MAY IT PLEASE THE JUSTICE: JUSTICE KENNEDY AND SCHOOL DESEGREGATION AFTER *PICS*

by
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The 2007 Supreme Court decision in Parents Involved in Community Schools v. Seattle School District No. 1 *was a significant milestone in school desegregation, throwing many school district desegregation plans into constitutional question. Parsing the many opinions handed down in the case, a plan likely needs to win the favor of Justice Kennedy—the swing vote between the plurality and the minority—in order for it to survive scrutiny. Using the text of Kennedy's opinion and some of his past opinions, this Comment applies these sometimes-murky signposts to develop a school district desegregation plan with an increased likelihood of constitutionality post-*PICS. *Following discussion of the plan fundamentals, it is then applied to a large, urban school district to measure its efficacy.*

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I. INTRODUCTION

As of 2006, there were more than 16,000 public school districts in the United States, enrolling millions of students.[1] From the time the Supreme Court declared that "in the field of public education the doctrine of 'separate but equal' has no place,"[2] these districts have made efforts (sometimes with the assistance, urging, or mandate of federal district courts[3]) to desegregate their institutions.[4] Although school desegregation—commingling students of different backgrounds and races—is not the same as true integration, it is a necessary prerequisite.[5] For us to reach the ideal of integration, desegregation is a critical step.

After a flurry of initial court-driven desegregation litigation,[6] these efforts were largely handled by local governments without much judicial review.[7] Over the last several years, with changing dynamics of the Court, school desegregation has again faced significant judicial scrutiny. Initially this attention centered on the postsecondary context, exploring affirmative action in admissions at the undergraduate[8] and graduate[9] levels.

Most recently, the specter of *Brown v. Board of Education*[10] was again raised in *Parents Involved in Community Schools v. Seattle School District No. 1*[11] (*PICS*). *PICS* was a consolidation of two cases, one from Washington and one from Kentucky, focusing on the placement of high school students

[1] National Center for Education Statistics, Fast Facts, Back to School Statistics, http://nces.ed.gov/fastfacts/display.asp?id=372.

[2] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

[3] For an insightful history of these early federal district court efforts, see J.W. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (Illini Books 1971).

[4] *See infra* note 15 and accompanying text.

[5] For a discussion of the differences between desegregation and integration, particularly after the *PICS* decision, see Martha Minow, *After* Brown*: What Would Martin Luther King Say*, 12 LEWIS & CLARK L. REV. 599 (2008).

[6] *See, e.g.,* Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955); Carson v. Bd. of Educ. of McDowell County, 227 F.2d 789 (4th Cir. 1955); Shuttlesworth v. Birmingham Bd. of Educ. of Jefferson County, 162 F. Supp. 372 (N.D. Ala. 1958).

[7] For an overview of the desegregation efforts between 1954 and 1970, see J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954–1978 (1981).

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

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

[10] 347 U.S. 483 (1954).

[11] 127 S. Ct. 2738 (2007) [hereinafter *PICS*].

and elementary and middle school students, respectively.[12] In each case, the school district had an organized plan to combat the doctrine of "separate but equal" and in each case, the Supreme Court, in a 5–4 decision, found the plans to be unconstitutional.[13] In the aftermath of the *PICS* decision, there is little clarity about what, if anything, comprises a *constitutional* plan—and how best to effect the public policy of school desegregation.

Using and interpreting the signposts that Justice Kennedy—a "swing justice" in *PICS*—lays out in that opinion, this Comment attempts to craft a school desegregation approach that achieves a district's goals while withstanding today's constitutional scrutiny. Part II establishes the newly heightened constitutional backdrop, recapitulating the key facts of *PICS* and the *Sturm und Drang* of the numerous *PICS* opinions. Part III focuses on a threshold matter for any school desegregation plan: the question of de jure and de facto segregation—a distinction which the *PICS* dissent rejects, the plurality firmly supports, and Justice Kennedy uneasily maintains as a useful legal construct for crafting a remedy.[14] Part IV begins outlining the elements of a plan, exploring the system of facially race-neutral measures Justice Kennedy suggests in his opinion, discussing the strengths and weaknesses of each. Part V continues the desegregation plan framework by detailing the race-conscious measures proposed in *PICS*, and Part VI discusses general considerations inherent in ensuring that a desegregation plan is constitutional. In order to assess the potential effectiveness of a desegregation plan that exists within the confines of *PICS*, the final Part uses the guideposts of the *PICS* opinion to craft a sample, potentially constitutional plan and applies it to actual data from a large urban school district.

II. SEATTLE, KENTUCKY, *PICS*, AND JUSTICE KENNEDY

The paths that the Seattle and Jefferson County school districts took to the Supreme Court began many years prior to the Court's decision. Outlining that period and the idiosyncratic plans that each district developed over the years help to anchor the resulting set of opinions in *PICS*—and the framework around which a new plan must be created.

Beginning in the 1960s, the Seattle School District has crafted desegregation plans to ameliorate the segregation of neighborhoods around the city.[15] In 1998, following experiments with mandatory busing and other approaches, the district instituted an "open choice" policy for

[12] *See infra* notes 15–30 and accompanying text.

[13] *PICS*, 127 S. Ct. at 2738.

[14] *Id.* at 2761, 2828 (Breyer, J., dissenting), 2795–96 (Kennedy, J., concurring in part and concurring in the judgment).

[15] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1237 (W.D. Wash. 2001).

enrollment at the high school level.[16] Students submitted a ranked preference list identifying which of the ten regular high schools they wished to attend.[17] In 2000, 82% of the students entering high school ranked one of five higher-performing high schools as their first choice over their neighborhood school.[18] This oversubscription required a means of "tie-breaking."

The first tiebreaker used was sibling school placement; if a sibling was already at the first-choice high school, the student would also be placed there.[19] The second tiebreaker depended on the racial makeup of the high school. If the school's racial makeup deviated by less than 15% from the broader Seattle community (defined in 2001 as 40% white and 60% nonwhite), the selection of the student's school would be based on the distance from her home to the school or, if all else failed, on a placement lottery.[20] If the racial makeup of the high school was "out of balance," however (with nonwhite populations less than 45% or greater than 75%), the student's race would be a factor.[21]

Unlike Seattle, the Jefferson County Public Schools in Kentucky faced a court decree to desegregate, outlining a plan to remain in effect until the courts found the district to be unitary—sufficiently desegregated[22]—which it did in 2000.[23] Once the court-mandated approach expired, a new student assignment system was put into place in 2001.[24] That plan required each school to seek a black student enrollment[25] between 15% and 50%, a broad range around the approximate one-third proportion in the broader community.[26]

With such a wide range, under the operation of the plan, most Jefferson County students automatically attended their neighborhood

[16] *Id.* at 1225–26.

[17] *Id.* at 1226.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Newburg Area Council, Inc. v. Bd. of Educ., Nos. 7045 & 7291, Judgment & Findings of Fact and Conclusions of Law (W.D. Ky. July 30, 1975). For a detailed and well-written history of the early desegregation lawsuits in Jefferson County, see Hampton v. Jefferson County Bd. of Educ., 72 F. Supp. 2d 753, 755–69 (W.D. Ky. 1999).

[23] Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000).

[24] McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 841 (W.D.Ky. 2004).

[25] At the time of these cases, the non-white student population of Jefferson County was almost exclusively non-Hispanic Black. The school district did not track ethnicity beyond broad categories of Black and Other (which the District Court, following extensive testimony from the school district, interpreted to largely mean White). *Id.* at 840 n.6.

