THE RACE-BASED SCHOOL ASSIGNMENT POLICY RESPONSE TO *PARENTS INVOLVED V. SEATTLE SCHOOLS* BY 125 DISTRICTS FROM THE CIVIL RIGHTS COMMISSION'S 1987 META STUDY ON THE EFFECTS OF DESEGREGATION

A Dissertation

Presented to the Faculty of the Graduate School

University of Missouri-Columbia

In Partial Fulfillment

Of the Requirements for the Degree

Doctor of Education

By

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MAY, 2013

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The undersigned, appointed by the Dean of the Graduate School, have examined the dissertation entitled

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Presented by Stephen Himes, a candidate for the degree of Doctor of Education, and hereby certify that, in their opinion, it is worthy of acceptance.

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DEDICATION

This dissertation is dedicated to my wife, Franci. As difficult as this program is, she made the most sacrifices to make my doctorate a reality. First, she ushered me through law school at the University of Kansas, travelling to and from Lawrence every other weekend for over two years. Then she went without me for several months while I studied for the bar. She took care of me during a year long job search, and has given up dozens of weekends, two entire summer months, and numerous weekday evenings while I read, wrote, and studied for this degree. Whatever good comes from this, Franci is the reason it happened.

ACKNOWLEDGEMENTS

First and foremost, I would like to acknowledge the role my parents have played in my academic career. As a child, they gave me the freedom to set my own schedule so I could take college courses, play sports, participate in academic extra-curriculars, work part time jobs, and have a social life. Without that freedom, I would not be able to handle the schedule I keep now. I have never properly thanked them for that.

The biggest difference between the ELPA program and law school is learning how to work in teams. Law school trained me to analyze the kind of wicked problems we dealt with in ELPA. I could have written the entire twelve page wicked problem paper in three hours because it was framed like a bar exam question. But my answer would never have approached the quality and depth of the product we produced in my summer group. Colleen Becker, Randy Caffey, Bryndyn Crutcher, Natalie Precise, and Kris Schuler taught me patience, delegation, and collaboration. After talking through and hashing out different theories and analyses, we created a great paper—far better than anyone could do alone. I have carried this invaluable experience into my professional life. Thank you, Team F-1.

The same can be said for my site group in Liberty. Again, the work we did together on those many Wednesdays and Saturdays was far better than anything I would have come up with on my own. Not only did we create quality work, but the emotional support of the group helped sustain me for three years. Tammy Bunch, Stephanie DeClue, Eric Greely, Mary Laughlin, and Debbie Psychoyos, who skyped in from Panama every week, thank you.

Finally, a big thank you to Dr. Phillip Messner and Dr. Carole Edmonds, who also emotionally sustained us during those long years of classwork. Dr. Messner's patience during Quantitative Analysis is like a monk's, and his guidance in thinking through research issues is second to none. Dr. Edmonds came to us in the second year of the program, and her tireless support is the reason I finally finished this project. Several times, she helped me through previously intractable problems with precise insights. Dr. Edmonds is an invaluable part of the ELPA program.

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THE RACE-BASED SCHOOL ASSIGNMENT POLICY RESPONSE TO *PARENTS INVOLVED V. SEATTLE SCHOOLS* BY 125 DISTRICTS FROM THE CIVIL RIGHTS COMMISSION'S 1987 META STUDY ON THE EFFECTS OF DESEGREGATION

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ABSTRACT

In *Parents Involved v. Seattle Schools* (2007), the Supreme Court struck school assignment policies in Seattle and Louisville, leaving questions about what kinds of race conscious school assignment policies (RCSAPs) are constitutional. The researcher used a policy analysis approach to analyze how districts amended RCSAPs after the case. The sample came from a 1987 Civil Rights Commission meta study cited by Justice Breyer in his *Parents Involved* dissent. The researcher used grounded theory methods to develop this theme: most districts interpreted *Parents Involved* to eliminate consideration of race from school assignment, though the law allows for limited use of race in such policies.

The researcher recommends that districts set parameters for gathering input on school assignment, and they should consider examples in Justice Kennedy's *Parents Involved* opinion, the federal district and appellate decisions in *Lower Merion*, and the Department of Education Civil Rights Division's published advice. The researcher recommends the Supreme Court affirm that race may be considered in school assignment because the public is better served by a transparent and free exchange of ideas on such a context specific issue. The researcher also recommends the Court adopt Justice Kennedy's "neutral individualism" approach to school assignment: race can be one of many factors, if each student is given individual consideration in the policy.

CHAPTER 1

INTRODUCTION TO THE STUDY

Background

In *Parents Involved v. Seattle Schools* (2007), Chief Justice John Roberts and Justice Stephen Breyer both claimed the mantle of *Brown v. Board of Education* (1954) to support opposing positions on the constitutionality of race conscious school assignment policies (RCSAPs). Chief Justice Roberts (2007) found RCSAPs *per se* unconstitutional, arguing *Brown* stands for the proposition that the "Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race" (p. 747). His non-controlling plurality opinion culminated in the most famous sentence in his jurisprudence: "The way to stop discrimination of the basis of race is to stop discriminating on the basis of race" (p. 748).

In dissent, Justice John Paul Stevens (2007) wrote that the Chief Justice's reading of *Brown* was a "cruel irony" that "rewrites the history of one of this court's most important decisions" (p. 798, 799). Justice Breyer (2007) went farther, writing that Chief Justice Roberts' "color blind constitutionalism" ignored the context of *Brown* and invalidated perfectly democratic interests "in producing an educational environment that reflects the 'pluralistic society' in which our children will live" (p. 840).

In the middle of the argument sat Justice Anthony Kennedy, the Roberts Court's "swing justice." Justice Kennedy (2007) affirmed the Chief Justice's holding that the RCSAPs in the Seattle and Louisville districts violated the Equal Protection Clause, but wrote separately to affirm that "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue" (p. 783). Justice Kennedy

found a constitutionally compelling interest in a district's pursuit of a "diverse student population," but "[r]ace may be one component of that diversity…other demographic factors, plus special talents and needs, should also be considered" (p. 798).

In short, Justice Kennedy's controlling opinion holds that districts may use race as a factor in school assignment policy, but does not give much definitive guidance about when and how.

"Constitutional Law Is What Justice Kennedy Says It Is"

A Reagan appointee, Justice Kennedy's vote is crucial to almost all 5-4 cases (Schmidt, 2010). In fact, Justice Kennedy has cast the deciding vote in 27.5% of his 5-4 cases, a percentage second only to Justice Sherman Minton since 1953 (Enns & Wohlfarth, 2011, p. 43). During the 2008-2009 term, Justice Kennedy voted in the majority in 92% of all cases, including 18 of 23 decided by a 5-4 margin (Liptak, 2009). More importantly, Justice Kennedy *authors* more 5-4 majority opinions than any current justice. Since the 1996-1997 term, Justice Kennedy voted in 5-4 majorities 187 times (25 times more than any other justice) and authored 25.1% of those 5-4 opinions. Justice Kennedy authored 47 of the most closely contested decisions in the Court's recent history—16 more than Justice Antonin Scalia, whose 31 opinions ranks second, and 26 more than the average for each justice (Bhatia, 2011, p. 2).

The results are not surprising, considering the Court's history of wooing the swing justice with the promise of authoring the controlling opinion (Bonneau, Hammond, Maltzman, & Wahlbeck, 2007). Because the *Parents Involved* line of cases is a battle to define the legendary decision in *Brown v. Board of Education*, most Court observers expect Justice Kennedy to not only cast the deciding vote in the next RCSAP case, but

also to author the opinion. As Chicago-Kent College of Law Professor Christopher Schmidt (2010) observed, “Put simply, on a striking number of contentious issues, constitutional law is what Justice Kennedy says it is” (p. 3).

For school leaders in districts with RCSAPs, the upshot is obvious: for the policy to survive, it must win the heart and mind of Justice Anthony Kennedy (Scott, 2008, p. 559).

How Brown *Changed the Racial Composition of Cities and Schools*

The story of *Parents Involved* starts with *Brown v. Board of Education.* As Justice Breyer (2010) explained, *Brown* itself did not secure liberty for millions of disenfranchised minorities; rather, shifting public opinion and the gradual acceptance of the federal government’s enforcement of the Court’s decision gave *Brown* its legitimacy. Still, *Brown* is an enduring symbol of the Civil Rights Movement because of Chief Justice Earl Warren’s moving articulation of the Constitution’s guarantee of “equal protection of the laws” (Breyer, 2010). Warren (1954) reasoned that government enforced segregation is *per se* unconstitutional because “separate but equal” necessitates believing races are inherently unequal—otherwise, there would be no need for separate facilities. (*Brown v. Board of Education*, 1954). Warren bolstered his idealistic argument with social science research from City College of New York Psychology Professor Kenneth Clark, whose famous “doll experiments” provided evidence that segregation causes significant psychological and social damage to Black students (Adler, 2003).

The gradual public acceptance of the Court’s decision legitimized the principle of judicial review, that the Supreme Court has the “final say” on constitutional issues (Breyer, 2010). Warren’s opinion, President Eisenhower’s enforcement of the opinion,

and public acceptance dramatically changed the composition of public schools and their relationships with their constituents. In short, no Supreme Court case has impacted, and continues to impact, public schools more than *Brown*, especially in diverse urban and inner-suburban districts (Ashenfelter, Collins, & Yoon, 2005).

During the rest of the 1950s and through most of the 1960s, schools gradually became more integrated across the country, sometimes dramatically so in major urban districts. However, after a period of relatively racially balanced schools, by the mid-1980s school districts started to resegregate by neighborhood composition, driven by White Flight, among other factors (Frankenberg, Lee, & Orfield, 2003). By the end of the 1990s, many urban schools had become "apartheid schools," serving the only students left in these areas: impoverished minorities (Frankenberg, Lee, & Orfield, 2003).

In recent years, minorities who can leave these schools have done so, moving into highly White suburban schools. At the same time, many White middle class families are moving back into cities (Berube et al, 2010). The combination of White repopulation and a growing Hispanic population has spurred urban and inner-suburban districts to formulate new school assignment policies to accommodate the emerging mixed-race demographic shift (Berube et al, 2010). This is especially true in districts with neighborhood schools, which can create racially homogenous schools within an otherwise diverse district.

Resistance to these policies resulted in the legal question in *Parents Involved*, which is the inverse of *Brown*: If schools cannot enforce racial segregation, can they enforce racial desegregation?

What Can Brown *Do For You:* Parents Involved v. Seattle Schools

The Supreme Court's politically charged 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* was the most significant ruling on race in school assignment policy since *Brown* (McNeal, 2009). As noted above, the only certain result of *Parents Involved* was the Court struck down racial diversity plans in the urban Seattle and Louisville school districts as violations of the Fourteenth Amendment. Both districts factored race into voluntary school assignment policies, but the Court declared these plans unconstitutional on Equal Protection grounds (*Parents Involved v. Seattle*, 2007).

Because of the fractured nature of the justices' opinions, *Parents Involved* is fraught with uncertainty that could affect RCSAPs and other public school diversity policies for decades to come (Scott, 2008, p. 562). Chief Justice Roberts' "color blind Constitution" opinion commanded only a plurality of the Court, so the Seattle and Louisville plans were declared unconstitutional. However, the Chief Justice's reasoning that, in the K-12 context, race can *never* be used to ensure racial diversity lacks precedential value because it did not command a five vote majority. Justice Kennedy wrote separately to explicitly leave open the possibility RCSAPs might be constitutional, but did not definitively say when this might be (Scott, 2008, p. 562). Justice Kennedy affirmed RCSAPs are subject to some sort of "strict scrutiny" analysis, meaning that, at a minimum, RCSAPs need to be "narrowly tailored" to meet the district's "compelling interest" in achieving racially diverse schools (Scott, 2008, p. 562).

The specific, fact-based nature of the "narrow tailoring" element of Equal Protection jurisprudence means that school districts' policy decisions will be vital to

determining the meaning of the Fourteenth Amendment and the legacy of *Brown v. Board of Education* (Morgan & Pullin, 2010, p. 516). When the next case in this line reaches the Court, the particulars of the district's policy will be analogized to every other RCSAP in the nation to determine their constitutionality. In other words, the specifics of school district policy will become constitutional law (Morgan & Pullin, 2010, p. 516). Thus, the Court's direction in the *Parents Involved* line of cases will not only determine how schools can adapt to resegregation and rapid desegregation, but also determine the meaning of the Constitution itself.

Statement of the Problem

The ambiguity of *Parents Involved* leaves districts not just with questions about the constitutionality of their RCSAPs, but whether RCSAPs are constitutional at all. Without further guidance from the Court, districts are making educated guesses about whether their policies can withstand legal scrutiny. Regardless, no matter what the courts do with *Parents Involved,* districts with RCSAPs will not suddenly drop their interest in cultivating more racially diverse student bodies—the existence of RCSAPs themselves are evidence that districts value racial diversity enough to enshrine it in policy.

This case has been analyzed extensively by legal commentators on all sides of the political spectrum, so there is little gap in knowledge about where the various voices in the legal community stand on *Parents Involved*. But for educators, George Mason School of Law Professor Nelson Lund (2008) puts the issue succinctly: "Justice Kennedy's views are the best predictor of future decisions in this area…and will probably be treated more or less as the law by most lower court" (p. 17). Thus, districts amending their RCSAPs should tailor policies towards what Justice Kennedy would deem constitutional.

To this end, constitutional law is not solely an abstract exercise—Supreme Court justices, including Justice Kennedy, often look to the practical effects of decisions when crafting opinions (Breyer, 2005). If the Court placed great restrictions on RCSAPs, they would nullify dozens of RCSAPs enacted by democratically elected school boards. Rather than take that extraordinary step, the Court will likely ask if districts have reacted to *Parents Involved* in some sort of discernible pattern (Breyer, 2005). Justice Kennedy has shown himself to be persuaded by consensus response, even looking to international law for guidance on constitutional issues (Toobin, 2005). Thus, rather than Justice Kennedy telling districts what RCSAPs are constitutional, perhaps districts will tell Justice Kennedy which ones are.

The problem was that, while the legal community has thoroughly dissected the case, no researcher had directly surveyed school districts with RCSAPs to analyze the mass response to *Parents Involved*. Some researchers had looked at the federal government's response to the issue and have monitored newspaper articles on local RCSAP issues (Siegel-Hawley & Frankenberg, 2011). Still, there was an overall gap in knowledge about how districts with RCSAPs have responded to *Parents Involved*.

Purpose of the Study

The purpose of this study was to analyze how school districts with RCSAPs have responded to *Parents Involved.* The author gathered qualitative data through an open ended survey administered to a sample of districts with RCSAPs like the ones at issue in *Parents Involved*, then analyzed it through the lens of a leading theory on Justice Kennedy's Equal Protection jurisprudence.

The researcher discovered a clear trend in districts' response to *Parents Involved*, which led to suggestions for districts dealing with resegregation. For the legal community, the research revealed some data on whether the Court is likely to expand or curtail Chief Justice Roberts' plurality opinion in *Parents Involved*, a major symbol in the fight over the Court's Equal Protection jurisprudence. For the education leaders in districts with RCSAPs, further analysis of the data, validating studies, other court decisions, and advice from the Department of Education's Office for Civil Rights offered a guide to creating a school assignment policy without violating *Parents Involved*.

The research could even influence the Supreme Court: social science research figured prominently in Justice Breyer's *Parents Involved* dissent, and could influence Justice Kennedy because of the clear patterns of behavior that emerged (Morgan & Pullin, 2010, p. 520). In fact, the researcher asked Justice Breyer if an analysis of districts' response to *Parents Involved* would be of interest to the Court. Justice Breyer replied, "I would be very interested in reading that, and the Court would find it helpful in its deliberations" (S. Breyer, personal communication, December 8, 2011).

Research Question

How have districts amended their RCSAPs in response to *Parents Involved*?

Conceptual Framework

Because this study focused on the law's effect on education policy, the conceptual framework provided a lens for educators to look at the law. The theoretical framework established the philosophical reasons school district leaders must follow the law even if it violates their personal sense of morality. The narrower conceptual underpinnings described how the law is determined and established a lens by which to analyze the data.

Theoretical Framework: Locke's Social Contract

John Locke's (1690) Social Contract Theory, articulated in his *Second Treatise on Government*, greatly influenced several framers of the Constitution. For example, in the *Declaration of Independence*, Thomas Jefferson relied upon Locke for the principle that both citizens and the government are obligated to follow laws established by the consent of the governed (Wills, 2002).

Modern thinkers have further parsed Locke's ideas. Most relevant to this study was the Plural Subject Theory of Political Obligation, defined by Margaret Gilbert (2008) as the idea that "membership in a political society in and of itself obligates one to support that society's political institutions" (p. 1). This "joint commitment" is not necessarily a moral obligation, but is incurred merely by participating in society. The second is Legal Obligation Theory, defined by Bhiku Parekh (1993) as the obligation to obey laws enacted by a legitimate civil authority. Under Legal Obligation Theory, the law's morality is irrelevant: if an individual acknowledges a legitimate legal system, then its laws are binding on that individual (Parekh, 1993).

Combined, these theories suggest a framework: under the social contract, if individuals participate in a society established by the consent of the governed, they are obligated to support its political institutions. If a political institution is a legitimate civil authority, then the individual is obligated to follow its laws, regardless of whether he finds them moral. Under this theoretical framework, public school leaders are obligated to comply with the laws of the United States' political institutions, including the Supreme Court, regardless of their opinions about those laws.

Conceptual Underpinning: Judicial Review

The people of the United States ratified the Constitution as its governing document, its social contract. In almost all questions of governance, the Constitution lays out interpretable principles rather than definitive, detailed laws of the land. Thus, the law is established by those with the final interpretation of the Constitution (Breyer, 2010). Since 1803, the United States government has—with some minor, century-old deviations—followed the doctrine of "judicial review," which established the Supreme Court's authority to interpret the constitutionality of laws (Breyer, 2010; *Marbury v. Madison*, 1803). In the Equal Protection context, the Supreme Court is the final arbiter of whether RCSAPs are constitutional under the Fourteenth Amendment.

