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CONFLICT ON THE UNITED STATES SUPREME COURT: JUDICIAL CONFUSION AND RACE-CONSCIOUS SCHOOL ASSIGNMENTS

Philip T. K. Daniel and Mark A. Gooden***

I. INTRODUCTION

The United States Supreme Court addressed the question of race-conscious decision making in student assignment plans in *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*.[1] Immediately following the court's decision, many questioned whether policymaking could ever focus on such plans in K-12 education. As the courts and other legal authorities have subsequently interpreted the case, it seems evident that educational diversity may be a compelling governmental interest that justifies the implementation of policies designed to provide some level of racial balance in K-12 education. What constitutes a plan that is narrowly tailored to meet this interest—and thus what constitutes a constitutionally permissible plan—is the subject of judicial confusion.

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1. Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1 551 U.S. 701 (2007) [hereinafter *PICS*].

> School districts in Seattle, Washington and Jefferson County, Kentucky voluntarily adopted race-conscious student assignment plans as both a remedial measure to address de facto segregation and, coextensively, to achieve the educational goal of a diverse student body that would be reflective of the racial make-up of the entire district community. The objective of the activity, according to school officials, was to promote the pedagogical and social benefits flowing from diversity in an increasingly pluralistic society and global marketplace.

Phillip T.K. Daniel, *Not So Much a Counterpoint as a Call for Change: The Decision of* Parents Involved for Community Schools v. Seattle School District No. 1 *and its Impact on America's Schools*, 231 EDUC. L. REP. 511, 512 (2008).

The opinion authored by Chief Justice John Roberts, joined by three other justices, holds that diversity absent de jure[2] segregation was not a compelling interest for K-12 education.[3] Justice Stephen Breyer's dissenting opinion, joined by another three justices, holds in contrast that diversity in education is often a compelling interest absent de jure segregation.[4] Between these two divergent opinions rests Justice Anthony Kennedy's concurrence; functionally, his concurrence serves as the court's decision since it is needed to place Roberts' opinion in the majority.

This Article discusses *PICS* opinions at length, paying particular attention to Chief Justice Roberts' plurality and Justice Kennedy's concurrence. The analysis includes potential criticism of the plurality opinion and addresses unclear or inconsistent positions. Careful analysis shows that *PICS* leaves much open for interpretation and potential ambiguity. The following section analyzes four subsequent lower court opinions attempting to interpret and apply *PICS*. Comparison of these opinions and the widely divergent approaches of the four lower courts employ evidences judicial confusion and inconsistent application. The examination of these cases demonstrates the apparent lack of universally applicable standards for courts to apply in future cases.

For both educators and the attorneys who represent them, the crucial question remains as to what the *PICS* decision means for the future of race-conscious school assignments.

II. FOUR ON THE RIGHT, FOUR ON THE LEFT, AND KENNEDY IN BETWEEN

The first thing likely to strike any reader of the *PICS* decision is that it requires some effort to determine which of the opinions actually controls.[5] A close reading reveals that

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2. Daniel, *supra* note 1, at 8.

> De jure racial discrimination, as defined by the courts in desegregation cases, occurs in public education when the state or its representative agencies classify and segregate students according to race and thereby create dual school systems or racially identifiable schools within a school district. In contrast, de facto segregation in the public schools refers to a racial imbalance caused by decision making of private individuals involving social or economic factors such as housing patterns, rather than any official action.

3. *See PICS*, 551 U.S. at 720.

4. *Id.* at 842 (Breyer, J., dissenting).

5. The *PICS* case contains in fact five separate opinions, this Article analyzes at

only the portions of the Roberts opinion in which Justice Kennedy concurs are controlling law, as they are the only portions of any of the opinions that garnered the votes of a majority of the Court. It is important, to note, however, that the Breyer dissent received four votes, and that on certain issues, Justice Kennedy's swing vote is more closely aligned with the dissent than the majority. The resulting decision in this case is at once both intricate and entropic.

This section analyzes and offers a critique of the Roberts plurality, the Breyer dissent, and the Kennedy concurrence. This treatment will orient the reader as to each opinion's approach to the law, some shortcomings and strengths of each position, and difficulties that emerge in trying to glean a workable standard from the case.

A. Chief Justice Roberts

Chief Justice Roberts's opinion clarifies, first and foremost, that any government action in which the state "distributes burdens or benefits on the basis of individual racial classifications . . . is reviewed under strict scrutiny."[6] Consequently, a school district's use of racial classification must be "'narrowly tailored' to achieve a 'compelling governmental interest.'"[7] According to the Roberts opinion, to date, there are only two compelling governmental interests that the Supreme Court has identified for which an educational institution may use racial classifications: remedying racial discrimination created by law (de jure segregation), and student body diversity, broadly defined, in the context of higher education.[8]

Chief Justice Roberts wrote that neither of these contexts was applicable in *PICS*.[9] Regarding the first compelling governmental interest of remedying de jure segregation created by law, he observed that the Seattle School District was not subject to a court desegregation order at that time. For this reason, Roberts explained that it was difficult to argue that the district's efforts at racially influenced assignment decisions

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length three of them. For additional information, see *PICS* 551 U.S. 701 (2007).

6. *Id.* at 720.
7. *Id.* (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).
8. *Id.* at 720-22.
9. *Id.* at 720-21.

were required in order to comply with a court order to remediate de jure segregation.[10] Although the Louisville School District was at one time subject to a desegregation order, upon compliance with that order, the court closed the proceedings and certified the district as unitary.[11] As a result, Louisville school officials were likewise unable to claim that they were remedying de jure segregation.[12]

Further, the Roberts opinion summarily distinguished *Grutter v. Bollinger*,[13] a case permitting the use of race in collegiate admissions decisions. The Chief Justice factually distinguished between K-12 attendance and a college education, claiming that the "diversity interest at stake in [*Grutter*] . . . flowed from the unique First Amendment issues inhering in the context of high education: [specifically] expansive notions of freedom of thought and speech associated with 'institutional' academic freedom."[14]

With these two precedents identified and distinguished from the case at bar, Chief Justice Roberts sought resolution of the next two questions: first, is there another educational goal like remedying de jure segregation or student diversity in higher education that is a compelling governmental interest, and if so, are the actions by the school districts in *PICS* narrowly tailored to achieve this goal?

Chief Justice Roberts first addressed the underlying goals of the districts' plans. Since the plans were not individualized in their application, considered only two racial categories (white and non-white), and identified the number of students assigned on the basis of race only after the fact, he found that true goal of the student assignment plans was "directed only to racial balance, pure and simple."[15] As racial balancing was "an objective this Court has repeatedly condemned as illegitimate," it could not be a compelling governmental interest.[16] In explaining this position, the Chief Justice argued that accepting racial balancing without demanding a greater

10. *Id.* at 712.

