"Together at the Table of Brotherhood" Voluntary Student Assignment Plans and the Supreme Court

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Many school districts embrace voluntary programs designed to maintain or increase diversity (racial, ethnic, and other sorts) within their schools. They do so for a variety of reasons and through a number of different mechanisms and formulas. Most controversially, some schools use race to determine a student's school assignment. In June 2007, the Supreme Court considered two challenges to race-based plans. In a deeply divided plurality decision in Parents Involved in Community Schools v. Seattle School Dist No. 1 *(*PICS*), the Court held both assignment plans unconstitutional. Following* PICS*, the question remains: what voluntary school assignment plans in the K-12 public school setting are constitutional and how effective are they at achieving their stated goals? The purpose of this Article is to review the different paths school districts may take in crafting assignment plans and to determine if they will both pass constitutional muster and succeed at increasing diversity. After analyzing the* PICS *decision and the tension inherent in the two lines of precedent that inform this area of law, the Article will review existing and theoretical voluntary assignment plans to assess their constitutionality and effectiveness in achieving diversity, racial or otherwise. This Article concludes that race-based plans remain constitutionally permissible after* PICS*, but only with exacting standards school districts will find difficult if not impossible to meet or in circumstances where the plan is largely ineffective at effecting change in school composition. While race-neutral plans, including those related to socioeconomic status, are almost certainly constitutional, their effectiveness varies and may not capture all forms of student diversity.*

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"I have a dream that one day on the red hills of Georgia the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood. . ."

"I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. . ."

~ Dr. Martin Luther King, Jr.

I. Introduction

No aspect of American life challenges Dr. King's simultaneous dreams of race-blind equality and racial integration more than the K-12 public school system. *Brown v. Board of Education*[1] signaled the beginning of the end for the legal structure of segregation that separated blacks and whites in virtually every area of public interaction. Yet, despite significant success in dismantling segregation in most other realms, schools remain one of the most contentious and racially segregated aspects of American life. The Supreme Court has struggled for over fifty years to determine the nature of the Constitutional violation presented by racially segregated

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

schools, the available remedies, and how to measure the success of these efforts. From school choice plans, to busing, to affirmative action, the Court and society at large continue to wrestle with how we can create equal opportunity for all students in our public school systems.

This struggle has come to a head in the controversy surrounding voluntary, race-based school assignment plans adopted by K-12 public school systems. Many school districts embrace voluntary programs designed to maintain or increase diversity (racial, ethnic, and other sorts) within their schools. They do so for a variety of reasons and through a number of different mechanisms and formulas. Most controversially, some schools use race to determine a student's school assignment. In 2007, two challenges to these race-based plans were adjudicated by the Supreme Court: a Seattle school district used race to inform student placement in its high schools while a Kentucky school district utilized race to help determine student placement and transfer requests in all grades except kindergarten. These cases highlight the tension between the goals of the *Brown* desegregation cases and the rigorous scrutiny of race-based state action contained in the Court's decisions on affirmative action. The Supreme Court held both race-based assignment plans unconstitutional in *Parents Involved in Community Schools v. Seattle School Dist No. 1 (PICS)*.[2] The key question presented following the decision in *PICS* is: what voluntary school assignment plans in the K-12 setting are constitutional and how effective are those assignments at achieving their goals?

The purpose of this Article is to review the different paths school districts can take in crafting school assignment plans and to determine whether they will both pass constitutional muster and succeed at increasing diversity. After laying out normative understandings of critical terms, Part II of the Article will analyze the Court's plurality opinion in *PICS*. It will explain how the strict scrutiny formula as applied by the majority of the Court led to the striking down of the school plans, while Justice Kennedy's concurrence and Justice Breyer's dissent suggested some remaining constitutional use of race in this context. Part III will review the two strands of precedent, the *Brown* line of desegregation decisions and the *Grutter/Gratz*[3] line of affirmative action decisions, and demonstrate how they gave rise to the "meaning" and "method" behind the Court's analysis in *PICS*. Following this historical review, Part IV will lay out the constitutional structure for voluntary student assignment plans in the wake of *PICS*. Part V will use this framework to examine prior challenges to plans in the circuit courts in order to analyze alternative race-based plans in use prior to *PICS* and determine whether they would withstand judicial scrutiny in the wake of the Court's ruling. Finally, Part VI will review the effectiveness and constitutionality of other existing and potential voluntary plans created by school districts or suggested by academics, including both race-based and race-neutral alternatives.

2. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).
3. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

A. *Normative Understanding of Terms*

Before beginning this discussion on race, the law, and public schools, it is important to be clear about the meaning of key terms. The words used to discuss race – most significantly "diversity," "desegregation," and "integration" – are slippery at best, and their meaning can be obscured if they are not employed with care. The ambiguity surrounding the meaning of these critical terms created significant debate among members of the Court, and even led Justice Thomas to explicitly define key terms at the beginning of his concurrence in *PICS*.[4] Unless otherwise modified by another word, like "viewpoint" or "economic," in this paper "diversity" will mean racial diversity. Unless otherwise noted by the paragraph's context, "desegregation" will mean the removal of government policies for separate schooling, whereas "integration" will mean the deliberate and affirmative attempt to have some racial mixture in a school and school system.

II. The Supreme Court's Decision in *Parents Involved in Community Schools*

As the link between the law of *Brown*, the case that mandated the elimination of de jure segregation in public schools, and the law of *Grutter/Gratz*, the cases that articulated the constitutional parameters for affirmative action programs in higher education, the Supreme Court's decision in *Parents Involved in Community Schools* is critical to understanding how the Equal Protection Clause of the Fourteenth Amendment supports or confines attempts by school districts to use race in school planning. In examining the specific plans considered, the case's procedural history, and the Supreme Court's decision, the constitutional boundaries of the benign use of race in K-12 public schools come into focus. Additionally, a thorough review of the line of cases leading to the Court's decision sheds light on the potential routes that communities may take in the future when they attempt to increase different sorts of diversity in their schools.

A. *The School Assignment Plans*

i. *Jefferson County School District*

The *Jefferson County* case developed in a Louisville, Kentucky school district with an intimate connection to the nation's history of de jure segregation. In 1975, after being sued by parents and students for maintaining a segregated school system, Jefferson County was placed under federal court control and ordered to create a student assignment plan that "eliminated all vestiges of state-imposed segregation in the . . . school

4. *See Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2768-70 (Thomas, J., concurring) ("segregation is the deliberate operation of a school system to 'carry out a governmental policy to separate pupils in schools solely on the basis of race'. . . racial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large").

systems."[5] Twenty-five years later, in June 2000, following complaints by parents whose children were denied admission to a specialty high school due to the racial guidelines, the court dissolved the desegregation decree and declared that the school district, no longer legally separated into two racially distinct schools, achieved "unitary status."[6] Notably, when the court dissolved its mandatory orders, it wrote that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes" and also added that the school district had "treated the ideal of an integrated system as much more than a legal obligation – [the Board] consider[s] it a positive, desirable policy and an essential element of any well-rounded public school education."[7]

After being released from the federally-mandated desegregation order, the school district concluded that it should try to maintain racially integrated schools and would do so through the use of certain broad racial guidelines. In 2001, the School Board established a student assignment plan designed to "maintain a fully integrated countywide system of schools."[8] The plan consisted of two separate programs: one that applied to all regular schools as well as magnet schools and other specialty programs, and one that applied solely to so-called "Traditional" schools, which taught the same curriculum but in a unique educational environment.[9] The former plan, which applied to the majority of schools in the district, consisted of three components: (1) clustering schools in geographic "resides" areas (grouping by neighborhood), (2) allowing for student choice among schools and programs, and (3) managing broad racial guidelines.[10] Essentially, students were guaranteed admittance to one of the schools within the geographic resides area located near their home.[11] Students could also request transfers or apply to magnet or other special programs anywhere in the district.[12] Along with residence location, choice-based requests were evaluated based on student grades, behavior records, school capacity, and other similar indicia.[13] Within this framework, all schools were required to maintain a black student enrollment of at least fifteen percent and no more than fifty percent.[14]

The Traditional schools plan differed significantly from the other plan. Traditional schools were not grouped into resides areas, allowed enrollment by admission only, and thus required all students to apply for en-

5. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 841 (W.D. Ky. 2004) (also implicating then-separate Louisville school district in the discriminatory actions).
6. *Id*.
7. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2809, 2830 (Breyer, J., dissenting) (quoting Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 370 (W.D. Ky. 2000) (Hampton II)).
8. *Jefferson County Pub. Sch.*, 330 F. Supp. 2d at 842.
9. *Id*.
10. *Id*.
11. *Id.* at 844.
12. *Id.*
13. *Id.*
14. *Id.* at 842.

trance.[15] Students who applied to these schools were placed on one of four separate lists at each grade level based on gender and race (e.g. "Black Male," "White Female") from which the principal of the school would make selections to conform to the racial guidelines.[16]

ii. Seattle School District

Unlike the Jefferson County school system, the Seattle school district was never placed under federal court control due to a finding of de jure segregation in the schools. Instead, after being sued in 1977 by the NAACP and the ACLU, the school district decided to settle, forego the trial, and develop its own voluntary desegregation plan.[17] The plan faced significant public opposition which culminated in a successful state initiative designed to end the busing portion of the plan; the Supreme Court subsequently held this initiative to be a violation of the Fourteenth Amendment, allowing the school district to continue busing students.[18] Over the next twenty-two years, the school district modified the desegregation plan a number of times.[19] Finally, in the 1998-99 school year, the Board of Education fashioned the school assignment plan challenged in *PICS*.[20]

Seattle's school assignment plan is designed to allow for student choice while still providing for an integrated school system. Rising freshman students may choose from the ten Seattle high schools to attend the following school year.[21] If a high school already has the maximum number of students that it can legally hold, the school is considered "oversubscribed" and students are admitted to the school based on a series of four tie-breakers.[22] First, students who have siblings at the school are admitted.[23] Second, and most relevant to the case, a race-based tie-breaker is triggered if a school is "racially imbalanced." A school is racially imbalanced when the student body racial composition differs by more than fifteen percent in either direction from the District's demographics.[24] If the student is of a race that will increase the racial imbalance, he or she will not be admitted. The racial tie-breaker works as a "thermostat" and is "turned off" if a school is no longer considered racially imbalanced.[25] The

15. *Jefferson County Pub. Sch.*, 330 F. Supp. 2d at 847.
16. *Id.*
17. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2802-06 (2007) (Breyer, J., dissenting); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1167 (9th Cir. 2005).
18. *See generally* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).
19. *Parents Involved in Cmty. Sch.*, 426 F.3d at 1168.
20. The plan is reviewed annually by the School Board; the most recent version is for the 2001-2002 school year. *Id.*
21. *Id.* at 1169.
22. *Id.*
23. *Id*.
24. Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1, 426 F.3d 1162, 1171 (9th Cir. 2005).
25. *Id.*

third tie-breaker is based on relative proximity to the school site. Finally, if seats still remain, a lottery is used.[26]

B. *Lower Court Holdings*

i. McFarland v. Jefferson County School District – *Sixth Circuit*

In July 2005, the Sixth Circuit handed down a per curiam opinion that affirmed the decision of the District Court in full and complimented the District Court for issuing a "well-reasoned" opinion.[27] This opinion by Chief Judge Heyburn held that Jefferson County Public Schools had a compelling interest in maintaining racially integrated schools and that the main 2001 student assignment plan was narrowly tailored to meet those interests.[28] The court also struck down the Traditional school plan on narrow tailoring grounds.[29]

ii. Parents Involved in Community Schools v. Seattle School District – *Ninth Circuit*

After five different decisions had been handed down by the federal district court, the Washington State Supreme Court, and two Ninth Circuit three-judge panels,[30] the Ninth Circuit reviewed the case *en banc* and held that Seattle's student assignment plan did not violate the Equal Protection Clause of the Fourteenth Amendment. The court found that Seattle had a compelling interest in the "educational and social benefits of racial (and ethnic) diversity, and in ameliorating racial isolation of concentration in its high schools by ensuring that its assignments do not simply replicate Seattle's segregated housing patterns."[31] It also found that the school plan was narrowly tailored to meet these interests.[32] In a concurring opinion, Judge Kozinski broke with precedent and argued that a lower level of scrutiny should be used when evaluating "benign" and "inclusive" race-based decision-making such as voluntary assignment plans.[33]

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26. The lottery tiebreaker was never used. *Parents Involved in Cmty. Sch.*, 426 F.3d at 1171.
27. McFarland v. Jefferson County Pub. Sch., 416 F.3d 513, 514 (6th Cir. 2005).
28. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004).
29. *Id.*
30. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001) (*Parents I*); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 285 F.3d 1236 (9th Cir. 2002) (*Parents II*); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 294 F.3d 1084 (9th Cir. 2002) (*Parents III*); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 149 Wash. 2d 660 (2003) (*Parents IV*); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 377 F.3d 949 (9th Cir. 2004) (*Parents V*).
31. Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1, 426 F.3d 1162, 1166 (9th Cir. 2005).
32. *Id.*
33. *Id.* at 1196 (Kozinski, J., concurring).

C. *The Supreme Court Decision in* Parents Involved in Community Schools

In the years following the Supreme Court's rulings on affirmative action in higher education,[34] most academics believed it possible for a carefully crafted race-based K-12 assignment plan to survive judicial review by the Supreme Court.[35] A fractured and deeply divided Supreme Court could not come to a similar consensus in *PICS*. Instead, the Court produced a plurality opinion with four members (Chief Justice Roberts, and Justices Scalia, Thomas, and Alito) opposed to virtually any use of race in the public schools and four members (Justices Breyer, Souter, Stevens, Ginsburg) in agreement that both the Seattle and Jefferson County plans satisfied the requirements imposed by equal protection jurisprudence. As the controlling vote, Justice Kennedy precariously straddled the two sides by agreeing that the use of race in these plans is unconstitutional because they are not narrowly tailored, but also suggested that future race-based plans still could be successful if appropriately designed.[36]

Chief Justice Roberts wrote the opinion that secured a partial majority of votes, consisting of Justices Scalia, Alito, Thomas, and Kennedy, holding both the Seattle and Jefferson County plans unconstitutional under the Fourteenth Amendment. The majority framed the legal question as "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments."[37] The five justices agreed on only a few fundamental issues. First, all public school assignment plans that use race must be reviewed under the traditional equal protection strict scrutiny framework, which requires that the plans be "narrowly tailored" to meet a "compelling government interest."[38] As discussed more fully below, the Court was unable to gain majority support for any articulation of the precise contours of those "compelling interests," except to say that the interests involved in this case did not fit either of the two interests approved by the Court in prior cases.[39] The same majority agreed that the use of race by Seattle and Jeffer-

34. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).
35. *See* Michael J. Anderson, *Race as a Factor in K-12 Student Assignment Plans: Balancing the Promise of* Brown *with the Modern Realities of Strict Scrutiny*, 54 Cath. U. L. Rev. 961 (2005); James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 Ohio St. L.J. 327 (2006); Celia M. Ruiz, *Can Voluntary Racial Integration Plans at the K-12 Educational Level Meet* Grutter*'s Constitutional Standard?*, 67 Ohio St. L.J. 303 (2006); Lisa J. Holmes, *After* Grutter*: Ensuring Diversity in K-12 Schools*, 52 UCLA L. Rev. 563 (2004); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 Duke L.J. 781 (2006); *but see* Eboni S. Nelson, Parents Involved *&* Meredith*: A Prediction regarding the (Un)Constitutionality of Race-Conscious Student Assignment Plans*, 84 Denv. U. L. Rev. 293 (2006); William E. Thro & Charles J. Russo, *The Constitutionality of Racial Preferences in K-12 Education After* Grutter *&* Gratz, 211 Ed. Law. Rep. 537 (Oct. 5, 2006).
36. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2788-97 (2007) (Kennedy, J., concurring).
37. *Id.* at 2746.
38. *Id.* at 2751-52.
39. *Id.* at 2752-54 (stating that neither the remedial rationale nor the *Grutter* diversity rationale is applicable).

son County was not narrowly tailored and that race-neutral means could have been equally effective at securing their goals.[40] Despite the Justices' deep divisions on virtually every other issue, the plans were held unconstitutional due to a lack of narrow tailoring.