Conceptual Underpinning: Neutral Individualism

A conceptual underpinning should help the researcher "see it in the field." Because of its grounding in constitutional principles, this research needed to be analyzed through a constitutional lens (J. Scribner, personal communication, March 13, 2009). Because of Justice Kennedy's likely importance in the next case in the *Parents Involved* line, the data required a unifying concept of his Equal Protection jurisprudence. To that end, Court observers have tried to make sense of Justice Kennedy's jurisprudence for much of the last decade, with few definitive results. Justice Kennedy frustrates legal commentators and law professors, captured best by the title of the *Slate* article "The Sphinx of Sacramento" (Lithwick & Epps, 2007).

However, Purdue University Political Science Professor Frank Colucci (2009) offered a persuasive theory that Justice Kennedy's Equal Protection jurisprudence is consistent under the concept of "neutral individualism." Colucci (2009) argued Justice

Kennedy believes the Constitution "neither knows nor tolerates classes among citizens," but does not view the Constitution as "color-blind" (p. 103). Rather, Justice Kennedy abhors defining people solely by group membership, but acknowledges an individual's make-up includes group membership. Thus, if a law gives individual consideration, which can include group memberships, then Justice Kennedy will deem the law constitutional (Colucci, 2009, p. 104).

Filtering data through the lens of neutral individualism provided a way of analyzing patterns in the data. This concept will be helpful in monitoring the effect of *Parents Involved* in the future. Perhaps districts will tailor policies in the same ways, as if in a collective effort to appeal to Justice Kennedy. Or, they may tailor policies differently, making it very important which lawsuit first arrives on Justice Kennedy's desk. Or, districts may not tailor policies at all, rendering the case moot. Whatever the data may suggest, Colucci's concept has the "admirable precision" to make sense of Kennedy's Equal Protection jurisprudence (McGinnis, 2007).

Assumptions

According to several meta-studies by the United States Commission on Civil Rights (2006), most school districts want to achieve diversity within individual schools, regardless of whether the district as a whole is segregated. The researcher assumes that the existence of a RCSAP is evidence the district sees racial diversity in individual schools as a compelling government interest. Whether this value stance is supported by research on, say, Black achievement in desegregated schools, is not at issue. The researcher simply wants to discover how districts are pursuing the value of racial diversity within schools.

Rationale and Significance

This research is vital to urban and inner suburban school administrators and civil rights lawyers in education, and it offers a framework for continuous evaluation of the issue. As will be discussed in Chapters 4 and 5, the data show that many districts have rescinded their RCSAPs or amended school assignment policies to include definitions of diversity not involving race. Under the concept of judicial review, *Parents Involved* is moot for many districts because the decision does not apply to school assignment policies that do not explicitly include race—in short, there's nothing for the Court to review. *Parents Involved* stands as a symbol of the Court's political divide, but nothing more.

However, if some districts have not rescinded RCSAPs or are amending RCSAPs to try to comply with *Parents Involved*, more lawsuits are likely to emerge. Thus, case specific facts and national trends will be important to schools and the courts. Educational research literally becomes arguments of law because "narrow tailoring to further a compelling government interest" involves intense, fact-based analysis (Welner, 2006). This research is evidence that many school districts are still considering race in their school assignment, even if they comply with the "no consideration of race" perception of *Parents Involved*—further evidence that racial diversity in schools is a "compelling government interest" and that the law needs to be tailored to fit the reality of school assignment policy (Morgan & Pullin, 2010, p. 523).

Definition of Key Terms

Compelling Interest

In Equal Protection analysis, an interest sufficiently crucial to the public interest that the Constitution allows the government to regulate it.

This is the first test in the "strict scrutiny" standard used to determine whether a law violates the Equal Protection Clause. The Supreme Court has not clearly defined "compelling interest," but examples include national security and preserving explicit constitutional protections. For purposes of this research, in *Grutter v. Bollinger* (2003) Justice Sandra Day O'Conner found universities have a "compelling interest in attaining a diverse student body" (Adams, 2008, p. 948). In his *Parents Involved* plurality opinion, Chief Justice Roberts did not apply this interest to K-12 schools, but Justice Kennedy did rely on *Grutter* "to reach the conclusion that the public school districts had a compelling interest in obtaining racial diversity" (Adams, 2008, p. 985).

Diversity

Unless otherwise noted, "diversity" will mean racial diversity, which is consistent with the context of *Brown* and most research on segregation in schools.

Narrow Tailoring

In Equal Protection analysis, the idea that a law must not give the government more power than necessary to achieve its compelling interest in an issue.

This is the second test in the "strict scrutiny" standard used to determine whether a law violates the Equal Protection Clause. The Supreme Court's definition has evolved, and according to many observers, has merged with the third strict scrutiny test, the "least restrictive means" test. In the context of race, the Court requires the law to use the minimum necessary racial preference to accomplish its goal. If the government can accomplish its goal without using race, then it cannot use race at all (Ayres & Foster, 2006, p. 2). However, Yale School of Law Professor Ian Ayres (2006) argues *Grutter* changed "narrow tailoring" to mean that racial preferences are allowed as long as the law

provides for "individualized consideration" of each student's application (p. 30). In his *Parents Involved* concurrence, Justice Kennedy does not question this definition of "narrow tailoring," but he does emphasize a number of race neutral alternatives to the Seattle and Louisville plans (LeGrand, 2009, p. 65).

Neutral Individualism

Under neutral individualism, Justice Kennedy does not see the Constitution as "color blind," but neither should the law define people solely by race, class or other group membership (Colucci, 2009, p. 103).

This is Professor Frank Colucci's (2009) unifying theory of Justice Kennedy's Equal Protection jurisprudence. The law may consider race, class or other group membership as long as it also gives the *individual* consideration as well. If it does, Justice Kennedy will deem the law constitutional (Colucci, 2009, p. 104).

Race Conscious School Assignment Policy (RCSAP)

Policies developed by school districts to integrate schools as a remedy for past discrimination or to create racial diversity within individual schools. In the 1960s and 1970s, most RCSAPs integrated previously segregated schools, but by the 1980s, many RCSAPs became voluntary as a way of maintaining diversity (Welner, 2006).

Socioeconomic Status

Grouping people with similar occupational, educational and economic characteristics (Santrock, 2004, p. 583). Santrock (2004) adds that people of similar socioeconomic status have similar abilities to "control resources and participate in society's rewards" (p. 583).

Strict Scrutiny

For a law to pass strict scrutiny, the government must have a "compelling interest" in creating the law, "narrowly tailor" the law to meet the government's objectives, and have no "less restrictive means" to accomplish the same objective ("Strict scrutiny," n.d.).

This is one of the legal standards used to determine whether a law violates the Equal Protection Clause. It is the most rigorous Equal Protection standard, used when the law deals with a "suspect classification," as when people are grouped by race or religion.

White Flight

The process of White migration from racially mixed urban areas to more racially homogeneous suburban or exurban areas. In this dissertation, "White Flight" will refer to the post World War II, post *Brown* period of the 1950s, 1960s and 1970s, where the White middle class dramatically expanded the suburbs, segregating impoverished minorities to urban cores (Schaefer, 2008).

Summary

The first section of the Introduction to the Study details the background of *Parents Involved*. The opening explains the complexity of the Supreme Court's decision on the constitutionality of race conscious school assignment policies. Then, Justice Kennedy's importance to the case and the future of RCSAPs are outlined. The background transitioned to the origins of *Parents Involved* in *Brown v. Board of Education*, which relied in part on social science research for its holding that districts cannot forcibly segregate students by race. *Brown*'s effect on the racial composition of schools and cities is detailed, from White Flight to the repopulation of cities by Whites.

This history culminates in *Parents Involved*'s legal question, the inverse of *Brown*'s: Can districts use race to desegregate schools?

The Introduction then announces the statement of the problem, which is that the ambiguity of *Parents Involved* leaves schools to make educated guesses about whether RCSAPs are constitutional, and if so, what kinds are. The purpose of this research is to discover "what's happening in the field" to guide educators' response to *Parents Involved*. The research question is "How have districts amended their RCSAPs in response to *Parents Involved*?"

This question is undergirded by a conceptual framework to establish how educators should look at the law. The theoretical framework uses Locke's Social Contract to establish that district leaders must abide by the law, no matter their opinions about the correctness or morality of the law. The conceptual underpinnings describe what the law is. The first underpinning is judicial review, the principle that the Supreme Court is the final arbiter of the Constitution's meaning. The second underpinning is specific to this research: neutral individualism, the leading theory of how Justice Kennedy sees the Equal Protection Clause. The underlying assumption of this research is that districts with RCSAPs have racial diversity as a goal and will continue to pursue that goal in the wake of *Parents Involved*'s ambiguity. Finally, key terms are defined, clarifying key legal principles and specific social science terms.

CHAPTER 2

REVIEW OF RELATED LITERATURE

The history of public school desegregation research begins with a series of Congressionally commissioned reports in the wake of *Brown v. Board of Education*. These reports deal with desegregation's impact on Black achievement, which is not at issue in this dissertation. Still, the research drove school desegregation reforms that accelerated White Flight and the resegregation of schools, which is at issue in this dissertation. From here, the repopulation of Whites and Hispanics in cities and inner suburbs gave rise to voluntary RCSAPs and the resulting legal issue in *Parents Involved*.

The History of Public School Desegregation Research

Discussion of desegregation's impact on educational outcomes begins with the Congressionally mandated *Equality of Educational Opportunity*, commonly referred to as *The Coleman Report* (Coleman, 1966). Commissioned as part of the Civil Rights Act of 1964 in response to courts' post-*Brown* reliance on social science for legal conclusions, *Coleman* is generally cited as evidence that student background and socioeconomic status (SES) has more impact on student achievement than allocation of school resources. *Coleman* was also the first major educational study to focus on outcomes, finding an extraordinary achievement gap between Whites and Blacks, regardless of how well funded their school. As for desegregation, *Coleman* found that, despite forced integration, most students attend schools with racial peers, with little difference in desegregation rates between the American South and the North (Coleman, 1966).

Coleman's most controversial finding concerned the relationship between Black achievement and overall school SES. Black students were found to achieve better in middle class schools than in poor ones (Coleman, 1966). These findings were amplified

by *Racial Isolation in the Public Schools*, commonly referred to as *The Hannah Report* (Hannah, 1967). Authorized by the U.S. Commission on Civil Rights, *Hannah* found that Black students achieved much more in classrooms with majority White students. According to the report, this effect even outweighed teacher quality: "Negro students in majority-White schools with poorer teachers generally achieve better than similar Negro students in majority-Negro schools with better teachers" (Hannah, 1967, p. 4). Later in the report, *Hannah* stated the implication of this conclusion: "The longer Negro students are in racially isolated schools, the greater the negative impact. The longer Negro students are in desegregated schools, the higher their performance" (Hannah, 1967, p. 5).

Hannah became the foundation for urban busing policies, where Black students were transported to schools outside their neighborhood to get the benefits of mixed-race schooling (Viadero, 2006). Diane Ravitch would later derisively call *Hannah* "the bible of integrationist forces" in the backlash to busing (Viadero, 2006, p. 22). Coleman himself came under intense criticism from integrationists for arguing that busing accelerated White flight from urban school districts. In a subsequent report, Coleman seemed to repudiate many of his previous findings: "in the long run the policies that have been pursued will defeat the purpose of increasing overall contact among races in schools" (Coleman, 1975, p. 12). Coleman, though, still supported integration but maintained "the instrument through which most desegregation was accomplished—the courts…are probably the worst instrument of social policy" (Coleman, 1975, p. 12).

At the time of the *Second Coleman Report*, one of the most outspoken critics of busing was David Armor, then a Senior Social Scientist at The Rand Corporation (*Time*, 1975). Armor found that courts struck down "metropolitan plans," where suburbs were

brought under city control to bus Whites into city schools for racial balance. Even where courts had not struck these plans—an example being Louisville, Kentucky—Whites simply moved farther away or went to private schools. As an alternative, Armor advocated for "magnet" schools to draw students of all races into the city, creating a kind of "voluntary" integration through better educational opportunities (*Time*, 1975).

Armor's "magnet schools" theory was tested by the Kansas City, Missouri Public School District (KCMSD) during the 1980s. In 1984, Federal District Judge Russell Clark, after a series of complex legal maneuvers, found the district and the state liable for the unconstitutionally segregated student population in the KCMSD. Rather than consolidating KCMSD with surrounding suburban districts and introducing a mandatory busing plan, Judge Clark ordered KCMSD to spend money creating magnet schools, with the state of Missouri funding cost overruns (*Jenkins v. Missouri*, 1984). The result was a "Field of Dreams" theory of desegregating schools: "If you build it, they will come" (Ciotti, 1998). Over the next decade, KCMSD spent $1.6 billion dollars to develop some of the best school facilities in the nation, including an Olympic-sized swimming pool, a robotics lab, a planetarium, and a 25 acre wildlife sanctuary (Ciotti, 1998).

The plan did not work. In 1997 Professor Armor himself testified to Judge Clark that his research showed KCMSD had become more segregated, and more importantly, Black students in the least segregated classrooms scored no better than Black students in the most segregated classrooms (Ciotti, 1998). Professor Eric Hanushek, who worked on the original *Coleman Report*, testified to Judge Clark that his meta-analysis of desegregation found little correlation to improved minority student achievement, which was confirmed by the experience in Kansas City (Ciotti, 1998).

A decade later, Armor conducted his own meta-analysis of desegregation research, including an analysis of other meta-analyses in field, for the U.S. Civil Rights Commission (Armor, 2006). According to Armor (2006), the balance of research "will show that the academic and social benefits of school desegregation are quite limited" (p. 18). He found that studies show Black students' academic achievement has "wide variation," and in the aggregate, benefits are "weak or nonexistent" (Armor, 2006, p. 18). For example, a 2003 National Assessment of Educational Progress (NAEP) study found, after adjusting for SES, "Blacks in predominately White schools only score 2 points higher than those in predominately Black schools" (Armor, 2006, p. 19). This is not to say there is no gap in achievement: a significant 24 percentage point gap exists between White and Black students. But when comparing Black students in "Black schools" to those in "White schools," there is little change in achievement. While there are some significant differences in Black performance in schools of different racial compositions, overall there is little change (Armor, 2006, p. 19).

The results were different for Hispanic students. When adjusted for SES, Hispanic students typically scored better in predominately Hispanic schools. The NAEP's Hispanic sample was mostly from California and Texas, which have high concentrations of Hispanic students. This suggests an obvious explanation, that schools with Spanish speaking teachers are better able to teach Spanish speaking students. Interestingly, though, concentration of Hispanic students did not seem to matter, suggesting that some states "may do a better job helping students with language problems" (Armor, 2006, p. 19).

These results mirrored the results of previous meta-analyses on desegregation. St. John (1975) found that desegregation mattered to Black achievement much less than quality teaching, as in "child centered" schools. Stephan (1978) tested the propositions of *Brown* by examining studies measuring not only achievement, but also self esteem and prejudice. Though his results were "tentative," Stephan (1978) found that Black self esteem rarely increased in desegregated schools, both White and Black prejudice remained constant, and there were only some instances of Black achievement increasing in desegregated schools. In his analysis of 19 studies on the topic, Cook (1984) observes that, whatever other purposes of desegregation, if the "purpose of desegregation is to raise the achievement of Black children, then more effective means exist" (p. 9). Schofield (1995) found desegregation had a "modest measurable effect" on Black reading skills, but math skills "seem generally unaffected by desegregation" (p. 610). Armor and Rossell (2002) reported similar results when they studied desegregated districts in the South, finding "school desegregation has failed to deliver on its promises" of closing the achievement gap between Whites and Blacks (p. 221).

Armor (2006) admitted some reviewers see that "the long-term benefits of desegregation are greater than short-term effects" (p. 23). Specifically, Black students from desegregated schools tend to go to desegregated colleges and are employed in desegregated work environments (pg. 23). However, Armor (2006) argued this result is more correlational than causational, stemming from self selection bias (p. 25). As for the "self esteem" issues cited prominently in *Brown*, Armor (1995) and Schofield (1995) both found that by 1970, there was no significant relationship between desegregation and Black self esteem (p. 99-101; p. 607). Moreover, research on racial attitudes and race

relations showed highly variable results, even that desegregation increases racism by Whites (St. John, 1975). Further still, some studies showed that Blacks report positive experiences in desegregated schools (Wells, 2004). Schofield (1995) summed up the various analyses this way: “virtually all of the reviewers determined that few, if any, firm conclusions” could be drawn about the effect of desegregation (p. 609).

Hanushek’s more recent studies revealed more evidence in favor of desegregation than Armor, finding evidence in Texas that Black students with higher percentages of Black classmates achieve less, with a similar but less intense effect for White students (Hanushek, Kain, & Rivkin, 2009, p. 349). Mickelson (2001) proposed an alternative explanation for low Black achievement in desegregated schools: in mixed race environments, Black students are routinely tracked into lower achieving classes (p. 215). Mickelson’s (2001) analysis revealed that White lawsuits against the Charlotte-Mecklenberg School District disproportionately led White students to higher achieving magnet schools, though in the “regular” schools, Black students were put disproportionately into lower level classes. Another explanation came from Rumberger and Palardy’s (2005) longitudinal study of 913 high schools, which found the total socioeconomic status (SES) of a school matters more than an individual student’s SES. No matter their race, advantaged students performed less than expected in low SES schools, and disadvantaged students performed higher than expected in high SES schools (Rumberger & Palardy, 2005). Another study found an alternative explanation for desegregation’s lack of impact on achievement: desegregation studies may “control” for SES, but they tend to understate the problems facing schools concentrated in high minority areas (Wells, Holme, Revilla, & Atanda, 2004). Thus, they overstate the failures

of desegregated schools and do not appreciate the fact that desegregation itself is yet another obstacle (Wells, Holme, Revilla, & Atanda, 2004).

