JUSTIFYING DIVERSITY IN SCHOOLS: ARE LAWYERS RELYING ON RESEARCH TO MAKE THE CASE?

Chelsea Zimmerman

Submitted to the faculty of the School of Education
in partial fulfillment of the requirements
for the degree Doctor of Education
in the Department of Educational Leadership and Policy Studies
Indiana University
July 2022

Accepted by the School of Education Faculty, Indiana University, in partial fulfillment of the requirements for the degree of Doctor of Education

Doctoral Committee

Suzanne Eckes, J.D., Ph.D. (Chairperson)

Christopher Lubienski, Ph.D.

Dionne Danns, Ph.D.

Date of Defense
May 31, 2022

Acknowledgements

As I write this, the amount of gratitude that I feel at this moment cannot be described. This journey has been long but rewarding, and it couldn't have been done without the support of so many people. Although I believe my words will fall short in expressing the level of gratitude I have for everyone, what I share in these next few pages are from my heart.

First and foremost, I thank God for His grace, mercy, and countless blessings as I worked to complete my degree.

To my parents, James and Cheryl Zimmerman- to whom I owe everything- thank you for your love, patience, and endless support. In my 32 years of life, you have been my rock, giving me the foundation needed to become the successful woman I am today. I am forever indebted to you. Thank you to my loving sisters, Kelli and Janna. Whether food, laughter, or being a listening ear, I am truly grateful for your support throughout my doctoral journey.

I cannot say enough about all my friends who have put up with me as I completed my dissertation. I love each one of you. A special shoutout to my best friend Mary Jenkins for being my accountability partner in the final stretch of my dissertation. You stuck to your word, and checked in frequently and I am so appreciative of your unwavering support. And to Dr. Eric Williams, thank you for answering my late night calls of panic and providing the reassurance I needed to keep going!

This doctorate would not have been possible without the support of my dissertation chair, Suzanne Eckes. When I emailed her in the spring of 2015 inquiring about the program, I never thought that a few months later I would be in the program. If it wasn't for your encouragement, I would have never applied. Fast forward seven years, and look where we are! Your guidance and motivation have pushed me further than I even knew was possible. I could keep going about your support, and it still would not do justice in expressing my gratitude. Thank you Dr. Eckes! It has been an honor to have you as my chair.

Thank you to my committee members, Chris Lubienski and Dionne Danns. Your feedback and expertise pushed me to dig deeper and in turn enhanced my research. I truly enjoyed learning from each of you and appreciate your support.

Chelsea Zimmerman

JUSTIFYING DIVERSITY IN SCHOOLS: ARE LAWYERS RELYING ON RESEARCH TO MAKE THE CASE?

Dating back to the United States Supreme Court's inclusion of social science research in the *Brown* (1954) decision, social science research has been important in advancing racially diverse schools. Since the landmark ruling, a substantial body of literature has established how attending a school with a more diverse student body correlates with positive student outcomes. Despite well-established evidence demonstrating the educational benefits of diversity, schools are increasingly becoming more racially isolated. The current state of addressing resegregation shows there is still a need to continue studying the use of research to demonstrate the educational benefits of diversity. In an effort to understand to what extent, if any, social science research is used when arguing the educational benefits of diversity, I explored the following research questions: (1) How, if at all, are attorneys using social science research in Supreme Court oral arguments that focus on student body diversity issues? (2) How, if at all, have the justices addressed the use of social science research in oral arguments that focus on study body diversity issues? Using a systematic content analysis, the oral arguments of six U.S. Supreme Court cases involving race-conscious student assignment and admission policies were analyzed. Following the four-step process developed by Hall & Wright (2008), each oral argument transcript was reviewed and coded based on pre-established codes. This study will instead bring attention to the role of oral arguments in education policy-related litigation and analyze if and how social science is used during oral argument proceedings.

Suzanne Eckes, J.D., Ph.D. (Chairperson)

Christopher Lubienski, Ph.D.

Dionne Danns, Ph.D.

TABLE OF CONTENTS

Chapter 1: Introduction

In 1954, the Supreme Court delivered a unanimous decision finding that schools segregated on the basis of race were inherently unequal (*Brown v. Board of Education*). The landmark ruling reshaped the landscape of education and redefined the judiciary's role in education policy (Frankenberg, 2007; Garces, 2013; Moran, 2010). The *Brown* (1954) decision also demonstrated the critical role social science can have in judicial decision-making. Law professor Michael Heise argued that "one of *Brown's* critical-though underappreciated- indirect effects [is that of] transformation educational opportunity doctrine by casting it empirically" (as cited in Moran, 2010, p. 523). It showed that the Supreme Court was willing to use social science research to justify its finding that "separate but equal" does not yield equal educational opportunity (Morgan & Pullin, 2010). Since *Brown* (1954), a number of prominent Supreme Court cases involving race and diversity have drawn upon social science research to support their conclusion (Garces, 2013; Moran, 2010; Morgan & Pullin, 2010).[1] Research examining the use of social science research in judicial decision-making has focused on amicus briefs, and has largely ignored how such research is relied upon during Supreme Court oral arguments.[2]

Statement of the Problem

The Supreme Court's invalidation of the separate but equal doctrine in its decision in *Brown* (1954) promised to expand access to quality education to all students regardless of race (George & Darling-Hammond, 2019). Today's education landscape, however, is not a reflection of that promise. The kind of school system that the Court sought to eradicate still persists, and

[1] For the purposes of this study, when I discuss diversity, I am referring to the practice of including students from a range of different racial and ethnic backgrounds.

[2] For the purposes of this study, when I discuss social science research, I am referring to research as an activity that involves systematic, empirical methods to answer a specific social problem.

now features "double segregation," along both racial and socioeconomic lines (Orfield, Ee, Frankenberg, Siegel-Hawley, 2016). Efforts to address "double segregation" have been stifled by recent actions by the government. Starting with the Court's retreat from desegregation efforts in the 1990s (*Dowell v. Oklahoma,* 1991*; Freeman v. Pitts,* 1992) to the United States Department of Education rescinding federal guidance on race-conscious school policies, the federal government's distancing from promoting a diverse integrated school system has limited the ways districts can address resegregation.

Resegregation is a critical issue in education. Nationwide, students of color are disproportionately confined to racial isolation in underfunded schools (Potter & Burris, 2020). Though *Brown* (1954) marked the end of state-sponsored, or de jure segregation in America's schools, the growing phenomenon of resegregation suggests that segregation in education has not ended, but only modified (Losen, 1999). Resegregation is a product of white flight in the 1970s; urban areas that were seeing improvement in student body diversity through desegregation efforts quickly saw racial isolation return when white families moved to suburban areas (Chemerinsky, 2003). Compounding the concern of increased racially isolated schools is the quality of educational opportunities offered at those schools including fewer qualified teachers, low faculty retention, fewer educational resources, and "limited exposure to peers who can positively influence academic learning" (American Education Research Association as cited in Darling-Hammond, 2018, p. 4). A 2016 report published by the U.S. Government Accountability Office (GAO) found an increase in K-12 schools that are poor and are mostly African American or Hispanic. The most recent data has shown schools becoming hypersegregated with the percentage of K-12 public schools with high enrollment of poor and African American or Hispanic students growing from 9% to 16% in school years 2000-01 to 2013-14. These schools

also represented the most racially and economically concentrated populations as 75 to 100% of students were African American or Hispanic and were also eligible for free or reduced-price lunch (GAO, 2016). The report also found that these schools face other challenges including resource inequities, higher rates of students retained in 9th grade, and higher suspension or expulsion rates (GAO, 2016).

The increase of racial isolation in schools has been linked to residential and socioeconomic segregation through discriminatory housing practices. Socioeconomic segregation drew strict lines across neighborhoods, reshaping the student composition of schools (Frankenberg & Orfield, 2012; Orfield, 2001; Reardon, Grewel, Kalogrides & Greenberg, 2012). White flight from urban centers to more suburban neighborhoods only accelerated resegregation. Scholars have repeatedly found a correlation between housing patterns and school compositions in various areas of the county (Frankenberg & Orfield, 2012; Orfield & Lee, 2005; Reardon & Yun, 2002). In the South, the most studied geographical area in school resegregation literature, resegregation started early and quickly. Orfield et.al (2003) found that by 2001, on average, White students attended schools that were 80% white.

The federal government can play a pivotal role in advancing diversity in schools; however, it has also sometimes undermines the process. The administration under Richard Nixon slowed the enforcement of desegregation efforts and "ended the federal government's cooperation with private advocacy groups like LDF (the NAACP Legal Defense and Education Fund) and rejected some of the initiatives of prior administrations" (Le, 2010 as cited in George & Darling-Hammond, 2019). In the 1980s, the Reagan administration determined that the continuation of school integration related litigation was not a remedy to school segregation. Rather than continue the work of their predecessors, the administration opted to advocate for

voluntary desegregation efforts and rejected the mechanisms crucial to the eradication of racial segregation (Danns, 2014; Orfield, 2001). In the wake of *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), a case involving voluntary desegregation practices, the George W. Bush administration issued a "Dear Colleague Letter" that narrowly interpreted the case causing confusion and impacted districts pursuing race-conscious student assignment programs (George & Darling-Hammond, 2019). Clarity emerged during the Obama administration through guidance issued in a series of Dear Colleague Letters. The administration's guidance clarified how districts could develop and implement policies and practices to promote racially diverse schools. The guidance, however, was rescinded by the Trump administration in July 2018 (George & Darling-Hammond, 2019). Since rescinding the guidance, no additional guidance has been issued to reduce racial isolation in public schools.

Addressing resegregation requires involvement from both the Department of Education (DOE) and the Department of Justice (DOJ) (George & Darling-Hammond, 2019). The GAO report (2016) recommended the Department of Education conduct more routine analyses of civil rights data to identify disparities among school types and student groups, and that the Department of Justice track key case information on open federal desegregation cases. As of November 2015, there were 178 desegregation cases that the DOJ was monitoring, many of which were originally filed 30 to 40 years ago (GAO, 2016). Since the 2016 report, both departments have implemented changes that aligned with the recommendations of the GAO. The DOE included analyses by school groups and types to help it identify disparities and patterns and the DOJ developed a task force specifically to help monitor open desegregation cases (GAO, 2021).

The current state of school integration efforts was best captured by a 2020 study by the Century Foundation. Using federal datasets, it identified 907 districts and networks with active integration efforts, including 185 districts and charters that consider race and/or socioeconomic status in their assignment policies and 722 districts and charters that were subject to a legal desegregation order or voluntary agreement (Potter & Burris, 2020). Although nearly 75% of all public school students attend school districts or charters that do not have active integration policies in place to address resegregation, the study did find that in between 2017 and 2020, 17 school districts and 28 charter schools added new integration policies (Potter & Burris, 2020).

While the nation continues to grow more diverse, impacting student body composition, a trend of racial isolation among school districts increases. The isolation of African American and Latinx students has serious ramifications including lower academic achievement and higher suspension and expulsion rates, both of which contribute to the school to prison pipeline (Skiba, Arredondo & Williams, 2014). A large body of research on the educational benefits of diversity has shown "consistent and unambiguous" evidence about the positive effects of diverse schools (Potter, Quick & Davies, 2016 as cited in George & Darling-Hammond, 2019, p. 12).

Educational Benefits of Diversity

A primary argument for creating racially diverse schools has been the educational benefits of having a diverse student body (Orfield & Frankenberg, 2013). Dating back to the Court's inclusion of social science research in the *Brown* (1954) decision, social science research has been important in advancing racially diverse schools (George & Darling-Hammond, 2019). There is a substantial body of literature that has established how attending a school with a more diverse student body correlates with positive student outcomes.

Literature on the impact of diverse study body composition has focused on three types of diversity: structural diversity, classroom diversity, and informal interactional diversity (Gurin, 1999; Shaw, 2005). Structural diversity refers to the demographics of a school's student body, and while it is necessary, research has pointed out that is not enough to yield maximum educational benefits. Terenzini, Cabrera, Colbeck, Bjorklund, and Parente (2001) suggested that despite its low impact, researching structural diversity is linked to the notion that judges require research when examining the consideration of race in admissions policies. Classroom diversity looks at the incorporation of diverse groups in course content or curricula. Informal interactional diversity describes the opportunity for students to interact with peers of diverse backgrounds (Association for the Study of Higher Education, 2015; Gurin, 1999; Shaw, 2005).

In examining the effects of diversity in the K-12 setting, Kurlaender and Yun (2001) identified three categories of student outcomes as a result of an integrated, diverse student body: enhanced learning, higher educational and occupational aspirations, and greater opportunity for social interactions among members of different racial and ethnic backgrounds. The increase of African American student achievement has been attributed to greater access to better educational resources at predominantly white schools (Orfield & Eaton, 1996). At the peak of desegregation efforts, the racial achievement gap closed more rapidly, in comparison to the current era in which many desegregation efforts were dismantled. Attending racially diverse schools benefits all students, as it increases the achievement of African American and Latinx students, and does not decrease achievement among White students (Wells, Fox & Cordova-Cobo, 2016).

Literature on the educational benefits of diversity has been presented in amicus briefs. In *Parents Involved* (2007), a brief submitted by more than 550 social scientists showed that integrated schools contribute to "promoting tolerance; developing cross-cultural understanding:

eliminating bias and prejudice; improving academic and critical thinking skills; improving educational attainment and promoting civic participation in a diverse global economy" (George & Darling-Hammond, 2019, p. 11-12). In *Grutter v. Bollinger* (2003), a brief submitted by sixty-five Fortune 500 companies emphasized the importance of having a diverse workforce, which could only be achieved if colleges and universities consider race in admissions policies to create a diverse study body (Devins, 2004). The same argument was made in *Fisher v. University of Texas* (*Fisher I*) (2014) in two briefs submitted by more than 50 prominent companies, demonstrating that racially diverse schools are not only beneficial to individuals but for the "economic and democratic well-being of communities and society" (Ayscue, Frankenberg & Siegel-Hawley, 2017, p. 3).

Despite well-established evidence demonstrating the educational and workplace benefits of diversity, schools are increasingly becoming more racially isolated (George & Darling-Hammond, 2019). As the work of Potter and Burris (2020) shows, only 907 school districts have active integration policies in place to advance student body diversity. The current state of addressing resegregation shows there is still a need to continue researching the educational benefits of diversity as it is necessary to provide attorneys, judges, and policymakers well-informed research about the consideration of race in K-12 and university student assignment policies (Shaw, 2005).

The Role and Importance of Oral Arguments

Demonstrating the educational benefit of a racially integrated educational setting was critical to desegregation and race-conscious policy litigation. Since *Brown's* (1954) inclusion of social science research and Justice Powell recognizing diversity as a compelling government interest in *Regents of the University of California v. Bakke* (1978), scholars, policymakers, and

attorneys have relied on amicus briefs to introduce social science research about the benefit of racial and ethnic diversity. Literature on the use of social science in cases involving race-conscious student assignment policies (RCSAP) has highlighted amicus briefs as a popular means to try to influence the Court's decision. An area that has not yet been examined is how attorneys might articulate racial diversity during oral arguments or how the Justices might engage in this research during oral arguments.

Oral arguments have been recognized as an important component in the legal decision-making process; they provide the Justices information relevant for deciding the case (Johnson, 2004). Before written briefs became the primary means of presenting case information, oral arguments provided the opportunity for the parties to inform Justices of the matter of fact and law (Jacobi & Sag, 2019). Despite the reliance on written briefs, oral arguments provide "a clear presentation of the issues, the relationship of those issues to existing law, and the implications of a decision for public policy" (Wahlbeck, 1998, p. 783). Due to its role, oral arguments have the potential to influence case outcomes as they allow Justices the opportunity to clarify complex legal and factual issues (Johnson, Wahlbeck & Spriggs, 2006). Justices themselves have found value in oral arguments. Justice Blackmun has stated that a "good oralist can add a lot to a case and help [us] in our later analysis of what the case is all about. Many times confusion [in the brief] is clarified by what the attorneys have to say" (Strum, 2000 as cited in Johnson, Wahlbeck & Spriggs, 2006, p. 99). Chief Justice Roberts contends,

> Oral arguments matter, but not just because of what the attorneys have to say. It is the organizing point for the entire judicial process...with the voting coming so closely on the heels of oral arguments...the discussion at conference is going to focus on what took place at argument (Roberts, 2005 as cited in Phillips & Carter, 2010, p. 88)

In addition to giving attorneys a chance to present their argument to the Justices, it also allows Justices to "test out ideas, confront advocates with hard questions about the application of their proposed rules to future cases and as for support for propositions of fact and law" (Jacobi & Sag, 2019, p. 1166-1167). Jacobi and Rozema (2018) found that judicial behavior during oral arguments can predict case outcomes. An interactive process, oral arguments provide the Justices an opportunity to communicate among themselves and begin forming conclusions. During the process, Justices often interject with questions and comments for the attorneys. Wrightsman (2008) identified eight motives for the questions or comments:

> "(1) to try to learn information they feel is not contained in the briefs or lower court's ruling, (2) to seek clarification of a party's position, (3) to highlight weaknesses in an attorney's argument, (4) to inject a contradictory viewpoint into the discussion, (5) to discover what are the implications or boundaries of an attorney's argument, (6) to help an attorney by providing support, (7) to reduce tension or add humor, and (8) to speak with other Justices through the attorney" (as cited in Phillips & Carter, 2010, p. 99).

Beyond its informational role, oral arguments allow the public to see the Court as an "impartial tribunal" deciding cases of national importance (Jacobi & Sag, 2019, p. 1168). The decision-making of the Supreme Court is shrouded in secrecy; oral arguments provide a level of accountability through transparency and visibility.

Purpose of the Study

The purpose of the study is to explore how social science may or may not be used by attorneys during oral arguments. If social science research is presented, I also want to learn how the Justices respond to it during the arguments. Literature on the use of social science in legal decision-making of race-conscious student policies has focused on amicus briefs submitted and

the Court's opinions. This study will instead bring attention to the role of oral arguments in education policy-related litigation and analyze if and how social science is used during oral argument proceedings. This approach is helpful because the outcome of a Supreme Court case can influence education policy (Chemerinsky, 2003; Superfine 2010).

Research Questions

(1) How, if at all, are attorneys using social science research in oral arguments that focus on student body diversity?

(2) How, if at all, have the Justices addressed the use of social science research in oral arguments that focus on student body diversity?

Positionality

Since a young age, I have experienced being one of the few students of color in a classroom full of white students. Despite attending schools after legally imposed segregation was struck down, the student population did not reflect racial integration envisioned in *Brown* (1954), but rather racial isolation. The predominantly white schools of the suburbs offered more pathways of success than the schools that were predominantly African American schools in the city. The stark contrast between the school districts highlighted a growing problem facing schools, resegregation.

As a school counselor for the past 7 years, I have worked in various settings including racially diverse and racially isolated schools. Currently, I work in a district that faced challenges in integrating its schools following the *Brown* (1954) decision. Although there are some schools that reflect greater student body diversity, the district still has schools that are racially isolated. It could be argued that many schools lack the critical mass that *Grutter* (2003) and *Gratz* (2003) argued is necessary to reap the educational benefits of diversity despite being integrated, as many

are 80-95% homogenous in terms of racial composition. Having attended and worked in racially isolated schools in a post-*Brown* (1954) society, I have witnessed the disparities that stem from resegregation including higher retention rates, lower graduation rates, and lower teacher retention. Attending a school that is predominantly white is very different from attending a school that is predominantly African American. Even as an African American student at a predominantly white school, my experience differs from an African American student attending a predominantly African American school. Understanding that the composition of the student body often correlates with resource allocation; I am interested in identifying ways to reduce racially isolated schools.

Significance

Resegregation in school districts across the nation has left district leaders grappling with issue of student body diversity. The decision of *Parents Involved* (2007) severely limited the ways in which districts could address growing concerns of racial isolation in schools. Any policies designed to promote equity and diversity are often met with resistance and the threat of suit. Recently, cases involving student body diversity have taken a slightly different approach than before- focusing on the impact of such policies on Asian American students. As a new perspective on an existing question of constitutionality, school leaders and the social science community should re-examine the ways their voices can be heard in the legal decision making process (Morgan & Pullin, 2010).

Since *Brown* (1954), the federal court system has become an important forum for resolving education policy disputes. *Brown* (1954) also marked the first time the use of social science research impacted the decision of the Court. Since then, the social science community has lent its voice in addressing the constitutionality of policies promoting student body diversity.

The ways in which social science research is utilized during the legal proceedings of cases involving education policy can inform trends in social science research and impact the policy decisions of local school district leaders.

Chapter Summary and Dissertation Overview

The remainder of this dissertation will be presented in four chapters. Chapter 2 provides an overview of the involvement of the federal court system in race-related lawsuits in education and the role social science had in judicial decision-making. I examine relevant Supreme Court cases to give background and context to the current landscape of judicial involvement in decisions involving race-conscious student assignment policies. I also address the use of social science in race-related lawsuits in education to inform the Court's decision and briefly discuss research utilization in education policy. In Chapter 3, I discuss how I use systematic content analysis to examine whether social science was presented during Supreme Court cases involving race-conscious student assignment policies. Chapter 4 consists of the detailed analysis of the six cases, and Chapter 5 discusses the implications of my findings for practitioners, scholars, attorneys and policymakers.

Chapter 2: Literature Review

The federal court system has historically played a role in addressing racial inequities in education. For example, federal courts have examined both the dual system of de jure school segregation as well as race-conscious student assignment policies. When examining these issues, it became clear that federal courts can influence education policy and that sometimes the use of social science can help inform judicial decision-making. This study sought to understand if and how social science is considered during oral argument in cases involving race-conscious student assignment policies. The following chapter will provide an overview of relevant literature in five sections. First, I discuss the role of the federal court system in education policy including a detailed account of federal cases involving segregation in education. The second section considers the jurisprudence related to desegregation and relatedly the third section examines the constitutionality of race-conscious student assignment policies. The fourth section analyzes the use of social science research in race-related lawsuits in education and finally, the fifth section provides a brief discussion of research utilization in education policy. These five areas of existing literature help set up the context for how policies related to race in school have been considered by the courts, and how social science research might better inform jurisprudence in the area.

Role of the Courts in Education Policy

The Supreme Court is a prominent force in shaping various education policies in the United States (Chemerinsky, 2003). In every decision it makes, the Supreme Court creates, clarifies and changes legal precedent. Education policy did not become a major area of federal litigation until the mid-1950s. Prior to this time, fewer than 300 cases involving education had been initiated in federal courts (McCarthy, 1990). After gradually increasing through the

Depression era, the average number of cases decided per year grew from 1,552 in the 1940s to 6,788 in the 1970s (West & Dunn, 2008). After the landmark decision in *Brown v. Board of Education* (1954), the federal courts were recognized as an important tool to influence public policy, including education. In the 1970s, more legal challenges to school practices were initiated in that decade than in the proceeding seven decades combined (McCarthy, 1990). This increase in the federal courts' involvement in influencing education policies was sometimes contributed to judicial activism and public law litigation.

The rise in education policy-related litigation aligned with increased controversial issues involving segregation, separation of church and state, and student discipline policies. Following *Brown* (1954), the judiciary's role in education policy-making increased, which marked a new era of judicial involvement (McCarthy, 1990, West & Dunn, 2016). This increased involvement in education-related controversies was considered to be judicial activism by some observers (West & Dunn, 2016). The earliest definition for judicial activism was by the term's creator Arthur Schlesinger Jr., a historian (Green, 2008). When discussing the dynamic of the newly established Supreme Court, Schlesinger provided a working definition of judicial activism:

> The Black-Douglas group believes that the Supreme Court can play an affirmative role in promoting the social welfare; the Frankfurter-Jackson group advocates a policy of judicial self-restraint. One group is more concerned with the employment of the judicial power for their own conception of the social good; the other with expanding the range of allowable judgment for legislatures, even if it means upholding conclusions they privately condemn… In brief, the Black-Douglas wing appears to be more concerned with settling particular cases in accordance with their own social preconceptions; the Frankfurter-

> Jackson wing with preserving the judiciary in its established but limited place in the American system (Schlesinger, 1947 as cited in Kmiec, 2004, p. 1446-1447).

Prior to Schelsinger's use of the term "judicial activism," the act of striking down a piece of duly enacted legislation was often described as judicial review. Established in *Marbury v. Madison* (1803), judicial review occurs when actions of the executive and legislative branches are subject to review and possible invalidation by the judiciary (Green, 2008). What distinguishes activism from review, is the judges' use of their own personal views of the policy at hand. This withdrawal from formal review of policies has led to the criticism that judicial activism lacks restraint. However, as Christopher Wolfe, a political science professor, pointed out, the dichotomy of restraint and activism cannot be summed up by who can better interpret the constitution: "Activism and restraint, therefore, cannot be reduced to the simple idea that activist judges 'make law' and restrained judges merely 'interpret the Constitution.' Inevitably, the differences between activism and restraint are more a question of degree than of kind" (Wolfe, 1991, p. 4).

Judicial activism has been both praised and criticized for its role in striking down socially charged legislation. The issue of judicial activism is that it can undermine the democratic processes of legislation (McCarthy, 1990). Critics of judicial activism argue that judges should seldom invalidate legislation or executive actions, whereas supporters argue that judges' ability to scrutinize and interpret constitutional laws is necessary to retain balance in any political system (Bickel, 1962; Kmiec, 2004; McCarthy, 1990; Zeitlow, 2008). Judicial activism began to take shape as reform litigation or public law litigation, where the aim was to reform institutional structures of policy and governance (Superfine, 2010). The courts have long been seen as the checks and balances system within the United States, striking down laws that were in violation of

the Constitution. A judge's ability to rule on the constitutionality of a statute "is not simply a matter of measuring a statute against crisply defined constitutional provisions but, rather, a policy-making process, in which judges engage after the legislators" (Bickel, 1962, p. 36). In other words, judges engage in public policymaking merely by exercising the function of judicial review. Furthermore, through judicial review, judges often right social wrongs through their decisions.

School Desegregation

Court decisions focused on desegregation inform this study because they provide insight about how school policies related to race were interpreted by the judiciary. As noted, prior to the latter half of the 20th century, the courts were seldomly involved in education policy. After *Brown* (1954), the courts became an important tool to influence social policies especially as it relates to school segregation challenges. School desegregation cases "created a magnetic field around the courts, attracting litigation in areas where judicial intervention had earlier seemed implausible" (Horowitz, 1977, p. 10 as cited in McCarthy, 1990). The *Brown* (1954) decision prompted increased interest in addressing civil wrongs in society through litigation. School desegregation litigation is the best-known body of public law litigation.

