PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies

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I. Introduction

In Topeka, Kansas, in the early 1950s, Linda Brown was forced to travel twenty blocks from her home, through a railroad switchyard, to attend the all-black Monroe School because Kansas prohibited her from attending any of its racially segregated all-white schools. In *Brown v. Board of Education*, the Supreme Court held that the Equal Protection Clause of the U.S. Constitution bars public school districts from denying Linda Brown, and all other "children of the minority group," the ability to attend a racially-integrated school.[1]

More than half a century later in Seattle, Washington, Andy Meeks was unable to transfer to Ballard High School's specialized biotechnology program because the Seattle School District determined that his enrollment at that school would be incompatible with its goal of achieving the remedial, educational, and democratic benefits of a racially integrated educational environment.

Does the Equal Protection Clause bar a public school district like Seattle from considering the race of Andy Meeks and other children of the

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1. Brown v. Bd. of Educ., 347 U.S. 483 (1954). The Equal Protection Clause in the Constitution's Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

majority group as part of its effort to foster a racially integrated school? The answer not only hinges upon an understanding of the Supreme Court's interpretations of the Equal Protection Clause in *Brown* and its progeny; it also hinges upon the very nature of the principle of equality itself. Are Linda Brown and Andy Meeks "like" cases that must be treated in a "like" manner?

In *Parents Involved in Community Schools (PICS) v. Seattle School Dist. No. 1*, the Supreme Court declared as unconstitutional a school district's reliance upon an "individual student's race in assigning that student to a particular school so that racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole."[2] In doing so, the Court reiterated its presumption that such race-conscious educational classifications violate the Equal Protection Clause.[3]

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2. *See* Parents Involved in Cmty. Sch. (PICS) v. Seattle Sch. Dist. No. 1, *From Lexis:* 127 S. Ct. 2738, 2746*, 168 L. Ed. 2d 508, 517, 2007 U.S. LEXIS 8670 (2007) (Roberts, J., plurality opinion). **All pagination subject to change pending release of the final published version.* According to the Plurality Opinion, the Seattle School District classifies children as white or nonwhite in order to allocate slots at oversubscribed schools while the Jefferson County district classifies as black or "other" in order to make certain elementary school assignments and to rule on transfer requests. *Id.* at 2754.

3. *See* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834 (W.D.Ky. 2004) *aff'd*, McFarland v. Jefferson County Pub. Sch., 415 F.3d 513 (6th Cir. 2005), *rev'd sub nom.* Parents Involved in Cmty. Sch. (PICS) v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Parents Involved in Cmty. Sch. (PICS) v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2738 (2007).

The Seattle School District No. 1 operated an open choice plan whereby students could apply to any one of the district's ten secondary schools. Each student was asked to rank each of the district's high schools in the order of the student's preference. If there was capacity in the student's preferred school, the district assigned the student to that school. When a school became oversubscribed, however, the district gave preferential treatment to students who had siblings already attending the requested school. If the school was still oversubscribed, the district then considered the race of the student together with the racial composition of the school in making its school assignment. If the racial composition of a particular high school significantly (initially by 10 percent or more, and eventually by 15 percent or more) deviates from the demography of the Seattle district's overall student population (which is about 40 percent white and 60 percent nonwhite), and if the assignment of the student would bring the school's demography closer to the Seattle district's overall student demography, then the student would be assigned to that school. After all of the students whose admission to a particular school would bring that school's racial demography closer to the Seattle district's racial demography were admitted to an oversubscribed school, the district then assigned students to that school based on the distance between their residence and the school. A student who resides as little as one hundredth of a mile closer to the school than another student would be given priority. Finally, if, after considering student's choice, facilities capacity, racial demography and proximity, the district still had space for students in an oversubscribed school, assignment to that school is based on lottery. *See* PICS, 426 F.3d at 1169-70. Also, In *Grutter*, the Supreme Court previously held that race-conscious admissions policies violate the Equal Protection Clause unless they are part of an individualized consideration of each applicant to determine whether admission of that applicant might produce

Nonetheless, as this Article shows, a majority of the Court in *PICS* actually rejects a view of the Equal Protection Clause that would treat Linda Brown and Andy Meeks as "like" cases. Indeed, a careful analysis of the opinions in *PICS* reveals that a majority of the Supreme Court has rejected any view of the Equal Protection Clause and of the principle of equality that is "color-blind."

This Article begins with that analysis. In Section II, the Article examines the separate opinions in *PICS*, and shows that a majority of the Court's Justices reaffirmed a school district's ability to engage in important race-conscious integration strategies. Public school districts still may pursue strategies designed to bring together students of different races in order to meet the educational needs of their students and to achieve the educational goals of their schools. Justice Kennedy, who supplied the Court's fifth vote, writes separately to make clear that school districts may take race into account, consider the "racial makeup of schools" and pursue a variety of race-conscious strategies to achieve their compelling interests, including: (1) "ensuring all people have equal opportunity regardless of race;" (2) avoiding or diminishing the "racial isolation" in schools; (3) achieving a "diverse student body" of which racial diversity is a component; (4) "offering an equal educational opportunity to all of their students;" and (5) "bringing together students of diverse . . . races."[4] Justice Kennedy also joins the four dissenters in recognizing the relevance of racial differences in educational opportunities under the Equal Protection Clause.

In Section III, the Article identifies a variety of race-conscious integration strategies that school districts still may choose to pursue in the wake of *PICS*. Moreover, as demonstrated in Section IV, school districts may even consider race in assigning their students to particular schools if they do so as part of nuanced individual evaluation of those students in order to serve their educational goals, including the goal of teaching racial literacy. Finally, in Section V, the Article suggests that a majority of the Supreme Court has begun to recognize the proper place of racial differences in educational opportunities as part of an authentic application of the Equal Protection Clause.

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the educational benefits of a diverse learning environment. *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003) *with* Gratz v. Bollinger, 539 U.S. 244 (2003).

4. PICS, 127 S. Ct. at 2791-92 (Kennedy, J., concurring in part and concurring in the judgment).

II. A Majority of the Court Reaffirms a School District's Ability to Engage in Race-Conscious Integration Strategies

A. The Court Accepts the Plurality Opinion's Narrow Result But Rejects Its Broad Reasoning

Justice Roberts begins his Plurality Opinion by declaring that when the government seeks to distribute burdens or benefits based on "individual racial classifications," the government must demonstrate that the classification is narrowly tailored to achieve a compelling governmental interest.[5] The Opinion asserts that the Supreme Court previously has recognized only two interests in the "school context" that are compelling enough to justify racial classifications: (1) the interest in "remedying the effects of past intentional discrimination,"[6] and (2) "the interest in diversity in higher education upheld in *Grutter*."[7] A majority of the *PICS* Court concludes that the school districts have not properly asserted either interest.

First, the Court has allowed racial classifications to remedy past racial imbalances in schools resulting from past *de jure* segregation, or proven acts of *de facto* segregation.[8] According to the Court in *PICS*, however, this interest cannot itself justify racial classifications where a public school district engages in voluntary race-conscious decision-making.[9] Justice

5. *Id.* at 2751 (Roberts, J., plurality opinion) (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1993)).

6. *Id.* (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

7. *Id.* at 2753 (citing Grutter, 539 U.S. at 328).

8. *See, e.g.*, Freeman, 503 U.S. at 494.

9. *See* PICS, 551 U.S. at 2761. *Compare* (opinion of the Court) ("[T]he Seattle public schools *have not shown* that they were ever segregated by law" (emphasis added)), *with* (plurality opinion) (assuming "the Seattle school district was never segregated by law."). *Id.* at 2752, 2761.

The dissenters take issue with the Plurality's distinction:

> A court finding of *de jure* segregation cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated *by law* voluntarily desegregated their schools *without a court order*—just as Seattle did. *See, e.g.*, Coleman, *Desegregation of the Public Schools in Kentucky—The Second Year After the Supreme Court's Decision*, 25 J. NEGRO EDUC. 254, 256, 261 (1956) (40 of Kentucky's 180 school districts became desegregated without court orders); Branton, *Little Rock Revisited: Desegregation to Resegregation*, 52 J. NEGRO. EDUC. 250, 251 (1983) (similar in Arkansas); Bullock & Rodgers, *Coercion to Compliance: Southern School Districts and School Desegregation Guidelines*, 38 J. POLITICS 987, 991 (1976) (similar in Georgia); *McDaniel* v. *Barresi*, 402 U.S. 39, 40 n.1 (1971) (Clarke County, Georgia). *See also*

Roberts assumes that the Seattle district was "never segregated by law" or subject to a desegregation decree. Moreover, although the Jefferson County district had been the subject of such a decree, that decree was dissolved when the district was found to have achieved "uniform" status.[10]

Second, in *Grutter*, the Court allowed universities to consider race when deciding whether to admit a student in order to achieve the compelling governmental interest in producing the educational benefits of

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Letter from Robert F. Kennedy, Attorney General, to John F. Kennedy, President (Jan. 24, 1963) (hereinafter Kennedy Report), available at http://www.gilderlehrman.org/search/collection_pdfs/05/63/0/05630.pdf (all Internet materials as visited June 26, 2007, and available in Clerk of Court's case file) (reporting successful efforts by the Government to induce voluntary desegregation).

