PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1: Resolution Unattained

Introduction

In June 2007, the United States Supreme Court (hereinafter "the Court"), in *Parents Involved in Community Schools v. Seattle School District No. 1*[1] (hereinafter "*PICS*"), added another chapter to the storied and vitriolic history[2] of racially-based student placement in the nation's public schools. Holding that public school districts may no longer adopt voluntary race-based school assignment programs to ensure racial diversity in their schools,[3] because such an action violates the Equal Protection Clause of the Fourteenth Amendment,[4] a plurality opinion authored by Chief Justice John Roberts declared that it was time to eliminate the use of race as the sole factor in determining where schoolchildren receive their education.[5]

As clear as that holding may seem, nowhere is the paradox of *PICS* more apparent than in Justice Kennedy's concurring opinion, which urges the nation's school districts to continue "the important work of bringing together students of different racial, ethnic, and economic backgrounds,"[6] despite the plurality's incompatible holding. This paradox illustrates that, despite the Court's best intentions to provide a clearly-delineated resolution for schools utilizing race-based student placement programs, actual resolution remains unfulfilled.

This note argues that the Court in *PICS* properly applied strict scrutiny[7] and relevant case law to decide the issue before it. However, in doing so, the Court's attempt to cleanly break away from its prior support of race-based school assignments[8] is risky, and remains an unaccomplished goal. To establish this, Part I discusses the background of *PICS* and the history of the issue of state-sponsored racial programs. Part I addresses the application of precedent and the various theories underlying the *PICS* decision, including how the districts: 1) failed to prove their race-assignment plans were "narrowly tailored" to fulfill "a compelling government interest,"[9] and 2) could not pass constitutional muster absent a showing of *de jure* segregation or a "higher education exception."[10] Part III argues that the door remains open for public schools to subvert the Court's mandate in *PICS* and continue to maintain voluntary racial assignment programs.

I. Case Discussion

A. Background

The Court in *PICS* addressed two cases with similar factual backgrounds, both of which centered on challenges to two public school districts' racial assignment plans.[11] In the City of Seattle, from 1999 through 2002, incoming secondary school students could submit a list of their top choices as to where they wished to attend high school.[12] The district attempted to assign

each student to his or her first-choice school.[13] However, if a school was "oversubscribed," the district employed "tiebreakers"[14] to re-route students to other schools to ensure each school was in balance – e.g., diverse.[15] One of those tiebreakers was race.[16] The district claimed it employed racial tiebreakers to address the effects of "racially identifiable housing patterns" in school assignments.[17] However, a parental group brought suit after a student was denied his school of choice, arguing that Seattle's use of racial assignments violated the Equal Protection Clause.[18]

Meanwhile, in Jefferson County, Kentucky, public schools sought racial balance in both primary and secondary schools in the years after a desegregation decree was lifted.[19] The district voluntarily set a mandatory window, requiring at least fifteen percent of students at each school – but not more than fifty percent – to be African-American.[20] If a school reached the "extremes of the racial guidelines," a student whose race contributed to the racial imbalance would not be assigned there.[21] In 2002, parents of a kindergarten student who attempted to transfer schools filed suit after their child did not receive a transfer to the school of his choice because, "[t]he transfer would have [had] an adverse effect on desegregation compliance."[22]

The districts in both Seattle and Jefferson County utilized crude racial categorizations: Seattle classified its students exclusively in white/nonwhite terms, while Jefferson County used

only categories of black/“other.”[23] Ultimately, very few students were actually reassigned under each district’s plans.[24] Nevertheless, each school district saw their voluntary racial assignment programs upheld in the courts below,[25] though the City of Seattle’s program was upheld by the Ninth Circuit only after a rehearing en banc.[26]

B. The Evolution of Adjudicating State-sponsored Race-based Programs

The *PICS* decision is significant for myriad reasons. For one, it was a loud signal that the Chief Justice John Roberts era of the Court will likely be a divisive one.[27] On a more basic level, the issue of race in public schools is a topic which consistently garners public and media attention.[28] Perhaps most significantly, though, *PICS* is now part of a lineage of cases, starting with *Brown v. Board of Education*[29] in which the nation’s federal courts have involved themselves in the governance of race in schools, even at the local level.[30] The history of these cases had a substantial effect on the *PICS* decision.