Pre-Brown Litigation. Prior to *Brown* (1954), segregation efforts were limited by the Supreme Court decision in *Plessy v. Ferguson* (1896), which held that so long as the physical and tangible factors are equal, separate facilities were constitutional. Legal efforts to challenge the constitutionality of the separate but equal doctrine were largely unsuccessful, until two higher education cases were decided in 1950. In *McLaurin v. Oklahoma State Regents* (1950), the plaintiff, George McLaurin, argued that the requirement of separate facilities interfered with his education at the University of Oklahoma. McLaurin, an African American student, was

prohibited from interacting with his white peers and was required to sit in designated desks outside the classroom. The Supreme Court held that the different treatment on the basis of his race was a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court reasoned that the restrictions imposed by school officials denied McLaurin an education that was equal to his peers. The second case, *Sweatt v. Painter* (1950), involved the admission of an African American student to the University of Texas School of Law. Heman Sweatt was refused admission to the School of Law due to his race. The university's president, Theophilus Painter argued that Sweatt could not attend on the grounds that state law prohibited integrated education. Sweatt asked the state courts to order his admission. The district court continued the case for six months, allowing the state time to create the Texas State University for Negroes, which included a law school. Sweatt was offered a seat, but turned it down, instead appealing to the U.S. Supreme Court. Reversing the lower court decision, the Supreme Court held that the separate law school was grossly unequal to the University of Texas School of Law. The Court reasoned the mere separation from the majority of law students as well as the inferior facilities failed to qualify as equal. In a unanimous decision, the Supreme Court ruled that under the Equal Protection Clause of the Fourteenth Amendment, Sweatt had the right to attend this law school (*Sweatt v. Painter*, 1950).

The Supreme Court decisions from *McLaurin v. Oklahoma State Regents* (1950) and *Sweatt v. Painter* (1950), signaled a shift in the Supreme Court's views of race and civil rights in education. Recognizing the inequality in separate facilities in *Sweatt v. Painter* (1950), and the restrictiveness of different treatment in *McLaurin v. Oklahoma State Regents* (1950), the Court nullified the precedent set by *Plessy v. Ferguson* (1896). In the years following the two decisions, federal courts would hear cases specific to elementary and secondary schools. For

example, during the 1952-1953 term, the Court heard five cases that challenged the separate but equal doctrine of *Plessy* (1896); all five dealt with elementary and secondary schools.

Brown v. Board of Education. In 1951, Oliver Brown filed a class action lawsuit against the Board of Education of Topeka, after his daughter was not permitted to attend the all-white public school closer to their home. Brown and his attorneys argued that his daughter's denial of entry was a violation of the Equal Protection Clause of the Fourteenth Amendment. The case, along with four others, went before the Supreme Court, as *Brown v. Board of Education of Topeka* (*Brown v. Board of Education,* 1954; Klarman, 2006; Straus & Lemieux, 2016). The arguments in *Brown* (1954) focused primarily on the constitutionality of school segregation. There were, however, supplemental arguments in support of the plaintiffs that emphasized the harm of school segregation. Socially, the plaintiffs claimed, segregated school systems made African American children feel inferior to white children, arguing such a system should not be legally permissible (Klarman, 2006). The harm of school segregation was also acknowledged by the Truman Administration that addressed school segregation as a foreign relations problem (Dudziak, 2004).

Reaching a consensus on the issue of school segregation proved to be difficult. After a split decision in the spring of 1953, the Court asked to rehear the case in the fall of the same year. Prior to the reargument, then Chief Justice Fred Vinson died in September 1953 and was replaced by California governor Earl Warren. This change of leadership is considered to be a turning point for the case (Klarman, 2006). Following the closing of the reargruments in December of 1953, the nation waited more than five months to receive the unanimous decision. In May of 1954, Chief Justice Warren delivered the opinion, writing that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are

inherently unequal" (*Brown v. Board of Education*, 1954, p. 495). Overturning *Plessy*, the Court held that the segregation of children in public schools solely on the basis of race, regardless of equal physical and tangible factors may be equal, deprives students of color equal educational opportunity, which violates the Equal Protection Clause of the Fourteenth Amendment.

Some observers considered this case to be the archetype of judicial activism, and they argued that *Brown v. Board of Education* (1954), demonstrated the Court's willingness to ignore the doctrine of stare decisis to deliver a decision (McCarthy, 1990). The departure from judicial restraint to deliver a unanimous decision to overturn the separate but equal doctrine of *Plessy* (1896) was met with swift criticism. Opponents of the decision cited an overstep of judicial power, arguing that the Court lacked the knowledge and basis to make a legislative decision (see McCarthy, 1990; Wolters, 2005; Zietlow, 2008). On the other hand, proponents of the decision claimed that without the Court's activism, state-sponsored segregation and discrimination would have continued to remain unchecked (Zietlow, 2008). The Court's engagement in judicial activism to desegregate the nation's schools prompted subsequent public law litigation that would entangle federal courts in desegregation efforts for the next thirty-seven years.

Public Law Litigation. In the mid-1970s, Abram Chayes, a Harvard law professor, introduced public law litigation as the new model of litigation being used to address issues of inequity in public policy. He described the features of public law litigation as a lawsuit based in equity in which the litigation extended beyond the bilateral structure of traditional litigation to broadly impact public policy (Chayes, 1976; Pinder, 2013). This form of litigation includes both fact finding and remedy that are "prospective and legislative rather than retrospective and compensatory" like traditional litigation (Pinder, 2013, p. 250). A key feature of public law

litigation is its requirement of judicial activism and ongoing oversight in which the court functions as "policy planner and manager" (Chayes, 1976 as cited in Pinder, 2013, p. 250). Desegregation litigation was considered by Chayes as the archetype of public law litigation. After *Brown* (1954), the federal court system was tasked with remedying desegregation in schools. Through structural injunctions, the courts remodeled "an existing social or political institution to bring it into conformity with constitutional demands" (*Lampkin v. District of Columbia*, 1995 as cited in Pinder, 2013, p. 250). In the nearly four decades after *Brown* (1954), the courts were engaged in public law litigation within two distinct phases- remedying segregation and retreating from segregation efforts. During the first phase, from 1955 to 1973, the lower courts issued structural injunctive relief to remedy the effects of segregation; and within the second phase, from 1974 to 1993, the Supreme Court intervened in the cross-district line desegregation efforts and began to retreat from school segregation matters (Pinder, 2013).

Remedying Segregation. Just over a year after the *Brown* (1954) decision, the Supreme Court instructed the states to begin desegregation plans "with all deliberate speed" (*Brown v. Board of Education*, 1955, p. 301). The ruling upheld that "racial discrimination in public education is unconstitutional, and all provisions of federal state or local law requiring or permitting such discrimination must yield to this principle" (*Brown v. Board of Education*, 1955, p. 349). Now referred to as *Brown II* (1955), the decision delegated the responsibility of desegregating schools to lower courts and local leaders. As the lower courts grappled with the implementation of the Supreme Court's decision, Southern states did all they could to stall racial integration in schools.

Despite the "all deliberate speed" in *Brown II* (1955), there was no immediate change to desegregate schools due to political resistance, grassroots riots, and legal challenges in southern

states. These schemes to evade the vision of *Brown* (1954) were tolerated by the Supreme Court until the violent Little Rock Crisis in 1957 (Tushnet, 1992). The public hostility in Arkansas and outright opposition from the Governor and state legislation led the Little Rock school board members to file suit in the federal district court, urging for a postponement of desegregation plans (*Cooper v. Aaron,* 1958; Freyer, 2008). The hostile environment, the plaintiffs argued, was compromising integration efforts, and they requested that African American students be returned to segregated schools (Freyer, 2008). In *Cooper* (1958), the district court granted the school board's request, but the decision was later reversed by the Eighth Circuit Court of Appeals. The Supreme Court delivered a unanimous decision holding that Arkansas officials were bound by the Court's prior decision, which enforced that racial segregation in public schools was a violation of the Equal Protection Clause of the Fourteenth Amendment (*Cooper*, 1958). The Court noted that as agents of the state, the school board members and superintendent of schools' intentions of good faith would not constitute a legal excuse for the delay in school integration efforts. In a unanimous decision, the Supreme Court held that maintaining law and order by depriving African American students of their equal rights was a violation of the Equal Protection Clause. The Court also maintained that as the final interpreter of the U.S. Constitution, the supreme law of the land, the precedent set forth in *Brown* (1954) was the law of the land, defending its federal supremacy (Tushnet, 1992).

The *Cooper* (1958) ruling bound states to the supreme law of the land; however, states still found ways to stall school desegregation. By the early 1960s, most of the United States' public schools were still segregated (Freyer, 2006; Freyer, 2008). The ambiguity of *Brown II's* (1955) "all deliberate speed" allowed school leaders to take as little or as long a time they deemed necessary to desegregate their school district. In 1964, Congress passed The Civil Rights

Act of 1964, which helped address racial discrimination in schools (Danns, 2014). That same year, the Supreme Court heard *Griffin v. County School board of Prince Edward County* (1964). Following the 1954 ruling declaring racial segregation in public school unconstitutional, Prince Edward County had resisted desegregation by refusing to collect school taxes, which forced the public schools to close for the next five years. The money was instead used to provide tuition grants to use for private schools. All private schools in the region were racially segregated, and with no private schools for African American children; the students were deprived of a formal education from 1959 to 1963. Early decisions by the district court-ordered the schools to be opened and funded, but the Fourth Circuit reversed the decision, eventually leading to Supreme Court review. The plaintiffs argued that the closing of public schools violated the Equal Protection Clause of the Fourteenth Amendment. In a 7-2 decision, the Court ruled that the school closings denied African American students equal protection of the law. While the closing of the schools was not unconstitutional in itself, the closing of public schools for the purpose of denying education to a group of children based on race violated the Fourteenth Amendment (*Griffin*, 1964).

Addressing the Resistance to Integrate. Passive and massive resistance persisted over a decade because the Supreme Court continued to find segregation policies in public schools unconstitutional (Driver, 2013; Klarman, 2006; Tushnet, 1992). As a part of the resistance, the Virginia legislature passed the Pupil Placement Act which established the State Pupil Placement Board that oversaw the "freedom of choice" plans that allowed students to select the school of their choice (Driver, 2013; Klarman 2003). The small rural county only had two schools, and while the plans did not prevent anyone from attending the school they wanted to, only a few African American students transferred to the predominantly white school, New Kent, and no

white students transferred to George W. Watkins, a predominantly African American school. A lawsuit brought forth by parents and students, *Green v. County School Board of New Kent County* (1968), argued the freedom of choice plans were not adequately integrating schools. Both the district court and circuit court upheld the plan. In reviewing the lower courts' decisions, the Supreme Court, considering *Brown II*'s mandate that desegregation occur at "all deliberate speed" (*Brown v. Board of Education*, 1955 p. 301), concluded that the "freedom of choice" plan was not a sufficient step to remedy the segregated school system. In its ruling, the Court established that unitary status required that school districts eliminate any and all racially identifiable schools by addressing all aspects of school operations including student assignment, faculty and staff assignment, transportation, extracurricular activities, and facilities- also known as the *Green* factors. The reason for all the factors, the Court noted, was to extend desegregation to "every facet of school operations" (*Green v. County School Board of New Kent County,* 1968, p. 435). The *Green* (1968) decision also affirmed that district courts had an affirmative duty to fashion a more effective remedy and to oversee the school board's desegregation efforts. The *Green* (1968) decision affirmed courts' broad discretion in developing and imposing equitable relief when local authorities failed to develop effective plans of desegregation (Pinder, 2013).

Freedom of choice plans, like the one in *Green* (1968) were widely used in the South as a half-hearted attempt to try to respond to desegregation mandates (Frankenberg, 2007; Orfield, 2001). In other words, southern states that opposed the desegregation orders of the Supreme Court used the freedom of choice plans as a loophole to the "all deliberate speed" of *Brown II* (1955) to slow walk actually desegregating a school. Following the Court's rejection of freedom of choice plans (*Green*, 1968), residents of Holmes County, Mississippi sued the local school district for failure to desegregate. The petitioners argued that there were no meaningful attempts

to integrate schools. State officials overseeing desegregation efforts requested an extension for implementation, which was granted by the Fifth Circuit; however, the court did not disclose a specific date for implementing the desegregation plan. Petitioners argued that this contributed to the lack of school integration. The case was eventually argued at the Supreme Court (*Alexander v. Holmes County Board of Education*, 1969). The issue was whether such delays in implementing school desegregation plans were legally permissible. In a per curiam decision, the Court held that schools are obligated to immediately terminate any and all dual systems and operate as unitary schools.

As southern states continued to stall desegregation efforts, the courts continued to expand the reach of structural injunctions. A case in North Carolina called into question the federal court's role in remedying state-imposed segregation (Welner, 2006). The plaintiffs, the Swanns, sued the Charlotte-Mecklenburg district to allow their son to attend the school closest to their home. A federal judge ruled in favor of the family and oversaw the implementation of a busing strategy to integrate the district's schools. The school district appealed to the Supreme Court. Upholding the district court's actions, the Supreme Court held that once a school district had been found in violation of the Equal Protection Clause, a district court has "broad power to fashion remedies that will assure unitary school systems" (*Swann v. Charlotte-Mecklenburg Board of Education*, 1971, p. 16). The Court addressed four main issues regarding the student assignment, ruling that: (1) the use of mathematical or quotas were a legitimate "starting point" for solutions; (2) predominantly African American schools required close scrutiny by courts; (3) the pairing of nonadjacent attendance zones, as interim corrective measures, were within the Court's remedial powers; and (4) the use of busing was a permissible tool to correct state-enforced racial school segregation (*Swann v. Charlotte-Mecklenburg Board of Education*, 1971).

The Court also noted that busing was only temporary and that upon the establishment of unitary status, busing would end (Anderson, 2002; Orfield, 2001; Welner, 2006). The *Swann* (1971) decision altered the Court's power to issue experimental structural injunctive relief in the form of busing (Pinder, 2013). The Supreme Court also recognized the limitations of equitable relief; positing that the remedy needed to be tailored to the violation. Referencing the *Green* (1968) decision, the Court acknowledged its duty to "support, supplement, and even exceed legislative directives when local authorities failed to appropriately remedy a constitutional violation" (Pinder, 2013, p. 252).

De Facto Segregation. Concerns over the implementation of remedies that were tailored appropriately to the constitutional violations were brought forth again to the Supreme Court; however, this time it involved de facto segregation and a northern state. In *Keyes v. School District No. 1* (1973), the plaintiffs argued the district's retreat from a busing strategy to desegregate public schools was an intentional act to create a racially segregated school system. The plaintiffs sought injunctive relief and alleged that the district had violated the Fourteenth Amendment. After multiple years of appeals and several court orders, the Supreme Court heard the case in 1973, and ruled that while there was no legally imposed segregation in Denver, "the Board, through its actions over a period of years, intentionally created and maintained the segregated character of the core city schools" (*Keyes v. School District No. 1*, 1973, p. 206). A key part in the Court's decision was that when a part of a school system is found to be segregated, a "prima facie case of unlawful segregative design" becomes apparent (p. 208). The decision also addressed segregation involving Hispanic students, and the Court ruled that Hispanic and African American students should not be considered as desegregation from each other because the inequities they faced were similar. In Denver, the school district failed to prove

it operated without segregative intent, and thus, requiring it to be declared a dual system. As the first case that examined segregative intent within schools, the *Keyes* (1973) case reshaped the landscape of desegregation litigation.

Retreating from Desegregation Efforts. After the Court's requirement to tailor the remedy to the constitutional violation, courts issued structural injunctive relief that increased in scope and specificity until 1974 in *Milliken v. Bradley*. On August 18, 1970, the NAACP filed a lawsuit against the state of Michigan and Detroit Public Schools because of an injunction to stop desegregation efforts in Detroit. The plaintiffs alleged that the action by state officials maintained racial inequities. The district court held the state of Michigan and the district leaders accountable for the persisting segregation and ordered a desegregation plan for both the Detroit area schools and fifty-three of the schools in the tri-county area. Both the state and school district appealed to the Sixth Circuit, which affirmed the lower court's ruling. The Supreme Court eventually reversed and remanded the decision. In a split decision, the Supreme Court held that school district lines could not be crossed to desegregate schools unless there was proof of an inter-district violation or effect. Chief Justice Warren Burger, delivering the majority decision wrote:

> To approve the [cross-district] remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and Brown II or any holding of this court. (*Milliken v. Bradley*, 1974, p. 745)

Chief Justice Burger observed that local control is essential in the consideration of injunctive relief, however, he argued that the district court could not impose a cross district remedy when the violation occurred in one district and the other districts were either unitary or segregated due

to de facto segregation. The decision marked the first time the Supreme Court did not closely defer to some of its earlier desegregation jurisprudence (Orfield, 2001). In its decision, the Court ruled that segregation did not require "any particular racial balance in each school, grade or classroom" (*Milliken v. Bradley*, 1974, p. 740). In short, the decision meant that school districts impacted by segregation as a result of drawn boundary lines were not in violation of the Equal Protection Clause. In the principal dissent, Justice Thurgood Marshall wrote:

> Exacerbating the effects of the extensive residential segregation between Negroes and whites, the school board consciously drew attendance zones along lines which maximized the segregation of the races in schools as well. Optional attendance zones were created for the neighborhoods undergoing racial transition so as to allow whites in the area to escape integration. (*Milliken v. Bradley*, 1974, p. 785)

The limitations of *Milliken* (1974) threatened the type of injunctive relief that would have resulted in genuine structural reform. In a second decision, the Court further narrowed the scope of structural injunctive relief in school desegregation challenges (*Milliken v. Bradley*, 1977). The lines drawn in *Milliken* (1974) represented the new perception of segregation and racial balance in schools. Whereas some viewed them as just arbitrary lines, others saw fences which were designed to exclude certain groups (Kiel, 2013). Regarding the most important desegregation decision since *Brown I* (1954), *Milliken* (1974) provided "the most effective means by which individuals seeking to avoid racially-integrated education could ensure that they would remain beyond the reach of a federal court order" (Kiel, 2013, p. 143). The retreat from desegregation plans only continued to strengthen following *Milliken* (1974) (Freeswick, 1975; Gadsden, 2010; Green & Gooden, 2016). *Brown* (1955) delegated the responsibility of monitoring the implementation of desegregation plans to the lower courts; however, the Supreme Court's

decision in *Milliken* (1974) implied the need to return control to local school boards (Freeswick, 1975; Gooden & Green, 2016).

Moreover, a series of cases in the early 1990s severely restricted the scope of remedial options for the courts, and relieved school districts of the court oversight and their duty to segregate (Orfield, 2001, Pinder, 2013). In 1991, the Supreme Court expanded on *Milliken* (1974) in its decision in *Dowell v. The Oklahoma City Board of Education.* Desegregation litigation in Oklahoma City began in 1961 when African American students and their parents sued the local board of education to address de jure segregation (Hannel, 1991). In 1972, the district court-ordered the Board to implement the "Finger Plan" which required a restructuring of school attendance zones while employing a reasonable busing strategy (Widdig, 1991). Three years after implementing the Finger Plan, the Board filed a motion to close the case and in 1977, the district court declared Oklahoma City had achieved unitary status. Demographic changes in the early 1980s forced the Board to re-evaluate the current desegregation plan that was in place. In response to the changes, the Board adopted a Student Reassignment Plan (SRP), which allowed neighborhood assignments for students in elementary school (Hannel, 1991). The SRP resulted in schools that were either predominantly African American or predominantly white. Claiming that the district had become re-segregated, parents of African American students sought to have the case reopened. The district court declined to reopen the case, but on an appeal, the Tenth Circuit held that while the 1977 order declared unitariness, the injunction was never formally removed and remanded the case. The district court again declined to restore an injunction, and the court of appeals again reversed. On a petition for certiorari, the Supreme Court agreed to review the case in 1991. The Court held that schools that have attained unitary status should no longer be under a desegregation order. Within the decision, the Court

acknowledged the potential of re-segregation but held that once declared unitary, schools are not obligated to maintain racial balancing plans (*Dowell v. Oklahoma City Board of Education*, 1991). In upholding the district court's decision, the Supreme Court acknowledged the flexible nature of structural injunctions, noting that such remedies are to be imposed only until the harm is remedied or when local authorities comply for a reasonable period of time (Pinder, 2013).

A similar decision was made a year later in *Freeman v. Pitts* (1992). Following the *Green* (1968) case, a Georgia school district- DeKalb County School System (DCSS)- entered into a consent decree to dismantle its dual school system (Amsterdam, 2017; Stubbs, 1993). In 1986, DCSS petitioned a federal trial court to declare it unitary. The Court ruled that while the district achieved unitary status in four of the six "Green Factors," it had not completely eliminated discrimination in the district. The two areas- faculty assignment and the allocation of resources- were to remain under the control of the courts, while the other four were released. Both DCSS and the parents of African American students appealed to the Eleventh Circuit, which reversed the lower court's decision (*Freeman v. Pitts*, 1992). The court of appeals held that until all six categories are desegregated, the district court is to remain in authority over DCSS. The Supreme Court reviewed the case and reversed the appellate court's decision, holding that the district court has the authority to relinquish control and supervision over school districts before full compliance has been achieved in every area of school operation (*Freeman v. Pitts*, 1992). Upholding the district court's decisions, the Supreme Court reiterated that the district court's role is limited to remedying the constitutional violation and restoring control to local authorities once the district is in the compliance of the Constitution (Moran, 2010; Pinder, 2013).

The *Dowell* (1991) and *Freeman* (1992) decisions not only marked the end of court-ordered desegregation plans, it also closed nearly forty years of public law litigation. After

adopting an integrationist vision, the Court directed lower courts to achieve integration, a process that ultimately produced public law litigation (Tushnet, 1992). An activist form of judicial review, public law litigation was the Court's aggressive means to desegregate the nation's schools. Public law litigation to promote diversity in public schools has not been without challenges. While lawsuits were successful in striking down legal segregation, public law litigation was less effective in addressing less deliberate or de facto discriminatory policies (Yergin, 2016). Since the narrowing of the courts' ability to issue experimental structural injunctive relief in *Missouri v. Jenkins* (1990), districts facing resegregation trends have been limited in their efforts to integrate schools. Even efforts to desegregate initiated by school districts rather than the courts were met with constitutional challenges (Love, 2009; Orfield, Frankenberg & Lee, 2003, Welner, 2006).

The Constitutionality of Race-conscious Student Assignment Policies

Desegregation litigation was not the only legal challenge that addressed the student racial composition in schools. Affirmative action and voluntary integration plans were established to ensure diverse student bodies in both post-secondary institutions and K-12 settings. Race-conscious student assignment policies (RCSAP), like affirmative action, involve racial classifications, but unlike segregation ordinances under "separate but equal" these policies intend to benefit African Americans and other students of color from historically marginalized populations. These plans, however, were scrutinized for their reliance on race, and were ultimately challenged in court (Ware, 2004). Due to race-conscious policies potentially granting preferential treatment to a specific group of people, opponents challenged the policies under the Fourteenth Amendment's Equal Protection Clause, invoking the courts to use strict scrutiny to determine constitutionality (Garfield, 2004).

The most rigorous form of judicial review, strict scrutiny examines the ends and means of using racial classifications in policies and laws (Ancheta, 2004; Ware, 2004). First, the law or policy must be justified by a compelling state interest, and second it must be narrowly tailored to achieve the intended result (Anderson, 2002; Nowak & Rotunda, 2016). In analyzing the two prongs of strict scrutiny, the courts examine multiple components. Under the compelling interest test, justices focus on the evidentiary basis to understand the objective of the government interest (Ancheta, 2004). Anderson (2002) points out that strict scrutiny can be viewed three ways dependent on the objective. The purposive view depends on of the state has acted with an invidious purpose; the effect view depends on the "empirical facts about the effects of the policies"; and the formal view suggest that racial preferences "inherently inflict" constitutional injury regardless of purpose (p. 1231). In litigation involving race-conscious student assignment policies, schools that employ race-conscious policies as a way to remedy the effects of past discrimination, school officials must show both the past discrimination as well as the present effects that requires the race-conscious policy (Ancheta, 2004). When testing the narrow tailoring of the policy or law, the courts often rely upon *United States v. Paradise* (1987), which established four factors to consider when examining policies using racial classification: "(1) the necessity for the relief and the efficacy of alternate remedies, particularly race-neutral alternatives; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant market; and (4) the impact of the relief on the rights of third parties" (Ancheta, 2004, p. 26).

Diversity Based Affirmative Action

Court decisions focused on affirmative action also inform this study. Affirmative action policies were established to allow the use of race-conscious actions to reduce the disparities

resulting from past discriminatory practices and policies. In education, this remedial rationale has been overshadowed by a different justification: the educational benefit of diversity (Ware, 2004). The diversity rationale in affirmative action emerged in the first case addressing affirmative integration policies in higher education, *Regents of the University of California v. Bakke* (1978). The University of California implemented an affirmative action program that included reserving sixteen spaces in each entering class of one hundred in the medical program for qualified minorities. This program came into question when Allan Bakke, a white man, was denied admission to the medical program twice, despite his qualifications exceeding those of any minority student who was admitted. Bakke contended that he was denied admission solely on the basis of his race, and sought an order to admit him to the medical school. He alleged a violation of the Equal Protection Clause and the Civil Rights Act of 1964.

In a split decision, with no majority, the Court held that the affirmative action program was unconstitutional. The lack of consensus among the Justices came down to a majority that could not agree on the applicable standard of review. Four Justices argued the use of racial classifications that are used to remedy the effects of discriminatory practices are different from segregation ordinances and should not be subject to strict scrutiny. Another four Justices contended that all racial classifications were "inherently suspect" and in the absence of a compelling interest, its use could not be justified (Ware, 2004, p. 2101). Providing the controlling rationale, Justice Lewis Powell argued that strict scrutiny should be applied to affirmative action programs, and the promotion of a diverse student body constituted a compelling state interest (Ware, 2004).

Despite finding the program unconstitutional, the highly fractured decision of *Regents of the University of California v. Bakke* (1978) did seem to allow a more limited affirmative action

program for future policies. The decision also marked the first time the Supreme Court recognized diversity as a compelling state interest under the Fourteenth Amendment. The Court's recognition of diversity as a compelling state interest within the Supreme Court's decision established the legal standard for affirmative action related litigation. Furthermore, it signaled to social scientists the type of research that could be used to influence future cases (Garces, 2013). While the decision in *Regents of the University of California v. Bakke* (1978) delivered a victory to both supporters and critics of affirmative action, the disagreement among the Justices impacted the implementation of the ruling. The split decision did not give clear guidance on the extent to which colleges and universities could consider race in admission processes. As a result, colleges and universities created alternative ways to promote diversity.