11. *Id.* at 720-21.

12. *Id.*

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

14. Daniel, *supra* note 1, at 515 (citing John LaNear, *The Misreading of* Sweezy*: How Justice Powell Mistakenly Created Institutional Academic Freedom*, 201 EDUC. L. REP. 501 (2006)).

15. *PICS*, 551 U.S. at 726.

16. *Id.*

objective, such as remedying intentional discrimination or student diversity in higher education, means that race consciousness could always be a compelling governmental interest regardless of context. This is because "[a]llowing racial balancing as a compelling end in itself would 'effectively assur[e] that race will always be relevant in American life, and that the "ultimate goal" of "eliminating entirely from governmental decision-making such irrelevant factors as a human being's race" will never be achieved.'"[17] Interestingly, Chief Justice Roberts did not purport that the goals behind the disputed plans in *PICS* were unjustifiable in all contexts.[18] The opinion pointed out that neither district framed the plans as pure racial balancing.[19] Indeed, the goals identified included the encouragement of racial diversity and the prevention of racial isolation.[20] Chief Justice Roberts did not find that these particular goals were insufficiently compelling, but rather that the plans at issue failed to actually address these goals.[21] To support this position, the opinion pointed to persuasive evidence on the record that the districts were unsure as to what precisely constituted racial diversity or racial isolation.[22]

Finally, the Chief Justice discussed the question of narrow tailoring. "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives.'"[23] The Louisville district provided no evidence of district consideration of alternative options.[24] The Seattle district did consider alternative options, but Chief Justice Roberts' assessment that the alternatives "were rejected with little or no consideration" seems an implicit finding of a failure to consider them in good faith.[25]

With a view toward both school districts, the Roberts opinion appears to suggest that the only compelling governmental interest justifying a student assignment plan

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17. *Id.* at 730 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 320 (1986) (Stevens, J., dissenting))).

18. *Id.* at 747-48.

19. *Id.* at 725-26.

20. *Id.* at 715.

21. *Id.* at 732.

22. *Id.* at 731.

23. *Id.* at 735 (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).

24. *Id.*

25. *Id.*

that takes race into account is one designed to remedy de jure segregation.[26] Additionally, even in the face of a compelling governmental interest, Chief Justice Roberts also required satisfaction of the narrow tailoring test; a student assignment plan must use racial classifications only as "a last resort."[27]

B. Criticism of the Roberts Opinion

This section offers a critique of Chief Justice Roberts' opinion in *PICS* on the basis of its seeming adherence to an ambiguous position of a color-blind constitution advocated in dissent by Justice Harlan in *Plessy v. Ferguson*. The analysis shows that subsequent Supreme Court treatment of the color-blind constitution position leaves dubious evidence of its actual precedential value and shows significant debate among the Justices as to its meaning. Chief Justice Roberts' reliance on this concept is therefore somewhat suspect and casts doubt upon the validity of his opinion.

As Justices Breyer and John Paul Stevens noted in their dissents,[28] Chief Justice Roberts's opinion seemed, in some respects, to ignore significant constitutional precedent by the Supreme Court holding that the Constitution does not require color-blind treatment under the law. The Chief Justice instead appeared to advocate a position much older than *Brown v. Board of Education*,[29] namely the view expressed by Justice John Harlan in his famous dissent in *Plessy v. Ferguson*:

> Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a

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26. *Id.* at 749 (Thomas, J., concurring).

27. *Id.* at 735 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 519 (1989)).

28. For Justice Stevens's opinion, see *id.* at 797–803; for Justice Breyer's opinion, see *id.* at 803–68.

29. 347 U.S. 483 (1954).

> State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.[30]

The most obvious problem with this position is that Justice Harlan wrote in dissent, so his words did not reflect the Supreme Court's position at the time he wrote them.[31] In order for the color-blind constitution to have precedential value, some subsequent decision or decisions must have adopted it; this proves problematic in trying to justify Chief Justice Roberts' adherence to Harlan's position. The Supreme Court overturned *Plessy v. Ferguson* in 1954 in *Brown v. Board of Education.*[32] In this subsequent case, the Supreme Court noted that prior to *Plessy*, the Supreme Court had interpreted the Fourteenth Amendment to prohibit "all state-imposed discriminations against the Negro race"—a concept distinguishable from Chief Justice Robert's articulation of the color-blind constitution as prohibiting discrimination against any racial group.[33] In order to follow precedent, the *Plessy* decision did not per se allow racial discrimination, but rather found that segregated services such as transportation and education, despite treating races differently, were separate but still equal and thus not discriminatory.[34] When the Court issued its decision in *Brown v. Board of Education*, it followed the *Plessy* decision insofar as it rejected outright racial discrimination, but went further in holding that segregation was itself discriminatory and therefore impermissible.[35]

While simplified, this timeline it is critically important for evidencing ambiguity and, perhaps, disingenuousness on the part of Chief Justice Roberts. The foregoing shows that when the Supreme Court overturned *Plessy*, it declined to adopt the color-blind constitution conceptualized by Justice Harlan. In fact, in the years following *Brown v. Board of Education*, it became quite apparent that the Supreme Court, even if it chose

30. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

31. It has been argued that Justice Harlan intended for his words to be applied only to African-Americans and not to other groups. *See* Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great was "The Great Dissenter?"*, 32 AKRON L. REV. 629 (1999).

32. Brown v. Bd. of Educ., 347 U.S. at 494-95.

33. *Id.* at 490-91.

34. *Id.* at 490.

35. *Id.* at 493.

to adopt the color-blind constitution idea, the Court was not entirely certain what this concept meant.[36]

One articulation of the color-blind constitution is found in Justice Potter Stewart's dissenting opinion in *Fullilove v. Klutznick*, joined by Justice William Rehnquist.[37] Justice Stewart argued that the color-blind constitution not only prohibited governmental action designed to exclude citizens on the basis of race, but that it also prohibited governmental action designed to grant preferential treatment to citizens of certain races.[38]

An alternative formulation of the color-blind constitution is found in Justice O'Connor's majority opinion in *Johnson v. California*, in which she argued that the color-blind constitution did not prohibit race-based governmental action, but only required strict scrutiny of any such action.[39]

A third iteration of the color-blind constitution——found in *Regents of the University of California v. Bakke* more or less rejects the concept. In partial dissent, Justice Brennan (with Justices White, Marshall, and Blackmun) argued that Justice Harlan's conception of a color-blind constitution "has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions."[40]

Finally, a fourth and divergent approach is found in *Grutter v. Bollinger*, wherein dissenting Justices Ginsburg, Souter, and Breyer argued that the constitution is color conscious rather than color-blind.[41] Under this construction, race-based governmental action is impermissible only when it is invidious, not when it is designed to "prevent discrimination being perpetuated and to undo the effects of past discrimination."[42]

Precisely what, if any, precedential value may be gleaned from the Harlan dissent in *Plessy* has been the subject of significant debate by the Supreme Court, as enumerated above,

36. *See* Bell v. Maryland, 378 U.S. 226, 343 n.42 (1964) (Black, J., dissenting).