[26] *Id.* at 842.

school—called the "resides school"—by default.[27] Other students had to compete for an array of other options, including nearby neighborhood schools within their local school "cluster," special programs and magnet schools, and at the high school level, open enrollment to any district high school.[28] In each case, admissions to the other cluster schools and optional programs were decided based on a variety of factors, including objective student performance (e.g., essays, grades and test scores); physical factors, including available space in the program or school; and geographic representation across the district area.[29] Racial guidelines were another factor considered in placement.[30]

These processes covered over 90% of Jefferson County students; the remaining pupils apply for, and attend, so-called "traditional" schools, a relatively new district program focusing on basic skills, discipline, patriotism, and morality.[31] In these programs, race is also a factor in placement, but is handled far more mechanically: separate lists are created of applicants broken down by race and gender; principals then choose students based in part on these lists.[32]

In a decision with five separate opinions, the Supreme Court found that both the Seattle and Jefferson County desegregation plans violated the Equal Protection Clause.[33] Writing in parts for a majority and parts for a plurality, Chief Justice Roberts took issue both with the intended diversity outcomes and the means the districts used to achieve them.[34] Only a plurality agreed when Roberts outlined the debate over the value of racial diversity in schools and declared it unnecessary to resolve, noting that "[these desegregation] plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."[35] These plans' apparent ties to demographics and not, more clearly, to pedagogical benefits of diversity, was, in the plurality's opinion, fatal.[36] Similarly, only a plurality endorsed Roberts's pronouncement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[37] The majority opinion reached consensus only on an issue of jurisdiction—determining that the

[27] *Id.*
[28] *Id.* at 844.
[29] *Id.* at 844–45
[30] *Id.* at 845.
[31] *Id.* at 845–46.
[32] *Id.* at 847.
[33] *PICS*, 127 S. Ct. 2738 (2007).
[34] *Id.* at 2755–60.
[35] *Id.* at 2755.
[36] *Id.*
[37] *Id.* at 2768.

Court had standing[38]—and that the methods of desegregation were not sufficiently narrowly-tailored to withstand strict scrutiny.[39]

On the issue of de jure versus de facto discrimination, Justice Roberts took the dissenting opinion head-on, writing that its author, Justice Breyer, "relies on inapplicable precedent and even dicta while dismissing contrary holdings," and that Breyer "alters and misapplies our well-established legal framework" for equal protection.[40] Only de jure segregation, Roberts writes, can warrant any race-conscious remedial measures.[41]

Justice Breyer's dissent, joined by Justices Stevens, Souter, and Ginsburg, put the Seattle and Jefferson County plans in a longitudinal context, detailing the Court's consistent support of race-conscious measures from *Brown*[42] to *Swann v. Charlotte-Mecklenburg*[43] to *Grutter v. Bollinger*.[44] Breyer found the Seattle and Jefferson County approaches to desegregation consistent with these earlier plans, and rejected any distinction between de jure segregation, allowing (if not requiring) court orders to remedy, and de facto segregation, permitting only voluntary efforts.[45]

In response, the plurality attacked Justice Breyer's dissent, noting "how far removed the discussion in the dissent is from the question actually presented in these cases"[46] and suggesting that Breyer "would not only put . . . extraordinary weight on admitted dicta [in *Swann*], but relies on the statement for something it does not remotely say."[47]

The lone Supreme Court jurist between these polar positions was Justice Kennedy. While concurring with the plurality on the matters of standing and the lack of narrow tailoring, Kennedy joined neither Roberts's attacks on the dissent nor the Chief Justice's assertions that diversity alone is not a legitimate state interest.[48] Rather, he noted that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[49] Further, Kennedy suggested that "[school authorities] are free to devise race-conscious measures to address the problem [of lack of diversity] in a general way

[38] *Id.* at 2751.
[39] *Id.* at 2760.
[40] *Id.* at 2761.
[41] *Id.*
[42] *Id.* at 2798 (Breyer, J., dissenting) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
[43] *Id.* at 2811–2812 (citing Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971)).
[44] *Id.* at 2817 (citing Grutter v. Bollinger, 539 U.S. 306 (2003).
[45] *Id.* at 2816.
[46] *Id.* at 2761.
[47] *Id.* at 2762.
[48] *Id.* at 2788 (Thomas, J., concurring).
[49] *Id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

and without treating each student in a different fashion solely on the basis of a systematic, individual typing by race."[50]

In the cases of Seattle and Jefferson County, however, Justice Kennedy found that their plans were unconstitutional, in part because categories of students were insufficiently specific, policies and procedures were inconsistent and unclear, and facially race-neutral approaches were not sufficiently exhausted.[51] He went on to suggest appropriate measures that, while race-conscious, are facially-neutral, in that they do not define students on an individual basis (and thus would not trigger strict scrutiny).[52] These measures include school site selection, programmatic resource allocation, and boundary alignment.[53] Once those approaches are exhausted, the district may conduct "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[54] The criteria for this evaluation, according to Kennedy, must align with the Court's opinion in *Grutter*, but "would differ based on the age of the students, the needs of the parents, and the role of the schools."[55] The facially-neutral and individual-defining race-conscious measures are discussed in greater detail below in Parts IV and V, respectively.

III. DE JURE VS. DE FACTO: THE THRESHOLD REMEDY QUESTION

In the context of the *PICS* opinion, the distinction between de jure and de facto segregation is dispositive in determining the level of scrutiny to apply to that plan. Justice Kennedy has called the difference between these two forms of segregation a "concept[] of central importance for determining the validity of laws . . . designed to alleviate the hurt . . . from race discrimination."[56] School districts that had engaged in de jure segregation (where discrimination was under the color of law[57]) are duty-bound to desegregate, while those with a past of de facto segregation (where such discrimination occurs outside the authority of the state[58]) are not.[59] Before identifying the range of possible remedies that a school

[50] *Id.* at 2792.
[51] *Id.* at 2789–2791.
[52] *Id.* at 2792.
[53] *Id.*
[54] *Id.* at 2793.
[55] *Id.*
[56] *Id.* at 2794.
[57] BLACK'S LAW DICTIONARY 1388 (8th ed. 2004).
[58] *Id.*
[59] *PICS*, 127 S. Ct. at 2795 (Kennedy, J., concurring in part and concurring in the judgment). For an alternative minority interpretation of this distinction, see Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part). Powell suggests that the de facto/de jure distinction unfairly punishes the South while leaving segregation intact in the North.

district can impose (or a court can enforce), this distinction must be clarified.

Because de jure segregation is state action which violates the Fourteenth Amendment, schools that have a history of de jure segregation are permitted to institute remedies consisting of race-based classifications.[60] Indeed, Justice Kennedy, writing for the Court in 1992, declared that "[t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system."[61] Fifteen years later, however, Kennedy narrowed his view, suggesting that these remedies must be limited, both in duration and in addressing the wrong in the narrowest way possible.[62] Interdistrict busing is one example highlighting the differences in permissible remedy between de facto and de jure segregation. Where de jure segregation was found in one school district and de facto segregation in neighboring districts, the race-conscious busing remedy was limited only to the contours of the de jure segregation.[63] Where the de jure segregation can be shown, however, a remediation plan can comprise a broader range of race-conscious remedies.[64]

Because the constitutional imprimatur of de facto segregation is more limited, in circumstances where the segregation is de facto, remedies are far more limited as well. Justice Kennedy's position in *PICS* is that the school district or public entity "must seek alternatives to the classification and differential treatment of individuals by race."[65] Districts in de facto segregation situations may see hope in a minor caveat to this unilateral pronouncement, however. Kennedy goes on to say that race-based remedies may be possible with de facto segregation with "some extraordinary showing not present [in *PICS*]."[66]

Kennedy's opinion in *PICS* is unclear as to what extraordinary showing would be required, other than noting its absence in the cases at bar.[67] The Justice helped define some of the requirements for this showing in his majority opinion in *Freeman v. Pitts*.[68] There, he noted that mere demographic shifts are unlikely to be extraordinary in this

[60] For two notable examples where the Supreme Court found school district *de jure* segregation and endorsed or ordered race-based remedies, see N.C. State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); and *Keyes*, 413 U.S. at 189.

[61] Freeman v. Pitts, 503 U.S. 467, 485 (1992).

[62] *PICS*, 127 S. Ct. at 2796 (Kennedy, J., concurring in part and concurring in the judgment).

[63] Missouri v. Jenkins, 515 U.S. 70, 86–89 (1995).

[64] *Id.* at 89–100.

[65] *PICS*, 127 S. Ct. at 2796 (Kennedy, J., concurring in part and concurring in the judgment).

[66] *Id.*

[67] *Id.*

[68] 503 U.S. at 467.

context.[69] Further, "[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications."[70] Regardless of this loophole, however, the threshold for race-based remedies in a de facto school segregation case is much higher than that of a de jure case. The threshold may even be fatal in fact.