The evolution of the adjudication of state-sponsored race-based programs begins with *Plessy v. Ferguson*,[31] which held that the policy of “separate but equal” treatment of African-Americans was legitimate.[32] That decision was not vitiated until *Brown* in 1954, which mandated integration of public schools.[33] Since *Brown*, the Supreme Court embarked on an inconsistent

path of case law – a problem the Court sought to remedy in *PICS* – creating varied exceptions and standards regarding the regulation of state-sponsored race-based programs.[34]

In *Swann v. Charlotte Mecklenburg Board of Education*,[35] the Court upheld a district's voluntary creation of race ratios for public schools to maintain.[36] Noting that school authorities have "broad power to formulate and implement educational policy,"[37] the Court set a strong precedent that local public school integration was a matter over which districts had autonomy. *Swann*'s central holding was affirmed in subsequent cases.[38] However, in the late 1970s, the Court's focus shifted and precedent was set that would eventually impact the decision in *PICS*.[39]

In *Regents of the University of California v. Bakke*, the Court considered a white male's application to a state medical school.[40] Justice Powell's concurrence, separate from the plurality, held that the medical school's use of rigid racial quotas violated the Equal Protection Clause.[41] However, Justice Powell also offered the open-ended idea that race may be permissible as one of *several* admissions criteria;[42] his concurrence was thus cited by both the plurality and dissents in *PICS*.[43]

The decision in *Bakke* set a precedent for the recent holding of *Grutter v. Bollinger*,[44] creating a "higher education" exception to strict scrutiny review of race-based assignment programs.[45]

Just how far strict scrutiny extends was a central question in deciding *PICS*. *Adarand Constructors, Inc. v. Peña*[46] was a landmark decision in which the Court considered whether a government-sponsored program awarding fees to contractors that hire minorities was constitutional.[47] The Court answered the question negatively, deciding that *all* state-sponsored race-based classifications must be judged under a strict scrutiny standard.[48]

In the history of these cases preceding *PICS*, public schools have often been granted discretion to implement programs of their choice,[49] only to see the permissibility of those programs limited over time.[50] Notably, each of the plurality, concurrences, and dissent in *PICS* cited these very same cases to establish the crux of their varied arguments, demonstrating the confusion that has arisen over time regarding this lineage of case law. An inevitable consequence of this confusion, the question of the extent to which local districts are empowered to implement race-based assignment programs has endured inconsistent adjudication at the state court and federal circuit levels for decades.[51] In that sense, the confusing lineage of cases since *Brown* has frustrated the goal of diversity in many public school districts,[52] and so the Court in *PICS* sought to resolve the uncertainty of race-based assignment programs in public schools – and the extent to which diversity should matter – once and for all.

II. Analysis: Premises of the Decision in *PICS*

After establishing that the petitioners in *PICS* had standing to challenge the race-based assignment programs,[53] the Court commenced its analysis. The overarching question the Court presented was actually simple: was it the right time in history to abandon the use of race as the sole determinant regarding where the nation's children go to school? The plurality answered the question affirmatively,[54] but not without vigorous concurrences and dissent.

A. Did the Districts in *PICS* Demonstrate a Compelling Government Interest to Satisfy Strict Scrutiny Analysis?

In order for a state-sponsored race-based program to pass the rigorous review of strict scrutiny, *Adarand* and its progeny mandate that the program must serve a "compelling governmental interest" that is "narrowly tailored" to achieve that interest.[55] It is notable that no Justice wrote an opinion disregarding strict scrutiny review under *Adarand*.[56] A majority of the Court found that the districts did not pass the narrow tailoring test.[57] However, the plurality's focus was on the compelling government interest test because, under *Adarand*, if the race-based program is not a compelling interest, the "narrow tailoring" step of the analysis is irrelevant.[58]