37. Fullilove v. Klutznick, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting).

38. *Id.* at 522-23.

39. Johnson v. California, 543 U.S. 499, 513 (2005).

40. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 355-56 (1978) (Brennan, J., concurring in part and dissenting in part).

41. Grutter v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting).

42. *Id.* at 302 (quoting U.S. v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966)).

and by legal scholars as well.[43] The result is that it is unclear to what extent the Court has ever affirmed the notion of a color-blind constitution. Even if the Supreme Court has indeed adopted the concept, it is uncertain what that color-blind constitution idea means in practical application since the Justices themselves have strongly disagreed on the meaning.

This judicial discord over the meaning of a color-blind constitution is strongly visible in the *PICS* decision. In acknowledging that a color-blind requirement need not apply to citizens if such treatment is the result of court-ordered desegregation, Chief Justice Roberts evidenced his own acknowledgment that at least recent Supreme Court precedent rejected an unqualified articulation of a color-blind constitution. Chief Justice Roberts' tacit recognition of past interpretation suggests that, Chief Justice Roberts is arguing for new acceptance of a color-blind constitution concept. In this sense, he might simply have attempted to move the Court to a new post-race position.[44] This position would be something akin to the Court's decision in *Grutter*, holding: "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [diversity in higher education] approved today."[45] Regardless if the new course advocated in the Chief Justice's opinion is a mere precedential correction or a completely new paradigm, Chief Justice Roberts' opinion appears to substantially depart from Supreme Court jurisprudence.[46]

Finally, it is important to note that the Chief Justice's opinion seems to be a rather activist one. Of particular significance is the willingness of Chief Justice Roberts and the conservative segment of the court to advocate for what seems to be little short of a rejection of stare decisis with regard to the Court's recent rulings on race. The liberal element of the Court

43. *E.g.*, Darlene C. Goring, *Private Problem, Public Solution: Affirmative Action in the 21st Century*, 33 AKRON L. REV. 209 (2000); Keith E. Sealing, *The Myth of a Color Blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L. 157 (1998).

44. *See* Jeffrey Rosen, *The Color Blind Court*, 45 AM. U. L. REV. 791 (1996) (arguing that the origin of this position is Justices Scalia, Thomas, Kennedy, and Chief Justice Rehnquist).

45. Grutter, 539 U.S. at 310. Note that the meaning of this "holding" is disputed. *See* Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83 (2006).

46. Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 38 (2007).

advocates a deferential approach to local school districts that seems to have its roots in federalism.[47]

C. Justice Breyer

Justice Breyer's dissent focused on a dramatically different issue than the Chief Justice's opinion. Justice Breyer argued that the issue before the Court was critical to educators and best resolved by educators rather than the Court.[48] This position, calling for a high level of deference to governmental policymakers, includes a strong appeal to federalism.[49] Education is typically a state issue, and the Court should arguably leave states and local school districts to develop educational policy without judicial interference.[50] Indeed, Justice Breyer's willingness to grant deference to local school districts was so great that he even advocated a different level of scrutiny for race-based student assignment plans. This lower level of scrutiny would result in relatively little judicial evaluation of student assignment plans based on efforts of racially inclusivity.[51] To understand this reasoning, one must walk step-by-step through the entire Breyer opinion.

Justice Breyer initially asserted that the Roberts plurality identified a distinction without a difference.[52] He agreed with the plurality that diversity has historically met the compelling governmental interest test when performed 'to remedy de jure segregation.[53] According to Justice Breyer, however, the issue in *PICS* involved housing patterns that, absent reassignment of some students, resulted in neighborhood schools as racially

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47. For an argument positing that the decision evidences judicial restraint, see William E. Thro, *The Constitutional, Educational, and Institutional Implications of the Majority and Concurring Opinions in* Parents Involved in Community Schools, 231 EDUC. L. REP. 495 (2008).

48. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 848-49 (Breyer, J., dissenting).

49. "Federalism, as it has developed in the United States, is the system in which power to govern is shared between the national and state governments and where federal and state officials may respectively have powers that are at once co-extensive and overlapping." Philip T.K. Daniel & Patrick D. Pauken, *The* PICS *Decision—Academic Freedom v. Federalism: Consider the Constitutional Implications*, 18 TEMP. POL. & CIV. RTS. L. REV. 111, 133 (2008).

50. *See id.*

51. *PICS*, 551 U.S. at 833 (Breyer, J., dissenting).

52. *Id.* at 806.

53. *Id.* at 843-44.

segregated as they would be under school segregation laws.[54] Circumstances where schools become racially segregated despite no legal requirement of racial separation are known as de facto segregation. For Justice Breyer, regardless if the segregation at issue results from either de jure or de facto segregation, district plans like those used by the Seattle and Louisville school districts "represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education* . . . long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake."[55]

According to the dissent, *Brown v. Board of Education* ruled that segregation was unconstitutional, and that school districts must integrate. Precisely how a school district complied with *Brown* in attempting to achieve integration was left "to the judgment of local communities."[56] Because segregation itself was found unconstitutional, Justice Breyer argued that "the distinction between *de jure* segregation . . . and *de facto* segregation . . . is meaningless in the present context."[57]

Justice Breyer also objected to Chief Justice Roberts' opinion on grounds that the distinction between de jure and de facto segregation as determined by judicial finding is neither meaningful nor manageable.[58] The extensive histories of both the Seattle and Louisville school districts provide some support for this position. As the plurality opinion pointed out, Louisville had once been subject to a desegregation order, while Seattle was never subject to such an order.[59] Justice Breyer, however, observed that the Seattle school district may quite possibly have been subjected to such an order had it not entered into a private settlement agreement that included desegregation.[60] In other words, both school districts were arguably segregated at one time, equally in violation of constitutional law; despite this, under Chief Justice Roberts' analysis, one district could permissibly use race-based admissions to integrate and the other district could not, the only distinction being whether the