In forecasting the level of scrutiny Justice Kennedy would apply to a desegregation plan with race-conscious measures, a helpful illustration can be found in his concurring opinion in *Croson*.[71] The case centers on the constitutionality of a city's requirements that public construction contractors subcontract at least 30% of each job to minority businesses.[72] In concurring that the plan is unconstitutional, Kennedy begins by reinforcing the state's power "to eradicate racial discrimination and its effects in both the public and private sectors" and goes on to highlight the legality of remedies for de jure segregation, suggesting the state has "the absolute duty to do so where those wrongs were caused intentionally by the State itself."[73] This opinion does not, however, speak to the remedies available in a de facto segregation situation, keeping the door somewhat open for the elusive "extraordinary showing."

Despite the endorsement of race-conscious measures in the context of de jure segregation, Kennedy concurred with Justice O'Connor's *Croson* opinion that these measures require strict scrutiny.[74] Such measures survive challenge only when they are narrowly tailored and serve a "compelling state interest."[75] This approach, Kennedy wrote, was necessary to keep with precedent and to enforce race-neutrality.[76] In determining if a measure survives strict scrutiny, Kennedy wrote that it would be appropriate to examine the discriminatory injury, its antecedent causes, how extensively the public entity contributed to the injury (either intentionally or passively), and the clarity of the causation between the public entity's action (or inaction) and the injury.[77] While this exploration may not be fatal in fact, it requires vigorously examining both current and historical facts relating to the segregationist practices.

A school district wishing to use the broader range of remedies afforded by a past of de jure segregation—but without the necessary prerequisites—may be able to impose these remedies if other collateral agencies imposed such segregation under the color of law. That is, even though the school districts themselves may not have been the specific public entities performing the segregationist actions, they may constitute

[69] *Id.* at 493.
[70] *Id.* at 495.
[71] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
[72] *Id.* at 477.
[73] *Id.* at 518.
[74] *Id.* at 519.
[75] City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).
[76] *Id.*
[77] *Croson*, 488 U.S. at 519.

a part of the remedy. Though largely untested at the Supreme Court level, Justice Stewart, in a concurrence to the opinion in *Milliken v. Bradley*,[78] suggested as much when he noted that interdistrict school busing may be a remedy after "purposeful, racially discriminatory use of state housing or zoning laws."[79] Currently existing more in the academic world than the judicial one, this approach may still pave a way to race-consciousness.

If the school district's history is insufficient to demonstrate de jure segregation, two additional elements must be present to justify the use of a race-conscious remedy. First, the district must show exhaustion of race-neutral measures, or that those measures were simply ineffective.[80] Second, a yet-undefined "extraordinary showing" must also be present.[81] The bar to allow race-conscious measures to combat de facto segregation is a high one.

IV. APPLYING FACIALLY RACE-NEUTRAL MEASURES

As Part III noted, demonstrating the nature of the antecedent segregation is a necessary prerequisite to determining whether the concomitant equitable remedy is allowable. While a setting of de jure segregation expands the field of remedy options, an environment of de facto segregation, absent exhaustion and an extraordinary showing of necessity, severely limits these available options. While this does not quash a school district's desegregation plan at the threshold, it limits many of the available approaches to those that are facially race-neutral.

Even in a de jure context, Justice Kennedy's concurrence in *PICS* noted that before implementing race-conscious measures, the school district must have exhausted measures that are facially race-neutral.[82] He suggests measures including "strategic site selection of new schools; drawing attendance zones [recognizing neighborhood demographics]; . . . allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking . . . statistics by race."[83] While Justice Breyer's dissent dismisses these measures in a single paragraph as being unnecessary,[84] each must be considered, along with their desegregationist potential, to meet with Justice Kennedy's approval and,

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[78] 418 U.S. 717 (1974).

[79] *Id.* at 755 (Stewart, J., concurring). For a more detailed analysis of indirect de jure segregation driving school-based remedy, see Note, *Housing Discrimination as a Basis for Interdistrict School Desegregation Remedies*, 93 YALE L. J. 340 (1983).

[80] *PICS*, 127 S. Ct. 2738, 2789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

[81] For a discussion of this extraordinary showing, see *supra* notes 66–73 and accompanying text.

[82] *PICS*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

[83] *Id.*

[84] *Id.* at 2828 (Breyer, J., dissenting).

thus, a five-vote majority approval for a district plan. There are, however, difficulties inherent in each. None of them is likely to successfully address the problem in a comprehensive or effective manner, requiring a district to resort to race-conscious approaches.

Though it must be noted and considered to pass Kennedy scrutiny, strategic site selection of new schools, will be meaningfully included only rarely. The first of these race-neutral measures, strategic selection focuses on placing newly-constructed or newly-opened schools in locations which would draw a demographic cross-section of students. This measure is very difficult for many districts to implement. It presupposes, for instance, either that growing enrollment is driving new school construction or that the district is wealthy enough to fund new construction absent such a need. Such is not the case. First, growing enrollment is rarely an issue; between the 2002 and 2005 school years, the largest districts in the country (those that are perhaps most likely to face desegregation issues[85]) generally lost enrollment or stayed about the same.[86] Second, absent growing enrollment, these districts are not wealthy enough to fund new school construction. During the 2002–2005 period, large district general per-student revenues only grew an average of 6.5% annually,[87] barely keeping up with the consumer price index[88] and actually shrinking operational revenues when factoring in the rising costs of employee benefits and health care.[89] Strategic site selection, then, is an option reserved for only a subset of school districts nationwide.

Drawing attendance boundaries while recognizing the region's demographics, the second race-neutral measure cited, is an effective option open to all districts with multiple schools—if implemented clearly. This measure realigns the geographic area from which a school draws its students. In cases where schools are located on the edge of different clusters of demographics, boundary realignment can significantly shift

[85] The largest school districts in the U.S. serve one-third of the nation's children, and thus are where segregation affects the greatest number of students. *See* Erika Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, THE CIVIL RIGHTS PROJECT, August 8, 2002, *available at* http://www.civilrightsproject.ucla.edu/research/deseg/reseg_schools02.php.

[86] National Center for Education Statistics, Common Core of Data: Build A Table, http://nces.ed.gov. Examining the fourteen school districts in the country with over 150,000 students, five dropped by more than 2% over the four-year period, while five stayed within 2% of their 2002 enrollment. Only four of the fourteen gained enrollment by more than two percent between 2002 and 2005.

[87] *Id.* Examining the fourteen school districts in the country with over 150,000 students, the annual revenue growth rate varied from 2.6% to 10.3%.

[88] BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX, *available at* http://www.bls.gov/cpi.

[89] For details on historical U.S. spending on health care and a comparison to other countries, see KAREN DAVIS ET AL., COMMONWEALTH FUND, SLOWING THE GROWTH OF U.S. HEALTH CARE EXPENDITURES: WHAT ARE THE OPTIONS?, January 29, 2007, http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=449510.

the mix of students in each school to make them more heterogeneous. Jefferson County Public Schools, a party in *PICS*, used targeted attendance areas as a part of their desegregation plan, but the plurality led by Chief Justice Roberts dismissed the approach because the intersection of attendance areas and racial preferences was not clearly delineated—it was not clear how race was used to define the borders.[90] While this concern was not raised in Justice Kennedy's opinion, delineation of the demographic characteristics used and the motivation for each will reduce the ambiguity and increase the likelihood of surviving a constitutional challenge. For instance, the factors (socioeconomic status, race, etc.) that drive the boundary selection, the reason for selecting those factors, the source of the data upon which the decisions are based—all would help mollify the plurality and solidify Justice Kennedy's support.

An analogy can be drawn between school district boundaries and voting district boundaries. Justice Kennedy makes this comparison himself in *PICS*, citing the electoral districting case *Bush v. Vera*[91] when discussing the race-neutrality of boundary selection in school districts. In the context of voting districts, Kennedy has reinforced recent Court doctrine that redistricting based on racial demographics is subject to strict scrutiny if race is the predominant factor motivating the boundary placement.[92] However, beyond that delineation, "redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."[93] Given that virtually all of the nation's nearly 100,000 local school board members are also elected,[94] perhaps this deference would also extend to those bodies.