The leading researchers finding evidence in favor of desegregation come from The Civil Rights Project (TCRP), which originated at Harvard but moved to the University of California-Los Angeles in 2007. TCRP's scholarship focuses on the harmful effects of the resegregation of schools and various communities' attempts to grapple with shifting demographics. For example, TCRP's "The Integration Report" blog chronicles desegregation issues across the country, focusing mostly on urban districts beset by reduced funding, gentrification, Black middle class flight and the proliferation of charter and magnet schools (Civil Rights Project, 2011). One of the TCRP's most influential studies argued that the "rapid resegregation" of schools creates high minority schools, or "apartheid" schools, whose marginalization accounts for much of the Black versus White achievement gap (Frankenberg, Lee, & Orfield, 2003). These schools are virtually all-minority and beset by poverty, limited resources, health issues and social issues of all kinds, disproportionately depressing Black achievement. Frankenberg, Lee and Orfield (2003) also found suburban districts have had a massive influx of minority students since the 1980's, but have become increasingly segregated—except in the South. Echoing Mickelson (2001), these researchers found minority students in suburban schools are typically tracked into lower level classes populated by large majorities of Black students (Frankenberg, Lee, & Orfield, 2003).

TCRP's first major study after *Parents Involved* argued the "rapidly growing population of Latino and Black students is more segregated than they have been since the 1960s," but *Parents Involved* "sharply limited local control in this arena" by striking

down even voluntary desegregation plans (Orfield & Lee, 2007). According to Orfield and Lee (2007), resegregation accelerated in the early 1990s after three Supreme Court decisions limited lower court's desegregation orders: *Board of Education of Oklahoma City v. Dowell*, *Freeman v. Pitts*, and the aforementioned *Missouri v. Jenkins* (p. 5). In the last few years, despite the proliferation of minority students to suburban schools, some areas have nearly single-race schools. This is especially problematic for Latino students, who face "triple segregation by race, class, and language" (Orfield & Lee, 2007, p. 6). In their analysis, Orfield and Lee (2007) argued *Parents Involved* outlaws "most of the techniques that have preserved a modicum of desegregation by voluntary local action," which will result in a "systematic denial of equal educational opportunity to the very populations that have been denied the most fundamental rights for centuries" (p. 9).

In this and other analyses, TCRP's argument seems to be that the lack of desegregation effects found by Armor and others is caused by the achievement gap itself—that the systematic oppression of minorities creates disadvantaging conditions no matter the situation. Thus, segregation produces and concentrates poverty, disadvantaging minority students even if they are given the opportunity to succeed is desegregated environments (Orfield & Lee, 2004; Orfield & Lee, 2005). TCRP's studies have typically focused on desegregation's effect on achievement, and have cited evidence of residual effects of desegregation on communities (Boger & Orfield, 2005).

However, some leading desegregation researchers have written for TCRP about the absence of research in how resegregation is affecting minority achievement (Horn & Kurlaender, 2006). To this point, in a recent study of the Denver Public Schools for TCRP, Horn and Kurlaender (2006) found Black students achieved "modestly" better in

schools where White enrollment increased more versus the rest of the district, with an "even more pronounced effect" for Latino students (p. 23). These results complemented a previous study by Kurlaender, which found enormous social benefits of desegregation in the multiracial Miami-Dade County Public Schools (Kurlaender & Yun, 2005). In the end, there is still enough evidence, in the eyes of some education policy makers, to continue to justify RCSAPs.

Facts and Legal History of the Seattle and Louisville Cases

The history of these two cases is significant for two reasons. First, they demonstrated the process of how a public school policy decision becomes a Supreme Court case—a lengthy, contentious, and expensive process. Second, they revealed the internal dynamics within the Supreme Court that eventual led to the complex decision.

Parents Involved v. Seattle School District

The Seattle School District (SSD) has never been found in violation of *Brown*, so its school assignment policy has never come under the purview of a federal court to eliminate vestiges of *de jure* segregation, or segregation required by law. However, in 1963, SSD appointed a committee to solve the "gross racial imbalance" in some schools, which subsequently recommended an open enrollment program. Instead, SSD adopted a voluntary transfer program, which proved insufficient to integrate several schools. By 1977, even after creating several magnet programs, 26 schools were still severely racially imbalanced. The National Association for the Advancement of Colored People filed a complaint with the U.S. Office of Civil Rights, and the American Civil Liberties Union and Church Council of Greater Seattle threatened lawsuits. In December 1977, SSD adopted the first large scale desegregation program without a court order, which resulted

in the busing of over 12,000 students in 1978. By 1980, only one school was unbalanced, but declining enrollments led to fourteen school closures. In 1989, SSD amended its desegregation initiative to a "controlled choice" policy, with only 7,400 students bused. In 1997, SSD further scaled back the policy, instituting the "racial tiebreaker" system (Breyer, 2007; Roberts, 2007; *Seattle Times*, 2008).

When instituted in 2000, the racial balancing tiebreaker affected about 300 students. The plan combined elements of open enrollment with mandatory school assignment. First, students entering ninth grade ranked their preferred schools. If a school was oversubscribed, the first "tie breaker" went to students with a sibling already at the preferred school. Second, if the school's racial composition was more than 15% unbalanced compared to the district's overall racial composition, then students who balanced the school would be admitted first. SSD classified students as either White or non-White, and its overall racial composition was approximately 40% White and 60% non-White. So, if White students applied to a school with a 56% White composition, they would lose the tiebreaker to a Black student. Third, if the racial tiebreaker did not apply, students geographically closer to the preferred school were admitted. The fourth and final tiebreaker was a seldom used lottery (Breyer, 2007; Roberts, 2007; *Seattle Times*, 2008).

In 2000, two SSD parents had students who were denied their first, second and third choices, then placed at school that required a two hour commute and three bus transfers to attend. SSD denied the parents' appeal, so through the non-profit group Parents Involved in Community Schools (PICS), the parents filed suit against SSD. Subsequently, in 2001 SSD stopped using the racial tiebreaker, but still defended its right to do so (Breyer, 2007; Roberts, 2007; *Seattle Times*, 2008).

The procedural history of *Parents Involved* is a tortured one. The case was originally filed in Washington's Western District federal court, which found for SSD. It was appealed to the Ninth Circuit Court of Appeals, which reversed for PICS—but then withdrew its own opinion because it then decided the Washington Supreme Court was best suited to answer whether the racial balancing policy violated Washington state law. The Washington Supreme Court found the policy comported with the state constitution and sent the case back to the federal Ninth Circuit. A panel of three circuit judges found for PICS, but SSD filed for a bench hearing of 12 judges, where it prevailed. PICS then filed for a writ of *certiorari* to be heard at the Supreme Court (Roberts, 2007).

Meredith v. Jefferson County Board of Education

In 1973, the Jefferson County Public Schools (JCPS) were found unconstitutionally segregated under *Brown* by the Sixth Circuit Court of Appeals, which issued a decree mandating that JCPS eliminate "all vestiges of state-imposed segregation." After consolidating with the Louisville Independent School District in 1975, JCPS instituted the "alphabet plan," which randomly assigned students based on the first letter of their last name and their grade level until elementary schools were between 12% and 40% Black, with middle and high schools 12.5% to 35% Black. Over the next decade, JCPS modified the policy to keep students in their same schools, to offer additional choice and to relax the race-based guidelines. In 1991, district policy was that middle and high schools had to be within 15% of the overall district Black student percentage enrollment, and elementary schools had to be 15% to 50% Black. In 1996, JCPS amended the policy to mandate that all schools, except for magnets, be between 15% and 50% Black. Finally, in 2000, the Western District of Kentucky federal court

declared the vestiges of segregation resolved (though some racial imbalances remained), and dissolved the 1975 decree (Breyer, 2007; Roberts 2007).

Though the decree had been lifted, JCPS continued to employ the policy to ensure continuing desegregation. This "managed choice" plan approved majority-to-minority transfers, grouped elementary schools to facilitate integration, reset attendance boundaries as needed and strategically placed special programs to draw students from various areas of the city to a school. The policy was designed so that each school, except for magnets, are between 15% and 50% Black in a district that is 34% Black. Each elementary student had a geographically-determined "resides school" within a "cluster" of schools. If a student wanted to attend a school other than his resides school, he could list a first and second choice among his cluster schools and a first and second choice of magnet schools. Middle and high school students had the same options, though ninth grade students may apply to any high school. From here, JCPS assigned students to magnet schools if they qualified, then assigned students to schools based on space and racial guidelines. If a student wanted to transfer from his assigned school, he could apply for a hardship or program waiver to attend his school of choice. Most students did not submit choice applications, so nearly all students attended their resides school or a cluster school. Though the population was *de facto* segregated by neighborhoods, the racial guidelines were usually met by the strategic drawing of attendance boundaries and clustering of schools. JCPS Board of Education reported that it polls "students, graduates, parents, and the community," who "show very strong" support for the plan (Breyer, 2007; Roberts 2007).

In 2002, Crystal Meredith, mother of Joshua McDonald, did not submit an application for Joshua's elementary school. In August, she asked that Joshua enroll in his resides school, Breckenridge-Franklin, which was already full. Joshua was assigned to cluster school Young Elementary, which required a 45 minute bus ride, and Meredith appealed for a transfer to Bloom Elementary, which was outside Joshua's cluster but much closer. Bloom Elementary rejected Joshua's application, fearing it would upset the racial balance of the school. This rejection prompted Meredith's lawsuit against JCPS (Breyer, 2007; Roberts 2007).

Meredith was joined in the lawsuit by a Black family and a Native American family. Judge John Heyburn of the Western District of Kentucky federal court found the policy unconstitutional for using race as the "sole factor" for magnet school admission, but upheld the policy for "regular" schools because the policy used a range, not a "quota." The Sixth Circuit Court of Appeals affirmed both holdings of Judge Heyburn's decision, prompting Meredith to file a petition for *certiorari* to the Supreme Court (Breyer, 2007; Roberts 2007).

The Supreme Court's Treatment of the Cases

On June 5th, 2006, the Supreme Court granted *certiorari* and consolidated both cases to be heard and considered at the same time. Oral arguments took place on December 4th, 2006, with the written opinions issued on June 28th, 2007. The Court's decision was highly unusual and procedurally complex. A five-member majority of the Court (Justices Roberts, Scalia, Thomas, Alito, and Kennedy) found the school districts' policies violated Equal Protection, with a four-member minority (Justices Stevens, Ginsburg, Souter, Breyer) voting to uphold the policies. However, Justice Kennedy

issued a separate concurrence, saying that while he agreed the policies were not "narrowly tailored" to pass constitutional muster, he disagreed with the rest of the majority's position that race can never be used in school assignment policies. Thus, Chief Justice John Roberts' opinion commanded only a plurality of the court, meaning that the Seattle and Jefferson County plans were unconstitutional, but leaving open the question about how race can be used in school assignment policies.

Parents Involved was an unusual case for the Supreme Court to hear because the lower courts both upheld the districts' plans, meaning there was no conflict among the circuit courts to resolve. Long time New York *Times* Supreme Court correspondent Linda Greenhouse (2007) traced this to Chief Justice Roberts' famous "punch line" at the end of his opinion: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." This line was cribbed without citation from Judge Carlos Bea's dissent when *Parents Involved* was heard by the Ninth Circuit (Greenhouse, 2007, p. 41). Roberts' sentiment, however, arced back to his tenure in the Reagan Justice Department, where he strongly advocated against expanding the Voting Rights Act and against aggressively enforcing civil rights laws under the purview of the Equal Employment Opportunity Commission (Greenhouse, 2007, p. 42).

Greenhouse (2007) theorized Chief Justice Roberts saw *Parents Involved* as an opportunity to crystallize his position in the Court's Equal Protection jurisprudence. In January of 2006, Justice Sandra Day O'Connor announced her retirement, three years after her surprising and controversial majority opinion in *Grutter v. Bollinger* (2003), which affirmed diversity as a compelling governmental interest in the higher education context. By March, Justice Samuel Alito had been confirmed as her replacement, and the

Seattle and Jefferson County cases were among the first considered for next term's docket. Chief Justice Roberts reportedly pushed these cases, even though many of his fellow justices saw no question for the Court to resolve, until they were finally put on the docket (Greenhouse, 2007, p. 46).

Legal Analysis of *Parents Involved v. Seattle Schools*

The critical response to *Parents Involved* was fairly predictable. Originalist conservatives, who believe the Constitution has a fixed meaning, tended to cheer it, especially Chief Justice Roberts' plurality. Liberals, who believe in a "living Constitution" that evolves with contemporary standards, criticized it (Strauss, 2010). Likewise, most of the media coverage of the case simplistically split it along these lines. However, the most interesting and relevant responses focused on the complexity and, some would argue, the contradictions at the heart of the Court's decision: Justice Kennedy's controlling opinion. Armor and O'Neill (2010) frame the issue this way:

> First, how can one conclude that school desegregation is a compelling government interest and, at the same time, conclude that students cannot be assigned to schools according to their race?...Second, if a school board declares that school desegregation is a compelling interest, how will it accomplish school desegregation if it cannot use race? (p. 1707)

Since *Parents Involved* was issued in 2007, hundreds of legal commentators, professors, government officials, and judges have tackled the issue. This review highlights some of the most influential reviews of *Parents Involved*, as well as some lesser known but insightful law review articles.

To understand the issues involved, a brief explanation of the Supreme Court's approach to Equal Protection jurisprudence is necessary. The Fourteenth Amendment declares no state shall "deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const. amend. XIV, § 1), which has since been interpreted to apply to the federal government as well (*Bolling v. Sharpe*, 1954). To analyze whether a law denies Equal Protection, the court must first decide if government action applies to a "suspect classification," such as race (*United States v. Carolene Products*, 1938). If a suspect classification is involved, then the standard of strict scrutiny is applied (*Korematsu v. U.S.*, 1944). Strict scrutiny is a three pronged test: the law must serve a compelling government interest, be narrowly tailored to serve that interest and be the least restrictive means to achieve the interest. Often, however, courts often merge "narrow tailoring" and "least restrictive means" into a single test, as the Supreme Court did in *Parents Involved*.

The "compelling government interest" prong is more philosophical in nature, based mostly on how one sees the Constitution's limits on governmental powers. Some commentators were surprised Justice Kennedy found diversity a compelling government interest, considering his dissent on this point four years previous in *Grutter* (2003). In that case, Justice O'Connor found, on First Amendment grounds, universities had a compelling interest in using race, without instituting quotas, to develop a diverse student body. Notably, in *Parents Involved*, Justice Kennedy found diversity in the K-12 context a compelling government interest, reversing his philosophical position from 4 years earlier from a different context.

Though this is the common reading of the case, Emory University Law Professor Kimberly Robinson (2009) contended Justice Kennedy articulates the compelling

government interest as "avoiding racial isolation" to realize a fully integrated nation (p. 277). In this view, Justice Kennedy seems to concede that some sort of classification by race is necessary to guarantee equal education opportunity (Robinson, 2009).

Other commentators saw error in Justice Kennedy's compelling interest argument. Former Comment Editor of the Boston Law Review Nicole Love (2009) took this one step further, arguing *Parents Involved* mistakenly conflates desegregation cases with affirmative action cases. Strict scrutiny applies to affirmative action cases, but nowhere in the Supreme Court's jurisprudence does strict scrutiny apply to desegregation (Love, 2009, p. 115). The Ohio State University Professor Phillip Daniel and education attorney Mark Gooden (2010) did not see where Justice Kennedy affirmed a compelling interest at all; they claim legal commentators have read this stance into the opinion because Justice Kennedy rejected parts of Chief Justice Roberts' opinion (p. 98).

In perhaps the most persuasive reading of Justice Kennedy's opinion, Yale University Law Professor Heather Gerken (2007) reconciled his stances in *Grutter* and *Parents Involved* by proposing Justice Kennedy sees no special First Amendment privilege for universities, but sees "one of the main purposes of public schools is to educate future citizens." As such, Justice Kennedy senses that "segregated schools are not the ideal environment for teaching students about the value of race neutrality" (p. 114). In *Parents Involved*, Justice Kennedy "anchors his concurrence in the domain of education," where *Grutter* was anchored in race (Gerken, 2007, p. 117). Here, Kennedy sees education as a vehicle for "teaching civic morality," where continued segregation "should remind us our highest aspirations are yet unfulfilled (Gerken, 2007, p. 117). Where the plurality sees a clear difference between *de jure* and *de facto* segregation, Justice

Kennedy chided his "colorblind' colleagues for not seeing how this legal fiction blurs the realities of the segregated classroom (Gerken, 2007, p. 117). Though he disagreed with the means, this combination of idealism and reality laid the foundation for Justice Kennedy's finding of a compelling interest in diversity.

Gerken (2007) saw Kennedy's embrace of diversity as a compelling government interest as a subtle leftward movement of the court, a "refusal to cast *Parents Involved* as yet another case in which race must be kept out of state decisionmaking" and an "insistence that his conservative colleagues are not thinking hard enough about…how a colorblind approach will interact with social realities" (p. 113). However, Fourth Circuit Court of Appeals Judge J. Harvie Wilkinson (2007) saw Kennedy's position as much less expansive, "marginally more open to the use of race in the achievement of diversity than the plurality" (p. 170). Wilkinson (2007) seemed to suggest Justice Kennedy stumbled onto this compelling interest as if on accident, that his "further examination of the record revealed only further contradictions…[and] the whole mess understandably led the Justice to conclude" race based decision should not be disallowed, despite the mass confusion in the Jefferson County Schools (p. 173).

This is where the compelling interest analysis gives way to the narrow tailoring analysis. Columbia University Law and Doctor of Education graduate Andrew LeGrand (2009) described how Justice Kennedy's narrow tailoring explanation attempts to "thread the needle" of the interest in diversity without using race. To Justice Kennedy, there is a constitutional difference between "facially neutral" decisions and those that "explicitly use racial classifications" (LeGrand, 2009, p. 56). Justice Kennedy "gave significant weight to, and spent considerable time describing" means of achieving integration

without identifying students specifically by race, specifically suggesting "strategic site selection of new school," "drawing attendance zones" with regard to neighborhood demographics, "allocating resources for special programs," targeted recruitment of students and faculty and "tracking enrollments, performance, and other statistics by race" (LeGrand, 2009, p. 56).