54. *Id.* at 806.
55. *Id.* at 803 (Breyer, J. dissenting).
56. *Id.* at 804.
57. *Id.* at 806.
58. *Id.* at 843-44.
59. *Id.* at 720-21.
60. *Id.* at 820-21 (Breyer, J., dissenting).

school district settled the case or took it to court.[61] For Justice Breyer, this was evidence that the distinction between de jure segregation and de facto segregation was—at least for the purposes of constitutional law—a false dichotomy.[62]

After dispensing with the de jure/de facto distinction, Justice Breyer reframed the question and asked, "Does the United States Constitution prohibit these school boards from using race-conscious criteria in the limited ways at issue here?"[63] In answering this question, Justice Breyer identified several cases in which the Supreme Court had, as a general principle, granted broad discretion to school districts in the creation of educational policy.[64] Consistent with this discretion, the Court found that, "'[A]s a matter of educational policy[,] school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.'"[65]

Justice Breyer argued that this position is consistent with historic equal protection jurisprudence holding that race-based policymaking is subject to different analyses dependent upon if the underlying policy seeks to include or to exclude members of the targeted race.[66] The dissent appears to argue for two independent race-based approaches depending on what is at issue: traditional strict scrutiny for racial exclusion policies and something similar to the rational basis test for racial inclusion policies.[67]

In applying his hybrid rational basis test[68] to the facts of *PICS*, Justice Breyer contended that "the school plans under review [did] not involve the kind of race-based harm that has led this Court, in other contexts, to find the use of race-conscious criteria unconstitutional."[69] A guidepost to aid in identifying whether the use of race considerations is inclusive

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61. *Id.*

62. *Id.* at 821.

63. *Id.* at 823.

64. *Id.* at 822.

65. *Id.* at 824 (quoting N.C. Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971)).

66. *Id.* at 829.

67. *Id.* at 832-33.

68. The "rational basis test" is a judicial construction where a finding is made that government activity affects neither a fundamental right nor implicates a suspect class, hence, prescribing the appropriate level of judicial scrutiny as rationally related to a legitimate government interest. *See, e.g.*, 16B Am. Jur. 2d *Constitutional Law* § 813 (1998).

69. *PICS*, 551 U.S. at 836 (Breyer, J., dissenting).

and permissible, or conversely exclusive and harmful, Justice Breyer iterated factors proposed by Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit. Judge Kozinski found that the use of race is not harmful if "'it carries no racial stigma and says nothing at all about that individual's aptitude or ability.'"[70] This, Justice Breyer argued, is a constitutionally distinct difference—that is, whether the race-based action is intended to result in racial inclusion or racial exclusion—requiring a different level of scrutiny depending on the nature of the action.[71]

Judge Kozinski took this same position in concurring with the majority when the *PICS* case appeared before the Ninth Circuit.[72] As he posited, the Fourteenth Amendment was designed to prevent the exclusion of racial minority groups.[73] For this reason, governmental efforts formulated to include racial minority groups cannot run afoul of the Fourteenth Amendment.[74] An inclusivity versus exclusivity distinction can explain seeming factual anomalies regarding race-conscious actions. The distinction illuminates, for example, why seeking to preemptively exclude members of racial minority groups from jury service is prohibited, while consideration of race in programs aimed at increased participation of racial minorities in higher education is permitted.[75]

Although not addressed in his dissent, Justice Breyer's distinction between policies of inclusion and policies of exclusion is itself problematic. The question remains how to determine if a policy is racially inclusive rather than exclusive. By way of example, if a citizen is a member of racial group A, then any policy designed to include more members of racial group B in a numerically limited activity, such as school enrollment, results in intentional action that automatically excludes members of racial group B. Despite this ambiguity, a clear standard for how a court should determine when a policy fosters racial inclusion rather than exclusion is, however, unaddressed by the dissent. Justice Breyer, having offered this

70. *Id.* (quoting Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1162, 1193-94 (2005)).

71. *Id.* at 836-37.

72. Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1193 (2005), *rev'd*, 551 U.S. 701 (2007) (Kozinski, J., concurring).

73. *Id.*

74. *Id.* at 1195.

75. *Id.* at 1193.

position, ultimately concluded this analysis by applying the traditional strict scrutiny test in an attempt to demonstrate that even under the analysis of the Roberts plurality, the student assignment plans were permissible.

Justice Breyer asserted three reasons that the student assignment plans articulated a compelling governmental interest.[76] First, the consequences of de jure segregation continue long after the underlying laws are struck down.[77] The continued existence of these consequences ultimately justify remedy, not whether there is a court order in place formally acknowledging their existence.[78]

Secondly, racial diversity has educational benefits for all students, and racial isolation is educationally harmful for all students.[79] Taken together, avoiding racial isolation and ensuring diversity is an important educational goal long-recognized by the Court—and as such, the Court should defer to the local school board's recognition of this goal as a compelling one.[80]

Finally, since our society is pluralistic, there is value in and need for a public school system that prepares students for life in an integrated, pluralistic society.[81] Again, Justice Breyer argued that more than sufficient evidence exists to support such an idea, and consequently, the Court should defer to a local school district's determination that such goals serve a compelling governmental interest.[82]

Taken individually or collectively, Justice Breyer argued that these three factors offer more than adequate justification for a finding that the Seattle and Louisville plans served a compelling governmental interest and therefore satisfied the first prong of the strict scrutiny test:

> The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general "societal discrimination" . . . but of primary and secondary school segregation . . . it includes an effort to create school environments that provide better educational opportunities

76. *PICS*, 551 U.S. at 838-841 (Breyer, J., dissenting).
77. *Id.* at 838.
78. *Id.* at 838-39.
79. *Id.* at 839.
80. *Id.*
81. *Id.* at 840.
82. *Id.* at 840-41.

> for all children; it includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not "compelling," what is?[83]

Justice Breyer summarized his position by arguing that in addition to serving a compelling governmental interest, the district plans also met the narrow tailoring requirement in that (1) student choice resolves eighty percent of school assignments, (2) broad range limitations on the disparity permissible in a given school are more narrowly tailored than an affirmative quota or similar approach, and (3) in each student assignment plan developed to date, race has played a less central part.[84] For Justice Breyer, continuing to advocate for some level of deference to the local school board, the plans at issue in *PICS* were narrowly tailored to achieve the compelling governmental interests previously identified.[85]

D. Justice Kennedy

Justice Kennedy opened his concurring opinion with what appears to be the theme of his position in the case: "In my view the state-mandated racial classifications at issue . . . are unconstitutional as the cases now come to us."[86] The key phrase here is "as the cases now come to us." Justice Kennedy engaged both the Roberts and Breyer opinions, accepting some premises from each. The result is that his concurrence is both the controlling precedent of the case by casting the deciding vote,—while at the same time representative of only Justice Kennedy's view. Eight other justices advocated different positions. In this respect, the Kennedy opinion is somewhat enigmatic, and thus deserves robust discussion.