A constitutionally-allowable electoral districting plan must take into account a variety of demographic characteristics. Not all of these characteristics can be proxies for race; it is, Kennedy wrote, "a disservice to [the] important goals [of preventing discrimination and fostering transformation to a society no longer fixated on race] by failing to account for the differences between people of the same race."[95] A districting plan must take into account the totality of the circumstances, including, to the degree it is relevant, proportionality of ethnicities in specific districts statewide versus that ethnicity's total population.[96] Analogizing to school district boundaries, then, drawing attendance

[90] *PICS*, 127 S. Ct. 2738, 2790 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

[91] 517 U.S. 952 (1996).

[92] Abrams v. Johnson, 521 U.S. 74, 92 (1997) (citing *Vera*, 517 U.S. at 962).

[93] *Abrams*, 521 U.S. at 101.

[94] NATIONAL SCHOOL BOARDS ASSOCIATION, ABOUT NSBA, *available at* http://www.nsba.org/FunctionNav/AboutNSBA.aspx.

[95] League of Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2618 (2006).

[96] *Id.* at 2619–20.

boundaries based solely on race or based on race plus other race-equating factors (for example, in some areas, socioeconomic status) would not pass muster. Additionally, the unique characteristics of each school's attendance area's demographics must be compared to that of the entire district as a whole. Where school boundaries are drawn with an eye toward replicating the heterogeneity of the whole district (a key goal of school desegregation), a plan seems to be more likely to withstand challenge.

The allocation of resources for special programs, another facially race-neutral measure suggested in *PICS*, is already operational in many large, urban districts.[97] Such programs can be divided into two groups: magnet schools (schools with special programs that draw from across the school district[98]) and programs based on intelligence or achievement (e.g., gifted and talented programs). Magnet schools are typical in urban districts, with five times the rate of large urban school districts having them than their suburban counterparts.[99] Additionally, admission to most of these magnet schools is very competitive.[100] Frequently, admission to these programs is handled by lottery, with a maximum proportion of students drawn from the surrounding neighborhood.[101]

While magnet schools may play a role in these facially race-neutral measures, they create additional difficulties as well. First, their very popularity creates a new set of haves and have-nots; those who are lucky in the lottery system enroll, while those less fortunate remain in potentially segregated schools. Second, because these programs have enrollees from around the school district, transportation issues arise. Widespread busing, deprecated since a Supreme Court decision handed down a decade before Kennedy took the bench,[102] returns to a focal role. If part of a desegregation plan, even though magnet school busing is per se different than the racial busing of the 1970s, both the public and the Court may equate the two, finding magnet school busing unconstitutional. Outside the umbrella of a desegregation plan, in contrast, such a busing program may be viewed as constitutionally benign.

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[97] NATIONAL CENTER FOR EDUCATION STATISTICS, PUBLIC ALTERNATIVE SCHOOLS AND PROGRAMS FOR STUDENTS AT RISK OF EDUCATION FAILURE: 2000–01, 6 (2002), *available at* http://nces.ed.gov/pubs2002/2002004.pdf.

[98] What is a Magnet School?, Public School Review, http://www.publicschoolreview.com/articles/2.

[99] Ellen Goldring & Claire Smrekar, *Magnet Schools: Reform and Race in Urban Education*, 76 CLEARING HOUSE 13, 13 (2002).

[100] *Id.*

[101] For a typical example of this admission process, see Chicago Public Schools Magnet Program, Frequently Asked Questions, http://www.cpsmagnet.org/faq.jsp. Chicago's magnet schools allow up to 30% of their enrollment from neighborhood students without a formal admission process, while all other enrollees complete an application.

[102] Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977).

The other type of special program present in many school districts is one based on student intelligence or achievement, a measure which is neither facially race-neutral nor desegregationist in practice. These problems with achievement-driven programs arise because students of certain races are frequently under-identified for participation. In 2003, 3% or 3.5% of African-American or Hispanic students were likely to be identified for placement into these programs.[103] At the same time, 7.5% of Caucasian and a stunning 10% of Asian students were likely to be so identified.[104] Thus, Asian students were three times more likely to be identified for these programs than African-American or Hispanic students. While the causes of this problem are complex and wide-ranging, from teacher identification biases to issues with standardized tests,[105] the result is that this measure is not a good option in practice.

Justice Kennedy notes a fourth facially race-neutral measure: recruiting students and faculty in a targeted fashion.[106] A primary difficulty in executing this measure is identifying its meaning, particularly absent race-conscious measures. Kennedy characterizes this measure as "race conscious but . . . not lead[ing] to different treatment based on a classification that tells each student he or she is to be defined by race . . . ."[107] Thus, it is not likely to demand strict scrutiny.

One alternative for the meaning of this measure is geographic recruitment. In urban areas, geography can often be a proxy for race and ethnicity—race and poverty tend to be concentrated within the same geographic areas.[108] Geographic recruitment, then, would be similar to boundary selection. To keep the measure facially race-neutral and not devolve into race-based student selection, lotteries must be held by neighborhood, with specific geographic targets for each school. If this is a plausible interpretation of Justice Kennedy's suggestion, it again raises the specter of transportation issues. It would also get very complex very quickly; a school district of fifty schools divided into only six geographic areas could have several billion permutations!

Tracking enrollments and performance data by race is the final facially race-neutral measure cited in Justice Kennedy's opinion.[109] While collecting data is a good input to action, it is not, in itself, action. That is,

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[103] Thomas Oakland & Eric Rossen, *A 21st-Century Model for Identifying Students for Gifted and Talented Programs in Light of National Conditions: An Emphasis on Race and Ethnicity*, 28 GIFTED CHILD TODAY 56, 58 (2005).

[104] *Id.*

[105] *Id.*

[106] *PICS*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

[107] *Id.*

[108] U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, THE STATE OF AMERICA'S CITIES, FINDING #2, *available at* http://www.huduser.org/publications/polleg/tsoc98/part1-2.html.

[109] *PICS*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

merely collecting information will not alter the educational experiences of the students of a school district. That having been acknowledged, collecting such data is hardly novel. The National Center for Education Statistics, a branch of the federal Department of Education, collects many data elements by race and ethnicity.[110] Further, the 2001 reauthorization of the Elementary and Secondary Education Act, commonly called the No Child Left Behind Act of 2001, instituted requirements for each school district to collect—and evaluate itself based on—student performance data by race and ethnicity.[111]

V. CRAFTING RACE-CONSCIOUS MEASURES

The facially race-neutral measures described above all present challenges in both design and implementation. While, most optimistically, some of these measures may mitigate school segregation somewhat, a plan must likely turn to race-conscious measures as the next step. That step can only be reached when the race-neutral measures are demonstrably insufficient, however.[112] In that situation, a district may turn to "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[113] Justice Kennedy allows such measures based on the Court's 2003 opinion in *Grutter*, a case in which he dissented.[114]

The *Grutter* case centered on the use of race as a factor in law school admission policies at the University of Michigan.[115] Because the school's policies were found to be holistic, not mechanical, and intended to ensure a breadth of diversity, the majority (led by Justice O'Connor) found the plan to be constitutional.[116] One of the six opinions in the case, Kennedy's dissent chastised the Court for applying insufficient scrutiny to the Michigan program.[117] His opinion illustrates his requirements for race-conscious measures in student placement to survive strict scrutiny.[118]

The theme of his requirements is the holistic nature of the student evaluation. To survive strict scrutiny, "individual assessment [must be] safeguarded through the entire process."[119] Kennedy goes on to affirm he has "no constitutional objection to . . . considering race as one modest

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[110] NATIONAL CENTER FOR EDUCATION STATISTICS, COMMON CORE OF DATA, http://nces.ed.gov/ccd.

[111] No Child Left Behind Act of 2001, 20 U.S.C. §§ 2311 (b)(2)(B), (b)(2)(C)(v)(II)(bb).

[112] *PICS*, 127 S. Ct. at 2796 (Kennedy, J., concurring in part and concurring in the judgment).

[113] *Id.* at 2793.

[114] 539 U.S. 306, 387 (2003).

[115] *Id.* at 311.

[116] *Id.* at 306.

[117] *Id.* at 388 (Kennedy, J. dissenting).

[118] *Id.* at 392.