Others cautioned against overinterpreting Justice Kennedy's specificity as an explicit endorsement of race conscious school assignment polices (RCSAPs). Valparasio University School of Law Professor Ivan Bodenstiner (2009) put a fine point on the issue: "Justice Kennedy has never voted to uphold a benign race-conscious program" (p. 1). Judge Wilkinson (2007) expanded on this observation, observing, "Yet the fact remains that Justice Kennedy has not voted uphold a race-conscious program in a nonremedial context, and his *Parents Involved* concurrence reflects the Justice's longstanding skepticism of racial classifications" (p. 170). As Gerken (2007) observed, Justice Kennedy himself, not just academics, grappled with the point he was trying to make: "If it is legitimate for school authorities to work to avoid racial isolation in their schools, must they do so only by indirection and general policies?" (p. 117).

Daniel (2010) argued Justice Kennedy does not make a fine distinction as much as weaving an "opaque tapestry" (p. 100). Justice Kennedy calls the Seattle School District's "White/non-White" classification "crude," saying that if the district is going to classify an individual by race, "it must first define what it means to be of a race" (Gerken, 2007, p. 119). Yet again, how can diversity be a compelling interest if it is impossible to define diversity? (Daniel, 2010). Rather than solving the riddle, some commentators suggested avoiding this tricky question altogether by simply taking race out of the

question altogether (Daniel, 2010, p. 100). Because class has become so entangled with race, districts could achieve the same goal by initiating class-based school assignment policies (Armor & O'Neill, 2010). If pursued, though, Caldas and Banskston (2007) saw "a new round of extensive judicial intervention in American schools" and asked, "If… racial redistribution has not worked to meaningfully desegregate schools, there is no reason to believe that the socioeconomic version would" (p. 278).

Judge Wilkinson (2007) suggested an alternative view of Justice Kennedy's narrow tailoring explanation, which goes to the heart of confusion over Justice Kennedy's opinion. Following Justice Kennedy's list of non-race based examples of narrow tailoring, he attempted to tie these examples together by calling for a "more nuanced, individual evaluation of school needs and student characteristics that might include race as a component," centered on a "highly individualized, holistic review of each applicant's file" (Wilkinson, 2007, p. 170). Wilkinson's (2007) view echoed Colucci's (2009) theory that Justice Kennedy's jurisprudence is guided by the principle of neutral individualism, that if the law gives someone individual consideration, which can include group memberships such as race, then he will find it constitutional.

Whatever Justice Kennedy's struggles with this issue, it must be said, as George Mason School of Law Professor Nelson Lund pointed out, "Kennedy takes the narrow tailoring requirement seriously and he does not think that 'as a last resort' means 'whenever convenient or efficient or politically expedient'" (Lund, 2008, p. 18). Though legal scholars often say this kind of scrutiny is "strict in theory, but fatal in fact," Justice Kennedy seems open to closely considering the particulars of a school district's policy to decide whether it passes constitutional muster. His exploration of specific alternatives,

along with his rejection of Justice Breyer's deference to the local school board, are evidence that the specific details of a district's RCSAP will be crucial to the Court's Equal Protection jurisprudence.

Subsequent Cases and Pending Litigation

The vast majority of cases citing *Parents Involved* do so for authority on issues unrelated to education: mootness, standing, jurisdiction and strict scrutiny applied to other suspect classifications (Nagle, 2010, p. 229). One appellate judge cited Chief Justice Roberts' "stop discriminating on the basis of race" dicta in relationship to a district's petition for unitary status regarding its faculty hiring policy (*Robinson v. Shelby County Board of Education*, 2009, p. 656). A federal district judge cited Justice Kennedy's dicta about the "moral and ethical obligation to fulfill its historical commitment to creating an integrated society that ensures equal opportunity for all its children" (*Anderson v. School Board of Madison County*, 2008, p. 305). Another judge cited Justice Kennedy's opinion for the proposition that "Courts clearly have the power to impose race-conscious remedies for past discrimination, although that authority is carefully circumscribed" (*Gensaw v. Del Norte County Unified School District*, 2008, p. 19). Another affirmed Justice Kennedy's compelling interest argument in the higher education context (*Coalition to Defend Affirmative Action v. Regents*, 2011). In one other noteworthy case, federal District of Columbia Judge Henry Kennedy held that *Parents Involved* does not apply to charter schools with RCSAPs because the government does not compel students to apply to charter schools (*Save Our Schools v. District of Columbia Board of Education*, 2008).

The first federal court to consider *Parents Involved* in the K-12 context was *Fisher v. Tucson Unified School District* (2007), where Judge David Bury applied Chief Justice Roberts' opinion and cited dicta from Justice Thomas' concurrence. Judge Bury interpreted *Parents Involved* to mean that once "vestiges of prior intentional segregation are eliminated," race cannot be used for school assignment (*Fisher*, 2007, p. 35). In fact, Judge Bury went clear back to *Brown* to find the constitutional error was not separating children on the basis of race, but the inequality of facilities. The court seemed to ignore that Chief Justice Roberts' opinion is merely a plurality and does not even consider "possible applications for Kennedy's narrow caveat" (Daniel & Gooden, 2010, p. 102).

In Judge Bury's defense, Tuscon's Student Transfer Policy 5090 permitted student transfers if it did not further imbalance of the home school's ethnic makeup, thus making race the decisive factor in the transfer decision. According to the court, Policy 5090 resembled the policies in Seattle and Jefferson County by "not provid[ing] for meaningful individualized view of the applicants but instead relied on the race of the student in a non-individualized, mechanical way" (*Fisher*, 2007, p. 35). Still, Judge Bury seemed to apply non-controlling opinions from *Parents Involved* when considering an application for unitary status, which is a completely separate issue. As such, the Ninth Circuit strongly rebuked Judge Bury, overturning his judgment without mention of *Parents Involved* (*Fisher*, 2010).

A strongly contrasting approach was Judge James Beaty's, who considered the Alamance-Burlington (North Carolina) Board of Education's petition to dismiss its desegregation order (*U.S. v. Alamance-Burlington*, 2009). Though Judge Beaty granted the petition, finding that the vestiges of *de jure* segregation had been remedied, he

encouraged the district to do more to integrate its schools. The court explicitly rejected the "color blind Constitution" principle, asserting Justice Kennedy dismissed the *de jure*/*de facto* distinction and affirmed diversity as a compelling government interest, imploring "the Constitution does not requires school districts to…'accept the status quo of racial isolation in schools'" (*U.S. v. Alamance-Burlington*, 2009, p. 224). In Judge Beaty's view, *Parents Involved* stands for the principle that a school may "adopt general policies to encourage a diverse student body, one aspect of which is its racial composition" (*U.S. v. Alamance-Burlington*, 2009, p. 225).

A procedurally unusual but substantive interpretation of *Parents Involved* came from *N.N. v. Madison Metropolitan School District* (2009). Here, student N.N. requested a transfer from Madison East High School, but the district denied the request based on Wisconsin's "Open Enrollment" Statute § 118.51, which said the district "shall reject any application for transfer…if the transfer would increase racial imbalance in the school district." N.N. was a White student at a school with a 43% minority population, and her departure would have upset the racial balance at the school under the district's policy.

In December of 2007, the Wisconsin Attorney General issued an opinion interpreting of *Parents Involved*. Though the Attorney General found districts have a "compelling interest in achieving a racially diverse student population," binary racial classifications, such as those employed in *Parents Involved* and Wisconsin, cannot be the "sole determinant" of a school assignment decision. Because the Wisconsin open enrollment statute explicitly used race in this way, the statute itself was unconstitutional (Wisconsin Attorney General, 2007).

The district agreed, but felt it could not unilaterally ignore the statute, so it denied N.N.'s request for transfer. Thus, the suit is about whether the district is liable for damages for following the statute. Judge Barbara Crabb ruled for the district, holding that it was under no obligation to defy the statute, even though it and the Attorney General assumed it to be unconstitutional. Of interest is the fact that the plaintiffs, the district, and the Attorney General all held the same opinion about *Parents Involved*: race cannot solely determine school assignment.

In another minor case, Judge Robert Dawson of the Western District of Arkansas faced an issue similar to the Wisconsin case, but did not reach the constitutional question about the race based components of Arkansas' School Choice Act. In that situation, the district enforced the constitutional part of the Act, meaning that the plaintiff sued the wrong entity. The case is likely to arise in the future, but after appellate courts have interpreted *Parents Involved* (*Hardy v. Malvern School District*, 2010).

The leading federal district case interpreting *Parents Involved* comes from Judge Michael Baylson of the Eastern District of Pennsylvania, who considered *Parents Involved*'s application to a RCSAP (*Doe v. Lower Merion*, 2010). In *Lower Merion*, nine Black students asserted Lower Merion's redistricting policy (Plan 3R) required them to attend Harriton High School, rather than Lower Merion High School, on the basis of race. Superintendent Christopher McGinley testified he wanted to amend district policy to combat the minority student achievement gap, and he felt "racial isolation" plays a major role in creating this gap. His goal was not to achieve a "threshold" of minority students in each classroom, but for the schools, and especially the honors classes, to have roughly the same percentage of minority students as the entire district. Also, in discussions about

establishing school boundaries, the district considered transportation issues along with other obstacles.

Eight of the nine Doe students are from what the district called the "Affected Area," the South Ardmore neighborhood with a high concentration of Black families. Over the decades, this and surrounding neighborhoods, including North Ardmore, have had schools closed and built, and students have been redistricted several times. The parents of the Doe students testified that, even though several of the students live within a mile of Lower Merion High School, they were bused to Harriton High School. They asserted this is because the district drew boundaries on the basis of race.

In 2004, the school board needed to modernize its two high schools, and rather than consolidating the two schools, they voted for two similar sized schools. At the time, 46 Black students attended Harriton, constituting 5.7% of the student population, whereas the entire district was about 10% Black. Lower Merion was much more centrally located, with Harriton in a mostly unwalkable area at the edge of the district. In the redistricting process, the administration, in Judge Baylson's view, clearly wanted race to be a factor, but the board rejected this idea, and race was nowhere in its "Non-Negotiable" principles. The administration solicited "Community Values" from the public, one of which included diversity, but Dr. McGinley testified he considered this a mandate for the schools after opening. To draw the boundaries, the district considered five different scenarios based on information about students' race, ethnicity, specials needs status and SES. During its deliberations, the administration considered some scenarios dealing solely with race.

At this phase of the process, *Parents Involved* was issued by the Supreme Court. Dr. McGinley testified he sought counsel from the district's attorneys about how the case

would affect Lower Merion's redistricting process. At a public presentation of Proposed Plan 1, which included an increase of Harriton's Black enrollment to 10%, the district advertised its interpretation of *Parents Involved*: because the community expressed an interest in diversity, and because Justice Kennedy's opinion states "diversity, depending on its meaning and definition, is a compelling education goal a school district may pursue," the case did not prohibit the district from accounting for overall diversity in a general way. In subsequent press releases and informative website information, though, Dr. McGinley admitted purging information on racial diversity data, which the judge found "troubling."

Proposed Plan 1 was rejected by the North Ardmore community, many of whom believed race motivated long busing times. Proposed Plan 2 lowered Black enrollment at Harriton from 10% to 7.8%, but was rejected by Asian-American families, many of whom would be split from classmates. In discussing Proposed Plan 3, Dr. McGinley expressed concern about a "racially isolated group of African American students at Harriton," among other statements about how best to achieve a diverse student body at Harriton. Proposed Plan 3 was also met with concerns about racial composition, so the board considered amended Proposed Plan 3R, which included expanded walk zones but less school choice for students in the Affected Area, which was now districted for Harriton. Proposed Plan 3R contained no diversity data. The adoption of Plan 3R by the board forced 21 students from the Affected Area, including 14 Black students, to transfer from Lower Merion into Harriton.

Judge Baylson rejected the argument that strict scrutiny applies to this case. He focused on Chief Justice Roberts' holding that "decisions based on an *individual*

student's race" (emphasis added by Judge Baylson) is different than Lower Merion's situation, which used geographic considerations to assign students to schools. He placed great weight on the fact that the Affected Area has a high concentration of Black students, but contained just as many White students. In his view, the evidence showed the district had several compelling interests in drawing its boundaries, not just diversity, but space considerations, travel times, transportation costs, educational continuity and walkability. Confusingly, Judge Baylson seems to reject the strict scrutiny standard, but argued that because "Plan 3R is the only plan the Court is aware of that simultaneously meets these goals, it is narrowly tailored and therefore survives strict scrutiny" (*Student Doe v. Lower Merion*, 2010, p. 49). Regardless, Judge Baylson cited Dr. McGinley's concern for closing the "achievement gap" and preventing "racial isolation" as compelling interests consistent with Justice Kennedy's opinion (*Student Doe v. Lower Merion*, 2010, p. 49).

Summary

The first section of the Review of Related Literature traces the history of desegregation and educational achievement to *The Coleman Report*, which found that Black students in poor schools perform worse than those in middle class ones. Subsequently, *The Hannah Report* found that Blacks in segregated schools perform worse than Black in desegregated schools, which became the rationale for busing policies across the country. Since the 1970s, however, most researchers—even those whose careers stem back to *Coleman*—found that desegregation has a limited effect on Black student achievement. One notable exception is research from The Civil Rights Project, who found desegregation supports educational achievement and other residual effects.

The second section reviews the facts and procedural history of the two cases consolidated in *Parents Involved*. Though the specific details of the Seattle and Louisville districts' policies are quite different, the Supreme Court seemed to take the case to establish the constitutional principle of a "color blind Constitution." The third section reviews the influential and insightful legal commentary on *Parents Involved*. Whether commentators cheer or criticize the case, most all agree that Justice Kennedy will both decide and probably write the next opinion in this line of cases. The fourth section reviews the cases which have cited *Parents Involved*, including an extensive discussion of the facts of *Doe v. Lower Merion*, the first major district case to deal directly with the issue of applying *Parents Involved* to a RCSAP.

CHAPTER 3

RESEARCH DESIGN AND METHODOLOGY

This research was intended to provide educators with insight into the evolution of race-conscious school assignment policies (RCSAPs), and also to advise the federal courts on developing workable frameworks for school assignment policy within the bounds of the Constitution. As such, the research design borrowed from different types of methods to speak to these different audiences. The research approach is a policy analysis, which differentiates between the various decisions actors have made in the field. The research design is an evaluation, borrowing methods from grounded theory. Grounded theory is intended to not only explain why school districts have reacted in certain ways, but also use this to advise the courts on a workable and constitutional RCSAP law.

Concept Map

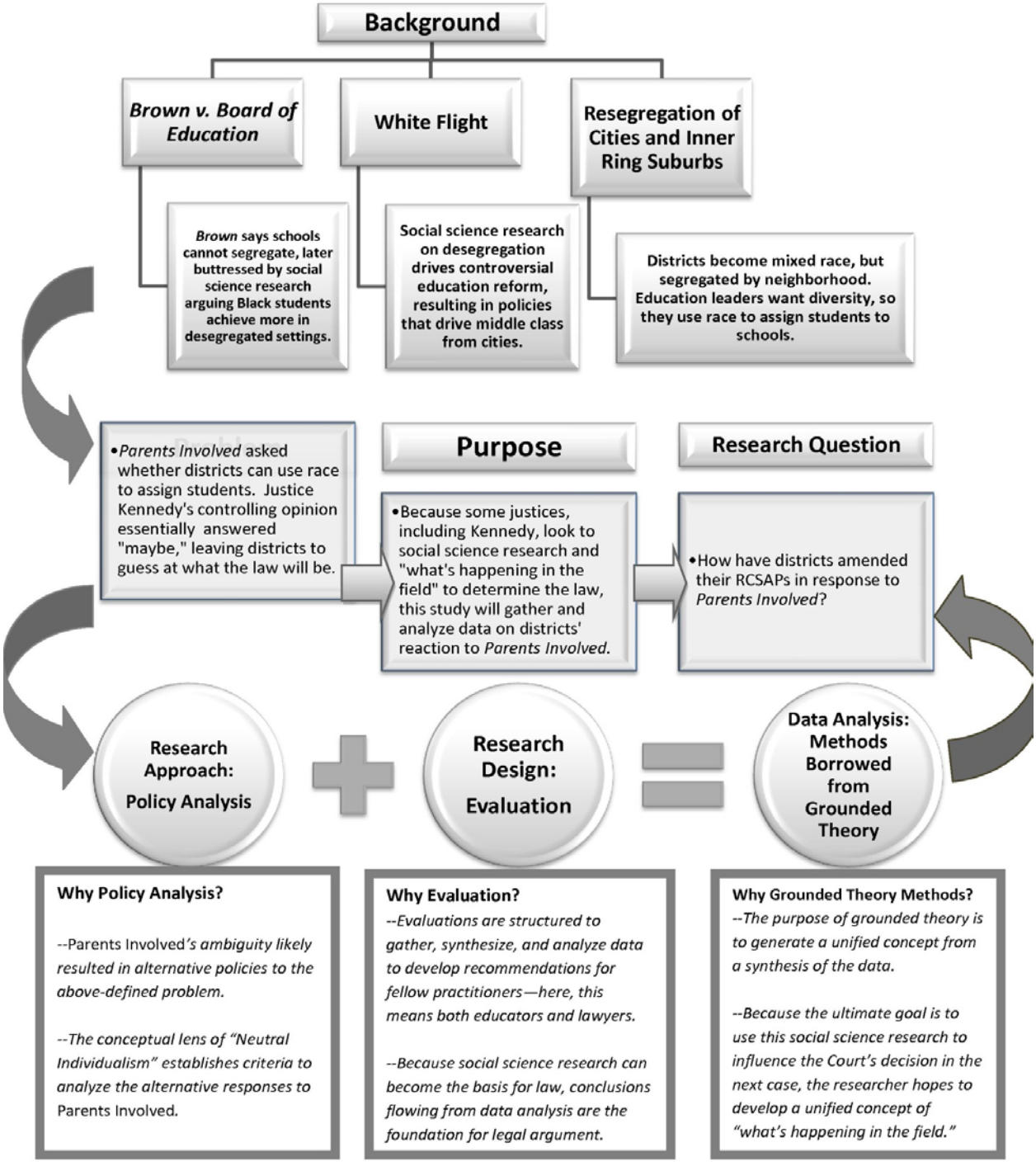

Figure 1. Concept Map for Study's Research Design and Methodology.