Beginning his opinion with a simple premise, Justice Kennedy rejected Chief Justice Roberts' assertion that the school districts failed to advance a compelling governmental interest for the race conscious student assignment plans at issue.[87] Justice Kennedy determined that, "[d]iversity,

83. *Id.* at 843.
84. *Id.* at 846-48.
85. *Id.* at 855.
86. *Id.* at 782 (Kennedy, J., concurring).
87. *Id.* at 783.

depending on its meaning and definition, is a compelling educational goal a school district may pursue."[88] Despite his acceptance that diversity, even in K-12 education, may serve a compelling governmental interest, he concurred with Chief Justice Roberts in finding the student assignment plans unconstitutional.[89] The explanation for this is relatively straightforward in that Justice Kennedy agreed with Chief Justice Roberts that the district plans must be subjected to strict judicial scrutiny; strict scrutiny required the plans to fulfill a compelling governmental interest while also narrowly tailored to achieve that interest.[90] In applying this test, Justice Kennedy acknowledged, without holding, that the student assignment plans might have a compelling governmental interest but even in the presence of that interest, the government still "has the burden of proving that [the] racial classifications are 'narrowly tailored measures.'"[91] Here, Justice Kennedy found that the narrow tailoring requirement was not satisfied because the school districts' disputed use of racial classifications was made in "terms so broad and imprecise that they cannot withstand strict scrutiny."[92]

One should recall, nevertheless, Justice Kennedy's introductory comment that the plans at issue were unconstitutional "as the cases now come to us." [93] The particular facts at issue that led to Justice Kennedy's opinion included the specific plan requirements and their execution. He further outlined the precise policies and practices he found objectionable. For example, he found an absence of narrow tailoring because it was unclear who made the formal decision to reject a student's request for assignment when it would adversely impact racial balance; the facts were also unclear whether this decision was subject to any administrative oversight.[94] Justice Kennedy also objected to the lack of explanation in the district plans for how similarly situated students should be treated when only one could be placed in a

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* (quoting Johnson v. California, 543 U.S. 499, 505 (2005)).
92. *Id.* at 785.
93. *Id.* at 782.
94. *Id.* at 785.

particular school.[95] The concurrence pointed out that many of these objections might be satisfactorily addressed in practice.[96] Despite this fact, because strict scrutiny requires that a school district bear the burden of proving narrow tailoring, compliance with this requirement demands carefully articulated policies.[97] In other words, the court "cannot construe ambiguities in favor of the state."[98]

Another of Justice Kennedy's objections focused on the actual racial categories utilized in the plans.[99] In the Seattle plan, students were divided into two racial categories: white and non-white.[100] Justice Kennedy found that these two "crude racial categories" did not evidence a carefully constructed, narrowly tailored means by which to achieve the compelling interest of educational diversity.[101]

The remainder of the concurrence addresses concerns raised by both Chief Justice Roberts and Justice Breyer. What results is a much clearer understanding of his views. First, he rejected what he referred to as the Chief Justice's "all-too-unyielding insistence that race cannot be a factor" in instances Justice Kennedy would himself probably allow.[102] While Chief Justice Roberts' admonition—that to end racial inequality, the government must cease treating individuals unequally based on race—might appeal to the other conservative members of the Court, Justice Kennedy believed such a position contradicts more than fifty years of experience that suggests "the problem before us defies so easy a solution."[103] Justice Kennedy agreed with Chief Justice Roberts that the *PICS* case included the promulgation of a compelling governmental interest unique from those previously recognized by the Court—including *Grutter*. —The concurrence nonetheless departed from the Chief Justice in that Justice Kennedy suggested that past recognition of compelling interests such as diversity in student enrollment in higher education "help inform the present

95. *Id.*
96. *Id.* at 786.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 787.
103. *Id.* at 788.

inquiry," and suggested that similar compelling interests might be identifiable under different factual circumstances.[104]

Similarly, while Justice Kennedy's aligned some of his views with Justice Breyer's dissent, he heavily criticized Justice Breyer for eschewing the strict scrutiny test in favor of a "permissive strict scrutiny test (which bears more than a passing resemblance to rational-basis review)."[105] The imposition of such a different standard of review for governmental inclusive race-based actions than for exclusive race-based actions would impose "no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling."[106]

Justice Kennedy concluded by stating:

> The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.[107]

The foregoing makes it seem that Justice Kennedy was reticent to accept the remedy of de facto segregation as a compelling governmental interest. He did, however, refuse to accept the Chief Justice's position that in most circumstances remedying de facto segregation in public schools cannot be a compelling governmental interest.[108]

Justice Kennedy's concurrence leaves unanswered two very serious questions that have since generated judicial confusion. The first question is whether Justice Kennedy implicitly recognized a compelling governmental interest that permits schools to use race-based policies to remedy de facto segregation. Although he rejected Chief Justice Roberts' negative answer to this question, he himself did not render a

104. *Id.* at 791.
105. *Id.*
106. *Id.*
107. *Id.* at 798.
108. *See id.*

positive response to the issue. For this reason, all educators are well advised to proceed cautiously before pursuing race-based policies. As discussed below, *PICS* is the second opportunity presented to Justice Kennedy to explicitly recognize a compelling governmental interest in race-based actions taken by public educators. On each occasion he declined to acknowledge such an interest outright, instead only acknowledging an abstract potential a compelling governmental interest. Educators and attorneys alike are left to wonder why Justice Kennedy avoided identifying what qualifies as a compelling governmental interest in this context.

The second question asks, assuming there is a compelling governmental interest, how can a school district fashion a policy or program to meet the narrow tailoring requirement? Critical to such an inquiry is the issue of how Justice Kennedy viewed the compelling interest in the education context. The compelling interest could be expressed as pursuit of educational diversity, or conversely as avoiding racial isolation in education. Candor requires concession this may be a false dichotomy. The simple fact of the matter is, however, that Justice Kennedy's opinion does little to clarify what the compelling governmental interest would be, assuming there even is one.

On the one hand, one can conceive that educational diversity might qualify as a compelling governmental interest, thereby permitting a school district to affirmatively pursue actions designed to maintain diversity at or further diversify a local school. Conversely, one can conceive a more narrow compelling governmental interest that permitted a local school district to act only to prevent racial isolation in education. Under the latter formulation, a district might engage in race-based action only when the district had already become de facto segregated. The broader approach, in contrast, would allow school districts to act affirmatively to avoid finding themselves in such a situation in the first place. Whether Justice Kennedy would find either of these or some alternative paradigm a compelling governmental interest is unclear the absence of bright-line judicial guidance leaves school districts with little direction as how to narrowly tailor their actions.