At the University of Michigan, a point system was implemented as an effort to enroll a diverse student body in one of the undergraduate colleges. Within the point system, students were awarded points based on race (up to 20 points), athleticism (up to 20 points), leadership and services (up to 5 points), essay (up to 3 points), and personal achievement (up to 5 points). In this system, students of color automatically earned more points. The university's admissions policy was called into question during a 2003 lawsuit brought forth by a white student who was denied admission to the university (*Gratz v. Bollinger,* 2003). The undergraduate student alleged that the point system was unconstitutional and discriminated against White students. The Supreme Court ruled that the admission process was unconstitutional. Using the strict scrutiny standard articulated in *Bakke* (1978), the Supreme Court reasoned that the point system's use of race as "a decisive factor for virtually every minimally qualified underrepresented minority applicant" was not narrowly tailored enough (*Gratz v. Bollinger*, 2003, p. 268-275). The Court did not rule out

affirmative action programs, but like *Regents of the University of California v. Bakke,* it required race to be used as a criterion among other admission requirements.

The Supreme Court, however, delivered another decision at the University of Michigan but this opinion involved the law school's admission program (*Grutter v. Bollinger*, 2003*).* Unlike *Gratz* (2003), the case did not involve a point system, but rather the law school used race more flexibly as a factor during the admission process to achieve a "critical mass" of underrepresented minority students. The White plaintiff alleged that the policy discriminated against White students and violated the Equal Protections Clause of the Fourteenth Amendment. The law school maintained that they did not use racial quotas in its admission process, but rather sought a critical mass of minority students. The Court upheld the law school's use of race in its admission process. The Supreme Court found that the use of race was permissible because unlike *Gratz* (2003) that relied on a formulaic point-based system, the law school used race flexibly and employed a more individualized approach to considering race as one of many factors in admissions. Thus, the law school's interest in promoting student body diversity was compelling enough to withstand strict scrutiny.

Grutter v. Bollinger (2003) and *Gratz v. Bollinger* (2003) set important precedence on handling race-conscious policies by establishing the components required for a plan or policy to be considered "narrowly tailored." Known as the *Grutter* factors, it was determined that in order to be narrowly tailored, an admission policy: "(1) cannot involve an impermissible quota or racial balancing and must be sufficiently flexible so as to consider each applicant as an individual; (2) must take into account race-neutral alternatives; (3) must not impose an undue burden on third parties; and (4) must be limited in time" (Anderson, 2004, p. 972). These factors

would later play a critical role in K-12 race-conscious student assignment policy cases (Love, 2009; Siegel, 2006; Welner, 2006).

The 2003 decisions reaffirmed the Supreme Court's position on affirmative action nearly twenty-five years after *Regents of the University of California v. Bakke* (1987). According to the Court, affirmative action programs were constitutional so long as race was used as one factor in an individualized evaluation, and the program sought to achieve diversity. *Grutter v. Bollinger* (2003) established diversity as the milestone towards racial equality.

Voluntary Integration Plans: Parents Involved

Race-conscious policies did not fully emerge in the K-12 landscape until schools sought solutions in response to the de facto segregation and the remaining effects of past discrimination (George & Darling-Hammond, 2019). The legal implications of these policies were not fully understood until the Supreme Court decided two combined cases at the K-12 level in 2007. The *Brown* (1954) decision and the passage of the Civil Rights Act of 1964 eliminated the ability of school districts to engage in de jure segregation. These events, however, did not prevent de facto segregation from interrupting integration efforts (Black, 2009). Thus, school districts experiencing the effects of de facto segregation resorted to voluntary integration efforts that took the form of race-conscious admissions, student transfers and other equity-focused policies. Much like affirmative action, K-12 race-conscious policies were met with criticism and legal challenges.

A 2007 decision combined two different cases from Seattle School District No. 1 in Washington and Jefferson County Public Schools in Kentucky. Both districts adopted plans that used race as one factor to help determine which schools certain students may attend. One of the goals of these policies was to increase student body diversity. The school districts named in the

lawsuits were categorically different from another. The Seattle district was never subjected to court-ordered desegregation and the challenged plan involved race used as tie breaker to allocate seats at particular high schools. Jefferson County, on the other hand, was under a desegregation decree until 2000, and the plan in question involved the racial classification of African American or "other" to make certain elementary school assignments. The plaintiffs, a parent organization in Seattle and a mother in Jefferson County, alleged the student assignment plans' use of race violated the Fourteenth Amendment's Equal Protection Clause. In the Seattle case, a federal district court upheld the tiebreaker, and the Ninth Circuit affirmed the decision, finding the district's plan narrowly tailored enough to serve a compelling state interest. The plan in Jefferson County was also found to meet the narrowly tailored standard by both the district court and the Sixth Circuit. The Supreme Court combined both cases and reversed the decisions of the lower courts.

In a split (4-1-4) decision, the Court held that the districts in Jefferson County and Seattle could not use race in this way to achieve integration within a voluntary desegregation plan. Although the majority found racial diversity to be a compelling interest, the explicit use of race, the Court argued, failed to meet the narrowly tailored standard established by *Grutter v. Bollinger* (2003). In the plurality opinion, Chief Justice Roberts wrote that the districts failed to "show that they considered methods other than explicit racial classification to achieve their stated goals" (*Parents Involved in Community Schools v. Seattle School District No. 1,* 2007, p. 735). The Court did acknowledge that seeking diversity is a compelling state interest, as established in *Regents of the University of California v. Bakke* (1987) and *Grutter v. Bollinger* (2003), however, it held that the K-12 cases were not necessarily governed by precedence in the affirmative action cases. *Grutter v. Bollinger* (2003) did not apply in the case at hand because the

student assignment plans did not utilize individualized evaluation of students with regard to race. In a controlling concurrence, Justice Kennedy highlighted that students must be "considered for a whole range of their talents and school needs with race as just one consideration" (*Parents Involved in Community Schools v. Seattle School District No. 1,* 2007*,* p. 793).

The dissent by Justice Breyer, joined by Justice Stevens, Justice Souter, and Justice Ginsburg, reasoned the assignment plans were sufficiently tailored enough to withstand strict scrutiny. Criticizing the plurality's step away from *Brown v. Board of Education* (1954), Justice Breyer wrote:

> The plurality pays inadequate attention to this law, to past opinions' rationales, their language and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local government to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm and disruptive round of race-related litigation, and it undermines Brown's promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause. (*Parents Involved in Community Schools v. Seattle School District No. 1,* 2007, p. 803-804).

Prior to the 2007 decision, the Supreme Court recognized the impact of "historical circumstances and persistent social realities of discrimination and segregation on efforts to integrate public schools" when deciding cases related to school desegregation (Sandberg, 2012, p. 450). In *Parents Involved* (2007)*,* the Court seemed to approach the case with a more colorblind reading

of the Fourteenth Amendment; abandoning the framework used for previous integration cases (Chermerinsky, 2015).

In finding the schools' assignment plans unconstitutional, the decision limited the ability of school districts to adopt voluntary desegregation plans. School districts dealing with the effects of de facto segregation are now left with two choices: (1) risk future litigation by drafting desegregation plans that are based on factors other than race; or, (2) abandon previous desegregation efforts entirely (Chemerinsky, 2014). The lack of clarity from the Court's decision also left schools more reluctant to implement voluntary desegregation plans (Black, 2008). A study by the Civil Rights Project (2008) found that "many of the policies and strategies that school districts commonly use to promote school diversity were not directly addressed or confronted by the Court" (p. 23). Since the *Parents Involved* (2007) ruling, guidance for K-12 schools has been limited to two Dear Colleague Letters from the Office for Civil Rights. In 2008, the Bush Administration issued guidance that emphasized compliance with the narrowly tailored standard and strongly encouraged the use of race-neutral methods for assigning students (U.S. Department of Education, 2008). Conversely, the 2011 letter by the Obama administration emphasized the importance of racially diverse schools, listing examples of permissible uses of race in school assignment policies (U.S. Department of Education and U.S. Department of Justice, 2011). Since the issuing of the 2011 guidance, it has been rescinded by the Trump administration in 2018. As of its rescission, there has not been any new explanation of the *Parents Involved* (2007) holding (Petty, 2019).

Affirmative Action: Subsequent Cases

After some of the Justices in *Parents Involved* (2007) seemed to suggest that the constitution requires the government to be colorblind, this signaled a shift in the Court's stance

on race-conscious policies in education. However, in 2013, the majority did not employ a colorblind analysis in a case involving the affirmative action plan of the University of Texas that challenged the use of race-conscious plans in place of race-neutral or colorblind plans. Abigail Fisher alleged the use of race in the university's admissions policy was discriminatory and a violation of the Fourteenth Amendment's Equal Protection Clause. The University of Texas, in this case, used a plan that accepted students in the top 10% of each high school's graduation class regardless of race. Students who were not automatically accepted through the 10% plan, like Fisher, could gain admission by scoring highly in a process that evaluates their talents, leadership qualities, family circumstances and race. The federal district court upheld the university's policy, finding that this plan was narrowly tailored and did serve a compelling interest as established in *Grutter v. Bollinger* (2003). The decision was affirmed by the Fifth Circuit, and the plaintiff appealed to the Supreme Court.

In the 7-1 decision, the Supreme Court concluded that the Fifth Circuit failed to apply strict scrutiny when examining the university's admission policy. The Court stated three controlling principles when examining the constitutionality of race-conscious policies: (1) strict scrutiny applies to race-conscious policies; (2) institutions receive limited deference on ends; and (3) institutions receive no deference on means. Ruling against the lower court's decision, the Supreme Court remanded the case back to the lower courts (*Fisher v. University of Texas,* 2013*)*. On remand, the Fifth Circuit held in favor of the university, finding the school's admission policy was constitutional. The case was heard for a second time by the Supreme Court in 2015. In a split decision, the Court upheld the Fifth Circuit's decision. The Court found the university's use of race as a factor in the holistic review was narrowly tailored to serve a compelling state

interest. In addressing the petitioner's claim that the university's race-conscious policy had a minimal impact, Justice Kennedy wrote:

> In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race-consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality (*Fisher v. University of Texas,* 2016, p. 2212*)*.

The Supreme Court concluded its decision by acknowledging the university's ongoing obligation to refine its admissions policies. It specifically encouraged the university to use its own data for three purposes: (1) to scrutinize the fairness of its admissions policies; (2) to assess whether changing demographics have weakened the need for race-conscious policies; and (3) to identify both the positive and negative effects of affirmative action measures (*Fisher v. University of Texas II,* 2016). The dissent written by Justice Alito argued the university did not present sufficient evidence to support its race-conscious policies.

Efforts to promote diversity in higher education and K-12 schools have been carefully scrutinized by the Court. Race-conscious policies were established to promote diversity in the education setting. The schools involved in race-conscious policy litigation cited diversity as an educational benefit for all. In *Bakke* (1987), Justice Powell recognized diversity as a compelling interest. Justice O'Connor reaffirmed its stance in *Grutter* (2003) writing "effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized" (p. 322). Although the Court struck down the student assignment policies because they were not narrowly tailored, in *Parents Involved* (2007), the Court recognized that diversity is a compelling state interest in schools.

Social Science and the Courts

Brown (1954) is regarded as one of the most influential Supreme Court decisions in America. The case is heralded for not only its use of social science to demonstrate the harm of segregation, but also for the Court's consideration of the social science and the subsequent inclusion of this evidence infamously in Footnote 11. The use of social science prompted both praise and skepticism as the legal and academic fields fought about whether that kind of research should play a role in the jurisprudence of race (Moran, 2010). The literature on social science and the legal system has demonstrated that social science has come to have an influential, if limited, role in judicial decision-making (Garces, 2013).

History of Social Science in the Courts

The utilization of social science in legal proceedings didn't start until the 1920s when legal realism began to rise. Before the 1920s, legal formalism, the dominant paradigm, all but kept out social science in constitutional fact finding (Koenig & Rustad, 1993; Monahan & Walker, 1991). Legal formalists relied heavily on precedent whereas legal realists argued that social context should play a role in judicial decision-making. Those who were a part of the realist movement asserted that judges devoted too much attention to past decisions and not enough to the social reality of their decisions. Legal realism paved the way for social science research to inform the courts regarding constitutional matters (Koenig & Rustad, 1993; Monahan & Walker, 1991).

The first significant time social science research was referred to in constitutional decision-making was in *Muller v. Oregon* (1908). In this case the Supreme Court examined the constitutionality of a state labor laws; a brief submitted by attorney Louis Brandeis provided medical and social science research that demonstrated the effects of long work hours on women

and girls. The substantial body of research outlined in the brief supported the state's law restricting the number of hours women could work. In their opinion to uphold the state's legislation, the Supreme Court referred to the brief in a footnote, an unprecedented course of action in judicial decision-making.

> It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters. (*Muller v. Oregon*, 1908, p. 419)

The Court's acknowledgement of extra-judicial factors signaled a shift from legal formalism towards legal realism (Monahan & Walker, 2010). The movement gained greater momentum during the Depression era, as the social realities of the critical time in the country prompted the Supreme Court to accept social science research (Monahan & Walker, 2010). Legal realism paved the way for *Brown v. Board of Education* (1954), where social science was infamously acknowledged in footnote 11. Since the landmark case, social science research has continued to play a role, to some extent, in judicial decisions.

How Social Science is Considered in Court

As the Court became more accepting of social science research, more politicians and advocacy groups began submitting amicus curiae briefs that included more research. The increase in use of such briefs has prompted some legal scholars to question its use in judicial decision-making (Garces, 2013; Moran, 2010). On one hand, there is some consensus between the social science community and legal decision makers that constitutional interpretation should be grounded in social realities. This perspective is especially important for topics including race and equity. On the other hand, there is criticism that social science can be selectively relied upon

to support a specific view on an issue. Furthermore, critics suggest that judges lack the training needed to assess the methodological strengths and weaknesses of the research (Garces, 2013).

The efficacy of social science research in judicial decision-making depends on whether the legal question requires a finding of fact or a finding of law. A finding of fact, or adjudicative question, involves disputes over the circumstances or facts that gave rise to the case in question. A finding of law, or legislative question, pertains to the underlying law or policy involved in the dispute (Garces 2013; Moran, 2010; Morgan & Pullin, 2010; West & Dunn, 2008). Literature on social science and the courts has shown that social science has greater influence on questions of fact more so than questions of law (Dunn & West, 2008; Garces, 2013). For example, in *Brown* (1954), the parties were concerned with segregation in a particular school district, however the attorneys, policymakers and social scientists who supported the case were also more interested in the effects of segregation in the broader sense (Morgan & Pullin, 2010).

Social Science: The NAACP Legal Strategy. The litigation campaign against public school segregation launched by the NAACP was not the organization's first challenge to legal segregation. Recognizing education as a way to address inequities faced by African Americans, the NAACP focused their legal strategy on equalization (Jackson, 2001; Oaks 2008). By demonstrating to the courts funding allocated for schools serving African American communities was significantly less than schools in white communities, the NAACP attorneys were able to show that although separate, the schools were not equal (Jackson, 2001). This strategy, while it led to small victories, relied on maintaining the status quo by forcing local governments to by the promise of equalizing separate facilities (Tushnet, 1987). By the early 1950s, the NAACP shifted its legal priority from equalizing segregated facilities towards a direct challenge to the constitutionality of legal segregation (Bergner, 2009; Jackson 2001).

Just as the NAACP's legal priority shifted, its legal strategy changed as well. Robert Carter, a key architect of the new legal strategy, believed that social science research could be used to challenge the system of segregation. Through social science evidence, Carter would demonstrate the harm of segregation (Frankenberg, 2011; Jackson, 2001; Moran, 2010). Carter and Thurgood Marshall implemented this strategy in *Mendez v. Westminster* (1947), a Ninth Circuit case involving the forced segregation of Mexican American students. In a brief submitted to the court, the attorneys made three arguments, two of which relied on legal precedents, while the third was based on sociological and psychological evidence he had assembled (Jackson, 2001; Valencia, 2005). Their third argument, which suggested inequality was a byproduct of segregation, Carter presented statistical data on educational funding and pointed out that in nine southern states, the funding for white students was over 200% greater than the average funding of African American students (Jackson, 2001). This data, Carter posited, was the result of segregation impeding the educational achievement of African American students (Jackson, 2001). Carter further argued that schools have a critical role in promoting tolerance amongst citizens of the nation. The Westminster Brief demonstrated both the difficulties posed by social science research and revealed the variety of uses the NAACP had for the research. The arguments presented in the Westminster Brief was an important innovation in the use of social science research in the constitutional challenge against segregation (Jackson, 2001). This strategy would be further developed by Carter during the litigation leading to *Brown* (1954).

A similar strategy was used in *Sweatt v. Painter* (1950). NAACP attorneys sought social science evidence and expert witnesses that would testify against segregation. Robert Redfield, an anthropologist from the University of Chicago, agreed to testify on behalf of the NAACP. In his testimony, Redfield asserted that segregation was harmful to society (Entin, 1986; Frankenberg,

2011; Jackson, 2001). Using his experience at the University of Chicago, a desegregated campus, Redfield argued that "segregation policy, and the stigma which segregation attaches to the segregated increases prejudice mutual suspicion between Negroes and Whites and contribute to the divisiveness and disorder of the national community, contributing to crime and violence" (Redfield, 1950 as cited in Jackson, 2001 p. 97). At the center of Redfield's argument was that segregation increases racial tension, and that integration would decrease it. Despite the lower court ruling against Sweatt and the NAACP, Redfield's testimony further established the integration would decrease the racial tension caused by segregation(Jackson, 2001).

The use of social science in early public-school segregation litigation has been isolated to the "doll test" by Drs. Kenneth and Mamie Clark; however, social science was used throughout the entire litigation process. Each of the five segregation trials incorporated the testimony of social science experts, the strategy Carter believed would best demonstrate the harms of segregation (Bergner, 2009; Jackson, 2001). In *Briggs v. Elliott* (1952), Carter sought to prove two points through the use of expert testimony: first, that educational access and opportunities were unequal between African American students and white students; and second, that despite the facilities provided, segregation was psychologically harmful, and impeded on the rights of African American students under the Fourteenth Amendment. To prove the second argument, Carter planned to demonstrate the harms of segregation through the use of social science (Bergner, 2009). In his instructions to expert witnesses, Carter wrote:

> Although it would be wonderful to be able to demonstrate that segregated education imposes the disadvantages and hardships which we will try to establish, if we can demonstrate that segregation is the cause, we have succeeded in proving, Point II, in my opinion (Carter, as cited in Jackson, 2001, page 137).

Research to demonstrate the psychological effects of segregated education was very limited. Carter, acknowledging the limitation, did not attempt to isolate segregated education, but rather the general harms of segregation (Bergner, 2009; Jackson, 2001). Throughout the trials, the expert witnesses that testified on behalf of the NAACP focused their opinions on three key points: (1) there was no significant difference in the learning ability between African American students and white students; (2) segregation imposed a sense of inferiority on African American students; and (3) de jure segregation, more so than de facto segregation, contributed to the feeling of inferiority (Jackson, 2001).

The use of expert witnesses apexed at the testimony of Dr. Kenneth Clark. In 1947, psychologists Drs. Kenneth and Mamie Clark published a paper presenting the results of their studies of African American self-identification. Continuing the work stated by writers who published the Adverse Childhood Experience (ACE) studies, the Clarks focused their research on the racial self-preference of African American children (Bergner, 2009). The premise of their study was grounded in the work of Kurt Lewin, who studied self-loathing among Jewish individuals living in Nazi Germany (Jackson, 2000; Jackson 2001). Lewin theorized that the self-identity of Jewish individuals was influenced by the oppression by Nazi Germany. To demonstrate this theory, Lewin used force field analysis, a form of action research, to examine the factors or forces that influence a situation. A key characteristic of this approach was Lewin's interest in assessing a situation as a whole rather than only focusing on details. The Clarks sought to use the same theory, but to demonstrate the effects of segregation on the self-identity of African Americans (Jackson, 2001).

To prove their theory, the Clarks conducted a series of experiments better known as the doll tests. Using four different dolls, two African American and two white, identical except for

color, the Clarks examined the racial perception of children. The subjects in the study were 253 African American children between the ages of 3 and 7. Of the sample, 134 children were in segregated southern schools and 119 were in integrated northern schools. In the experiment, the children were presented the four dolls and were asked a series of questions that were categorized into three research themes. The first four questions were designed to reveal racial preferences; the next three questions asked participants to indicate knowledge of racial differences; and the final question was designed to reveal self-identification (Clark & Clark, 1947). In their results, the Clarks found that two-thirds of the African American children in the study rejected the African American dolls in preference of the white dolls. They wrote, "The importance of these results for an understanding of the origins and development of racial concepts and attitudes in Negro children cannot be minimized" (Clark & Clark, 1947, p. 175). The Clarks reached a similar conclusion in a second study published in 1950. Emphasizing the need to address the psychological and developmental harm to African American children caused by discrimination and prejudice, the Clarks suggested that schools could contribute to the reduction of these harmful beliefs.

The data from the Clarks' study was first presented in *Briggs* (1952). Dr. Kenneth Clark testified that discrimination and segregation had "detrimental effects on the personality development of African American children" (Johnson, 2001, p. 35). In *Briggs* (1952), *Brown* (1952), and *Gebhart* (1952), Clark's testimony was not challenged in cross-examination by opposing attorneys. In *Davis* (1952), however, state attorneys were aware of the NAACP's strategy to use social science experts and provided expert witnesses for the trial. The testimony of Dr. Clark, as well as the other expert witnesses in support of the NAACP, were criticized by the state's experts who provided their own social science data (Jackson, 2001). The use of social

science research in *Davis* (1952) proved to be ineffective for both sides, despite the ruling upholding segregation in schools as constitutional. In their ruling, the Court declared that the expert testimonies canceled each other out as both sides presented equally convincing arguments (Frankenberg, 2011; Jackson, 2001). In *Gebhart* (1952) and *Brown* (1952), the NAACP's strategy to use social science appeared to impact the outcomes of the cases (Jackson, 2001; Patterson 2001). In a victory, the court in *Gebhart* (1952) found that African American students were denied educational opportunities. The social science in this case went unopposed and seemed to have been a deciding factor for the decision (Frankenberg, 2011; Jackson, 2001; Kluger, 2004). In *Brown* (1952), the court upheld segregation, but issued a finding of fact endorsing social science:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school (Huxman, 1951 as cited in Patterson, 2001, p. 35)

Between October 1951 and December 1953, the NAACP LDF collaborated with social scientists on the appeal of school segregation cases. At the trial level, the NAACP LDF received mixed results on their use of social science research to challenge the separate but equal doctrine. The decision to include social science research in the appeal to the Supreme Court was challenged by increasing public scrutiny of Dr. Clark's doll test. In a 1952 article, Yale University law student William Delano argued that because the tests indicated the psychological harm began before the

child reached school age, any harm could not be linked to school segregation (Jackson, 2001). As their lead social scientist incurred criticism, the NAACP LDF continued preparing for the Supreme Court.

The NAACP LDF and the team of social scientists compiled an eighteen-page brief of social science evidence in support of their challenge to school segregation. The brief made only two arguments: (1) that segregation was psychologically harmful to both minority and majority group students; and (2), that desegregation could be accomplished easily if ordered by the courts (Jackson, 2001). The brief relied upon the experimental work of Dr. Clark and Isador Chein, the theoretical perspectives of psychologists Davi Krech and Theodore Newcomb, and the sociological works of E. Franklin Frazier, Gunnar Myrdal and Alfred McLung Lee (Bergner, 2009; Jackson, 2001; Kluger, 2004). To strengthen the weight of the brief, the NAACP LDF sought the signatures of as many scientists as possible. In the end, 32 social scientists signed the statement. The brief was filed in December 1952, when the Supreme Court heard the first oral arguments of the school segregation cases.

Brown and Footnote 11. On May 17, 1954, the Supreme Court announced its decision in the K-12 school segregation cases, finding that the segregation was a violation of the Fourteenth Amendment. Not only had the Court struck down decade's old precedent, but social science research was acknowledged and mentioned in the process. In his first opinion on the Supreme Court, Chief Justice Warren wrote:

> In approaching this problem, we cannot turn back the clock to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public

> schools deprives these plaintiffs of the equal protections of the laws… Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is supported by ample authority (*Brown v. Board of Education*, 1954, p. 492-494).

The modern authority Chief Justice Warren referred to was in the eleventh footnote of the opinion in which he listed seven sociological and psychological studies. In the following paragraph, the Court announced its verdict that segregation violated the Fourteenth Amendment.

The prominent mention of social science in the landmark decision was a clear victory for the NAACP LDF, and indicated that their strategy to include social science paid off (Jackson, 2001). The decision, however, not only marked the beginning of a years-long battle to integrate schools, it also began the discussion on whether social science had a place in the courtroom. Following the momentous case, the "conventional narrative" that social science research influenced the case outcome was quickly growing (Mody, 2008, p. 803).

Footnote 11 and the use of social science was put to the test in 1963 in *Stell v. Savannah-Chatham County Board of Education*. In this federal district court case, the plaintiffs argued that "admission to various public schools of Savannah-Chatham County is determined solely upon the basis of race and that plaintiffs are irreparably injured thereby" (*Stell v. Savannah Chatham County Board of Education*, 1963, p. 667). The school district, conversely, contended that the damage would occur if the races were to be mixed in a given class. To support their claim, the district employed the testimonies of several established social scientists including Dr. Ernest van den Haag, a social philosophy professor at New York University, Dr. R.T. Osbourne, a psychology professor at the University of Georgia, and Dr. Henry E. Garrett, Emeritus Professor of Psychology at Columbia University (Rublin, 2011). The experts provided evidence on the issues of group identity and learning differences between White and African American students,

suggesting that if the races were to be mixed, it could cause academic frustration in African American students and thus cause psychological and behavior harm (Rublin, 2011).

The plaintiffs did not contest the testimonies of the social science experts, nor did they provide any experts on their own. Instead, they relied on the precedent set forth in *Brown* (1954) and the evidence of psychological and sociological harm referenced in the Court's opinion. The district court found that at the heart of the *Brown* (1954) case was a question of fact, rather than a question of law, limiting its binding effect. In turn, the court reasoned that the evidence provided in the case had a "somewhat stronger indica of truth than that on which the findings of potential injury were made" (p. 680). As a result, the court did not find *Brown* (1954) applicable and dismissed the case (Rublin, 2011).

