their support of Civil Rights for African Americans. Their openness to Civil Rights for African Americans is reflected in the decisions of the 1950s. Despite the changes to the Court's membership between 1954 and 1958, the Court remained consistent in its unanimity and its interpretation of the judiciary's role in ensuring compliance with the mandate issued in *Brown I* and *II*.

1960s. There were two cases examined in this study that were decided during the 1960s: *Griffin and Green.* Both of these cases originated in Virginia, and both were decided

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unanimously by the Supreme Court. As shown in Table 35, education only emerged as a code in *Griffin*. Although *Green* involved school segregation, the Court's concern was not on education or the importance of it, but instead sought to clarify the duty of local school boards to ensure that segregation was being eradicated and that dual school systems were being converted to unitary systems.

Table 35

1960s Code Occurrence

	GR64	GR68
Education	8	0
Equality	6	1
Race	3	1

Education was used as a code 8 times in *Griffin*. That case involved a Virginia school district that closed all schools rather than desegregate. A private school was established to educate white children, but black children had no school to attend. The Court acknowledged the numerous stalling tactics that Prince Edward County employed in order to resist *Brown's* mandate and emphatically stated that "the time for mere deliberate speed has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education" (p 234). The words deliberate speed are pulled from *Brown II*, which ordered desegregation to take place with "all deliberate speed". The Court's insistence that black children be afforded educational opportunities falls in line with all of the decisions from the previous decades.

Equality occurred as a code in both *Griffin* and in *Green*. The Court was very concerned with the fact that the black schoolchildren in Prince Edward County had effectively been denied

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an education between the years 1954 and 1964, despite numerous federal court actions, including *Brown I* and *Brown II* (p.222-225). In its rationale in *Griffin*, the Court states at p. 230:

> Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient.

The inequality perpetuated by Prince Edward County was the basis for the Court's determination that there was a constitutional violation and that the school district must desegregate. The school district's resistance to the *Brown I* mandate did not sway the Court from enforcing desegregation and ensuring that local school districts sought to eradicate the inequality brought about by segregation.

The Court's concern with equality in *Green* was directly tied to the fact that virtually no movement had been made to desegregate the schools until "11 years after *Brown I* was decided and 10 years after *Brown II*…" (p. 438). During that timeframe, the school district maintained its segregated dual system and black children were denied equal access to education as defined by *Brown I* and *Brown II*. *Green* was decided after the Civil Rights Act of 1964, which allowed the federal government to deny federal funds to states that perpetuated discrimination. In *Green,* the Court specifically mentions that the school district in *Green* did not attempt a desegregation plan until it was faced with not being eligible for federal funds (p.433). This "freedom of choice" desegregation plan was rejected by the Court as insufficient to ensure equal education for all students.

The terms Negro and colored were interchangeably used by the Court to refer to black children in *Griffin*. However, in *Green*, the word Negro was used exclusively. Race appeared as

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a code in both cases and was tied to the denial of equality. Race is not discussed in either case as a separate concern or issue, but instead is linked with education and equality in *Griffin*, and with equality in *Green*.

Griffin and *Green* join *Cooper* in addressing the resistance to the Court's *Brown* decisions. The overarching theme that emerged from this decade is that resistance will not be tolerated. While *Brown II* did not specify a time frame for desegregation, it did require that schools desegregate with "all deliberate speed" (p. 301). Rather than take the time to develop realistic plans toward desegregation, some school board such as those in *Griffin* and *Green* spent much of the 1950s and 1960s resisting the Court's mandates. The Court in the 1960s is growing weary of the resistance tactics and is signaling through its discourse that resistance to *Brown I* and *II* will not be tolerated.

Court composition. The 1960s brought significant changes to the Supreme Court's composition. By the time *Griffin* was decided in 1964, only 4 members of the Court that decided *Brown I* remained and only 5 members of the Court remained from *Brown II*. Justice Burton had been replaced by Justice P. Stewart, an Eisenhower appointee. Justice Frankfurter had been replaced by Justice Goldberg, a Kennedy appointee. Justice Earl Warren remained the Chief Justice but did not write the opinion in *Griffin*, as he did in all three cases from the 1950s. Instead, Justice Black issued the opinion in *Griffin*.

When *Green* was decided in 1968, the Court's composition had changed even more. Justice Goldberg had been replaced by Justice Fortas, a President Johnson appointee. Justice Clark, one of the original *Brown I* justices, had been replaced by the first African American on the Court, Justice Thurgood Marshall, an attorney from the *Brown I* and *II* cases and the higher education desegregation cases from earlier decades. Justice Marshall was appointed to the Court

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by President Lyndon Johnson. Justice Warren remained the Court's Chief Justice but did not write the *Green* opinion. Justice Brennan wrote the opinion.

President Eisenhower and Kennedy's Supreme Court appointees dominated the Court during the 1960s and continued the trajectory of the education, race, and equality discourse set in the 1950s by the Court in *Brown I*, *II*, and *Cooper.* Arguably, there is a more liberal slant to the Court's decisions during the 1960s. The 1950s Court was willing to give time to southern school districts, while the 1960s saw the Court shift toward demanding more immediate action from the noncompliant school districts. Some of this shift can be attributed to the amount of time that has passed since Brown I was decided, but the Court's composition also played a role. The four Eisenhower appointees, along with the Johnson and Kennedy appointees resulted in a much more liberal Court with a keen eye toward Civil Rights.

There were four cases examined in this study that were decided during the 1970s: *Swann*, *Keyes*, *Milliken*, and *Bakke*. The 1970s decisions addressed education, equality and race in the context of school settings that were different from those decided in the two previous decades. A major difference between the 1970s decisions and those examined in prior decades involves the location of the originating case. Cases from the 1950s and 1960s all originated in the southern U.S. and involved school districts that were once segregated by law. *Keyes*, *Milliken* and *Bakke* all originated outside the southern United States. *Swann*, *Keyes*, and *Milliken* all involved metropolitan areas. None of the previous cases involved large metropolitan areas. *Bakke* was the post *Brown* case to address education, equality, and race in context of higher education.

As shown in Table 36, education emerged as a code in all four cases. *Swann*, *Keyes*, and *Milliken* involved the duty of a K-12 school to address segregation. *Bakke* addressed a University's attempt to include a more diverse group of students. While education emerged as a

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code in all three K-12 cases, the Court's concern with education in each was tied to the discussion of a school district's duty to desegregate, rather than a discussion of education's importance.

Table 36

1970s Code Occurrence

	SW71.rtf	KE73.rtf	MI74.rtf	BA781.rtf
Education	4	11	11	3
Equality	2	3	4	18
Race	2	4	2	35

The issue in *Swann* was twofold: 1) the duty of a former de-jure school district to address segregation and 2) the scope of a federal court's power to issue a remedy. *Keyes* addressed the same issues, but outside the south and absent de-jure segregation. *Milliken* addressed the same two issues, with a larger focus on the scope of federal judiciary's power. The holdings of *Brown I* and *Brown II* were referenced and reaffirmed in *Swann*, *Keyes*, and *Milliken*, including the Court's rationale in *Brown I* regarding the importance of education. None of the 1970s K-12 cases explicitly address education with the same vigor as *Brown I*, but all three reference the original *Brown I* holding.