Succinctly put, Justice Kennedy's opinion creates an opaque tapestry, and consequently, those courts that have subsequently interpreted the decision in *PICS* have reached some remarkably different conclusions as to its meaning and application.

III. JUDICIAL CONFUSION

Relatively little authoritative judicial interpretation is available to give contour to the *PICS* case. No federal appellate court has analyzed the *PICS* decision. The federal district courts that have discussed the case have typically done so where the examination of the case was either not outcome determinative or the *PICS* decision was simply deemed inapplicable. Notwithstanding these limitations, the courts that have studied the case generally agree that Justice Kennedy's concurrence is the authoritative position. When it comes to applying that opinion to the facts before them, lower court judges have interpreted the case with fairly significant variation.

In short, the existing judicial commentary seems to agree that Justice Kennedy's opinion controls and that educational diversity, or the avoidance of racial isolation in education, might be a compelling governmental interest. Under what circumstances and how a plan can be narrowly tailored to meet that interest is, at best, crepuscular. The following analysis of four subsequent opinions demonstrates the broad spectrum of interpretation of the *PICS* case by lower courts. Without clear standards by which to evaluate future cases, the resultant opinions are divergent in nature and show the general confusion of lower courts.

A. *Fisher: Remedying past injustice manifested as de facto segregation is impermissible*

The first of these cases is *Fisher v. Tucson Unified School District.*[109] In *Fisher*, the defendant school district sought a certificate of closure terminating court oversight of district desegregation efforts.[110] While the court ordered that the school district submit a full report documenting compliance

109. Fisher v. Tucson Unified Sch. Dist., 2007 U.S. Dist. LEXIS 61679, at 1 (2007).
110. *Id.* at 3.

with the desegregation settlement, it also reviewed the district's student assignment policy in light of the recent *PICS* decision.[111] The court in *Fisher* found that the student assignment policy, like those at issue in *PICS*, "'[did] not provide for a meaningful individualized review of applicants' but instead relie[d] on the race of the student in a non-individualized, mechanical way."[112] According to the lower court, *PICS*: made it quite clear that race-based student assignments required pursuant to a desegregation decree become constitutionally prohibited once the vestiges of prior intentional segregation are eliminated."[113] The policy at issue in *Fisher* prohibited student transfer where the transfer would "'further imbalance the ethnic makeup of the home school.'"[114] As in *PICS*, the student assignment plan at issue could result in an individual's race determining the outcome. Rather than simply holding that this was unconstitutional under *PICS*, the court broadly held that such a policy is itself "unconstitutional segregation unless [it is] aimed at remedying de jure segregation."[115]

Though not explicit, the court apparently read Justice Kennedy's concurrence primarily in light of Chief Justice Roberts' opinion. Justice Kennedy signed onto the Chief Justice's opinion in several sections, including where Chief Justice Roberts said:

> Our cases recognized a fundamental difference between those districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. School districts that had engaged in *de jure* segregation had an affirmative constitutional duty to desegregate; those that were *de facto* segregated did not.[116]

Importantly, as noted, Justice Kennedy implicitly rejected the Roberts position that remedying de facto segregation could never be a compelling state interest:

> The cases here were argued upon the assumption, and come to us on the premise, that the discrimination in question did

111. *Id.* at 33.
112. *Id.* at 34 (quoting PICS, 551 U.S. at 723).
113. *Id.* at 35.
114. *Id.* at 34. (quoting Tucson Unified School District's Policy).
115. *Id.* at 40.
116. Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1 551 U.S. 701 (2007) (Kennedy, J., concurring).

> not result from *de jure* actions. And when *de facto* discrimination is at issue our tradition has been that the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here.[117]

The question emerges as to how authoritative is Justice Kennedy's admonition to avoid classifications of different races unless under extraordinary circumstances not shown in the *PICS* facts. This question is easily identifiable but difficult to answer. Chief Justice Roberts and three other justices found that only the remedy of de jure segregation is a permissible governmental interest—at least in terms of remedying the consequences of past discrimination by law. Justice Kennedy clearly states his own position as general agreement, but with the caveat of the final line: "at least absent some extraordinary showing." This language leaves open some exceptional circumstance in which remedying de facto segregation might be found a compelling governmental interest the issue remains as to the precedential value of this phrase. Without Justice Kennedy's fifth vote, the plurality opinion is not the majority opinion, therefore leaving possible applications for Kennedy's narrow caveat. The language is perhaps mere dicta. Regrettably, the court in *Fisher* did not specifically address Justice Kennedy's qualifying phrase, and seems to have held only, as in *PICS*, that de jure segregation may be addressed through remedies inappropriate for de facto segregation.

While the *Fisher* court's declining to comment on Justice Kennedy's cautionary language is troublesome, there is an additional and far more problematic issue in *Fisher* since Justice Kennedy leaves an open door for an education exception in some future case. In *PICS*, Justice Kennedy did, with the exception of his "extraordinary showing" caution, seem to agree with the Chief Justice that remedying de facto segregation cannot be justified on the basis of addressing the consequences of past de jure segregation. In the concurrence, however, Justice Kennedy indicated that educational diversity, or at least avoiding racial isolation in education, might be a compelling interest.[118] The court in *Fisher* completely ignored

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117. *Id.* at 796.
118. *Id.* at 797-98.

this portion of Justice Kennedy's opinion, that while other courts have identified this as a key part of the opinion.

One of two scenarios best explains the analytical shortcomings of the *Fisher* decision. One option is that the decision is the result of insufficient context. *Fisher* seems to correctly apply the portion of the Chief Justice's opinion with Justice Kennedy in concurrence, that found remedying de facto segregation is not justified by a need to address the consequences of past de jure segregation. The court in *Fisher*, nonetheless, overlooked two important limitations that Justice Kennedy imposed on his concurrence: first, the *Fisher* court included no discussion of what might constitute an "extraordinary showing," and secondly, was completely silent on the two points Justice Kennedy's suggested might qualify as a compelling governmental interest–namely, educational diversity or at least avoiding racial isolation in education.[119]

One possible explanation of this lack of context may be that the student assignment plan in *Fisher* was subordinate to the primary issue of whether the district had achieved unitary status.[120] Under these circumstances, the *PICS* discussion may have been raised by the court rather than the parties, and thus the lack of discussion of Justice Kennedy's limitations on the Chief Justice's opinion in *Fisher* may be explained by an absence of dialogue on the issue by the parties in motions, briefs, or hearings.