On appeal, the court's decision was reversed by the Fifth Circuit. According to the circuit court, lower courts are bound by the decision of the Supreme Court, regardless if such courts believe that the Supreme Court erred in their decision on the issues of fact or law (Rublin 2011). In its decision, the Fifth Circuit established that *Brown* (1954), supported by the social science of Footnote 11, was controlling. Furthermore, the ruling strongly suggested that if a legal conclusion that is meant to bind other courts is supported by social science, then the underlying social science becomes de facto conclusions of law, which are not disputable (Perry & Melton, 1983; Rublin 2011).

The *Stell* (1963) decision affirmed the NAACP's strategy to use social science to demonstrate the psychological harm of segregation to dismantle the legal segregation systems enforced in schools. Footnote 11 in the *Brown* decision was binding and subsequent desegregation litigation would follow the precedent set in the 1954 decision. The *Brown* (1954) case demonstrated the Court's willingness to consider empirical social science evidence to justify

finding de jure segregation an impedance to education equality (Moran, 2010; Morgan & Pullian, 2010). This willingness raised the possibility that judges might consider social science in other similarly important legal decisions. Furthermore, *Brown* (1954) revealed the role courts can play in articulating public policy in education, signaling to the social science community the types of research that could influence future Supreme Court cases (Moran, 2010).

Social Science in Amicus Briefs. In *Brown* (1954), the NAACP LDF assembled expert testimony from social scientists, sociologist, psychologists, and educators to demonstrate that the inequities of race were not due to biology, but were based in social and economic constructs; and that segregation practices reflecting scientifically unproven assumptions perpetuate the negative self-perception of African American children (Oakes, 2008). The sociological argument presented by the NAACP LDF illustrated the harm-benefit thesis, which suggests that school segregation is harmful and that desegregation is beneficial to educational and social outcomes of schooling (Armor, 1995 as cited in Oakes, 2008, p. 71). The "harm" in the argument focused on the social oppression of African Americans. Relying heavily on the work of the Clarks, the social science statement presented research and data supporting the argument that full integration addresses the harm of segregation and allows African American children equal educational opportunities (Oakes, 2008). The social science statement in *Brown* (1954) set strategic precedent in addressing the racial inequities in education.

In the years following *Brown* (1954), there was little social science presented to the Court regarding race related education policy, however, Justice Powell's opinion in *Bakke* (1978) did signal to the social science community the type of research that could influence future cases (Moran, 2010) . Interestingly, the *Grutter* (2003) and *Gratz* (2003) decisions saw an unprecedented amount of amicus briefs submitted to the Court. Specifically, when the

constitutionality of race-conscious admissions policies reached the Supreme Court in 2003, ample amounts of social science research detailing the benefits of a diverse student body had been thoroughly documented (Ancheta, 2006; Garces, 2013).

To illustrate, in *Grutter* (2003), ninety-eight amicus briefs were submitted to the Court; seventy-three in support of the respondent, nineteen in support of the petitioner, and six in support of neither party. Justice O'Connor relied on eight amicus briefs when delivering the opinion of the court. First, she cited the brief by Judith Areen et. al and the brief by Amherst College et. al to make the argument that "public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies" (*Grutter v. Bollinger*, 2003, p. 323). She then cited five briefs that supported the University of Michigan Law School's compelling interest in diversity; highlighting the educational benefits outlined in the brief from the American Educational Research Association and the "real" benefits in briefs by 3M, General Motors and the United States Military (Julius B. Becton Jr., et. al). She closed her discussion of the Law School's compelling interest by citing briefs by the United States and the Association of American Law Schools (Colker, 2007).

In 2006, the Supreme Court agreed to determine the constitutionality of voluntary integration plans implemented by K-12 districts to address trends of resegregation (*Parents Involved*, 2007). Similar to *Grutter* (2003), several amicus briefs were submitted to present social science evidence relevant to the Court's determination (Garces, 2013). Despite the large number of amici submitted in support of the school districts, the Supreme Court ruled against the use of voluntary integration plans. Since the decision, scholars have examined if social science was included in the opinion and how it was used. There is some debate on the influence social science had on the Court's opinion in *Parents Involved* (2007). Morgan and Pullin (2010)

asserted that very little social science evidence was cited in the Court's opinion, whereas a 2007 report by the National Academy of Education propositioned that the social science presented was used by the Court. Justice Breyer, in his dissent, had the most explicit use of social science, including evidence not included in the briefs. On the other hand, Chief Justice Roberts, who delivered the Court's opinion, made little reference to social science research (Morgan & Pullin, 2010). Justice Thomas' concurring opinion in *Parents Involved* (2007) criticized the cherry picking of social science research:

> …neither plan serves a genuinely compelling state interest. The dissent avoids reaching that conclusion by unquestioningly accepting the assertions of selected social scientists while completely ignoring the fact that those assertions are the subject of fervent debate. Ultimately, the dissent's entire analysis is corrupted by the considerations that lead it initially to question whether strict scrutiny should apply at all. What emerges is a version of "strict scrutiny" that combines hollow assurances of harmlessness with reflexive acceptance of conventional wisdom. When it comes to government race-based decision-making, the Constitution demands more (*Parents Involved in Community Schools v. Seattle School District No. 1,* 2007, p. 757)

Justice Thomas implied that social science research was only useful when there was an unanimity amongst social scientists regarding the outcomes (Morgan & Pullin, 2010). Due to the varying contexts and methodologies, unanimity within social science research is difficult to obtain; however, Frankenberg and Garces (2007) have pointed out that despite the lack in consensus, social science research has led to "several widely accepted conclusions regarding the benefits of racially diverse schools as well as the need to consider race in assignment policies to further these benefits" (p. 46).

The Use of Research in Education Policy Making

The use of social science research in educational policy making has continued to evolve since its most notable inclusion in *Brown* (1954) (Lubienski et. al, 2014; Natow, 2020). During the policy making process, research can be used in many different ways. Research can have a direct impact on policy or can influence policy by "focusing attention on issues that were previously unknown to decision makers, identifying opportunities for improving current programs and policies, or by providing information about the plausibility of policy theories of action" (Penuel, Briggs, Davidson, Herlihy, Sherer, Hill, Farrell & Allen, 2016, p. 7). Understanding how policy makers access and use research is important to addressing policy problems in education.

Brief History of Research Utilization

For the past several decades, most of the discussion about research utilization has focused on ways to increase use of social science research in government bodies (Weiss & Bucuvalas, 1980; Wells & Roda, 2016). Following the Great Society era in the 1960s, there was an increase in government support in social science research (Lagemann, 2000). Weiss and Bucuvalas (1980) noted that the programs established during this era were "being based on social science research, or at least on social science concepts and values" (p. 6 as cited in Wells & Roda, 2016). As a result, the federal government's role in K-12 education policy expanded as well as the involvement of social scientists (Lagemann, 2000). The influence of social science peaked in the 1960s, however, beginning in the same decade, the usefulness of social science was being called into question (Adams, 1976; Ness, 2010).

By the 1970s, the role of research in policy decisions had been greatly reduced, prompting scholars to examine the "research and policy nexus," including Carol Weiss (Ness,

2010, p. 5). After perceiving her research was ignored by the federal government, Weiss provided the foundation for modern research utilization studies (Lubienski, Scott & Debray, 2014). In 1979, she identified seven models of research use in the decision making process: knowledge driven, problem-solving, interactive, political, tactical, enlightenment and intellectual enterprise. An earlier study by Caplan, Morrison and Stambaugh in 1975 analyzed data from interviews with over 200 high ranking government officials which yielded 575 self-report instances of research influencing policy decisions (Ness, 2010). Another study by Caplan (1979) found that policy makers more often use empirical data for smaller, routine decisions and during larger decisions relied upon information from various different sources including social research data. In 1991, Robert Rich identified four assumptions of research utilization: "(1) information provided is of value; (2) the public would benefit from the use of this information; (3) political and bureaucratic considerations should not guide the use and acquisition of information; and (4) use of information by policy makers should be guided by the quality of information (p. 320 as cited in Ness, 2010). These assumptions cautioned scholars to go beyond the assumption that increased utilization would lead to better policies and aim to understand the role of research in policy making (Ness, 2010).

Background on Research Utilization

The term "research utilization" refers to the type of information and the extent that information is used during the policy making process (Ness, 2010; Weiss, 1977). Also known as "knowledge utilization," Dunn, Holzner and Zaltman (1985) described it as being "concerned with understanding and improving the utilization of scientific and professional knowledge in settings of public policy and professional practice" (as cited in Lester, 1993, p. 267). Larson (1980) defined knowledge utilization as "a complex process involving political, organizational,

socioeconomic, and attitudinal components in addition to the specific information or knowledge" (p. 424). A part of the discussion on research utilization is determining what makes research useful. Weiss and Bucuvalas (1977) explained useful involving "(1) whether the content makes an intrinsic contribution to the work of an agency; and (2) whether government officials says they would be likely to take that research into account in decision making" (Lester, 1993, p. 269). Weiss (1977) suggests that in its simplest form, research use "stresses the application of specific research conclusions to specific decisional choices" (Weiss, 1977, p. 533). As these definitions suggest, the primary aim of research utilization is how information is used to make policy decisions (Ness, 2010).

There are various ways to use research in policy making. Weiss (1979) identified seven models of research utilization in decision making: (1) knowledge-driven model; (2) problem-solving model; (3) interactive model; (4) political model; (5) tactical model; (6) enlightenment model; (7) intellectual enterprise model. Both the knowledge driven model and problem-solving model use social science research in practical instrumental ways, involving the direct application of the research to answer policy relevant problems. The interactive, political and tactical models describe ways social science research is used strategically to influence policymakers, and can be less direct or specific. The final two models, enlightenment and intellectual enterprise, demonstrate the broad implications of social science research on policymaking. Over time, scholars, including Weiss, have conceptualized research use into distinct categories including instrumental use, conceptual use and political use (Natow, 2020; Ness, 2010).

There are many different ways in which research is leveraged during policymaking. Sometimes research is used in a very observable and straightforward manner, providing research findings in direct response to a specific policy problem. This type of research use has been

categorized as instrumental use. Often described as "rational" and "problem-solving research," instrumental research use is a linear approach to research utilization in which empirical evidence is used to generate a solution. The process by which research is generated follows a specific sequence: (1) definition of pending decision; (2) identification of missing knowledge; (3) acquisition of social science research; (4) interpretation of the research for the decision context; and (5) policy choice (Weiss, 1979). Within this category of research use is the assumption that there is a consensus between the policy makers and researchers on goals. When policy makers turn to research on which to base their decision, the research used must align with their goals. Examples of instrumental use are when policy makers discontinue programs because research has shown them to be ineffective. Through this process, the research used by policy makers will have "direct and immediate applicability" for the policymaking process (Weiss, 1979, p. 428). Despite this applicability, instrumental use of research is a rare occurrence in policy making. Instead a less direct approach is taken by policymakers (Weiss, 1977).

Unlike the observable instrumental use of research, conceptual use is less straightforward and identifiable. Sometimes called the "enlightenment model" of research, conceptual use refers to the broad, long-term impact research can have on the understanding on specific policy issues (Ness, 2010). Considered to be the most frequent means by which social science research is introduced during the policy making process, conceptual use of research is less about providing specific findings than the concepts and theoretical perspectives that are a result of social science research (Weiss, 1979). Instead of involving direct connection between research findings and policy maker actions, conceptual use "provides context and definitions to better understand a policy matter" (Natow, 2020 p. 6). With conceptual use, evidence is often nonspecific and can

include other forms of knowledge such as historical information, statistical data and legal analyses (Farrell & Colburn, 2016, Natow, 2020; Ness, 2010; Oancea & Pring, 2009).

Despite its difficulty in tracing, the conceptual use of research can have an impact on policy making. Weiss (1977) argued that conceptual use of research "may be the most important contribution that social science makes to government policy," contending that the process provides the opportunity to introduce new perspectives and allows policy makers opportunities to orient themselves to problems and formulate solutions (p. 535). When used conceptually, research can extend its reach beyond influencing a single decision and can shape agendas (Farrell & Colburn, 2016).

Sometimes referred to as "ammunition," political use is tactical, and serves purposes as influencing pre-determined positions and delaying action (Weiss, 1979). Much like conceptual use, policy makers do not always provide specific citations about the research findings (Asen et al., 2011; Natow, 2020; Weiss, 1979). The political use of research is very prominent in policy contexts due to its influential nature. While Huberman (1990) described this model of research utilization as "manipulative," Weiss (1979) wrote that using research in a political manner is legitimate. While research can be used to influence policy, Alkin and King (2017) noted that research does not need to be identified as the basis of a policy to be considered research utilization, provided the research was discussed during the process (as cited in Natow, 2020).

In a 2020 study, Natow explored how different forms of research use "work in concert with each other during the policy making process" (p. 7). Prior to this study, observations of overlapping forms of research use were rare, however, other scholars of research utilization acknowledged the need to analyze how different forms of research use work together (Klemper et al., 2001; Natow, 2020; Nutley et al., 2007). Natow (2020) found that due to the political

nature of policymaking, research use in policymaking often involves combinations of political use with other traditional research uses, referred to as "politically infused uses" (p. 18). The study identified three politically infused uses: political-instrumental, political-conceptual, and political-imposed. Research, when used in a political-instrumental way, involves using research to address questions and problems that emerge during the policymaking process (Natow, 2020). Political-conceptual use occurs when research users distribute research that favors their political preference with the goal to change the perspectives of key decision makers. Finally, political-imposed, research use required by law or mandate (imposed use of research) is used to justify the policy reference of the research user. Natow (2020) suggested that future research should expand on how politically infused research may be used in other contexts, including other policy areas in education.

Standards of Research Utilization

The ways in which research is used can depend on conditions in the policy making process (Ness, 2010). Weiss (1991) identified three models of research: research as data, research as ideas, and research as argumentation. Research as data, which aligns with instrumental use, is most influential when "few alternatives are sharply opposed and when policy makers are analytically sophisticated" (Ness, 2010, p. 10). Conceptual use, which involves broad concepts and theoretical perspectives that provides context, is the utilization in which research as ideas would be seen. During the policy making process, research as ideas would be most influential in the early stages. Research as argumentation, on the other hand, is most influential after the policy decision has been made. When research is used politically, the aim is to increase support for a previously determined decision; research as argumentation would best fit this utilization (Ness, 2010; Weiss, 1991).

Conclusion

Connecting research and policy remains a challenge in education policy. The studies on research utilization have presented useful models for how research is used as well as provided insight on the types of research policy makers prefer (Ness, 2010). The aim of this study was to learn whether attorneys are using social science research when arguing cases involving race-conscious student assignment policy cases. The federal court system has a history of changing and even creating policy, and is continued to be used as a venue for policy challenges in education. As such, attorneys have an integral role in the judiciary led policy making process as they argue the need for certain policies. Understanding research utilization not only by the attorneys, but also the Justices during the oral arguments of education policy cases can improve the use of research in the legal arena and other educational policy making processes.

Chapter 3: Methodology

This study explores whether social science research was presented during six U.S. Supreme Court cases that examined race-conscious student assignment policies- *Bakke* (1978), *Grutter* (2003), *Gratz* (2003), *Parents Involved* (2007), *Fisher I* (2014), and *Fisher II* (2016). Specifically, I sought to answer two questions: (1) How, if at all, are attorneys using social science research in oral arguments that focus on student body diversity issues, and (2) how, if at all, have the Justices addressed the use of social science research in oral arguments that focus on student body diversity issues? "Student body diversity issues" fall under the umbrella of affirmative action program or race-conscious student assignment plans. If social science research was mentioned during the oral arguments, I will briefly discuss the study in order to provide some additional context.

Drawing from legal research methods to identify data sources, I will provide a review and analysis of oral arguments from Supreme Court cases involving race-conscious student assignments policies. The chapter consists of four sections. First, I will explain the limitations of previous research. The second section provides an argument for legal research in education. Next, I discuss the role of content analysis in legal research and how this approach will be used in this study. Finally, the chapter will close with a section on the process for data collection and analysis for the current study.

Limitations of Previous Studies

There is a significant amount of research on the use of social science in cases involving race-conscious student assignment policies. However, there is little research that has examined if and how attorneys include social science in oral arguments. Furthermore, there is limited research on how Supreme Court Justices address social science during oral arguments. Current

literature, instead, has focused on answering questions outside the scope of the specific questions asked in this study, including literature that focuses on the use of social science in amicus briefs submitted in cases; inclusion of social science research in Court opinions; and if and how social science influenced the Court's decision. Additionally, much of the previous research only examines one or a few cases, limiting the ability to develop a holistic view to identifying trends.

As discussed in chapter 2, social science research has long played a large role in litigation addressing race discrimination in education. Amicus briefs have become an increasingly popular means to influence a judicial opinion, as they inform courts of information that may be beyond its expertise. Oral arguments, however, are still regarded as a very influential component of the litigation process (Johnson, 2004). In addition to providing the Justices an opportunity to gather information beyond the formalized briefs and prior written opinions, oral arguments allow them to raise issues about information not explicitly included in briefs (Johnson 2004). No study addresses the interaction of the Justices and attorneys during oral arguments of cases involving race-conscious student assignment policies, nor are there studies that specifically explore if the interactions concern social science research.

Through a systematic content analysis of oral arguments from cases involving race-conscious student assignment policies, this dissertation provides information to school leaders, attorneys and social scientists. Since the 2016 decision in *Fisher II*, new challenges to race-conscious student assignment policies have been making their way through the lower courts (*Students for Fair Admissions v. President & Fellows of Harvard College*, 2020; *Coal. for TJ v. Fairfax Cnty. Sch. Bd., Civil Action No. 1,* 2021). In fact, the U.S. Supreme Court has agreed to hear another affirmative action decision in higher education during its next term; the case involves a challenge to the affirmative action plans at Harvard University and the University of

North Carolina (*Students for Fair Admissions v. President & Fellows of Harvard College*, 2020). By analyzing oral arguments of relevant cases, coding for social science inclusion and usage, this study provides the education law and policy community clarity on a topic that remains important in addressing education equity.

The Need for Legal Research in Education

Research in education policy is often related to a legal matter, however, legal research remains relatively underutilized. It was litigation that birthed desegregation into law and it was also litigation that led to more protections for historically marginalized student populations in schools. While litigation is something that many school leaders work to avoid, the outcomes shape much of the education system. Policies and practices within the education field are the product of law; therefore understanding the role of law is essential to education policy studies (Chemerinsky, 2003; Superfine 2010). Scholars of education law have long argued the need for legal research in the field of education (McCarthy, 2016).

Traditional Legal Research

A long-practiced method for attorneys, traditional legal research requires a thorough search and analysis of various sources of law (Russo, 2006). Posner (1981) described traditional or doctrinal legal research as the "careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions reconciling holdings, and otherwise exercising the characteristic skills of legal analysis" (p. 1113). Legal research involves exploring past case law, legislative history, and other historical documents to put meaning towards the question at hand. *Stare decisis*, which requires courts to follow historical cases- or precedence- when making a ruling in a similar case, contributes to the historical approach of legal research. Russo (2006), describing the reliance on

precedence, described legal research "as a form of historical-legal research" that involves "the interpretation and explanation of law" (p. 6).

Traditional legal research is very doctrinal, analyzing legal authorities to answer the question of law (Sughrue & Driscoll, 2012). Legal authority can be divided into two categories: primary and secondary authority. Primary authority is simply the law as authorized by a governmental branch and is the only binding source of law (e.g. legislation case law and statutes). Secondary authority, in contrast, is a private interpretation that describes, explains or analyzes the law such as law review articles, scholarly journals, and encyclopedias (Russo, 2006; Sughrue & Driscoll, 2012). Sources of primary and secondary authority should both be consulted when conducting legal research. The order in which a researcher consults each type depends on the purpose of the research. According to Russo (2006):

> The source of law one begins with is, in large part, a matter of preference depending upon how familiar one is with legal sources and research . . . an experienced researcher should be able to go right to a primary source, such as a Supreme Court opinion. On the other hand, a novice who is unacquainted with the intricacies of legal research might be wise to start with a secondary source such as an article . . . a law review, or an entry in a legal encyclopedia since these should provide information that can help the researcher to develop a full understanding of the issues (p. 36).

When locating these sources, legal scholars or practitioners can utilize electronic databases or websites such as Westlaw or LexisNexis, or visit a law or university library that houses hard copies of these documents (Russo, 2006). Legal scholars and practitioners can use the knowledge acquired from these sources to develop a reasoned notion as to the legality of the policy or practice (Sughrue & Driscoll, 2012).

Education Law Scholarship

Law continues to play "an increasingly significant role" in education policy (Eckes, 2017; McCarthy, 2016, p. 565). Historically, the courts have served a key role in education reform, including having an impact on segregation and affirmative action (Marin et al., 2018). As the courts are still being used to address divisive issues in education, the need for education law scholarship grows. Legal research, according to Russo (2006), can serve two purposes: (1) to inform practitioners and policymakers of legal issues, and (2) to raise questions for future research. In education, legal research includes "formal acts of government that shape public education, legal cases that involve educational agencies and/or the development of legal precedent" (Adler, 2015, p. 25-26). Furthermore, legal research can provide practical guidance on issues that are common in day to day decisions of school leaders (Sughrue & Driscoll, 2012).

Developed out of the demands from both education and law, education law scholarship has been described as legal rules that affect education (Russo & Stewart, 2001). According to Posner (1981) the increase of interdisciplinary legal research resulted from a decline of political consensus in the law community. With increasing reliance on scientific inquiry, the traditional research method did not account for context beyond law (Hollander, 2007). Priest (1993) offered a rationale underlying interdisciplinary legal scholarship,

> To understand the actual effect of law on society, however, it is essential to go beyond the law and legal doctrine. The law itself possesses neither an internal metric nor a methodology for determining effects. Obviously, the most promising avenues for studying the effects of law and social sciences that have been developed to study effects of other contexts (as cited in Hollader, 2007, p. 784).

Dworkin (1973) identified this type of legal research as broad legal research. A researcher that uses a broad approach to legal research, focuses on the wider implications of law, examining what effects law has on society and other fields of study.

Historically, complex issues in education policy have either been handled by educators or attorneys. The dichotomous resolution toward education policy issues has led to a gap between the practices of educators and the development of policies by lawmakers. This lack of cross-disciplinary knowledge can negatively impact the field of education (Redfield, 2003). The fluidity in education policy, as well as the long-term trends in law, requires a collaboration between educators and attorneys. Legal research can facilitate this intersection between the fields of law and education. Quoting Dr. Ellenmorris Tiegermann, founder of the School for Language and Communication Development, Redfield (2003) notes: "The interface of education and law creates a nexus, which is both conceptual and pragmatic in nature...The "legal educator" can provide a holistic view of the complex issues, which have historically been handled by either educators or attorneys" (p. 642). As Tiegermann highlighted, addressing issues of education policy will require a convergence of education and law scholarship. In an overly litigious society, school leaders must be equipped with the skills to understand the role of law in education. Oppositely, attorneys must understand and stay current with education policy (Redfield, 2003). Through legal research in education, practitioners and attorneys can address questions and make decisions regarding the issues in education policy (Russo, 2006). According to Russo (2006), "by using more than one approach, individuals who conduct systematic inquiry in the law can deepen their insights into their unique subject of study and can help others in their understanding of the relationship between law and education" (p. 21-22).

The purpose of legal research in education is to understand the legal authority that governs the law. Practitioners may conduct legal research to determine if the law is being followed in its application of a specific policy in education. Legal research, according to Sughrue and Driscoll (2012), plays a role in "(a) explaining government authority and responsibility for education; (b) exposing potential legal vulnerabilities that result from misguided or outdated educational policies and practices; (c) critically analyzing the unintended consequences of education law and policy that may deny education equity to students or that may infringe on the civil rights of teachers or of students and their families; (d) providing political and/or historical context to the law affecting education; and (e) informing policymakers and practitioners of the trends in judicial reasoning and in applied legal principles that determine the legality and reasonableness of law, policy, and practice" (p. 2). In short, legal research functions as an agent of accountability (Lee & Adler, 2006).

According to Heubert (1997), the "law is a powerful tool that educators can use to advance their most important aims" (pp. 574-575 as cited in Eckes, 2017). Education law scholarship is crucial to the development of education policy. The use of legal research to examine issues in education can inform school leaders about the tools to better understand court decisions and how to identify problems of practice. This study on social science research presented during oral arguments of cases involving race-conscious student assignment policies is an example of legal research in education.

Systematic Content Analysis

The legal research process is neither qualitative or quantitative in nature; however, both approaches may be used as a part of legal inquiry (Russo, 2006). As noted, legal research involves identifying trends in the law through the analysis of past decisions (Eckes, 2017). Thus,

legal research often employs a historical perspective on judicial decision-making because this perspective is an important channel for understanding the interrelationship of law and education. As noted by education law scholars Joe Beckham et al. (2005), this method "combines elements of legal reasoning with an evolutionary perspective on the genesis and development of particular issues relevant to education" (Eckes, 2017, p. 23). Beckham and his colleagues also suggest that our understanding of the law is transformed and informed through the adjudication of new cases. As such, the qualitative method of document or content analysis are often used to understand the impact of legal precedents (Hall & Wright, 2008). The current study examined the social science research presented during the oral argument in Supreme Court cases involving race-conscious student assignment policies using systematic content analysis.

Legal content analysis is considered a hybrid of traditional legal analysis and empirical legal studies, and an extension of content analysis. It reflects the systematization of empirical legal studies and traditional legal scholarship's attention to texts, and builds on the procedural method to derive valid inferences from texts (Hall & Wright, 2008; Oldfather, Bockhorst & Dimmer, 2012; Wells, 1990). Hall and Wright (2008) describe the SCA process as a systematic review of a set of documents, such as judicial opinions, and recording frequent themes and drawing inferences about their use and meanings. Hsieh and Shannon (2005) offered a similar definition of content analysis, describing it as "a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes and codes" (p. 1278). Weber (1990) provided the foundation of the method, outlining several steps for content analysis including identifying a coding scheme, defining categories, and assessing reliability of the coding process. The systematic approach of content analysis has since evolved to include an understanding of the text and analyzing the text as a whole (Hsieh &

Shannon, 2005). Content analysis can be applied in the analysis of a variety of texts, ranging from interview transcripts to legal texts (Salehijam, 2018). Hall and Wright (2008) proposed that content analysis could provide the basis for a unique legal empirical methodology as it can "identify patterns to be explored more deeply through interpretive, theoretical, or normative legal analysis" (p. 100). Studies that employ content analysis focus on questions of legal methods, judicial decision-making, and constitutional interpretation (Hall & Wright, 2008). In this study, content analysis was used to identify whether and how social science research is used in Supreme Court oral arguments.