[119] *Id.*

factor among many others," so long as race is not a predominant factor in decisions.[120] Thus, any inclination toward mechanically crafting a student placement program veers, in Kennedy's mind, toward the unconstitutional.

Despite the differences between *Grutter* and school desegregation, that restriction is likely to apply in both settings because while the facts are different, the constitutional issues of race-based student placement are the same. It would seem that K–12 school desegregation creates an even more compelling interest than in higher education, given its compulsory nature. Justice Kennedy highlights this difference in the interests when contrasting *PICS* with *Grutter*'s companion university admissions case, *Gratz v. Bollinger*.[121] Kennedy notes that "in the context of college admissions . . . students [have] other choices [than in K–12 schools] . . . ."[122] Kennedy goes on to use that distinction to heighten the scrutiny on schools, however, noting that those choices allow universities more latitude in defining their interests in diversity.[123]

These distinctions between higher education and K–12 schools can lead to differing interpretations of Kennedy's *PICS* dissent. The Justice writes that a successful desegregation approach "would be informed by *Grutter*, though of course the criteria . . . would differ based on the age of the students, the needs of the parents, and the role of the schools."[124] These differing criteria may be intended as required characteristics of a successful plan; that is, a constitutional plan would incorporate variability along these three axes. Alternatively, Kennedy may merely be citing these to highlight the differences between a constitutional plan under *Grutter* and that in *PICS* based on the intrinsic differences between higher education and K–12. This Part presumes the more rigorous interpretation, that examining and using each of the three criteria would be necessary for a constitutional plan. Though an analysis may lead to a more elaborate plan, the result may be more likely to withstand challenge.

A. Age of the Students

Incorporating considerations of student age into a desegregation plan—trying to customize the result for students of differing age groups—introduces conflicting policies and inconsistent data. A recent review of current studies demonstrated that the results are mixed about

[120] *Id.* at 392–93.

[121] 539 U.S. 244 (2003).

[122] *PICS*, 127 S. Ct. at 2794 (Kennedy, J., concurring in part and concurring in the judgment).

[123] *Id.*

[124] *Id.* at 2793.

the effects of school integration based on the age of the students.[125] Yet other studies conducted by social scientists are clear that children learn about race and racism at an early age.[126] Further, pragmatic concerns about transporting children over long distances are heightened with younger students. A school system will need to consider each of these concerns.

Sociological data recommend the implementation of the most stringent desegregation plans at the earliest age possible, close to when children begin to notice race. "[M]ost researchers agree that the majority of children have a solid conception of racial and ethnic distinctions by the time they are about six."[127] Some have found these distinctions arise even before children have the ability to speak.[128] Further, children's observations about race and opinions on racism can be readily shaped outside the home, in school and other group settings.[129]

Countervailing that preference is the pragmatic issue of transport distance. Younger students may have a greater need for proximity to home. Further, younger children are often less patient for long trips in a car or bus. Additionally, younger students may be more likely to need parental intervention during the day (e.g., mid-day doctor or dentist appointments, injuries, discipline issues), so transport to a location distant from home creates a greater burden for parents. Hauling such students for potentially the longest distance in the name of desegregation raises these logistic concerns.

Beyond the logistic issues, uprooting students from their neighborhood school raises implications for the consistency of developmental attachments as well. Multiple studies have shown that a strong peer support system for children can help them succeed.[130] Maintaining such a support system implies a priority on reducing disruptions whenever possible. One way to execute such a system would be to alter the transportation requirements based on the grade brackets of the schools; that is, if the schools are K–5, 6–8, and 9–12, using those

[125] The Benefits of Racial and Ethnic Diversity in Elementary and Secondary Education: A Briefing Before the United States Commission on Civil Rights (July 28, 2006), *available at* http://www.usccr.gov/pubs/112806diversity.pdf.

[126] DEBRA VAN AUSDALE & JOE R. FEAGIN, THE FIRST R: HOW CHILDREN LEARN RACE AND RACISM (2001).

[127] *Id.* at 189.

[128] *Id.*

[129] *Id.* at 1. As an example, the book authors cite Carla, a three-year-old child who tells her teacher she must move her cot at naptime because she can't "sleep next to a nigger," referring to a nearby four-year-old. Upon investigation, it appears Carla learned the epithet and the affect from another child at school.

[130] *See, e.g.*, Paul Naylor & Helen Cowie, *The Effectiveness of Peer Support Systems in Challenging School Bullying,* 22 J. OF ADOLESCENCE 467, 467–79 (1999); Beth Doll, *Children Without Friends: Implications for Practice and Policy*, 25 SCH. PSYCHOL. REV. 165 (1996); Thomas Farmer & Thomas Cadwallader, *Social Interactions and Peer Support for Problem Behavior*, 44 PREVENTING SCH. FAILURE 105–09 (2000).

grade groupings as the points at which student placement choices change.

A balance must be struck when assimilating these competing interests related to student age. The most appropriate such balance would set a maximum transport distance by age and grade group, while imposing preferences for assigning younger pupils to nearer schools than older ones. For instance, a school district could self-impose a plan limitation that no elementary student will be bused more than five miles, no middle school student more than eight miles, and no high school student more than ten miles. This approach does not exempt the youngest students from the benefits of diversity, but does so with a minimum of disruption to support systems and to geographical proximity.

B. Needs of the Parents

Considerations of parental need are a second area for distinguishing a K–12 desegregation plan from the higher education admission plan in *Grutter*. Parental need is sufficiently broad to again cover both the societal and the pragmatic. This breadth, in a similar manner as student age, creates more ambiguity than it addresses.

In suggesting that parental choice is a valuable criterion, Justice Kennedy remains consistent with the Court's past opinions. In *Zelman*, a 2002 Supreme Court opinion upholding school vouchers as constitutional under the Establishment Clause, Justice Kennedy was in the majority.[131] He was, in fact, one of only two in the majority not to write their own opinions—a true believer.[132] In that case, one anchor of Chief Justice Rehnquist's majority opinion was that the program "is a program of true private choice . . . ."[133]

Turning specifically to race, there are many reasons the needs of parents of some races would be different from those of others. Justice Thomas noted in his concurring opinion in *Zelman* that "failing urban public schools disproportionately affect minority children most in need of educational opportunity."[134] One example of that lack of proportionality is in the availability of school resources. Statistics show that in 2000–2001, one-sixth of the nation's black students and one-fourth of black students in specific regions of the country were in all non-white schools.[135] These schools have fewer resources and more

[131] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[132] *Id.*

[133] *Id.* at 653.

[134] *Id.* at 681 (Thomas, J. concurring).

[135] ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (2003), *available at* http://www.civilrightsproject.ucla.edu/research/reseg03/reseg03_full.php.

concentrated social and health problems.[136] These data show that race plays a key role in students' school experiences—and those of their parents.

An area of differentiating parental need with more ambiguous implications is socioeconomic status. For decades, a key predictor of the quality of an American school has been its students' economic station.[137] This might imply that the lower the socioeconomic status of the family, the greater the need for intervention, no matter the travel distance, because the need for school quality is so great. Yet these families are those least likely to have access to transportation—so as with the youngest students, perhaps it is preferable to narrow the geographic range to avoid sending students where parents cannot easily travel. Either approach must justify the costs and benefits of the decision made.

A final area of ambiguity with the needs of the parents is the role parental need plays in the context of other criteria cited by Kennedy. In practice, the needs of the parents, then, may become a proxy for the age of the student. Because parents do not have as unfettered a choice of placement in elementary and secondary schools as they do in higher education, a narrower range of imposition in the solution is implied—school districts should burden parents less than universities do, because parents of K–12 students do not have the same kind of options for their children. This very lack of parental placement choice requires more discretion in fashioning a disruptive remedy.

C. Role of the Schools

The final of the three criteria cited by Justice Kennedy—the role of the schools—is perhaps the least intuitively developed. One reasonable interpretation is that the role of the schools, cited as a criterion that differentiates K–12 schools from the university in *Grutter*, is as a modifier to his characterization of appropriate race-conscious measures. Earlier in his *PICS* opinion, Kennedy allows for race-conscious measures that include an "individual evaluation of school needs . . . ."[138] Citing the role of the schools as a criterion immediately thereafter may signify less that it requires unique, stand-alone attention in a desegregation plan, and more that it provides a lens for examining the needs of the school system.