Moreover, Louisville's history makes clear that a community under a court order to desegregate might submit a race-conscious remedial plan *before* the court dissolved the order, but with every intention of following that plan even *after* dissolution. The Supreme Court in fact has not treated as merely *de facto* segregated those school districts that avoided a federal order by voluntarily complying with *Brown*'s requirements. The Court has previously done just the opposite, permitting a race-conscious remedy without any kind of court decree.

Id. at 2810-11 (Breyer, J., dissenting).

10. Justice Roberts asserts that "Seattle has never operated segregated schools." *PICS*, 127 S. Ct. at 2747. That assertion is, however, not accurate. By any measure, the Seattle schools long have been identifiable by race. Indeed, the Chief Justice acknowledges that because "[m]ost white students live in the northern part of Seattle, [and] most students of other racial backgrounds live in the southern part," the district's "racially identifiable" housing pattern has had an effect on the racial identity of the Seattle schools. *Id.* As if to acknowledge the factual inaccuracy of his assertion that Seattle has "never operated segregated schools," Justice Roberts quickly tries to define "segregated schools" as "legally separate schools for students of different races." But even by his own definition, Justice Roberts' assertion is still inaccurate. Seattle in fact did operate "legally separate schools of students of different races." In Seattle, school officials were alleged to have engaged in "school board policies and actions" that helped to create, maintain and aggravate racial segregation. *Id.* at 2802 (Breyer, J., dissenting). The factual record is clear that Seattle actually admitted in a legal document that it had maintained racially segregated schools. In 1956, a memorandum for the Seattle School Board reported that school segregation reflected not only segregated housing patterns but also school board policies that permitted white students to transfer out of black schools while restricting the transfer of black students into white schools. *Id.* at 2803 (Breyer, J., dissenting).

Similarly, Justice Roberts's recitation of the history of the Jefferson County schools is not correct. He writes that Jefferson Country adopted the voluntary student assignment plan at issue in the case in 2001, after the federal district court dissolved its desegregation decree. *Id.* at 2749 (Roberts, J. plurality opinion). Yet, the record demonstrates that Jefferson County did not adopt a new plan after the dissolution of the decree. *Id.* at 2809 (Breyer, J., dissenting). Rather, the district merely continued to implement its prior plan, with one exception. *Id.* The district discontinued its use of race-based targets to govern admission to its magnet schools, as ordered by the court. *Id.* Accordingly, Jefferson County's entire plan was the product of a court order: It continued the student assignment strategies, and discontinued its magnet school targets, both of which the court had ordered. *Id.*

student body diversity.[11] The *PICS* Court, however, defined the compelling interest upheld in *Grutter* as an interest in "a specific type of broad-based diversity" in the "unique context of higher education."[12] The Court, therefore, concluded that the "present cases are not governed by *Grutter*."[13]

In the next section of his Opinion, Justice Roberts addressed the additional interests that the school districts claimed to be compelling. The districts proffered interests in reducing racial concentration in their schools, ensuring that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools, and fostering the educational and social benefits of a racially diverse learning environment. Significantly, not even Justice Roberts, in this section of his Plurality Opinion for just three other members of the Court, could find that these interests are not compelling.[14] He writes that the "debate" as to whether those interests are "compelling" is "not one [the Court] need resolve."[15]

Instead, the Court asserts that even if those interests were compelling, they could not be upheld because "the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity."[16] Writing for five justices including Justice Kennedy, Justice Roberts proceeds to find that the particular methods employed by the districts actually had a minimal effect on student assignment, suggesting that means other than explicit racial classification would have been as effective in serving their compelling objectives. In addition, the districts "failed to show that they considered methods other than explicit racial classifications to achieve their stated goals."[17]

Going beyond his narrow holding, Justice Roberts then attempts to articulate his particular conception of the nature of equality within the Equal Protection Clause. Joined by only three members of the Court, however, Justice Roberts claims that the Equal Protection Clause embodies a timeless constitutional principle that no person shall be treated differently by the government because of that person's race.[18] All racial

11. *Grutter*, 539 U.S. at 328; Gratz v. Bollinger, 539 U.S. 244, 268-69 (2003).
12. *PICS*, 127 S. Ct. at 2754.
13. *Id.*
14. *Id.* at 2755-56.
15. *Id.*
16. *Id.* at 2755.
17. *Id.* at 2760.
18. *PICS*, 127 S. Ct. at 2765.

classifications—no matter how benign or benevolent they may appear to be—are "pernicious."[19] The Equal Protection Clause gives to each individual the right to be free from any government policy that classifies that individual by his or her race. According to Justice Roberts, the *Brown* decision's true import is that it prohibits school districts from violating the "personal interest of the plaintiffs in admission to public schools . . .on a nondiscriminatory basis."[20] Like Linda Brown, the plaintiffs in *PICS* were told by a school district where they "could and could not go to school based on the color of their skin."[21] Justice Roberts suggests that all such racial classifications of individuals are violative of the principle of equality in the Equal Protection Clause. He therefore concludes his opinion with the statement: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[22] A majority of the Court, however, ultimately rejects this slogan, and the phatic appeal to equality on which it is based.

B. The Court Accepts the Dissent's Fundamental Reasoning But Rejects Its Result

Writing for four members of the Court, Justice Breyer begins his dissent by detailing the history of the efforts by the Seattle and Jefferson County school districts to integrate their schools. In light of that historic context, the dissenters find the districts' racial classification to be justified by at least three compelling interests: (1) the "remedial" interest in bringing about greater racial integration in their primary and secondary schools pursuant to a school desegregation order or settlement;[23] (2) the educational interest in "overcoming the adverse educational effects produced by and associated with highly segregated schools," and "create[ing] school environments that provide better educational opportunities for all children;"[24] and (3), the "democratic" interest in helping to "create citizens better prepared to know, to understand, and to work with people of all races and backgrounds"[25] and in "helping children learn to work and play together with children of different racial backgrounds."[26] According to the dissent, the districts' race-conscious

19. *Id.* at 2752 (quoting Gratz v. Bollinger, 539 U.S. 244, 268-69 (2003)).
20. *Id.* at 2765 (quoting Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955)).
21. *Id.* at 2768.
22. *Id.*
23. *Id.* at 2820 (Breyer, J., dissenting).
24. *Id.* at 2820, 2823 (Breyer, J., dissenting).
25. *Id.* at 2823.
26. *Id.* at 2821 (Breyer, J., dissenting).

student assignment plans were "narrowly tailored" to serve these compelling interests because of their "limited and historically-diminishing use of race; . . . their strong reliance upon other non-race-conscious elements;" their history and [evolution] over time; the less burdensome nature of the plans relative to other approved approaches; and the lack of "reasonably evident alternatives."[27] Justice Kennedy, however, could not accept the dissent's "narrow tailoring" analysis, and therefore joined the Plurality's result.

Nonetheless, the dissent's understanding of the Equal Protection Clause ultimately carries the day. As Justice Breyer declares: "A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it."[28] In *Swann v. Charlotte-Mecklenburg Board of Education*, a unanimous Court wrote:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.[29]

Moreover, in *North Carolina Board of Education v. Swann*,[30] the Court reaffirmed that "school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." Indeed, in *McDaniel v. Barresi*, a case decided the same day as *Board v. Swann*, a group of parents challenged a race-conscious student assignment plan that the school district had *voluntarily* adopted as a remedy without a court order.[31] The plan required that each elementary school in the district maintain 20 percent to 40 percent enrollment of African-American students, corresponding to the racial composition of the district.[32] The

27. *Id.* at 2829-30 (Breyer, J., dissenting).

28 *Id.* at 2811.

29. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

30. N.C. Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 16).

31. McDaniel v. Barresi, 402 U.S. 39, 41 (1971).

32. *See* Barresi v. Browne, 175 S. E. 2d 649, 650-651 (Ga. 1970).

Supreme Court upheld the plan.[33]

According to the dissent, *Board v. Swann* is based upon a well-established interpretation of the Fourteenth Amendment: the objective of those who wrote the Equal Protection Clause was to forbid practices that lead to racial *exclusion*. "The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery."[34]

Justice Breyer concludes that those who drafted the Equal Protection Clause with this basic purpose in mind would have understood the legal and practical *difference* between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together.[35] The Constitution almost always forbids governmental actions that employ racial classifications to exclude, separate or subjugate members of the minority race. The Equal Protection Clause, however, is "more lenient" of government efforts to include, integrate or de-subjugate members of that race.[36]

C. Justice Kennedy's Dispositive Opinion Adopts the Dissent's Fundamental Reasoning But Accepts the Plurality's Narrow Result

Justice Kennedy rejects the Plurality's approach as "inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause."[37] In his critical, separate opinion, Justice Kennedy agrees with the four dissenters that the interests asserted by the

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33. *See* McDaniel, 402 U.S. at 41.

34. Parents Involved in Cmty. Sch. (PICS) v. Seattle Sch. Dist. No. 1, *From Lexis:* 127 S. Ct. 2738, 2815*, 168 L. Ed. 2d 508, 517, 2007 U.S. LEXIS 8670 (2007) (Breyer, J., dissenting). **All pagination subject to change pending release of the final published version.* (citing Slaughter-House Cases, 83 U.S. 36, 71 (1873)) ("[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] . . . we mean the freedom of the slave race"); Strauder v. West Virginia, 100 U.S. 303, 306 (1879) ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated . . . all the civil rights that the superior race enjoy.").