The more nuanced and difficult questions presented by school assignment plans fractured the Justices, who wrote five competing opinions, none of which gathered a majority. Aside from the above-mentioned portions that secured a five-person majority, Chief Justice Roberts' opinion secured the assent of only Justices Scalia, Thomas, and Alito. The Chief Justice suggested that racial diversity absent any other form of diversity could never be a compelling interest. According to Roberts, "to the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end."[41] In concurrence, Justice Thomas vigorously responded to the dissent, going so far as to compare Justice Breyer's arguments to those articulated by segregationists prior to the *Brown* decision.[42] Thomas also distinguished himself from Roberts, Scalia, and Alito by reiterating his long-held belief that diversity of any form cannot amount to a compelling government interest and, as a result, no non-remedial school assignment plan predicated on race can ever be held constitutional.[43]

The dissent, written by Justice Breyer and signed by Justices Stevens, Ginsburg, and Souter, laid out an alternate vision of the Court's equal protection jurisprudence. Following a detailed review of the factual history of the case, Justice Breyer framed the legal question differently from the majority: "Does the United States Constitution prohibit these school boards from using race-conscious criteria in the limited ways at issue here?"[44] After posing the question, Breyer first argued that strict scrutiny analysis did not function properly in this setting and, like Judge Kozinski in the Ninth Circuit, thought a lower level of scrutiny would be more appropriate.[45] Alternatively, Justice Breyer applied strict scrutiny analysis and argued that both plans were narrowly tailored to meet a compelling interest. Specifically, he described a compelling interest in eliminating racial isolation and increasing racial diversity and explained why neither the Seattle nor the Jefferson County plan could be more narrowly tailored.[46] Concurring fully with Justice Breyer, Justice Stevens also wrote a brief dissent to critique Chief Justice Roberts' opinion and proclaim, "It is

40. *Id.* at 2759-60 ("The minimal effect these classifications have on student assignments, however, suggests that other means would be effective.").
41. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2759 (Roberts, C.J., plurality).
42. *See id.* at 2786-87 (Thomas, J., concurring).
43. *Id.* at 2782 (Thomas, J., concurring) ("only 'those measures the State must take to provide a bulwark against anarchy . . . or to prevent violence' and 'a government's effort to remedy past discrimination for which it is responsible' constitute compelling interests").
44. *Id.* at 2811 (Breyer, J., dissenting).
45. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2819-20 (Breyer, J., dissenting) ("In my view, this contextual approach to scrutiny is altogether fitting.").
46. *See id.* at 2820-30 (Breyer, J., dissenting) (Parts IIIA and IIIB).

my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."[47]

Justice Kennedy's concurrence is the most important because it lays out a basic framework for assignment plans that might be constitutionally adequate to a majority of justices. As mentioned above, Kennedy concurred in the holding, finding that strict scrutiny analysis was appropriate and that the plans at issue were not narrowly tailored.[48] Although he agreed that the case did not fit any existing compelling interest framework, Justice Kennedy argued, like Justice Breyer, that there was a compelling interest in avoiding racial isolation and achieving diversity in schools. Unlike the dissenters, however, Kennedy specifically noted that, "other demographic factors, plus special talents and needs, should also be considered."[49] Justice Kennedy said little about how a school assignment plan that considered the race of individual students might ever be narrowly tailored, but he did point to "race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[50] He specifically noted school site selection, alteration of attendance zones, resource allocation for special programs, recruiting efforts for students and faculty, and enrollment tracking as means that would be constitutional.[51] As more thoroughly discussed below, Kennedy, as the swing vote on this issue for the foreseeable future, makes his ideas about constitutional methods to use race in school assignment much more significant than a typical Justice's concurrence. Ultimately, the deep fissures seen in *PICS* can be traced back to the inherent tension between the two lines of precedent that came into conflict in this K-12 public school setting.

III. Race & Education Jurisprudence – The Meaning & The Method

Parents Involved in Community Schools presented the Supreme Court with the problem of two distinct and potentially conflicting lines of precedent regarding the constitutionality of race in public institutions. In one line of cases, the Court attempted to eradicate de jure segregation and its effects, focusing specifically on the context of public school systems.[52] In the second line, the Supreme Court grappled with attempts by public and private institutions, including public universities, to voluntarily and affirmatively create an integrated or diverse environment.[53] Both areas of law are critical to understanding how and why the justices reached a vari-

47. *Id.* at 2800 (Stevens, J., dissenting).
48. *Id.* at 2789 (Kennedy, J., concurring).
49. *Id.* at 2797 (Kennedy, J., concurring).
50. *Id.* at 2792 (Kennedy, J., concurring).
51. *Id.* ("These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.").
52. *See, e.g., Brown I*, 347 U.S. 483 (1954); Green v. County Sch. Bd., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Missouri v. Jenkins, 515 U.S. 70 (1995).
53. *See, e.g.,* Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors v. Peña,

ety of strikingly different opinions in the plurality decision. The desegregation cases, from *Brown*[54] to *Jenkins*,[55] provide the historical context and "meaning" of race in public schools – they explain why this is an ongoing, significant constitutional issue and why some members of the Court think of it as a sui generis area of equal protection jurisprudence. The affirmative action cases, most importantly *Grutter*[56] and *Gratz*,[57] set up the "method" by which the court analyzed the constitutionality of the use of race – they explain how the Court analyzed the case and how they might do so in a future challenge. A review of these lines of precedent and the various ways in which the justices grappled with these issues helps explain the meaning of the opinion and suggest possible options for school districts interested in diversity and integration.

A. The Meaning – Desegregation and Integration Cases

In *Brown v. Board of Education*,[58] the Court attempted to eradicate de jure segregation and its effects on the public school system. Through this landmark case, the Court reversed *Plessy v. Ferguson*[59] and over sixty years of judicially sanctioned segregation.[60] In later cases, the Court moved further still and embraced court-regulated equitable remedies to integrate the formerly segregated school systems.[61] The decisions from the *Brown* line of precedent are significant to *PICS* because they provide the historical context of racial segregation and integration that lies beneath the surface of race-based public school planning. They help explain what one journalist meant when he said that *PICS* was a debate over whether the "logic" or the "music" of *Brown* controlled the future use of race in public schools.[62] Additionally, understanding the historical motivations behind the Court's equal protection analysis can help school districts explain their own motivations and focus their strategy for creating school assignment plans.

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515 U.S. 200 (1995); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

54. *Brown I*, 347 U.S. 483.
55. *Jenkins*, 515 U.S. 70.
56. *Grutter*, 539 U.S. 306.
57. *Gratz*, 539 U.S. 244.
58. 347 U.S. 483.
59. 163 U.S. 537 (1896).
60. Despite the gradual restriction of its principles, *Plessy* remained good law until *Brown* was decided in 1954. *See* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899); *see also* Gong Lum v. Rice, 275 U.S. 78, 85-86 (1927); *Brown I*, 347 U.S. at 692.
61. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (articulating affirmative remedies for segregated schools); Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (allowing remedial plans outside of the South).
62. Adam Liptak, *Brown v. Board of Education, Second Round*, N.Y. TIMES, Dec. 10, 2006, § 4, at 3 ("The disagreement was, in short, whether the meaning of Brown can be found in what it said or what it did."); *see also* Adam Liptak, *The Same Words, but Differing Views,* N.Y. TIMES, June 29, 2007 (Professor Laurence H. Tribe states that *PICS* "is a historic clash between two dramatically different visions not only of *Brown*, but also the meaning of the Constitution.").

i. The Limits of Court-Ordered Desegregation

The most important aspect of the *Brown* line of cases to *PICS*, as well as to every school district interested in race-based school planning, is that it defines the constitutional limits of court-ordered desegregation and integration. It establishes the boundary between race-based plans that are constitutionally required and plans that may or may not be constitutionally acceptable, explaining why communities interested in integration feel they need to create race-based school plans voluntarily and without judicial compulsion, as well as why the Court applied the rigorous framework of strict scrutiny to its analyses of the Seattle and Jefferson County plans. Four specific qualities in particular have helped define the constitutional borders of judicial desegregation: (1) the de jure/de facto distinction, (2) the political/geographical scope of the remedy, (3) the unitary status finding, and (4) judicial deference to local control.

1. The De Jure/De Facto Distinction

In the immediate aftermath of *Brown*, it was unclear how far the Supreme Court would go to eradicate segregated school systems. While it was clear that the laws of southern states mandating separate schools for black and white students were now unconstitutional,[63] it remained an open question whether school segregation in other regions caused by a combination of racially invidious government policies and social factors such as housing patterns might also be unconstitutional. It was not until *Swann v. Charlotte-Mecklenburg Board*[64] that the court began to articulate a clear distinction in this setting between segregation authorized by law, de jure, and segregation rooted in social circumstances, de facto. Laws or policies created under color of law–by school districts, school boards, and other government institutions–which segregated school systems were unconstitutional.[65] The court refined this distinction a few years later in *Keyes v. School District No. 1*, stating that the policy or law in question had to have the "*purpose* or *intent* to segregate."[66] After *Keyes,* if a suit is brought against a school district and a court finds evidence of de jure segregation, then district court-administered desegregation plans are constitutionally mandated to remediate the harm to that student population.[67] In contrast, communities with de facto segregated schools cannot request a court to order the enactment of a race-based plan. These communities can choose to do nothing, since nothing is required by law, or they can create a voluntary plan that may or may not be struck down under the stricter guidelines of affirmative action review.

63. *Brown I,* 347 U.S. at 495.
64. 402 U.S. 1.
65. *Swann*, 402 U.S. at 15 ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.").
66. *Keyes,* 413 U.S. at 208 (emphasis added) ("We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation to which we referred in Swann is purpose or intent to segregate.").
67. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 436 (1968) ("The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about.").

PICS forced the Supreme Court to confront the value and validity of this legal distinction. The factual setting of the Seattle plan challenged the basic definition of the two legal terms. The majority held that "Seattle has never operated segregated schools" and confirmed that the case was outside the province of de jure remediation because "Seattle public schools have not shown that they were ever segregated by law."[68] Justice Thomas made a point to note that, while de jure segregation may sometimes be difficult to determine, "in most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring a separation of the races."[69] However, as mentioned above, Seattle was sued by civil rights organizations precisely because it allegedly operated a segregated school system; the Court was unable to identify any de jure segregation because the school district chose to settle rather than try the case. Justice Breyer noted that Seattle was similar to a number of southern school systems that clearly operated government-sanctioned segregated schools, but set up voluntary integration-based assignment plans in the wake of *Brown* in an effort to avoid further litigation.[70] Justice Kennedy conceded that "the distinction between government and private action . . . can be amorphous both as a historical matter and as a matter of present-day finding of fact," but accepted the distinction as critical to "delimit the powers of the Judiciary in the fashioning of remedies."[71] Although *PICS* raised interesting questions about the nature of the de jure/de facto distinction and some Justices admit ambiguity in the terms, the majority of the Court was unwilling to change its reasoning. In the wake of *PICS*, unless there is a judicial finding of de jure segregation, a school assignment plan will not be presumed constitutional under the *Brown* line and will be reviewed through the more rigorous strict scrutiny analysis used in the affirmative action context.

2. Political/Geographic Scope

Another aspect of segregation jurisprudence is the geographic limits of the remedy. The boundaries of many school districts lay upon racial fault lines; a common example is the predominately racial minority urban school district adjacent to the overwhelmingly white suburban district. Responding to lower court decisions that manipulated political boundaries and crafted multi-district desegregation plans to solve this problem, the Supreme Court ruled in *Milliken v. Bradley* that equitable remedies could only be established within pre-existing political boundaries and only within districts where de jure segregation was shown to exist.[72] Neither Seattle nor Jefferson County relied on multi-district plans, so the Court did not revisit this issue.

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68. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2747, 2752 (2007).
69. *Id*. at 2771 n.4 (Thomas, J., concurring).
70. *Id*. at 2810 (Breyer, J., dissenting).
71. *Id.* at 2795-96 (Kennedy, J., concurring).
72. *See* Milliken v. Bradley, 418 U.S. 717, 741 (1974); Missouri v. Jenkins, 515 U.S. 70, 92-93 (1995).

3. The Unitary Status Finding

The extent of segregation in a school system is measured by the "*Green* Factors," articulated in *Green v. County School Board*. In order to determine how best to remedy the effects of school segregation, courts examine six factors: (1) student body composition, (2) faculty, (3) staff, (4) transportation, (5) extracurricular activities, and (6) physical facilities.[73] A school district placed under a court-ordered desegregation plan cannot be relieved of its burden until the vestiges of segregation, as delineated by the *Green* Factors, have been removed and it is certified as having attained "unitary status" by the district court.[74] Once a district achieves unitary status, the taint of de jure segregation has theoretically been removed, and further challenges based on those past practices are precluded.[75] The Supreme Court later held that a school district could also achieve "partial" unitary status once it eliminated the effects of segregation in at least one particular *Green* factor; at that point the parts of the remedial plan dealing with that factor are no longer enforced.[76] Today, many school districts formerly under remedial plans that achieved full or partial unitary status are in danger of becoming resegregated; however, they can no longer be challenged on de jure grounds.[77] Communities interested in maintaining integrated school systems created under court order can only do so with voluntary plans that, perhaps ironically, can now be challenged as unconstitutional for making impermissible racial distinctions and subjected to strict scrutiny analysis.

In *PICS*, Justice Breyer seized on this fact, noting that the district court granted Jefferson County unitary status because its school system complied in good faith and the plan it created treated integration as a true goal and not merely a legal obligation.[78] "A community might submit a race-conscious remedial plan *before* the court dissolved the order, but with every intention of following that plan even *after* dissolution. How could such a plan be lawful the day before dissolution but then become unlawful the very next day?"[79] Despite these protestations, the majority of the Court remains committed to the idea that a finding of unitary sta-

73. *See Green*, 391 U.S. at 435.

74. *Id.* at 436; *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

75. *See* Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 247 (1991).

76. Freeman v. Pitts, 503 U.S. 467, 489-90 (1992) ("Partial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities.").

77. Studies of southern school districts suggest resegregation is already occurring at a rapid pace. *See, e.g.*, John Charles Boger, *Education's Perfect Storm? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. Rev. 1375, 1403 (2003); *see also Jenkins*, 515 U.S. at 93.

78. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2809, 2830 (Breyer, J., dissenting) (quoting Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 370 (W.D. Ky. 2000) (Hampton II)).

79. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2811 (2007) (Breyer, J., dissenting) (emphasis in original).

tus ends a school district's right to use race-conscious measures to remedy segregation in its schools.[80]

4. Judicial Deference to Local Control

Perhaps the most contentious issue that sits at the dividing line between court-ordered and voluntary desegregation plans is the Court's deference to local control. In *Swann*, the Court stated that voluntary integration programs that utilized racial distinctions were well within a school board's power to set policy.[81] In a companion case,[82] the Court was even more explicit: "school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."[83] In *Milliken*, the Court cited local control as an important interest to be protected and a reason why district boundaries could not be "casually ignored."[84] Although made in the context of de jure segregation, the Court's enunciated deference towards local control and its statements about the specific actions a local government body might take to desegregate on its own suggested to some that voluntary race-based plans intended to combat de facto discrimination had the Court's blessing, or at the least, understanding. Justice Breyer rested his dissent in *PICS* heavily on this deference to local control. Although he admitted it to be dicta, Breyer noted that the statement in *Swann* was no mere footnote, but set forth "prominently in an important opinion joined by all nine Justices, knowing that it would be read and followed throughout the nation."[85] Linking this to unitary status, he argued that the unitary finding rested in part on "the wisdom and desirability of returning schools to local control."[86] This finding meant that, while race-based integration plans were no longer required, they were permitted under *Swann*. The majority, however, maintained that the *Swann* dicta carried no legal weight and arose in the different context of de jure segregation.[87] Chief Justice Roberts also argued in plurality that "*Swann* addresses only a pos-

80. *Id.* at 2752 ("Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.").
81. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . .").
82. North Carolina State Bd. of Educ. v. Swann, 403 U.S. 43 (1971).
83. *Id.* at 45.
84. Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").
85. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2816 (Breyer, J., dissenting).
86. *Id*.
87. *Id.* at 2752 n.10 ("*Swann*, evaluating a school district engaged in court-ordered desegregation, had no occasion to consider whether a district's voluntary adoption of race-based assignments in the absence of a finding of prior *de jure* segregation was constitutionally permissible.").

sible state objective; it says nothing of the permissible means . . . that a school district might employ to achieve that objective."[88] Just as it did with all of the other issues related to the limits of court-ordered desegregation, the Court split between those that felt that *PICS* fell at least partially within the realm of *Brown* and de jure segregation and those that believed it to be wholly outside of the court-ordered desegregation context. Ultimately, *PICS* maintains a strict distinction between court-ordered desegregation and voluntary race-based assignment plans.

ii. The Public School Setting

Additionally, the *Brown* line of cases is relevant to the Supreme Court's decision in *PICS* because the Court began the dismantling of the entire legal framework for segregation within the same K-12 public education setting. Although the first tentative steps towards reversing *Plessy* occurred at the university level,[89] the Court took its critical stand against "separate but equal" with K-12 public education in *Brown*. The unanimous decision written by Chief Justice Warren is one of the most lauded and well-known judicial opinions in American history.[90] In *Brown*, and the subsequent public school desegregation decisions, the justices noted the importance of education for all and their desire to remove the stigma of segregation.[91] The justices found segregation in public education to be so pernicious and stubborn that they moved from "negative" enforcement of de jure segregation to "positively" enforcing integration, using remedies like busing and magnet schools. Today, even as some claim that the Court is abandoning its commitment to integration,[92] its decisions continue to endorse the importance of desegregated public schools.[93] Al-

88. *Id.* at 2762 (Roberts, C.J., plurality).
89. Starting with higher level education was a deliberate strategy (the "Margold Strategy") of Thurgood Marshall and the NAACP. *See generally* Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality (Vintage Books 2004) (1975). *See also* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (State must provide in-state education to black university student); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (State must provide substantially equal treatment to black university students); Sweatt v. Painter, 339 U.S. 629 (1959) (Intangible qualities of university education must be considered in determining substantially equal treatment).
90. *See* Kluger, *supra* note 89; *See also* Liptak, *Brown*, *supra* note 62, at 3 ("If there is a sacred text in the American legal canon, it is the Supreme Court's 1954 decision in Brown v. Board of Education. It is the court's one undisputed triumph . . . .").
91. *See e.g.*, *Brown I*, 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."); Green v. County Sch. Bd., 391 U.S. 430, 436 (1968) ("The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about."); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 200 n.1 (1973) (refuting the idea that the Constitution "merely forbids discrimination," but instead requires integration of schools); Milliken v. Bradley, 418 U.S. 717, 764 (1974) (White, J., dissenting) ("[The task] is to desegregate an educational system in which the races have been kept apart, without, at the same time, losing sight of the central educational function of the schools.").
92. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. Rev. 1597, 1615-20 (2003).
93. *See, e.g.*, Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 250 (1991) (After release from court ordered plans, "[a school district] of course remains sub-

though *PICS* dealt with voluntary plans to alleviate de facto segregation and thus technically fell outside the bounds of *Brown*, the decision can nevertheless be seen as in tension with the spirit of decades worth of precedent.

Reviewing the Court's prior efforts, and the voluntary embrace of integration by Seattle and Jefferson County schools, Justice Breyer asked a critical question at oral argument: "Why, given that change in society, which is a good one . . . how can the Constitution be interpreted in a way that would require us, the judges, to go in and make them take the black children out of the school?"[94] He continued in dissent, arguing that the assignment plans were "local efforts to bring about the kind of racially integrated education" that *Brown* promised[95] and noted that the Court's decisions "recogniz[e] that the fate of race relations in this country depends upon unity among our children."[96] In contrast, Chief Justice Roberts and Justice Thomas argued that, however unique the public education setting may appear, the goal remains the same as in other settings where segregation exists: removing race as a government decision-making tool.[97] Justice Kennedy again forged a middle ground in the debate, arguing that *Brown* "should teach us that the problem before us defies so easy a solution."[98] He opposed the suggestions of the Roberts plurality, disagreeing that "local school authorities must accept the status quo of racial isolation in schools."[99] In the end, although the Supreme Court chose to analyze *PICS* in the same fashion as any other race-based action by the government, there remains some support for the idea that K-12 public education is a unique setting for judicial action.

iii. Race and How We Classify

Justice Breyer's focus on the "black children" highlights the complicated understanding of race and its constitutional significance as the concept has been developed in the case law. The issue of racial identity has always been a difficult concept for the Court, both in determining when to identify an individual as falling within a certain racial group[100] and in determining the outer bounds of what characteristics define an individual's race.[101] With *Brown* and other early school cases, the issue was left

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ject to the mandate of the Equal Protection Clause of the Fourteenth Amendment."); Freeman v. Pitts, 503 U.S. 467, 485 (1992) (School districts must take all necessary steps to eliminate de jure segregation "in order to ensure that the principal wrong . . . the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present.").

94. Transcript of Oral Argument at 24, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (filed June 5, 2006).
95. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting).
96. *Id.* at 2835 (Breyer, J., dissenting).
97. *Id.* at 2767-68, 2786.
98. *Id.* at 2791 (Kennedy, J., concurring).
99. *Id.*
100. *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78 (1927) (student of Chinese descent must attend "colored" school).
101. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 360 (1991) (Court declined to determine whether language bears "close relation to ethnicity"); *see also* Paulette Cald-

largely untouched because the directive was broad and appeared to apply across races: legal segregation of (any) race is constitutionally impermissible. As the Court crafted decisions that expressly required schools to integrate, race became a more significant issue lurking in the corners of the opinions: what races needed to be integrated with one another, and what racial demography qualified as integrated? Though the Court focused largely on the integration of African Americans in their decisions, their determination of which schools were segregated and which groups merited integration depended largely on the facts of the particular case.[102] In *PICS*, absent any previous de jure segregation of a particular group, the school districts' deliberate classification of certain racial groups or groupings in their student assignment plans brought the question to the fore: assuming it is constitutional to voluntarily integrate a school district, how should districts define the populations they wish to integrate in multi-racial school districts? School districts wishing to use race in student assignment plans must consider how to classify racial groups and which of these groups should be integrated.

Racial identity played a significant role in the Court's decision in *PICS*. Seattle's use of a white/nonwhite binary and Jefferson County's use of a black/other standard in their assignment plans were critical to the majority's finding that the plans were not narrowly tailored.[103] The majority pointed out that "under the Seattle plan, a school with fifty percent Asian-American students and fifty percent white students but no African Americans, Native American, or Latino Students would qualify as balanced, while a school with thirty percent Asian-American, twenty-five percent African American, twenty-five percent Latino, and twenty percent white students would not."[104] Justice Kennedy did not find any explanation from Seattle as to why the white/nonwhite distinction helped achieve their goal of diversity in a multi-racial community.[105] To Justice Thomas, the delineation suggested a degree of patronizing racism, an implication that African Americans in particular needed to be integrated.[106] Justice Breyer attempted to provide the justification for the specific racial classifications used, pointing out that the different binaries mapped onto the unique demographics of the two communities; for example, Seattle

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well, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365 (personal experience with hair as racial characteristic); Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights 131-39 (Random House 2006) (review of "status" and "behavior" distinctions made by courts regarding what "counts" as part of racial identity).

102. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 195-98 (1973) (holding that "what is or is not a segregated school will necessarily depend on the facts of each particular case" and that, in this case, predominately "Hispano" and mixed "Negro-Hispano" schools can be deemed segregated).
103. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754 ("Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/'other' terms in Jefferson County.").
104. *Id.*
105. *Id.* at 2791 (Kennedy, J., concurring).
106. *Id.* at 2776 (Thomas, J., concurring) ("In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.").

neighborhoods are essentially segregated into a white northern part of the city and a multi-racial southern part of the city.[107] Ultimately, the Court as a whole remains skeptical of any school district's decision to label individuals by race and requires significant justification for the school's definition of racial groups in assignment plans.

iv. Race, Harm and Remedy

Another issue raised by the school desegregation cases is how the Court defines the constitutional harm associated with segregation and what remedy it chooses to craft. The questions of harm and remedy are critical to understanding the Court's use of the *Grutter/Gratz* compelling interest and narrow tailoring framework to strike down most voluntary student assignment plans. Specifically, the desegregation cases explain why some school districts believe "alleviating racial isolation" is an appropriate interest and "individual consideration" is a less relevant aspect of narrow tailoring.

Beginning with *Plessy*, the Court debated whether the harm caused by segregation was merely a "fallacy" created "solely because the colored race chooses to put that construction upon it"[108] or whether, as Justice Harlan famously claimed, the harm was inherent because, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[109] As *Brown* attempted to repair the damage wrought by segregation, it failed to explain whether the Court was more concerned about providing access to educational opportunity for all children or opposed to the use of racial distinctions altogether. This difference of perspective is critical to how we can legally consider race in education. If the underlying principle of *Brown* and its progeny is that all students should be provided some form of equal educational opportunity regardless of skin color, then breathing room remains for the use of race. Arguments that racial identity may be legitimate, meaningful and have social utility[110] are not constitutionally forbidden and compliment studies that suggest higher achievement for all children in racially diverse classrooms.[111] Through this "anti-subordination" construct,[112] schools, such as Seattle and Jefferson County in *PICS*, have argued that the use of race in student

107. *Id.* at 2829 (Breyer, J., dissenting) (also noting the "white/nonwhite" distinction developed in response to the Federal Emergency School Aid Act's requirements).
108. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
109. *Id.* at 559 (Harlan, J., dissenting).
110. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*," 44 STAN. L. REV. 1 (1994).
111. *See* Brief for Profs. Amy Stuart Wells, Jomills Henry Braddock II, Linda Darling-Hammond, Jay P. Heubert, Jeannie Oakes and Michael A. Rebell and the Campaign for Educational Equity as Amicus Curiae Supporting Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, No. 05-908; *see also* NAT'L ACAD. OF EDUC., RACE-CONCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES (2007) (concluding that evidence supports academic and other long-term benefits from integrated schools).
112. *See generally* PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 824-31 (4th ed. 2000) (surveying literature on "anti-subordination" and "anti-classification" principles in equal protection jurisprudence).

assignment for the purpose of integration or increasing racial diversity is a compelling interest because it produces greater achievement and educational opportunity.[113] On the other hand, if *Brown* stands for the "anti-classification" principle - that grouping by race is inherently harmful and unconstitutional - then the use of race is unacceptable regardless of the benign purposes or potential benefits. Since the latter principle views race as nothing more than the random genetic assignment of melanin, schools are precluded from using race as a factor unless they can show the advance of some *other* compelling form of diversity, like social background or viewpoint.

Although *Brown* repudiated state-mandated racially segregated schools, it is unclear if the Court's decision stemmed from a belief that any classification by race is harmful or from a belief that "education is perhaps the most important function of state and local governments"[114] and that unequal, separate schooling as defined by race is the critical injury. Chief Justice Warren cited *Sweatt v. Painter*[115] and *McLaurin v. Oklahoma State Regents*,[116] which found that inequality would always exist in segregated schooling based on intangible factors such as school reputation and lack of interaction with other students, suggesting that the Court considered racial distinctions harmful due to their effect on education when race is used expressly to separate and diminish a group. Yet in the next breath, Warren pointed out the "feelings of inferiority" that simply being in a separate racial group can produce, implying that racial classification however used was harmful.[117] The Court's post-*Brown* history of public school segregation cases also suggests that the Court had complicated opinions concerning constitutional harms. In *Green*, the Court held that schools in districts once deliberately segregated must be altered in a way that removed their racially identifiable nature before a school could be found to be in compliance with the Constitution. Stating that "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about," the Court no longer simply claimed that state-sanctioned segregation was a constitutional violation, but suggested that the only acceptable solution was *integrating* the school districts in question through the use of racial identifiers.[118] While this statement does not deny that racial classification absent court order might be constitutionally impermissible, it supports the idea that exclusion by race is the primary harm to be rectified.

Three years after *Green*, the Court in *Swann* reviewed and upheld equitable measures that could be employed in court-ordered desegregation plans.[119] Among other things, the Court focused on remedial altering of

113. *See* Brief for Respondents at 24-30, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007) (No. 05-908); Brief for Respondents at 24-9, Meredith v. Jefferson County Bd. of Educ., (No. 05-915) (consolidated with *Parents Involved in Cmty. Sch.*, 127 S. Ct. 2738).
114. *Brown I*, 347 U.S. 483, 493 (1954).
115. 339 U.S. 629 (1950).
116. 339 U.S. 637 (1950).
117. *Brown I*, 347 U.S. at 494.
118. Green v. County Sch. Bd., 391 U.S. 430, 436 (1968).
119. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

attendance zones and busing students from different areas to achieve greater school site diversity.[120] In the context of school systems formerly segregated by law, the Supreme Court put its constitutional imprimatur on remedial plans that considered race to integrate school systems. Seattle, Jefferson County, and other school districts that crafted voluntary race-based student assignment likely relied on the spirit and methods approved in these decisions, along with the previously mentioned *Swann* dictum, when creating their plans. In a statement directly related to the *Swann* language but applicable to the broader sentiments of the desegregation decisions, Justice Breyer noted, "Thousands of school districts across the country, we're told, have relied on that statement in an opinion to try to bring about a degree of integration."[121]

The Court divided sharply over this aspect of the legacy of *Brown*. Chief Justice Roberts' plurality opinion and Justice Thomas's concurrence both strenuously argued for the "colorblind Constitution" and the idea that racial classification by the government is inherently suspect and almost certainly unconstitutional. To Roberts, "distinctions between citizens solely because of their ancestry are by their very nature odious" and "the way to stop discriminating on the basis of race is to stop discriminating on the basis of race."[122] The "hard-won gain" of *Brown*, according to Thomas, was eliminating vestiges of state-enforced racial separation – the focus being on "racial" and not "separation."[123]

In contrast, Justice Breyer, and those that signed his dissent, claimed that *Brown* and the Fourteenth Amendment as a whole stand for anti-subordination principles that allow the "benign" use of race to integrate schools. In articulating a compelling interest for the plans, Breyer relied heavily on the idea that *Brown* allowed the use of race to create less segregated schools and that this diversity created educational benefits for all in the classroom.[124] In his closing, Breyer noted, "the Equal Protection Clause . . . has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races."[125] In further support, Justice Stevens quoted the wry comments of author Anatole France[126] and noted the "cruel irony" of the plurality's reliance on *Brown* because "it was only black schoolchildren who were [told where they could and could not go

120. *Id.* at 24-30.

121. Transcript of Oral Argument at 25, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, No. 05-908 (filed June 5, 2006).

122. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767-68 (2007) (Roberts, C.J., plurality).

123. *Id.* at 2770 n.3 (Thomas, J., concurring) ("However, the actual hard-won gain in these cases is the elimination of the vestiges of the system of state-enforced racial separation that once existed in Louisville. To equate the achievement of a certain statistical mix in several schools with the elimination of the system of systematic de jure segregation trivializes the latter accomplishment.").

124. *See Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2820-24 (Breyer, J., dissenting).

125. *Id.* at 2834-35 (Breyer, J., dissenting).

126. *Id.* at 2797-98 (Stevens, J., dissenting) ("The majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.").

to school]; indeed the history books do not tell stories of white children struggling to attend black schools."[127]

Again in the middle, Justice Kennedy refused to sign on to the Chief Justice's strong embrace of anti-classification, stating that schools could use race if properly tailored because Justice Harlan's "colorblind Constitution" is an aspirational goal rather than a hard judicial rule.[128] However, he still provided a majority for the holding that "the harm being remedied by mandatory desegregation plans is the harm that is traceable to [de jure] segregation" and that there exists a compelling interest in the use of race for nonremedial purposes only when coupled with a "broader array of qualification and characteristics."[129]

Some of the lawyers that originally argued *Brown* added an interesting epilogue to this chapter of the debate over race in education. Chief Justice Roberts quoted one of the NAACP attorneys at oral arguments for *Brown* as support for his belief that any consideration of race is constitutionally impermissible.[130] That attorney, Robert L. Carter, now a Senior Federal District Judge, responded that his argument in *Brown* was rooted in the fact that "at that point in time [race was only used] to deny equal opportunity to black people" and that Chief Justice Roberts' interpretation "[is] to stand that argument on its head."[131] Jack Greenberg, another attorney who worked on *Brown*, called the Chief Justice's understanding "preposterous" while yet another *Brown* lawyer stated, "the majority opinion is 100 percent wrong."[132] Nevertheless, after *PICS*, the majority of the Court views the use of race alone, benign or otherwise, as a potential constitutional harm.