The plurality subsequently described situations in which race-based programs were found to serve a "compelling government interest."[59] These situations included "remedying the effects of past intentional [or *de jure*] discrimination,"[60] and the "interest in diversity in higher education."[61] The plurality held that the districts in *PICS* did not demonstrate a compelling government interest to satisfy strict scrutiny.[62] In doing so, the plurality deconstructed Justice Breyer's dissent, noting that the flexibility given to a state when responding to *de jure* segregation differs significantly from what it may do in response to *de facto* segregation.[63] When responding to *de jure* segregation, a school district may employ whatever means necessary to remedy segregation, including the use of race-only factors.[64] The plurality thus held that because the school districts in *PICS* were not responding to *de jure* segregation, their assignment programs did not satisfy strict scrutiny review.[65] This analysis, however, ignored a major issue: it is erroneous to even distinguish between *de jure* and *de facto* segregation.[66]

As the dissent noted in *PICS*, on prior occasions, the Court granted public school districts flexibility in determining how to respond to even *de facto* segregation.[67] Furthermore, from a historical standpoint, "[n]o case of [the] Court has ever relied upon the *de jure/de facto* distinction…to limit what a school district is voluntarily allowed to do."[68] Ultimately, however,

no opinion in *PICS* came out to say what really matters: *de facto* segregation may be equally as pernicious as *de jure* segregation, because both have the same effect of hurting schoolchildren.[69]

Meanwhile, the Court in *PICS* also held that the higher education exception, created by *Grutter*[70] but initiated by *Bakke* twenty-five years prior,[71] did not apply to public secondary and primary schools.[72] Under *Grutter*, schools of higher education may use race as one of many factors in their analysis of applicants.[73] But the question of whether this exception applied to secondary and primary schools in *PICS* was answered swiftly and vehemently by Justice Thomas, who in his concurrence wrote, "[t]he expansive freedoms of speech and thought associated with the university environment [are not] present in elementary and secondary schools."[74] This is, undoubtedly, a jarring concept.

Consequently, the dissent attacked Justice Thomas's argument, noting that there is at least *as much* – if not more – to gain from diversity in public secondary and primary schools than in higher education.[75] Justice Breyer posited that achieving diversity in secondary and primary schools "must be, *a fortiori,* a compelling state interest" that satisfies strict scrutiny.[76] However, the truth as to just how far the higher education exception extends likely resides somewhere between the contrasting opinions of Justices Thomas and Breyer.

There are certainly benefits to be derived from a racially diverse environment in both higher education *and* primary and secondary schools. The distinction is that higher education admissions programs, like the plans utilized in *Grutter* and envisioned by Justice Powell in *Bakke*, consistently use race as one factor among others,[77] whereas the districts in *PICS* – like many, if not all public school districts – used race exclusively.[78] Accordingly, the districts' programs did not satisfy strict scrutiny review.[79]

B. Does Prior Case Law Granting School Districts Discretion to Integrate Apply?

A major tension among the opinions in *PICS* was the extent to which prior case law granting school districts leeway to implement voluntary racial assignment programs applied. In *Swann*, the Court upheld a voluntary desegregation plan, asserting that school authorities have broad discretion to implement policy.[80] In *McDaniel v. Barresi*,[81] another voluntary desegregation plan was upheld, as the Court reaffirmed the notion that districts suffering from segregation may "take whatever steps necessary" to eradicate racial discrimination from schools.[82] This is strong language indicating that public school districts do indeed have leeway when determining how to racially balance their schools. In that sense, to arrive at its ultimate

decision that race may no longer be the sole factor used when assigning students to public schools, the plurality had to evade such damaging precedent.

Chief Justice Roberts's opinion thus called the language from *McDaniel* and *Swann* used in Justice Breyer's dissent mere dicta, noting that the Court was not bound to adhere to dicta "[from] a prior case in which the point now at issue was not fully debated."[83] In other words, the relevant language in *McDaniel* and *Swann* had *no* practical application to the decision in *PICS*. Going forward, this is a dangerous argument on a number of levels.

Roberts's argument insinuates that the Court may pick and choose language it desires from any case, eschewing limiting language as dicta. For example, would the Court dare dispute the concept in *Brown* that all children have a right to an equal education,[84] simply because the topic was not as vigorously addressed in the opinion as desegregation?[85] The further resulting danger of *PICS*, then, is the potential for inconsistent application of principles from precedent such as *Swann* and *McDaniel*; neither the plurality nor concurrences even alleged that *Swann* and *McDaniel* were overturned after *PICS*. Where do those cases, which upheld voluntary racial assignments in public schools, now fit into this spectrum of case law? With each occasion the Court rejects fair and relevant arguments by citing dicta, the risk of future inconsistent

applications of the law grows; lower court judges may confuse what case law language to actually apply in their rulings. This is another reason *PICS*, despite the Court's attempts otherwise, remains assailable.