Research Approach

This study was approached as a policy analysis, which Patton and Sawicki (1993) defined as "[t]he process through which we identify and evaluate alternative policies or programs that are intended to lessen or resolve social, economic, or physical problems" (p. 52). They described policy analysis as a six-step process: defining the problem, establishing criteria, identifying alternatives, evaluating alternatives, distinguishing between alternatives, and monitoring the policy (Patton & Sawicki, 1993, p. 52).

The researcher chose this approach because the study's objective was to synthesize and analyze various districts' policy decisions. There was a clearly defined problem: the gap in knowledge about how districts amended their RCSAPs in response to *Parents Involved*. The conceptual framework established the criterion of neutral individualism to organize the data evaluation. The data analysis identified the various responses to *Parents Involved*, then evaluated those alternatives through this conceptual lens. Finally, the study distinguished alternatives by analyzing their likelihoods of success at the Supreme Court.

Research Design

The study was designed as an evaluation, whose purpose was to gather, synthesize and analyze data as a foundation for recommendations. (Rossi, Freeman, & Lipsey, 1999). To this end, the policy analysis approach guided the collection, synthesis and analysis of data (Rossi, Freeman, & Lipsey, 1999). To answer the question about how districts have amended RCSAPs, the researcher gathered qualitative data with open-ended survey questions. The data was synthesized and analyzed through the criterion of neutral individualism, culminating in an evaluation of the current state of the law versus

the perception of the law. This policy analysis yielded predictions for future cases in the *Parents Involved* line and suggested courses of action for districts with RCSAPs. Additionally, this research could be submitted to the Supreme Court via *amicus* brief to persuade Justice Kennedy that race should be one in multifactor school assignment policies, reflecting the demands of the democratic process the bear on public schools and practical reality of how these policies are formulated (Morgan & Pullin, 2010, p. 523).

Population and Sample

The study's population was inspired by Justice Breyer's dissent, one of the longest in Supreme Court history. Breyer argued school boards "may need all of the means presently at their disposal" to combat the "serious educational, social, and civic problems" posed by *de facto* resegregation (*Parents Involved*, 2007, pp. 61-62). As an example, Breyer cited a Civil Rights Commission study of 125 districts—of varying sizes, locations, racial compositions, and levels of segregation—that implemented desegregation plans (Welch, Light, Dong, & Ross, 1987). Breyer argued, and surely Chief Justice Roberts would agree, that under the plurality's "color blind Constitution" position, these RCSAPs would be unconstitutional (*Parents Involved*, 2007, p. 61).

The study tests Justice Breyer's proposition. Rather than develop a sample of the vast and varied RCSAP population, this study used the Civil Rights Commission sample cited in Breyer's dissent. This strategy was a form of convenience sampling because the researcher used an established sample from a respected authority (Mertens 1998). More importantly, judges tend to be persuaded by evidence "drawn from a sample similar to the people at issue in a given legal dispute" (Morgan & Pullin, 2010, p. 517).

Some researchers eschew “rules of thumb,” and because this study collected qualitative data, sample size formulas were inappropriate (Mertens, 1998). Still, the sample size of 125 was more than Mertens’ recommended 100 subjects for survey research (1998, p. 270). More importantly, Mertens recommended using a sample size from a similar study, as was the case here. The researcher could not assemble a more representative sample—without prohibitive time and cost—than a Civil Rights Commission in a study cited as evidence by the Supreme Court.

Instrumentation

Data was gathered with a descriptive, “one-shot” survey intended to take a snapshot of the effect of *Parents Involved* on RCASPs five years after the decision (Mertens, 1998, p. 108; Appendix A). The five open-ended questions were designed to allow respondents to comment briefly on their knowledge of *Parents Involved*, their districts’ philosophy on racial diversity and their districts’ response to the Supreme Court’s ruling. The questions were phrased not to “quiz” respondents on their knowledge of the case, which should have reduced resentment bias (Fink, 2009). The questions were neutrally phrased not to provoke agreement or disagreement with *Parents Involved*, but to report on its impact on district policy (Fink, 2009). Some questions were reverse-phrased to minimize response bias (Field, 2009).

Data Collection

The survey respondent was the district’s chief legal counsel (Appendix A). For researchers planning on using social science in court briefs, Morgan and Pullin (2010) recommended that “researchers should consider the benefits that might flow from collaborating with lawyers” before submitting social science research to a court (p. 522).

The researcher sent the survey electronically with an Informed Consent Form explaining the survey's purpose and the researcher's confidentiality procedures (Appendix B). The survey was administered via an online service that protected confidentiality (Fink, 2009).

Data Analysis: Qualitative Procedures

Qualitative procedures were used to analyze data intended to answer the research question: How have districts amended their RCSAPs in response to *Parents Involved*? Because specific, measurable variables could not be identified, this question was unfit for quantitative research. Qualitative methods best fit this question because each district's attempt to amend its RCSAP is contextual and complex (Mertens 1998).

Because the study was designed as an evaluation, the Recommendations synthesized the districts' responses to provide suggested courses of action. As such, the qualitative data analysis borrowed techniques from grounded theory. The data was open coded to identify major categories of information, then axial coding centered the data around a central phenomenon (Creswell, 2007, p. 64). Finally, selective coding created a narrative that "connects the categories" to produce a "theoretical proposition" for the Recommendations (Gibbs, 2010b).

Initially, the codes were derived from the evaluation criteria of neutral individualism. The researcher looked for certain "code words" and legal terms of art, such as "voluntary," "choice," "individual consideration" and "educational purpose"—or whether use of race had been eliminated from consideration in school assignment policy. As is the nature of qualitative research, the data demanded flexible coding, usually in recognizing causal conditions, strategies, intervening conditions and consequences to organize the data (Strauss & Corbin, 1990, as cited in Creswell, 2007, p. 64).

Dependability and Generalizability

Dependability was checked by "maintaining…protocol that details each in the research process" (Yin, 1994, as cited in Mertens, 1998, p. 184). If emerging patterns in the data suggested the researcher's assumptions about neutral individualism were off-target, the researcher would document this change in focus by showing how conclusions were reached and how new theories were generated. Confirmability was checked by creating a "chain of evidence," tracking the data to the surveys while maintaining respondent's anonymity (Yin, 1994, as cited in Mertens, 1998, p. 184). Trustworthiness was established by triangulation, checking the results against existing federal court opinions citing *Parents Involved* (Creswell, 2007, p. 208).

Because the sample was a non-random part of a much greater population of unknown size, the results may not be generalizable (Mertens, 1998, p. 343). However, the sample size was large enough that strong, uniform results could indicate possible generalizability and warrant further research. Regardless, the study can provide useful information to districts simply by identifying and systematically organizing the various ways districts have responded to *Parents Involved*. If schools districts see that a significant number of RCSAPs would be overturned by Chief Justice Roberts' "color blind Constitution" position—even if the study is not generalizable to the whole population—the Court may be less likely to adopt the Roberts' position in deference to the local control of school boards.

Researcher Positionality

The researcher's positionality is that of both an educator and an attorney. The researcher teaches in a private school in a rigidly segregated urban area, within the

boundaries of a so-called “apartheid” school district (Frankenberg, Lee, & Orfield, 2003). His legal interest is in how Supreme Court rulings affect conditions “in the field.” *Parents Involved* intersects these interests because educators’ decision making is subject to the Court’s interpretation of the Constitution.

Like educators, attorneys are advocates. And like many educators, the researcher assumes diversity—especially racial diversity—benefits not only students, but society. The researcher’s education background informs his pragmatist, rather than formalist, legal approach. As in the classroom, authorities should consider the effect of enforcement as well as the letter of the law. The researcher hopes the data will reject Chief Justice Roberts’ “color blind” Constitution theory. In the researcher’s estimation, the best way to stop discriminating on the basis of race is to model for children, in a diverse setting, not discriminating on the basis of race. But if the data does not support a constitutionally plausible course of action, an attorney, like an educator, has an ethical obligation to report this professional judgment.

Ethical Issues

Because its sponsoring institution receives federal funding and the data collection required interaction with human subjects, the study was approved by the Institutional Review Board (34 CFR 97.102[f]). For this study, the chief Institutional Review Board (IRB) concerns were informed consent and the preservation anonymity and confidentiality (AERA, 2009; Pritchard, 2002). Informed consent was addressed in the survey introduction letter (Appendix B), which explained the study’s educational purpose and data use. Complete anonymity was impossible because the researcher made direct contact with the respondent and the sample was taken from a published Civil Rights

Commission report. However, confidentiality was preserved by using an online service that protects confidentiality and declining to name specific districts in the study. Because of the large sample size, brief district descriptions did disclose which specific districts responded to the survey (Pritchard, 2002).

An added concern was the potential for breaching attorney-client privilege. In the relevant case law, a district's chief legal counsel likely falls under the category of "in-house counsel." In most jurisdictions, *Upjohn Co. v. United States,* 449 U.S. 383 (1981) extends the privilege to in-house counsels, which was then clarified by *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789 (2007). Though this has not been tested in the courts, it is possible that a legal counsel might not want to divulge the client district's intentions, even if they are a part of the public record and not necessarily immune under *Vioxx*'s primary purpose test.

The researcher sought legal ethics advice from the Missouri Bar's Legal Ethics Counsel Sara Rittman, who saw no issue attorney-client privilege, but knew of no case or situation that was exactly on point (S. Rittman, personal communication, June 10, 2011). The researcher consulted with University of Missouri School of Law legal ethics professor Rodney Uphoff, who had never been posed with this question (R. Uphoff, personal communication, August 10, 2011). The researcher also questioned former Kansas City, Missouri School District Assistant Superintendent of Human Resources Steven Harris, who was also an attorney for the Missouri Attorney General's office during the Kansas City desegregation case referenced in the Review of Literature. Dr. Harris saw no immediate issue with the survey, but also did not know of a similar situation (S. Harris, personal communication, April 8, 2010).

Strengths

This is not the first attempt to study school districts' response to *Parents Involved*. Siegel-Hawley and Frankenberg (2011) "systematically track[ed] newspaper articles dealing school desegregation, unitary status, and school assignment polices" (p. 539). Their study described RSCAP amendments in 25 school districts, admitting "it is impossible to know to what extent [their] examples are generalizable across all states and local communities" (p. 539-540). Though the researcher does not claim this research to be generalizable, its sample was much larger and obtained information directly from school sources, which brought more comprehensive and insightful data.

Also, the research approach and design effectively followed the basic process attorneys use to turn educational research and legal argument. Grounded Theory methods are, by design, a synthesis that unifies the data analysis into a clear concept. For this study, the unifying concept formed a clear narrative of school district behavior. The researcher turned this narrative into advice for districts seeking racial diversity and for courts trying to create a workable framework for the use of race in school assignment.

Limitations

Siegel-Hawley and Frankenberg (2011) conducted some "informal interviews" for their study (p. 540). They note that "given the current legal climate, there is potential benefit to keeping policymaking quiet in district seeking to pursue integration" (p. 540). Ensuring anonymity may not be enough to convince some attorneys or school leaders to respond to the survey. As for the ethics issues, though the researcher consulted legal ethics experts who found no immediate issue with research design, he found no explicit endorsement of the approach.

Summary

First, the researcher gave background on the topic of study: school district with RCSAPs and their responses to *Parents Involved v. Seattle Schools* (2007). The study's purpose was to measure the effect of response and to discover ways districts have responded. The study's policy analysis approach drove its evaluation design, with the process of evaluating policy culminating in a detailed Recommendations section. The population and sample came from 125 districts in a Civil Rights Commission report cited in Justice Breyer's *Parents Involved* dissent. These districts were surveyed with open-ended questions to gather qualitative information to be analyzed borrowing techniques from grounded theory. The role of the researcher is as an advocate who wishes to see evidence that the use of race in school assignment will survive court scrutiny, but with an ethical obligation to report the truth as he sees it. The researcher discussed the study's strength, a more comprehensive approach to collecting data. Finally, the researcher discussed the study's weakness, the potential for a low return rate because of confidentiality issues.

CHAPTER 4

FINDINGS

In this chapter, the researcher presents the finding that *Parents Involved* has had an enormous "chilling effect" on the use of race in school assignment policy because schools believe Chief Justice Roberts' "color blind Constitution" opinion is the law of the land. The "chilling effect" conclusion is validated by a similar study by Siegel-Hawley and Frankenberg (2011). Both studies found a few schools moving to a multifactor school assignment policy or a socioeconomically based policy. Still, the overall response to *Parents Involved* has been this: districts interpreted the case to eliminate consideration of race from school assignment, so they eliminated or severely curtailed its use. Districts have tried to gather feedback and monitor the community response, but since *Parents Involved,* they have largely evaded the issue of race in school assignment, though it is too early to know the full extent of the consequences.

Survey Questions

The attorneys surveyed were asked five questions in a specific logical progression, designed to understand their district's thinking on *Parents Involved* and race conscious school assignment policy (RCSAP). The first question was the entry question: Did *Parents Involved* cause the district to change its school assignment policy? The second question asked for the legal interpretation leading to the change, and the third tried to isolate the specific effect by asking for other factors in the change. The fourth and fifth questions asked about the effects of the change, as gathered by constituent feedback and the district's own assessment of the repercussions. This order of questions produced the narrative the researcher used to develop the recommendations in Chapter 5.

Coding Procedures

The survey yielded eighteen responses over the course of two different administration periods. Because a similar answer structure appeared on nearly all the surveys during both administrations, the researcher considered the data saturated and commenced with coding. For open coding, the researcher grouped responses to each of the five questions into broad categories that distinguished district responses. In the axial coding stage, the researcher consolidated the data into binary categories to understand what districts were actually doing in response to *Parents Involved*. Finally, the data were further narrowed by selective coding to produce a narrative around the central phenomenon identified in the axial coding.

Open Coding

Question #1 asked "How has your district amended its school assignment policy in response to *Parents Involved v. Seattle Schools*?" Four respondents said their district did not use race in its school assignment policy when *Parents Involved* was decided. Five said their district did not change its policy. Six removed race from their school assignment polices specifically because of *Parents Involved*. Two more removed race in favor of a "class based" school assignment diversity policy. One other said it was "trying to amend" its policy.

Question #2 asked "What legal interpretation of *Parents Involved* led the district to amend its school assignment policy?" Eleven respondents did not answer the question. Five said the use of race in school assignment policy is impermissible. Another said the district must balance the policy so race is not used in the policy, but the district also eliminates "inappropriate racial segregation." Another said the use of race is "limited."

Question #3 asked "What factors, other than compliance with *Parents Involved*, led the district to amend the school assignment policies?" Only six respondents answered the question. Two cited court ordered desegregation as a factor. One district said each of the following: transportation, "freedom of school choice," "community support," and "diversity goals."

Question #4 asked "How has the district gathered information and feedback on its school assignment policy amendments?" Five districts had community meetings and public open forums. Four others had committees dedicated to school assignment policy. Four others sent surveys to parents and/or community members. One had a "parent hotline." Only one respondent did not answer this question.

Question #5 asked "What were the repercussions of the school assignment policy amendments?" Eleven respondents did not answer the question. Three said there were insignificant repercussions. One respondent said each of the following: transportation issues, choice issues at top schools, parent dissatisfaction with neighborhood school, racial isolation and identification.

Axial Coding

Graham Gibbs (2010a) advised that axial coding should further break down data to make connections between categories to develop the study's central phenomenon. To that end, Question #1 was further broken into two categories: Nine districts said *Parents Involved* either did not apply or did not cause them to change their policies. Another nine either removed or were attempting to remove race from their policies.

Question #2 was broken down into two categories. Eleven districts did not answer the question. Of the seven that did, all said *Parents Involved* either eliminated race from

school assignment policy or limited it. Notably, no district said *Parents Involved* affirmed racial diversity as compelling government interest in school assignment policy.

Question #3 was also broken into two categories. Fifteen respondents mentioned factors other than racial diversity drove their amendments to school assignment policy. Three districts affirmed a commitment to racial diversity.

Question #4 was also broken into two categories. Nine districts gathered feedback on school assignment policy in some sort of public setting. Five districts solicited feedback privately.

Question #5 was also broken into two categories. All but one district either did not answer or gave a non race related answer. Only one district said its amended school assignment policy affected racial diversity.

Using Gibbs' (2010a) axial coding model, one clear central phenomenon emerged from the data: Of the districts using race in school assignment policy at the time*Parents Involved* was decided, nearly all believed the case eliminates or severely restricts the use of race in school assignment policy. Of the nine districts that said *Parents Involved* applied to their school assignment policies, all nine amended their policies to eliminate or further restrict the use of race. When asked why, districts said they interpreted *Parents Involved* to have curtailed the use of race. When asked what other factors led them to amend their policies, only three districts said they were motivated by a desire to develop or maintain racial diversity. Nearly all districts got feedback on these policy amendments in public and private forums, but nearly none reported definitive conclusions about how these amendments have affected race within their districts.

Selective Coding

Selective coding is the process of interpreting data coding into a narrative. Gibbs' (2010a) provided a framework for interpreting axial codes into narrative: Causal Conditions → Phenomenon → Strategies → Consequences. This structure mirrors the study's survey questions, yielding the following theory about how the vast majority of districts using race in school assignment policy have responded to *Parents Involved*.

The causal condition was that districts interpreted *Parents Involved* much in line with Chief Justice Roberts' opinion, which would eliminate consideration of race from school assignment. The resulting phenomenon was that districts limited or severely curtailed the use of race in school assignment policy. In the immediate aftermath of this new legal and political landscape, districts tried to maintain a dialogue about school assignment through various types of community forums, committees, and surveys. Still, the consequences of this chilling effect were that districts were largely skirting the issue of race.