B. The Method – Affirmative Action Cases

Following the success of the Civil Rights Movement, state and private actors began to consider voluntary methods with which to integrate their schools, places of business, and other public realms. They created "affirmative action" programs that utilized racial identity in various capacities in an attempt to remedy the lack of minority individuals in those settings. The use of race for arguably benign purposes was, and remains, a highly contentious political and legal issue. Since voluntary, race-based school district planning is done affirmatively and absent a judicial order, the "method" used by the Supreme Court to determine the constitutionality of these plans stems from the affirmative action cases, most importantly *Grutter* and *Gratz*. It is critical to understand the method of analysis

127. *Id.*
128. *Id.* at 2791-92 (Kennedy, J., concurring) ("In the real world, it is regrettable to say, it cannot be a universal constitutional principle.").
129. *Id.* at 2752-53.
130. *See Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2767-68 ("'We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.'") (quoting Tr. of Oral Arg. in *Brown I*, p. 7 (Robert L. Carter, Dec. 9, 1952)).
131. *See* Liptak, *The Same Words, But Differing Views*, *supra* note 62.
132. *Id.*

in these cases to see why the Court struck down the plans in *PICS* and to ascertain how other voluntary school district plans might survive judicial scrutiny in the future.

i. Strict Scrutiny

A critical element in the judicial review of voluntary school planning cases is the type of scrutiny they receive. Beginning with *Korematsu v. United States*[133] and *Loving v. Virginia*,[134] the Court began to apply "strict scrutiny" to race-based classifications. These classifications can only survive judicial review if they are made to advance a compelling governmental interest in a manner that is narrowly tailored to meet that interest.[135] In the affirmative action context, the Court wrestled for years with the question whether benign racial classification merited some relatively reduced level of scrutiny.[136] Ultimately, the Court held that all racial classifications would face strict scrutiny, regardless of the race in question and whether for benign or malign intent.[137] This standard is so rigorous that many thought it to be "strict in theory, but fatal in fact" in most all cases.[138] It was not until *Grutter* in 2003 that an affirmative action program was upheld by a majority of the Court when reviewed with a strict scrutiny analysis.[139] With the exception of the NAACP's amicus brief,[140] and Judge Kozinski's concurrence in the Ninth Circuit,[141] most legal authorities believed that strict scrutiny was nearly certain to be the level of review the Court would use in evaluating any race-based public school plan.[142]

PICS maintained the requirement of strict scrutiny analysis for any race-based state action, but renewed debate over whether the tiered-scrutiny approach is appropriate to all race-related equal protection issues.[143] Although they eventually applied a strict scrutiny analysis in finding the

133. 323 U.S. 214 (1944).
134. 388 U.S. 1 (1968).
135. Regents of the University of California v. Bakke, 438 U.S. 265, 299 (1978) ("When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.").
136. *See* City of Richmond v. J.A. Croson, 488 U.S. 469, 469 (1989); Metro Broad. v. FCC, 497 U.S. 547, 548 (1990).
137. Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995).
138. *Id.* at 237 (attempting to "dispel the notion" that the application of strict scrutiny ensured that the issue would be held unconstitutional).
139. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).
140. Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (No. 05-908).
141. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1193-94 (9th Cir. 2005) (Kozinski, J., concurring).
142. *See, e.g.*, Anderson, *supra* note 35, at 984 ("Nevertheless, the standard of review is clear: *any* racial classification will merit strict scrutiny."); Ryan, *supra* note 35, at 332 ("it seems safe to start with the presumption that voluntary integration plans will be subject to strict scrutiny"); Nelson, *supra* note 35, at 324 ("All racial classifications are subject to strict scrutiny . . . .").
143. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2751-52 (2007).

PICS plans to be constitutional,[144] Justice Breyer and the three co-signers of his dissent argued that a different, less-than-strict approach could be appropriate for school assignment plans that use race because they are benign and are designed to include rather than exclude groups.[145] The underlying motivation for strict scrutiny does not exist in such situations because, unlike higher education or government contracts, school assignment plans do not distribute a limited commodity to the detriment of certain individuals; no student has a constitutional right to go to a particular school and every student gets a seat in some school within the district.[146] According to Breyer, the analysis would still require "careful review" by the courts, but in this "contextual approach," "a judge would also be aware that a legislature or school administrators, ultimately accountable to the electorate, could *nonetheless* properly conclude that a racial classification sometimes serves a purpose important enough to overcome the risks [the plurality] mention[s]."[147] Justice Stevens likewise argued for a different approach in his additional dissent.[148]

Chief Justice Roberts and Justice Thomas took the dissent to task for what they perceived as dangerous judicial activism. Roberts rejected the exclude/include contextual argument and argued that Justice Breyer "relies on the good intentions and motives of the school districts[;]. . .[o]ur cases clearly reject the argument that motives affect the strict scrutiny analysis."[149] Justice Thomas agreed that the Court made it "unusually clear" that strict scrutiny applies to all racial classifications and, responding to the benign/malign and exclude/include contextual argument, stated, "if our history has taught us anything, it has taught us to beware of elites bearing racial theories."[150] While not joining in the same rhetoric, Justice Kennedy secured a majority for the application of strict scrutiny, separately noting that the dangers inherent in racial classification are reduced when we require all use of race to be subject to rigorous analysis.[151]

ii. Compelling Interest

To survive strict judicial review, the rationale for using a race-based classification must be upheld as "compelling." Prior to *PICS*, the Supreme Court had found only two interests to meet the compelling re-

144. *Id.* at 2820 (Breyer, J., concurring) ("Nonetheless, in light of *Grutter* and other precedents . . . I shall adopt the first alternative. I shall apply the version of strict scrutiny that those cases embody.").
145. *See Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2818-19 (Breyer, J., concurring).
146. *Id.* at 2818 ("This context is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the bases of merit and which are in short supply. . . . The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.").
147. *Id* at 2819.
148. *See id.* at 2798 n.3 (Stevens, J., dissenting) (noting he has "long adhered to the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason").
149. *See id.* at 2764 (Roberts, C.J., plurality).
150. *Id.* at 2774, 2787 (Thomas, J., dissenting).
151. *See Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2796-97 (Kennedy, J., concurring) ("To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.").

quirement: (1) remediation of past discrimination and (2) diversity. Drawing on the earlier desegregation jurisprudence of *Brown*, the Court first accepted remediation as a compelling interest in the affirmative action context with *Regents of the University of California v. Bakke*.[152] In *Bakke* and later precedent, the Court held that a state actor may voluntarily consider race to remediate past discrimination, so long as it is aimed at those directly harmed by the discrimination or remedied its own past discriminatory acts that have presently existing effects.[153] Remediation in the public school setting thus requires some showing of prior or current de jure segregation by the school district or school board. As noted below, very few school districts directly claimed a remedial compelling interest in defense of their plan.

Unlike the remedial rationale, the diversity rationale has been more ambiguously defined and was fiercely debated in the school assignment cases. Since it does not require a past history of de jure segregation, it has the potential to apply to a wider range of state action, particularly in the educational setting. The idea that diversity was an acceptable interest first appeared in *Bakke* as dicta: "the attainment of a diverse student body . . . is a constitutionally permissible goal."[154] Justice Powell also noted the role of the First Amendment and academic freedom as supporting this goal of a diverse student body.[155] Following a brief, failed attempt to expand it to the public broadcasting setting,[156] the Court did not discuss the diversity rationale again until it addressed university affirmative action programs in *Grutter v. Bollinger* and *Gratz v. Bollinger*. In the twin decisions, the majority cited the diversity language in *Bakke* and held that in the context of higher education, it was a compelling interest.[157] Similar to the aforementioned deference to local control in the desegregation cases, *Grutter* held that there should be some deference to the judgment of the academic institution in its claims of the compelling need for diversity.[158] Despite finally coming down clearly for diversity as a compelling interest, questions remained as to the meaning of diversity – whether it was only a

152. 438 U.S. 265, 307 (1978) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.").

153. *See* Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (federal statute that utilized race "is justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress"); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (remedying those directly harmed by discrimination or the state actor's own past discriminatory acts that had presently existing effects was compelling); Adarand Constructors v. Peña, 515 U.S. 200 (1995) (recognizing compelling interest in remedial rationale in contracting context).

154. *Bakke,* 438 U.S. at 311-12.

155. *Id.* at 312 ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.").

156. Metro Broad. v. FCC, 497 U.S. 547, 548 (1990) (discussing "viewpoint" diversity).

157. Grutter v. Bollinger, 539 U.S. 306, 328-31 (2003).

158. *Id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

broad, multifaceted notion of diversity[159] or whether diversity of race was itself a valid interest.

By and large, scholars believed some form of a diversity rationale as a compelling interest would be appropriate to the goals of K-12 desegregation plans and likely to withstand the Court's review. In articulating the specifics of the rationale in the public school setting they offered a variety of different justifications. Some argued that the "viewpoint diversity" of *Grutter* still existed in the K-12 setting, but was supplemented by goals such as integrating schools, good citizenship, and interaction with peers of other races.[160] These scholars suggested that because the voluntary plans echoed the rhetoric of the Court in the *Brown* line about the importance of integrating schools and desegregating communities, it virtually required the current Court to find a compelling interest.[161] Others believed this to be a distinct diversity interest from the one in *Grutter*, but split over whether it was a valid interest.[162] Still, a vocal minority argued that it was "merely" racial diversity and insufficient under the current standard of review.[163] A number of writers also argued that the discretion offered to universities in *Grutter* could naturally be extended to the K-12 setting and even had more credence due to the "local control" deference articulated in desegregation cases like *Milliken*.[164]

The Supreme Court attempted to answer two questions in *PICS*: do the interests claimed by the school districts fit existing compelling interest precedent and, if not, do the stated interests rise to a level considered compelling enough to find it constitutionally acceptable? The majority held that the interests involved in voluntary school assignment plans did not fit traditional conceptions of remediation or diversity.[165] Relying on its understanding of unitary status and *Swann* as pure dicta, the majority held that neither school relied on an interest in remediating de jure segregation.[166] Attempting to clarify the meaning of diversity, the majority nar-

159. *Id.* at 328-31 (affirming the importance of attaining a critical mass of minority students to gain a variety of perspectives).
160. *See* Holmes, *supra* note 35, at 570-71 (similar interests to university setting coupled with additional unique interests); Anderson, *supra* note 35, at 986-90 (diversity rationale is "transferable" to K-12 setting).
161. *See* Anderson, *supra* note 35, at 986-90; Ryan, *supra* note 35, at 336-39 (although some goals are similar, mostly unique K-12 diversity from *Brown*); Ruiz, *supra* note 35, at 310-15 (also points to First and Fourth Amendment analysis in public schools as further support).
162. *See generally* Ryan, *supra* note 35; Siegel, *supra* note 35.
163. *See* Thro & Russo, *supra* note 35, at 547-50 (racial diversity cannot survive scrutiny); Nelson, *supra* note 35, at 319 (schools are asking for new interest in integration that will not be recognized).
164. *See* Holmes, *supra* note 35, at 591 ("Given this history of deference to school districts' expertise, especially in the context of public school desegregation, deference should be granted to school administrators' educational judgments that integrated schools are essential to their educational mission."); Ryan, *supra* note 35, at 338 ("Public schools should be afforded similar deference, but for different reasons and because of a different tradition.").
165. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752, 2754 (2007).
166. *Id.* at 2752 ("We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation.").

rowly found *Grutter* to be upholding "student body diversity in the context of higher education" and that it required a consideration of "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[167] In the Seattle and Jefferson County plans, the majority found that race itself was decisive in the decision-making process, not part of a broader conception of diversity, and therefore outside of the *Grutter* understanding of diversity.[168] The majority did not, or could not, come to an agreement as to whether a new compelling interest arose in this case.

Rather than attempting to fit the interests involved in this case into the narrow confines of traditional diversity or remediation interests, Justice Breyer's dissent instead articulated a new compelling interest in eliminating racial isolation and increasing racial diversity.[169] This interest comprised of three elements: (1) a remedial interest in continuing to combat remnants of segregation caused to some degree by past school-related policies, (2) an educational interest in the educational benefits received by students in integrated settings, and (3) a democratic interest in "producing an educational environment that reflects the 'pluralistic society' in which our children live."[170] He also noted that the diversity found compelling in the higher education setting of *Grutter* must a fortiori be at least as equally compelling in the K-12 setting. As perhaps expected, the members of the plurality strongly opposed creating a new compelling interest, particularly the one delineated by the dissent. The plurality rejected racial diversity as "racial balancing," noting that such a definition of racial diversity would change with the demographics of the community.[171] They believed that, if there is a compelling interest in getting students to see each other as diverse individuals rather than "solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end."[172] Justice Thomas critiqued each element of Justice Breyer's compelling interest. He rejected the remedial element as invalid because of a lack of de jure segregation, found the educational element untenable because of conflicting social science proof, and thought the democratic element was pure racial balancing.[173] He also argued that *Grutter* is properly confined to higher education because of the "special niche" of higher education and the university setting.[174]

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167. *Id.* at 2753.

168. *Id.*

169. *Id.* at 2820 (Breyer, J., dissenting) ("I have used more general terms to signify that interest, describing it, for example, as an interest in promoting or preserving greater racial 'integration' of public schools. By this term, I mean the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience.").

170. *See id.* at 2820-22 (Breyer, J., dissenting).

171. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2758 (Roberts, C.J., plurality).

172. *Id.* at 2759.

173. *See id.* at 2775-82 (Thomas, J., concurring).

174. *See id.* at 2781-83 (Thomas, J., concurring).

Again, the most important sentiment resides in Justice Kennedy's concurrence. Although he agreed that the interests in this setting did not fit either remediation or diversity as understood by the Court, he believed that there was a compelling interest in *PICS* "informed by" the two traditional interests.[175] According to Kennedy, "a compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."[176] Despite some similarity to Justice Breyer's ideas, Kennedy hewed closer to the broad diversity espoused in *Grutter*, noting that "other demographic factors, plus special talents and needs, should also be considered."[177] The potential for a compelling interest in race-based assignment plans appears to be the place of closest agreement between the dissent and Justice Kennedy.

iii. Narrow Tailoring

In order to withstand strict judicial scrutiny, the means used to attain a compelling interest must be "narrowly tailored." The narrow tailoring test most relevant to that employed in *PICS* is the one laid out by the Court in conjunction with the diversity rationale in *Grutter* and *Gratz*. Following this precedent, the Court will review a program to determine (1) if the system acts as an impermissible quota or is outright racial balancing; (2) if there is an individual, holistic, determination of each individual; (3) if race-neutral alternatives are not similarly effective; (4) the degree of harm caused to the discriminated-against group; and (5) if it is limited in duration.[178] The specific factual setting of a given case also influences the Court's narrow tailoring analysis. For example, since the program in *Grutter* and *Gratz* involved the selection and rejection of students to the University of Michigan, a prestigious, competitive academic institution, the Court leaned heavily on the need for individual consideration and a review of the harm caused to discriminated-against groups.[179]

Prior to the Court's decision in *PICS*, most academics argued that race-based school planning could pass constitutional muster by "fitting" the factual setting into the prongs of *Grutter*'s narrow tailoring analysis and relying on the "context matters" language (discussed more fully below) to excuse any departure from the holding.[180] In regards to avoiding racial quotas and considering race-neutral alternatives, most believed school

175. *Id.* at 2793 (Kennedy, J., concurring) ("At the same time, these compelling interests, in my view, do help inform the present inquiry. And to the extent the plurality opinion can be interpreted to foreclose consideration of these interests, I disagree with that reasoning.").
176. *Id.* at 2797 (Kennedy, J., concurring).
177. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2797 ("What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.").
178. *See* Grutter v. Bollinger, 539 U.S. 306, 333-43 (2003).
179. *Id.*
180. Although each framed it somewhat differently, all at least reviewed it according to the *Grutter* analysis. *See, e.g.*, Ruiz, *supra* note 35; Ryan, *supra* note 35; Holmes, *supra* note 35.

districts could make arguments directly analogous to those successful in *Grutter*. Specifically, they could claim that the plans were not seeking quotas but a "critical mass"[181] and race-neutral options were considered but would come at too high a cost of the educational goals of the institution.[182] In contrast, most disagreement by academics occurred over how to successfully navigate individualized consideration and the burden placed on discriminated-against groups in a setting where individualized consideration is exceedingly difficult. While some argued that a modified form of individualized consideration could still be achieved in K-12 school planning,[183] the majority believed that this was where context could allow a different, less rigorous, analysis.[184] Assuming equal educational opportunity in the various schools in the district (a highly contentious point in its own right), litigants could claim that there was no competition because "everyone got a seat" in an integrated school district.[185] As such, the burden on the groups other than those targeted for integration is minimal[186] and the need for individualized consideration is unnecessary where no merit-based values are considered in the process; any process that assigns students to schools that doesn't include student abilities is inherently "irrational."[187] Finally, the "limited in time" element of *Grutter* seemed to many to be a minor concern since the University of Michigan itself only needed to periodically review their plans in order to satisfy the criterion.[188]

The majority in *PICS* found neither the Seattle plan nor the Jefferson County plan to be narrowly tailored enough to be constitutional. The Court focused on two problems, both related to race-neutral alternatives.