35. *Id.* (Breyer, J., dissenting) (citing R. SEARS, A UTOPIAN EXPERIMENT IN KENTUCKY: INTEGRATION AND SOCIAL EQUALITY AT BEREA, 1866-1904 (1996) (describing federal funding, through the Freedman's Bureau, of race-conscious school integration programs). *See also* R. FISCHER, THE SEGREGATION STRUGGLE IN LOUISIANA 1862-77, 51 (1974) (describing the use of race-conscious remedies); Harlan, *Desegregation in New Orleans Public Schools During Reconstruction*, 64 AM. HIST. REV. 663, 664 (1962) (same); W. VAUGHN, SCHOOLS FOR ALL: THE BLACKS AND PUBLIC EDUCATION IN THE SOUTH, 1865-1877, 111-116 (1974) (same)).

36. *Id.* (Breyer, J., dissenting) *See also* Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting).

37. *Id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

districts in these cases are "compelling," and could therefore justify broad racial classifications and even narrowly tailored, race-conscious assignments of individual students.[38] He concludes that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[39] He further finds related compelling interests in: (1) ensuring all people have equal opportunity regardless of race; (2) reaching *Brown*'s objective of equal educational opportunity; (3) refusing to accept the "status quo of racial isolation in schools;"[40] (4) altering "student-body composition of certain schools" that interfere with the "objective of offering an equal education to all of their students;"[41] (5) "bringing together students of diverse backgrounds and races;"[42] (6) "remedying the *effects* of past intentional discrimination and . . . increasing diversity in higher education;"[43] (7) avoiding racial isolation;"[44] (8) achiev[ing] a diverse student population;"[45] and, (9) "bringing together students of different racial, ethnic and economic backgrounds."[46]

Although he finds the district's asserted interests in the educational and societal benefits of a racially-diverse learning environment to be compelling, Justice Kennedy concludes–with the Plurality–that their methods of achieving those interests are not "narrowly tailored."[47] Justice Kennedy finds that Jefferson County's assignment plans are "broad and imprecise," inconsistently applied and even "ad hoc."[48] The district also failed to make "clear" who makes the assignment decisions, what "oversight" is employed, and "the precise circumstances in which an assignment decision will or will not be made on the basis of race."[49] Seattle, for its part, failed to "make an adequate showing" that its "blunt distinction" between white and nonwhite students furthers its own asserted remedial, educational and democratic interests because a school with 50 percent white students and 50 percent African-American students would qualify as "balanced," but a school with 30 percent Asian-American, 25

38. *Id.*
39. *Id.*
40. *Id.* at 2791.
41. *Id.* at 2792.
42. *Id.*
43. *Id.* at 2793.
44. *Id.* at 2797.
45. *Id.*
46. *Id.*
47. *Id.* at 2791.
48. *Id.* at 2790.
49. *Id.*

percent African-American, 25 percent Latino and 20 percent white students would not be racially balanced.[50]

Nonetheless, Justice Kennedy concludes that school districts must be "free to devise race-conscious measures" to achieve their compelling interests in offering an equal educational opportunity to all students.[51] Such race-conscious measures include: strategic site selection of new schools, drawing attendance zones in recognition of neighborhood demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollment, performance and other statistics by race.[52] Justice Kennedy asserts that each one of these mechanisms is "race-conscious."[53] Yet, significantly, he concludes that none of them would "demand strict scrutiny to be found permissible."[54]

If a school district is determined to employ a method of achieving its objectives that treats each student in a different fashion solely on the basis of a systematic, individual typing by race, however, that district must undergo strict scrutiny. Yet, even a classification of burdens and benefits to individual students based on their race would be constitutional if the district can establish that its classification is "the last resort" to achieve its compelling interest.[55] In doing so, the district would have to show that it could not have achieved its objectives through "facially-neutral means" or through a "more nuanced, individual evaluation of student needs and student characteristics that might include race as a component" as envisioned by *Grutter* in light of the different "age of the students, the needs of the parents, and the role of the schools."[56]

D. A Majority of the Court Recognizes Compelling Governmental Interests That Justify Race-Conscious Integration Strategies

In *PICS*, a majority of the Court recognized as compelling a school district's interest in creating a racially diverse educational environment. Justice Breyer's dissent for four members of the Court finds compelling remedial, educational and democratic interests in a racially diverse educational environment.[57] Justice Kennedy, as well, concludes that a

50. *PICS*, 127 S. Ct. at 2790-91.
51. *Id.* at 2792.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 2793.
57. *Id.* at 2822-23 (Breyer, J., dissenting).

racially diverse educational environment is a compelling objective.[58]

In addition, a majority of the *PICS* Court concludes that school districts have wide latitude to engage in race-conscious integration strategies that do not rely upon racial classifications of individual students. Furthermore, school districts also may employ student assignment strategies that consider the race of individual students where the district shows that those strategies are narrowly tailored to achieve their objectives. The Court's majority goes further to indicate that a school district may engage in broad race-conscious strategies designed to achieve their interest in equal educational opportunities without being subjected to strict scrutiny, and without violating the core principles of equality in the Equal Protection Clause.

III. The *PICS* Court Enables School Districts to Pursue a Variety of Race-Conscious Strategies to Serve Their Compelling Interests in Fostering Racially Integrated Schools

In his separate Opinion, Justice Kennedy declares that school districts are "free to devise race-conscious measures" in shaping the racial composition of their schools in order to remove impediments to equal educational opportunities.[59] If these measures "address the problem in a general way without treating each student in a different fashion solely on the basis of a systematic, individual typing by race" these measures will not be subject to strict scrutiny.[60] Although these methods of achieving a racially diverse school are race-conscious, school districts may employ them without demonstrating that they are narrowly tailored to achieve any compelling interests. Rather, Justice Kennedy indicates that school districts must be given broad deference in their efforts to achieve a racially integrated educational environment.[61]

In the absence of strict scrutiny, these methods will be upheld so long as they are rationally related to the district's legitimate goals. Accordingly, Justice Kennedy suggests that school boards:

> may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a

58. *Id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

59. *Id.*

60. *Id.*

61. *Id.* at 2792-93.

> targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them will demand strict scrutiny be found permissible.[62]

The use of these strategies by some school districts may result in some racial integration. Where school districts seek to achieve the benefits of racial integration, they should at least experiment with these strategies to determine whether they will be successful.[63] Their experimentation will not be scrutinized strictly by the courts. Unfortunately, however, there is little evidence that the use of these broad, race-conscious integration strategies will adequately achieve the objectives that Justice Kennedy finds compelling for most school districts.[64]

A. Strategic Site Selection and Attendance Zoning for Specially Resourced Magnet Schools and Programs

Justice Kennedy indicates that before employing the "last resort" of student assignment based on race, a school district should attempt to meet its goal of fostering student body diversity through means such as strategic site selection and attendance zoning for new, specially resourced programs and schools.[65] To avoid racial concentration in its schools, for example, a school district might create merit-based academic, avocational and vocational magnet programs. These programs can help each school address racial diversity issues by encouraging students to travel outside of their geographic attendance zone to participate in a specific magnet program.

Dual-language Spanish magnet schools can be a particularly effective way of achieving racial diversity where the program attracts an equal number of English speaking students and students for whom Spanish is

62. *Id.* at 2792.

63. *Id.*

64. As Justice Breyer shows, Seattle and Louisville are excellent examples of the ineffectiveness of these methods. *Id.* at 2802 (Breyer, J., dissenting). As to "strategic site selection," Seattle has built one new high school in the last forty-four years. In fact, six of the Seattle high schools involved in the *PICS* case were built by the 1920s; the other four were open by the early 1960s. *Id.* at 2828. Louisville tried "drawing" neighborhood "attendance zones" on a racial basis. *Id.* That method worked only when forced busing was also part of the plan. *Id.* Both Louisville and Seattle also tried "allocating resources for special programs." *Id.* They both experimented with specially resourced "magnet school" programs, but the limited desegregation effect of these efforts extends at most to those few schools to which additional resources are granted. *Id.* In addition, there is no evidence from the experience of these school districts that it will make any meaningful impact. *Id.* Louisville and Seattle also tried "recruiting faculty" on the basis of race, but only as one part of a broader assignment program. *Id.*

65. *Id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

their first language. The magnet may pull white students away from their geographic attendance zones and into a school with a significant number of Hispanic or Latino students for whom English may not be their first language. The program's goal is foreign language acquisition, but its methods may have the collateral benefit of achieving a racially diverse classroom.

In Illinois School District 112, for example, the district operates a dual-language immersion program that has produced both foreign language acquisition learning outcomes and racial diversity.[66] The district educates approximately four thousand students in eight elementary schools and three middle schools. The district as a whole is predominately white,[67] but more than 62 percent of the students who reside in the northern section of the district are Hispanic.[68] In 1996, the district began a dual-language (Spanish-English) immersion program. The program was housed in one school building in the predominately Hispanic northern attendance zone, and in two school buildings in the predominately white southern attendance zone.[69] The program requires school administrators to assign an equal number of students who are Spanish-dominant and English-dominant to the same classroom.[70] The program's goals include high academic achievement in Spanish and English, and "cross-cultural awareness."[71] In 2006 and 2007, 570 of the district's students participated in the program, which enticed English-dominant students to choose to attend school in the predominantly Spanish-dominant attendance zone, and enticed Spanish-dominant students to choose to attend schools in the predominately English-dominant attendance zone. The result of the program was that the dual language classrooms throughout the district had equal numbers of English and Spanish dominant children. As a collateral benefit, these classrooms were racially diverse as well.