According to Hall and Wright (2008), there are four stages in content analysis: (1) case selection, typically done via electronic legal search engines; (2) reviewing of sample codes and recording occurrences of the criteria; (3) analyzing the case coding; and (4) applying the code to the entire study. Salehijam (2018) suggested that content analysis could be more accurately described in five stages: "(1) determination of a suitable research question or hypothesis for content analysis; (2) identification and collection of sufficient data for analysis; (3) coding of the data, which has its own stages; (4) drawing of conclusions/observations; and (5) reporting the findings in a manner comprehensible to the legal community" (p. 36). The primary means of data collection in content analysis is coding. Hall and Wright (2008) proposed a four-step process of ensuring an effective coding process. First, the researchers should create a tentative set of coding categories based on the questions of the study. Next, the researcher should develop a codebook and a set of coding instructions, and apply these to the data set to be coded. Following the creation of the codebook, a pilot test should be conducted to ensure reliability among the coders. Next, the researcher should revise the coding categories based on the results of the pilot, and

repeat reliability testing as needed. Finally, when the codebook is finalized, apply it to all data (Hall & Wright, 2008).

SCA can be a useful tool to practitioners conducting legal research. The interpretive method can study the "connections between judicial opinions and other parts of the social, political or economic landscapes" (Hall & Wright, 2008, p. 100). SCA focuses overwhelmingly on judicial opinions, however, there are other documents involved in litigation that can yield beneficial information. Amicus briefs and presentations at oral argument have long been used as a means to inform the court of information that was beyond its expertise (Marin et al., 2018; Simpson & Vasaly, 2015). Through the application of SCA, I examined if and how social science research is present in oral arguments of Supreme Court cases involving race-conscious students assignment policies.

Data Collection and Analysis for this Study

The following section will provide an outline of the procedure I used based on the literature on systematic content analysis. The current study included steps of SCA offered by Hall and Wright (2008) and Salehijam (2018) presented in the previous section. While the overall procedure followed the five steps defined by Salehijam (2018), I followed the four steps of SCA outlined by Hall and Wright (2008) during the coding process.

Definition of Research

The definition of research has continued to evolve in the public policy arena. In 2002, research was defined as "the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to educational activities" (NCLB, 2002). Nutley and colleagues (2007) provided a broad definition, describing research as " any investigation towards increasing the sum of knowledge based on planned and systematic inquiry" (p. 21-22 as cited in

Natow, 2020). Asen et al. (2013) offered their own definition: "empirical findings derived from systematic analysis of information, guided by purposeful research questions and method" (p. 40). Perhaps the simplest definition, Penuel et al. (2016) defined research as "an activity in which people employ systematic, empirical methods to answer a specific question"(p. 15). Each of these definitions, while different, all share the common theme of systematic and methodological inquiry in response to a specific question (Natow, 2020). Social science research, specifically, involves answering a question of a social problem and examining social phenomena. Lune and Berg (2017) describe social science research as providing "necessary support for innumerable professions, bolstering and directing policy decisions, fact-checking both wild and mundane claims about the world, and helping us understand ourselves and others" (p. 9). For the purpose of this study, I defined social science research as an activity that involves systematic, empirical methods to answer a specific question of a social problem.

Procedure

The first stage of SCA is formulating a research question. Salehijam (2018) suggests ensuring the question is suitable for SCA. This specific method is commonly used in law when analyzing large volumes of data such as case law. The current study analyzed oral arguments from Supreme Court cases. Based on the established question and data set, SCA is an appropriate research design. In the second stage, I identified the data set that will be used in the analysis. The data set should be a reflection of the question being answered; and researchers should determine the data set based on the breadth and scope of their question. The current study examined Supreme Court cases involving race-conscious student assignment policies. The primary data sources for this study are the oral arguments and verbatim transcripts of the arguments from *Bakke* (1978), *Gratz* (2003), *Grutter* (2003), *Parents Involved* (2007), *Fisher I* (2014) and *Fisher*

II (2016) that are available on the Oyez Project website that is maintained by the Illinois Institute of Technology Chicago-Kent College of Law.

As described above, the third stage of SCA involves a coding process to identify common threads in the data (Salehijam, 2018). In this study, I conducted a multi-step coding process following the four basic steps of SCA described by Hall and Wright (2008). First, they recommend developing a tentative set of coding categories and refining the categories after "thorough evaluation, including feedback from colleagues, study team members or expert consultants" (p. 107). For this study, the research questions have established the coding categories. The second step recommends writing a coding sheet with instructions, also known as a codebook. I utilized an excel spreadsheet as the codebook to collect, record and organize codes. The third step of SCA is the primary phase of coding in which the researcher is to "add, delete, or revise coding categories based on this pilot experience, and repeat reliability testing…" (Hall & Wright, 2008, p. 107). For this step, I reviewed documents in the three phases. First, I listened to the oral argument two times, while following along with the transcript, noting any uses of the words relevant to the research question. During the second phase, I listened to the oral arguments, reviewing sentences to understand the context in which that specific word was used. In the third phase, I reviewed the codes to determine if social science research was used. As recommended by Hall & Wright (2008), I conducted a pilot, reviewing and coding two of the six documents. As will be discussed, I relied on peer-debriefing to help with validity concerns. In the fourth and final step, I applied the code to the entire data set. After completing the coding process, I interpreted the data, developing conclusions based on the findings, and presented the findings; the final two stages of SCA defined by Salejiham (2018).

Establishing Validity

Both Salehijam (2018) and Hall and Wright (2008) have described SCA as a method to enhance traditional legal research. When used properly, SCA can strengthen legal research; however, there are challenges in using the method. Establishing validity is a primary criticism of legal research as it is often seen as lacking objectivity. SCA employs qualitative research methods to which there are several procedures that are routinely used to establish validity, including member checking, triangulation, and external audits are used (Creswell & Miller, 2000).

An external audit, also known as peer debriefing, is the review of the data and research process by someone familiar with the research. The primary role of the peer debriefer is to challenge the researcher's assumptions and ask the hard questions about methods and interpretations (Creswell & Miller, 2000). Lincoln and Guba (1985) define peer debriefing as "the process of exposing oneself to a disinterested peer in a manner paralleling an analytic session and for the purpose of exploring aspects of the inquiry that might otherwise remain only implicit within the inquirer's mind" (p. 308). They offer four purposes of peer debriefing: (1) a peer can reduce researcher bias; (2) the debriefing supports the researcher in testing emerging hypotheses; (3) the peer can help the researcher test methods to establish reliability; and (4) the process provides the researcher emotional support and encouragement (Lincoln & Guba, 1985). The close collaboration between the researcher and the peer debriefer not only adds credibility to the study but also serves as a support to the researcher. For this study, I used a peer debriefer familiar with qualitative research and reviewing the codes that were identified to ensure there were no gaps in the analysis. The peer debriefer was especially helpful to me when determining whether the social science research discussed during the oral argument met my established

definition. As noted, I defined social science research as an activity that involves systematic, empirical methods to answer a specific question of a social problem.

Limitations

The research was designed to examine the use, misuse, and nonuse of social science research during oral arguments of cases involving race-conscious student assignment policies. Supreme Court oral arguments last roughly an hour, with a 30-minute time restriction for each side to present their arguments. In addition to time constraints limiting what attorneys can discuss, justices can interrupt at any moment with questions or comments, further reducing the attorney's time. Understanding the time constraints, the researcher acknowledges it may impact what attorneys present during oral argument.

As discussed earlier in the chapter, there are limitations to SCA must consider. SCA is a blended method involving traditional legal research and qualitative methodology (Hall & Wright, 2008; Salehijam, 2018; Sughrue & Driscoll, 2012). Challenges of the method include its uniqueness, limited utility, and data collection validity (Salehijam, 2018). Despite growing recognition in the legal and social science community, SCA is still not widely used and subject to criticism. According to Hall and Wright (2008), the limited utility of the method makes one "trade depth for breadth" to an extent; however, Siems and Sithigh (2012) emphasize the powerful use of the method in saying SCA "may prove an eventual disciplinary consensus, turning law into a mature science" (as cited in Salehijam, 2018, p. 38)

A final limitation of the study is my lack of legal training. As a school counselor, I have little direct experience in law. Even though I did complete a 12-credit Education Law Certificate I am not a legal scholar or attorney. Thus, some of the terminology used by attorneys and the

Justices in the oral argument might be unfamiliar. To address these issues, throughout the study, I worked closely with my dissertation chair who is an education law professor and attorney.

Conclusion

Systematic content analysis is the appropriate method for analyzing the use of social science during the oral arguments of cases involving race-conscious student assignment policies. As the courts become a favored means to influence education policy, understanding how research is used in the legal arena is essential (Marin et al., 2018). The current study provides a foundation for exploring the role of social science research in arguing for the educational benefits of diversity.

Chapter 4: Findings

My study included an analysis of six U.S. Supreme Court cases involving race-conscious admissions programs or student assignment policies. I examined six oral arguments from these cases in order to answer the following two research questions, which are the focus of this study:

(1) How, if at all, are attorneys using social science research in oral arguments that focus on student body diversity?

(2) How, if at all, have the Justices addressed the use of social science research in oral arguments that focus on student body diversity?

As discussed earlier, I define social science research as an activity that involves systematic, empirical methods to answer a specific question of a social problem. I also mentioned in Chapter 3 that I independently coded each document (i.e., oral argument transcript) and recorded the data into a codebook. I coded each document in three phases. During the first phase, I listened to the oral arguments and followed along with the transcripts, noting any uses of words relevant to research (i.e. study, data, social science). During the second phase, I listened to the oral arguments again, reviewing sentences to understand the context in which that specific word was used. Finally, in the third phase, I reviewed the codes to determine the use of research. In the following sections arranged by case, examples from the attorneys and the Supreme Court Justices are presented to explain how social science research was or was not used during the oral argument. For those oral arguments in which social science use was discussed by the attorneys or the Justices, I also included an abstract from the cited study to provide some additional context about what was being discussed during the argument.

Regents of the University of California v. Bakke Oral Argument

On the morning of October 12, 1977, the U.S. Supreme Court sat to hear the oral arguments for the first case involving race-conscious admissions policies in higher education. Sitting for the oral arguments were Chief Justice Warren Burger, Justice Lewis Powell, Justice John Paul Stevens, Justice Harry Blackmun, Justice William Rehnquist, Justice Bryon White, Justice Thurgood Marshall, Justice William Brennan, and Justice Potter Stewart. While *Bakke* was the first affirmative action case to be heard by the Court, members of the Court were familiar with earlier cases involving race and education policy. All Justices, with the exception of Powell and Stevens, had examined a major case involving school desegregation. Justice Marshall, who served as chief counsel for the NAACP, argued before the Court the landmark case *Brown v. Board of Education* (1954) in addition to sitting for various other school desegregation cases. Leading the legal team for UC-Davis, Archibald Cox had an extensive background in arguing before the Court. In addition to being a former U.S. Solicitor General, Cox was also the special prosecutor during Watergate. Representing the interests of the United States, Wade McCree, the second African American Solicitor General, argued in support of the admissions program at UC-Davis. Unlike Cox and Solicitor General McCree, Reynold Colvin, who was representing Allan Bakke, had no experience arguing before the Supreme Court. Colvin was a well-respected attorney who practiced in California.

The oral arguments began promptly at 10:00 am and ended at 11:58 am (Schwartz, 1998). Due to the importance of the case, the Court granted *Bakke* two hours and forty-five minutes, an increase from the usual one-hour oral argument (Williams, 1989). Archibald Cox was first to argue, followed by McCree and then Colvin. Both Cox and McCree argued that the use of race as a factor in the admissions process was necessary to remedy issues relating to the harsh

realities of past and persisting discrimination in education. Colvin, on the other hand, argued that the use of racial quotas in the admissions process was unconstitutional under the Fourteenth Amendment.

***Bakke*: The Use of Social Science Research**

When arguing for the use of race in admissions policies, very little social science research was offered by Cox or McCree. To illustrate, the only reference to social science in the oral argument occurred when Cox directed the Justices to a study included within the university's brief that was submitted to the Court. When referencing this study, Cox was specifically answering a question from Chief Justice Burger regarding the use of alternatives to race in admissions. In answering the question, Cox provided two suggestions about any alternatives to using race in admissions. The first suggestion was to build more medical schools. He reasoned that an increase in medical schools would allow for more students of color to attend. The second suggestion was to improve recruiting efforts to increase the enrollment of students of color. When explaining the second suggestion, Cox referred the Justices to a study within the University's brief.

> **Attorney Cox**: That suggestion seems to us to overlook the extensive recruiting efforts that were made during the late 60's that are describe *[sic]* in Odegaard minorities in medicine which incidentally is probably the best reference spoke on this subject and other references in our brief.

"Odegaard minorities in medicine" is a reference to *Minorities in Medicine, From Receptive Passivity to Positive Action 1966-76*, a book by Charles E. Odegaard[3]. A more detailed discussion about the book will be included in Chapter 5.

[3] This book assesses the experience of medical schools during the last decade in their deliberate efforts to increase the number of minority students in medicine. Sources for the report include journal articles, a previously published

This publication met my definition of social science research, but it was clear from the exchange above that the attorneys and Justices did not engage in any active discussion about the study. There were three other instances where research was mentioned, but these brief references, did not meet the definition of social science research used in this study. For example, Attorney Cox brought up the "Carnegie of Higher Education" when he was asked about the exclusion of minority students in medical school.

Solicitor General McCree also used research to try to bolster his argument for the use of race in admissions policies including a quote from a legal scholar. In his opening statements, he emphasized the relevance of historical experiences including a quote by Michael J. Zimmer, Associate Professor of Law at Wayne State University, who was visiting the University of Illinois at the time. Similar to the reference to the "Carnegie of Higher Education," this article did not meet the definition of social science research.

The use of social science research in *Bakke* (1978) was limited to one reference by Cox when discussing race-neutral or alternative admissions plans during his oral argument. While there were other attempts to include research during oral arguments, the uses were either too vague to make a determination if it met the definition of social science research or simply did not meet the definition of social science research. As the first case that addressed affirmative action in higher education, little literature on the impact of race-conscious admissions or the educational benefits of diversity existed. It was not until Justice Powell's opinion in *Bakke*,

---

survey and evaluation of equal educational opportunity in health professions schools, and visits to forty medical schools. Beginning in 1968 there was a movement to bring more minority students into the study of medicine. The range and interest of individual medical schools involved in equal educational opportunity efforts varied enormously. Two possible deterrents to positive action are legal difficulties and the need for money. Further positive change to keep the program of action moving ahead in many medical schools depends upon refurbishing their commitment to positive action on behalf of minorities. The list of types of helpful programs for minorities has grown rapidly since 1968. A description of special programs developed to recruit minorities into medical schools and to improve their chances of graduating is included (Odegaard, 1977).

which acknowledged diversity as a compelling interest, that literature on the topic gained momentum. The effect of his opinion on social science research would be seen in the affirmative action cases to come.

Grutter v. Bollinger Oral Argument

On Tuesday, April 1, 2003, amidst a tense backdrop of various advocacy groups and private citizens occupying the steps of the U.S. Supreme Court, the Justices prepared to hear the first of two arguments involving admissions policies at the University of Michigan. The composition of the Court had changed since *Bakke* (1978), and there was no consensus on how the Court would decide this case. Only Chief Justice William Rehnquist and Justice John Paul Stevens sat for the 1977 oral arguments. Of the newer members of the Court, Justices Clarence Thomas and Antonin Scalia were expected to oppose affirmative action, and Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer were expected to vote in support of the university's admissions policies. Both Justices Sandra Day O'Connor and Anthony Kennedy were considered the swing vote.

At 10:00 am sharp, the Justices sat to hear the oral arguments of *Grutter*. Washington D.C. attorney and former clerk to Chief Justice Rehnquist, Maureen Mahoney represented the law school program at the oral argument. Kirk Kolbo and Bush-appointed U.S. Solicitor General Ted Olsen argued in support of the plaintiffs. Oral arguments ended at 11:04 am, and for the second time in the history of the U.S. Supreme Court, recordings of the oral arguments were released the same day.

Grutter: The Use of Social Science Research

Developing an argument for the use of race in admissions policies, Mahoney turned to *Bakke* (1978). In the debate regarding race-conscious admissions policies, Harvard University is

cited frequently. Specifically, in his opinion for *Bakke* (1978), Justice Powell cited the "Harvard College program" as the model race-conscious admissions program because it did not use a numerical quota. He wrote:

> In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according to them the same weight…This kind of program treats each applicant as an individual in the admissions process. (p. 437)

Justice Powell's acknowledgment of the Harvard plan in *Bakke* was intensely debated in *Grutter*. When Chief Justice Rehnquist and Justice Scalia questioned Mahoney regarding the Harvard plan, she turned to Justice Powell's opinion in which he cited a study by the Carnegie Council on Policy Studies in Higher Education in a footnote.

> **Chief Justice Rehnquist**: Can…can we tell from the statistics whether things have been achieved say, more and more minorities are getting in on their own to the University of Michigan Law School without the quotas?
>
> **Attorney Mahoney:** Yes.
>
> **Chief Justice Rehnquist:** Or whether—
>
> **Attorney Mahoney:** Yes, they're not quotas, Your Honor.
>
> **Chief Justice Rehnquist**: --The critical mass?
>
> **Attorney Mahoney**: We know aspirations. At per rations moan *[sic]* but we do not know Your Honor that there has been improvement, in fact, Justice Powell cited to a study. It was by Manning it's in footnote 50 of Justice Powell's opinion and it gives the number of minorities who had achieved a 165 and a 3.5 on the LSAT.

The 1977 study by Winston Manning examined fairness in the selective admissions process[4]. The study was part two of a three-part report published by the Carnegie Council on Policy Studies in Higher Education titled *Selective Admissions in Higher Education. Public Policy and Academic Policy; The Pursuit of Fairness in Admissions to Higher Education; The Status of Selective Admissions.*

Later in her argument, Mahoney referenced a study by Gary Orfield (Figure 3) in response to Justice Steven's inquiry about an endpoint to the need for race-conscious admissions policies and whether the program causes racial hostility.

> **Justice Stevens**: Ms. Mahoney, may I ask you a question that is really prompted by Justice O'Connor's question about the terminal point in all of this? And we're all hoping someday race will be a totally irrelevant factor in all decisions, but one of your arguments on the other side of your case is that there's actually... these programs actually generate racial hostility particularly on the part of the excluded members. And that in turn delays the ultimate day we are all hoping for. What is your comment about that?
>
> **Attorney Mahoney**: The record certainly does not support that inference under this program. And the reason is this: The program... one of the ways to prevent that from happening is to have a narrowly tailored program to have very limited consideration of race and not to, for instance, have too great a disparity between the qualifications of the

[4] The selective admissions issue in higher education is examined in this book from three perspectives. Part One on public policy and academic policy includes comments and recommendations by the Carnegie Council on Policy Studies in Higher Education. A report by Winton H. Manning in Part Two deals with fairness, including: the role of values in pursuing fairness in admissions; institutions and individuals in the admission process; arguments for consideration of race in admissions policies; educational due process in admissions; a two-stage model of the admissions process; special programs; and decision strategies. In Part Three the status of selective admissions is examined by Warren W. Willingham and Hunter M. Breland in association with Richard I. Ferrin and Mary Fruen. It covers: selective undergraduate admissions; admissions to graduate schools of arts and sciences, law schools, medical schools, and management schools; and use and limitations of selection measures.
(Carnegie Council on Policy Studies in Higher Education, 1977)

> white students who are admitted and the minority students who are admitted under the program. Here it's actually quite limited. In fact, you know, the vast... the most... the most of the minorities who are admitted are in the top 16 percent of all LSAT takers in the country. So we're talking about a really exceptional group of students. By keeping the relative qualifications fairly close, like that, you really minimize the potential for any kind of stigmatizing or hostility, that sort of thing. And what the record shows is that in the Orfield study which was done of Harvard and University of Michigan's students, it's in the record at Exhibit 167, that there is overwhelming support by the students at Harvard and Michigan Law Schools for maintaining the diversity program, because they regard it as so positive. That's—

Orfield, who at the time was a professor of education and social policy at Harvard University, served as the expert witness on behalf of the University of Michigan. His expert report was a collection of articles he had published on issues involving race and admissions policies. Within the collection of articles was a 1999 study he conducted with Dean Whitla that explored the impact of diversity on the experiences of students[5].

The findings of the Orfield and Whitla study align with the judgment of Justice Powell in *Bakke* and supports Attorney Mahoney's argument that diversity is educationally beneficial to students, regardless of race. In response to her reference to the study, Justice Scalia rejected the findings, suggesting those students who were surveyed would not feel resentment because they were actually accepted into the university.

[5] This study reports on the experiences of students captured in a high response-rate survey administered by the Gallup Poll at two of the nation's most competitive law schools, Harvard Law School and the University of Michigan Law School, as well as through data collected through an email/internet survey at five other law schools. The data indicate that the Supreme Court was correct in its conclusions about the impact of diversity in Bakke and earlier higher education decisions. (Orfield & Whitla, 1999)

> **Justice Scalia**: The people you want to talk to are the high school seniors who have seen... who have seen people visibly less qualified than they are get *[sic]* into prestigious institutions where they are rejected. If you think that is not creating resentment, you are just wrong.

While he rejected the findings presented by Orfield (1999), Justice Scalia did reference social science research of his own when questioning Mahoney's reference to the Harvard plan Justice Powell included in his opinion on *Bakke* (1978).

> **Justice Scalia**: Did... did the Court know what... what social scientists have later pointed out and many people knew before it that when the Harvard plan was originally adopted, its purpose was to achieve diversity by reducing the number of Jewish students from New York that were... that were...that were getting into Harvard on the basis of merit alone.

While there was no specific citation included in Justice Scalia's response to Mahoney's argument of the educational benefits of diversity, his reference points to not only the Court's consideration of research but the Court's own use of research during the oral arguments.

Ms. Mahoney's multiple references to research demonstrated her ability to draw upon social science research to support her argument for the continued consideration of race in admissions policies. In addition to tying the Manning (1977) study back to the precedent set in *Bakke* (1978), Mahoney referenced a well-respected scholar on race issues in education, Gary Orfield. Furthermore, her social science research references prompted an exchange between herself and the Justices, including the vague social science reference by Justice Scalia when he tried to discount the benefits of affirmative action programs. The increase of social science research since *Bakke* (1978) was apparent in the oral arguments in *Grutter* (2003).

Gratz v. Bollinger Oral Argument

At 11:06 am, just one minute after the closing of *Grutter*, the Court heard the oral arguments for the second Michigan case, *Gratz v. Bollinger*. While the *Grutter* case examined the law school's admissions policy, *Gratz* involved the review the University of Michigan's undergraduate admissions policy in one of the University's colleges. Mr. Kolbo and U.S. Solicitor General Olson again argued on behalf of the plaintiffs. Representing the University of Michigan was John Payton, an African American civil rights attorney who was eventually appointed as the sixth president and director-counsel of the NAACP Legal Defense Fund. Much like *Grutter*, the case outcome was widely anticipated.

At the center of the case was the constitutionality of an admissions program that awarded points based on the applicant's race. Payton argued the educational benefits of diversity, echoing Justice Powell's recognition of diversity being a compelling state interest in *Bakke* (1978), when defending the constitutionality of the admissions program. The plaintiffs challenged the program, arguing that the "mere" social benefit of diversity "does not rise to the level of compelling interest," nor does it satisfy strict scrutiny (*Gratz v. Bollinger*, 2003).

Gratz: Use of Social Science Research

The oral arguments of Kolbo and Payton differed greatly, aside from argument points, as Payton relied on social science research and Kolbo offered very little. In his time before the Court, Payton spent time discussing the educational benefits of a diverse student body referring to expert reports that cited social science research when explaining the connection between race-conscious admissions and student outcomes.

> **Attorney Payton**: In the record, we actually have an expert report that's not contradicted in any way by Professor Raudenbush and by Professor Gurin, just on the issue of how do

you know when you have enough students in different contexts and circumstances that there will be these meaningful numbers.

Patricia Gurin, now the Nancy Cantur Distinguished University Professor Emeritas of Psychology and Women's Studies at the University of Michigan, and Stephen Raudenbush, the Lewis-Sebring Distinguished Service Professor in the Department of Sociology at the University of Chicago, who then was a professor of sociology at Michigan conducted their own respective studies on the benefit of diversity[6]. While I could not access all of Raudenbush's report to provide an abstract, I do have results from his report which will be discussed in chapter 5. Later in his argument, Payton clarified his reason for his reference to Gurin and Raudenbush in response to a question from Justice Souter.

Justice Souter: Has anyone at Michigan ever defined critical mass as being anything more specific than something beyond token numbers?

Attorney Payton: I think that the reason I referenced the two expert reports by Professor Raudenbush and Professor Gurin is to try to see this... those two reports try to put this in sort of an everyday example, you know, students don't interact with the student body as a whole, they interact in small settings and it's to see if you see what our minority student population is how that would distribute into these small settings. And on the basis of how that distribution works, Professor Gurin looked at it to see whether or not that looked like

[6] A racially and ethnically diverse university student body has far-ranging and significant benefits for all students, non-minorities and minorities alike. Students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting. In fact, patterns of racial segregation and separation historically rooted in our national life can be broken by diversity experiences in higher education. This Report describes the strong evidence supporting these conclusions derived from three parallel empirical analyses of university students, as well as from existing social science theory and research.

that would be generating the interactions that she would expect for these educational benefits.

The reference to the two expert reports demonstrates Payton's reliance on the social science research to convey to the Court the need for a race-conscious admissions plan to create the critical mass necessary for educational benefit.

In the discussion of the consideration of race in admissions policies, the constitutional concern is whether white students are treated fairly under the current points system the University of Michigan had implemented. Specifically, as discussed, the undergraduate program had created a point system where some students were given additional points if they were from an underrepresented group. Justices Kennedy and Breyer pressed Payton for a response to their inquiry on the school's review committee being able to ignore the points.

Justice Breyer: So I want a clear answer to this. That review committee can look at the applications individually and ignore the points?