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181. *See* Ryan, *supra* note 35, at 340-41 (assuming quotas only mean fixed number, easy to meet); Holmes, *supra* note 35, at 594-95; Anderson, *supra* note 35, at 998-99 (only need to avoid racial proportionality); *see also* Ruiz, *supra* note 35, at 322 (quota prong inapplicable since non-competitive). *But see* Nelson, *supra* note 35, at 321-24 (would likely fail as pure racial balancing).

182. *See* Ryan, *supra* note 35, at 342 (no need to sacrifice for race-neutral alternative); Thro & Russo, *supra* note 35, at 555 (critical, but think courts allow only cursory review of alternatives); Holmes, *supra* note 35, at 597 (satisfies prong if makes effort to look for alternative). *But see* Anderson, *supra* note 35, at 993 ('Where racial diversity is clearly integral to the overall goal, using race to achieve that goal creates [a] tight fit . . . ."); Ruiz, *supra* note 35, at 320-21 (inefficacy of race-neutral alternatives); Nelson, *supra* note 35, at 325 (plans are not considering available alternatives and other diversity elements instead of race).

183. *See* Ryan, *supra* note 35, at 342 (race does not have to be sole factor in consideration).

184. *See* Ryan, *supra* note 35, at 339; Anderson, *supra* note 35, at 996; Ruiz, *supra* note 35, at 308 ("Once context is considered as part of strict scrutiny analysis, not every racially influenced decision will be found equally objectionable."); Siegel, *supra* note 35, at 786-87.

185. *See* Anderson, *supra* note 35, at 992.

186. *See* Holmes, *supra* note 35, at 598-99; Anderson, *supra* note 35, at 992; *see also* Ruiz, *supra* note 35, at 323 (students benefit from having the racial diversity and suffer no undue harm). *But see* Thro & Russo, *supra* note 35, at 556 (points out First Circuit comment that students and parents "do not view the schools as fungible").

187. *See* Holmes, *supra* note 35, at 563; Ryan, *supra* note 35, at 341.

188. *See* Holmes, *supra* note 35, at 574, 599 (same periodic review requirement as *Grutter*). *See also* Ruiz, *supra* note 35, at 324-25 (history of discrimination suggests need for longer timeline). *But see* Thro & Russo, *supra* note 35, at 557 (Court meant duration requirement to have "substantive meaning").

First, the classification by race only affected a small number of student assignments in both school districts, suggesting to the Court that a race-neutral method would be similarly effective.[189] Clarifying that they did not mean that school districts should purposefully rely more heavily on race-based decision making, the Court stated that, following *Grutter*, "consideration of race was viewed as indispensable in attaining greater minority representation."[190] Second, the Court found that both school districts "failed to show that they considered methods other than explicit racial classifications to achieve their stated goals."[191] The majority also noted that the plans did not provide for appropriately individualized review, insisting instead that they used race in a mechanical fashion and allowed race alone to be a decisive factor.[192]

The plurality went further in criticizing the plans for a lack of narrow tailoring. Specifically, it noted that the ratios sought to be achieved through race-based assignment were not tied to any pedagogic concept of diversity needed to obtain the asserted educational benefits.[193] Also, unlike the "critical mass" sought in the higher education setting of *Grutter*, here the plans appeared to be simply "counting back" from the numbers with which they ended.[194] Along with supporting the majority's critique, Justice Kennedy noted two other tailoring problems in his concurrence. Jefferson County's plan was too vague, evidenced by the fact that the case was brought by the parent of a student who, pursuant to the assignment plan exemption of kindergarten, technically should not have been classified by race in the first instance.[195] The problem with the Seattle plan rested in the white/nonwhite binary. As mentioned previously, Kennedy thought that the school district failed to explain how the binary helped achieve the compelling interest.[196] Finally, Justice Kennedy noted that, "[i]f those students were considered for a whole range of their talents and

189. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2759 (2007) ("The minimal effect these classifications have on student assignments, suggests that other means would be effective.").

190. *Id.* at 2760 ("While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications.").

191. *Id.*

192. *Id.* at 2753.

193. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2756 (Roberts, C.J., plurality) ("Nor did [Seattle] demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian-American, which would qualify as diverse under Seattle's plan, than at a school that is 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated.").

194. *Id.* at 2758 (Roberts, C.J., plurality) ("The validity of our concern that racial balancing has 'no logical stopping point' . . . is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics.").

195. *See id.* at 2789-90 (Kennedy, J., concurring) ("Jefferson County fails to make clear to this Court-even in the limited respects implicated by Joshua's initial assignment and transfer denial-whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and *ad hoc* manner that a less forgiving reading of the record would suggest.").

196. *Id.* at 2790-91 (Kennedy, J., concurring).

school needs with race as just one consideration, *Grutter* would have some application."[197]

In response, the dissent fashioned an argument supporting the school assignment plans as narrowly tailored. First, the racial criteria only marked the outer bounds of broad ranges of possible demographic permutations. Unlike a quota that requires a certain fixed number, Justice Breyer argued, "they constitute but one part of plans that depend primarily upon other, nonracial elements."[198] Next, the dissent argued that the plans in *PICS* are less burdensome than those approved in *Grutter*; the loss of a seat in a particular school while still being guaranteed a seat somewhere in the district is less intrusive than the loss of a seat at a unique, highly competitive university or graduate school.[199] Third, Justice Breyer argued that the school plans were "devised" in a narrowly tailored fashion. He noted that, despite the majority's contention, other race-neutral plans were previously considered and rejected as unsatisfactory:

> For the plurality now to insist as it does . . . that these school districts ought to have said so officially is either to ask for the superfluous (if they need only make explicit what is implicit) or to demand the impossible (if they must somehow provide more proof that there is no hypothetical *other* plan that could work as well as theirs).[200]

In examining the demographic ratio element that the majority found to be inappropriate, Justice Breyer pointed to the fact that federal law utilizes similar ratios and also noted that social science data supported their use.[201] Finally, Justice Breyer responded to Justice Kennedy's critiques, noting that the student in Jefferson County was not granted his preferred assignment because his parent missed the application deadline and that Seattle utilized a white/nonwhite binary because it mapped onto the community's white/nonwhite geographic segregation.[202]

iv. "Context Matters" – Finding a Strict Scrutiny Loophole

Despite the rigorous structure of the narrow tailoring analysis, the Supreme Court implied in past precedent that there might be other ways to satisfy strict scrutiny. Significantly, Justice O'Connor's decision in *Grutter* stated that "context matters" with regards to race-based policies and how the court should properly analyze them.[203] As noted more fully below, some school district litigants heeded this supposed signal by the Court and articulated distinct compelling interests beyond remedial and diversity rationales as well as claiming less restrictive or slightly altered narrow tailoring analyses.

In *PICS*, the Court came to two strikingly different understandings of the meaning of "context matters." To the majority, "context matters" was

197. *Id.* at 2794 (Kennedy, J., concurring).
198. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2824-25 (Breyer, J., dissenting).
199. *Id.* at 2825 (Breyer, J., dissenting).
200. *Id.* at 2827 (Breyer, J., dissenting).
201. *See id.* at 2827-28 (Breyer, J., dissenting).
202. *See id.* at 2828-29 (Breyer, J., dissenting).
203. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

one reason why they thought the affirmative action plan in *Grutter* could satisfy strict scrutiny while the student assignment plans in *PICS* could not. They relied upon "considerations unique to institutions of higher education," specifically the unique role of freedom of speech and thought in the university environment first noted in *Bakke*.[204] Justice Breyer's dissent crafted a very different vision of this ambiguous phrase. Focusing on Justice O'Connor's statement in *Grutter* that "not every decision influenced by race is equally objectionable," the dissent argued that "context matters" means that strict scrutiny is applied differently to race-conscious plans that *exclude* than to those that *include*.[205] As noted above, because student assignment plans are expressly designed to use race to bring racial groups together, the dissent thought this case deserved a more lenient strict scrutiny analysis.[206] Since the majority's comments are dicta unnecessary to its holding and Justice Breyer's sentiments did not seem to impact a fifth justice like Kennedy, the effect of "context matters" on student assignment plans remains in doubt.

IV. The Implications of the Holding in *PICS*

Parents Involved in Community Schools is a badly fractured decision with five different opinions and a majority ruling on only the narrowest of grounds. Nevertheless, the basic contours for creating a student assignment plan that might be accepted by the Court can be divined from the various statements of the justices. Based on the opinions in *PICS*, a student assignment plan will pass constitutional review in one of three different scenarios.

First, if the program is wholly race-neutral, it will avoid strict scrutiny review and almost certainly be found to be constitutional pursuant to a rational basis standard of review.

Second, if the plan articulates an appropriately compelling rationale and is sufficiently narrowly tailored, it will pass strict scrutiny analysis.[207] Given the posture of Justice Kennedy and the dissent, a plan may be able to gain at least five votes if it can justify a compelling interest in "avoiding racial isolation" and "achieving a diverse student population."[208] To satisfy the narrow tailoring requirement, a plan must follow the *Grutter/Gratz* framework discussed above. Based on the majority opinion in *PICS*, school districts should pay particular attention to demonstrating that race-neutral methods were considered and clearly would be less effective than race-conscious measures.[209] School districts should also make sure

204. *See Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754.
205. *See id.* at 2817-18 (Breyer, J., dissenting) ("Rather, they apply the strict scrutiny test in a manner that is 'fatal in fact' only to racial classifications that harmfully *exclude;* they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*.").
206. *Id.* at 2818 (Breyer, J., dissenting) ("Here, the context is one in which school districts seek to advance or to maintain racial integration in primary and secondary schools.").
207. *Id.* at 2751-52.
208. *See Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2797 (Kennedy, J., concurring); *see also id.* at 2820 (Breyer, J., dissenting).
209. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2759-60.

their plans are not vaguely written and should be able to justify how and why they use the particular racial identifiers (e.g. white/nonwhite in the Seattle plan) in order to allay the concerns of Justice Kennedy.[210] Given the concerns over individualized consideration in *PICS*, the plans should also utilize other measures of student talents and school needs in assigning students.[211] Though not necessary to secure five votes, it would also be wise to address the plurality's concern of tying the diversity numbers to social science research justifying the plan's benefits.[212]

Third, if the plan does not deal directly with specific, individual students classified by race, but instead works with broad racial demographics, it is likely to survive constitutional challenge. As mentioned above, Justice Kennedy believes that school districts "are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[213] He specifically pointed to school site selection, attendance zone modification, resource allocation for special programs designed to increase diversity in certain schools, targeted recruiting of students and faculty to achieve diversity, and enrollment tracking as methods that schools should be permitted to employ with "candor and confidence."[214]

V. CIRCUIT DECISIONS ON VOLUNTARY DESEGREGATION PLANS

In trying to predict the future of race-based K-12 school planning, it is useful to first look back at the "pre-history" of the Supreme Court's decision: the voluntary student assignment plans litigated in the federal appellate courts. A look to cases decided in the circuit courts prior to *PICS*, but never certified for further review, reveals insights regarding the constitutional propriety of the myriad voluntary school integration plans that may be challenged in the wake of the Court's decision. The cases provide a variety of race-based student plans that were actually adopted and put into practice. An examination of the circuit courts' rulings on the constitutionality of these plans and of their acceptability in a post-*PICS* world provides school districts with guidance regarding plans they may attempt in the future.

A. Wessman v. Gittens *and* Dowd v. City of Boston

i. The School Plan

In *Wessman v. Gittens*, the Boston Public Schools set up "flexible racial guidelines" in its assignment plans for its examination-based Boston Latin Schools.[215] After filling fifty percent of the seats in the Latin schools

210. *See id.* at 2789-91 (Kennedy, J., concurring).
211. *See id.* at 2794 (Kennedy, J., concurring).
212. *See id.* at 2755-56 (Roberts, C.J., plurality).
213. *Id.* at 2792 (Kennedy, J., concurring).
214. *Id.* (Kennedy, J., concurring) ("These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.").
215. Wessman v. Gittens, 160 F.3d 790, 793-94 (1st Cir. 1998).

based strictly on merit-based composite scores of GPA and test results, the other fifty percent of the seats were allocated using the scores coupled with racial guidelines.[216] This race-informed seat allocation attempted to preserve the approximate ratio of the racial groups that applied for entrance.[217] The City of Boston's public school system was sued again in *Dowd v. City of Boston*.[218] The school district, originally under a court-ordered plan for de jure violations, developed a voluntary plan for the entire public school system (excluding the aforementioned Latin Schools) after obtaining unitary status.[219] The "Controlled Choice Student Assignment Plan" provided a number of factors for school choices–siblings in the school, same neighborhood, walking distance, etc.–that also included an "ideal racial percentage" constraint.[220] Before *Dowd* could be litigated at the federal appellate level, however, Boston removed the racial factor from its student assignment plan.

ii. The Decisions

Since the student plan in *Dowd* no longer contained a racial element, the First Circuit utilized rational basis review in its analysis of the constitutional validity of the plan.[221] The school system subsequently claimed the preservation of parental choice and opportunity as rational interests for the plan.[222] Although the plan still intended to create diverse school environments, since there was no disproportionate effect that could constitute intent to discriminate based on race, the First Circuit upheld the plan as rational.[223]

In *Wessmann*, the Boston School Committee referenced *Swann*'s notion of "preparing students to live in a pluralistic society" as justification for the Boston Latin assignment plan.[224] The school system argued that, in the alternative, the plan served the remedial interest of remedying vestiges of past discrimination.[225] They claimed that, along with other factors, the "achievement gap" between white students and students of color demonstrated that such vestiges existed.[226] Despite a thorough discussion of the ambiguity of the concept of diversity, the First Circuit did not rule as to whether it was a compelling interest and instead moved directly to a narrow tailoring analysis.[227] Regarding the claim that the plan remedied vestiges of past discrimination, the court stated that Boston's prior mandatory desegregation orders coupled with a current imbalance were not controlling because they had previously been granted unitary sta-

216. *Id.*
217. *Id.*
218. 375 F.3d 71 (1st Cir. 2004).
219. *Id.* at 74.
220. *Id.* at 75.
221. *Id.* at 87.
222. *Id.* at 91.
223. *Id.* at 87.
224. Wessman v. Gittens, 160 F.3d 790, 796 (1st Cir. 1988).
225. *Id.* at 800-04.
226. *Id.*
227. *Id*. at 798.

tus.[228] Boston's alternative remedial argument, that an achievement gap between races was a vestige of discrimination to be remedied, also failed due to a lack of evidence demonstrating a connection between past discrimination by the school district and present achievement levels.[229] Finally, the First Circuit held that even if Boston provided sufficient evidence to show a connection to past discrimination, its plan would fail the narrow tailoring analysis because an achievement gap "at the primary school level" would not be effectively remedied by race-informed admissions policies in the Latin high schools.[230]

*iii. Post-*PICS *Constitutionality*

Absent a racial element, the *Dowd* plan would still pass rational basis review in the Supreme Court. In contrast, the Boston school system's assignment plan for its Latin Schools in *Wessmann* would probably still be struck down under a *PICS* analysis. The remedial argument would fail due to a lack of evidence of prior de jure segregation. The *Swann*-backed diversity interest might be similar enough to the diversity considered acceptable by Kennedy in *PICS*, but the plan would fail a narrow tailoring analysis. The Boston Latin Schools are competitive and, like in *Gratz*, this can create an undue burden on discriminated-against groups that lose out on a fair chance to compete for a spot in a prestigious institution. Unlike in *PICS*, the school district cannot claim that the student is merely losing a seat in a preferred school while they may still go to another, essentially equal school in the district precisely because Boston Latin Schools are specifically designed to be "better" than traditional public schools. Additionally, the plan allots a specific percentage of its seats to students with scores that includes a racial factor rather than a flexible range or an even more ambiguously defined "critical mass." Most significant, a student might have a higher merit-based score yet lose out to another student solely because of her race, which would violate the individual consideration requirement of *Grutter* as upheld in *PICS*. Since race can be the single determinative factor, it is almost certain that five of the current justices would strike down the plan.