The program assesses its students to determine whether its educational objectives have been met.[72] Students from both language backgrounds

66. More than 80 percent of the district's students are white. *See* Ill. Sch. Dist. 112 State Report Card (2005), http://www.nssd112.org/reportcards/schoolrprtcrd05/ot05src.pdf [hereinafter, "Report Card"].

67. *Id.*

68. *Id.*

69 Melissa K. Wolf, North Shore School District 112, Dual Language Immersion Program (2005), http://www.nssd112.org/curriculum/frameworkpdfs/DLpowerpoint.ppt#229,17,InterpretingtheNCE.

70. *Id.*

71. *Id.*

72. *Id. See also* North Shore School District 112, Highland Park, IL Homepage, http://www.nssd112.org/curriculum/dlassessments.htm (last visited Sept. 15, 2007).

have enjoyed tremendous academic success.[73] Spanish-dominant children in Kindergarten through eighth grade acquire English language skills at a more rapid rate than their Spanish-dominant peers in traditional bilingual programs.[74] English-dominant students acquire Spanish language skills at a highly accelerated rate relative to their peers.[75] Moreover, both Spanish-dominant and English-dominant students show great academic success in cognitive areas other than language.[76] In fact, the evidence indicates that English-dominant students in the dual language program perform better on state standardized tests in Math and English than their English-dominant peers in the same district.[77] Accordingly, this type of magnet program is a race-neutral strategy for producing dual-language acquisition which can in some districts also produce the benefits of racial integration.

Yet, "there is little evidence that such magnet school programs" alone, whatever their other merits, can achieve effective racial integration. Even magnet programs receiving federal funding through the Department of Education's Magnet Schools Assistance Program ("MSAP") have had only modest success in achieving racial integration. The Department of Education's most recent evaluation of the MSAP acknowledged that MSAP recipients "overall made only modest progress in reducing minority group isolation" in the individual magnet schools targeted by the MSAP grant.[78]

The Department of Education's report explains that the relative lack of integration success may be due to the fact that the districts were prohibited from using race-conscious student assignment plans. The Report concludes that "limitations placed on the use of race as a factor in selection of students" are a "potentially important factor" that may "help explain why more than 40 percent of desegregation-targeted schools were not successful in making progress on their desegregation objective."[79] Magnet programs

73. *See* WOLF, *supra* note 69.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See* N. Shore Sch. Dist. 112, *supra* note 72.

78. U.S. DEP'T OF EDUC., EVALUATION OF THE MAGNET SCHOOLS ASSISTANCE PROGRAM, 1998 GRANTEES VII-3 (2003) (defining "minority group isolation" as the degree to which a school enrolled more than 50 percent minority students). In 43 percent of the 294 schools targeted for desegregation during the grant cycle, the degree of minority group isolation (MGI) actually *increased* or remained the same. *Id.* at xiii. The remaining 57 percent of schools succeeded in reducing minority group isolation, but 35 percent of the targeted schools did so by less than five percentage points. *Id.* at xii-xiii.

79. *Id.* at IV-11. The Report further explains, "[I]n District C, for example, the project director contended that it is difficult to meet the desegregation objective when school officials are prohibited from taking race into account in making school assignments, even though administrators did consider eligibility for reduced-price lunches and reading scores instead." *Id.*

simply cannot be as finely tailored to achieve the educational benefits of racial diversity as race-conscious school assignment designed to achieve precisely these benefits. Racial diversity is at best a collateral benefit of the magnet program.

B. Socio-economic Integration Strategies

There is great debate about whether student assignment or admission based on socio-economic status is an effective race-neutral method of achieving a racially diverse educational environment.[80] Significantly, Justice Kennedy does not include socio-economic integration strategies among the methods that school districts must exhaust before using explicit racial classifications. Perhaps Justice Kennedy eliminated that method because he is aware of the overwhelming data demonstrating that reliance on socio-economic status does not advance the goal of racial integration in schools.

Because there are instances in which student admission based on socio-economic status can have the collateral benefit of enhancing racial diversity, however, objectors to a school district's voluntary integration program may still argue that the district must first experiment with such a race-neutral strategy. In the Seattle district, for instance, the northern Seattle area contains a majority of "white" students and is "historically more affluent."[81] The southern Seattle area is necessarily less affluent. Thus, moving more affluent students south, and less affluent students north, could possibly provide a more diverse student body.[82] A report issued by the Office for Civil Rights of the United States Department of Education, entitled *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004), however, concludes that there is no evidence showing that socio-economic-based measures of school assignment or site selection actually succeed in achieving racial integration.[83] The Office for Civil

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at VI-13.

80. *See, e.g.*, CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES (The Civil Rights Project, Harvard Univ. 2003); WILLIAM G. BOWEN ET. AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 177 (2005); Richard Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 471, 474 (1997); Mark Satin, *Economic-Class-Based Affirmative Action: The Elites Loathe It, the People Want It*, Radical Middle Newsletter, (July/August 2003), *available at* http://www.radicalmiddle.com/x_affirmative_action; Alec MacGillis, *Basing Affirmative Action on Income Changes Payoff*, THE SUN, May 25, 2003, at 1C; RICHARD KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996).

81. Parents Involved in Cmty. Sch. (PICS) v. Seattle School Dist. No. 1, 426 F.3d 1162, 1166 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2738 (2007).

82. *Id.* at 1188.

83. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY, RACE

Rights Report profiles the following five school districts as models for using socio-economic-based assignments as a race-neutral alternative to achieving student body diversity: Charlotte-Mecklenburg, North Carolina; Wake County, North Carolina; San Francisco, California; Brandywine, Delaware; and La Crosse, Wisconsin.[84]

None of the five districts that adopted socio-economic policies succeeded in eliminating school segregation. In fact, the adoption of socio-economic-based policies increased segregation in two of the districts, and introduced or increased racial isolation in three of the districts.[85] Two of the five districts—Charlotte-Mecklenburg and Wake County—experienced *increases* in the percentage of students in segregated schools.[86] The three remaining districts—San Francisco, Brandywine, and La Crosse—only modestly reduced the percentage of students attending segregated schools, and none actually succeeded in eliminating segregation.[87] Moreover, where schools with intensely segregated populations of at least 90 percent minority enrollment exist, socio-economic status assignment plans actually increased racial concentration.[88]

The research suggests that the use of socio-economic status for school assignments alone has not succeeded in desegregating public schools, particularly in larger districts.[89] Based on that evidence, the use of socio-economic status for school assignments will likely not prove to be a workable alternative for school districts seeking to further their compelling interest in racial integration.

Even if student assignment based on socio-economic status were workable and in certain cases resulted in enhanced racial diversity, there is no doubt that the use of socio-economic status is less tailored to achieve the goal of meaningful racial diversity than the use of racial diversity itself. The use of socio-economic status as a proxy for racial status is both overbroad and under-inclusive. Accordingly, the fit between the "means" of student assignment based on socio-economic status and the "end" of racially diverse educational institutions is not as precise as the fit between the "means" of student assignment based on race and the "end" of racially diverse educational institutions. If the "compelling interest" that drives student assignment is producing the educational benefits of a racially

NEUTRAL ALTERNATIVE IN AMERICAN EDUCATION 61-62, 66-71 (2004).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

diverse student body, then the method of socio-economic integration is not tailored to serve that interest.

IV. Public School Districts Can Meet Their Burden of Proving That Assigning a Meaningful Number of Racially Diverse Students to an Educational Environment is Narrowly Tailored to Achieving the Compelling Interest in Teaching Racial Literacy to Secondary School Students

After *PICS*, public school districts may still employ explicit racial classifications of individual students, so long as they can show that their classifications are narrowly tailored to achieve their compelling interests in the benefits of a diverse student population.[90] As a majority of the Court, including Justice Kennedy, makes clear in *PICS*, school districts may still engage in a "nuanced, individual evaluation" of student characteristics including their race, to meet a school's compelling educational needs.[91]

A. Public School Districts Have a Compelling Interest in Teaching Racial Literacy

The concept of racial literacy includes: an understanding of the biological and social components of race itself; an understanding of the history of race throughout the world and in America; an understanding of the current and projected racial composition of the world, the country, the state, the county, the school district and the school; an understanding of the relationship *vel non* between race and politics, law, society, geography, language, culture, religion, family, and education; an understanding of the connection *vel non* between race and perceptions of the world and one's self; an understanding of the racial prejudices and biases that may exist in each student; an understanding of the strategies that may be used to overcome such prejudices and biases; and an understanding of the value of racial differences and racial tolerance.[92]

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90. *See* Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

91. Parents Involved in Cmty. Sch. (PICS) v. Seattle Sch. Dist. No. 1, *From Lexis:* 127 S. Ct. 2738, 2793*, 168 L. Ed. 2d 508, 567, 2007 U.S. LEXIS 8670 (2007) (Roberts, J., plurality opinion). ****All pagination subject to change pending release of the final published version. PICS*, 127 S. Ct. at 2793 (Kennedy, J., concurring in part, and concurring in the judgment).