The needs of higher education and K–12 schools vary widely, notably based on the role each plays in modern society and the burden each bears in inculcating democratic and egalitarian values. In the *PICS*

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[136] *Id.*

[137] *See, e.g.*, JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1992). In areas where socioeconomic status tracks race, crafting an integration plan based on such status may achieve desegregationist goals while incurring lesser scrutiny than a plan centering on race.

[138] *PICS*, 127 S. Ct. 2738, 2793 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

opinion, Justice Kennedy notes that elementary and secondary schools play many roles, including "to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."[139] Similarly, in the *Zelman* school voucher case, fellow *PICS* dissenter Justice Thomas noted that "one of the purposes of public schools [is] to promote democracy and a more egalitarian culture."[140] K–12 schools bear more responsibility, and thus, perhaps have a stronger, more compelling interest in desegregation than that of higher education.

Within the elementary and secondary school context, the role of schools may vary as well. Research into the development of the human brain demonstrates that during the first decade of life, the brain's ability to change is the greatest.[141] Similarly, racial attitudes are also formed at early ages.[142] Thus, a desegregation plan that incorporates the role of the schools as a relevant criterion must incorporate these principles—though again, they may simply end up as a proxy for student age—focusing substantially more at younger ages when both the brain and the attitudes are rapidly being shaped.

VI. CONSIDERATIONS IN PLAN DEVELOPMENT

Looking beyond the substantive structure of a desegregation plan, three additional procedural considerations must be present to make it constitutional. First among these is clarity. As Kennedy noted, "[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State."[143] Second, the consistency of the plan is critical. In *PICS*, Jefferson County Public Schools denied a kindergarten transfer based on the racial guidelines, but then maintained that the guidelines do not take effect until first grade.[144] Though not raised by the parties, the issue was included in the majority opinion.[145] Finally, specificity is an essential consideration, particularly in the granularity of racial categorization. For Justice Kennedy in *PICS*, Seattle School District's very broad division of races into White and Non-White was dispositive.[146] Each of these considerations must be closely attended to in order to pass muster with a majority.

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[139] *Id.* at 2788.

[140] Zelman v. Simmons-Harris, 536 U.S. 639, 681 (2002) (Thomas, J. concurring) (citing N. EDWARDS & H.G. RICHEY, SCHOOL IN THE AMERICAN SOCIAL ORDER: THE DYNAMICS OF AMERICAN EDUCATION (Houghton Mifflin 1963) (1947)).

[141] FAMILIES AND WORK INSTITUTE, RETHINKING THE BRAIN: NEW INSIGHTS INTO EARLY DEVELOPMENT, (1996), *available at* http://www.del.wa.gov/publications/development/docs/22-300.pdf.

[142] VAN AUSDALE & FEAGIN, *supra* note 126.

[143] *PICS*, 127 S. Ct. at 2790 (Kennedy, J., concurring in part and concurring in the judgment).

[144] *Id.* at 2750 n.8.

[145] *Id.*

[146] *Id.* at 2791.

A. Clarity

A key point of clarity (indeed, the lack thereof) derided in the *PICS* opinion focused on confusion triggered by the use of generalities. In many instances, these generalities arose when placement was contingent on a set of factors, but the underlying contingency was not specified. As an example, in Jefferson County's plan, the district noted that each student has a "resides school," at varying times determined by the parent's address, by the student's address, and by mere completion of the previous grade[147]—which, for some students, may lead to three different schools. While each of these statements may be true under varying circumstances, the breadth of the language used in the plans made it unclear that they were true only circumstantially. While this language may be a school district administrative drafting error or an oversight in the brief, it can effectively nullify a plan. "When . . . [a case] involves a 'complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools' . . . these ambiguities become all the more problematic."[148] It is in these plans where such contingencies are likely to arise, and the complexity of the plan may make it difficult to unravel the correct placement.

Similarly, language based on platitudes, while potentially enhancing the political and marketing aspects of a desegregation plan, is also ineffective constitutionally. So-called 'blanket' mandates that "[s]chools shall work cooperatively with each other" to reach goals are attractive but obfuscatory.[149] In another example, a plan which merely supports specific decision points as being "based on . . . the racial guidelines" will not survive Justice Kennedy's scrutiny, either.[150] School desegregation plans are complex by their very nature, and thus, must be explicit and clear.

B. Consistency

Apart from the dictates of the Supreme Court, consistency of student placement methodology in a complex desegregation plan is essential for mere fairness of treatment; this is consistent with the very foundation of a desegregation plan. One compelling reason for such a plan is consistency (and equity) of students' educational experiences, regardless of race. It follows, then, that the plan itself must treat both the students placed and the decision-making processes with that same attention to consistency. More acutely, in order for a plan to survive strict scrutiny, three specific areas arise in the context of *PICS*: the consistency of application within intraschool grade groupings (e.g., K–5, 6–8, 9–12), of the decision-making process, and of the race-conscious measures across the races.

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[147] *Id.* at 2790 (citing Brief for the Respondents No. 05-915, at 4).

[148] *Id.* at 2790.

[149] *Id.* (citing Brief for the Appellants No. 05-915, at 81).

[150] *Id.* at 2790 (citing Brief for the Appellants No. 05-915, at 38, 42).

Student grade level and age are critical axes of any desegregation plan. Decisions must be made differently for students in first grade than for those in high school; similarly, needs for eight-year-olds may be different than those for sixteen-year-olds. This framework is also necessary for a plan to comport with the race-conscious criteria noted by Justice Kennedy. In *PICS*, both Chief Justice Roberts in his majority opinion and Justice Kennedy in his concurrence noted the Jefferson County Public Schools' example of inconsistently applying the guidelines to a petitioner's kindergarten son.[151] In that case, kindergartener Joshua McDonald was incorporated in the district's desegregation plan, despite a written policy that exempted kindergarten students.[152] As a matter of simple procedural attention to detail, this is a comparatively easy area to address in plan development.

The typical grade structure of American public schools is kindergarten through fifth grade in elementary school, sixth through eighth grades in middle school, and ninth through twelfth grades in high school.[153] Thus, to reduce disruption within the enrollment at a school, an intuitive approach would consist of one consistent set of guidelines for students across grade K–5 elementary schools, another set for those in grade 6–8 middle schools, and another set for those in grade 9–12 high schools. When incorporating parental need for proximity that decreases with student age, perhaps students in kindergarten and below are exempted. Note that the exemption of kindergarten students from the desegregation plan was not the difficult issue for Jefferson County, but rather the inconsistent application of that rule to the student(s) in question. While this may lead to disruption at the changes between grades 5–6 and 8–9, the school changes that would happen regardless are already periods of stress and challenge for students.[154]

A second area of concern regarding consistency is the consistency of process used to make student placement determinations. To meet its scrutiny burden, a school district "must establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program."[155] Because, based on Kennedy's comparison with *Grutter*,[156] the decision cannot be a mere mechanical one, the role of the decision-maker is critical. The plan must be explicit about whether

[151] *Id.* at 2750 n.8; *id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

[152] *Id.* at 2750 n.8.

[153] NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, TABLE 95 (2006), *available at* nces.ed.gov/programs/digest/d07/tables/dt07_095.asp; NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, TABLE 96 (2006), *available at* nces.ed.gov/programs/digest/d07/tables/dt07_096.asp.

[154] Patrick Akos, *Student Perceptions of the Transition from Elementary to Middle School*, 5 PROFESSIONAL SCHOOL COUNSELING 339 (2002).

[155] *PICS*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

[156] *See supra* notes 114–124 and accompanying text.

this is done by a school or school district official, and likely specify the decision-maker's title. Further, the methodology applied by that individual cannot be a simple points system or other calculation—some judgment or holistic review will be required.