The descriptive code education as applied in *Bakke* is directly linked to the versus code K-12 versus higher education. The University of California at Davis's argument for its use of race in its admission policy were the same arguments that had been used by the K-12 desegregation cases along with the argument that it was addressing societal discrimination. The Court was not persuaded by these arguments, and the Court found those arguments "inapposite" because U.C. Davis was not addressing a constitutional violation when it began using race in its

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admissions policy (p.300). The Court further distinguishes the K-12 discussion from higher education admission issues at page 306 when it states:

> In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of societal discrimination, an amorphous concept of injury that may be ageless in its reach into the past.

The fact that *Bakke* did not involve the University remedying a constitutional violation led to the Court's refusal to apply the same standards articulated in the prior K-12 cases. Justice Powell, the author of the *Bakke* plurality, did note that under some circumstances, diversity inthe higher education setting could be considered a compelling interest due to the benefits of students from different backgrounds learning from each other (p. 312-313). However, this view was simply a part of a plurality due to the vast disagreements among the justices as to how the case was to be decided.

Race and equality occurred as codes in all 4 cases decided in the 1970s. As noted earlier in Chapter 4, in *Swann*, *Keyes*, and *Milliken*, equality was tied to the Court's ensuring school districts were not discriminating against school children by operating segregated schools. *Keyes* differed from the other K-12 cases in that its discussion of race involved three races, rather than two. All prior K-12 cases involved discrimination against black children. *Keyes* added the discrimination against Hispano children as well. The Court noted that similarities in treatment between blacks in the south and Hispanics in the southwest and allowed them to be considered a part of the same category for establishing the minority population.

Bakke addressed equality in an entirely different context from all prior cases. For the first time in the body of cases examined here, the Court addressed equality from the perspective of a

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white individual being denied equal protection in favor of preference being given to racial minorities. The University argued that benign discrimination against whites, should not be treated the same as a discrimination against blacks due to the legal and social discrimination perpetuated against blacks in the United States.

Justice Powell outright rejected the University's argument when he states that "it is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others" (p.295). Equality, according to Justice Powell's interpretation, should be administered without regard to race. Justice Powell also argues that ideas around what constitutes ethnic majorities and minorities are "political" and "temporary" and that the white racial group is composed of "minorities" who at some point may have been subjected to discrimination as well (p.295-296). He uses this reasoning to justify not allowing racial preferences in the admissions process, even with evidence of how prior discrimination has impacted African Americans and other racial minorities.

In section 3 of his dissent in *Bakke*, Justice Marshall argues that the admissions plan at issue is constitutional. He argues that given the egregious treatment of blacks in the United States has had serious impacts on the condition of African Americans in the United States, particularly in the areas of unemployment, life span, and income (p.395-396). He views U.C. Davis' admission policy as an attempt to remedy centuries of discrimination against blacks and argues that "bringing the Negro into the mainstream of American life should be a state interest of the highest order" (p.396).

The theme that emerged during the 1970s was a resistance to punish innocent parties in order to help minorities. *Milliken* and *Bakke* both involved situations where one party was

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disadvantaged by efforts to help racial minorities. In both cases, the Supreme Court rejected the arguments, that the duty to equalize minorities outweighed the burden that would be placed on the opposing party. In *Milliken*, the burden would have been on surrounding school districts that had nothing to do with the Detroit segregative practices. In *Bakke*, white students were unable to compete for the seats that had been set aside for minority students. In both cases, the minority interest were outweighed by the Court's decisions.

Justice Powell's and Justice Marshall's opinions show the opposing positions taken by the Court and exemplify why there was no majority opinion in *Bakke.* As the last case examined in this study in the 1970s, *Bakke* is a culmination of the Court's fracturing in its decisions that involve race and education. A further discussion of the Court's composition and the shifts in decision occur in the next section.

Court composition. As shown in Table 33, the 1970s brought more changes to the Supreme Court's composition. The number of justices who had decided *Brown I* declined with each case decided in the decade. In 1971 in *Swann*, there were 2 *Brown I* justices still on the Court. By the time *Keyes* was decided in 1973, only Justice Douglas remained from the justices that decided *Brown I*. There were no changes to the Court between 1973 when *Keyes* was decided and 1974 when *Milliken* was decided. However, by the 1978 when *Bakke* was decided, Justice Douglas, had been replaced by Justice Stevens.

Another shift occurred in the Court's composition occurred during the 1970s. The 1950s and 1960s decisions had been influenced by justices who had been appointed by Presidents Roosevelt, Truman, Eisenhower and Johnson, all of whom had favorable records toward advancing the Civil Rights of minorities. The Court in the 1950s was heavily weighted with Roosevelt appointees, while the Court in the 1960s was dominated by the four Eisenhower

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appointees. Along with the 2 Kennedy appointees (Justices White and Goldberg) and the Johnson appointees (Justices Fortas and Marshall), the Eisenhower appointees represented a friendly Court for the expansion and protection of civil rights during the 1960s. The 1970s brought significant change.

By the time *Swann* was decided in 1971, President Nixon had appointed Justices Burger and Blackmun to the Court. Justice Burger served as the Chief Justice of the Supreme Court through the decade. President Nixon was far more conservative in regard to civil rights and did not have the same record of support for civil rights as his predecessors dating back to Eisenhower. When *Keyes* was decided two years later, there were 2 more Nixon appointees on the Supreme Court: Justice Rehnquist and Justice Powell, shifting the balance of conservative appointed justices to 4. Just 6 years earlier, there were four liberal leaning Eisenhower appointees on the Court. The changes in the Court's composition from the 1960s through the 1970s coincide with the opinions becoming more fractured.

Swann (1971) was the earliest case examined in the 1970s. It is the only unanimous decision in this study decided in the 1970s. After *Swann*, the Court became increasingly fractured. *Keyes* was decided 2 years later with a vote of 7-1 for the students and parents who had sued the Colorado school district. Justice Rehnquist, a Nixon appointee, fully dissented in that case. Justice Powell, another Nixon appointee partially dissented.

The Court's members remained the same in from *Keyes* to *Milliken*, but the *Milliken* decision was even more fractured than *Keyes*. *Milliken* was decided by a vote of 5-4 against the individual parents and students alleging noncompliance with *Brown I* and *II* in the case. All four Nixon appointees along with Justice Stewart, an Eisenhower appointee formed the majority. The four dissenters were all appointed by liberal leaning presidents. *Milliken* should be viewed as a

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turning point in the Court's ideological structure post- *Brown I*. The *Milliken* decision represents a departure from the expansive judicial activism of the 1950s and 1960s and begins the era of judicial restraint in regard to school desegregation cases.