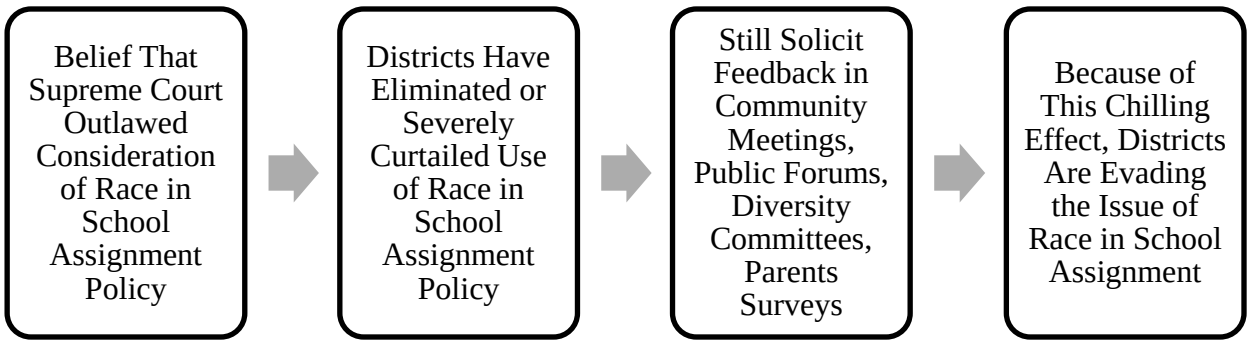

Figure 2. Selective Coding Concept Map.

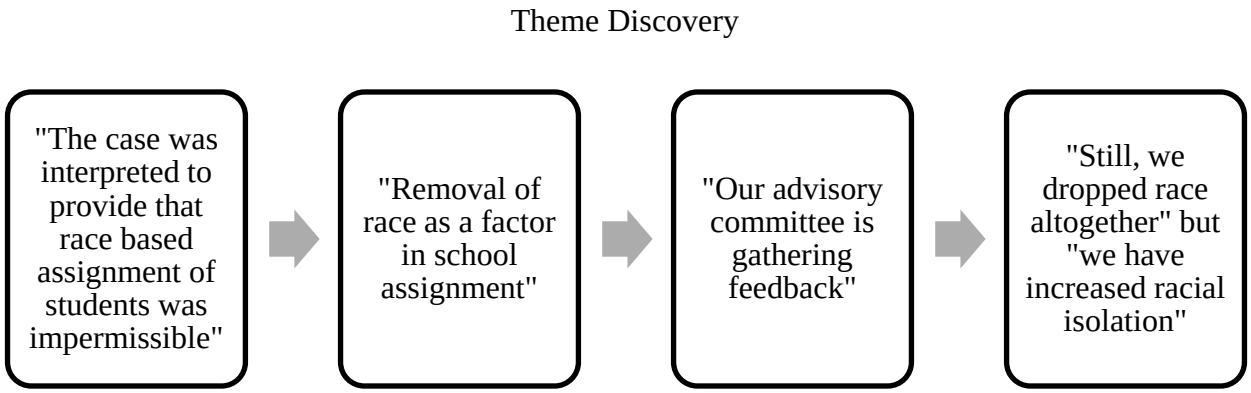

Figure 3. Theme Discovery Concept Map

The theme was stated most starkly in one district's response to Question #1: "Removal of race as a factor in school assignment." Another said, "Yes, we dropped race altogether," and another said, "The district amended its school assignment policy to eliminate race as a factor." A school "modified the criteria for magnet school selection to remove race as a factor to be considered in selection." Some schools eliminated racial diversity and "moved to a class-based system" and "modified to class-based multi-factor that includes sibling relationships and program needs."

These responses were driven by legal interpretations of *Parents Involved*, such as "racial diversity alone [is] not a compelling governmental interest justifying consideration of race in assignment of students." Another stated the issue more directly: "The case was interpreted to provide that race based assignment of students was impermissible." Others were more succinct: "We shouldn't use race at all"; "The district felt we should avoid using race altogether"; "We think the court limited the use of race"; "The district read the case to mean that race shouldn't factor into school assignment decisions." One school was subject to "court-ordered desegregation" because of a "school assignment policy [that] led to race-based inequalities."

These legal interpretations were not the end of the issue. One district gathered feedback with "community meetings, school improvement accountability committees, and annual surveys of staff and community." Another used "open forums, board meetings, public comments in surveys." Three districts had advisory committees, one that "reviews proposed changes to attendance boundaries and makes recommendations to the School Board," another that had a "school improvement accountability committee" to monitor school assignment, and another's advisory committee "is gathering feedback." Several had "community surveys," "surveys and forums," "parent/student surveys and town hall meetings," and "many forums and meetings within the district." One district even employed a "parent feedback 'hotline'" to monitor school assignment and other parental concerns. Few schools reported significant repercussions, though one school reported "increased racial isolation. Racially identifiable schools" and another said that "Parents [are] dissatisfied with their school zone."

Triangulation and Validation

Of the reporting districts in the Civil Rights Commission's 1987 sample cited by Justice Breyer in his *Parents Involved* dissent, nearly all eliminated from school assignment policy (*Parents Involved v. Seattle Schools*, 2007, p. 59). Only Jefferson County, Kentucky—one of the defendants in *Parents Involved*—changed its policy to retain race in school assignment policy based on an expansive interpretation of Justice Kennedy's concurrence in *Parents Involved* (Jefferson County Public Schools, 2011). Either for legal, political, or other reasons, the overwhelming majority of public school districts adopted Chief Justice Roberts' "color blind Constitution" theory to guide their

school assignment policies, despite the bulk of legal scholarship saying that it has little precedential value.

Few Districts Expanded the Use of Race in School Assignment.

This dissertation's findings echoed one of the leading RCSAP studies from The Civil Rights Project's Genevieve Siegel-Hawley and Erica Frankenberg (2011). Siegel-Hawley and Frankenberg (2011) interpreted *Parents Involved* consistent with the bulk of the legal scholarship discussed in Chapter 2, that "Justice Kennedy's concurrence provides a thin but significant purchase for entities wishing to still pursue diversity" (p. 534). To discover how many districts acted on this thin purchase, Siegel-Hawley and Frankenberg (2011) set up "daily Google Alerts to systematically track newspaper articles dealing with school desegregation, unitary status, and student assignment policies," along with conducting "informal interviews" with various public school stakeholders (p. 539-540).

This Google-sized net caught only four instances of districts in the post-*Parents Involved* era moving to a Justice Kennedy-style "multifactor" assignment policy: Montclair, New Jersey; Seminole County, Florida; Ector County Independent School District, Texas; and Jefferson County, Kentucky. These four districts crafted definitions of diversity including race, but did not assign students based solely on race. This approach mirrored the "neutral individualism" interpretation of Justice Kennedy's Equal Protection jurisprudence (Colucci 2010) and the view that Justice Kennedy will take the "narrow tailoring" requirement very seriously when the next case in the *Parents Involved* line reaches the Supreme Court (Lund, 2008; Wilkinson, 2007).

However, Siegel-Hawley and Frankenberg (2011) made far too much of their findings, especially in light of this dissertation's findings. They assert "using multifactor plans seems to be one significant response to [*Parents Involved*]," which had been pioneered in two Bay Area districts (San Francisco and Berkeley) in the early 2000s. Whatever the rationale, the fact that four districts in the five years since *Parents Involved* have adopted Justice Kennedy's reasoning can scarcely be called "significant." Siegel-Hawley and Frankenberg (2011) seemed to recognize this insignificance themselves while simultaneously asserting the opposite. They conceded "these new multifactor plans may reflect a dilution of the significance of race," but then equivocated by saying "on the other hand, these new multifactor plans may reflect a continued recognition that race still matters, marking a political effort to preserve *any* use of race in the face of judicial limitation or race-conscious policymaking" (p. 542).

This is not to say, however, public schools suddenly dropped their interest in diverse schools. To this point, this dissertation found three districts moving from racial classifications to socioeconomic classifications. Siegel-Hawley and Frankenberg's (2011) research corroborated this, finding fifteen districts in the entire country switching to class-based student assignment policies since *Parents Involved*.

Slightly More Districts are Defining Diversity By Socioeconomic Status

As Siegel-Hawley and Frankenberg (2011) pointed out, "class-based plans still seek to pursue diversity…[in] a more race-neutral way," meaning that socioeconomics took the place of race in creating diversity (p. 545). However, districts cannot use socioeconomic status as a proxy for race when it can be shown the policy was "motivated by a racial purpose" or "unexplainable on grounds other than race" (*Hunt v. Cromartie*,

1999, p. 541). According to Siegel-Hawley and Frankenberg (2011), “there is no evidence that any of the districts…intend the use of class as such” (p. 545). This researcher found similar results, with two districts moving to a socioeconomically based school assignment policy.

Summary

The open, axial, and selective coding process revealed a core theme: public school districts have interpreted *Parents Involved* to eliminate or severely curtail the use of race in school assignment policy, so districts have largely abandoned race in school assignment policy. Still, districts monitored the response to school assignment policy, though few have reported definitive changes. The long term consequences are unknown, but in the short term, this chilling effect means that districts have mostly evaded the issue. These results were validated by a similar study by Siegel-Hawley and Frankenberg (2011), which found a few districts adjusting to a Justice Kennedy style multifactor school assignment policy or a socioeconomically based policy.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

Chapter 5 uses the results in Chapter 4 to build two arguments. The data revealed that districts think the Supreme Court outlawed the use of race in school assignment policy, creating a "chilling effect" on the use of race in school assignment by eliminating or severely curtailing it. School administrators have largely evaded the issue in public forums while considering it in private deliberations on school assignment policy. This result is at odds with the actual state of the law.

The researcher will first argue that, despite their perception of the law, public school administrators can still use race in school assignment policy, though in a limited way. Second, the researcher will argue that, to create a workable law compatible with the Constitution, the Supreme Court must affirm that race can be considered in race conscious school assignment policies (RCSAPs).

How Chief Justice Roberts Created the *Parents Involved* Chilling Effect

School districts have interpreted the law to severely limit the use of race in school assignment policy, but this does not mean that have stopped considering race in school assignment. The reason stems from the Supreme Court's evidentiary regime in these kinds of cases, which incentivizes public school administrators from talking about using race and denying race ever entered into their thinking. In other words, the lack of *legal* evidence of racial consideration does not preclude consideration of race from being the *practical* reality. The evidentiary regime established by Chief Justice Roberts' *Parents Involved* opinion led to this disconnect, which has likely driven the conversation about race in school assignment out of the public forum and into private ones.

In the Supreme Court's formulation of the socioeconomic proxy rule, there are only two types of evidence to prove motivation by race. First is an admission that race was the motivating purpose. If the district does not talk about race in its policy or deliberations about the policy, there is no legal evidence it did. Thus, because of the perception that districts cannot use race in their school assignment policies, school administrators are incentivized not to discuss race openly. To this point, when this dissertation was proposed, a former superintendent seemed puzzled by the research design: "As an administrator, why would even answer a question about race in school assignment?" (Fridell, 2012). Siegel-Hawley and Frankenberg (2011) seem to understand the sensitive legal grounds districts tread upon. In an article that generally supports the use of race in school assignment policy, they admit that in "the current legal climate, there is potential benefit to keeping policymaking quiet in districts seeking to pursue integration" (p. 540).

The second type of evidence is the use of data to indicate such overlap between socioeconomics and race that no other explanation is possible. This mode of evidence creates a perverse logic for school administrators. Even if a district genuinely wants to create socioeconomically diverse schools without any consideration of race, prudent districts are still incentivized to create a policy model based on race. This way, the district could compare the "real" model to the "race considered" model to make sure it would pass court muster—which, under the "consideration of race" logic in Chief Justice Roberts' opinion, the district could not do.

In effect, the wide scale adoption of Chief Justice Roberts' opinion has not eliminated the consideration of race in school assignment policy, nor would it ever.

Rather, it has created an elaborate game for school administrators to play. Public school districts and their communities still have to decide how to compose school assignment policies, no matter the criteria. Race is a part of this conversation, but the evidentiary regime proposed by Chief Justice Roberts incentivizes school districts not to talk openly about race or to deny the conversation altogether. So, school administrators have to talk about the issue without seeming like they are talking about the issue.

The Practical Effect of *Parents Involved* in Practice: *Student Doe v. Lower Merion*

The overwhelming rejection of race in school assignment policy, even in districts that want to create racially diverse schools, may be explained by the story of *Student Doe v. Lower Merion*. The Findings of Fact in *Student Doe v. Lower Merion* showed the real world effects of the Chief Justice's "color blind Constitution" evidentiary regime. In *Lower Merion* (2010), Judge Baylson described the dramatic change in deliberations at the precise moment a district superintendent discovered *Parents Involved v. Seattle Schools*. Beginning in June of 2008, Dr. Christopher McGinley of the Lower Merion School District oversaw the redistricting of Lower Merion's two high schools, holding community meetings to get input from district stakeholders, intensively studying the impact on racial diversity percentages, and developing data on projected African-American student enrollment. In recounting the initial process by which the district solicited community input for Lower Merion's school assignment plan, Judge Baylson observes the obvious: "The District cannot be faulted for soliciting the community's input…In addition, the Board could not preclude discussions of race" (*Student Doe v. Lower Merion* Findings of Fact, 2010, p. 28).

Expunging the Discussion of Race from the Discussion of Race

On August 13, 2008, Dr. McGinley found a newspaper article misleadingly entitled "Supreme Court: Schools Can't Use Race to Assign Students" (*Student Doe v. Lower Merion* Findings of Fact, 2010, p. 37). He immediately contacted Dr. Ross Haber, the district's redistricting consultant, who then drew up a "color blind" map that supposedly eliminated race from consideration and sent it by email to Dr. McGinley (p. 37). The judge did not describe Dr. Haber's redistricting scenario, but Dr. Haber testified that he drew a "color blind" map that did not *appear* to consider race.

Dr. McGinley sought legal counsel after contacting Dr. Haber, did not respond to Dr. Haber's email, nor did he comment on the new "color blind" map in any subsequent deliberations. Because of lawyer/client privilege, there was no record of the legal advice Dr. McGinley received. What is apparent, however, was Dr. McGinley did not discuss the use of race with Dr. Haber in drawing a new map. As described above, counsel interpreting both *Parents Involved* and *Hunt v. Cromartie* would likely advise against any on-record discussions of race in crafting a school assignment policy because, as an evidentiary matter, the district's *intent* is difficult to prove without a trail of evidence admitting to using race in school assignment.

Soon after, Lower Merion published a press release which removed sentences indicating that "ethnic, socio-economic, and special needs backgrounds" were used in proposed redistricting maps (*Student Doe v. Lower Merion* Findings of Fact, 2010, p. 44-45). After a public presentation of a proposed plan, the district posted a "Frequently Asked Questions" section on its website that neglected mentioning any information on diversity, even though diversity research had been a major part of the district's report. Dr.

McGinley sent the district's Director of Public Relations an email saying, "[m]y gut feeling is that we include most of what [Dr. Haber] wrote, [but] I would omit the ending sentence about diversity in each section" (*Student Doe v. Lower Merion* Findings of Fact, 2010, p. 46). Dr. McGinley eliminated a slide in a presentation on the redistricting plan dealing with diversity data; in another slide on diversity-related community input, he wrote "Say don't post" (*Student Doe v. Lower Merion* Findings of Fact, 2010, p. 46). In a memorandum concerning a later proposal, Dr. McGinley referred to a report on "Community Values" that included diversity as a guideline for redistricting, but testified he was referring to "minimized travel times" (*Student Doe v. Lower Merion* Findings of Fact, 2010, p. 46). The next five pages of the court's opinion contained more evidence of Dr. McGinley and the rest of the Lower Merion leadership trying to expunge published mentions of race when discussing their various school assignment policy proposals. When pressed by plaintiff's counsel to clarify his comments on race in emails and public presentation, in each instance, Dr. McGinley gave an evasive, non-race related answer.

Considering Race to Show You Are Not Considering Race

The plaintiffs, in addition to attempting to show consideration of race by admission, hired an expert statistician to analyze the likelihood Lower Merion's redistricting plans were composed without considering race. Dr. Pavel Greenfield found a "close to zero percent chance" two subsequent maps were not randomized, and a twenty percent chance another was randomized (*Student Doe v. Lower Merion* Findings of Fact, 2011, p. 43). Though Dr. Greenfield admitted he could not isolate race as a variable, the lesson for districts is clear: school assignment policies will be analyzed statistically for evidence of the use of race. In fact, Dr. Haber anticipated this and immediately drew a

new map that did not appear to be considering race. Thus is the paradox Chief Justice Roberts' opinion: the district must consider race to create the appearance that it is not considering race.

Dr. McGinley's plight is the findings in this dissertation writ large. It is true that Justice Kennedy's opinion in *Parents Involved* technically preserved race as a factor in school assignment policy. But because he voted with the majority to strike down the Seattle and Jefferson County plans and did not provide much guidance for districts seeking racial diversity in schools, the clarity of Chief Justice's "color blind Constitution" effectively became the law of the land. As such, any public school district (except for the four cited by Siegel-Hawley and Frankenberg) attempting to deal with racial diversity will likely conduct the same charade as Lower Merion: grapple with race without saying the "magic words," thus shutting down public discussion and keeping important decisions on racial diversity in schools behind closed doors.

The State of the Law: *Student Doe v. Lower Merion* Federal Court History

A close look at Judge Baylson's district court opinion and its subsequent appeal to the federal Third Circuit Court of Appeals will help school district administrators understand the current legal parameters of race in school assignment policy. Indeed, many of the districts in this dissertation's sample did not say they abandoned racial diversity as a value, but dropped it for legal reasons. And as Siegel-Hawley and Frankenberg (2011) found, the confusing legal climate does not mean districts do not necessarily *want* to abandon racial diversity, but are discouraged by the widespread acceptance of Chief Justice Roberts' "color blind Constitution" opinion. To this point, the

Third Circuit has actually given school districts much more latitude than Justice Kennedy would allow, as long as schools are willing to follow its legal and evidentiary regime.

Judge Baylson's District Court Opinion in Student Doe v. Lower Merion

Judge Baylson found "racial considerations were one of several motivating factors that resulted in the Administration's development of various plans," including the adopted "Plan 3R" (*Student Doe v. Lower Merion* Findings of Fact, 2011, p. 84). The court found "the Administration plainly allowed racial consideration to influence what neighborhoods would be assigned" to certain high schools, "targeting" certain neighborhoods because of its high concentration of Black students (*Student Doe v. Lower Merion* Findings of Fact, 2011, p. 80). Clearly, Judge Baylson found Lower Merion considered race in its deliberations on the new school boundaries.