B. Tuttle v. Arlington County School Board

i. The School Plan

In *Tuttle v. Arlington County School Board*, a Virginia-based district chose to use race-based factors in assigning students to the Arlington Traditional Schools ("ATS"), an alternative school structure open to any student in the district.[231] After admitting students with siblings presently in the school, the district placed the remainder of students in a random-

228. *Wessmann,* 160 F.3d at 802.
229. *Id.* at 807 ("In a nutshell, there is not a shred of evidence in the record supporting the contention that unstable leadership and the absence of uniform curriculum standards bore any relationship either to discrimination in the Boston schools or to the existence of the achievement gap.").
230. *Id.* at 807-08.
231. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 701 (4th Cir. 1999).

ized lottery weighted so that under-represented racial groups had a greater chance of selection to the over-requested schools.[232] The goal of the lottery was to obtain a student body "in proportions that approximate the distribution of students from those groups in the district's overall student population."[233]

ii. The Decision

Similar to the Boston Latin schools, the Arlington school system's stated goals were to "(1) 'prepare and educate students to live in a diverse, global society' by 'reflect[ing] the diversity of the community' and (2) to help the School Board 'serve the diverse group of students in the district . . . .'"[234] Absent controlling precedent, the Fourth Circuit assumed, arguendo, that this diversity rationale was a compelling interest.[235] However, the court applied a narrow tailoring analysis and found that the Arlington school system could not meet the high threshold.[236] First, the court noted three race-neutral alternatives that the School Board had proposed but had chosen not to use.[237] Second, the program failed to meet the limited duration requirement because the policy stated it was for the 1999-2000 school year and thereafter.[238] Third, the stated goal of mirroring the approximate racial populations of students in the entire school system struck the court as racial balancing.[239] Fourth, the lottery-based system did not treat the students as individuals.[240] Finally, the court felt the plan unduly harmed "innocent third parties" by teaching children to view people as members of a class rather than as individuals.[241]

*iii. Post-*PICS *Constitutionality*

The weighted lottery student assignment plan as presented in *Tuttle* would also fail to satisfy the Supreme Court. The interests motivating the plan are problematic because the district does not adequately justify any need for diversity beyond mirroring the demographics of the community. As they have not claimed to be seeking any specific educational benefits from racial diversity or interests rooted in the *Brown* cases such as avoiding racial isolation, the Court is unlikely to find the interests compelling. Additionally, the problems identified by the circuit court would remain problematic under a *PICS*-informed narrow tailoring analysis; the need for a review of race-neutral alternatives, racial balancing, and limited duration all would need to be addressed. Absent these problems, the plan would still face tough scrutiny for its lottery system. Although it makes the process more "random" and less directly guided by administrators, it

232. *Id.* at 702.
233. *Id.* at 701.
234. *Id.*
235. *Id.* at 704.
236. *Id.* at 707.
237. *Tuttle,* 195 F.3d at 706.
238. *Id.*
239. *Id.* at 707.
240. *Id.*
241. *Id.*

also removes any semblance of individualized consideration. The lottery treats students as racially grouped numbers with no other personal traits and uses race in a mechanical fashion that the Court frowns upon. In sum, the Arlington plan would be ill-fated under the *PICS* framework.

C. Eisenberg v. Montgomery County Public Schools

i. The School Plan

The Montgomery County Public Schools in Maryland utilized race in considering transfers into their magnet schools in *Eisenberg v. Montgomery County Public Schools*.[242] Upon a voluntary transfer request by a student, the district considered a number of factors (school stability, utilization/enrollment, diversity profile, and reason for the request) concurrently and determined if the student's requested school was under- or over-utilized in terms of enrollment.[243] One of the factors considered was a "diversity profile" that identified students according to racial/ethnic background.[244] Within each school, the ethnic or racial groups were broken into four categories based on the size of the group's population in the school compared to the community-wide population. Students from racial groups in Category 1 or Category 2 - with higher populations in the school than the community at large - were generally not allowed to transfer into the school and the reverse followed for Category 3 and Category 4.[245] Again, the objective of the plan was to maintain enrollment within each school that somewhat mirrored the district-wide racial population.

ii. The Decision

The Montgomery schools in *Eisenberg* claimed two compelling interests: (1) the avoidance of racial isolation and (2) promotion of a diverse student body.[246] As in *Tuttle*, the Fourth Circuit avoided any ruling on whether diversity could be a compelling interest and instead struck the plan down on narrow tailoring grounds.[247] Similar to the court in *Wessmann*, the court noted that mere racial imbalances in the schools did not alone support the idea that vestiges of past de jure discrimination existed and did not allow the case to proceed under a remedial rationale. As a result, the court found that the diversity profile that affected transfers into magnet schools was "racial balancing in a pure form."[248] In finding the plan constitutionally unacceptable, the court in particular focused on the fact that, under the plan, race could be the only factor leading to the denial of admission of one student and the admittance of another.[249]

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242. Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999).
243. *Id.* at 126.
244. *Id.* at 126-27.
245. *See id.*
246. *Id.* at 129.
247. *Eisenberg*, 197 F.3d at 130-31.
248. *Id.* at 131.
249. *Id.*

*iii. Post-*PICS *Constitutionality*

Assuming that the district articulated a more comprehensive rationale for its desire for diversity in Montgomery schools, it could likely satisfy the compelling interest requirement in a post-*PICS* challenge before the Supreme Court. Justice Kennedy's concurrence describes an acceptable diversity interest in precisely this context. This plan, however, would likely fail on narrow tailoring grounds. Although the idea of a diversity profile suggests a more rigorous attempt at individualized consideration, it still contains many flaws. The profile is solely comprised of racial or ethnic information and does not consider any other qualities or characteristics of the individual student. It works in a mechanical fashion, often allowing race to be the sole reason a student is assigned or denied a transfer slot. There is no evidence that race-neutral alternatives to create diversity were considered nor is there any social science evidence to justify why maintaining a school population that mirrors the demographics of the community would be particularly beneficial to the students' education. Ultimately, Montgomery County's use of race is something the Supreme Court would not hesitate to strike down in light of *PICS*.

D. Brewer v. West Irondequoit Central School District

i. The School Plan

In upstate New York, two school districts worked in collaboration to reduce what they perceived as the problem of racial isolation, an effort which gave rise to the litigation in *Brewer v. West Irondequoit Central School District*.[250] Rooted in a 1965 cooperative desegregation effort ("one of the oldest voluntary desegregation efforts in the nation")[251] in Rochester, the West Irondequoit Central School District and Rochester School District engaged in an inter-district transfer program to reduce racial isolation. The program allowed minority students to transfer from the predominantly minority Rochester city schools to the participating suburban schools, provided they did not "negatively affect the racial balance of the receiving school."[252] A "minority pupil" was defined as a student who is "of Black or Hispanic origin or is a member of another racial minority group that historically has been the subject of discrimination."[253]

ii. The Decision

The Second Circuit, in contrast to most other circuits, reviewed Supreme Court precedent and found a compelling interest "in a program that has as its object the reduction of racial isolation and what appears to be de facto segregation."[254] The court did not reach the narrow tailoring analysis and instead remanded the case back to the district court for further review.[255]

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250. Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738, 745 (2nd Cir. 2000).
251. *Id.* at 742.
252. *Id.*
253. *Id.*
254. *Brewer*, 212 F.3d at 752.
255. *Id.* at 753.

*iii. Post-*PICS *Constitutionality*

The plan appears destined to be struck down. While a desire to reduce racial isolation or to improve race-related diversity rooted in *Brown* precedent might garner the Court's support as a compelling interest, the plan will still fail on narrow tailoring grounds. The fact that only racial minorities can transfer from one school district to the other through this program is a much too direct use of race. It fails to consider any other significant personal factor of the student, other than her membership in a racially isolated minority community. Further, the program is vague: which ethnic groups might qualify as "historically discriminated against?" Additionally, a strong argument can be made that this plan imposes an unfair burden on white children who share precisely the same socio-economic setting in Rochester schools, but who are nonetheless not allowed to transfer. A plan that allows students to transfer out of the "bad schools" solely because of their race is precisely the sort of scheme the Court considers unconstitutional.

E. Comfort v. Lynn School Committee

i. The School Plan

In the small city of Lynn, Massachusetts, the school district established a transfer-based system that considered the impact of a transfer on the racial makeup of the schools.[256] The district's plan stated that students could always attend their neighborhood school, but could also transfer to other schools so long as it had a "neutral" or "desegregative" effect on the school population in both the school they were leaving and the one they wished to attend. Both "white" and "nonwhite" students could transfer if their enrollment affected the school in this manner.[257] The plan's goal was to keep the Lynn schools racially balanced in proportion with the minority population in the district as a whole.[258]

ii. The Decision

As one of the first post-*Grutter* cases, the Lynn school district articulated a more sophisticated compelling interest argument. In *Comfort*, the district argued it was interested in:

> fostering integrated public schools and what Lynn believes are [their] positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity; ensuring equal education and life opportunities and increasing the quality of education for all students.[259]

256. Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005).
257. *Id.* at 7-9.
258. *Id.* at 8.
259. *Id.* at 14.

The First Circuit decided in the wake of *Grutter/Gratz* that all of the interests mentioned by Lynn above fit under the rubric of diversity and were thus sufficiently compelling interests.[260] The appellate court also upheld Lynn School Committee's plan as narrowly tailored.[261] The court first found the plan to be minimally invasive and thus not unduly harmful to members of a particular racial group. Specifically, it noted that the plan governed only voluntary transfers and not initial assignments, allowed for free transfers among racially balanced schools, and provided an appeals process for students denied the right to transfer on racial grounds.[262] It also pointed to the fact that the only benefit lost in a non-competitive system where every student was guaranteed a seat in some school classroom was the loss of a transfer request.[263] Next, the court found that the flexible percentages used to determine the appropriate amount of students necessary to maintain a racial mixture was not a quota and it did not seek racial balancing for its own sake, but rather to gain the educational benefits inherent in a mixed classroom and to avoid the harm from racial isolation.[264] The court likened the district's numerical goals to the "critical mass" goals in the *Grutter* opinion.[265] The First Circuit further held that the racial distinctions made by the plan (white/nonwhite) were appropriate given the racial makeup of Lynn's community and because "narrow tailoring does not require that Lynn ensure diversity among every racial and ethnic subgroup as well."[266] In terms of duration, the court ruled that Lynn's periodic review of its policy was consistent with similar periodic review by the University of Michigan Law School upheld in *Grutter*.[267] Although it collapsed the individualized consideration analysis into the quota and undue burden questions, the First Circuit suggested that rigorous individualized review was unnecessary due to the non-competitive nature of school assignments.[268] Finally, the court held that Lynn "demonstrate[d] a good faith effort to consider feasible race-neutral alternatives."[269]

*iii. Post-*PICS *Constitutionality*

Although the Lynn plan is one of the more sophisticated plans in existence, it would likely fail to satisfy the Supreme Court's strict scrutiny review after the Court's decision in *PICS*.[270] The plan articulates a detailed compelling interest that would likely be upheld, and it goes to great

260. *Id.* at 14-17.
261. *Comfort*, 418 F.3d at 17.
262. *Id.* at 19.
263. *Id.*
264. *Id. at* 21.
265. *Id.*
266. *Comfort*, 418 F.3d at 22.
267. *Id.*
268. *Id.* at 17-18.
269. *Id.* at 23.
270. Whether this actually passes constitutional muster may soon be tested, as lawyers representing the parents who originally challenged the Lynn plan have filed a brief in federal district court asking for reconsideration in light of *PICS*. *See* April Yee, *Challenge to Lynn's Race Policy is Revived*, The Boston Globe, July 5, 2007, at 1A.

lengths, as the appellate court noted,[271] to satisfy most of the *Grutter* prongs. Unfortunately for the district, its plan is very similar to the Seattle school district plan and contains many similar shortcomings. The Court likely would re-scrutinize the plan to determine if race-neutral alternatives were truly considered and are definitively less effective at achieving diversity. Also, Justice Kennedy might again find that the white/non-white distinction lacks sufficient justification and relationship to an interest in achieving diversity. Since the Supreme Court is unlikely to accept "context matters" as an excuse, Lynn would have to more clearly show some form of legitimate individualized consideration of students; simply claiming that this is a non-competitive system will not satisfy the Court. Finally, and perhaps most significantly, the plan again fails to consider other student characteristics and school needs apart from whether the student transfer impacts the racial balance of the school.[272]

V. CREATING DIVERSE SCHOOLS IN A POST-*PICS* WORLD

With a ruling in *PICS* that restricts the use of race in the K-12 public education setting yet leaves open some avenues for constitutional race-conscious actions, the future of student assignment plans remain uncertain. Local communities and school districts committed to diversity-based goals will continue to create plans they hope will be both constitutional and effective. The purpose of this section is to review theoretical and existing school plans related to diversity and race to determine if they will survive judicial review and achieve their intended goals. Since the Court, particularly Justice Kennedy, made a similar distinction, the section is divided into two parts: first, a review of "student-based" plans, which assign specific students to specific schools based on factors pertaining to individuals. The next section will review "site-based" plans, which utilize student demographics to determine school populations in a broader sense. These sections will discuss how each plan works, the benefits and drawbacks of the plan, and whether the specific plan is constitutionally permissible following the Court's decision in *PICS*.

A. Student-Based Plans

As noted above, student-based plans rely on data about individual students rather than broad demographics. The critical aspect of these plans is that they effectively ask each member of their student populations to "check a box" and identify various personal factors that, when aggregated, provide detailed data about a school population that can then be manipulated by administrators. Plans attempting to increase diversity or integrate schools have focused primarily on a student's race, socio-economic status (SES), and academic achievement.

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271. *Comfort*, 418 F.3d at 21.

272. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2794 (2007) (Kennedy, J., concurring).

i. "Traditional" Race-Factor Plans

"Traditional" race-factor plans include race along with several other factors typically used to determine a student's school assignment in choice-based plans, such as having a sibling in the school or the student's geographic proximity to the school. These plans mirror those challenged in *PICS* and the various circuit court decisions mentioned above. Along with those previously mentioned in the above cases, the benefits of these sorts of plans are that the factors (other than race) are widely used by most districts that have choice plans, they require little modification to add an additional racial factor, and they clearly provide the necessary data to build racially diverse student populations.[273] Conversely, these plans can foster racial conflict,[274] lead to racial stereotyping, and run contrary to (most of) the justices' understanding of the "color-blind" legacy of *Brown*.[275] Most importantly, after *PICS*, the plans must tailor very carefully their intentional use of race as a factor or they will be struck down. They must adhere closely to each aspect of the *Grutter* narrow tailoring analysis and pay particular attention to the concerns Justice Kennedy espoused in *PICS*. Since the previous sections already provided a thorough review of these types of plans, how they have been challenged, and the likelihood of their future survival after *PICS*, it is unnecessary to review them further.

ii. "Race-neutral" SES Plans

School districts disinclined to use race as a factor have begun to look at the socio-economic status (SES) of students and their families as another method for achieving a diverse school environment. SES appears promising to many interested in diversity for a number of reasons. First, it is responsive to the argument, made famous by James Coleman, that student achievement is influenced primarily by family background and the socioeconomic status of the school community.[276] Since many diversity arguments focus on the beneficial effects of diversity on an individual

273. According to Pat Todd, the administrator for Jefferson County School District's assignment plan, "[w]e believe that it provides a better academic education for all students . . . , better appreciation of our political and cultural heritage for all students . . . , more competitive and attractive public schools . . . [and] broader community support for all JCPS schools." *Edited Event Transcript of a Century Foundation Event: The Future of School Integration: Race, Class, and the U.S. Supreme Court*, The Century Foundation, Nov. 28, 2006, http://www.tcf.org/publications/education/edutranscript.pdf [hereinafter *School Integration*].