By the time *Bakke* was decided in 1978, Justice Douglas had left the Court and President Ford had appointed Justice Stevens to the vacancy. *Bakke* is the only decision examined in this study where there was no clear majority opinion. Instead, four justices agreed that the admissions policy used by the university was a quota, and Justice Powell agreed, providing the 5th vote that ordered the school to allow the Petitioner to attend. The four liberal leaning justices found that the use of race was constitutional, and Justice Powell joined those four justices and stated that race could be used as a factor in admissions policies. The tension on the Court in *Bakke* largely coincided with whether the justices had been appointed by Presidents Nixon or Ford, both conservative, or by one of the earlier, more liberal leaning presidents.

1990s. During the 1980s, there were few cases that reached the Supreme Court that involved school desegregation, and no cases that involved race in higher education admissions. As a result, this study does not examine any cases from the 1980s and resumes its examination with cases decided in the 1990s.

There were four cases examined in this study that were decided during the 1990s: *Dowell*, *Freeman*, and *Jenkins*. The 1990s decisions all addressed desegregation decrees that had been in place for many years in southern school districts. A major difference between the 1990s decisions and those examined in prior decades involves the time that had passed since *Brown I*. By the time the first case examined in 1990s, Dowell (1991) was decided, 37 years had passed since *Brown I*, and 36 years had passed since *Brown II*. There were few school desegregation cases reaching the Supreme Court in the 1980s; instead most cases were handled by the lower

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Courts. As noted in Chapter 2 of this study, some scholars have termed *Dowell*, *Freeman*, and *Jenkins* as the resegregation cases since the Supreme Court limited federal supervision of desegregation decrees in each one of them. *Dowell* involved a desegregation decree that had been in place for 30 years. The decree in *Freeman* had been in place for 23 years. The decree in *Jenkins* had been in place for 18 years.

As shown in Table 37, education did not emerge as a code in *Dowell* or *Freeman* and appeared only once as a code in *Jenkins*. Equality did not appear as a code in *Dowell*, and only appeared in *Freeman* and *Jenkins* once. The Court's focus in the 1990s desegregation cases was not on the importance of access to equal education for all. There was no discussion in any of the cases about the importance of education or the need for equality. Instead, the Court's discourse centered around the desegregation decrees, the length of time each had been in place, the school district's efforts to comply with the desegregation decrees, and the need for local control over school districts.

Table 37

1990s Code Occurrence

	BO91.rtf	FR92.rtf	MI95.rtf
Education	0	0	3
Equality	0	1	1
Race	1	8	1
Remedy	4	11	20

In *Dowell*, the Court indicates that it considers desegregation decrees as temporary and states that "local control over the education of children allows citizens to participate in decision making…"(p. 248). In *Freeman,* the Court states that "returning schools to the control of local

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authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." (p. 490). In *Jenkins*, the Court cites *Freeman* and *Dowell* when it states "that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution" (p. 99). When considered together, these statements show that the Supreme Court is ready for federal intervention into local school districts to end, despite evidence, which was provided in each case, that failure to continue to intervene could result in the perpetuation of segregation. There is no concern shown for the children who might be impacted by segregation. There is no discussion of racial equality. The Court's shift in the 1990s shows a greater concern with returning schools to local control than protecting minority schoolchildren.

The overarching theme from the 1990s discourse is that it is time to move past the segregation discussion. The Court's preference for a return to local control is a sign of either its weariness or indifference to the segregation issue given that so many years have passed. The absence of discussion around equality and education is further evidence of the Court's weariness or indifference to the plight of children still plagued by segregation.

Court composition. The 1990s brought further changes to the Supreme Court's composition. There were no members left on the Supreme Court that had decided *Brown I* or *II* in the 1990s. Between 1978 when *Bakke* was decided and 1991, when *Dowell* was decided, there were four new appointees to the Supreme Court. Justice O'Connor, the first female Supreme Court Justice, was appointed by President Reagan and replaced Justice Stewart in 1981. Justice Kennedy was appointed by President Reagan and replaced Justice Powell. In 1986, Chief Justice Burger retired, and Justice Rehnquist became the Court's Chief Justice. Justice Antonin Scalia was appointed to Justice's Rehnquist's position as Associate Justice the same year. In 1990,

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Justice Souter, a George H.W. Bush appointee replaced Justice Brennan. Between 1991when *Dowell* was decided and 1992 when *Freeman* was decided, there was one change to the Court. Justice Thurgood Marshall, the first African American Justice retired. President Bush appointed Clarence Thomas, another African American, to fill Justice Marshall's seat. Ideologically, Justice Thomas was conservative and further shifted the Court's ideological leaning to the right. Justice Marshall's departure from the Court left only one Justice who had been appointed by a liberal leaning president on the bench, Justice White. In 1994, Bill Clinton was the first democratic President to be elected since President Carter in 1977. By the time *Jenkins* was decided in 1995, President Clinton had appointed Justice Ginsburg, the second female Justice, and Justice Breyer to the Supreme Court. Justice Ginsburg replaced Justice White. Justice Breyer replaced Justice Blackmun, a Nixon appointee.

All of these changes to the Court's composition are notable for a number of reasons. First, by 1991, 7 of the 9 Supreme Court Justices had been nominated by conservative leaning Republican presidents. Between 1969 and 1993, the Republican Party dominated the presidency. During that period, only one term was served by a Democrat, President Carter, who had no Supreme Court appointees during his tenure. Presidents Nixon, Ford, Reagan and H.W. Bush had a total of 10 Supreme Court appointees, resulting in a more conservative Court, particularly in the earliest part of the decade.

Another result of the change in composition was the leadership of Justice Rehnquist as the Chief Justice of the Supreme Court. Justice Rehnquist was the only Justice to issue a dissent in *Keyes* (1973), an early indication of his preference for less federal intervention in desegregation cases. He also dissented in *Milliken* and did not agree that race could be used as a factor in *Bakke*. As Chief Justice of a conservative leaning Court, his influence was evident in

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the rationales of *Dowell*, *Freeman*, and *Jenkins*. He wrote the majority opinions in *Dowell* and *Jenkins*. The majority opinion in *Freeman* was written by Justice Kennedy, but *Freeman* quoted heavily from *Dowell*, so his influence was seen in that case as well.

2000s. There were three cases examined in this study that were decided between 2000 and 2010: *Gratz, Grutter, and Parents Involved. Gratz* and *Grutter*, were decided in 2003 during the same term and by the same Court. *Gratz* and *Grutter* are the first two cases to reach the Supreme Court on the race in admissions issue after the *Bakke* plurality. The law was unsettled, and the lower federal circuit courts were divided on the interpretation of *Bakke* (Hopwood v. Texas (5th Cir.1996), Smith v. University of Washington (9th Cir.2000). The facts of *Gratz* and *Grutter* are similar to those in *Bakke*. Both cases originated from the University of Michigan. In *Gratz*, white students who had been denied admission to the University's undergraduate College of Literature, Sciences and Arts alleged that the admissions policy was unconstitutional and discriminatory for its use of race in admissions. *Grutter* involved the University of Michigan's Law School admission policy, which also allowed the use of race in admissions. *Grutter*, a white student, alleged that her denial of admission was a violation of her civil rights due to the use of race in the admissions policy.