Attorney Payton: And it does. In *Bakke*, where Justice Powell says that he could look at one example of an admissions policy and he discusses briefly the Harvard plan and then he has a long quote from it, there is the footnote 50 that Ms. Mahoney mentioned. In both footnote 50 and footnote 51 there is a citation to this study by Carnegie and he introduces that by saying in the footnote there are in this study examples of the actions by other leading institutions, trying to get diverse student bodies. That study indicates that there are plenty of other models where in fact some effort to come up with a system to handle these different factors was successful.

The Carnegie study that Payton references is the same that Attorney Mahoney referenced by name in *Grutter* (2003). Manning (1977), the study's author, explored whether minority status should be an explicit criterion in the admissions process. Specifically, he looked at this question in several frameworks including education versus legal; group versus individual equity; and sponsored admissions versus the contest process of individual students. Manning (1977) concluded that race is a relevant criterion in the admissions process to enable historically marginalized groups access to higher education.

In one of the more observable uses of social science research, Payton not only referenced the study, but also provided a detailed explanation for his choice to include the research. The reports by Gurin and Raudenbush, both professors at the University of Michigan at the time of the case, provided a direct link between the research and the case in question. Payton's final use of social science research- the Manning report from 1977- like Mahoney, connected back to *Bakke* (1978), which at the time was the guiding precedence on affirmative action. As the literature on the educational benefits of diversity grew, the likelihood of the inclusion of this research in oral arguments has also increased, as seen in *Gratz* (2003).

Parents Involved in Community Schools v. Seattle School District No. 1 **Oral Argument**

A decade after a trilogy of U.S. Supreme Court rulings in the 1990s eased the schools' release from desegregation orders, the Court heard the oral arguments for *Parents Involved* on December 4, 2006 at 10:00 am. Prior to *Parents Involved*, the Court never fully addressed the issue of voluntary integration or race conscious admissions efforts in K-12 education. The blurred line between what school districts may do and what school districts must do in terms of integration against a backdrop of resegregation made the case especially timely.

Since the Michigan cases three years earlier, there were changes to the composition of the Court. Originally nominated to replace retiring Justice Sandra Day O'Connor, Chief Justice John Roberts was re-nominated for chief justice following the passing of Chief Justice Rehnquist. Justice Samuel Alito was confirmed in January 2006 to replace O'Connor. In comparison to the preceding Rehnquist Court, the Roberts Court is considered more conservative. In terms of experience with cases involving school desegregation, Justices Scalia, Kennedy, and Souter heard both *Dowell* (1991) and *Freeman* (1992). Justices Scalia and Kennedy joined the majority in those earlier cases holding that once a school district has made sufficient effort in complying with desegregation and has eliminated the vestiges of past discrimination, the segregation decrees could be dissolved.

In a change from the higher education affirmative action cases, the attorneys in this case were all white males. Representing the school district was Michael Madden, a Seattle attorney with wide ranging appellate experience. Harry Korrell, a Chicago based attorney, represented the plaintiffs. Neither Madden or Korrell had experience before the Supreme Court. Korrell was joined by U.S. Solicitor General Paul Clement, who before his appointment was a law clerk to Justice Scalia.

***Parents Involved*: Use of Social Science Research**

In the only case that addressed race conscious admissions policies at the K-12 levels, there was an overall absence of social science research during the oral argument. Arguing on behalf of the school district, Attorney Madden spent a great deal of his time before the Court establishing the need for race conscious remedies: to prevent racial isolations in schools and prepare students to live in a diverse society. He, however, did not reference any social science research to support his arguments, other than the generic statement:

Attorney Madden: The goal is to maintain the diversity that existed within a broad range in order to try to obtain the benefits that the educational research show flow from an integrated education.

While there is a large library of literature that describes the educational benefit of diversity, Attorney Madden did not offer any specific studies that would demonstrate the benefits that he argued. Instead, much of the evidence provided to support his arguments were based on precedence from earlier court decisions and data from the school district.

Fisher v. The University of Texas Oral Argument

The Supreme Court revisited affirmative action in higher education nearly ten years after the ruling in *Grutter* (2003) and *Gratz* (2003), when it heard arguments in *Fisher I* on October 10, 2012 at 11:04 am. The petitioner in the case made a tactical decision to not challenge the principal holding in *Grutter* (2003). The admissions policy in question was developed under the confines of the Supreme Court decisions in *Grutter* (2003) and *Gratz* (2003). Instead, the university was challenging the implementation of the affirmative action plan and argued that the plan was not narrowly tailored.

Arguing on behalf of the University of Texas, Gregory Garre had a well-established record before the Court. He served at the 44th U.S. Solicitor General and was the second former law clerk of Chief Justice Rehnquist. In another change from most recent cases involving race-conscious admissions policies, the U.S. Solicitor General Donald B. Verilli, Jr. argued as an amicus curiae supporting the University of Texas. Prior to his appointment to succeed Elena Kagan, Verilli was a law clerk to Justice Brennan, a supporter of race-conscious admission policies. Kagan, who was nominated to the Court in 2010, recused herself from *Fisher* because of her involvement in earlier litigation related to this case while she was Solicitor General. Sonia

Sotomayor, the first woman of color on the Court, who joined the Court in 2009, heard her first case involving race conscious admissions in higher education.

Fisher I: Use of Social Science Research

In a continuation of the Supreme Court's negotiation of the constitutionality of race conscious admissions policies, Garre argued the benefits of diversity in educational settings (Ancholonu, 2013, p. 206). Like *Grutter* (2003), a central issue was the defining of critical mass. In an exchange with Justice Scalia, Garre referenced a study by the University of Texas.

> **Attorney Garre**: This Court in *Grutter*, Your Honor, and maybe the most important thing that was said during the first 30 minutes was, when given an opportunity to challenge *Grutter*, I understood my friend not to ask this Court to overrule it. This Court in *Grutter* recognized the obvious fact that the classroom is one of the most important environments where the educational benefits of diversity are realized, and so the University of Texas, in determining whether or not it had reached a critical mass, looked to the classroom along with–
>
> **Justice Scalia**: Fine, I'm asking how. How did they look to the classroom?
>
> **Attorney Garre**: Well, Your Honor—
>
> **Justice Scalia:** Did they require everybody to check a box or they have somebody figure out, oh, this person looks 1/32nd Hispanic and that's enough?
>
> **Attorney Garre**:--They did a study, Your Honor, that took into account the same considerations that they did in discussing the enrollment categories--
>
> **Justice Scalia**: What kind of study?

Following the *Grutter* (2003) decision, the University of Texas Board of Regents authorized each of the institutions within the system to examine whether to consider the race of the applicant during the admissions process "in accordance with the standards enunciated in *Grutter* (2003)" (*Board of Regents of the University of Texas*, 2003, p. 4). In response to the resolution, the University of Texas commissioned two studies to examine whether the university was enrolling a critical mass of minority applicants. Both studies were conducted in the fall of 2003. The first study examined student of color representation in undergraduate classes[7], while the second study explored student perception of diversity on campus. Results of the second study were included in the deposition of Dr. Bruce Walker, then Vice Provost and Director of Admissions; however, I could not access these documents.

After introducing the study, both Chief Justice Roberts and Justice Scalia engaged in a dialogue with Garre, asking questions to understand how this study measured classroom diversity. At one point, Garre had to clarify that the diversity study conducted by the University of Texas was not the only source of data the University relied on when deciding to implement a race conscious admissions policy.

> **Attorney Garre**: Of course, each classroom, the university knows which students are taking its classes and one can then, if you want to gauge diversity in the classrooms, go back--
>
> **Chief Justice Roberts**: Oh, you go back to what they checked on the form.

[7] Recent United States Supreme Court rulings on affirmative action in higher education have become an occasion for selective colleges and universities to audit their admission policies and their underlying philosophy. Specifically, the Court's emphasis on educational benefits focuses on diversity, not of a campus or entering freshman class, but where teaching takes place—in the classroom. This document reports the results of an investigation into levels of diversity in undergraduate classrooms at The University of Texas at Austin from 1996 through 2002. (University of Texas, 2003)

Attorney Garre:--Your Honor, this was a part of a--

Chief Justice Roberts: That's a yes or no question. You go back to what they checked on their application form in deciding whether Economics 201 has a sufficient number of African Americans or Hispanics?

Attorney Garre:--That is information that is available to the university, Your Honor, the race of students if they've checked it on the application. But I do want to be clear on this classroom diversity study. This was only one of many information points that the university looked to.

In an exchange with Justice Alito regarding students of color who were not admitted under the Top 10 Percent plan, Garre acknowledged the study was conducted prior to the admissions plan at issue. Under the Top 10 Percent plan, adopted in 1997, Texas high school seniors in the top 10 percent of their class are automatically admitted to any Texas state university. The Top 10 Percent Law did not admit students on the basis of race; however, underrepresented minorities were a targeted group under the law. According to 2004 enrollment data, 77% of enrolled African Americans and 68% of Hispanics had been admitted under the law.

At the time of *Fisher I*, the law was still in effect, but the university adopted a holistic admissions policy that included race as one of many factors considered in admissions. It was this plan that was at issue. In his response to Justice Alito, Garre attempted to include data from the study conducted by the University of Texas.

Justice Alito: How many -- how many non-Top 10 Percent members of the two minorities at issue here are admitted in each class?

Attorney Garre: Your Honor, we didn't look specifically at that determination. What we did -- in other words, to try to find whether there were holistic admits or percentage admits, we did conclude in 2004 -- and again this was before -- we did the classroom study before the plan at issue was adopted and at that time there were no holistic admits taking race into account. And what we concluded was that we simply -- if you looked at African Americans, for example, in 90 percent of the classes of the most common participatory size--

Justice Alito: I really don't understand your answer. You know the total number of, let's say, African Americans in an entering class, right? Yes or no?

Attorney Garre:--Yes, Your Honor

Justice Alito: And you know the total number who were admitted under the Top 10 Percent Plan?

Attorney Garre: We do Your Honor. But again at the time--

Justice Alito: If you subtract A from B you'll get C, right?

Attorney Garre:--Your Honor, at that time--

Justice Alito: And what value of C per class?

Attorney Garre:--Your Honor, I don't know the answer to that question, and let me try to explain why the university didn't look specifically to that. Because at the time that the classroom diversity study was conducted, it was before the holistic admissions process at issue here was adopted in 2003-2004. And so that determination wouldn't have been as important as just finding out are *[sic]* African Americans or Hispanics, underrepresented

minorities, present at the university in such numbers that we are not experiencing racial isolation in the classroom.

Like the previous cases involving race-conscious admissions policies, the Justices pressed the attorneys to quantify critical mass. The diversity study provided quantitative data to support the need to consider race in admissions as well as qualitative data from students to demonstrate the perceived benefits of diversity on campus. Garre reiterated later in his argument the use of student feedback when examining whether race should be considered in admissions.

Attorney Garre: What -- what we look to, and we think that courts can review this determination, one, we look to feedback directly from students about racial isolation that they experience. Do they feel like spokespersons for their race?

Chief Justice Roberts: So, what, you conduct a survey and ask students if they feel racially isolated?

Attorney Garre: That's one of the things we looked at.

The social science research used during the oral arguments of *Fisher I* (2014) was more prominent in comparison to previous cases, in part to the increased dialogue with Justices regarding the research. While the only social science research presented was the diversity study conducted by the University of Texas, there were instances in which Garre pointed to the fact that several sources of data were used in the school's determination to continue considering race in admissions policies.

Fisher v. University of Texas II Oral Arguments

On remand, the Fifth Circuit again held that the admission plan at the University of Texas was constitutional. The Supreme Court again granted certiorari, hearing oral arguments on

December 9, 2015. The same attorneys for both parties that argued in *Fisher I* (2013) stood before the Court again nearly three years later. During oral arguments, the Justices, with the exception of Justice Thomas, asked several questions to attorneys on both sides. Chief Justice Roberts along with Justices Scalia, Alito and Kennedy expressed a level of skepticism in their questioning on if the university demonstrated a need for the additional use of race in admissions. Justice Scalia, a critic of affirmative action, made several challenges to the plan, and was expected to rule against the university; however, he passed away prior to the decision.

***Fisher II*: Use of Social Science Research**

In the continued debate on the use of race in admissions policies there was greater focus on the effectiveness of the admissions policy to consider race. Following the 2003 diversity study, the university published a proposed admissions plan to consider race in 2004. This proposal, based on the 2003 study findings, was referenced as a part of Attorney Garre's argument in response to Justice Breyer's question regarding the university's admissions policy.

> **Justice Breyer**: Your plan is pursuing diversity among the 25 percent who are not admitted under the Top 10 Plan. Your principled, reasoned explanation for that academic decision is?
>
> **Attorney Garre**: Your Honor, it's set forth in the 2004 proposal which is in the Supplemental Joint Appendix. It's elaborated by the deposition testimony. Let me give you some -- a few pieces of that. Number one is, is the University made clear it was pursuing the educational benefits of diversity in the broad sense specifically recognized by this Court. This is on pages 1 through 3 of the Supplemental Joint Appendix. Number two, the University made clear that in its judgment the Top 10 Percent Plan, in particular as it grew to crowd out the class, was compromising its educational objectives. That's on

> page 25a and 31a of the Supplemental Joint Appendix. Number three, the University made clear that because of the decrease in student body diversity under the very race-neutral policies that our opponents are asking this Court to impose, that additional measures were necessary to make sure that it was achieving its educational objectives. All of that is laid out in far more detail, frankly, than it was in Grutter or that it was in the Harvard plan.

The Joint Supplemental Appendix referenced by Garre included the diversity study conducted by the University of Texas. The specific pages Garre is pointing the justices to is the 2004 Proposal that relies heavily on the results of the diversity study.

Garre again presented social science research to the Court, as he did in *Fisher I* (2014); however, he did so in more indirect ways. Instead of explaining findings, like he did in the first case, he pointed the Justices to the briefs submitted in the case, including amicus briefs. At one point, he was beginning to discuss amicus briefs, which are often filled with various research to support their argument, but was cut off. While it cannot be determined if Garre would have mentioned the specific social science research from the briefs, it is worth noting their inclusion in the oral arguments due to its heavy reliance on social science research. Missed opportunities for research, such as the case here, will be further discussed in chapter 5.

Summary of Cases Analysis

The use of social science research by attorneys in Supreme Court cases involving race-conscious admissions policies in higher education was observable based on either direct citations of studies or indirect references to social science research. On the other hand, in the lone case involving race-conscious student assignments policies in K-12 schools, the attorney did not

provide social science research when arguing the educational benefits of diversity. Table 1 summarizes these findings.

Table 1.
Summary of Research Use in Race-Conscious Admissions Supreme Court Cases

Supreme Court Cases	**Social Science Research Used in Oral Argument**
Regents of the University of California v. Bakke (1978)	Odegaard, C. E. (1977). Minorities in Medicine, From Receptive Passivity to Positive Action 1966-76.
Grutter v. Bollinger (2003)	Manning, W. H. (1977). Selective Admissions in Higher Education. Public Policy and Academic Policy; The Pursuit of Fairness in Admissions to Higher Education; The Status of Selective Admissions. Orfield, G., & Whitla, D. (1999). Diversity and legal education: Student experiences in leading law schools.
Gratz v. Bollinger (2003)	Gurin, P. (1999). Expert report of patricia gurin. Michigan Journal of Race and Law, 5(1), 363-425. Raudenbush, S.W. (1999). Supplemental Expert Witness Report, Grutter v. Bollinger et al. No. 97-75928 (E.D. Mich.), 3 March. Manning, W. H. (1977). Selective Admissions in Higher Education. Public Policy and Academic Policy; The Pursuit of Fairness in Admissions to Higher Education; The Status of Selective Admissions.
Parents Involved in Community Schools v. Seattle School District No. 1 (2007)	N/A
Fisher v. the University of Texas (2014)	Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996-2002
Fisher v. the University of Texas (2016)	Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996-2002

During the oral arguments, the Justices did have frequent exchanges with the attorneys regarding the social science research presented during the oral arguments. While there was only one instance in which the bench provided social science research, the Justices often sought to understand the strength and outcomes of the social science research presented. Additionally,

some of the Justices used the time to scrutinize, or even discredit the social science research. As discussed, Justice Scalia specifically rejected the findings from a study that Attorney Mahoney presented when trying to demonstrate that diversity is beneficial to students.

Since *Bakke* (1978) there has been a steady increase of research on the educational benefits of diversity in higher education cases. This increase in literature aided attorneys in their task of arguing for the continued need for race-conscious admissions policies in higher education. However, the attorneys and justices did not discuss social science research in the race-conscious student assignment policies in K-12 school districts during the *Parents Involved* argument. As schools continue to navigate trends in resegregation and colleges confront constitutional challenges to affirmative action, the reliance on social science research to argue the benefits of diversity will hopefully continue to increase.

Chapter 5: Discussion

The purpose of this study was to examine the oral arguments of U.S. Supreme Court cases involving race-conscious admissions policies in order to understand if and/or how the attorneys and Supreme Court justices considered social science research. Specifically, I was interested in answering the following questions:

(1) How, if at all, are attorneys using social science research in oral arguments that focus on student body diversity?

(2) How, if at all, have the Justices addressed the use of social science research in oral arguments that focus on student body diversity?

This chapter will include the following sections, which will discuss: (1) the social science research in each of the six cases and a summary related to research use; (2) the lost opportunities of research use during oral arguments; (3) the limitations and future research; (4) implications; and (5) closing thoughts.

Social Science Research in Each of the Six Cases

As discussed in Chapter 4, several of the oral arguments did, to some extent, discuss social science research. In this section, I explain some further detail about the social science research that the attorneys and Justices were addressing in order to provide some additional context. My goal within this discussion is not to evaluate the research but to instead provide the reader with some additional information about the studies that were addressed during the oral arguments. I conclude this section with a brief summary related to research use.

Bakke: Use of Social Science Research Discussion

As the first U.S. Supreme Court case to explore the constitutionality of affirmative action in higher education, there was not a robust library of literature on the topic. The Odegaard (1977)

report referenced by Attorney Cox was the single-use of social science research in *Bakke* (1978). The Odegaard report was a detailed report commissioned by the Josiah Macy Jr., Foundation, which examined the strengths and weaknesses of past efforts to advance students of color in medicine. The study was conducted by Dr. Charles Odegaard, the former president of the University of Washington, who had an extensive background in developing programs to increase access to higher education for students of color. As an early pioneer of affirmative action programs, Odegaard was involved in a prior case involving affirmative action in 1974, *DeFunis v. Odegaard*. By the time *DeFunis* reached the Supreme Court, the case was ultimately dismissed for being moot.

Over the course of three years, Dr. Odegaard interviewed officials and students at forty of the nation's 115 medical schools. In his evaluation of the data, Dr. Odegaard found a disproportionality of students of color in medical school, writing "a five-fold increase in the enrollment of medical students from minority groups in the United States over the last decade has not produced enrollments matching the percentage of these minority groups in the present population" (Odegaard, 1977 as cited in Macy). At the time of the report, there was one African American physician for 4,100 African American people in the general population, compared to one white physician for 583 white people. The report also found that some early alternative programs targeting HBCU students, like post-baccalaureate programs, were met with resistance from students of color as they felt that "participation in such postgraduate programs was viewed by some as stamping them very publicly with a badge of inferiority because they had already received a college degree" (Odegaard, 1977, p.101). Other data from the study included medical school enrollment and retention of students of color as well as findings on faculty support and perception of medical students of color (Odegaard, 1977).

Cox referred to the study as the best reference book on the subject of effective recruitment efforts to increase the enrollment of students of color in medical school. While he did reference the study, he did not present findings or data that may have been helpful in answering the question of race-neutral alternatives posed by Chief Justice Burger. Johnson (2001) found that oral arguments are an information gathering session for Justices, and questions asked during the oral arguments are to gain information beyond the briefs. The report pointed to the history of discrimination that students of color faced and provided support to why the consideration of race was necessary in graduate admissions policies. There was no specific mention of the recruitment efforts described by Odegaard (1977) in the brief that Cox pointed the Justices to during the oral arguments.

The little use of social science research in *Bakke* (1978) reflected the limited research on the topic of affirmative action at the time. Race-conscious admissions policies were still relatively new; they only started to evolve after *Brown* (1955) and the Civil Rights Act of 1965. Prior to the 1978 decision, which prompted a new wave of research about affirmative action and other race-conscious plans in education, research on affirmative action focused largely on the effectiveness of the programs. It was not until Justice Powell's diversity statement in *Bakke* that research shifted from the lack of effectiveness of general admissions policies to the educational benefits of diversity. This diversity statement spurred additional social science research that was included in some subsequent affirmative action decisions.

***Grutter*: Use of Social Science Research Discussion**

The use of social science research by Attorney Mahoney during the *Grutter* (2003) oral argument reflected this shift in the arguments made in affirmative action cases. In arguing for the continued consideration of race in admissions policies, Mahoney had to demonstrate not only the

need for affirmative action to counter the persisting effects of discrimination but also that diversity is educationally beneficial for all students. Both arguments highlighted the irony that Orfield (2001) pointed out: having to prove "that white students and all other students gain something vital educationally to justify policies to offset the history and traditions of white preference" (p. 2). In her argument, Mahoney referenced two separate pieces of social science research to try to address this shift. In doing so, Mahoney relied on a study by Winston Manning (1977) and a study by Gary Orfield and Dean Whitla (1999).

The report by the Carnegie Council on Policy Studies in Higher Education is composed of three parts. The first part provided a summary of public policy and academic policy. The second part, authored by Winton Manning, examined the selective graduate admissions process; and the final part by Warren Willingham and Hunter Breland reviewed the status of selective admissions programs. The study by Manning (1977) included: 1) the role of values in pursuing fairness in admissions; 2) how institutions and individuals interact in the admissions process; 3) arguments for consideration of race in admissions policies; 4) educational due process in admissions; 5) a two-stage model of the admissions process; 5) special programs that related to diversity; and 5) decision strategies. Not included in the report is the data mentioned by Attorney Mahoney.

The data that Mahoney referenced was from the statistical analysis conducted by Willingham and Breland (1977) in association with Richard Ferrin and Mary Frue in Part 3 of the Carnegie Council report. In their report, the authors briefly described the nature of selective admissions and special programs, providing recent enrollment data and discussing the strengths and weaknesses of various measures typically used by admissions programs when selecting students.

Within the provided enrollment data, Willingham and Breland (1977) examined the number of Black candidates who were offered admissions to at least one LSDAS-ABA law school. This analysis was the basis of Mahoney's reference during her argument; however, there was a discrepancy involving the data she cited. According to Mahoney's reference, the study provided the number of students of color who had achieved a 165 and 3.5 on the LSAT. After reviewing Willingham and Breland's (1978) report, the score range from the LSAT differs from what Mahoney mentions. During the 1970s, the score range from the LSAT was 200 to 800. In the 1980s and 1990s, there was a series of significant changes to the exam, with its current form developed in 1991 with a score scale of 120 to 180. Under the current format, the 90th percentile is 165, the score cited by Mahoney. In Willingham and Breland's (1977) report, a percentile was not available but rather a table detailing the number and percentage of candidates at or above selected LSAT scores and undergraduate GPA (UGPA) levels and, the number and percentage of those who received at least one offer of admission to an LSDAS-ABA law school. In the table (Willingham & Breland, 1977, p. 192), the top score and UGPA outlined were ≥ 600 and 3.25 respectively. The analysis by Willingham and Breland (1977) identified different trends in selective admissions. Acceptance rates for Black applicants increased from 1969 to 1979, however, those who were admitted had lower LSAT and undergraduate grades. From their analysis, it is clear that law schools were employing race-conscious strategies in their admissions plans, but it was also clear that many of the students of color who applied presented academic credentials that were not as competitive as those presented by other applicants (Willingham & Breland, 1977, p. 150-151).

Mahoney's reference to the 1977 report was an attempt to answer Chief Justice Rehnquist's question regarding the enrollment of students of color in law school. While there was

an increase in the admission of applicants of color, the report did not yield results of enrollment data without race-conscious policies. The inclusion of the study in her argument to demonstrate the impact of race-conscious policies on the admissions rates of students of color was observable; however, the use was a misrepresentation of the actual citation by Justice Powell and the report by the Carnegie Council.

The second piece of social science research referenced by Mahoney was the study by Orfield and Whitla (1999). Collaborating with the Gallup Poll, Orfield and Whitla (1999) distributed a questionnaire to Harvard Law School and the University of Michigan asking students to reflect on their experience with diversity. A total of 1,820 students or 81% of students from the two schools were surveyed. The survey consisted of twenty-two questions on general interracial experience, five questions on the intellectual impact of diversity, three questions on conflicts and whether the law school experience was working positively, six questions on whether discussions with students of different racial and ethnic backgrounds changed their view on various legal and social issues, and one final question asked for their opinion on their law school's admissions policy. The results of the study found that a large majority of students had positive educational experiences when diversity increased. Questions seeking to assess the intellectual impact of diversity found that more than two-thirds of students report a positive impact. Even when faced with conflict, students reported positive outcomes. When asked about their school's admission policy, the largest number of students favored not only maintaining but strengthening the diversity policies.

The data from the Orfield and Whitla (1999) study provided an early quantitative look at the benefits of diversity. Up until the 2003 case, little research had been done to argue the benefits of a diverse student body. It should be noted that the Orfield and Whitla study from

1991 was part of a book published in 2001 by the Harvard Civil Rights Project. The 2001 book explores theories of the educational impact related to affirmative action. Mahoney's choice to reference only the study done with Whitla in 1991 rather than the entire book from 2001 demonstrated an attempt to use evidence that not only supports the broad claim that diversity is educationally beneficial to many students but also because the data was based specifically on students from the University of Michigan law school.

Grutter (2003) was the only oral argument in which a justice used social science research. In his response to Attorney Mahoney's reference to Orfield and Whitla (1991), Justice Scalia offered social science research that suggested the Harvard Plan that was been widely recognized as an exemplar race-conscious admissions policy was originally created to reduce the number of Jewish students accepted by the university. Not only was his reference rare, but also surprising. On his time on the Court, Justice Scalia's use of social science research was little in comparison to the number of opinions written. In an analysis of Supreme Court opinions between 2001-2015, Justice Scalia wrote sixty-six of the Court's opinions, the most of any justice in the timeframe; however, he referenced social science research in only thirteen of the opinions, roughly 19.7% (Mietl, 2017). In a bench memo in *McCleskey v. Kemp* (1987), he wrote, "I don't need no stinking social science. We already know everything that the Baldus study purports" (cited in Butler, 2018, p. 1461). The way in which he used the social science reference, however, was not surprising, as he did so to discredit Attorney Mahoney's use of social science.