The second possible scenario is that this decision was simply a means to an end and that rather than overlooking Justice Kennedy's limitations, the court deliberately disregarded them. The *Fisher* court's silence at to these limitations makes it uncertain if the court disregarded them nefariously or merely inadvertently, or if the court simply chose not to analyze these issues in the written ruling.

Regardless of the foregoing analysis, *Fisher* is the post-*PICS* decision that most resembles Chief Justice Roberts' opinion. However, because it does not align well with the Kennedy concurrence or other post-*PICS* cases, it remains to be seen to what extent the *Fisher* decision will be deemed authoritative.

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119. *Id.* at 796-98.

120. *See generally id.* at 715 (describing a school district found to have reached unitary status by removing its previous policy of segregation to the extent it was practicable).

B. Coalition to Defend Affirmative Action: Remedying de facto segregation is permissible if for the purpose of educational diversity or at least preventing racial isolation in education

Other courts have looked to the *PICS* case and reached a very different conclusion than that arrived at in *Fisher*. The court in *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, found that remedying de facto segregation is permissible if for the purpose of education diversity or at least preventing racial isolation in education.[121] Numerous plaintiffs filed suit, alleging that a state constitutional amendment prohibiting the state's use of affirmative action violated the Fourteenth Amendment of the United States Constitution.[122] The defendant, University of Michigan, moved to dismiss.[123]

In partially granting and partially denying the motion to dismiss, the court, albeit superficially, discussed *PICS* as the Supreme Court's reaffirmation that "states have a 'compelling interest [in] remedying the effects of past intentional discrimination' with race-conscious programs"—de jure segregation—and that "[i]t also appears that a majority of the justices agree that schools may employ race-based programs to address 'the problem of *de facto* resegregation in schooling.'"[124] The court found this precedent in Justice Kennedy's concurrence wherein he stated:

> The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.[125]

Although the court in *Coalition to Defend Affirmative Action* spent minimal time discussing *PICS*, it did recognize Justice Kennedy's mixed message on the subject, noting that while action to cure de facto segregation is apparently permissible, it

121. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 539 F. Supp. 2d 924, 957 (E.D. Mich. 2008) [hereinafter *Coalition*].

122. *Id.* at 924.

123. *Id.* at 944.

124. *Id.* at 957.

125. *PICS*, 551 U.S. at 788 (Kennedy, J., concurring).

is "fundamentally different" from the "obligation to cure past discrimination" that is the remedy for de jure segregation.[126] Unfortunately, the court did not address the deceptively simple question of what this "fundamental" difference may be.

Coalition to Defend Affirmative Action is an important case because it held—quite differently from the court in *Fisher*—that the limitations to the Chief Justice's opinion put forth by Justice Kennedy in his concurrence are in fact the authoritative decision in *PICS*. As a result of this, that court agreed with Justice Kennedy's implicit rejection of the position that only de jure segregation may be the basis for race-conscious remedial action. However, the lower court's limited treatment of the case also reflects the fact that Justice Kennedy has not affirmatively stated that race-conscious remedial action is permissible to address de facto segregation. The resulting decision in *Coalition to Defend Affirmative Action* seems to more accurately represent Justice Kennedy's position than the analysis *Fisher*, but still fails to provide meaningful interpretation and guidance for educators.

C. Meredith: De facto segregation may be addressed for the purpose of educational diversity or at least preventing racial isolation in education and, for guidance as to permissible means, one should look to the actions specifically listed in Justice Kennedy's concurring opinion in PICS

The views expressed in *Fisher* and *Coalition to Defend Affirmative Action* evidence continued confusion on the parts of lower courts on how best to interpret Justice Kennedy's concurrence. An alternative approach to the previously discussed cases involves applying Justice Kennedy's opinion as literally as possible. The Louisville school district in *PICS* implicitly took this approach in subsequent litigation.

In *Meredith v. Jefferson County Board of Education*, a case following *PICS*, the plaintiff requested that the court mandate a certain student's enrollment in a specific school within the district.[127] The court considered the plaintiff's request moot since the student was enrolled in the desired school prior to the

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126. *Coalition*, 539 F. Supp. 2d at 957.

127. Meredith v. Jefferson County Bd. of Educ., 2007 U.S. Dist. LEXIS 64473, at 2 (W.D. Ky. 2007).

hearing.[128] However, the court discovered during this dispute that the defendant school district utilized different attendance zones for black and white students.[129] This practice was not previously known to nor considered by either the district court or the United States Supreme Court. The district court ruled that the race-based attendance zone practice was impermissible, as "such an approach appears to be the functional equivalent of a race-based binary selection process, which a solid majority of the current Supreme Court has rejected in these circumstances."[130] The court, nonetheless, cited Justice Kennedy's concurrence as precedent, language stating that "[s]chool boards 'are free to devise race-conscious measures to address the problem in a general way and without treating each student in a different fashion solely on the basis of a systematic, individual typing by race.'"[131]

In order to explain the meaning of this finding, the court looked to the opinion itself, implying that permissible action on the part of the school district must conform to the list of actions specifically enumerated by Justice Kennedy in his concurrence:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. 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 that any of them would demand strict scrutiny to be found permissible.[132]

While treating Justice Kennedy's list as exhaustive is convenient and appears judicially manageable, this approach does not seem entirely consistent with Justice Kennedy's intentions. Justice Kennedy made it clear that the list provided was not meant to be exhaustive:

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128. *Id.* at 9.
129. *Id.* at 2.
130. *Id.* at 4.
131. *Id.* at 5 (quoting Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788-89 (2007)).
132. *PICS*, 551 U.S. at 789 (Kennedy, J., concurring).

> If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in a different fashion solely on the basis of a systematic, individual typing by race.[133]

The court in *Meredith* concluded that regardless what may or may not be permissible, Chief Justice Roberts and three other judges firmly shunned decision-making that can result in race becoming the sole determining factor, and observed that "Justice Kennedy, while not so unequivocal, was nevertheless equally clear" that this kind of racial classification was impermissible.[134]

Of particular concern with this approach is whether the benefit a judicially manageable test outweighs the detriment caused by an inflexible set of permissible options. This is best considered by the issue in this case. The Louisville school district utilized race-based attendance zones. The court found that this was impermissible because this practice was not one enumerated by Justice Kennedy, and further, it was a practice most analogous to the race-based student assignment plan struck down by the Court in *PICS*.

Two potential problems arise from this analysis. First and most obvious, Justice Kennedy expressed in his opinion that his words were not intended to be treated legalistically.[135] While it is understandable that a cautious court would do so anyway, the result is something of a judicial shortcut that ultimately provides little guidance for educators.