C. Is the Time Now? Moving Past Governmental Racial Classifications in General

In his plurality opinion, Chief Justice Roberts cited case law to demonstrate that the overuse of governmental racial classifications in general in American society perpetuates the struggles of minorities.[86] In tackling this subject, the Chief Justice implicated a provocative question seeping into the *PICS* inquiry: are we a more or less bigoted as a society when government must mandate minorities' presence in schools?

It is a question whose explicit answer was ultimately missing from *PICS*. However, the plurality stressed that "[g]overnment action dividing us by race…promote[s] notions of racial inferiority,"[87] an assertion indicating the Court is moving toward a more conservative, less invasive direction for the future. Still, it is puzzling that the plurality combined three cases – all outside the scope of public school racial diversity[88] – to affirm its belief that race should no longer be a factor in the nation's schools:

> Accepting racial balancing in schools as a compelling state interest justifies the imposition of racial proportionality throughout American society…[and] reinforce[s] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin…[this] endorse[s] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.[89]

The good intentions of these statements are readily discernible. The problem with such reasoning, however, is that the plurality never applied this rationale to public schoolchildren. Perhaps the time *is* now to move beyond governmental racial classifications in other walks of life, but perhaps it is *not* the proper time for the nation's public secondary and primary schools. The plurality opinion never considered this, instead asserting that because there was no evidence linking racial diversity to educational benefits in the classroom, race should no longer be a factor used by public school districts anywhere.[90]

However, considering the history of the *PICS*'s school districts traced by Justice Breyer,[91] there seems to be an unfortunate truth to the contention that the Jefferson County and Seattle school districts at issue were still recovering from segregation.[92] Consequently, even considering the good intentions of the Court in *PICS*, more harm than help might come to the nation's schoolchildren if segregation is in fact ongoing in our public secondary and primary schools. Rather than jettisoning race entirely from the equation of public school assignments,

then, as the plurality would have done, Justice Kennedy's concurrence offered a more appropriate solution. Kennedy rightly suggested that the school districts in *PICS* "could have achieved their stated ends through different means," including individual evaluations of school needs and consideration of student characteristics that could include race as one component.[93]

III. Comment

There is no denying that race will continue to be a factor in United States schools. *Brown* and the lineage of cases deriving therefrom were decided precisely because there was need for a solution. The fact that the *PICS* decision received so much media scrutiny[94] indicates that the issue of race in public schools still strikes at the very fabric of our society. Furthermore, there remain affirmative action programs and many organizations meant to safeguard the rights of minority schoolchildren.[95] There is little doubt, then, that race will remain an issue in public schools, despite the plurality's push for a final resolution.

Given that there is such varied and inconsistent empirical evidence regarding the effect of racial diversity on education, the plurality likely saw no other choice than to rule the way it did. However, if the plurality believed this decision would end race-based problems in schools, they were mistaken. The decision in *PICS* may force schools to drop measures they have taken to

ensure diverse schools, resulting in exactly the type of *de facto* segregation with which the dissent was concerned.[96] Still, the door remains open for public schools to continue race-based assignment programs.

In *PICS*, the Court struck down a student assignment plan based on crude racial classifications.[97] It is not difficult to envision, then, the next issue the Court may face: as a response to *PICS*, a public secondary school implements a rigorous screening process for its students meant to satisfy the standards in *Grutter* and *Bakke*, taking an "individualized, holistic view of its applicants and students"[98] where race is just one factor considered among others.

The permissibility of such an endeavor would depend on how much emphasis the Court wishes to place on the distinctions it made in *PICS* between the lofty ideals of diversity in higher education and less rigorous standards expected of primary and secondary education. If, as Justice Thomas suggests, there truly is a drastic difference between the levels of diversity needed in higher education as compared to secondary education,[99] the Court is likely to extend *PICS* and reject any school district's attempt to screen applicants to public school. Despite the speculation about what the court might do in the future, one thing is certain: the decision in *PICS*, despite the Court's intentions, is not the final stop in the debate regarding race-based school assignments.