Implicitly, this consistency of making student placement decisions includes some sort of review process. This review process, in addition to helping a plan survive strict scrutiny, helps to provide a consistency of decision-making. Given the level of scrutiny that a race-conscious plan incurs, an administrative review process akin to traditional due process is likely needed. Analogizing to the more fundamental liberty interests inherent in a criminal's competence to be executed, Justice Kennedy has laid out specific ideas. Writing for the majority in *Panetti v. Quarterman*,[157] Kennedy reiterated the critical elements of a fair hearing in accord with fundamental fairness and an opportunity to be heard, drawing from Justice Powell's concurring opinion in *Ford v. Wainwright*.[158] In *Panetti*, however, Kennedy noted that even in the context of the death penalty, "a constitutionally acceptable procedure may be far less formal than a trial."[159] It is clear that a review process must be in place that is fair and provides an opportunity to be heard; presuming those guidelines are met, the formality of the process may vary. Consistency of student placement decisions, however, remains critical.

C. Specificity

Demonstrating that a desegregation plan is narrowly tailored and thus will survive strict scrutiny, requires, minimally, two areas of specificity. The first area, cited by Justice Kennedy as dispositive, is the specific classifications used in student placement.[160] The second area focuses on when the classifications are applied to the students to be placed. While the former is more critical (and more difficult) than the latter, both are essential elements of a constitutional desegregation plan.

Specific student classifications for placement determination within the desegregation plan are essential. Seattle Public Schools, in its plan's fatal flaw, categorized students as "white" and "non-white" as the basis for its assignment decisions.[161] Despite being more thorough than Jefferson County in "describing the methods and criteria used to determine assignment decisions on the basis of individual racial classifications,"[162] Justice Kennedy determined that "[a]s the district fails to account for the classification system it has chosen . . . Seattle has not shown its plan to be

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[157] 127 S. Ct. 2842 (2007).

[158] 477 U.S. 399, 418 (1986).

[159] *Panetti*, 127 S. Ct. at 2856 (quoting Justice Powell in *Ford*, 477 U.S. at 427).

[160] *PICS*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

[161] *Id.* at 2790–91.

[162] *Id.* at 2790.

narrowly tailored to achieve its own ends; and thus it fails to pass strict scrutiny."[163] Specificity of grouping not only helps with judicial scrutiny, but also helps the school district track the effectiveness of the classification system and the desegregation plan itself. Without clear delineations, statistical analysis of the data groups becomes murky at best.

Fortunately, guidelines already exist related to the collection of student race and ethnicity data for later use in tracking achievement and behavior. The National Center for Education Statistics (NCES), an arm of the U.S. Department of Education, imposes a two-question format on the states.[164] According to that standard, schools must first ask if a student is Hispanic or not, then in which of five racial categories they fall.[165] Using all of these categories would result in a theoretical ten combinations, but there are ways to meaningfully limit the data.

These limitations are intended to protect the privacy of a student or family, and begin from a statistical derivation—how few students need there be in a single group for an observer to figure out the identity of the child? The United States government restricts disclosure of student information if the size of any individual group is under three students.[166] In a large urban school district, however, a group of three in all ten categories is quite possible. Maybe, then, the statistical limitation may be expanded into one of administrative convenience for the purposes of a desegregation plan. Because a primary concern for Justice Kennedy, however, was "fail[ing] to account for the classification system it has chosen,"[167] perhaps a larger group size threshold is possible, if it can be reasonably justified. One option would be to set it at a fixed percentage, like 1%, which still makes development and implementation of a plan complex, but balances the school district's need for convenience with parental and student equity concerns.

The second area of specificity relates to the logistics of student classification. A plan must identify when the classifications are made—upon pre-kindergarten registration, kindergarten registration, or each year. Being inconsistent with these selections can lead to a shifting population and thus, a moving target in terms of desegregation needs at specific schools. The plan must contain a process for students who transfer into the district at a time that is inconsistent with the policy. Similarly, a contingency must be made for families who opt to not declare their race or ethnicity. This latter issue is less of a concern after the 2001

[163] *Id.* at 2791.

[164] NATIONAL CENTER FOR EDUCATION STATISTICS, NCES STATISTICAL STANDARDS, STANDARD 1–5, DEFINING RACE AND ETHNICITY DATA (2005), *available at* nces.ed.gov/StatProg/2002/std1_5.asp.

[165] *Id.*

[166] NATIONAL FORUM FOR EDUCATION STATISTICS, FORUM GUIDE TO PROTECTING THE PRIVACY OF STUDENT INFORMATION: STATE AND LOCAL EDUCATION AGENCIES § 6A (2005).

[167] *PICS*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

passage of federal legislation linking school performance to racial subgroups,[168] which has driven many school districts to require reporting. Finally, some students, particularly those from multi-racial origins, change their self-identified race or ethnicity during the schooling process;[169] some accommodation must be made for these students as well.

Regardless of the specific measures selected in crafting a plan and the manner in which they are intended to be implemented, the language and structure of the plan itself will also be dispositive of its success. Focusing on the clarity, consistency, and specificity of the plan will help ensure that effectively-developed measures will become an effectively-communicated (and constitutional) plan.

VII. EXPLORING A SAMPLE PLAN

In the interests of exploring these concepts in practice, this Part outlines the details of a sample plan created pursuant to these recommendations. Following that discussion, the plan is applied to a representative school district, the Elk Grove Unified Schools in Sacramento, California. As a threshold matter, because (absent an extraordinary showing) de facto segregation affords a narrower set of remedies, this plan assumes that—unlike the situation in *PICS*[170]—the required showing of unresolved past de jure segregation is present.[171]

A. Details of the Plan

As a preliminary matter, we are required to review the facially race-neutral measures available and their efficacy. The first may be easily set aside: strategic site selection of new schools. The plan presumes there are insufficient funds to build new schools, and thus, this measure is without any value.

This hypothetical plan next turns to demographic recognition through boundary selection. For purposes of the plan, the demographic identified as dispositive is socioeconomic status. Thus, each school boundary is examined individually to determine the median income within each. Where adjacent schools differ by more than 10%, boundaries are adjusted to the degree that such differences can be mitigated.

Resources for special programs are considered in turn. This plan establishes sufficient magnet programs to accommodate 20% of the

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[168] No Child Left Behind Act 2001, 20 U.S.C. §§ 2311 (b)(2)(B), (b)(2)(C)(v)(II)(bb).

[169] David L. Brunsma, *Interracial Families and the Racial Identification of Mixed-Race Children: Evidence from the Early Childhood Longitudinal Study*, 84 SOCIAL FORCES 1131 (2005).

[170] *PICS*, 127 S. Ct. at 2752.

[171] Note that this in no way implies that such de jure segregation is or is not present in the Elk Grove Unified Schools.

students, which is a high percentage, compared to large districts across the country.[172] To make the population characteristics of these schools as close to the broader district population as possible, admission to these magnet programs will be by lottery. Based on the racial identification issues inherent in talented and gifted programs, they are not considered to be helpful special programs in this plan.

The remaining two race-neutral measures are handled quickly. Recruiting students and faculty in a targeted fashion is given no consideration, largely because of its ambiguity. In contrast, tracking enrollments and performance by race is done in great detail, in part based on compliance with federal law.[173] These data will help establish the percentage ranges for the plan, as well as establishing the current conditions in each school. Beyond the scope of student placement, the data will help monitor differential student performance patterns by racial and ethnic subgroup.

Following the implementation of the race-neutral measures, the district must gather data for a 'snapshot' as to the current status of desegregation in the schools. Therefore, the plan requires an examination of the racial disparities across the school district. First, the plan must define classification groups; the sample plan adopts the NCES categories.[174] For simplicity (and to avoid the ten possible combinations of five races with or without Hispanicity as a simultaneous characteristic[175]), the plan treats Hispanic as a race alongside the five NCES groupings. The plan limits the use of each grouping, however, to those that comprise at least 1% of the school district student population. Within those groups, race-conscious measures are then contemplated in schools where the racial balance is substantially disparate from the district as a whole. The plan defines this threshold as more than 20% disparate from the broader population. This range is chosen because it is broad enough to allow for discretionary placement (and thus, not mechanical), but is narrow enough to result in more integrated schools.

A holistic approach is then taken to the incorporation of race in student placement. Characteristics taken into account include race, gender, socioeconomic status, age of the student, needs of the parents, and the role of the schools. The approach is school-by-school, identifying disparities across these groups of students in each. To illustrate, a large

[172] NATIONAL CENTER FOR EDUCATION STATISTICS, CHARACTERISTICS OF THE 100 LARGEST: PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE U.S. 2001–02. Table 6 of that report shows that the average percentage of students accommodated in such programs was 14.6%, and the median was 8.8%.