The second problem with the analysis in *Meredith* is that there is no explanation of how the impermissible race-based attendance zones were distinguishable from the permissible attendance zones drawn "with general recognition of the demographics of neighborhoods" mentioned in Justice Kennedy's concurrence.[136] While it is certainly possible to consider these distinguishable practices, without an examination of how they are distinguishable, the holding in *Meredith* also lacks meaningful guidance, despite its adherence

133. *Id.* at 788-89.

134. *Meredith*, 2007 U.S. Dist. LEXIS 64473, at 4.

135. *PICS*, 551 U.S. at 797-798 (Kennedy, J., concurring).

136. *Id.* at 789.

to Justice Kennedy's list of acceptable practices. In short, even if educators apply *PICS* legalistically and engage only in the practices specifically identified in the Kennedy concurrence as permissible, significant ambiguity may still plague their action. Educators are left to determine whether a specific district policy (such as race-based attendance zones) falls within the scope of one or more of the identified permissible practices). Reliance on Justice Kennedy's non-exclusive list of permissible practices in the *PICS* decision, may prove only to be the illusion of compliance.

Finally, perhaps the most interesting interpretation of the *PICS* case is found in *Hart v. Community School Board of Brooklyn.*[137] The court in *Hart* moved far from the Chief Justice's opinion, finding that *PICS* actually holds that *Grutter* applies to K-12 education as well as higher education.[138] *Hart* appears to be the other bookend to *Fisher* in that each seems, to some extent, to seek the means for an already determined end.

In *Hart*, the defendant school district moved to terminate a desegregation order and requested a certificate of closure.[139] The prospective interveners argued that although a formal certificate of closure had not previously been requested or granted, the court in 1990 had found the district had remedied the underlying de jure segregation constitutional violations.[140] Because of this finding, the school district's continued use of race in student assignments violated the Equal Protection Clause.[141] The court granted the motion to terminate the desegregation order and issued a certificate of closure.[142]

The court then stated that in *PICS* "Justice Kennedy acknowledged the need in some instances to take race into account in school assignments."[143] With no further explanation of how Justice Kennedy's concurrence supported the proposition, the court cited *Brown v. Board of Education* for the precedent that segregation "has a detrimental effect" on

137. Hart v. Cmty. Sch. Bd. of Brooklyn, 536 F. Supp. 2d 274 (E.D.N.Y. 2008).

138. *Id.* at 283.

139. *Id.* at 275.

140. *Id.* at 276.

141. *Id.*

142. *Id.* at 284.

143. *Id.* at 282.

education.[144] The court further announced that "[t]he same considerations that permit race as one factor among many that may be considered in college and graduate schools under *Grutter* and *Bakke* should be applied to grade schools where characteristics for future success or failure are imprinted on students."[145]

The application of the *Grutter* standard to grades K-12, though poorly substantiated in *Hart*, is not without justification. Admittedly, one problem with this argument is that Justice Kennedy dissented in *Grutter*—indicating that he would be unlikely to find *Grutter* applicable elsewhere. Significantly, a review of Justice Kennedy's dissent in that case reflects a position quite similar to his position in *PICS*:

> To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process. There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decision making.[146]

The inference when comparing these two cases is that Justice Kennedy acknowledges that there might be a compelling governmental interest in educational diversity or at least avoiding racial isolation in both K-12 and higher education, but that the processes at issue in both *Grutter* and *PICS* were not sufficiently narrowly tailored to achieve these interests.

Unfortunately, this inference is not so intuitive in context of the actual opinions. First, Justice Kennedy agreed to the plurality opinion written by Chief Justice Roberts with regard to Parts I, II, III-A, and III-C of *PICS*. In the conclusion of Part III-A, Chief Justice Roberts specifically identifies the *Grutter* decision, noting:

> The Court in *Grutter* expressly articulated key limitations on its holding—defining— a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments

144. *Id.* at 283.
145. *Id.*
146. Grutter v. Bollinger, 539 U.S. 306, 392-93 (2003).

> in elementary and secondary schools. The present cases are not governed by *Grutter*.[147]

While this would seem to suggest that Justice Kennedy similarly rejects the applicability of *Grutter*, he elsewhere somewhat favorably discusses that case. In his concurrence, he found the dissent's reliance on *Grutter* "understandable."[148] Justice Kennedy, however, found it "simply baffling" to think that either of the student assignment plans would hold up under *Grutter*.[149]

According to Justice Kennedy, in *Grutter* "the Court sustained a system that, it found, was flexible enough to take into account 'all pertinent elements of diversity.'"[150] In *PICS*, nevertheless, the school plans at issue were inflexible and overly-broad:

> If those students [subject to the assignment plans at issue] were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application. That, though, is not the case.[151]

Again, one is left with the distinct impression that Justice Kennedy had no quarrel with educational diversity, or at least avoiding racial isolation in K-12 education, as a compelling governmental interest. Justice Kennedy rather appears to argue that even if they were compelling governmental interests—and he seems almost coy in his refusal to say that they qualify—the Seattle and Louisville student assignment plans would still fail for lack of narrow tailoring, the same objection that he raised in *Grutter*.

IV. CONCLUSION

Although there has been no authoritative interpretation of *PICS* since the Supreme Court reached its decision, the consensus view of the lower courts is that Justice Kennedy's concurrence is the authoritative opinion of the court.[152] The few

147. Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007).

148. *Id.* at 792 (Kennedy, J., concurring).

149. *Id.* at 793 (quoting *Grutter*, 539 U.S. at 341).

150. *Id.*

151. *Id.*

152. Note that this is not a definitively resolved issue. For a recent article portraying the Roberts opinion as the more definitive portion of the decision see

extant federal trial court decisions are, by and large, in agreement that Justice Kennedy has implicitly accepted educational diversity and avoiding racial isolation in education as compelling governmental interests.

While there remains a great deal of uncertainty is how a school district can narrowly tailor a student assignment plan in order to achieve such an interest without running afoul of the Equal Protection Clause. At the very least, it seems that those actions listed specifically in Justice Kennedy's concurring opinion are constitutionally permissible, though as is seen in *Meredith*, the most recent decision, it is not always clear how those listed actions will be defined. It is also apparent that any race-based student assignment policy that results in one individual's race as the determinative factor in school enrollment is likely impermissible. There remains, however, a world of uncertainty between these two points, as evidenced by the significant nuances offered by the lower courts.

William E. Thro, *The Constitutional, Educational, and Institutional Implications of the Majority and Concurring Opinions in* Parents Involved in Community Schools, 231 EDUC. L. REP. 495 (2008).