ENDNOTES

1 127 S.Ct. 2738 (2007).

[2] *See generally* Brown v. Bd. of Ed., 347 U.S. 483 (1954); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[3] *PICS*, 127 S.Ct. at 2767-68.

[4] *See id.* at 2752.

[5] *Id.* at 2767 ("Government action dividing us by race is inherently suspect because such classifications…'reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin'…") (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)).

[6] *PICS*, 127 S.Ct. at 2797.

[7] Id. at 2751-52. The strict scrutiny standard applied in PICS is the standard first set forth by Adarand Constructurs, Inc. v. Peña, 515 U.S. 200 (1995) (holding all state-sponsored race based programs are subject to strict scrutiny) and recently affirmed in Johnson v. California, 543 U.S. 499 (reviewing racial classifications by government requires strict scrutiny).

[8] *See* McDaniel v. Barresi, 402 U.S. 39 (1971) (race-based student assignment plan did not violate Equal Protection); *see also* N.C. State Bd. of Ed., 402 U.S. 43, 45 ("[s]chool authorities have wide discretion in formulating school policy").

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

[10] *Id.* at 2752-53.

[11] *See id.* at 2746.

[12] *See id.* at 2747.

[13] *Id.*

[14] *See id.* at 2747.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See id.* at 2748.

[19] *See id.* at 2749.

[20] *Id.*

[21] *See id.* at 2749-50.

[22] *See id.* at 2750.

[23] The Seattle school district classified its students as either "white" or "non-white." *PICS*, 127 S.Ct. at 2747. Jefferson County schools classified its students in terms of "black" or "other." *Id.* at 2754.

[24] *See id.* at 2759.

[25] *See id.* at 2748, 2750.

[26] *See id.* at 2749.

[27] The Court's voting in *PICS* was 5-4; Justice Kennedy voted with the majority while writing a concurring opinion separate from the plurality. In light of that, some commentators have called the vote in *PICS* a 4-4-1 split. *See* Transcript of the Diane Rehm Show, Monday, July 2, 2007 at p. 5. Moreover, since former Justice Sandra Day O'Connor's retirement and the additions of Chief Justice John Roberts and Justice Samuel Alito, many commentators have noted that the political lines of the Court have been drawn, with Justice Kennedy left in the middle, sure to be a frequent swing-vote. *See* Benjamin Wittes, *Anthony Kennedy Punts on the Question of School*

Diversity, The New Republic, July 2, 2007, available at

http://www.tnr.com/docprint.mhtml?i=w070702&s=wittes/070207.

[28] *See* John R. Miller, *Race has no place in Seattle Schools*, Seattle Times, July 24, 2007, at B1; *see also* George F. Will, *The Court Returns to* Brown, Wash. Post, July 5, 2007, at A17.

[29] *See Brown*, 347 U.S. 483, 495 (1954) ("[i]n the field of public education the doctrine of 'separate but equal' has no place"); *see also* Brown v. Bd. of Ed., 349 U.S. 294, 300 (1954) (enforcing the first *Brown* holding and requiring schools to make "prompt and reasonable start toward full compliance").

[30] *See, e.g.,* Bustop v. Bd. of Ed. of City of L.A., 439 U.S. 1380 (1978) (ruling that state supreme court was permitted to mandate a desegregation action); *see also* Grutter v. Bollinger, 539 U.S. 306 (2003) (race-based admissions programs in higher education are acceptable if program uses race as one criterion among others).

[31] 163 U.S. 537 (1896). It is worth noting that the *Plessy* decision was not focused on race in schools, but rather on a one-eighth African-American man who refused to leave a whites-only train car. *Id.* at 1139-40. Rather, the lineage of race-related issues in schools begins with *Plessy*

because it was *Plessy*'s central "separate but equal" holding that was later overturned in *Brown*. *See Brown*, 347 U.S. at 495.

[32] *Id.* at 548 ("[t]he enforced separation of the races…[does not abridge] the privileges or immunities of the colored man").