Parents Involved was a K-12 case involving a voluntary student assignment plan adopted by the Seattle School District, a district that had never had de jure segregation or a desegregation decree. All three cases were decided by a divided Court. The Court in *Gratz* ruled against the university in a 6-3 decision. In *Grutter,* the Court ruled for the university in a 5-4 decision. *Parents Involved* was a 5-4 decision against the school district.

As noted in Table 38, education, equality, and race all occurred as codes in each of the cases examined during the 2000s. This contrasts with the limited occurrence of the same three

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codes in the cases from the 1990s. Of particular note is the high occurrence of the code race. The Court was explicit in its discussion of race in all three of these cases in the majority opinions, the concurrences, and the dissents.

Table 38

2000s Code Occurrence

	GR03	GRU03	PA07
Education	1	15	3
Equality	5	6	8
Race	12	27	43

The Court's discussion of race and education in *Gratz* and *Grutter* centered around diversity and whether its proposed benefits were a compelling enough interest to allow race to be used as one of many factors in the admissions process. The Court upheld the use of race in admissions in *Grutter*, allowing for the use of race as long as it was one of many factors. In contrast, the Court found that the use of race in *Gratz* was impermissible because a student's race was given a higher consideration than other diversity factors. In *Grutter*, the Court states "The Law Schools educational judgement that such diversity is essential to its educational mission is one to which we defer" (p.328). The Court is willing to accept the University's argument that diversity is an important component of the educational process. However, when *Grutter* is viewed in conjunction with the holding in *Gratz*, it appears that the Court's deference is limited. Diversity is a compelling interest in the educational process, but the use of race must be narrowly tailored, and race can be used only as one of many factors in the admissions process.

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Parents Involved was the only K-12 case examined during this decade. The issue in *Parents Involved* was whether a public school that had never had de jure segregation or had been found to be unitary could use race to classify students for assignment to certain schools. The school district attempted to use the higher education diversity argument that had been accepted by the Court in *Grutter* to justify its admission plan, but the Court disagreed, and used *Brown I* to justify its position at pages 747-748:

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again--even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way to achieve a system of determining admission to the public schools on a nonracial basis, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

In writing for the majority, Chief Justice Rehnquist ignores the historical discrimination against blacks and other minorities in this country and demands an approach that refuses to consider the history that served as the backdrop of *Brown I* and all other K-12 desegregation cases. Whether de jure or de facto, the legacy of slavery created a system whereby African Americans were treated as second class citizens and were not afforded the opportunities that were given to whites. The school districts in *Parents Involved* were trying to assure that minority students would have equal access to schools and promote diversity in the district through their voluntary plan. The

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Court chooses to protect the rights of a few white children who didn't get into the schools of their choice over the rights of minority children who may not have had access to those schools due to where they resided. This reasoning is similar to the logic of *Dowell*, *Freeman*, and *Jenkins*, where the importance of local school control was viewed as more important than the rights of black children to be freed of segregation.

The overarching theme of the decade between 2000 and 2010 is limitation. While the Court allowed the use of a race in college admissions to further the compelling of diversity, it was allowed with specific limitations. Likewise, in Parents Involved, the Court forecloses the use of race in school assignments, thus limiting the way a K-12 school district can seek to ensure diversity and access to high quality schools to all of its students.

Court composition. Between 1995 and 2003 when *Gratz* and *Grutter* were decided, there were no changes to the composition of the Supreme Court. However, by the time *Parents Involved* was decided in 2007, President George W. Bush had made two appointments to the Supreme Court: Justice John Roberts and Justice Samuel Alito. Justice Roberts replaced Justice Rehnquist as the Chief Justice. Justice Alito replaced Justice O'Conner. Both of these Justices were conservatives, so the ideological composition of the Court did not change during the 2000s.

Conclusion

The purpose of Chapter 4 was to present findings related to the two research questions presented in this study:

Research Question 1: What is the dialectical relationship between education, race, and equality in Supreme Court judicial discourse from 1954-2007?

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Research Question 2: How have the changes in the members of the Supreme Court affected the judicial discourse regarding race, equality, and education since 1954?

The Dialectical Relationship Between Race, Education, and Equality

The data examined in this study indicates that race, education, and equality were tightly connected in the earliest cases examined, but that connection waned after the 1960s. *In Brown I,* the Court discussed race, education, and equality openly, and built their rationale around the importance of education to the development of good citizens. This argument placed the interests of black children right beside the interest of white children, resulting in a decision that was rooted in equality. Though the Court consisted of 9 white men, the power of their position was used to structure an argument aimed at producing racial equality in the educational setting.

The Court in *Brown II* did not have the same focus on race, equality and education as *Brown I* and *Griffin*. While *Brown I* and *Griffin* directly addressed the educational conditions of black children affected by segregation, the Court's focus shifted instead to the local school districts and how they would implement *Brown I*. Not only was there no direct references in the discourse of *Brown II* to education, race, and equality for black children, the Court instead chose to vaguely outline when desegregation needed to take place. Its "all deliberate speed" language was connected to a concern with how the school districts would go about desegregating. Rather than create a clear timeline for *Brown I's* implementation, the Court gave greater weight to the concerns of segregated schools than the rights of black school children. Equality was not a consideration in *Brown II*.

As in *Brown I*, this discourse in *Griffin* also had a strong connection between race, education, and equality. The Court repudiated the stalling tactics employed by the school district

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and directly stated that these tactics had deprived black children of equal access to education, particularly given the fact that white children had private schools to attend. Though Griffin did not express the importance of education as strongly as *Brown I*, it did clearly articulate its concern with the denial of equality in education to black children. Again, an all-white, all male Supreme Court used its power to force a school district to place black children on equal terms with white children.

The Supreme Court never articulated the importance of racial equality for black children in K12 education after *Griffin*. The 1970s cases, *Swann*, *Keyes* and *Milliken* all involved remedies for segregation, and the Court's focus in those cases shifted to question of how much power the federal judiciary had in remedying segregation. In these cases, the concern for the minority children was overshadowed by discussions of what the federal courts could and could not do. The very people that *Brown I* and *Griffin* sought equality for were effectively ignored during the 1970s in the K12 cases. Although the Court's decisions in *Swann* and *Keyes* found for the minority school children, the Court's rationale did not center on them. Race, education, and equality were outweighed by the Court's discourse around federal court power and local school district control.