92. In *From Racial Liberalism to Racial Literacy*, 91 J. AM. HIST. 92, 114 (2004), Lani Guinier has defined "racial literacy" in the different context of developing a sophisticated understanding and reaction to race in America. She writes that "racial literacy is epiphenomenal . . . is contextual rather than universal . . . depends on the engagement between action and thought . . . is about learning rather than knowing . . . is an interactive process in which race functions as a tool of diagnosis, feedback and assessment." *Id. See also* Devon W. Carbado & Mitu Gulati; *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149, 1153-1154 (2003)

Racial literacy is hardly a novel educational objective. John Dewey concluded that encouraging students to understand and confront racial differences is a particularly critical function to be performed by education in the American Democracy.[93] Educational philosophers and practitioners have long recognized that because of the pervasiveness of racial issues throughout the curriculum, students must receive an educational foundation in racial literacy.[94] Moreover, local public school districts, under direction from their states, commonly include racial understanding as a required component of their curriculum and instructional practices.[95] The legitimacy of the educational judgment that racial literacy is an essential learning outcome for American secondary school students, therefore, is unassailable.[96]

In *Grutter*, the Supreme Court recognized that the promotion of specific educational benefits that flow from such a diverse student population is a compelling governmental interest.[97] The Court identified no less than thirteen "substantial" governmental benefits that flow from a diverse student population: (1) overarching educational benefits; (2) an increase in the "robust" exchange of ideas; (3) cross-racial understanding; (4) breaking down racial stereotypes; (5) livelier, more spirited, enlightening and interesting classroom discussions; (6) the promotion of learning "outcomes;" (7) better preparation of students to work and interact in an "increasingly diverse" society and workforce; (8) better preparation as professionals in an "increasingly global marketplace;" (9) helping the

("Central to racial diversity . . . is the notion that how we experience, think about, and conduct ourselves in society is shaped, though not determined, by our race").

93. JOHN DEWEY, EDUCATION IN DEMOCRACY, *reprinted in* CAHN, CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION 288-93 (1997).

94. NEIL POSTMAN, THE END OF EDUCATION: REDEFINING THE VALUE OF SCHOOL (1995).

95. *See* BRUCE M. MITCHELL & ROBERT E. SALSBURY, MULTICULTURAL EDUCATION IN THE U.S.: A GUIDE TO POLICIES AND PROGRAMS IN THE 50 STATES *passim* (2000) (citing states that have racial literacy programs, persons overseeing such programs, funding for programs, or other similar equity programs: Connecticut, Delaware, Florida, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Washington, Wisconsin, and Wyoming). Numerous other states, although lacking a specific program, stress multi-racial learning within the classrooms through efforts such as teacher education and local decision-making. *Id.*

96. *See, e.g.*, Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1, 426 F.3d 1162 (9th Cir. 2006), *rev'd,* 127 S. Ct. 2738 (2007); McFarland v. Jefferson County Public Schools, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd sub nom. PICS*, 127 S. Ct. at 2753 (recognizing the legitimacy of the objective of teaching racial literacy in the Jefferson County and Seattle School Districts).

97. *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (noting that the law school's concept of critical mass must be "defined by reference to the educational benefits that diversity is designed to produce.").

military to fulfill its very mission of "national security;" (10) facilitating the "diffusion of knowledge and opportunity through public institutions of higher education" to be accessible to all individuals and thereby sustaining our "political and cultural heritage;" (11) fostering the effective participation by members of all racial and ethnic groups which is vital to becoming one nation; (12) supporting the training in law school for diverse national leaders and thereby cultivating leaders with legitimacy; and, (13) developing attorneys of diverse races and ethnicities who will be able, in turn, to help all members of a "heterogeneous society" succeed.[98]

These substantial benefits include racial literacy in the form of cross-racial understanding, breaking down racial stereotypes, learning outcomes regarding race, preparation to operate in a "diverse" society, and the "diffusion of knowledge" about racial diversity.[99] In evaluating the relevance of diversity to educational objectives, the Court focused principally on the "learning outcomes" that a diverse student body provides.[100] Those learning outcomes are derived not only from having diverse viewpoints represented in the "robust exchange of ideas,"[101] but also from the presence of racially diverse students in the classroom as a method of challenging racial stereotypes.[102]

A majority of the Court in *PICS* also recognized the state's compelling interest in fostering the educational benefits of student body diversity. Justice Breyer's Opinion for four Justices declares that among the compelling interests that justify race-conscious decision making is "an effort to create citizens better prepared to know, to understand and to work with people of all races. . . ."[103] Significantly, Justice Kennedy, as well, declares that race-conscious strategies can be employed when narrowly tailored to achieve the "goal of bringing together students of diverse backgrounds and races. . . ."[104] He further declares that school districts may consider the "racial makeup of schools" and the "racial composition"

98. *Id. See also* MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY AND PRACTICE: CASES AND MATERIALS 527 (2005).

99. *See* KAUFMAN & KAUFMAN, *supra* note 98.

100. For an outstanding empirical analysis of the achievement gains produced by a racially diverse educational environment, *see* Roslyn A. Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. Rev. 1513, 1517, 1546 (2003) ("desegregated education leads to higher achievement."). *See also* PICS, 127 S. Ct. at 2776.

101. *Grutter*, 539 U.S. at 329-30.

102. *Id.* at 330, 333.

103. *PICS*, 127 S. Ct. at 2823 (Breyer, J., dissenting).

104. *Id.* at 2792 (Kennedy, J., concurring in part, and concurring in the judgment).

of students in order to encourage a diverse student body.[105]

Public school districts may readily articulate the precise and compelling educational benefits produced by a diverse elementary and secondary school population. These benefits include the acquisition of racial literacy.[106] A vast amount of social science research has been generated indicating the educational benefits of a racially diverse educational environment generally, and the benefits of such an environment to the production of racial literacy.[107] The Supreme Court also

105. *Id.*

106. Academic research has shown that inter-group contact reduces prejudice and supports the values of citizenship. *See* Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. Rev. 923, 951-52 (2002) (collecting academic research demonstrating that interpersonal interaction in desegregated schools reduces racial prejudice and stereotypes, improving students' citizenship values and their ability to succeed in a racially diverse society in their adult lives).

107. *See, e.g.*, Robert E. Slavin & Eileen Oickle, *Effects of Cooperative Learning Teams on Student Achievement and Race Relations: Treatment by Race Interactions*, 54 SOC. OF EDUC. 174, 178 (1981) (finding that both white and African-American students gained academically from cooperative diverse learning environments); Robert Slavin, *Cooperative Learning and Intergroup Relations*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 633 (James A. Banks ed. 2001) (offering an overview of intergroup research studies and concluding that students in ethnically diverse education settings receive long-lasting social, cross-ethnic friendships and improved student achievement); Amy Stuart Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society*, *in* IN SEARCH OF *BROWN* (Harvard Univ. Press 2005) (reporting positive overall societal results from integration of schools by studying a particular class from 1980, including students who are less racially prejudiced and more open to people of different backgrounds); Thomas F. Pettigrew, *Intergroup Contact: Theory, Research, and New Perspectives*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 770 (James A. Banks ed., 2d ed. 2004) (arguing that proper education prepares students better for democratic citizenship); Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. OF SOC. ISSUES, 17, 32 (2004) (presenting studies that examine and conclude that diversity in student bodies, although altered by personal experiences with the diverse groups, generally create students that are better suited for "democratic citizenship"); Amy Guttman, *Unity and Diversity in Democratic Multicultural Education*, *in* DIVERSITY AND CITIZENSHIP EDUCATION 71 (James A. Banks ed., 2004) (presenting that multicultural education furthers democratic ideals through teaching tolerance and role that cultural differences have had in the shaping of society); Walter G. Stephan & Cooke White Stephan, *Intergroup Relations in Multicultural Education Programs*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 782 (James A. Banks ed., 2d ed. 2004) (affirming that one goal of multicultural education is to improve relations among ethnic groups and reviewing the processes that lead to such change); Janet Ward Schofield, *Fostering Positive Intergroup Relations in Schools*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 799 (James A. Banks ed., 2d ed. 2004) (agreeing that multicultural education can improve ethnic relations among students, primarily because young students have their first experiences with others from different ethnic backgrounds in schools, and outlining policies to effectively foster those relationships); James A Banks, *Democratic Citizenship Education in Multicultural Societies*, *in* DIVERSITY AND CITIZENSHIP EDUCATION 10 (James A. Banks ed., 2004) (arguing that proper education can prepare students better for democratic citizenship); Black, *supra* note 106, at 944-47 (noting the vast amount of research affirming the positive effects of diverse educational environments); Genva Gay, *Curriculum Theory and Multicultural Education*, *in*

has recognized that the educational benefits of a racially diverse school extend to all students in that school: "attending an ethnically diverse school may help . . . [in] preparing minority children for citizenship in our pluralistic society while, we may hope, teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage."[108]

HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 32-33 (James A. Banks ed., 2d ed. 2004) (reviewing scholarship on the value of multicultural education and defining multicultural education as an idea that recognizes the importance of ethnic and cultural diversity in educational settings); Gloria Ladson-Billings, *Culture Versus Citizenship, in* DIVERSITY AND CITIZENSHIP EDUCATION 122 (James A. Banks ed., 2004) (finding that part of the educator's responsibility is to teach civic and democratic ideals); Janet Wart Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (James A. Banks & Cherry A. McGee Banks eds., 2004) (providing a comprehensive survey of the major social and statistical studies on desegregation and the impact on African-American students, Hispanic students, and white students from 1975 through 1991, and concluding that the positive effects of desegregation include, *inter alia*, improved reading skills for African-American youth and higher college graduation rates leading to higher employment income); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-term Effects of School Desegregation*, 64 REV. OF EDUC. RES., 531, 532, 540, 546, 552 (1994) (reviewing twenty-one studies of the impacts of desegregation and integrated learning environments, concluding that African American students attending desegregated schools set future employment goals higher than in segregated schools, a higher ratio of African-American students from desegregated schools attain higher education, African-American students from desegregated schools are more likely to be employed in white-collar/professional careers); Eric A. Hanushek, et al., *New Evidence About* Brown v. Board of Education: *The Complex Effects of School Racial Composition on Achievement* 23-24 (Nat'l Bureau of Econ. Research, Working Paper No. W8741, 2004) (studying academic achievement and concluding that African-American achievement, particularly in mathematics, is improved through diverse learning); Mickelson, *supra* note 100, at 1560 (concluding that all students benefit from diverse schools, African-American-identified schools have negative effects on all students, and even desegregated schools may have disproportionate education based on race due to other social and academic factors); Maureen Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 753 (1998) (providing an overview of the social science literature regarding diversity and desegregation, the resulting impact on students, and finding that the reliable findings are typically positive); Jomills Henry Braddock II & Tamela McMulty Eitle, *The Effects of School Desegregation, in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 828 (James A. Banks ed., 2d ed. 2004) (providing an overview of the social science research regarding the effects of desegregation and concluding that modest, but significant, improvements exist for African-American students); THE CIVIL RIGHTS PROJECT, THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES; CAMBRIDGE, MA SCHOOL DISTRICT 12 (2002), *available at* http://www.civilrightsproject.ucla.edu/research/diversity/cambridge_diversity.pdf; THE CIVIL RIGHTS PROJECT, THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: LYNN, MA SCHOOL DISTRICT 11 (2002), *available at* http://www.civilrightsproject.ucla.edu/research/diversity/lynnreport.pdf.

108. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 473 (1982) (internal quotation marks and citations omitted).

B. Race-Conscious and Nuanced Individual Student Assignment Strategies Can Be Narrowly Tailored to Serve the Compelling Educational Interest in Teaching Racial Literacy

The Supreme Court thus has recognized that states have a compelling interest in encouraging their educational institutions to provide "educational benefits" to their citizens.[109] The Court also has recognized that a school's use of student enrollment to produce a meaningful number of diverse students within an educational institution can be narrowly tailored to achieve the compelling governmental interest in producing these educational benefits.[110]

In the wake of *PICS*, school districts seeking to show that their classifications and assignments of individual students based on race are narrowly tailored to serve their compelling interests must demonstrate that: (1) their classifications are part of a carefully monitored and nuanced, individualized consideration of student characteristics including race; and, (2) their pursuit of alternative race-neutral strategies has not been or would not be successful in achieving their precise, compelling interests. Neither of these considerations should frustrate a school district's efforts to conduct a nuanced individual consideration of student characteristics to achieve its goal of teaching racial literacy.

1. Individualized Nuanced Consideration of Student Characteristics

Grutter emphasized the importance of the individualized consideration of each student, declaring that in the context of a race-conscious university admissions program, such consideration:

> must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. *The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.*[111]

Similarly, Justice Kennedy wrote in *PICS* that the "nuanced, individual evaluation of school needs and student characteristics that might include race as a component," would allow a school district to tailor the

109. *PICS*, 127 S. Ct. at 2755 (Kennedy, J., concurring in part and concurring in the judgment). *See also* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244, 268 (2003).

110. *Id. See also* PICS, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment); *PICS*, 127 S. Ct. at 2824-25 (Breyer, J., dissenting).

111. *Grutter*, 539 U.S. at 337 (emphasis added).

racial composition of its schools to meet its precise pedagogical goals.[112] One may advance the precise educational outcome of teaching racial literacy by assigning pedagogically meaningful numbers of *racially* diverse students to a school or classroom. Racial diversity in the high school environment thus has a particularly meaningful role in fostering the precise objective of teaching racial literacy.[113]

The educational judgment that racial literacy is best taught in a racially diverse school environment is not only reasonable; it is virtually undisputed. Educational professionals have determined that a uniquely effective method of teaching racial literacy requires students to interact with peers from different racial backgrounds.[114] Secondary school educational professionals understand that racial literacy cannot be taught through the monolithic delivery of information to passive students.[115] Rather, teaching racial literacy requires prompting students to confront the personal and political nature of race and racism in their educational environment.[116]

The professional judgment that racially diverse educational environments are indispensable to teaching racial literacy is not a pretext for individual racial classifications or for racial engineering. Rather, empirical evidence shows that interpersonal interaction in desegregated

112. *PICS*, 127 S. Ct. at 2793 (Kennedy, J., concurring in part and concurring in the judgment).

113. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 18 (1st Cir. 2005) (holding that when racial diversity is the compelling interest "[t]he only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest"); Brewer v. W. Irondequoit Ctr.. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) ("If reducing racial isolation is—standing alone—a constitutionally permissible goal, . . . then there is no more effective means of achieving that goal than to base decisions on race."). *See also* Jeff Sapp, *Cooperative Learning: A Foundation for Race Dialogue*, 30 TEACHING TOLERANCE, Fall 2006, *available at* http://www.tolerance.org.teach/.magazine/features.jsp?is=39&ar=684; Spencer Kagan, *The Power to Transform Race Relations*, 30 TEACHING TOLERANCE, Fall 2006, *available at* http://www.tolerance.org/teach/printar.jsp?p=0&ar=684&pi=ttm; Otis Grant, *Teaching and Learning About Racial Issues in the Modern Classroom*, 5 RACIAL PEDAGOGY, 2003, *available at* http://radicalpedagogy.icaap.org/content/issue5_1/02_grant.html.

114. *See, e.g.* THE CIVIL RIGHTS PROJECT, THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES; CAMBRIDGE, MA SCHOOL DISTRICT 12 (2002), *available at* http://www.civilrightsproject.ucla.edu/research/diversity/cambridge_diversity; GARY ORFIELD, DIVERSITY CHALLENGED (The Civil Rights Project, Harvard Univ. 2002); ALFIE KOHN, WHAT TO LOOK FOR IN A CLASSROOM AND OTHER ESSAYS (Jossey-Bass 1998) (concluding that genuine character or moral education would require students to practice perspective taking with diverse students in their class).

115. *See, e.g.*, Jane Bolgatz, Developing Racial Literacy: What Happens When Students and Teachers Talk About Race, 2004. http://www.diversity-conference.com/ProposalSystem/

Presentations/P000465.

116. *Id. See also* KOHN, *supra* note 114.

schools reduces racial prejudice and stereotypes and improves students' citizenship values and their ability to succeed in a racially diverse society in their adult lives.[117] Interracial contact among children in schools encourages tolerance, breaks down stereotypes, and decreases racial prejudice–particularly during students' "formative years."[118] Research further demonstrates that diverse public schools lead to a greater sense of civic and political engagement and an increased desire to live and work in multiracial settings as adults.[119] The social science research is consistent and clear.[120]

Racial diversity in the classroom advances academic achievement because it contributes to the process of learning. Education involves far more than the transmission of knowledge from teacher to student.[121] A classroom occupied by students from diverse backgrounds exposes each to a broader array of vantage points and experiences. Students learn by formulating, revising, and refining conceptions of the world.[122] In particular, students develop their cognitive abilities when shaken by new facts, beliefs, experiences, and viewpoints.[123] If they are exposed to peers

117. *See*, Black, *supra* note 106, at 951-52.

118. Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. OF INTERCULTURAL REL. 1, 14-15 (1996).

119. *See* Janet W. Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature*, 17 REV. EDUC. RES. 335, 335-409 (1991); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781 (1993); Amy S. Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* 15-18 (1994).

120. *See* Janet W. Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597, 610 (James A. Banks ed., 2d ed. 2004); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 741-42 (1998); Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools, in The Consequences of School Desegregation* 103, 111, 113 (Christine H. Rossell & Willis D. Hawley eds., 1983).

121. The word "educate" derives from the Latin "educe," "to draw out." Ideas must be "utilized, or tested, or thrown into fresh combinations." ALFRED NORTH WHITEHEAD, THE ORGANIZATION OF THOUGHT, EDUCATIONAL AND SCIENTIFIC 4 (1974). "There is only one subject-matter for education and that is Life in all its manifestations." *Id.* at 13. *See also* JOHN DEWEY, DEMOCRACY AND EDUCATION 5-6 (Free Press 1966) (1916) ("[O]ne has to assimilate, imaginatively, something of another's experience in order to tell him intelligently of one's own experience.").

122. Peter B. Pufall, *The Development of Thought: On Perceiving and Knowing, in* PERCEIVING, ACTING AND KNOWING: TOWARD AN ECOLOGICAL PSYCHOLOGY, 173-74 (Robert Shaw & John Bransford eds.,1977).

123. "Disequilibration," which is the student's positive struggle to restore cognitive balance when confronted with cognitive dissonance, has the greatest impact when it comes from "social interaction." *See Piaget's Theory, in* 1 CARMICHAEL'S MANUAL OF CHILD PSYCHOLOGY (P.H. Mussen eds., 3d ed. Wiley 1970).

who have new, different or unexpected ways of looking at the world, students will fully explore and absorb those perspectives. Under settled principles of developmental psychology, racial diversity in an educational environment prompts students of all races to develop their minds through exposure to new perspectives, experiences, and the cognitive struggle that leads to critical thought.[124]

A racially diverse classroom also leads students to overcome the false assumption that all members of one race think alike or share the same viewpoint.[125] Diversity in the educational environment enables students to experience the error of their own stereotypes, and to learn that there is a broad range of experiences and perspectives within minority communities.[126] Accordingly, professional educators may credibly establish a guideline for the nature and extent of racial diversity in the classrooms that will lead to these precise educational outcomes.