***Gratz*: Use of Social Science Research Discussion**

Attorney Payton, who was tasked with arguing the second affirmative action case involving the University of Michigan, also relied heavily on the argument that diversity results in

educational benefits for all students. Turning to the expert reports provided in the case, Payton referenced a study by Patricia Gurin (hereinafter the Gurin Report) and Stephen Raudenbush. Like the Orfield and Whitla (1999) study, the studies referenced in *Gratz* were analyses of data from the University of Michigan.

In the brief submitted to the Court, counsel for the respondent referenced a report by Patricia Gurin (2001) titled *Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Wood and Sherman Critique by the National Association of Scholars of the Expert Witness Report of Patricia Gurin in Gratz, et al. v Bollinger, et al. and Grutter v Bollinger, et al*. The expert report submitted by Gurin for *Gratz* (2003) and *Grutter* (2003) discussed three empirical analyses: (1) the Michigan Student Study, (2) the study of the Intergroup Relations, Conflict; and (3) Community Program at the University of Michigan, and the 4-year and 9-year data from the Cooperative Institutional Research Program. The 1999 report produced empirical data verifying the educational benefits of diversity on learning outcomes. Specifically, Gurin (1999) found that students who had the most exposure to diversity were more intellectually engaged academically, in comparison to students with the least classroom diversity. This pattern of positive relationships between diversity and student outcomes, the report found, holds across racial and ethnic groups, and over time (5 years after graduating). Since its submission in 1999, the study was met with swift criticism. The 2001 Wood and Sherman critique outlined weaknesses in Gurin's statistical analysis, prompting a response from Gurin in the same year and again in 2003. In 2002, Lerner and Nagai also criticized the statistical analysis of Gurin's report, going so far as to say "no scientifically valid statistical evidence has been presented to show that racial and ethnic diversity in a school benefits students" (p. 1). Gurin again defended her work, responding to the critique in 2003 (Gurin, Gurin, & Matlock, 2003).

By the time Payton argued before the Court, Gurin's work had been attacked by multiple scholars. The multiple critiques of the 1999 expert report may explain why he opted to choose to reference Gurin's responses rather than the initial report.

The expert report by Raudenbush was no longer accessible through the citation in the brief, but through my own research, I was able to review limited results of his study through a 2007 study by Ayres and Foster. Raudenbush's report focused on predicting the effect of eliminating the consideration of race in admissions policies. Using two methods to analyze 1996 admission data for the College of Literature, Science and the Arts, Raudenbush calculated that for the College in 1998, the percentage of students of color admitted would be 6% in the absence of race-conscious policies, and 14% with the policy (Ayres & Foster, 2007). This data suggests that race-neutral admissions policies would reduce the number of students of color. Both reports referenced by Attorney Payton supported the need for race-conscious admissions policies; however, neither provided an answer about how a school would know if they have reached a meaningful number or critical mass.

***Parents Involved*: Use of Social Science Research Discussion**

The absence of social science research in the *Parents Involved* oral argument was surprising considering the amount of literature available on the educational benefits of diversity at the time. It is worth noting that compared to Grutter and Gratz, there was more time spent on the narrowly tailoring analysis rather than establishing whether K-12 diversity is a compelling state interest. Much of Attorney Madden's oral argument was spent answering hypothetical questions posed by the Justices. In the single instance of research referenced, Madden did not provide specific data or citations to support his argument.

The oral argument from *Parents Involved* was a missed opportunity to present social science research before the Court to argue for the continued consideration of race in student assignment. It would have been easy for the attorneys to reference during the argument as twenty-seven of the forty-seven amicus briefs submitted in support of the school districts included social science research (Welner, 2007). Despite the abundance of research submitted within the amicus briefs as well as the social science references in *Grutter* and *Gratz*, the oral argument lacked any specific mention of social science research. Later in the chapter, I will elaborate more on the missed opportunities of presenting social science research during oral arguments.

Fisher I: **Use of Social Science Research Discussion**

As discussed above, in these later cases, the attorneys needed to focus on demonstrating that racial diversity was a compelling state interest and that the university's policy was narrowly tailored to achieve that goal. Similar to the University of Michigan cases (i.e., *Grutter* and *Gratz*), one of the central questions of the *Fisher I* case at the oral argument was determining the meaning of critical mass. Critical mass refers to a meaningful number of underrepresented students of color to achieve objectives established by the school. Garre pointed the Justices to a study conducted by the University of Texas to demonstrate the lack of critical mass in the classroom. The study examined the representation of students of color in undergraduate classes, focusing on classes with 5 to 24 students, which was defined as "participatory size" as these classes were determined to offer the best opportunity for diverse interactions. The study found that in Fall 2002 enrollment in these small classes, roughly 90% and 43% had one or no African American and Hispanic students, respectively. The proposal also included anecdotal information from student interviews that focused on exploring student perception of diversity on campus. The

student feedback supported the findings of the study that there was "insufficient minority representation" in their classes to receive the full benefits of diversity (Joint Appendix, 2012, 432a).

The findings from the study were later presented in the university's "Proposal to Consider Race and Ethnicity in Admissions" published in June 2004. Citing the 2003 study, the university concluded that it had not yet achieved the "critical mass of underrepresented minority students needed to obtain the full benefits of diversity" (*Fisher*, 2011, p. 17). The 2004 Proposal further explained that a diverse student body promotes cross-racial understanding and prepares students for the challenges of an increasingly diverse workforce -- an objective of the university. Accordingly, the 2004 Proposal recommended adding the consideration of race as an additional factor within a larger admissions index (*Fisher*, 2011, p.17).

Garre's referencing of the study prompted multiple exchanges with some of the Justices, all of which were not convinced of the university's need to continue considering race in admissions. For example, Justice Scalia inquired about the type of study conducted. In his response, Garre pointed to the Joint Supplemental Appendix rather than describe the type of study the university conducted. The response proved to not be sufficient enough for some of the Justices. As they pressed for a quantifiable threshold for critical mass, Garre repeatedly turned to the study. His reliance on the study demonstrated appropriate utilization of research data as evidence to support his argument as well as a tool to persuade the decision-makers; however, the effectiveness of his use of the study was not as compelling -- the conservative Justices seemed unsatisfied with Garre's answers.

Unlike Justices Roberts, Scalia, and Alito who were not too keen to accept the study data provided by Garre, Justice Sotomayor acknowledged the data from the study as evidence

demonstrating the need for a critical mass of students of color in an exchange with Attorney Rein during his time before the Justices.

> **Justice Sotomayor**: So what are you telling us is the standard of critical mass [*sic*]? At what point does a district court or a university know that it doesn't have to do any more to equalize the desegregation that has happened in that particular State over decades, that it's now going to be stuck at a fixed number and it has to change its rules. What's that fixed number?
>
> **Attorney Rein**: --We -- it's not our burden to establish the number. It was the burden of the University of Texas to determine whether—
>
> **Sonia Sotomayor**: Well, they told -- they told the district court. They took a study of students. They analyzed the composition of their classes, and they determined in their educational judgment that greater diversity, just as we said in Grutter, is a goal of their educational program, and one that includes diversifying classes. So what more proof do you require?
>
> **Attorney Rein**: --Well, if you are allowed to state all the grounds that need to be proved, you will always prove them, in all fairness, Justice Sotomayor. The question is, they have-
>
> **Justice Sotomayor**: Well, but given it was in the evidence, what more do you think they needed?

This exchange was particularly interesting as it was Justice Sotomayor referencing the study in addressing Rein's argument that the university was admitting enough students of color. Rein never mentioned the study on his own during his oral argument. This reference to the study did highlight how some Justices might use social science research within the oral arguments.

Fisher II: Use of Social Science Research Discussion

In the second part of the Court's examination of affirmative action at the University of Texas, Garre again turned to the study by the university. In comparison to his first time arguing the case, Garre did not spend much time elaborating on the study; however, there was greater discussion of the study in the Court's opinion. Writing for the majority, Justice Kennedy recognized the study as a "reasoned, principled explanation" of the university's goal, dismissing the petitioner's claim that the goal lacked standing as it was rebutted by the record, "the record itself contains significant evidence, both statistical and anecdotal, in support of the University's position" (*Fisher*, 2016, p. 14). He went on to also criticize his fellow Justices for challenging the studies,

> At no stage in this litigation has petitioner challenged the University's good faith in conducting its studies, and the Court properly declines to consider the extra record materials the dissent relies upon, many of which are tangential to this case at best and none of which the University has had a full opportunity to respond to (*Fisher I*, 2016, p. 14).

Justice Kennedy demonstrated a strong understanding of the data presented in the study. Throughout the opinion, he presented data from the study to refute the petitioner's claim that the university's goal was "insufficiently concrete." The reliance on the study in his opinion reflected Garre's utilization of the study in his oral argument. While little social science research was presented to the Court during oral arguments, the single reference proved to be enough to influence the Court's majority decision.

A Summary of Social Science Research Use in the Oral Arguments

The ways in which social science research was used during the oral arguments can direct the continued use of social science research in legal decision-making regarding education policy. As discussed in Chapter 2, research utilization consists of two characteristics- the type of information and the extent that which information is used during the policymaking process (Ness, 2010). In my analysis of the oral arguments, trends emerged in both of these areas.

Types of Research Used. Following *Bakke*, there was an influx of social science research on the educational benefits of diversity. Literature on the topic is now vast and includes both quantitative and qualitative data. In the research used during the oral arguments three studies provided statistical analyses of admissions data (Raudenbush, 2001; University of Texas, 2003; William & Breland, 1977), two studies were quantitative but reviewed qualitative data on the effects of diversity experiences (Gurin 2001; Orfield & Whitla, 1999) and one study provided both a statistical analysis of admissions data and qualitative data from interviews (Odegaard, 1977). Oftentimes the type of social science research presented was dependent on the question the attorney was attempting to answer. In *Grutter* (2003), for example, Mahoney provided data from the William and Breland (1977) study when Justice Rehnquist asked about the statistical data of students of color enrollment in law school. Mahoney referenced the Orfield and Whitla (1999) study about student perception of diversity when Justice Stevens questioned if race-conscious plans caused hostility between students. Payton offered the reports by Gurin (2001) and Raudenbush (1999) in response to the Court's questions related to determining what constitutes a critical mass. The Raudenbush (1999) study provided a quantitative explanation whereas the Gurin (2001) report provided a qualitative explanation. In *Fisher I* (2013), Garre

presented the university study (2003) to answer the Court's inquiry on how the university determined the need for race-conscious plans.

As the question of race-conscious admissions continues to take shape in court, research related to what constitutes a critical mass will be helpful. Indeed, the focus on numerical inquiry has impacted the type of social science research presented to the Court. In the *Fisher* (2013; 2016) cases, the only source of social science research was the university study, which included a statistical analysis of enrollment data. In the current case on the docket for the Court, *Students for Fair Admissions v. Harvard* (2020), a majority of the research presented in the briefs are statistical analyses by experts. A section within the brief submitted in the First Circuit is titled "The Statistical Evidence Did Not Show Discrimination," illustrating the shift towards statistical evidence when demonstrating the need for race-conscious admission plans. Even though there was not a study of the district enrollment data provided in *Parents Involved* (2007), Madden did provide student enrollment data to the Court in order to argue the need for race-conscious student assignment policies.

How Research Is Used. The second characteristic of research utilization focused on the method in which the research was presented. As the previous section has emphasized, attorneys will often employ social science research findings based on the questions of the Court in an effort to support their argument. This method of research use aligns with the political use described by Weiss (1979). Also, Natow (2000) observed that: "Policymaking, including higher education policymaking, is a political process. The use of research and data is also inherently political" (p. 7). As the most tactical and influential use of research, a political use of research during oral arguments was expected. The goal of providing social science research during the oral arguments is to support the attorney's argument and influence how the Justices view the

issue. Within the political use of research is research as argumentation. Weiss (1991) suggests that the conditions in which research is being presented will impact use. Unlike more traditional policymaking settings in which policy is created, the Court's role is to uphold or strike down an existing policy. This condition would align with research as argumentation, which is fitting as attorneys are presenting research during oral arguments.

In addition to using research politically, much of the social science research use was conceptual. Natow (2020) suggested that research used politically can have a conceptual effect, in that the research use can "redefine the policy agenda" (Weiss, 1979, p. 430). In judicial proceedings, the decisions of the Court often shape subsequent policy. In *Brown* (1954; 1955), the Court's ruling that segregation on the basis of race was unconstitutional prompted a series of state and federal legislation to prohibit segregation not only in schools but in various aspects of society. In *Parents Involved* (2007), the Court's ruling struck down race-conscious student assignment policies, and the Obama administration subsequently released Dear Colleague Letters outlining ways to reduce resegregation in light of the ruling. As a result, school districts adapted or removed policies designed to prevent racial isolation in schools.

Similarly, research use can promote a reconceptualization of the policy, a common occurrence within judicial decision-making. When attorneys use social science research it is done so politically to influence the Court's decision. Research use also reflects the last model of Weiss (1979), research as part of the intellectual enterprise of the society. Weiss points out that social science and policy influence each other, reflecting the current thought of society. Justice Powell's opinion in *Bakke* (1978) provides a great illustration of how social science and policy interact. Recognizing diversity as a compelling interest, led the social science community to

research the educational benefits of diversity. That research was then presented to the Court when reviewing the same policy concern (reconceptualization) in subsequent cases.

The ways in which research was used did reflect several models that overlapped with one another, a phenomenon pointed out by Natow (2020). The political-conceptual model identified by Natow (2020) best describes research use during oral arguments- using research that supports their policy preference (argument) with the goal of changing the perspective of key decision-makers (the Supreme Court). The intellectual enterprise model by Weiss (1979) explains research within judicial policymaking, not just oral arguments. All three models demonstrate that the ways research is used during oral arguments can, and often, impact judicial policymaking.

Lost Opportunities of Social Science Research Use

The most evident absence of social science research in oral arguments was in *Parents Involved* (2007). As the sole case that reviewed race-conscious student assignment policies in K-12 education, the lack of social science presented was a lost opportunity for Attorney Madden to support his argument for the continued consideration of race in student school assignments. As noted, twenty-seven of the forty-seven amicus briefs included social science research. Johnson (2004) suggested that oral arguments allow attorneys the opportunity to further explain arguments set forth in the brief; however, in *Parents Involved* (2007), Madden's brief to the Court also lacked social science research. Despite the abundance of literature on the effects of racial isolation and the benefits of diversity, social science research was missing from the argument. The absence of social science could be due in part to the oral argument being spent on the second prong of strict scrutiny, the narrowly tailoring analysis rather than establishing whether K-12 diversity is compelling state interest.

While Madden did not include social science research, the Justices provided their own interpretations of social science research. In their examination of social science research use in *Parents Involved* (2007), Frankenberg and Garces (2007) found that in the five separate opinions, the Justices discussed social science research, but "viewed and treated the presented social science evidence in conflicting ways" (p. 46). Other scholars who have examined *Parents Involved* (2007) have also highlighted the use and misuse of social science research within the Court's opinions. Few, if any, have examined Madden's oral argument to evaluate research use. While it cannot be determined if social science research use during the oral argument would have had an impact on the Court's decision, literature on oral arguments has suggested that they do have an impact on the decisional process (Johnson, 2004). In fact, Johnson, Wahlbeck, and Spriggs (2006) found that the quality of the oral argument, including the information presented, can have an impact on the Justices' final votes.

The unique scenario of social science research use in *Parents Involved* (2007) points to the critical need for attorneys to articulate social science research during oral arguments. Oftentimes, Justices have read the litigants' briefs and some amicus briefs prior to the oral arguments. Attorneys can use their time before the Court to clarify or emphasize social science research highlighted in their briefs. While the appellant brief in *Parents Involved* (2007) did not provide specific social science research, Madden could have referenced one of the twenty-seven amicus briefs submitted to the Court. This practice was done in *Gratz* (2003) as well as in *Fisher II* (2016). It was through these same briefs that the Justices drew interpretations of the issue at hand through social science. Additionally, articulating social science research requires a level of understanding of the application of the research during oral arguments. In the discussions of each case earlier in the chapter, attorneys aptly presented social science data to answer questions from

the Court. The application of the research reflected an understanding of social science research findings, which in turn strengthened the argument being made.

Literature on the role oral arguments have in judicial policymaking has suggested that the quality of the oral arguments can be the determining factor in its effectiveness (Johnson, Wahlbeck, & Spriggs, 2006). The quality of the argument in affirmative action cases should include the attorneys' ability to present social science research to the Court. As the primary information-seeking segment of the decisional process, attorneys can provide a "clear presentation of the issues, the relationship of those issues to existing law, and the implications of a decision for public policy" (Wahlbeck 1998, as cited in Johnson, Wahlbeck & Spriggs, 2006, p. 101). Social science research can have a role in each of the areas Wahlbeck (1998) described; and to prevent lost opportunities as observed in *Parents Involved* (2007), attorneys, social scientists, and school leaders should collaborate to provide the Court with social science research when arguing for the educational benefits of diversity.

Limitations and Suggestions for Future Research

My review of Supreme Court cases involving race-conscious admissions only provides a snapshot of social science research use in oral arguments. I focused only on oral arguments because previous studies have explored how social science research was used in other aspects of the affirmative action cases (e.g., amicus briefs). This might be seen as a limitation. Although I read the amicus briefs and Court opinions, these sources were not specifically part of my dataset. Similarly, I did not interview the attorneys involved in the litigation as my sole focus was on the analysis of the oral arguments. Another limitation is that each case had to move through the federal court system, which sometimes included other oral presentations. An analysis of these other arguments was beyond the scope of this study. In light of these limitations, I suggest the

following avenues of future research: (1) an analysis of the cases through the appellate process to learn how research is used at each level; (2) interviewing attorneys on their perception of social science research use; and (3) examining attorney preparation for understanding and applying social science research.

Building upon my research, an analysis of the cases from the district court to the Supreme Court may provide insight into social science research use at each level of the appellate process. Additionally, understanding the role attorneys have in communicating social science research could improve its use during oral arguments. Hearing from attorneys can aid the social science community in how they present findings within their reports. Furthermore, learning about the preparation of attorneys to communicate social science research can identify areas of concern for social scientists and promote improved use of social science research use in oral argument proceedings.

Implications

The Court's usage of social science research in cases involving race-conscious admissions policies suggests a need for attorneys to clearly communicate complex findings about the educational benefits of diversity. In turn, this will require greater collaboration between the legal and social science community. As my findings suggest, social science research use is a tactical act that requires attorneys to understand research findings and apply those findings to law. The constitutional challenge to race-conscious admissions policies is not over, and the legal and social science communities will need to continue to work together to develop some arguments that are grounded in research. The study also pointed to the role social scientists and attorneys can have in local education policymaking. As school districts develop policies to address resegregation, the involvement of attorneys and social scientists during this process may lead to

better informed practices in schools. Morgan and Pullin (2010) suggested this "proactive stance toward the formation of education policy can create a more reasoned approach to changing policy" (p. 522).

As my findings suggest, blending social science research with legal strategy is important in developing strong arguments for the continued consideration of race in student assignment policies. In forming education policies, integrating social science research and legal literacy into the process may prove beneficial. Moving beyond the implications of my research, I recommend the following practical ways for the three communities- social science, law, and K-12 leadership- to work in tandem to ensure policies that are equitable and legal.

First, social scientists should work with attorneys to ensure the social science research provided to the Court answers the questions of the Justices. Since *Grutter* (2003), the Court has sought to quantify critical mass. There was no longer a question of the educational benefit of diversity, social scientists, as well as Justice Powell, have solidified this finding. Trends in research type have become increasingly statistical as there is a continued search for the critical mass threshold. Research on race-conscious admissions should reflect this shift. For K-12 student assignment policies, social scientists and attorneys should collaborate with school leaders during the process. This early involvement may help clarify the goals of the policies and ensure that they do not offend past legal precedent (Morgan & Pullian, 2010).

Second, attorneys must improve their understanding of social science research. The ability to articulate social science findings is key to the effective use of research in the oral arguments. Attorneys are social scientists by proxy and must be able to answer the questions of the Court regarding not only law but also the research being discussed. An improved understanding of social science findings may increase an attorney's comfort level in relying on

social science research. Furthermore, attorneys need to improve their ability to determine reliable research. Many definitions for research include the common theme of systematic and methodological inquiry in response to a specific question, however even internet surveys or strongly biased blogs can provide research under this broad understanding of research. Attorneys should collaborate with the social science community to understand ways to identify reliable research for litigation support.

Finally, for local K-12 education policymakers, this research lends itself to multiple uses within the K-12 settings. In addition to demonstrating the need for greater collaboration between school leaders, social science researchers, and attorneys to ensure the articulation of sound policy goals, findings from this study provide school leaders with the type of social science research used by attorneys when arguing for the continued consideration of race in student assignment policies. This can aid school leaders in understanding the type of social science research they can use to evaluate their status of diversity within the district. Furthermore, it points to the type of data school leaders should monitor and track, as this is typically the data used by attorneys in conjunction with social science research during oral arguments. The Supreme Court's interpretation of the law defines the context within which schools can function; employing the research that has proven effective in judicial policymaking could be a best practice (Frankenberg & Graces, 2007).

Closing Thoughts

The persisting effect of discrimination on the equity of education has been challenged in federal court for the past 68 years. Currently, on the Supreme Court docket is a case seeking to dismantle policies in place to promote equitable access in another affirmative action case (*SFFA v. Harvard*, 2020). In addition to the U.S. Supreme Court being asked to weigh in on affirmative

in higher education once again, there are other state and lower federal courts examining related matters in the K-12 context. To illustrate, in March 2022, the New Jersey Supreme Court heard oral arguments in a case involving statewide systemic school segregation (*Latino Action Network v. New Jersey*, 2018). A federal district court in Virginia heard a challenge about the constitutionality of a race-neutral admissions plan at the Thomas Jefferson High School for Science and Technology (*Coal. for TJ v. Fairfax Cnty. Sch. Bd., Civil Action No. 1*, 2022). These are only a few of the many cases involving race, diversity, and student assignment/admissions currently evolving through the state and federal court systems. As courts continue to hear these cases, and attorneys continue to argue for policies aimed at creating equitable and diverse educational environments, my research examining the use of social science research by attorneys arguing for the continued use of policies promoting student body diversity.

Social science research can play a pivotal role in the decision of the Supreme Court as seen in *Brown* (1954), *Grutter* (2003), and the *Fisher* cases (2013, 2016). During my analysis, I pondered the reasons behind the lack of social science research during oral arguments and the attorneys' briefs in *Parents Involved* (2003). The case has infamously been recognized as the undoing of *Brown* (1954), specifically because of Chief Justice Robert's interpretation of the ruling. The case was not deprived of any attention from the social science community, and even the Justices relied on social science within their opinion; however, its absence from the oral arguments remains troublesome. In the pending Thomas Jefferson High School case, *Parents Involved* (2007) may eventually be revisited and the social science community and legal scholars must work together to help support arguments that relate to the benefits of diversity in schools. Additionally, the case may decide the future of percentage plans as seen in *Fisher I* and *II* (2013,

2016). I, too, will follow the case closely to observe whether social science research is utilized by the attorneys and the Court.

Looking back on my own education, as an often isolated African American student amongst several white students, examining how research on diversity is used in arguing for the continued consideration of race in admissions policies has provided great insight in how I can use my role to inform policies that involve race and questions of equity. My career in education was heavily influenced by witnessing the differences at racially isolated schools. As schools remain racially isolated, and access to quality education divided among racial and socioeconomic lines, having an understanding of the research used in Supreme Court cases involved diversity issues can inform policies that relate to resegregation in all aspects of education in my building.

References

Acholonu, I. (2013). The "gutting" of Grutter: White racial innocence and post-racialism in the Abigail Fisher v. University of Texas Austin oral arguments. Journal of Curriculum Theorizing, *29*(2).

Adams, J. S. (1976). The structure and dynamics of behavior in organizational boundary roles. In M. D. Dunnette (Ed.), Handbook of industrial and organizational psychology. Chicago: Rand McNally College Publishing Co.

Adler, L. (2015). Qualitative research redux: Researching contemporary legal issues concerning education. *Research Methods for Studying Legal Issues in Education, 2nd Edition (Education Law Association K-12 Series Book 92)* (2nd ed.).

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

Alkin, M. C., & King, J. A. (2017). Definitions of evaluation use and misuse, evaluation influence, and factors affecting use. American Journal of Evaluation, *38*(3), 434-450.

Amsterdam, D. (2017). Toward the resegregation of southern schools: African American suburbanization and historical erasure in Freeman v. Pitts. *History of Education Quarterly*, *57*(4), 451-479.

Ancheta, A. N. (2004). Contextual strict scrutiny and race-conscious policy-making. *Loyola University Chicago Law Journal, 36*(1), 21-56.

Ancheta, A. N. (2006). Scientific evidence and equal protection of the law. In Scientific Evidence and Equal Protection of the Law. Rutgers University Press.Anderson, E. S.

(2002). Integration, affirmative action, and strict scrutiny. *New York University Law Review, 77*(5), 1195-1271.

Anderson, M. J. (2004). Race as a factor in K-12 student assignment plans: Balancing the promise of Brown with the modern realities of strict scrutiny. *Catholic University Law Review, 54*(3), 961-1000.

Asen, R., Gurke, D., Solomon, R., Conners, P., & Gumm, E. (2011). "The research says": Definitions and uses of a key policy term in federal law and local school board deliberations. Argumentation and advocacy, 47, 195-213.

Asen, R., Gurke, D., Solomon, R., Conners, P., & Gumm, E. (2011). "The research says": Definitions and uses of a key policy term in federal law and local school board deliberations. Argumentation and advocacy, 47, 195-213.

Ayscue, J., Frankenberg, E., & Siegel-Hawley, G. (2017). The complementary benefits of racial and socioeconomic diversity in schools. *Research Brief No. 10. National Coalition on School Diversity*.

Beckham, J., Leas, T., Melear, K. B., & Mooney, K. (2005). Applying legal-historical analysis to selected higher education issues: Frameworks for the study of judicial opinions. In annual meeting of the American Education Research Association, Montreal, Canada.

Becton, J. W. (2003). Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. Amici Curiae at, *7*(9).

Bergner, G. (2009). Black children, White preference: Brown v. Board, the doll tests, and the politics of self-esteem. *American Quarterly*, *61*(2), 299-332.

Bickel, A. M. (1986). *The least dangerous branch: The supreme court at the bar of politics*. New Haven, CT: Yale University Press.