The Supreme Court's discourse in the 1990s was similar to the discourse in the 1970s. Race and educational equality were outweighed with concerns of returning schools to the control of the school district. The data from the 1990s cases indicates that racial equality in K-12 education was not a concern. The codes reasonableness and temporary are seen in the 1990s cases and are connected to the Court's discussion of returning schools to the local control of school districts. By the 1990s, black children's quest for educational equality appears to be of

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little concern to the Court. The Court in the 1990s is willing to accept partial compliance with desegregation decrees in spite of the potential for re-segregation.

The final shift in the discourse around race, education and equality in K-12 cases occurred when the Court agreed with the white plaintiffs use of the idea of racial equality as a means to challenge the school district's attempt to combat residential segregation and balance the races in *Parents Involved*. None of the prior K-12 decisions examined in this study involved white plaintiffs alleging discrimination. The Court had gone from protecting the rights of black children from inequality in the educational system in the 1950s to protecting white children, a class of individuals who had no history of prior discrimination. The arguments of *Brown I* were used as justification to protect the educational rights of white students at the expense of black students.

The discourse in higher education cases involving race, education, and equality is quite different. All of those cases involved explicit discussions about race, equality, and whether racial diversity was a compelling interest in the university setting strong enough to allow for the use of race in admissions. There was a close connection between race, education, and equality in the university cases, even though the opinions in all of them were fractured. In every university case examined, there were 3 or more justices who believed strongly that race should not be used at all in higher education admissions. Even in the concurrences and dissents, race, education, and equality were discussed together, even if each individual justice's analysis was ideologically different from another's. There was a willingness and an openness to discuss and argue positions among the justices, which is evident in the data by the fact that every higher education case had more than one dissent and concurrence.

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The Effects of Changes in Supreme Court Composition

Table 39 shows the Presidents and the number of Supreme Court Justices nominated by each of them. The data is clear as it relates to the effects of the changes in Supreme Court composition to the discourse around race, equality and education. Presidents Roosevelt, Truman, and Eisenhower appointed a total of 18 Supreme Court justices. These presidents had positive records toward race relations, and their Supreme Court appointees decided *Brown I* and the cases from the 1950s and 1960s. Most of these justices remained on the Court through the 1960s, and those who were replaced, were replaced by President John F. Kennedy and President Lyndon Johnson, both of whom were involved with moving the country toward more equitable treatment for blacks. The 1950s and 1960s saw a united Supreme Court in its efforts to ensure that *Brown I* was implemented. Although racial equality was not articulated clearly in every opinion during this time, the Court was unanimous in every case examined during the 1950s and 1960s, and found for the plaintiffs, who were black individuals who were seeking equality in education.

However, with the election of President Nixon, a conservative who was not a proponent of the Civil Rights movement, the country saw 20 years of conservative Republican presidents, and these presidents were able to completely restructure the Supreme Court. Table 39 shows that Presidents Nixon, Ford, Reagan, and George H.W. Bush had a total of 11 Supreme Court appointees. These appointees replaced the justices that had been appointed by more liberal leaning Presidents of earlier decades. These changes meant that the Court that decided the cases in the 1990s was on the other end of the ideological spectrum from the Court that decided the cases of prior decades. The discourse in support of focal control of school districts that was articulated in the 1990s Supreme Court cases is a direct result of conservative politics, and impacted the Court's treatment of K-12 desegregation issues.

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By the time the first higher education case, *Bakke*, was decided in 1978, the Court had already shifted right, resulting in the fractured plurality opinion issued in the case. Four justices agreed with the use of race in admissions policies. Four did not. Four justices believed that the racial set aside *Bakke* was unconstitutional, four did not. Had Bakke been decided 10 years earlier, the Court would have been shifted more toward the left, and the decision would likely have been much less fractured. As the Court changes ideologically, its rationale in all cases shifts with it. The liberal, activist Court of the 1950s and 1960s was gradually replaced by a Court that was increasingly reluctant to use its power to ensure racial equality in the educational setting.

Table 39

President and Number of Appointed Supreme Court Justices

President	President's Party	Years in Office	Number of Supreme Court Appointees
Franklin D. Roosevelt*	Democratic	1933-1945	**9**
Harry S. Truman	Democratic	1945-1953	**4**
Dwight D. Eisenhower*	Republican	1953-1961	**5**
John F. Kennedy	Democratic	1961-1963	**2**
Lyndon B. Johnson	Democratic	1963-1969	**2**
Richard Nixon	Republican	1969-1974	**4**
Gerald Ford	Republican	1974-1977	**1**
Jimmy Carter	Democratic	1977-1981	**0**
Ronald Reagan*	Republican	1981-1989	**4**

(continued)

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Table 39 (continued)

President	President's Party	Years in Office	Number of Supreme Court Appointees
George H.W. Bush	Republican	1989-1993	**2**
William Clinton	Democratic	1993-2001	**2**
George W. Bush	Republican	2001-2009	**2**
Barack Obama	Democratic	2009-2017	**2**

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CHAPTER FIVE

Discussion

In this chapter, I offer my final discussion related to this study. Chapter 5 is organized into 5 sections. Section 1 summarizes the study and findings; Section 2 outlines the limitations of the study; Section 3 includes conclusions drawn from the study. Section 4 includes the implications of the study, and Section 5 includes my recommendations for future research and final thoughts.

Summary of the Study and Findings

The idea for this study was brought about by my curiosity about how the Supreme Court used its power to evoke social change in *Brown I,* and how its discourse related to race, education, and equality changed over time. I chose Critical Race Theory (CRT) as my theoretical framework, largely because my personal belief that power is always at the heart of judicial decisions that involve race is in line with the beliefs articulated by critical race theorists. I chose Critical Discourse Analysis (CDA) as my methodology because I wanted to examine the actual words of the Supreme Court and how those words were used to help or harm black people in their quest for racial equality in the educational setting. When CDA and CRT are used together, as in this study, the researcher looks examines the use of language through the dual lens of race and power.

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This study involved the examination of a total of 15 Supreme Court cases decided between 1954 and 2007. Each case was coded using descriptive, values, and versus coding. Descriptive codes are topic driven and generated throughout the coding process. Values codes represent both the values of the justices and the country as a whole. The values codes used here were developed *in priori*, or prior to the beginning of the coding process. Versus codes identify people, institutions, ideas, or concepts that are in direct conflict with each other. These three types of codes were used with each case and helped identify the patterns and themes that emerged from the coding process.

When considered holistically, the data analyzed in this study indicates that there was a close relationship between race, education, and equality in the cases from the 1950s and early 1960s, but link diminished after the late 1960s. In the landmark *Brown I* decision, the Court was transparent in its discussion of race and the ills of segregation in the public school setting. The interest of black children was considered alongside the interest of white children, and the unanimous decision issued by the Court was closely tied to its discussion of equality. The fact that the Court was all white did not preclude a decision aimed at seeking educational equality for all children.