[33] *See Brown*, 347 U.S. at 494 ("in the field of public education the doctrine of 'separate but equal' has no place").

[34] *See, e.g.,* Swann v. Charlotte Mecklenburg, 402 U.S. 1, 16 (1971) (school authorities have broad power to implement policy); *but see* Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 319 (1986) (noting the Court should not lightly approve government's use of race-based distinctions).

[35] 402 U.S. 1 (1971).

[36] *Id.* at 16.

[37] *Id.*

[38] *See* McDaniel v. Barresi, 402 U.S. 39, 41 (1971) (in a remedial process, schools may take steps to convert a segregated system); *see also* N.C. State Bd. of Ed. v. Swann, 402 U.S. 43, 45 (1971) (schools have some autonomy to decide racial balance).

[39] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J., concurring) ("preferring members of any one group for no reason other than race…is discrimination for its own sake").

[40] *See id.* at 276.

[41] *Id.* at 320.

[42] *Id.* at 311-12.

[43] *See PICS*, 127 S.Ct. at 2753 (plurality opinion); *id.* at 2794 (Kennedy, J., concurring); *id.* at 2798 (Stevens, J., dissenting); *id.* at 2816 (Breyer, J., dissenting).

[44] 539 U.S. 306 (2003).

[45] *See id.* at 328.

[46] 515 U.S. 200 (1995).

[47] *Id.* at 204.

[48] *Id.* at 227.

[49] *See* Wash. v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (rejecting initiative prohibiting districts from placing students in schools based on race)*; see also* Swann v. Charlotte Mecklenburg, 402 U.S. 1, 16 (1971) (school authorities have broad power to implement policy).

[50] *See* Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (holding unconstitutional an undergraduate university's admissions program favoring minorities in a points-rating system).

[51] *See Gratz*, 539 U.S. at 270; *see also* Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005) (holding that goal of achieving diversity can serve as a compelling state interest); Tometz v. Bd. of Ed., Waukegan City Sch. Dist. No. 61, 237 N.E.2d 498 (Ill. 1968) (affirming state legislature's directive to school boards to re-draw school boundaries based on race).

[52] *See* Michael J. Kaufman, *Reading, Writing and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. Rich. L. Rev. 707, 719 (2007) (Discussing the educational benefits of teaching racial literacy to secondary school students, "[d]iversity in the classroom increases the likelihood that students will discuss racial or ethnic issues…[d]iversity is…a valuable resource for teaching students to become citizen in a multi-racial/multi-ethnic world").

[53] *PICS*, 127 S.Ct. at 2750-51.

[54] *Id.* at 2758 (citing City of Richmond v. Croson, 488 U.S. 469, 495 (1989)) ("Allowing 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 decisionmaking such irrelevant factors as a human being's race' will never be achieved").

[55] *PICS*, 127 S.Ct. at 2751-52.

[56] In his dissenting opinion, Justice Breyer asserts that *PICS* should be analyzed under a modified strict scrutiny review that is "not 'strict' in the traditional sense of that word." *PICS*, 127 S.Ct. at 2819.

[57] *Id.* at 2755 (plurality opinion); *id.* at 2791 (Kennedy, J., concurring) (rejecting school districts' plan for lack of narrow tailoring).

[58] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (delineating separate two-step analysis for strict scrutiny regarding racial classifications by government).

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

[60] *Id.*

[61] *Id.* at 2753.

[62] *Id.* at 2757-58.

[63] *Id.* at 2802 (Breyer, J. dissenting) (defining *de facto* segregation as "[discrimination c]aused by…housing patterns or generalized societal discrimination").

[64] *Id.* at 2768-69.

[65] *Id.* at 2761.

[66] *Id.* at 2801 (Breyer, J. dissenting) ("[t]he distinction between *de jure* segregation…and *de facto* segregation…is meaningless in the present context").

[67] *Id.* at 2811, citing McDaniel v. Barresi, 402 U.S. 39, 41 (1971) (permitting race-conscious remedy by school without court order mandating remedy).

[68] *PICS*, 127 S.Ct. at 2823.