274. *See* Siegel, *supra* note 35, at 787 ("[T]he critical question [for the Supreme Court] is whether and when the use of race in student assignment exacerbates or ameliorates racial balkanization in America.").

275. According to Center for Equal Opportunity General Counsel and President Roger Clegg, "[i]t teaches that racial identity is very important . . . [and] encourages the embrace and exaltation of such a racial identity as well as a victim mindset." *School Integration*, *supra* note 273.

276. James Coleman, *The Concept of Equality of Educational Opportunity*, 38 Harv. Ed. Rev. 1 (1968); *see also* Richard D. Kahlenberg, *A New Way on School Integration*, The Century Foundation, p. 4, Nov. 28, 2006, http://www.tcf.org/publications/education/schoolintegration.pdf; U.S. Dep't of Educ., Achieving Diversity: Race-Neutral Alternatives in American Education 62 (2004) [hereinafter Achieving Diversity].

student's education, the idea that "all children do better in middle-class schools" supports blending student populations on the basis of economic background.[277] SES diversity has also been shown to lead to racial diversity in schools[278] without the negative implications many see in singling out individuals based on race. The use of SES instead of race to guide school assignment removes the stigma, emphasized by Justice Thomas, that implies that "anything that is predominantly black must be inferior."[279]

However, basing school assignment on socioeconomic status alone will not necessarily lead to racially integrated school systems.[280] As a result, the problems of segregation and the benefits of integration that some argue are inherent to race (e.g. the value of interacting with someone of a different race) may not be effectively captured by a race-neutral SES plan.[281] Alternatively, the use of SES as a substitute for race can be seen as a clumsy placeholder that "hides the ball" by using race-neutral means to pursue racially-driven ends.[282] Lastly, some argue that the use of race would be preferable and is not stigmatic when done with the understanding that minority communities are disproportionately affected by multiple problems not *fully* captured by SES, like high poverty, low performing schools, and teacher retention issues.[283] Ultimately, the effectiveness of SES as a factor can only be measured in the context of specific assignment plans.

1. The Wake County Plan

Prior to its adoption of a race-neutral SES plan, the school district in Wake County, North Carolina utilized magnet programs and explicit ra-

277. Kahlenberg, *supra* note 276, at 4; *see also* RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 228-57 (Brookings Institution Press 2001) [hereinafter ALL TOGETHER NOW].

278. *See* Kahlenberg, *supra* note 276, at 7 ("The evidence suggests that socioeconomic integration in many cases can produce a substantial racial dividend."); ACHIEVING DIVERSITY, *supra* note 276, at 62; *see generally* ALL TOGETHER NOW, *supra* note 277.

279. Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

280. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, FACT SHEET: IMPACT OF RACE-NEUTRAL ALTERNATIVES [hereinafter NAACP] ("Income and race cannot stand as proxies for one another in school integration policies."); Kahlenberg, *supra* note 276, at 9 ("Just as racial integration did not produce much socioeconomic integration . . . so socioeconomic integration may not always produce adequate levels of racial integration.").

281. *See* Jonathan D. Glater & Alan Finder, *School Diversity Based on Income Segregates Some*, N.Y. TIMES, July 15, 2007, at A24 ("[T]he experiences of these districts show how difficult it can be to balance socioeconomic diversity, racial integration and academic success.").

282. "Hiding the ball" is a favorite criticism of Justice Souter in regards to affirmative action jurisprudence. *See* Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Souter, J., dissenting) ("Equal protection cannot become an exercise in which the winners are the ones who hide the ball."); Transcript of Oral Argument at 20, Meredith v. Jefferson County Bd. of Educ., 127 S. Ct. 2738 (No. 05-915) ("Why do they have to hide the ball by saying, oh, we're going to consider these other things, ability to teach, educational credits, whatever you could come up with when at the beginning and at the end, the objective is to achieve a racial mix? Why can't they do that candidly and employ a criterion that candidly addresses that objective?").

283. Kahlenberg, *supra* note 276, at 9.

cial guidelines.[284] Adopted in the 1980s to avoid court-ordered busing,[285] the race-based plan successfully integrated the school system.[286] After the Fourth Circuit ruled in the late 1990s that this voluntary use of race in student assignment was unconstitutional, the district shifted to a race-neutral plan.[287] The plan, which passed in January 2000, states the goal of "maintaining diverse student populations in each school" because diversity is "critical to ensuring academic success for all students."[288] The plan requires that, in assigning students to schools, the district maintain (1) "[d]iversity in student achievement," defined as no higher than twenty-five percent of a student body scoring below grade level, and (2) "[d]iversity in socioeconomic status," defined as no higher than forty percent of a student body being eligible for free or reduced price lunch.[289]

The most concrete advantage of this plan is that it has worked well for the Wake County schools. With relatively broad support from the community,[290] the plan largely maintained the level of integration that existed under the previous race-based plan;[291] there has only been a seven percent increase of students in racially segregated schools over the first four years the SES plan has been in place.[292] These results were achieved by moving away from the more constitutionally limited and polarizing use of race, and towards a more sophisticated conception of a diverse student population that includes SES and achievement.[293] Yet by the same token, the plan does this at the expense of pursuing racial diversity and the values promoted by this form of diversity.[294] Even as the Wake County plan hews to the Court's belief that race "should not count," it does so disingenuously, as community members openly hope to use the plan to achieve and maintain racial diversity.[295] Also problematic was the fact that the plan required the district to significantly alter the way it managed school choice.[296] Perhaps the most significant critique of the plan is that while it works in Wake County, it is not destined for replication everywhere. Poverty and race are not directly correlated in all communities and do not necessarily map onto preexisting residential segregation patterns.[297] If, as the *Brown* line intimated, there is some positive good to

284. *See* Elizabeth Jean Bower, *Answering the Call: Wake County's Commitment to Diversity in Education*, 78 N.C. L. Rev. 2026, 2037 (2000); All Together Now, *supra* note 277, at 251-53; Achieving Diversity, *supra* note 276, at 66.
285. All Together Now, *supra* note 277, at 251.
286. *Id.* at 251-52.
287. *Id.* at 252-53.
288. Wake County Public School System, Board Policy – Student Assignment (6200), (Revised Mar. 18, 2003), http://www.wcpss.net/policy-files/series/policies/6200-bp.html [hereinafter Wake County Policy].
289. *Id.*
290. All Together Now, *supra* note 277, at 253-54.
291. *See* Kahlenberg, *supra* note 276, at 8.
292. NAACP, *supra* note 280.
293. *See* Bower, *supra* note 284, at 2037-38; Kahlenberg, *supra* note 276, at 3.
294. *See* NAACP, *supra* note 280.
295. *See* Bower, *supra* note 284, at 2042.
296. All Together Now, *supra* note 277, at 254.
297. *See* NAACP, *supra* note 280; Anurima Bhargava, Assistant Counsel for NAACP Legal Defense and Educational Fund, Address to New York University School of Law Education Law Seminar (Spring Semester, 2007).

racial diversity in schools, an SES plan like that used in Wake County will not always capture it.

However, Wake County's race-neutral SES plan is probably constitutionally permissible. There is no facial use of race in the school assignment policy. A litigant could potentially cite to the aforementioned desire of policy makers to maintain racial diversity through this plan as evidence of intentional, racial discrimination through *Washington v. Davis*,[298] but there is little evidence that the Wake County district administrators were motivated by some invidious discriminatory intent in designing their plans.[299] Thus, a constitutional challenge to the plan would likely be reviewed under a rational basis test. Wake County stated an interest in increasing diversity and academic achievement that is likely to be deemed, not simply rational, but compelling in this context. A plan that considers factors shown to be linked to poverty like free/reduced lunch and student achievement is definitely "reasonably related" to these interests.

2. The San Francisco Plan

The San Francisco Unified School District (SFUSD) set up its race-neutral plan after the race element in its existing assignment plan was challenged as an unconstitutional quota.[300] After the court rejected SFUSD's first alternative plan, which still included race as an "aspirational goal[ ],"[301] the school district set up a new plan that utilized a computer-generated, multi-step assignment process. Entitled "Excellence for All," the goals of the plan are, first, "to eliminate existing segregation (and vestiges of past segregation) in SFUSD's schools, programs, and classrooms, and, second, to improve the academic achievement of all students, but particularly those students whose performance has lagged behind others in SFUSD."[302] Students are eligible to attend any school in the district and create a ranked list of their choices; the assignment process is only triggered if they apply to oversubscribed schools.[303] The students with siblings in the oversubscribed school are admitted first, followed by students with specialized learning needs applying to schools with programs to meet those needs.[304] Following this process, students are assigned to one of the schools on their list according to their ranking on a "Diversity Index" created by a program which analyzes six factors: "so-

298. 426 U.S. 229 (1976).
299. *See* Bower, *supra* note 284, at 2043 (noting the potential for a *Davis* suit, but ultimately concluding the plan is constitutional).
300. *See* David I. Levine, *Public School Assignment Methods After* Grutter *and* Gratz*: The View from San Francisco*, 30 HASTINGS CONST. L. Q. 511, 512-13, 524 (2003). Ironically, the original plan itself was established as part of a § 1983 settlement of a race-discrimination case brought by the NAACP. *Id.* at 511.
301. *Id.* at 524.
302. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, EXCELLENCE FOR ALL: A FIVE-YEAR COMPREHENSIVE PLAN TO ACHIEVE EDUCATIONAL EQUITY IN THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT (Revised Jan. 24, 2002), http://www.sfusd.edu/news/pdf/X4All rev021302.pdf.
303. *See* Kahlenberg, *supra* note 276, at 3.
304. Levine, *supra* note 300, at 529.

cioeconomic status, academic achievement status, mother's educational background, language status, academic performance index, and home language."[305] The students are given a diversity score, ranked, and admitted based on how much they contribute to the diversity, numerically speaking, of the school.[306]

In spite of the fact that the SFUSD assignment plan is the most complicated of those surveyed, it has resulted in few beneficial effects and has given rise to a multitude of critiques. Aside from the arguable benefits of avoiding the use of race in seeking out diversity, the plan's only positive benefits seem to be its ability to place students in the school of their choice at a reasonable rate regardless of their diversity "ranking"[307] and the fact that, "from a mechanical point of view, [it] works statistically to make the entering classes of students as diverse as possible, given the parameters."[308] Yet since the diversity rankings are determined on a school-by-school basis, the level of possible diversity is tied directly to the applicant pool; a school with a homogeneous group of applicants will always lack diversity.[309] The plan does not have any significant impact on severe racial segregation[310] and may actually have "allowed, if not caused" resegregation within the district.[311] The complex nature of the computer-driven plan also caused a high degree of confusion among families.[312] Since the implementation of the SFUSD plan, the achievement gap among racial groups in San Francisco has actually increased.[313]

Nonetheless, the San Francisco Plan is almost certainly constitutional. Similar to the Wake County Plan, the SFUSD plan manifests no facial intent to discriminate. There is no evidence available to mount a disproportionate impact challenge under *Davis*. Although not particularly effective by most measures, a federal court would most likely find the plan rationally related to the interests of reducing segregation and increasing student achievement.

3. The LaCrosse Plan

The town of LaCrosse, Wisconsin historically suffered from racial and economic segregation between its two high schools.[314] In the late 1970s, the town's school board redrew attendance boundaries to both alleviate overcrowding and to increase the mixture of socioeconomic status between the two high schools.[315] In the 1990s, the school district adopted an explicit numerical goal for its elementary schools: no school should have

305. *Id*. at 529-30.
306. *Id*. at 530.
307. *Id*. at 533.
308. *Id*. at 533-34.
309. *Id*. at 534.
310. Levine, *supra* note 300, at 535.
311. NAACP, *supra* note 280.
312. Levine, *supra* note 300, at 538.
313. NAACP, *supra* note 280.
314. *See* Achieving Diversity, *supra* note 276, at 68; *see generally* All Together Now, *supra* note 277, at 228-37.
315. Achieving Diversity, *supra* note 276, at 68, Kahlenberg, *supra* note 276, at 3; All Together Now, *supra* note 277, at 228-37.

less than 15 percent or more than 45 percent of students eligible for free lunch.[316] Through this plan, the district hoped to achieve socioeconomic integration of the school district and an incidental increase in ethnic diversity[317] while raising the academic achievement levels of low performing students.

Supporters of the LaCrosse plan point out that the traditionally lower performing, lower SES high school now performs as well academically as the traditionally wealthier school.[318] This has held true even as the community witnessed a ten percent increase in students qualifying for free or reduced lunch.[319] There was also some success in terms of economic integration of the student populations[320] and a small reduction in the percentage of students in racially segregated schools.[321] However, it is important to note that LaCrosse is a relatively homogeneous, white community (85 percent) with a smaller school population (approximately 7,800) than most of the other communities struggling to integrate.[322]

Like Wake County and San Francisco, the LaCrosse plan will face only a rational review because it does not consider race and is not motivated by any intent to discriminate. Although the plan is rather simple in comparison to the other two plans considered in this section, it is still rationally related to its goal of socioeconomic integration and therefore would be held constitutional.

4. Other Race-Neutral SES Plans

Though they have been less thoroughly analyzed than the three previous plans, student assignment plans that attempt to achieve diversity through race-neutral means have also been implemented in Brandywine, DE; Manchester, CT; and Charlotte, NC. Generally speaking, these plans encountered the same benefits and difficulties as those discussed above, most significantly that they may have some effect on reducing economic segregation but little impact on racial segregation. Like the plans discussed above, these plans could all survive a constitutional challenge, as they would be reviewed under a rational basis analysis.[323]

iii. SES Plans that Consider Race

The Cambridge Public Schools created one of the most thoughtful student assignment plans to date. The Cambridge Plan was crafted as a compromise between wholly race-neutral SES plans and traditional plans that incorporate race as one of many considered factors. The stated rationale of the "Controlled Choice Plan" is to produce a "multi-faceted diversity in each school that will provide all students with equitable educational

316. Kahlenberg, *supra* note 276, at 3; ALL TOGETHER NOW, *supra* note 277, at 228-37.
317. ALL TOGETHER NOW, *supra* note 277, at 233-37.
318. ACHIEVING DIVERSITY, *supra* note 276, at 68.
319. *Id.*
320. *See* ALL TOGETHER NOW, *supra* note 277, at 243-44.
321. NAACP, *supra* note 280.
322. *Id.*
323. *See generally* Kahlenberg, *supra* note 276, at 3; ALL TOGETHER NOW, *supra* note 277, at 228-37.

opportunities and with improved achievement."[324] Along with the traditional factors of assigning students to schools based on choice, siblings, proximity to home, special education status, and language status, the Cambridge Plan also requires schools to consider a student's socioeconomic status, gender,[325] and when necessary, race.[326] The SES component requires schools to have a percentage of their students qualifying for free or reduced lunch plans that is within ten percent of the number of such students on a community-wide scale.[327] After student choice and the other diversity factors have been considered, if a school's applicant pool is still found to differ from the community wide percentage of White, African American, Latino, Asian and Native American students by more than ten percent, then race will be considered in the assignment process.[328] The plan states that this "narrowly tailored" process is used because "it is important to have the option to use race or ethnicity as one of the diversity factors in order to avoid the harms of racial/ethnic isolation and to provide students the benefits of learning from students who are of different racial and ethnic backgrounds."[329]

The most attractive aspect of the Cambridge Plan is that it attempts to satisfy all of the competing concerns related to integration and the use of racial classifications. It focuses on race-neutral factors, particularly socioeconomic status, as the primary methods for true, multi-faceted integration of the community. At the same time it allows for race to be the backstop where SES does not incidentally improve racial diversity. It accepts that there is value for students in the racial integration of their schools. The Cambridge plan appears to have been successful in improving the academic proficiency of low-income students through socioeconomic status assignment.[330] For at least a period of time, in promoting economic integration, the plan also increased racial integration, and administrators had no need to directly consider race in making placement decisions.[331] Recently, however, racial imbalances have increased in the Cambridge schools. While less than 40 percent were racially imbalanced before the plan took effect, by 2007 that figure had grown to almost 60 percent.[332] Whether the race component of the plan has been ineffective in

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324. Cambridge Public Schools, Controlled Choice Plan 11 (Dec. 18, 2001), http://www.cpsd.us/Web/PubInfo/ControlledChoice.pdf [hereinafter Cambridge Plan] (last visited Nov. 10, 2007).
325. This paper will not discuss the special constitutional issues that might be associated with the gender factor.
326. Cambridge Plan, *supra* note 324, at 6-11.
327. The variance number is supposed to decrease each school term. *Id.*
328. *Id.* at 9-10.
329. *Id.* at 9.
330. *See* Glater & Finder, *supra* note 281 ("Last year, 75.8 percent of Cambridge's low-income third graders were judged to be progressing toward reading proficiency. That was higher than the statewide average for low-income students, 71.3 percent, and better than the rate in more than a dozen other cities in the state.").
331. One Cambridge administrator noted, "In future years, race may prove to be determinative, but so far socioeconomic guidelines have produced racial diversity by themselves and no student has been denied a spot because of race." Kahlenberg, *supra* note 276, at 10.
332. *See* Tracy Jan, *An Imbalance Grows in Cambridge Schools*, Boston Globe, July 23, 2007.

fixing this growing imbalance or the district has simply hesitated to use the race element is unclear.