The discourse in *Griffin* was similar to that in *Brown I.* There was a close connection between education, race, and equality that was evident throughout the discourse as the Court condemned the stalling tactics used by the local school district. Though the Court in *Griffin* did not express the importance of education as strongly as it did in *Brown I*, it clearly articulated its concern with the denial of equality in education to black children. *Brown I* and *Griffin* directly addressed the educational conditions endured by black children affected by segregation in the south.

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However, after *Griffin,* the Supreme Court never clearly articulated the importance of race in the educational setting again. All of the cases from the 1970s involved the remedies for segregation, and the federal courts' role in ensuring that the remedies were fair and reasonable. The concern for minority children was obscured by the Court's concern with the scope of the federal courts' power and the duty of local school boards. The Court allowed the discourse around the federal court power and local control to outweigh the interest of the black schoolchildren that *Brown I* had set out to protect from the beginning.

The close dialectical relationship between education, race, and equality that was present in *Brown I* and *Griffin* was not present in any of the other K-12 Supreme Court decisions examined in this study. In those two cases, the Court used its power to articulate racial equality in the K-12 education setting. The interests of black children were paramount, and all other issues and interests were secondary to the Court's focus on racial equality. In contrast, latter cases addressed desegregation, but the Court did not articulate a connection between education, race, and equality. Instead, the focus turned to the interests of local school districts, white school children, and the Court's preoccupation with federal judicial power.

The 1990s brought a continuation of the Supreme Court's discourse from the 1970s. Race and educational equality were outweighed by concerns of returning schools to the control of the local school district. The data from the 1990s cases indicates that racial equality in K-12 education was not a consideration for the Court. The codes reasonableness and temporary increased during the 1990s cases and are directly connected to the discourse around returning schools to the control of local school districts. Partial compliance with desegregation orders becomes acceptable to the Supreme Court, and the Court is not moved by arguments for the potential for re-segregation.

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The Court's decision in *Parents Involved* represents the final shift in the discourse involving education, race, and equality in K-12 cases. The Court sided with white plaintiffs who used the idea of racial equality as a means to challenge the school district's attempt to combat residential segregation in the school district. Prior to *Parents Involved*, none of the previous K-12 decisions examined in this study involved white plaintiffs alleging discrimination at the hands of the school district. The Court had gone from protecting the rights of black children from discriminatory school districts in the 1950s to using the same arguments of equality to find against a school district seeking to remedy residential segregation. The arguments of *Brown I* were used as justification to protect the educational rights of white students at the expense of black students.

The data also shows that the Court's composition is an important indicator for how it treats the protection of minorities in their quest for equality in the educational setting. As the Court shifted from a majority of liberal leaning justices appointed by liberal leaning presidents to a majority of conservative leaning justices appointed by conservative leaning presidents, the discourse around race and equality changed. A greater emphasis was placed on the rights of white Americans and local school districts.

The discourse in higher education cases involving race, education, and equality is quite different from that of the K-12 sector. All higher education cases examined in this study involved discussions about race, equality, and whether racial diversity was a strong enough compelling interest to allow for the use of race in admissions. The connection between race, education, and equality remained close in the university cases, even though the opinions in all of them were fractured. The justices, guided by their own systems of values, were divided on the issue of the use of race in admissions. None of the university cases were unanimous; in each,

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there were 3 or more justices who believed strongly that race should not be used at all in higher education admissions. In the concurrences and dissents, race, education, and equality were discussed together, even if each individual justice's analysis was ideologically different from another's. There was a willingness and an openness to discuss and argue positions among the justices, which is evident, since every higher education case had more than one dissent and concurrence.

The changes in Supreme Court composition had a direct effect on the discourse around race, equality and education in the cases examined. The 1950s and 1960s saw a united Supreme Court in its efforts to ensure that *Brown I* was implemented. Every case examined during the 1950s and 1960s involved a unanimous Supreme Court. Although the dialectical connection between race, equality, and education waned during this time period, the Court was still united in its approach to handling the K-12 desegregation cases. All justices in *Brown I* were appointed to the Court by presidents who had positive records related to integration, and most of these justices remained on the Court through the 1960s. The justices who were replaced during the 1960s were replaced by President John F. Kennedy and President Johnson, both of whom had positive records relating to race relations.

The Court began to shift with the election of President Nixon. Three of the four presidents who followed President Nixon were conservative Republicans. The lone Democrat, President Jimmy Carter, did not have the opportunity to appoint a Supreme Court Justice. The other three presidents did. The post-Nixon era saw 20 years of conservative Republican presidents who were able to completely reshape the Supreme Court. The ideology had shifted completely from the 1960s to the 1990s. The discourse in support of local control of school districts that was articulated in the 1990s Supreme Court cases is a direct result of the

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conservative shift on the Court and had a pronounced effect on the Court's treatment of K-12 desegregation issues.

The fractured plurality in *Bakke* is further evidence of how the Court's composition can influence the treatment of race and equality in the discourse. By 1978, when *Bakke* was decided, the Supreme Court had begun its rightward shift, but the shift was incomplete. There were still judges who had been appointed by more liberal presidents on the Court along with the more conservative Nixon and Ford appointees. As a result, four justices agreed with the use of race in admissions policies and four did not. Four justices believed that the admission policy in *Bakke* was unconstitutional, four disagreed. The division in the Court's discourse remained 25 years later when the Court discussed the race in the context of higher education in *Gratz* and *Grutter*. By the time these two cases were decided, there were 2 President Clinton appointees on the Court. The Court was still split ideologically about the use of race in higher education admissions, even though the use of race was upheld in limited circumstances.

Ultimately, the analysis in this study reveals that as the Court changes ideologically, its rationale in all cases shifts with it. The liberal, activist Court of the 1950s and 1960s was gradually replaced by a Court that was increasingly reluctant to use its power to ensure racial equality in the educational setting. This effected the discourse, and there was a shift away from the Court's focus on ensuring that educational opportunities were equal for black students.

Limitations

The present study is a qualitative Critical Discourse Analysis framed by Critical Race Theory and was limited in several ways. First, it is impossible to remove my positionality as an African American female who grew up in the southern United States. Critical Race Theory encourages the researcher to take a stand and issue a call to action, and I have done so in this

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paper. However, any bias from my perspective is bracketed by the intense scrutiny of my dissertation committee and committee chair.

Another limitation of the study is that the cases examined were limited to education. There is a host of Supreme Court jurisprudence around race, employment, and public accommodations, but since they were not related to education, those cases were not included in this study. The attempt here was to focus on the educational context and cases that did not involve education were immediately excluded from consideration as a part of the study.

Finally, with the exception of *Brown I* and *Brown II*, cases that were brought back to the Court a second time were excluded from the study. For example, *Milliken v. Bradley* (1974) was examined in this study. However, in 1977, the Supreme Court heard *Milliken* again. The 1977 case was not included in the study, largely because I was more concerned with the Court's initial responses to the facts presented. Often, cases cite and quote previous cases in the history of its litigation. I did not feel that it would be a benefit to the study to review the second case, given that it originated from the case that I did examine.