Black, D. W. (2009). In defense of voluntary desegregation: All things are not equal. *Wake Forest Law Review, 44*(1), 107-182.

Board of Ed. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991).

Briggs v. Elliott, 342 U.S. 350, (1952).

Brown v. Board of Education, 347 U.S. 483 (1954).

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

Butler, P. (2017). Equal protection and white supremacy. *Nw. UL Rev.*, *112*, 1457.

Caplan, N. (1979). The two-communities theory and knowledge utilization. American Behavioral Scientist, *22*(3), 459–470.

Chayes, A. (1976). The role of the judiciary in a public law system, *Harvard Law Review, 89*(7), 1281-1316

Chemerinsky, E. (2002). The segregation and resegregation of American public education: The court's role. *North Carolina Law Review, 81*(4) 1597-1622.

Chemerinsky, E. (2014). Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1. Mich. St. L. Rev., 633.

Clark, K. B., & Clark, M. P. (1947). Racial identification and preference in Negro children. In T.M. Newcomb & E. L. Hartley (Eds.), *Readings in Social Psychology* (pp. 602– 611). New York, NY: Holt, Rinehart & Winston

Colker, R. (2007). Justice Sandra Day O'Connor's friends. *Ohio State Law Journal, 68*(2), 517-608.

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

Creswell, J. W., & Miller, D. L. (2000). Determining validity in qualitative inquiry. Theory into practice, *39*(3), 124-130.

Danns, D. (2014). *Desegregating Chicago's public schools: Policy Implementation, Politics, and Protest, 1965–1985*. Springer.

Darling-Hammond, L. (2018). Education and the Path to One Nation, Indivisible. Research Brief. Learning Policy Institute.

Davis v. County School Board, 103 F. Supp. 337 (E.D. Va. 1952).

Driver, J. (2013). Supremacies and the southern manifesto. *Texas Law Review, 92*(5) 1053-1136.

Dudziak, M. L. (2004). Brown as a Cold War case. *The Journal of American History*, *91*(1), 32-42.

Dunn, J. M., & West, M. R. (2008). Calculated justice: Education research and the courts. In F. M. Hess, (Ed.), When research matters: How scholarship influences education policy (pp. 155-176). Cambridge, MA: Harvard Education Press.

Dunn, J. M., & West, M. R. (Eds.). (2010). *From Schoolhouse to Courthouse: The Judiciary's Role in American Education*. Brookings Institution Press.

Dunn, W. N., Holzner, B., & Zaltman, G. (1985). Knowledge utilization. In T. Husen & T. N. Postlewaite (Eds.), The international encyclopedia of education (pp. 2831–2839). Oxford: Pergamon.

Dworkin, R. (1973). *Legal Research*. Daedalus, 53-64.

Eckes, S. E. (2017). Homophobic expression in K-12 public schools: Legal and policy considerations involving speech that denigrates others. *Berkeley Review of Education*, *7*(1), 49-80.

Entin, J. L. (1986). Sweatt v. Painter, the end of segregation, and the transformation of education law. *The Review of Litigation, 5*(1), 3-72.

Farrell, C. C., & Coburn, C. E. (2017). Absorptive capacity: A conceptual framework for understanding district central office learning. Journal of Educational Change, *18*(2), 135-159.

Fisher v. University of Texas at Austin, 570 U.S. 297 (2013).

Fisher v. University of Texas at Austin, 579 U.S. (2016).

Fisher v. University of Texas, No. 11-345, Supplemental Joint Appendix (Feb. 23, 2009).

Fisher v. University of Texas, No. 11-345, Joint Appendix (Aug. 13, 2008).

Frankenberg, E. (2007). School segregation, desegregation, and integration: What do these terms mean in a post-Parents Involved in Community Schools, racially transitioning society. *Seattle Journal for Social Justice, 6*(2), 533-590.

Frankenberg, E. (2011). The authority of race in legal decisions: The district court of opinions of Brown v. Board of Education. *University of Pennsylvania Journal of Law and Social Change, 15*(1), 67-86.

Frankenberg, E., & Garces, L. M. (2007). The use of social science evidence in Parents Involved and Meredith: Implications for researchers and schools. U. Louisville L. Rev., 46, 703.

Frankenberg , E. , & Lee , C. (2002) . Race in American public schools : Rapidly resegregating school districts . Cambridge , MA : Civil Rights Project

Frankenberg, E., Orfield, G., & Harvard University, G. S. of E. (2012). *The Resegregation of Suburban Schools: A Hidden Crisis in American Education*. Cambridge, MA: Harvard Education Press.

Freeman v. Pitts, 503 U.S. 467 (1992).

Freeswick, J. R. (1975). Milliken v. Bradley. *Hofstra Law Review, 3*(2), 487-516.

Freyer, T. A. (2006). " Cooper v. Aaron:" Incident and consequence. *The Arkansas Historical Quarterly*, *65*(1), 1-6.

Freyer, T. A. (2008). Cooper v. Aaron (1958): A hidden story of unanimity and division. *Journal of Supreme Court History*, *33*(1), 89-109.

Fuller, B., Wright, J., Gesicki, K., & Kang, E. (2007). Gauging growth: How to judge no child left behind?. *Educational Researcher*, *36*(5), 268-278.

Gadsden, B. (2010). The other side of the Milliken coin: The promise and pitfalls of metropolitan school desegregation. *Journal of Urban History*, *36*(2), 173-196.

Garces, L. M. (2013). Social science research and the courts: Informing post–Grutter v. Bollinger developments in higher education cases. *Educational Policy*, *27*(4), 591-614.

Garfield, L. Y. (2004). Back to Bakke: Defining the strict scrutiny test for affirmative action policies aimed at achieving diversity in the classroom. *Nebraska Law Review, 83*(3), 631-684.

Gebhart v. Belton, 91 A.2d 137 (1952).

George, J., & Darling-Hammond, L. (2019). *The federal role and school integration: Brown's promise and present challenges*. Palo Alto, CA: Learning Policy Institute.

Gratz v. Bollinger, 539 U.S. 244 (2003).

Green, C. (2008). An intellectual history of judicial activism. *Emory Law Journal, 58*(5), 1195-1264

Green, T. L., & Gooden, M. A. (2016). The shaping of policy: Exploring the context, contradictions, and contours of privilege in Milliken v. Bradley, over 40 years later. *Teachers College Record*, *118*(3), 1-30.

Green v. School Board of New Kent County, 391 U.S. 430 (1968)

Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964).

Grutter v. Bollinger, 539 U.S. 306 (2003).

Gurin, P. (1999). Selections from the compelling need for diversity in higher education, expert reports in defense of the University of Michigan. *Equity & Excellence*, *32*(2), 36-62.

Gurin, P. Y., Dey, E. L., Gurin, G., & Hurtado, S. (2003). How does racial/ethnic diversity promote education?. Western Journal of Black Studies, *27*(1), 20.

Hall, M. A., & Wright, R. F. (2008). Systematic content analysis of judicial opinions. *California Law Review, 9(1)*, 63-122.

Hannel, J. (1991). Future of desegregation after Dowell: Returning to pre-Brown days, *Missouri Law Review, 56*(4) 1141-1156.

Heubert, J. P. (1997). Schools without rules? Charter schools, federal disability law, and the paradoxes of deregulation. Harv. CR-CLL Rev., 32, 301.

Hollander, D. A. (2007). Interdisciplinary legal scholarship: What can we learn from Princeton's long-standing tradition. *Law Library Journal, 99*(4), 771-792.

Hsieh, H. F., & Shannon, S. E. (2005). Three approaches to qualitative content analysis. *Qualitative Health Research*, *15*(9), 1277-1288.

Huberman, M. (1990). Linkage between researchers and practitioners: A qualitative study. American educational research journal, *27*(2), 363-391.

Jacobi, T., & Rozema, K. (2018). Judicial Conflicts and Voting Agreement: Evidence from Interruptions at Oral Argument. *Boston College Law Review, 59*(7), 2259-2318.

Jackson Jr, J. P. (2000). Blind law and powerless science: The American Jewish Congress, the NAACP, and the scientific case against discrimination, 1945-1950. *Isis, 91*(1), 89-116. https://doi.org/10.1086/384627

Jackson Jr, J. P. (2001). *Social scientists for social justice: Making the case against segregation* (Vol. 85). New York, NY: NYU Press.

Johnson, T. R. (2004). *Oral Arguments and Decision-making on the United States Supreme Court*. SUNY Press.

Johnson, T. R., Wahlbeck, P. J., & Spriggs, J. F. (2006). The influence of oral arguments on the US Supreme Court. *American Political Science Review*, 99-113.

Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973).

Kiel, D. (2013). The enduring power of Milliken's fences. *The Urban Attorney, 45*(1), 137-182.

Klarman, M. J. (2006). *From Jim Crow to Civil rights: The Supreme Court and the Struggle for Racial Equality*. Oxford, UK: Oxford University Press.

Kluger, R. (2004). *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Vintage.

Kmiec, K. D. (2004). The origin and current meanings of judicial activism. *California Law Review, 92*(5), 1441-1478.

Kurlaender, M., & Yun, J. (2001). Is diversity a compelling educational interest? Evidence from Louisville. In G. Orfield (Ed.), Diversity Challenged (pp. 111-141). Cambridge, MA: Harvard Education Publishing Group.

Kurland, P. B., & Casper, G. (1975). *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law (Vol. 1).* University Publications of America.

Lagemann, E. C. (2000). An elusive science: The troubling history of education research University of Chicago Press.

Lee, J., & Adler, L. (2006). Qualitative research redux: Researching contemporary legal issues concerning education. *Research Methods for Studying Legal Issues in Education*, *1*(72), 5-25.

Lester, J. P. (1993). The utilization of policy analysis by state agency officials. Knowledge, 14(3), 267-290. London: New York University Press.

Lincoln, Y. S., & Guba, E. G. (1985). *Naturalistic Inquiry.* Newbury Park, CA: Sage Publications, Inc.

Losen, D. (1999). Silent segregation in our nation's schools. *Harvard Civil Liberties Civil Rights Law Review, 34*(2), 517-546

Love, N. (2009). Parents Involved in Community Schools v. Seattle School District No. 1: The application of strict scrutiny to race-conscious student assignment policies in K-12 public schools. *Boston College Third World Journal, 29*(1), 115-150.

Lubienski, C., Scott, J., & DeBray, E. (2014). The politics of research production, promotion, and utilization in educational policy. Educational Policy, *28*(2), 131-144.

Manning, W. H. (1977). Selective Admissions in Higher Education. Public Policy and Academic Policy; The Pursuit of Fairness in Admissions to Higher Education; The Status of Selective Admissions.

Marbury v. Madison, 5 U.S. 137 (1803).

Marin, P., Horn, C. L., Miksch, K., Garces, L. M., & Yun, J. T. (2018). Use of extra-legal sources in amicus curiae briefs submitted in Fisher v. University of Texas at Austin. *Education Policy Analysis Archives, 26*(38), 1-24.

McCarthy, M. M. (1990). The courts as educational policymakers: Recent trends And future prospects. *Educational Horizons*, *69*(1), 4-9.

McCarthy, M.M. (2016). The marginalization of school law knowledge and research: Missed opportunities for educators, *Education Law Reporter*, 331, 565-584.

McLaurin v. Oklahoma State Regents for Higher Ed., 339 U.S. 637 (1950).

Meitl, M. M. (2017). US Supreme Court use of social science research to inform constitutional criminal law and procedure opinions throughout the 2001–2015 terms (Doctoral dissertation).

Mendez v. Westminister School Dist., 64 F. Supp. 544 (S.D. Cal. 1946).

Milliken v. Bradley, 418 U.S. 717 (1974).

Milliken v. Bradley, 433 U.S. 267 (1977).

Missouri v. Jenkins, 491 U.S. 274 (1989).

Mody, S. (2002). Brown footnote eleven in historical context: Social science and the Supreme Court's quest for legitimacy. *Stanford Law Review, 54*(4), 793-829.

Monahan, J., & Walker, L. (1991). Judicial use of social science research. *Law and Human Behavior*, *15*(6), 571-584.

Moran, R. F. (2010). What counts as knowledge? A reflection on race, social science, and the law. *Law & Society Review*, *44*(3-4), 515-552.

Morgan, J. M., & Pullin, D. (2010). Social science and the courts: Challenges and strategies for bridging gaps between law and research. *Educational Researcher*, *39*(7), 515-524.

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

Ness, E. C. (2010). The role of information in the policy process: Implications for the examination of research utilization in higher education policy. In Higher education: Handbook of theory and research (pp. 1-49). Springer, Dordrecht.

Oakes, A. R. (2008). From pedagogical sociology to constitutional adjudication: The meaning of desegregation in social science research and law. *Michigan Journal of Race and Law, 14*(1), 61-108.

Oancea, A., & Pring, R. (2008). The importance of being thorough: on systematic accumulations of 'what works' in education research. Journal of Philosophy of Education, 42, 15-39.

Odegaard, C. E. (1977). Minorities in Medicine, From Receptive Passivity to Positive Action 1966-76.

Oldfather, C. M., Bockhorst, J. P., & Dimmer, B. P. (2012). Triangulating judicial responsiveness: automated content analysis, judicial opinions, and the methodology of legal scholarship. *Florida Law Review, 64*(5), 1189-1242.

Orfield, G. (2001). Diversity challenged: Evidence on the impact of affirmative action. Harvard Education Publishing Group, Harvard Graduate School of Education, 8 Story St., 5th floor, Cambridge, MA 02138.

Orfield, G. (2001). Schools more separate: Consequences of a decade of resegregation.

Orfield, G., & Eaton, S. E. (1996). Dismantling Desegregation. The Quiet Reversal of Brown v. Board of Education. The New Press, 500 Fifth Avenue, New York, NY 10110.

Orfield, G., Ee, J., Frankenberg, E., & Siegel-Hawley, G. (2016). *Brown at 62: School Segregation by Race, Poverty and State*. UCLA: The Civil Rights Project / Proyecto Derechos Civiles.

Orfield, G., Frankenberg, E. D., & Lee, C. (2003). The resurgence of school segregation. *Educational Leadership*, *60*(4), 16-20.

Orfield, G., & Lee, C. (2005). Why segregation matters: Poverty and educational inequality. Civil Rights Project at Harvard University. Cambridge: MA.

Orfield, G., & Frankenberg, E. (2014). Increasingly segregated and unequal schools as courts

Orfield, G., & Whitla, D. (1999). Diversity and Legal Education: Student Experiences in Leading Law Schools. UCLA: The Civil Rights Project / Proyecto Derechos Civiles. Retrieved from https://escholarship.org/uc/item/5m39k8bq

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007)

Patterson, J. T. (2001). *Brown v. Board of Education: A civil rights milestone and its troubled legacy*. Oxford, UK: Oxford University Press

Penuel, W. R., Briggs, D. C., Davidson, K. L., Herlihy, C., Sherer, D., Hill, H. C., ... & Allen, A. R. (2016). Findings from a National Study on Research Use among School and District Leaders. Technical Report No. 1. National Center for Research in Policy and Practice.

Petty, L. (2019). The way forward: Permissible and effective race-conscious strategies for avoiding racial segregation in diverse school districts. *Fordham Urban Law Journal, 47*(3), 659-716.

Perry, G. S., & Melton, G. B. (1983). Precedential value of judicial notice of social facts: Parham as an example. J. Fam. L., 22, 633.

Phillips, J. C., & Carter, E. L. (2010). Source of information or dog and pony show: Judicial information seeking during U.S. Supreme Court oral argument, 1963-1965 & 2004-2009. *Santa Clara Law Review, 50*(1), 79-182.

Pinder, K. A. (2013). Reconciling race-neutral strategies and race-conscious objectives: The potential resurgence of the structural injunction in education litigation. *Stanford Journal of Civil Rights and Civil Liberties, 9*(2) 247-280.

Plessy v. Ferguson, 163 U.S. 537 (1896).

Posner, R. A. (1981). The present situation in legal scholarship. *The Yale Law Journal*, *90*(5), 1113-1130.

Potter, H., & Burris, M. (2021, April 1). Here is what school integration in America looks like today. The Century Foundation. https://tcf.org/content/report/school-integration-america-looks-like-today/

Priest, G. L. (1993). The growth of interdisciplinary research and the industrial structure of the production of legal ideas: A reply to Judge Edwards. *Michigan Law Review*, 91, 1929.

Raudenbush, S.W. (1999). Supplemental Expert Witness Report, Grutter v. Bollinger et al. No. 97-75928 (E.D. Mich.), 3 March.

Reardon, S. F., Grewal, E. T., Kalogrides, D., & Greenberg, E. (2012). Brown fades: The end of court-ordered school desegregation and the resegregation of American public schools. *Journal of Policy Analysis and Management*, *31*(4), 876-904.

Reardon, S., & Yun, J. T. (2002). Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation, 1990 - 2000. UCLA: The Civil Rights Project / Proyecto Derechos Civiles. Retrieved from https://escholarship.org/uc/item/92w2w3nw

Redfield, S. (2003). The convergence of education and law: A new class of educators and attorneys. *Indiana Law Review, 36*(3), 609-644.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)

Rublin, A. (2011). The Role of Social Science in Judicial Decision Making. Duke University.

Russo, C. J. (2006). Legal research: The traditional method. Research methods for studying legal issues in education, (72), 5-25.

Russo, C. J., & Stewart, D. (2001). The place of education law in the international community. *Education Law Journal, 2001*(1), 20-27.

Rustad, M., & Koenig, T. (1993). The Supreme Court and junk social science: Selective distortion in amicus briefs. NCL Rev., 72, 91.

Sag, M., & Jacobi, T. (2019). The New Oral Argument: Justices as Advocates.

Salehijam, M. (2018). The value of systematic content analysis in legal research. *Tilburg Law Review, 23*(1), 34-42.

Schwartz, B. (1988). Behind Bakke: affirmative action and the Supreme Court. New York University Press.

SFFA v. President and Fellows of Harvard College, 980 F.3d 157 (1st Cir. 2020).

Shaw, E. J. (2005). *Researching the Educational Benefits of Diversity*. Research Report No. 2005-4. College Board.

Siegel, N. S. (2006). Race-conscious student assignment plans: Balkanization, integration, and individualized consideration. *Duke Law Journal, 56*(3), 781-860.

Siems, M. M., & Mac Síthigh, D. (2012). Mapping legal research. *Cambridge Law Journal, 71*(3), 651-676.

Simpson, R. W., & Vasaly, M. R. (2015). *The amicus brief: Answering the ten most important questions about amicus practic*e. American Bar Association, Tort, Trial, Insurance.

Skiba, R. J., Arredondo, M. I., & Williams, N. T. (2014). More than a metaphor: The contribution of exclusionary discipline to a school-to-prison pipeline. *Equity & Excellence in Education*, *47*(4), 546-564.

Stell v. Savannah-Chatham County Board of Education, 220 F. Supp. 667 (1963).

Straus, R. M., & Lemieux, S. (2016). The two Browns: Policy implementation and the retrenchment of Brown v. Board of Education. *New Political Science*, *38*(1), 44-60.

Stubbs III, F. H. (1993). Freeman v. Pitts: A rethinking of public school desegregation. *University of Richmond Law Review, 27*(2), 399-418.

Sughrue, J., & Driscoll, L. G. (2012). Legal Research in the Context of Educational Leadership and Policy Studies. International Journal of Educational Leadership Preparation, *7*(2), n2.

Superfine, B. M. (2010). Court-driven reform and equal educational opportunity: Centralization, decentralization, and the shifting judicial role. *Review of Educational Research*, *80*(1), 108-137.

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971).

Sweatt v. Painter, 339 U.S. 629 (1950).

Terenzini, P. T., Cabrera, A. F., Colbeck, C. L., Bjorklund, S. A., & Parente, J. M. (2001). Racial and ethnic diversity in the classroom: Does it promote student learning? *The Journal of Higher Education*, *72*(5), 509-531.

Tushnet, M. (1992). Public Law Litigation and the Ambiguities of Brown. *Fordham Law Review, 61*(1), 23-28.

Tushnet, M. V. (1987). *The NAACP's Legal Strategy Against Segregated Education, 1925-1950 (Vol. 2)*. Chapel Hill, NC: Univ of North Carolina Press.

United States v. Paradise, 480 U.S. 149 (1987).

U.S. Department of Justice & U.S. Department of Education. (2011). Guidance on the voluntary use of race to achieve diversity and avoid racial isolation in elementary and secondary schools. Washington, DC: Author. [Rescinded July 2, 2018, U.S. Department of Justice and U.S. Department of Education].

U.S. Government Accountability Office. (2016). K–12 education: Better use of information could help agencies identify disparities and address racial discrimination. Washington, DC: Author.

Valencia, R. (2005). The Mexican American struggle for equal educational opportunity in Mendez v. Westminster: Helping to pave the way for Brown v. Board of Education. *Teachers College Record*, *107*(3), 389-423.

Ware, L. (2004). From Brown to Grutter: affirmative action and higher education in the south. Strict scrutiny, affirmative action, and academic freedom: the University of Michigan cases. *Tulane Law Review*, 78(6), 2097-2115.

Wahlbeck, Paul J. 1998. The development of a legal rule: The federal common law of public nuisance. *Law & Society Review, 32*(3), 2097-2116.

Weber, R. P. (1990). Basic content analysis (No. 49). Sage

Weiss, C. H. (1977). Using social research in public policymaking. Lexington, MA: Lexington Books.

Weiss, C. H. (1979). The many meanings of research utilization. Public Administration Review, 39, 426–431.

Weiss, C. H. (1991). Policy research as advocacy: Pro and con. Knowledge & Policy, 4, 37–56.

Weiss, C. H., & Bucuvalas, M. J. (1977). The challenge of social research to decisionmaking. In C. Weiss (Ed.), Using social research in public policymaking (pp. 213–233). Lexington, MA: Lexington Books.

Weiss, C. H., & Bucuvalas, M. J. (1980). Social science and decision-making. New York: Columbia University Press.

Wells, A. S., & Roda, A. (2016). The impact of political context on the questions asked and answered: The evolution of education research on racial inequality. Review of research in education, *40*(1), 62-93.

Wells, A., Fox, L., & Cordova-Cobo, D. (2020, January 28). How Racially Diverse Schools and Classrooms Can Benefit All Students. The Century Foundation. https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/?agreed=1

Welner, K. G. (2006). K–12 Race-conscious student assignment policies: Law, social science, and diversity. *Review of Educational Research*, *76*(3), 349-382.

Widdig, G. M. (1991). Board of Education of Oklahoma City v. Dowell: A solution to perpetual judicial supervision. *Tulsa Law Journal, 27*(1), 85-110.

Williams Jr, A. L. (1989). A Critical Analysis of the Bakke Case. SUL Rev., 16, 129.

Willingham, W. W., Breland, H. M., Ferrin, R. I., & Fruen, M. (1977). The status of selective admissions. Carnegie Council on Policy Studies in Higher Education (Ed.), Selective admissions in higher education. San Francisco: Jossey-Bass.

Wolfe, C. (1991). Judicial Activism: Bulwark of Freedom or Precarious Security. Harcourt College Pub.

Wolters, R. (2005). Constitutional history, social science, and Brown v. Board of Education 1954–1964. *Occidental Quarterly*, *5*(1), 7-34.

Wood, T. E., & Sherman, M. J. (2001). Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected.

Wrightsman, L. (2008). *Oral arguments Before the Supreme Court: An empirical Approach*. Oxford University Press.

Zietlow, R. E. (2008). The judicial restraint of the Warren Court (and why it matters). *Ohio State Law Journal*, *69*(2), 255-302.

Chelsea Zimmerman

Savannah, GA | LinkedIn | chelzimm@gmail.com

WORK EXPERIENCE

Savannah Chatham County Public School System **Savannah, GA**
Lead School Counselor *2020-Present*

- Collaborated with school and district leadership to secure accreditation for the new virtual school, Savannah Chatham E-Learning Academy, after one year of successful school operations.
- Assessed student achievement data to build the master schedule of 50+ course offerings for over 400 high school students, ensuring resources are arranged to promote optimum learning.
- Promoted innovative school counseling practices by implementing new procedures and modeling best practices, including the development of a virtual crisis protocol, resulting in 100% improvement in addressing student social-emotional concerns.

Savannah Chatham County Public School System **Savannah, GA**
School Counselor *2019- 2020*

- Revamped the school counseling program at a Title I elementary school serving more than 500 students through the use of student and staff surveys to determine areas of need, increasing social-emotional learning (SEL) opportunities by 28%.
- Collected and assessed qualitative and quantitative data from Response-to-Intervention (RTI) plans to improve student outcomes, resulting in a 14% reduction in student behavior in the identified group.
- Developed an effective virtual counseling environment with access to counseling services and SEL lessons, engaging 32% of the student population during the pandemic.

LEADERSHIP EXPERIENCE

Savannah Chatham County Public School System **Savannah, GA**
Data Chair, School Counseling Department Advisory Committee *2019-Present*

- Leveraged data analysis expertise to identify areas of improvement and further promote school counseling programming within the district.
- Provided professional development to over 30 counselors in the district on best practices in data collection and analysis to increase program impact on student achievement.

Savannah Chatham County Public School System **Savannah, GA**
Superintendent Intern *2019*

- Participated in district leadership meetings on Title I funding and policies, curriculum and instruction, district accountability systems, and building leadership.
- Conducted a district-wide survey at SCCPSS to understand time utilization in the school counseling profession and how that impacts overall school counseling program effectiveness.

MSD of Wayne Township **Savannah, GA**
Data Chair, Ben Davis High School Discipline Committee *2016-2017*

- Led a year-long project of assessing student discipline data to assess equitable practices, and recommend practical ways to reduce the disproportionate use of exclusionary discipline practices with students of color.
- Collected staff perceptions of disciplinary practices and student behavior through a survey, using survey results to drive changes in discipline policies.

EDUCATION

Indiana University **Bloomington, IN**
Ed.D., Educational Leadership *July 2022*
Indiana University **Bloomington, IN**
Graduate Certificate, Educational Law *July 2019*
Indiana University, Purdue University-Indianapolis **Indianapolis, IN**
M.S.Ed., Counselor Education *June 2014*
Indiana University, Purdue University-Indianapolis **Indianapolis, IN**
B.A., Psychology *May 2012*

SKILLS & INTERESTS

Skills: Microsoft Office (Excel, PowerPoint)| Google Suite (Forms, Sheets, Sites) | R | SPSS |

Interests: Education Law and Policy, Data Analysis, College and Career Consulting, Music and Theatre