Any such decision to assign a student to a particular school or classroom in order to create a pedagogically meaningful number of diverse students in that environment and thereby realize these benefits will not be driven by a racial quota or by the effort to achieve racial balance for its own sake. To the contrary, the school seeks to assign meaningful numbers of diverse students in its educational institution in order to realize its compelling educational interests. Such a plan would reason "forward" to the creation of the level of racial diversity required to meet the district's precise educational goals.[127] A school district that seeks to maintain a relatively stable critical mass of white and nonwhite students in each of its schools does so in order to produce the educational benefits derived from an educational environment with a "meaningful" number of students from different racial groups. A nuanced student assignment plan designed to foster the educational benefits recognized to flow from meaningful

124. *See, e.g.*, MICHAL KURLAENDER & JOHN T. YUN, THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: CAMBRIDGE, MA SCHOOL DISTRICT 2 (The Civil Rights Project, Harvard Univ. 2002) (finding that students in diverse schools "increased their level of understanding of diverse points of view, and enhanced their desire to interact with people of different backgrounds in the future").

125. *See* Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

126. *See* Jonathan R. Alger, *The Educational Value of Diversity*, 83 ACADEME 20, 21 (Jan.-Feb. 1997) ("For example, by seeing firsthand that all black or Hispanic students do not think alike, white students can overcome learned prejudices that may have arisen in part from a lack of direct exposure to individuals of other races.").

127. *Compare* Parents Involved in Cmty. Sch. (PICS) v. Seattle Sch. Dist. No. 1, *From Lexis:* 127 S. Ct. 2738, 2757*, 168 L. Ed. 2d 508, 529, 2007 U.S. LEXIS 8670 (2007) (Roberts, J., plurality opinion). **All pagination subject to change pending release of the final published version.* (criticizing Seattle and Jefferson County for reasoning backward from racial balance for its own sake).

numbers of white and nonwhite students in a particular school must necessarily attempt to achieve those meaningful numbers.[128]

2. Serious Consideration of Workable Race-Neutral Alternatives

In *PICS* the Supreme Court explained that narrow tailoring also "[r]equire[s] serious, good faith consideration of *workable* race-neutral alternatives that will achieve the diversity the university seeks."[129]

As discussed in Section III, there may be school districts in which student assignment plans based on socio-economic status, or race-conscious strategic site selection and attendance zoning of certain schools will result in a meaningful number of racially diverse students in a particular school. Yet, while race-neutrality as an abstract matter may be preferable to explicit but nuanced racial classifications of students, race-neutrality cannot be required where it will not serve the interest deemed compelling. Because producing the educational benefits of racial literacy is a compelling interest, a school district may permissibly seek that interest if its means are narrowly tailored to achieve that precise interest. Race-conscious but broad based efforts to achieve a racially-diverse classroom without resorting to racial classification of students generally do not work. None of these efforts are tailored to serve the interest of teaching racial literacy. They cannot replace precisely tailored efforts to create a pedagogically meaningful number of diverse students in a classroom in order to achieve the district's educational goal of racial literacy. A school district that seeks to accomplish its compelling educational objective of teaching racial literacy by means of race-conscious student assignments, therefore, may establish that its assignments are a "last resort" and therefore constitutional method of achieving that precise objective.

V. A Majority of the Court Recognizes that Race-Conscious Integration Strategies by Public School Districts are Constitutional Under Authentic Standards of Equal Protection

The Plurality Opinion in *PICS* is based on an understanding of equal protection doctrine that presumes that all race-conscious decisions by governmental officials are unconstitutional. As demonstrated in this section, the Plurality's presumption that race-conscious decisions violate "equal protection" is contrary to any authentic application of the Equal Protection Clause and the principle of equality on which it is based.

128. *See Grutter*, 539 U.S. at 336 ("[S]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.") (internal quotation marks and citations omitted).

129. *PICS*, 127 S. Ct. at 2760 (quoting Grutter, 539 U.S. at 339 (emphasis added)).

Moreover, a majority of the Court's members seem to have recognized that any such authentic application of the Equal Protection Clause must be based on a presumption that there are in fact racial differences in educational opportunities that would justify differential treatment based on race.

A. Justice Roberts' Presumption that Race-Conscious Decisions Violate the Principle of Equality is Unfounded

1. Justice Roberts' Doctrinal Proposition That Race-Conscious Governmental Action is Unconstitutional has a Dubious Lineage

The Supreme Court's three-tiered Equal Protection Clause analysis evolved from the Court's suspicion that legislation classifying persons based on race was designed to disadvantage members of a racial minority.[130] Under that analysis, a governmental educational program that affects a "suspect class," like an underrepresented racial minority, will be strictly scrutinized to determine whether it violates the Fourteenth Amendment.[131] The source for such heightened scrutiny is often traced to footnote four in *United States v. Carolene Products*.[132] Yet, that footnote was designed at most to suggest exceptions to the presumption of constitutionality usually given to legislation.[133] The *Carolene Products* Court cautioned that the presumption of constitutionality may be "narrower" where the challenged legislation is within a "specific prohibition of the Constitution," or where the law "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation" or is "directed at particular religious [minorities], . . . national [minorities] . . . racial minorities . . . [or] discrete

130. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944). *See also* Lucy Katz, *Public Affirmative Action & the Fourteenth Amendment: The Fragmentation of Theory after* Richmond v. J.A. Croson Co. *and* Metro Broadcasting, Inc. v. Federal Communications Commission, 17 T. MARSHALL L. REV. 317, 339 (1992).

131. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 561 (1982) (citing Carey v. Brown, 447 U.S. 455, 460 (1980)). *See also* Korematsu, 323 U.S. at 216 ("[a]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); Loving v. Virginia, 388 U.S. 1, 11 (1967) ("[d]istinctions between citizens solely because of their ancestry . . . [are] odious to a free people whose institutions are founded upon the doctrine of equality" (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

132. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 290 n.28 (1978).

133. *Carolene Products*, 304 U.S. at 152, n.4. *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (expanding upon the footnote's suggestions to create a theory of judicial review based upon the Court's role in protecting the democratic political process).

and insular minorities."[134]

While the Court questioned whether "exacting judicial scrutiny" might be appropriate in these circumstances, it never suggested overturning the presumption that legislation is constitutionally valid. Nevertheless, under the "strict scrutiny" standard reasserted by Justice Roberts, any state regulation that classifies people based on their race is presumed to violate the Equal Protection Clause; that presumption is unassailable unless the state can show that the challenged law is finely tailored to achieve a compelling or substantial state interest.[135] Justice Roberts' presumption that all racial classifications are presumed to violate the Equal Protection Clause thus finds little support in the origins of the strict scrutiny doctrine.

2. Justice Roberts' Failure to Recognize the Possibility of Racial Difference in Educational Opportunities Leads to His Unfounded Presumption that Race-Conscious Decisions Violate the Principle of Equality

Justice Roberts' presumption that race-conscious decisions are unconstitutional not only has a questionable precedential foundation, it is contrary to the principle of equality itself. As Aristotle fully understood, his maxim that "like cases should be treated in a like manner,"[136] and that "unlike cases should be treated in an unlike manner"[137] requires both a descriptive analysis of the "likeness" of citizens and a normative analysis of the propriety of their treatment by the law.[138] Even if a regime presumes that all persons are entitled by their nature to equal protection of the laws, important judgments about which cases are in fact alike and which cases should be treated alike cannot be resolved without standards independent of equality.

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134. *Carolene Products,* 304 U.S. at 152, n.4.

135. Parents Involved in Cmty. Sch. (PICS) v. Seattle Sch. Dist. No. 1, *From Lexis:* 127 S. Ct. 2738, 2752*, 168 L. Ed. 2d 508, 523, 2007 U.S. LEXIS 8670 (2007). **All pagination subject to change pending release of the final published version. See also* Gratz v. Bollinger, 539 U.S. 244, 270 (2003); Grutter v. Bollinger, 539 U.S. 306, 326 (2003). *See generally* Angelo N. Ancheta, *Contextual Strict Scrutiny and Race Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004).

136. *See* Westen, *supra* note 131, at 543 (citing ARISTOTLE, POLITICS, book III.9 1280a; III.12. 1282b - 1283a; V. 1. 1301a - 1301b. (Benjamin Jowett trans., Clarendon Press 1921)).

137. *See* ARISTOTLE, POLITICS, book III. 9. 1280a; book III. 12. 1282b (Benjamin Jowett trans., Clarendon Press 1921).

138. Aristotle recognized that each regime would have to reach the political judgment about whether its citizens were "like" or "unalike." He understood that linking justice with equality begged the political question of the relevance of similarities and differences: "All men agree that what is just in distribution should be according to merit of some sort, but not all men agree as to what that merit should be . . . ." ARISTOTLE, *supra* note 136, at 1131a.

Once these judgments are made, however, the equality maxim appears to call into question laws that treat like cases in an unlike manner. Presuming the constitutionality of laws that treat like cases in a like manner seems to be consistent with the equality maxim. Yet, the equality maxim also calls into question laws that treat unlike cases in a like manner; the maxim should lead to a presumption against the constitutionality of those laws. Laws that treat like cases in a like manner and unlike cases in an unlike manner should enjoy a presumption of constitutionality under the equality principle.