Conclusions

There are three overarching conclusions that can be drawn from this study. First, the longer the time that elapses from a landmark decision such as *Brown I*, the less urgency the Courts have in refining and revisiting the issue. Second, over the timeframe examined in this study, the Supreme Court has become more partisan and less focused on the people most affected by the original Brown decision. Finally, a majority on the Court has embraced a colorblind interpretation of the Constitution that actually works against diversity and embraces white privilege. Each of these conclusions is discussed below.

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Conclusion 1: The longer the time that lapses from a landmark decision (e.g. *Brown I*) the less urgency from the courts.

It was clear from this study that the longer the time lapsed from *Brown I*, the Courts had less and less urgency to address issues related to race and equality in educational settings. *Brown I* and *Brown II* were decided in 1954 and 1955, respectively. The Court remained unanimous in all cases examined in this study for the next 17 years. *Swann,* decided in 1971, was the last case examined in this study to be decided by a unanimous Court. The next year, Justice Rehnquist issued the only dissent in *Keyes*. After *Keyes*, the cases became even more fractured. *Milliken* was decided in 1974 with a vote of 5-4. In 1978, the Court could not even reach a majority on the issue of race in admissions in *Bakke.*

By the time *Dowell*, *Freeman*, and *Jenkins* were decided in the 1990s, the Court had moved well beyond the unanimity of the 1950s and 1960s. The discourse indicates that the Court had grown weary of the intricacies of District Courts desegregation orders and was far more willing to allow the return of schools to the local control and limit federal intervention, even when the evidence showed that segregation would remain or return without federal intervention. The rulings become more fractured, and there was more of a willingness to consider the needs of the local school districts over the needs of minority children.

This shift is related to both the changes in the Court and the amount of time that has passed since *Brown I*. After approximately 40 years, the Court no longer had justices who were involved in the initial *Brown* decision. The Justices in the 1990s were not attached to the *Brown* era and were much less willing to offer full protection to children who were the victims of school districts' failure to fully desegregate.

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Conclusion 2: Over the 60 years of this study (1950 - 2007) the Supreme Court has become more partisan and less focused on the minorities who will be affected by its decisions.

The 60 years of Supreme Court jurisprudence examined in this study indicates that the Supreme Court has gradually become more partisan and less focused on the people who are actually affected by school desegregation and university admissions cases. There were ten U.S. presidents elected during the timespan examined. Every one of those presidents, with the exception of President Carter, was able to make at least one appointee to the Court. The ideological stance of the justice, in most cases, mirrors the ideological stance of the president. *Brown I* ushered in a period of liberal judicial activism, where the Court was actively engaged in righting social wrongs. The presidents during the same time frame were doing the same thing. President Eisenhower used his executive power to further the desegregation of the military during the time leading up to *Brown I*. President Kennedy proposed the legislation that ultimately became the Civil Rights Act of 1964 before his assassination, and President Johnson pushed the legislation forward when he assumed the presidency after Kennedy's death. This was during the same time period of *Griffin* and *Green*. Just as Congress was willing to come together to pass legislation for the good of the nation, the Supreme Court justices of this era, regardless of party affiliation, were able to come together unanimously to ensure that the rights of minority children were protected.

Presidents and their ideology can shape the Court for decades, as is apparent from the shifts in the judicial discourse related to race, equality and education that occurred during the late 1970s after several Nixon appointees became Supreme Court justices. The 1980s saw several Reagan appointees to the Supreme Court, including the elevation of Justice Rehnquist, a Nixon

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appointee to the role of Chief Justice. Justice Rehnquist, the sole dissenter in *Swann*, became the head of the majority by the time *Dowell* was decided in 1991. Shifts in discourse mirror shifts in Court composition. As time passed, the partisanship became much more of a driving factor in politics, and similarly in the decisions, which disproportionately disadvantaged minorities. Justices who were appointed by conservative presidents took the side of local school districts and white plaintiffs, while justices who were appointed by more liberal presidents were more likely to support the rights of minorities.

The Supreme Court is always balancing interests; it is rare that the interests of minorities are truly the focal point of Supreme Court decisions. When viewed through the lens of CRT, the Supreme Court is uniquely poised to be an instrument of subordination to minorities. The Supreme Court operates under the veneer of the American principles of equality and justice, and because it has this cover, it has the ability to place the interests of school districts, white college applicants, and anything else above minority interests. *Brown I* and *Griffin* were unusual in that minority interests were at the heart of the Court's rationale in both of those cases. The children and their educational plight were highlighted directly in the texts of each opinion. In *Griffin*, the fact that white children had a school, but black children were without education for years was directly stated and expounded upon in the text of the unanimous opinion. But after *Brown I* and *Griffin*, the interests of minorities were barely recognized, even in cases that were decided in favor of the minorities.

When the actual people harmed are taken out of the discussion and the Court resorts to a technical analysis of remedies as it did in *Green*, *Swann*, and *Keyes*, the door is open to ignore the very people who are affected by the decision. The interest of minorities took a back seat to the interests in maintaining federal judicial power in the late 1960s through the early 1970s of

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federal judicial power. The cases from this time period were decided for minorities, but the focal point was on the power of the federal judiciary.

In the 1990s K-12 cases, the interests of the local school districts regaining control over their schools from federal desegregation decrees overrode the interests of minorities seeking to maintain the protection afforded by federal intervention. The Court chipped away at the circumstances needed to release a school district from federal intervention, allowing them to regain more of their local control, even if they had not fully complied with the federal orders. Again, the Court subjugates minorities when it holds the interests of local school districts who had been found in violation of *Brown I* above the interests of minorities seeking to ensure that schools do not become more segregated.

Conclusion 3: Since *Bakke*, a majority of Supreme Court justices have begun to support a colorblind interpretation of the Constitution that works against diversity and embraces white privilege.

An analysis of the data examined in this study indicates the trend over the last three decades has been for the Supreme Court to adopt a stance that embraces a colorblind interpretation of the Constitution. The colorblind trend began with *Bakke* in 1978. The rationale for a colorblind interpretation of the Constitution is that all people should be treated the same all the time with no regard for or social historical context. This theme was not evident in *Brown I*, or in any of the cases prior to *Bakke*, but after *Bakke*, it emerged in *Gratz*, *Grutter*, and in *Parents Involved*.

When viewed in the context of CRT, this colorblind notion falls into line with CRT's concern with the ordinariness of racism. When history and social context are erased from the legal discussion, the inequalities that emanate from racism remain unaddressed and can fester

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and cause even more harm to minority populations who exist on the fringes of the legal and social power structure. The status quo becomes acceptable, regardless of the impact on minority populations. The Supreme Court is complicit in this, particularly in light of the *Parents Involved* decision, which relied heavily on the argument of a colorblind constitution. If the Supreme Court refuses to allow a school district to address the residual segregative effects of housing patterns through a voluntary attendance assignment plan, it leaves the school district with no recourse if it wants to ensure that minority children have an opportunity to attend high quality schools.