However, the court did not find *Parents Involved* applied to *Lower Merion*. Judge Baylson differentiated the two cases by arguing the policies in *Parents Involved* used race expressly, whereas Plan 3R is facially race neutral (*Student Doe v. Lower Merion*, 2011, p. 13). Even so, Judge Baylson found strict scrutiny still applied because "once race has been shown to be a motivating factor in decision making, all racial classifications must survive strict scrutiny" (*Student Doe v. Lower Merion*, 2011, p. 26; *Pryor v. National Collegiate Athletic Association*, 2002, p. 562).

Nonetheless, Judge Baylson found Plan 3R survived strict scrutiny because the district had four other compelling educational interests beyond racial desegregation, the district "merely considered racial demographics" in meeting those interests, and the use of race was not for an "invidious" purpose. The court supported its analysis by asserting

"Plan 3R would still have been adopted even had racial demographics not been considered" (*Student Doe v. Lower Merion*, 2011, p. 92).

There are several takeaways for public school administrators seeking racial diversity in schools. First, if the policy itself makes no mention of race, *Parents Involved* does not apply. Second, race may be discussed and deliberated if it is one in a list of stated purposes for the school assignment policy. Third, if the policy is crafted toward the compelling interest of creating diverse schools rather than isolating students by race, the court will likely support it. Fourth, if the policy seems like it would be adopted even in the absence of racial consideration, the court will consider it "narrowly tailored" for the purposes of strict scrutiny.

In effect, Judge Baylson charted a path around *Parents Involved* for public school administrators seeking racial diversity in school assignment policy.

The Third Circuit Court of Appeals' Treatment of Lower Merion

The Third Circuit Court of Appeals did further damage to Chief Justice Roberts' *Parents Involved* opinion. In the vast majority of Equal Protection cases, the level of scrutiny dictates the outcome. Laws requiring strict scrutiny often fail this high standard and are struck down, whereas laws requiring only a rational basis almost always survive (Strauss, 2012, p. 136). Judge Baylson, however, followed Justice Sandra Day O'Connor's maxim in *Adarand Constructors v. Pena* (1995) that "strict scrutiny is strict in theory, but not fatal in fact" (p. 237). He found Plan 3R required strict scrutiny because of Lower Merion's consideration of race, but the policy still survived for the reasons listed in the above advice to public school administrators.

The Third Circuit went even further than Judge Baylson, opening the door for more open consideration of race in school assignment policy. In an opinion by Circuit Judge Joseph Greenaway, Jr., President Obama's replacement for the appellate court vacancy left by Supreme Court Justice Samuel Alito, the court not only found *Parents Involved* does not apply when the school assignment policy is facially race neutral, it found strict scrutiny does not apply.

Judge Greenaway corrected Judge Baylson's interpretation of *Pryor*'s "race as a motivating purpose" holding. According to Judge Greenaway, consideration of, or motivation by, race does not automatically trigger strict scrutiny. Rather, a "discriminatory purpose" must be a motivating factor in the decision (*Student Doe v. Lower Merion*, 2011, p. 563). In other words, simple awareness of racial classification does not trigger strict scrutiny because, as the Supreme Court held in *Shaw v. Reno* (1993), the governing body "always is aware of race when it draws district lines" and "race consciousness does not lead inevitably to impermissible race discrimination" (*Student Doe v. Lower Merion*, 2011, p. 564). In Judge Greenaway's formulation, an impermissible racial classification only occurs when the policy actually "distributes burdens or benefits on the basis of race," as in *Parents Involved* (*Student Doe v. Lower Merion*, 2011, p. 564).

So, even though Dr. McGinley and the Lower Merion School Board considered race and were "aware of neighborhood demographics" when developing the policy, it was "administered in a race-neutral fashion" and therefore lacked "discriminatory purpose" (*Student Doe v. Lower Merion*, 2011, p. 565). Quoting *Parents Involved*, Judge Greenaway notes that the Supreme Court's holding is strict scrutiny applies to a "plan

that uses race as one of many factors." So, if race is not in the actual policy, it can be considered when developing the policy, provided that it is administered in a race neutral way and does not force students "to compete in a race-based system that may prejudice them" (*Student Doe v. Lower Merion*, 2011, p. 565, 567). The school district's motivation is irrelevant as long as the impact is acceptably race neutral because, as the Supreme Court held in *Massachusetts v. Feeney* (1979), "the Fourteenth Amendment guarantees equal laws, not equal results" (*Student Doe v. Lower Merion*, 2011, p. 577). Lower Merion's race neutral explanation that Plan 3R balanced the total school populations, evened out travel times, and helped bus routes was enough for Judge Greenaway to accept the policy, despite the fact that some African American students had to change schools after Plan 3R. Therefore, facially race neutral school assignment policies like Lower Merion's are subject only to rational basis review, meaning the policy must only be rationally related to legitimate government interests, including diversity (*Student Doe v. Lower Merion*, 2011, p. 581).

Student Doe v. Lower Merion (2011) was decided by a panel of three judges, two appellate (one Democratic and one Republican appointee) and one district judge (Democratic appointee). Judge Jane Richards Roth, a Reagan appointee to the federal bench, agreed with the decision but dissented on the issue of strict scrutiny. She cited Justice Kennedy's *Parents Involved* concurrence, agreeing that diversity is a compelling government interest in the K-12 context and each student should be considered individually, not as a group. However, Judge Roth reasoned Plan 3R actually did have race as one of its factors because of the intense racial composition of the neighborhoods considered in the policy. Judge Roth's concern was that, under Plan 3R, African

American students were *de facto* treated as a group because of the intense segregation of neighborhoods in Lower Merion.

Still, this is a minor point. The takeaway for school administrators is Judge Baylson's roadmap applies in the same basic form, but the Third Circuit made it much easier for RCSAPs to survive in court.

The Supreme Court's Rejection of Certiorari *for* Student Doe v. Lower Merion

The students petitioned the Supreme Court to issue a writ of *certiorari* to review the Third Circuit's ruling, which the Court declined (*Student Doe v. Lower Merion*, 2012). *Certiorari* is a matter of judicial discretion, granted "only for compelling reasons" because the Court only hears about 80 of the thousands of cases petitioned to it each year (Cornell University Law School, 2013). The Court may deny *certiorari* because the case does not address a Constitutional question worthy of its docket space, but in *Lower Merion*, there are two other reasons the Court may have denied *certiorari.*

Formally, Supreme Court Rule 10 says the Court may hear an appeal when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" (Cornell University Law School, 2013). *Student Doe v. Lower Merion* is the first case in which a court of appeals reached a final verdict in a post *Parents Involved* RCSAP case. Thus, there is no appellate court conflict for the Supreme Court to resolve.

Informally, considering *Parents Involved*'s stature in the Roberts Court's jurisprudence, it is unlikely the justices felt *Lower Merion* was not important enough to hear. However, the Supreme Court unofficially abides by the "Rule of Four," meaning that four justices must agree to hear the case for the Court to grant *certiorari* (Cornell

University Law School, 2013). Without insider reporting, it is impossible to know why at least five justices declined to review *Lower Merion*, but politically, the result makes sense for both the conservative and liberal wings of the Supreme Court.

The conservative wing of the Court (Justices Roberts, Scalia, Thomas, and Alito) would risk Justice Kennedy affirming the Third Circuit, thus enshrining racial diversity in the K-12 context as a compelling governmental interest in the law. Arguably, this is already true, but for reasons discussed below, Chief Justice Roberts' opinion is largely the most influential in the case. A Justice Kennedy opinion upholding a district's RCSAP would effectively render Chief Justice Roberts' "color blind Constitution" a dissent without precedential value except for policies similar to Seattle's and Jefferson County's.

The Court's liberal wing (Justices Ginsburg, Breyer, Sotomayor, and Kagan) would risk Justice Kennedy changing his mind about racial diversity in the K-12 context. Or, Justice Kennedy might do what he did in *Parents Involved*: declare Plan 3R unconstitutional while leaving the door for racial consideration slightly open, further cementing the impression that the Chief Justice's "color blind Constitution" is the law.

In any event, *Lower Merion* is the only federal appellate court to make a final ruling on a RCSAP after *Parents Involved*. Though it is not binding outside of the Third Circuit's jurisdiction in Pennsylvania, Delaware, and New Jersey, it is the only precedential guidance the courts have.

Recommendations for Public School Administrators Seeking Racial Diversity

As outlined above, this dissertation's research, Siegel-Hawley and Frankenberg's research (2011), and the Lower Merion saga revealed a huge gap between the *perception* and *reality* of RCSAP law. Only a few public schools expanded the use of race in school

assignment; in fact, most shied away from it or are trying to find proxies for race in socioeconomic status. Most believed Chief Justice Roberts' "color blind Constitution" opinion explicitly outlawed any consideration of race whatsoever in school assignment. This is how many school districts in this dissertation's sample replied. In *Lower Merion*, Dr. McGinley read an erroneous newspaper headline, and then on what was likely the advice of counsel, attempted to erase all traces of race from school assignment policy deliberations.

As described in the section on *Lower Merion*, the actual state of the law is much different. Justice Kennedy prevented Chief Justice Roberts' "color blind Constitution" from becoming law. In fact, Justice Kennedy gave school districts some direction on how to pass constitutional muster; specifically, he wrote "drawing attendance zones with general recognition of the demographics of the neighborhoods" would be legal (*Parents Involved*, 2007, p. 789). But still, Dr. McGinley and others like him—including nearly all the respondents in this dissertation's sample—thought this was outlawed by the Supreme Court. This should be expected; as Judge Baylson wrote in his *Lower Merion* (2010) opinion, "understanding *Seattle* is challenging for judges and lawyers, let alone for a professional educator" (p. 18).

Model the Policy on the Decision in Lower Merion

As noted above, the only final judgment in the federal appellate courts endorsed a roadmap around *Parents Involved*, one that sidesteps the illogical outcomes of the Chief Justice's "color blind Constitution" theory. District administrators cannot help but consider race when looking at the various neighborhoods and demographics of their district. Nor could they, or should they, censor the public when seeking input on a new

policy. But under the Chief Justice's theory, district administrators who "consider" race put their policies at risk in court.

Also, because policies could have an unconstitutional discriminatory impact, district administrators are incentivized to draw up policies that do not *appear* to be racially motivated. Of course, to do that, they would need to consider race to show they are not considering race. Even more perversely, district administrators would be incentivized to further *segregate* schools to "prove" they are not *desegregating* them. But, if the policy is facially race neutral, race is not effectively the deciding factor in school placement. If the plan is rationally explainable on grounds other than race, there is now legal precedent for upholding the policy.

One note of caution. *Student Doe v. Lower Merion* (2011) is only binding in states covered by the Third Circuit, Delaware, New Jersey, and Pennsylvania. Courts in other states may consider *Student Doe v. Lower Merion*, but until the Supreme Court clarifies the issue, Justice Kennedy's *Parents Involved* opinion should be closely considered before any policy discussions.

Consider the Suggestions in Justice Kennedy's Parents Involved *Concurrence*

To that end, though Justice Kennedy's opinion is mostly vague about when race can be used in school assignment policy, he did offer some concrete suggestions. Justice Kennedy suggested "strategic site selection of new schools," "drawing attendance zones with general recognition of the demographics of the neighborhood," funding special programs to attract minority students, targeted recruiting of students and faculty, and "tracking" enrollment and performance data by race. To Justice Kennedy (2011), these are "race conscious" without leading to "different treatment" based on race (p. 9).

Perhaps the most important takeaway for school administrators is in this section of Justice Kennedy's opinion. Justice Kennedy cited *Adarand Constructors v. Pena* (1995), the same case Judge Baylson and the Third Circuit cited in their opinions, which upheld the limited consideration of race in electoral district lines (p. 213). As long as boundary lines are "facially race neutral," strict scrutiny does not apply (Kennedy, 2007, p. 9). Justice Kennedy (2007) went even further, saying that if there is no strict racial classification within the policy itself, school administrators can consider race "with candor and with confidence that a constitutional violation does not occur" (p. 9). Though the Seattle and Jefferson County districts contended they had to explicitly use race in their school assignment policy because "there was no other way to avoid racial isolation," Justice Kennedy (2011) will not accept a "crude system of individual racial classifications" (p. 9).

In other words, Justice Kennedy seems ready to accept Judge Baylson's and the Third Circuit's reasoning on facially race neutral school assignment policies, especially if the district has attempted some of the advice he explicitly listed in his opinion.

Seek Guidance from the Department of Education's Office for Civil Rights

There is perhaps one overlooked reason for the mass perception the Supreme Court outlawed consideration of race in school assignment policy: the George W. Bush Administration's Department of Education's Office for Civil Rights "offered a blatantly inaccurate statement of the Court's opinion" (Black, 2012, p. 6). In a "Dear Colleague" letter published on the Office for Civil Right's website on August 28th, 2008, Assistant Secretary of Civil Rights Stephanie Monroe adopted Chief Justice Roberts' opinion as the federal government's position without mentioning Justice Kennedy's controlling opinion

(Black, 2012, para. 6). Secretary Monroe's memo incorrectly asserted race could only be used to remedy past segregation to achieve diversity in higher education; all other uses of race are "patently unconstitutional" (Office for Civil Rights, 2008, p. 25). Furthermore, Secretary Monroe's memo "neglected to mention the kinds of permissible race-conscious measures that Justice Kennedy explicitly contemplated in his concurrence" (Le, 2010, p. 755). Secretary Monroe's "Dear Colleague" memo sat on the Office for Civil Right's website as the federal government's official advice three years into the Obama Administration, finally replaced in December of 2012. (Black, 2012, p.7).

The Obama Administration's replacement memo interprets Justice Kennedy's concurrence much the same as Judge Baylson and the Third Circuit. The Office for Civil Rights (OCR) takes the position that a majority of the Court recognized diversity as a compelling interest and explicit racial classifications are subject to strict scrutiny. The OCR also explains Seattle and Jefferson County had not "seriously considered race-neutral alternatives" or "provided for a meaningful, individualized review of student assignments" (Office for Civil Rights, 2012, p. 3). Echoing Professor Colucci's neutral individualism theory, the memo interprets Justice Kennedy's opinion to say schools are "free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashions solely on the basis of systematic, individual typing by race" (Office for Civil Rights, 2012, p. 4).

The memo then discusses different applications of these principles. In its first example, OCR seems not to take its cues not from *Parents Involved*, but *Grutter v. Bollinger* (2003), the Supreme Court's decision affirming racial diversity in higher education. OCR (2012) advocates "approaches that do not rely on the race of individual

students," echoing the courts in the *Parents Involved* line (p. 7). But then OCR asserts "school districts are required to use race-neutral approaches only if they are workable," relying on *Grutter* for the term "workable" (*Grutter v. Bollinger*, 2003, p. 339). When race neutral policies are not "workable," OCR (2012) says districts may use "generalized race-based approaches" (p. 7). To be clear, the "workability" requirement is from the higher education context, which courts have clearly distinguished from K-12, so this language may not pass muster with the courts. However, OCR's (2012) applied example is more in line with the courts, considering overall racial compositions of neighborhoods without individualized decisions based on race (p. 7).

Second, OCR (2012) discusses "approaches that rely on individual racial classifications" (p. 8). Again, OCR (2012) relies on language from *Grutter*, that race can be a "plus factor" among non-racial considerations only after all other methods are deemed "unworkable" (p. 8). Race cannot "insulate" students from comparison to other applicants, nor define students totally by race, but give each student "individual consideration" (Office for Civil Rights, 2012, p. 8). Finally, the district needs to "periodically review" its policy to determine whether racial classifications are still necessary to achieve its diversity goals. Because OCR relies on language and theory from the higher education context, its advice may be better suited for application based assignments rather than traditional public school boundaries. In the K-12 context, OCR's advice is probably better applied to magnet school applications and other specialized programs than actual line-drawn boundaries.

Next, OCR offers some illustrative examples of what their advice looks like in practice. First, when siting schools and special programs, districts should consider race

and other forms of diversity in a general way. Geographically speaking, new schools should be located to naturally draw from different socioeconomic and racial groups. Specialized academic programs could be situated in low performing schools to attract a more diverse student body (Office for Civil Rights, 2012, p. 9). Districts should consider grade realignment and feeder patterns to create diversity as students progress through the system.

Next, OCR recommends using socioeconomic or other race neutral characteristics to draw school boundaries. Here, OCR (2012) echoes language from Judge Baylson's opinion in *Lower Merion*, using criteria like "equalizing enrollment," "minimizing travel times," and "peer continuity" to draw boundaries (p. 9). For districts using open enrollment or school choice programs, OCR (2012) borrows from the amended policy in Jefferson County, Kentucky, one of the defendants in *Parents Involved*. In these scenarios, parents rank schools, then the district assigns students by lottery of top choices, "clusters" of schools from neighborhoods of varying socioeconomic and racial diversity, or "planning areas" where neighborhoods of extreme racial isolation get priority in school choice. If the district finds these alternatives "unworkable," the district could assign students by race as one factor among many (Office for Civil Rights, 2012, p. 9). OCR (2012) also recommends using lotteries or giving preference to students in "neighborhoods selected specifically because of their racial composition and other factors" for competitive programs, and allowing inter- and intra- district transfers from schools based on race and other considerations (p. 10).

Another word of caution: the Supreme Court has not upheld a plan like any of these, and a few of these scenarios are similar to the plans struck down in Seattle and

Jefferson County. OCR grounds some of its arguments in *Grutter v. Bollinger* (2003), a case the courts have explicitly distinguished from *Parents Involved*. In any event, OCR does offer assistance to any districts seeking racial diversity. As Professor Derek Black of the Education Rights Center at the Howard University School of Law (2012) asserted, "the guidance offers any school system that is seriously committed to diversifying or reducing the racial isolation realistic and workable options to achieve its goal" (p. 11).