[173] No Child Left Behind Act of 2001.

[174] NCES Statistical Standards, *supra* note 164.

[175] These ten would be White, White+Hispanic, Black, Black+Hispanic, Native Hawaiian/Pacific Islander, Native Hawaiian/Pacific Islander+Hispanic, American Indian/Alaska Native, American Indian/Alaska Native+Hispanic, Asian, Asian+Hispanic. Instead, the plan uses White, Black, Native Hawaiian/Pacific Islander, Asian, American Indian/Alaska Native, and Hispanic.

elementary school may be divided into a matrix of subgroups—with four racial groups represented, two genders, and two levels of socioeconomic status, there could be sixteen subgroups.

Pre-kindergarten and kindergarten students are exempted from the plan; all of these students attend their neighborhood schools. Beginning at the first grade, the plan focuses first on elementary school students.[176] The first priority is to find the shortest distance that elementary school students must travel to get them into the appropriate mix of student body. This approach helps to mitigate the need for a different approach at the middle school, envisioning that most elementary school students will simply travel to the middle school which is geographically proximate to the elementary school (the "feeder school").

High schools are handled with open enrollment, allowing student preference as a factor, but merely one among the several holistic factors identified above. This flexibility is allowable because of the greater mobility of high school students, as well as the comparatively smaller number of high schools in relation to elementary and middle schools. There simply are not as many choices for student placement at that level.

The school district's attendance department makes the decision about student placement, based on demographic self-identification at the time the student registered in the district (whether as a pre-kindergartner or as a transfer student). If a family opts to change the student's subgroup identification during their student's enrollment at the district, any necessary adjustment to student placement will take place prior to the beginning of the next school year. This identification of the responsible party helps ensure accountability and consistency.

Also to aid consistency and accountability, an appeals process is included. Appeals of student placement are handled at the school district level to avoid interschool competition, and may be made to the school district's deputy superintendent. A final appeal may be made to the publicly-elected school board, which provides a neutral arbiter and an opportunity to be heard.

Finally, data will be collected on which students are traveling what distances, grouped by race, gender, ethnicity, and socioeconomic status. The purpose of this collection is to ensure that the percentages of the populations in each category are roughly equivalent, and that no subgroup is being particularly advantaged or disadvantaged within the plan.

B. Application of the Plan

The Elk Grove Unified School District comprises approximately 61,000 students, making it the fifth-largest school district in California

[176] For an explanation as to why age is a factor here, see *supra* notes 125–130 and accompanying text.

and among the 70 largest districts in the United States.[177] The district has 62 schools, including 39 elementary schools, eight middle schools, eight high schools, three alternative schools, and four miscellaneous educational programs.[178] Based on the population of the school district, 30.5% of the students are White, 27.4% are Asian/Pacific Islander, 21.1% are Hispanic, 20.1% are Black, and 0.9% are American Indian/Alaska Native.[179]

Applying the 1% subgroup threshold, American Indian/Alaska Native students are not included within the plan. Also, though in a more complete application this would be possible (nay, necessary), based on the availability of data, socioeconomic status will be included by proxy in this application. Finally, also based on the lack of available data, this implementation of the sample plan applies the elementary school approach to all elementary grades, including kindergarten.

1. School Subgroup Distribution Prior to Plan

Looking at the eight subgroups (males and females in each of the four remaining racial groups), district-wide averages range from 9.9% (Black females) to 16% (White males). On an individual school level, the subgroup percentages are universally within 20% of these averages, with the exception of four elementary schools and an alternative high school. This is seemingly dichotomous with the statistic that on a race-only basis, 15 elementary schools, three middle schools, and six high schools would have subgroup populations that exceed the 20% margin, a total of 24 schools. This is because if you leave the range at 20% but divide the population into smaller subgroups, the variability of each subgroup diminishes and fewer groups exceed the 20% margin.

Thus, because the division of the racial subgroups into groups by gender effectively halves the average variability of each (each group is half the size, so its range also gets proportionally smaller), it is mathematically intuitive to halve the range of variability. Indeed, when the margin of group variation shrinks from 20% to 10%, 28 schools are identified as needing desegregation. All but one of the 24 schools identified above (when we kept the 20% range and evaluated only on race) are again included when we factor in gender. Five additional schools are also included. When we eliminate transition schools (schools with less than 100 students, generally those with transitory populations), the group settles at 24 schools.

[177] Elk Grove Unified School District, http://www.egusd.k12.ca.us; NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS (2007), *available at* http://nces.ed.gov/programs/digest/.

[178] NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS (2007), *available at* http://nces.ed.gov/programs/digest/.

[179] *Id.* Hereinafter, all student race and gender data originates from this source.

In this sample application of the plan, school identification will be done by racial group, with subgroup populations used to measure the varying impact of transportation.

2. Magnet Schools

We begin with a population of 24 schools subject to the desegregation plan. Our first step is to draw 20% of the school population from these schools into magnet programs. Because admission to magnet programs will be done by lottery, this removes subgroup populations from schools in roughly the proportion they exist there. Thus, schools with disparate subgroup populations should become less disproportionate with the introduction of the magnet programs.

After distributing the students into magnet programs, one elementary school and two high schools come within the 20% range in each racial category. At this stage of the plan, then, there are 14 elementary schools, three middle schools, and four high schools which require boundary review.

3. Boundary Realignment

The next analytical step in the process requires an individual school-by-school exploration of subgroup populations at the targeted schools in comparison with the subgroup populations at adjoining schools. This, the final of the race-neutral measures, is intended to minimize the number of schools subject to race-conscious measures like busing.

Applying this approach to the Elk Grove School District is surprisingly successful. Based on the 2007–2008 elementary school boundaries and the secondary school attendance areas as adopted by the district in January 2005, over half of the elementary schools are suitably realigned.[180] Additionally, all three of the middle schools are successfully realigned, and all but one of the high schools are as well.

4. Race-Conscious Measures

In order to equalize the subgroup populations within each of the remaining targeted schools, the plan with the minimum of schools involved comprises students from 14 elementary schools and two high schools. In all, 1,230 students are transported beyond their neighborhood schools.

Of these 1,230 students, fully half are White. Twenty-six percent of the students bused are Asian, 15.5% of the students are Hispanic, and 8.5% are Black. Turning to the elementary school students, 200 of the students, or about one-quarter, are bused less than five miles to or from

[180] Elk Grove Unified School District, 2007–2008 Elementary School Boundaries, http://www.egusd.net/new_to_egusd/boundaries.cfm; Elk Grove Unified School District, Current Secondary Attendance Areas Adopted 1-18-05, http://www.egusd.net/new_to_egusd/boundaries.cfm.

school.[181] Another 360 elementary school students, or nearly one-half, are bused between five and ten miles each way.[182] The remaining 230 elementary school students are bused between 12 and 13 miles each way.[183] In no case is the commute time longer than 20 minutes, however.[184]

Turning to the high school students, under the plan, students are bused between Elk Grove High School and Monterey Trail High School, a distance of under six miles and less than ten minutes each way.[185]

With race-conscious measures affecting only 2% of the school district population, a reviewing court may infer that race-neutral measures may have been sufficient in this case. Only by carefully documenting the effectiveness (or lack thereof) of the race-neutral measures can a court note that some limited race-conscious measures are necessary. Indeed, the limited extent of these measures may infer the requisite narrow tailoring required to survive strict scrutiny.

VIII.CONCLUSION

The 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[186] represented a significant shift in school desegregation jurisprudence. With such a divided court, it remains unclear how solid the majority opinion will be in the years to come. By hewing closely to the guidelines in Justice Kennedy's opinion while developing a desegregation plan, however, the likelihood of surviving a future constitutional challenge dramatically increases. Satisfying the Justice's concerns may again swing the Court in favor of a careful and enterprising school district.

[181] School addresses from Rowena Millado, Directory of Schools—Elk Grove Unified School District, http://sacramento.about.com/publicschools/a/edegusd.htm. Distances and drive times from GOOGLE MAPS, available at http://maps.google.com.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *PICS*, 127 S. Ct. 2738 (2007).