The Cambridge Plan almost seems tailor-made as a constitutional test case in the wake of *PICS*. Since it includes race as a factor, a court would review it using a strict scrutiny analysis. The goals espoused in the plan touch on both viewpoint diversity and the *Brown* interest in creating racially diverse public schools and are even backed up by some academic research.[333] A federal appellate court relying on Justice Kennedy's concurrence in *PICS* would probably find one or both of the Cambridge Plan's stated diversity rationales to be compelling. The true test of the plan after *PICS* would be the narrow tailoring analysis. The Cambridge Plan is written and applied in a way that would likely satisfy most of the narrow tailoring prongs. Its racial component only applies if race-neutral alternatives have been ineffective. A review mechanism is in place to ensure that the use of race is limited in duration in the same sense as *Grutter*. The degree of harm experienced by discriminated-against groups is minimized through the last-resort nature of that component of the plan and the lack of competition for spaces in the Cambridge schools. Although courts might be concerned that the ten percent trigger for the use of race is an impermissible quota, it is hard to distinguish from the "critical mass" numbers upheld in *Grutter*. Similar to its academic justification of its interest in diversity, the district should also consider providing social science research to justify the particular numbers used and how the plan might be educationally beneficial. The true test of the plan is the individualized consideration it affords to applicants. The Cambridge Public Schools could persuasively argue that in considering many aspects of a student's identity during the assignment process in advance of race, the district engages in real and significant individualized consideration of each student. If any plan that takes race into account can pass the Court's narrow tailoring analysis after *PICS*, it will be this one.

iv. Alternative Plans

In addition to plans that consider particular elements of an individual student's identity, a number of alternative proposals exist with strikingly different strategies for producing diverse, integrated school environments. Because they offer such unique procedures, these plans will be briefly described and analyzed. Since none of the plans facially consider race, it can be safely presumed that they would all pass a rational review by the courts.

1. Magnet Programs

The "magnet program" is one of the oldest methods for integrating public schools. It is also one of the "other means" suggested by Justice Kennedy in *PICS* that schools could use to bring about diversity without

333. The plan cites the work of Stanford Professor Gary Orfield to support its compelling interest. *See* CAMBRIDGE PLAN, *supra* note 324, at 6-11.

classifying individual students on the basis of race.[334] Originally suggested by courts in the post-*Brown* cases as an alternative to desegregation schemes that required extensive busing, magnet schools "are those that offer a specialized school curriculum organized around a particular subject matter or theme, or that use a distinctive teaching methodology, and seek to attract both white and minority students from all parts of the city, and away from their neighborhood schools or private schools."[335] As the definition suggests, these programs were primarily used in urban settings with the purpose of decreasing the "white flight" of the 1970s and 1980s.[336] The Department of Education has pressed for the use of magnet schools as a race-neutral alternative, requiring that federal funding assistance for magnets be tied to plans to use them to "reduce, eliminate, or prevent 'minority group isolation.'"[337] Despite these noble intentions, a number of problems remain with magnet schools. Like all race-neutral plans, they are a clumsy substitute for achieving the objective of racial diversity. They often result in classroom-level segregation and limit access to the most in-need, under-educated students of any racial background.[338] Finally, they are costly and would be exceedingly difficult to apply to a degree that would significantly desegregate or improve the diversity of an entire school district.

2. Lottery Systems

A lottery system is the most basic and most truly neutral plan for achieving diversity. A school assignment lottery would require individual schools or perhaps an entire school district to assign students from the community to schools completely at random. By assigning students at random, a lottery would create diversity by reducing the problem of racial segregation rooted in residential patterns that are mirrored when students go to their neighborhood schools. Charter and magnet schools have had some success creating a diverse student body in this fashion.[339] Although the Department of Education lists lotteries as one viable race-neutral alternative for a school system to pursue,[340] it seems to be an impractical if not impossible strategy for a community to pursue on a district-wide scale. Along with the fact that it would almost certainly be unpopular to remove all student choice and neighborhood school options, a lottery system also does nothing to improve diversity in homogenous communities. Clearly, a lottery which consists wholly of white students will not increase diversity to any significant degree.

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334. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792 (2007) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including . . . allocating resources for special programs and recruiting students and faculty in a targeted fashion . . . .").
335. Mark G. Yudof et al., Educational Policy and the Law 414 (West 2002) (1992).
336. *Id.*
337. Kahlenberg, *supra* note 276, at 9.
338. *See* Yudof, *supra* note 335, at 414-16.
339. *See* Achieving Diversity, *supra* note 276, at 79.
340. *Id.*

3. The Minneapolis "Choice Is Yours" Programs

The Minneapolis School District created the "Choice is Yours" program in the wake of a legal settlement following a challenge claiming that the district's segregated schools violated the Minnesota Constitution's education and equal protection clauses.[341] The plan can be described as a multi-district school choice plan created as a joint venture between urban and suburban school systems.[342] Focusing on socioeconomic status, the plan gives low-income Minneapolis students the choice to attend more affluent suburban schools.[343] As one of the few voluntary multi-district plans in existence, it reduces the problems associated with increasing diversity in racially isolated school districts. At the same time, it suffers from the same basic problems that afflict race-neutral SES plans: race and socioeconomic status do not always overlap and it thus may be less successful at achieving racial integration.[344] The fact that the Minneapolis plan was only created after a lawsuit settlement further suggests that this sort of remedy would be difficult to replicate.

4. Title I and No Child Left Behind

Some scholars suggest that Title I of the No Child Left Behind Act can serve as a force for increasing diversity.[345] The basic premise of the theory is that Title I of the No Child Left Behind Act provides parents with the right to transfer their child out of a failing school system and into a successful one.[346] Further, the law requires that the failing school district provide transportation for the transferred-out student(s) from its own Title I funds.[347] Since "failing," low-achieving school districts are disproportionately located in urban environments with high minority populations, diversity will be promoted if a significant number of parents from these areas transfer their children to the high-achieving, predominately white and middle class schools of the suburbs.[348] This theory has recently been put into practice in a few communities. In Greensboro, North Carolina, "considerable numbers" of students in "failing black schools" transferred to higher-performing schools with a predominately white population.[349] Ultimately, this plan is ineffective as a nation-wide solution to the

341. *See* Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 311 (2006).
342. *Id.* at 314.
343. *Id.*
344. *Id.* at 337.
345. *See* William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751 (2003); *see also* Jonathan Kozol, Op-Ed., *Transferring Up*, N.Y. TIMES, July 11, 2007 (making a similar argument as Professor Taylor, but recommending an amendment to No Child Left Behind strengthening transfer provisions).
346. Taylor, *supra* note 345, at 1757.
347. *Id.* Mr. Kozol recommends amending No Child Left Behind to require the state, rather than the low-income school, to pay for the cost of transfers. *See* Kozol, *supra* note 345.
348. Taylor, *supra* note 345, at 1758.
349. *See* Sam Dillon, *Alabama Plan Brings Out Cry of Resegregation*, N.Y TIMES, Sept. 17, 2007.

problem of segregated schools.[350] The plan is wholly voluntary and contingent on a significant number of families demanding school transfers for their children. For example, in Tuscaloosa, Alabama, in spite of significant outcry within the African American community and notification of the transfer right by the school district, only about 180 students requested a transfer under No Child Left Behind after a 2007 school attendance rezoning measure created dramatically resegregated schools.[351] This plan also does nothing to improve the diversity of the often racially isolated "failing" district; students are quite literally left behind. Most significantly, a school system cannot plan on an influx of students from a failing school district.

B. School Site-Based Plans

School site-based plans differ significantly from student-based plans. Instead of looking to the individual traits of specific students, like race or socioeconomic status, site-based plans analyze the demographics of the community or student population as a whole to determine appropriate school site assignments. In enacting a site-based plan, a government entity still uses racial identities to make decisions, but does so in a more generalized fashion that, to Justice Kennedy (and, presumably to the four dissenting justices), would be constitutional.[352] Justice Kennedy specifically referenced five different "general policies" for site-based plans that could permissibly consider race: (1) new school construction; (2) restructuring attendance zones; (3) allocating resources for special programs; (4) student and faculty recruiting; and (5) tracking enrollment, performance and other statistics.[353]

i. New School Construction

One way in which a community could create more diverse schools is by considering the intersection of race and residence when deciding where to build a new school. Choosing to build a school in a particular location in order to deliberately attract a heterogeneous cross-section of students has both advantages and disadvantages. Perhaps the most significant benefit of this strategy is that it is one of the few instances in the K-12 context in which the Supreme Court is still willing to allow the express consideration of race. This strategy does not "hide the ball" and allows communities to start from scratch in building a diverse school population. On the other hand, building new schools based on racial grounds would be politically controversial, is a relatively rare occurrence in any particular community, and will do little to affect desegregation in racially isolated school districts. Providing an example of this point, Justice Breyer noted in *PICS* that "Seattle has built one new high school in

350. Nationally, less than two to three percent of eligible students have utilized this transfer option. *Id.*; *see also* Kozol, *supra* note 345.
351. Dillon, *supra* note 349.
352. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring) ("It is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body.").
353. *Id.*

the last 44 years."[354] Absent a massive increase in school construction around the country, this strategy will have a minimal impact on school integration and diversity.

ii. Restructuring Attendance Zones

A similar site-based plan that could be used to integrate a school district is the restructuring of attendance zones. By redrawing the attendance lines for the schools in a district, a community might be able to alleviate the effects of residential segregation on school populations. This step can be taken by any school district at any time, without the need to wait for new school construction. The biggest problems with this strategy, however, are that it remains ineffective in racially isolated communities, would likely be controversial within a heterogeneous community, and might require gerrymandered attendance zones that force students to attend schools much further away than their traditional neighborhood schools. In Jefferson County, for example, restructuring only influenced diversity when it included a busing program.[355]

iii. Resource Allocation to Special Programs

School districts could also allocate resources to programs specifically designed to encourage ethnic or racial diversity. For example, a school district could set up a magnet program designed to attract students of all races on the basis of its academic rigor and promise of a superior education while also adding an ethnocentric element, such as an African American studies curriculum, to attract particular groups to the same school. The school funds a program designed to attract a particular racial group, but it does so in a fashion that does not consider the individual racial identity of each student. While this sort of program would likely be deemed constitutional, the problem lies in the fact that it is inherently a special program rather than a district-wide solution. "The limited desegregation effects of these efforts," wrote the *PICS* dissenters, "extends at most to those few schools to which additional resources are granted."[356] This strategy might create diversity in certain schools, but it is unlikely that a school district would have the resources to replicate programs in every single racially isolated school.

iv. Student and Faculty Recruiting

Student and faculty recruiting incorporates the idea of using resources for special programs to encourage racial diversity. Presumably, a school district would use its resources to target particular ethnic groups to attend or teach at particular school sites; this is similar to the diversity marketing many university and graduate schools pursue. Again, individual students or teachers would not be specifically required to attend a school because of their race, but rather school districts would send out materials to a large number of community members to encourage them to go to

354. *Id.* at 2828 (Breyer, J., dissenting).
355. *Id.*
356. *Id.*

certain schools. This sort of plan is advantageous because there is no compulsory element and such a strategy would probably not receive much adverse public reaction. At the same time, because it cannot mandate any sort of action, it is unlikely that a recruiting effort alone will lead to any immediate reform.

v. Tracking Data by Race

Justice Kennedy's final suggestion, "tracking enrollments, performance, and other statistics by race" is self-explanatory.[357] What he neglected to discuss in his concurrence is how such data-tracking might lead to greater diversity. As Justice Breyer argued, "tracking *reveals* the problem; it does not cure it."[358] While tracking these statistics is certainly useful to a school district, the data must be put to use by some other program designed to increase diversity. This brings a school district right back to the problem of what sort of program to use if race-neutral options, even those that use race-based data, fail to achieve diversity.

VII. Conclusion - The Future of Race, Segregation and Diversity in Schools

The role played by race in the K-12 public school setting remains deeply unsettled after the Supreme Court's decision in *Parents Involved in Community Schools*. The Court faced a collision between two distinct lines of precedent: one related to the desegregation and integration of public schools, the other related to the careful and restrictive use of race in affirmative action programs. The "meaning" behind the use of race in this setting is firmly entrenched in 50 years of cases following *Brown*, which struggled with the removal of de jure segregation and the creation of integration remedies. The "method" the Supreme Court applied when grappling with the constitutional meaning of the voluntary use of race is rooted in *Grutter* and *Gratz*'s rigorous requirements for strict scrutiny review of all race-based actions. The decision in *PICS* is ultimately a narrow one, leaving some room for the constitutional use of race in the public school context. Despite a majority that could say little about compelling interests and a plurality strongly suggesting that there can be no constitutional interest in the use of racial distinctions in the public school setting, five justices seem to agree that school districts have a compelling interest in using race to promote some form of student diversity as well as an interest in alleviating racial isolation. Although a majority found both the Seattle and Jefferson County plans to be insufficiently narrowly tailored, Justice Kennedy remained at least somewhat open to the idea that a plan of that type could withstand constitutional scrutiny. Further, Justice Kennedy specifically delineated a number of alternative plans that could use race in a general way and still remain constitutionally adequate. Nevertheless, it is clear that the majority of the current Court is committed to making the Constitution as color-blind as possible in the public school setting.

357. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2792 (Kennedy, J., concurring).
358. *Id.* at 2828 (Breyer, J., dissenting).

What does the result in *PICS* mean for future school planning and the desire for integration or some form of diversity? Are there any remaining programs that are both constitutional and effective? A review of the challenges brought against several traditional race-based assignment plans in the circuit courts prior to the Supreme Court's decision in *PICS* suggests that using the race of individual students as a definitive factor in the assignment process will almost always be held unconstitutional. Even the sophisticated plans employed in *Comfort* will likely fail because the Court does not seem willing to excuse *any* narrow tailoring factor with the argument that "context matters." Student assignment plans that have moved away from the use of race show greater promise of withstanding constitutional analysis but seem less likely to foster diverse or integrated schools. The various race-neutral plans that rely on students' socioeconomic status are constitutionally valid and utilize a factor that is related to achievement levels and may also lead to racial integration. Yet even when they are effective at integrating schools economically, these plans do not always map onto race and may forfeit some values associated with racial diversity. The nuanced Cambridge Plan attempts to incorporate both sets of values by focusing primarily on race-neutral diversity factors that include socioeconomic status while still reserving the right to use race in schools that remain segregated. Although this plan may be more effective at capturing all forms of diversity, it is also more constitutionally tenuous because of its use of race. Other alternative race-neutral plans such as lotteries and magnet schools are constitutional but are unlikely to have any significant impact on integration and diversity on a district-wide level. Finally, as noted above, site-based plans have the best hope of surviving judicial review despite dealing directly with race, but are also unlikely to be adopted in a way that will lead to widespread improvements in the diversity of school systems. In the end, a number of constitutionally valid methods remain for communities to use, but few appear to be truly effective at reducing racial segregation and increasing diversity.

It may appear ironic to the casual observer, but the Supreme Court's decisions led to a legal definition of diversity that almost entirely excludes race. School districts and the communities that control them must look for race-neutral means in creating diverse schools, even if they still wish to include race in their own internal definitions of diversity. Whether this is normatively desirable or undesirable depends on the perspective of the observer and his or her perception of race. The Supreme Court chose to support Dr. King's dream of being judged by the "content of one's character;" whether his dream that we all sit at the same "table of brotherhood" will follow remains to be seen.