Future Action in the Federal Courts

As Student Doe's counsel wrote in his petition to the Supreme Court, "because *Seattle* was such a fractured opinion, District Courts and Courts of Appeals have been left wondering exactly what standards they are to apply when school districts, without Court intervention, seek to use race a factor in students assignment plan in order to create diversity" (*Student Doe v. Lower Merion*, 2012, p. 19). Student Doe's Supreme Court brief also pointed to the impending result of the next case in the *Parents Involved* line: "The confusion that persists following *Seattle* can only be appreciated when one review post-*Seattle* court rulings regarding student assignment plans" (*Student Doe v. Lower Merion*, 2012, p. 20).

Or, put more succinctly by Judge Roth (2012) in her *Lower Merion* concurrence, "we need further guidance from the Supreme Court on this issue" (*Student Doe v. Lower Merion*, 2011, p. 591).

The likely next case to reach the appellate courts in the *Parents Involved* line is an appeal of *Lewis v. Ascension Parish School Board* (2011). In *Lewis* (2011), the Ascension Parish School District dealt with a middle school overcrowding issue by redistributing students to other schools in the district. Ascension's "Growth Impact

Committee" was charged with developing a plan that would comport with the district's previous desegregation order from the courts. Superintendent Donald Songy hired a "demographics application specialist" to help prepare alternatives. Eventually, Superintendent Songy presented to the school board a "statistical analysis" of four options, each with "current enrollment, percentage of African-American students, and percentage of at-risk students at each school," then with the changes under the four alternatives. At a later school board meeting, one member told the audience he was concerned about moving the fewest amount of kids and maintaining a suitable level of racial diversity to satisfy their previous court order. The board approved redrawn attendance zones forcing some African American students to change schools, which gave rise to the lawsuit (*Lewis v. Ascension Parish*, 2011).

The district judge adopted the Third Circuit's reasoning that a facially race neutral school assignment policy need only survive rational basis scrutiny. Because Lewis did not show "discriminatory motive" or "disparate impact," the court granted summary judgment in favor of Ascension Parish. "Summary Judgment" means "there is no genuine issue as to any material fact" and the movant is "entitled to judgment as a matter of law" when all facts and inferences are considered in the most favorable light of the non-movant (*Lewis v. Ascension Parish*¸ 2011, p. 347). The Fifth Circuit Court of Appeals denied summary judgment because, in its view, the factual record was not developed enough to support summary judgment. The court remanded the case for another trial to further develop the facts.

Student Doe's Supreme Court brief in *Lower Merion* (2012) argued the Fifth Circuit overturned the district court's ruling that a facially race neutral school assignment

policy is subject to rational basis scrutiny, thus creating a conflict between the circuits and triggering a compelling reason for the Supreme Court to grant *certiorari*. However, this is not the case: the factual record was simply too underdeveloped for the court to "determine whether the district's plan must be subjected to strict or rational basis scrutiny" (*Lewis v. Ascension Parish,* 2011, p. 347). As Lower Merion's Supreme Court brief (2012) point out, "the Fifth Circuit did not even decide which standard of review should apply" (p. 18).

Regardless, the remanded district court case is set for June 24, 2013 in the Middle District of Louisiana Federal District Court. Whatever the outcome, the case's importance renders it nearly certain to be appealed back to the same panel of three Fifth Circuit Court judges. Their first decision in *Lewis v. Ascension Parish* is as fractured as the Supreme Court's in *Parents Involved*, and the court seems likely to part ways with the Third Circuit. Judge Edith Jones argued "race-based student assignments…presumptively violate the equal protection clause," calling Ascension Parish's plan "racial gerrymandering" (*Lewis v. Ascension Parish,* 2011, p. 357). Judge Carolyn King adopted the Third Circuit's rational basis theory, saying that the majority opinion "threatens to require the application of strict scrutiny to actions taken with a mere awareness of their effects on racial demographics" (*Lewis v. Ascension Parish,* 2011, p. 362). Judge Catharina Haynes did not write separately, so it is impossible to know where she stands on the issue's merits; however, considering that she is a George W. Bush nominee from Texas with a conservative voting history, she may well side with Judge King. If so, this will create a genuine split between the appellate courts and possibly spur the Supreme Court to grant *certiorari* to resolve the differences.

If this happens, public school administrators should hope the Supreme Court will find four votes to grant *certiorari* to *Lewis v. Ascension Parish*. Until the district court bolsters the factual record in *Ascension Parish*, there is no way to guess what side Justice Kennedy will fall—and even with more facts, the "Sphinx of Sacramento" remains unpredictable (Lithwick & Epps, 2007). Still, the best outcome for public school administrators is an affirmation of the policy, no matter their personal position on the use of race in school assignment policy. Upholding a race conscious school assignment policy will help dispel the false notion that Chief Justice Roberts' "color blind Constitution" is the law of the land. Also, Justice Kennedy will most likely write the opinion to bolster his concurrence in *Parents Involved* by reasserting the principles of neutral individualism and, more importantly, giving schools more concrete guidance on how to properly use race in crafting race conscious school assignment policy. Or, Justice Kennedy may change his mind and join the Chief Justice. Either way, a new case in the *Parents Involved* line will give public school administrators what they most need on this issue: clarity.

Limitations of the Study

The sample in this dissertation was taken from a Civil Rights Commission (1987) study cited by Justice Breyer in his lengthy *Parents Involved* dissent. The sample contained schools of various sizes, locations, and demographics that the Commission deemed a good cross section of school districts with, at one point in their history, race conscious school assignment policies. For this dissertation, the researcher's data gathering strategy was to directly ask the district's legal counsel about the impact of *Parents Involved*. Many attorneys were candid about their district's intent; others were

evasive; many did not answer. One attorney said good research on RCSAPs is impossible because many school administrators fear the issue so much they have stopped talking about race altogether in any forum. In trying to estimate how many districts are striving for diversity after having remedied legal segregation, Siegel-Hawley and Frankenberg (2011) admit in footnote, “It is difficult to estimate precise numbers here because districts may try not to draw too much attention to an often sensitive topic” (p. 546).

Perhaps this is the point. This dissertation’s research, along with Siegel-Hawley and Frankenberg’s (2011) admissions, are far more telling than the handful of districts they identify as using race in school assignment policy. The widespread belief that Chief Justice Roberts’ opinion in *Parents Involved* completely outlawed the mere mention of race, coupled with the explosive political nature of race and the potential for contentious, protracted litigation, could drive the conversation about race out of the public’s debate on specific local policies. For these reasons, the research in this dissertation is not easily generalizable to the entire population. Then again, no research on this topic will be until school districts and their communities are free to talk about the segregation of public schools without legal constraints. Risk adverse school administrators will limit the conversation, of course, for some prudent political reasons. But this is a choice that the courts should not take away from schools and communities.

Recommendations for Future Research

The researcher assumes public school administrators are primarily interested in racially diverse schools for two reasons. First, they believe diverse schools will help close the achievement gap amongst minorities. Second, they believe in the residual citizenry

benefits of living in a truly multicultural society. From those premises, the researcher recommends the following research.

Mapping Demographics in School Districts

The 2010 census and 2012 presidential elections highlighted many shifting demographic trends. Rural districts are still very White but becoming much more poor, and some have pockets of enormous Hispanic growth. Exurban districts are very highly White and increasingly isolated from the more multicultural city core. Inner and second ring suburban districts are becoming more diverse and are developing poverty issues normally associated with urban schools (Chinni, 2012). Finally, urban districts are gentrifying due to reverse White Flight, but individual neighborhoods within districts remain intensely segregated (Roberts, 2008). This information will not only help school administrators plan current school boundaries, but anticipate segregation trends to create plans that will not require contentious reorganization in the future.

Continue Researching the Effect of Desegregation on Achievement

Professor David Armor, the leading researcher on this issue, concluded after decades of research that desegregation has had only marginal impact on Black achievement (Armor & O'Neill, 2006; Armor, 2010). Research from The Civil Rights Project suggested otherwise and advocated for the residual social benefits of diverse schools (Frankenberg, Lee, & Orfield, 2003; Civil Rights Project, 2011). This information will be helpful to communities as they decide what importance to place on racial diversity, especially in urban and inner ring suburban districts, many of which are debating the relative merits of neighborhood schools versus schools with wider boundaries.

Continue Researching Diversity Initiatives in Public Schools

The 2010 census and 2012 presidential election marked the dramatic changes in demographics across the country. As the courts clarify *Parents Involved, Student Doe v. Lower Merion, Lewis v. Ascension Parish*, and other race related cases in the K-12 context, public school administrators may increasingly take on diversity initiatives, especially as districts themselves become more diverse. Perhaps wider definitions of diversity, such as those cited in this dissertation and by Siegel-Hawley and Frankenberg (2011), will become the norm, with race becoming only one of many factors. This conversation is ongoing, and because current research suggests racial diversity initiatives are waning does not mean this trend will continue—especially if Justice Kennedy and the liberal wing of the Supreme Court reaffirms racial diversity as a compelling governmental interest.

Concluding Statement

One remaining question is this: why there is such a disconnect between the perception and reality of RCSAP law? The most famous and most memorable line from *Parents Involved* is Chief Justice Roberts' "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race." This line was not only the headline in much of the media coverage of the case, but also one of the most famous and powerful in the Chief Justice's distinguished career. Combined with the fact that Seattle's and Jefferson County's policies were struck down, the result was that much of the media reported the case wrongly—just as Dr. McGinley saw in the San Francisco *Chronicle*'s headline "Supreme Court: Schools can't use race to assign students" (Egelko, 2007).

Furthermore, because of the nature of evidentiary regime in racial diversity cases, Chief Justice Roberts has put public school administrators in an untenable position. Schools serve communities, so it is incumbent upon school administrators to gather public input, which is always going to include some element of race and diversity. But if administrators believe "you cannot use race in school assignment," what should they do when faced with this issue from the community? Ignore their constituents? Simply not have the conversation at all, lest they run afoul of the Constitution?

Saying race cannot factor into the map does not eliminate race from the map. Even the Third Circuit's decision puts school administrators in a dishonest position. Following their law, school administrators can get community input on the use of race. They can consider race "generally" when drawing the district map. But they cannot say "race" in the policy. In other words, they cannot *say* in the policy what they are effectively *doing* with the policy. Nor can they talk about race *too much*, lest they appear to make decisions motivated by an *excessive* concern for one of the most concerning issues in their communities.

Still, the Chief Justice's position is worse for school administrators. Because of the fear of appearing to "consider" race, administrators are incentivized to draw more segregated school maps than they otherwise might, lest they appear to have considered race. Furthermore, administrators are incentivized to simply not say the magic words "race" or "diversity" at all, lest these statements end up in a trial exhibit as evidence of consideration of race. In other words, the Chief Justice's "color blind Constitution" theory is putting school administers in a position where they cannot honestly talk about

important issues with their constituents. Surely most public school administrators leaders can understand Superintendent McGinley's plight in *Lower Merion*, where:

> Rather than admit that they engaged in race based decision-making, and then defend their actions in accordance with the "strict scrutiny" test, when called to testify at trial, LMSD's Administration repeatedly denied under oath, in vain, that they used race as a factor in formulating, selecting, and recommending redistricting plans. Specifically, Dr. Christopher McGinley, LMSD's School Superintendent, denied at least a dozen times during his testimony that race played any part in his actions. (*Student Doe v. Lower Merion,* Brief for Petitioners, 2012, p. 23).

Schools serve students, parents, taxpayers, and constituents—not the courts. The public deserves an open, transparent, and honest airing of these important community issues. Even though the Chief Justice's position does not have the full force of law, this research reveals what the "color blind Constitution" looks like in practice. Effectually, fear of "considering" race is driving the race conversation out of the public sphere and into the private conversations of district leaders. As the Petitioners in *Lower Merion* (2012) argue:

> Virtually every school district in this country has a vested interest in knowing exactly what it can do, what it must not do, when assigning students. The lack of clear guidance spurs litigation which will insure the squandering of scarce educational and judicial resources that parents, school districts, and Courts cannot afford. (p. 21-22).

Perhaps the Third Circuit is correct, that facially race neutral school assignment policies are the correct and legitimate interpretation of the Equal Protection Clause and the legacy of *Brown v. Board of Education*. Perhaps Justice Kennedy is right, that race can be used explicitly in school assignment policy when all other options have been exhausted. Whatever the course of justice, Justice Kennedy's "controlling" opinion did not do enough to encourage public school administrators to drag the race conversation into the sunlight where it can be debated and decided within the local political system. Democracy demands as much. The first step in stopping discrimination on the basis of race is for communities to talk about how to stop discriminating on the basis of race.

Summary

The following bullet points are the intended take-aways for the three intended audiences for this dissertation. The researcher assumes these audiences value racial diversity within individual school buildings and want to pursue diversity according to the Constitution's Equal Protection Clause.

Public School Administrators

- Consult with and retain an attorney with expertise in civil rights education law to help navigate this specialized area of the law.
- Based on this advice, set parameters for gathering public input on your school assignment policy. At the outset, know how you are going to handle information about racial diversity so your office is comfortable crafting a policy within a reasonable interpretation of the law.

- In crafting the policy, consider the principles and examples in Justice Kennedy's *Parents Involved* decision and Judge Baylson's and the Third Circuit's decisions in *Lower Merion.*
- Consult with the United States Department of Education Office for Civil Rights for advice on the particular elements of your school assignment policy.
- Seek input from parents and the public when crafting the policy.
- Limit the number of students moved from schools to promote diversity.

Education Law Attorneys

- If your clients want to pursue legal diversity, use *Parents Involved* and *Lower Merion*, as well as the Office for Civil Right's advice, to guide them. The "safe" answer is to say racial diversity cannot be considered in school assignment possible, and the law is very murky in this area. Still, a client who wants to pursue racial diversity does have some precedent in the law to do so.
- Make sure the client understands the risks inherent to pursuing policies in undefined areas of the law. Assess the risk tolerance of the client to help draft parameters for gather and handling information on racial diversity.
- Attend board meetings and appropriate administrative meetings, and be available to explain the district's interpretation of the law to the public.
- When the district is crafting its school assignment policy, help its stakeholders understand how the particulars of its policy fit within the law.
- After the law is adopted and administered, be available to defend the policy within the community, if necessary.

The Supreme Court

- Grant *certiorari* when the next case, likely *Lewis v. Ascension Parish,* passes through the federal circuit court.
- Affirm that race may be considered in school assignment policy, similar to *Grutter v. Bollinger*. Regardless of how the Court interprets the Equal Protection Clause, race is going to be considered in school assignment policy. The public is better served is this conversation is public and transparent with a free exchange of ideas on an issue so local and context specific.
- Limit the use of race to one of many factors in school assignment policy. As Justice Kennedy writes, students should not be defined completely by their race and deserve individual, holistic consideration when the district decides where they attend school. This is the appropriate compromise between the conservative and liberal wings of the Supreme Court, which also reflects what actually happens in school districts.

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APPENDICES

Appendix A

Parents Involved v. Seattle Schools Survey Questions

These questions revolve around the following question: How has *Parents Involved v. Seattle Schools* affected your district's school assignment policy? Explanations for you answers are appreciated.

Question #1

How has the district amended its school assignment policy in response to *Parents Involved v. Seattle Schools*?

Question #2

What legal interpretation of *Parents Involved* led the district to amend its school assignment policy?

Question #3

What factors, other than compliance with *Parents Involved*, led the district to amend the school assignment policies?

Question #4

How has the district gathered information and feedback on its school assignment policy amendments?

Question #5

What were the repercussions of the school assignment policy amendments?

Appendix B

Stephen Himes
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Dear Colleague:

As a requirement for the doctoral program in Educational Leadership and Policy Analysis at the University of Missouri-Columbia, I am working on a dissertation entitled "Stop Discriminating on the Basis of Race: The Public School Reaction to *Parents Involved*." My data requires input from the chief legal counsels at school districts with race-conscious school assignment policies. Enclosed is a survey asking a few questions about how your district's school assignment policy has changed since the Supreme Court's landmark 2007 decision. I would be grateful if you could take a few minutes to respond.

Your participation will help me assess the nationwide impact of the *Parents Involved* decision, which I will submit in an *amicus* brief to the Supreme Court when the next case in this line is granted *certiorari.* The questions on the survey do not intend for you to disclose information subject to attorney-client privilege. The questions simply ask you to identify the district's policy amendments in response to *Parents Involved.*

All answers will be submitted confidentially through an online survey service that assures anonymity. I will not be able to trace any responses to any districts. The survey will take about five minutes to complete. No institution or participant will be named in this study.

Your participation in this research is voluntary, and you are free to withdraw your consent and discontinue your participation at any time. Please know that your participation will help a fellow educator and attorney develop a study that will benefit educational diversity as the post-*Parents Involved* legal environment evolves. The findings may be subject to possible publication.

Please feel free to ask questions at any time during the study. You may contact me at the telephone number or email address below. If you have further questions, feel free to contact my dissertation advisor Dr. Phillip Messner at (660) 562-1478. If you have any question about your rights, please contact the University of Missouri Institutional Review Board at (573) 882-9585.

Collegially yours,

Stephen Himes

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VITA

Stephen Himes was born and raised in Clinton, Missouri, where he graduated high school in 1994. Stephen attended Drury College in Springfield, Missouri, graduated with a dual major in English and Secondary Education in 1998 and with master's in Gifted Education in 2001. Upon graduation, he became the gifted coordinator at Rogersville (MO) High School, teaching AP classes, coaching speech and debate and the tennis teams until 2004.

Stephen then attended the University of Kansas School of Law, where he coordinated a statewide advocacy group as the Executive Director of the Graduate and Professional Association. He also clerked for the Chief Judge of Kansas' 7th Judicial District, worked for the ranking minority on the Kansas Senate Education Committee, and interned for the Douglas County (KS) District Attorney. After passing the Missouri Bar in 2007, Stephen went back into education, teaching at St. Teresa's Academy in Kansas City, Missouri since 2008, where he has been twice named one of Missouri's Influential Teachers by the Missouri Scholars Academy.

Currently, Stephen runs his own boutique real estate practice in the Brookside/Waldo neighborhood of Kansas City, operates a test preparation business for elite high school students, and teaches night classes on Shakespeare and Dante.