[69] *See* Michelle Adams, *Radical Integration*, 94 Cal. L. Rev. 261, 262, 311 (2006) (noting the unfortunate "continuing reality of *de facto* segregation" and that "instrumental equality can only be achieved [upon] recommitt[ing] ourselves to eradicating segregation"); *see also* Michael J.

Kaufman, *Reading, Writing and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. Rich. L. Rev. 707, 719 (2007).

[70] 539 U.S. 306 (2003)

[71] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978). In his concurrence, Justice Powell commented, "Preferring members of any one group for no other reason than race or ethnic origin is discrimination for its own sake." He further noted, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

[72] *PICS*, 127 S.Ct. at 2754.

[73] *See* Grutter v. Bollinger, 539 U.S. 306, 336-37 (2003) ("When using race as a…factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual").

[74] *PICS*, 127 S.Ct. at 2781, citing *Grutter*, 539 U.S. at 329.

[75] *PICS*, 127 S.Ct. at 2829 (Breyer, J. dissenting) ("I do not believe the Constitution could possibly find 'compelling' the provision of a racially diverse education for a 23-year-old law student but not for a 13-year-old high school pupil").

[76] *PICS*, 127 S.Ct. at 2835.

[77] *See Grutter*, 539 U.S. at 336-37; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

[78] *PICS*, 127 S.Ct. at 2746

[79] *Id.* at 2755.

[80] *See* Swann v. Charlotte Mecklenburg, 402 U.S. 1, 16 (noting broad power of school authorities to maintain a prescribed ratio of minority students in certain schools).

[81] 402 U.S. 39 (1971).

[82] *Id.* at 41 (1971).

[83] *PICS*, 127 S.Ct. at 2762, citing Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006).

[84] *See* Brown v. Bd. of Ed., 347 U.S. 483, 493 (1954).

[85] *Id.* at 493-496.

[86] *PICS*, 127 S.Ct. at 2767 ("Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," citing City of Richmond v. Croson, 488 U.S. 469, 493 (1989), "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," citing Shaw v. Reno, 509 U.S. 630, 657 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict," citing Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 603 (1990)).

[87] *PICS*, 127 S.Ct. at 2767, citing *Croson*, 488 U.S. at 493.

[88] The plurality in *PICS* cites *Croson*, *Shaw* and *Metro Broadcasting* in an attempt to illustrate the need to move beyond racial classifications by government in schools. However, *Croson* centers on distributing city construction contracts to minority subcontractors, 488 U.S. at 469, *Shaw* focuses on a challenge to a congressional redistricting plan, 509 U.S. at 633, and *Metro Broadcasting* considers an FCC program designed to boost minority participation in the broadcast industry, 497 U.S. at 552-553.

[89] *PICS*, 127 S.Ct. at 2767, citing *Croson*, 488 U.S. at 493, *Shaw*, 509 U.S. at 657, and *Metro Broadcasting*, 497 U.S. at 603.

[90] *PICS*, 127 S.Ct. at 2768 ("[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

[91] *PICS*, 127 S.Ct. at 2802-10.

[92] In his dissent in *PICS*, Justice Breyer considers whether the Jefferson County and Seattle school districts were in fact free from segregation. *PICS*, 127 S.Ct. at 2802-10. Tracing the history of each school district, Justice Breyer contends that Seattle was legally segregated through at least 1978, and continues to recover from this segregation now. *Id.* at 2802-03. Meanwhile, the Jefferson Country district was under a desegregation order through the year 2000, and did not even change its race-based assignment guidelines after the desegregation order was lifted. *Id.* at 2809.

[93] *PICS*, 127 S.Ct. at 2793.

[94] *See* Jeffrey Rosen*, Can a Law Change A Society?*, N.Y. Times, July 1, 2007, at p. 1; *see also* George F. Will, *The Court Returns to* Brown, Wash. Post, July 5, 2007, at A17.

[95] Watchdog groups, like the National Association for the Advancement of Colored People (NAACP), the Urban League, and the American Civil Liberties Union (ACLU), often work to ensure that basic civil rights are upheld for minorities.

[96] *See PICS*, 127 S.Ct. at 2811.

[97] *See id. at* 2747, 2754.

[98] *See* Grutter v. Bollinger, 539 U.S. 306, 337 (2003).

[99] *PICS*, 127 S.Ct. at 2781.