The Court devolved between 1954 and 2007. It went from championing racial equality for minorities in the educational setting to agreeing with white students who had never been historically disadvantaged who claimed reverse racism. White privilege is on display in *Bakke*, *Gratz*, *Grutter*, and *Parents Involved*, and in 3 of those cases, the Supreme Court sanctions that argument. Historical context is ignored, white power and privilege prevails, and minorities are faced with losing all of the gains made in the 1950s-early 1970s.

Implications

This study has implications for K-12 educators, higher education administrators, and anyone interested in studying race relations in the U.S. It is important that K-12 educators remain aware of the Court's shifts as they relate to race and education. According to the Court in *Parents Involved*, racial balancing is not allowed in districts where there never was de-jure segregation, regardless of whether neighborhoods and housing patterns lead to segregated schools. If educators in districts that had no prior de jure segregation want to ensure diversity, they must seek creative ways of doing so outside of school assignmentpolicies.

Higher education administrators can use this study as a tool to examine the nuances of what is deemed acceptable and unacceptable use of race in admissions policies. This study

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examined three higher education admissions cases with virtually the same basic plaintiff facts: a white student was not admitted to a university and blamed the race-conscious admission policy as the reason for their rejection. The difference in each case was in how the admission policywas crafted and applied. Quotas are absolutely not allowed, as evident from *Bakke*. Policies that appear to be masked quotas are not allowed, as evidenced by *Gratz*. However, discourse in *Grutter* provides instruction from the Court's majority on how an admission policy can use race as a factor and remain constitutional.

This study is also of use to anyone outside the educational context who has an interest in race relations in the U.S. The Supreme Court discourse around race and education serves as a mirror to what occurs in society at a given point in time. Sometimes, as in *Brown*, the Court is a little ahead of societal shifts, and can serve as the catalyst for change. In other times, the Court may seem out of sync with the reality of societal shifts, as evident in *Parents Involved*. The examination of discourse in this study provides insight as to how the Court views issues related to race in our society.

Finally, this study serves as an important call to action. CRT encourages its proponents to take a stand in regard to the inequalities faced by minorities. In this study, my call to action is simple. Minorities must be aware of the importance of voting and play an active role in the political process. When minorities fail to exercise their right to vote, they foreclose one of the few methods available to them to seek justice. Though Supreme Court justices are not elected, the presidents who nominate them are, and a president with a strong record of supporting minority rights and interests is a strong predictor of the type of Supreme Court justice he or she will nominate.

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Currently there are two Supreme Court justices at least 80 years old. President Trump is poised to make several appointments to the Supreme Court. Trump's record on Civil Rights is clear. He has rolled back protections for LGBTQ individuals. He has rescinded guidance related to the use of race in higher education admissions. President Trump has already appointed two Supreme Court Justices since being elected. Justice Kennedy, who served as a swing vote on many contentious issues has been replaced by Justice Kavanaugh, whose contentious nomination process revealed highly partisan tendencies. (CBS, 2018). If Justice Breyer or Justice Ginsburg retires or dies, Trump will have the opportunity to appoint 2 more members to the Court. If this happens, 4 of the 5 members of the Court will be President Trump appointees. If he continues to nominate young justices that share his ideological stance, it will completely reshape the course of Supreme Court jurisprudence as it relates to Civil Rights and minority protection.

Recommendations for Future Research and Final Thoughts

The body of cases examined in this study spanned from 1954-2007. Education, race, and equality was addressed again in 2016 in *Fisher v. University of Texas* (2016). By 2016, 2 new Justices had been appointed to the Court. A Critical Discourse Analysis comparison study of *Parents Involved* and *Fisher* could provide information on more recent shifts in the Supreme Court's treatment of race and equality with two new justices on the bench.

Another area for future research would be a Critical Discourse Analysis of *Rodriguez v. San Antonio Independent School District* (1973). This case is mentioned in Chapter 2 of this study, but since it did not involve desegregation, it was eliminated from consideration for analysis here. However, the facts of *Rodriguez* involve school finance. School funding is another area where vast inequalities can occur. Poor schools tend to be less effective and have more minority students. Wealthier schools tend to be whiter and offer a higher quality of education.

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Rodriguez dealt with appropriations and whether there was a duty to equalize funding. An analysis of *Rodriguez* and other school finance cases could provide valuable insight to how the Supreme Court views race, poverty, and equality in the educational setting.

It is my sincere hope that this study will provide some insight into the importance of the Supreme Court as it relates to race, education, and equality. In our system of government, the Supreme Court is charged with interpreting the law and determining whether laws are constitutional. When we consider the Court's duty in the context of the years of segregation endured by African Americans throughout the southern United States, it is important to remember that the south had state laws requiring the segregation of races. The Supreme Court upheld this practice in *Plessy v. Ferguson*, ushering in decades of state sanctioned inequality between the races. After 58 years, it was the Supreme Court, in *Brown I* that overturned its own decision in *Plessy*. Times had changed, expectations were different, but most importantly, the Court shifted during those 58 years.

My final thought for consideration from the findings in this study is that all elections matter. Presidents and Supreme Court Justices matter. State judges in many jurisdictions are elected. These judges become a part of the pool of individuals to be nominated for federal judgeships. Federal District and Circuit Court judges become potential Supreme Court justices. This study examined the Supreme Court composition from 1954-2007, a 53-year time frame. The findings in this study show that there were distinct changes in the discourse that took place during this period.

We have now entered an era that appears to be fraught with the possibility of rollbacks to hard fought Civil Rights, not just for African Americans, but for all other races, immigrants, women, and the LGBTQ community. As states continue to pass laws designed to limit the rights

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of minorities, the importance of voting for presidents and congressmen and women who will nominate and approve members of the Supreme Court to protect the rights of minority populations becomes critical. This heightened importance of voting coincides with current efforts to limit the number of people voting. States have passed voter identification laws that disproportionally affect people of color by requiring state issued identification cards (Hainal, Z., Lajevardi, N., & Nielson, L. (2017). States such as Georgia have engaged in purging the voter registration rolls, removing individuals who have not voted in the previous elections. (Wise, 2016). These are arguably voter suppression tactics that unduly burden minority voters and can affect voter turnout, particularly in presidential elections that have far reaching implications for civil rights.

As frustrating as the current political climate may be, it is still essential that citizens, particularly those from groups that have been historically marginalized, remain active in the political process, especially in light of the efforts to keep individuals from exercising their right to vote. If the minority vote did not matter, it is highly unlikely that anyone would make an effort to design laws aimed at suppressing it. Suppression efforts alone are evidence that voting matters, particularly when it comes to selecting a president who will nominate Supreme Court justices dedicated to protecting Civil Rights.

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