In a seminal series of publications, Professor Peter Westen shows that Aristotle's principle of equality is circular,[139] and cannot be employed to resolve any jurisprudential question without reference to "substantive" values or rights wholly apart from equality itself.[140] Professor Westen dissects each part of the Aristotelian equality principle. First, the formula requires a determination of whether two or more persons are, or should be deemed, alike for the purpose of applying the equality principle.[141] Because no two persons are truly alike, that determination depends on a judgment about the relevance of the undeniable differences between people. People are alike only if their differences are judged irrelevant by some external standard.[142]

Second, Westen shows that "treatments can be alike only in reference to some moral rule."[143] The same moral rule or independent legal standard that determines the relevance of people's similarities and dissimilarities also determines whether people should or should not be treated alike under the law. A law cannot be judged, therefore, by the extent to which it treats people equally. Westen concludes that the constitutional concept of equal protection under the law is "an empty vessel with no substantive moral content of its own."[144] Accordingly, an idea of justice based solely on the principle of equality is meaningless without a "substantive moral or legal standard[ ] that determine[s] what is one's 'due'."[145]

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139. Westen acknowledges that this insight into the circular nature of "equality" is not new. Indeed, he posits that Aristotle's equality maxim has had staying power partly because it expresses an unassailable tautology. Westen, *supra* note 131, at 574-78.

140. Westen, *supra* note 131, at 561. *See also* Peter Westen, *The Meaning of Equality in Law, Science, Math and Morals: A Reply*, 81 MICH. L. REV. 604 (1983) [hereinafter *Westen Reply*]; PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF EQUALITY IN MORAL AND LEGAL DISCOURSE (1990) [hereinafter SPEAKING OF EQUALITY].

141. Westen, *supra* note 131, at 543.

142. *Id.* at 544.

143. *Id.* at 547.

144. *Id.*

145. *Id.* at 557. Any principle of justice based on this empty idea of equality is vacuous as

well. The foundation of justice is "giving every person his due." *Id.* at 556. The equality principle's declaration that persons who are alike should be treated alike indicates that treating people equally means giving them their "due." To argue that justice requires that persons who are alike should be treated alike, therefore, has no genuine meaning unless the argument contains some moral basis for determining whether they are alike in such a way as to make morally proper their similar treatment. *Id.* at 557.

Shortly after Westen authored his seminal work, a host of scholars feverishly attempted to inject some independent meaning into the idea of equality. Westen, however, effectively discarded these arguments. More recently, Professors Christopher Peters and Kent Greenwalt have tried to resurrect the principle of equality. Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1211 (1997) (arguing that equality's requirement that identical matters receive identical treatment is not empty); Kent Greenwalt, *"Prescriptive Equality:" Two Steps Forward*, 110 HARV. L. REV. 1265, 1273 (arguing the principle of equality carries normative force).

Professor Peters argues that the principle of "prescriptive equality" is not meaningless. Peters, *supra,* at 1211. Under this principle, the "bare fact that a person has been treated in a certain way is a reason in itself for treating another identically situated person in the same way." *Id.* at 1223. Once it is determined that two persons are identically situated, Peters contends, the equality principle has meaning because it requires their identical treatment. *Id.* at 1217. Peters concedes, however, that if this prescriptive principle does have any meaning, that meaning is misguided because it may lead to treating equals equally, even if that treatment is unjust. *Id.* For example, Professor Peters imagines a situation in which eleven drowning people compete for only ten available spots on a lifeboat. *Id.* at 1237. Because prescriptive equality demands that all of them be treated equally, none of them may receive spots in the lifeboat and all of them equally may drown. Accordingly, Peters concludes that the principle of equality is either irrelevant or harmful when there are conditions of scarcity. *Id.* at 1238-39.

Professor Greenwalt agrees with Peters that the principle of equality does not always lead to "right action." Greenwalt, *supra,* at 1273. Still, Greenwalt contends that the equality principle has presumptive force because it "might pull some people to treat equals equally, although other considerations would suggest a different outcome." *Id.* at 1277. For example, the principle of equality creates a presumption favoring equal distributions of lifeboat spots, but that presumption may be rebutted by stronger values, like saving lives. *Id.*

These scholars' efforts to resurrect the equality principle ultimately are unavailing. First, as Westen established in anticipating these efforts, any judicial allegiance to a deeply rooted presumption favoring equal treatment is ultimately indeterminate and obfuscates judgments independent of equality. The equality principle cannot support a presumption opposing laws that treat persons differently because all laws treat some people differently from others for some purposes. Second, and more importantly, the Court's presumption favoring equal treatment for all is inconsistent with the maxim of equality itself. Once again, the equality principle requires not only that like cases be treated in a like manner, but also that unlike cases be treated in an unlike manner.

Absent from the debate about the meaning of equality is any serious discussion of whether cases are in fact alike. Greenwalt, Peters and even Westen focus their attention on the presumption favoring the like treatment of like cases. They assume that the cases at issue are alike, and question whether the law treats them in a like manner. Hence, Peters' arguments about the possible injustice of treating like cases in a like manner (i.e., all drowning persons are treated the same, but they all die), do not question the basis for determining whether the cases are in fact "alike." Greenwalt also argues that deeply rooted feelings favor like treatment, but only after it is determined that the cases at issue are in fact alike. Yet, the equality maxim contains absolutely no presumption favoring like treatment. To the contrary, that maxim demands unlike treatment where it is determined that the persons affected by the treatment are in fact not alike.

Westen's most important contribution to serious thought about equality may well be his critique of the abuses of the "equality" principle in legal and political discourse surrounding the constitution's Equal Protection Clause. Once one concedes that the Equal Protection Clause does not require all persons to be treated alike, that clause, like the equality principle itself, cannot be interpreted without relying upon a legal or moral standard anterior to equality. Even scholars who doubt Westen's premise that equality is meaningless cannot deny his assertion that the Court's judicial interpretations of the Equal Protection Clause, in the context of education at least, cannot be explained by the empty rhetoric of equality.[146]

The opinion in *Sweatt v. Painter*, in which the Supreme Court held that a state statute barring African-American students from attending an all white law school violates the Equal Protection Clause, is a prime example.[147] It is meaningless to assert that Sweatt should be admitted to the all-white school simply because "like cases should be treated in a like manner."[148] Rather, "[t]he real question . . . was whether Sweatt's race would be allowed to make a constitutional difference between Sweatt and his white co-applicants."[149]

That question can only be answered by a "substantive idea of the kinds of wrongs from which a person has the right to be free."[150] In order to conclude that racial differences are "constitutionally irrelevant" for admissions purposes, a court must decide that "excluding blacks from law school on the basis of race causes them a kind of injury not caused in cases in which using race is conceded to be acceptable."[151] If, but only if, the Court determines that Sweatt has the right to be free from the injury of being denied admission to an all-white school because of his race, can the court then say that the state has treated him unequally by treating him differently from persons who the court has independently determined are the "same" in constitutionally relevant respects.[152] The decision to allow Sweatt to be treated "like" white applicants in admissions to law school is based on the independent judgment that African-American applicants to

146. *Id.* at 557. *See, e.g.*, William Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 TUL. L. REV. 884, 902 (1985) (arguing that judges use equality as a rationale for deciding cases which are really based on other substantive values in order to "avoid larger issues").

147. Sweatt v. Painter, 339 U.S. 629 (1950).

148. Westen, *supra* note 131, at 566-67.

149. *Id.* at 566.

150. *Id.* at 567.

151. *Id.* at 566.

152. *Id.* at 567.

law school should not be subjected to racial injury in admissions.[153]

From this perspective, not even *Brown v. Board of Education*, which stands as an enduring symbol of racial equality, can be justified by the equality principle alone.[154] The Court in *Brown* declared that racially segregated educational facilities are "inherently unequal."[155] As Westen shows, however, there is no such thing as "inherent" inequality. The actual reasoning of *Brown* is that state laws that impose racial segregation in public education violate the Equal Protection Clause because they *injure* African-American school children. According to *Brown*, even if such laws were to provide for equal educational resources, they would nevertheless be unconstitutional because they would have a "detrimental effect" on African-American students.[156] The Court emphasized that the laws (1) perpetuate a stereotype harmful to African-American students; (2) reinforce a stigma of inferiority injurious to African-American students; (3) generate a feeling of lesser status that hurts the hearts and minds of African-American students; (4) retard the mental and educational development of African-American students; and, (5) deny to African-American students the educational benefits of attending a racially integrated school.[157] As in *Sweatt*, the *Brown* case becomes consistent with equality only after it is first determined that African-American children are "like" white children in their right to be free from the "injury" of being denied the opportunity to attend a diverse school. *Brown* can be understood only by looking to these important substantive values apart from equality.

Because the rhetoric of equality is hollow, Justice Roberts is able to use that rhetoric in *PICS* to attempt to undercut the substantive values of *Brown*. Repeating that "[r]acial balance is not to be achieved for its own

153. *Id.* at 568.

154. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregating children in public schools on the basis of race is unconstitutional, even when both facilities and tangible factors are equal, because children are still deprived of equal educational opportunities).

155. *Id.* at 495. The *Brown* Court actually goes out of its way to make clear that some of the schools at issue in that case which were attended by African-American students were "like" the schools attended by white students in their tangible facilities and resources. *Id.* at 492. The Court declares that the racially segregated schools in the case, "have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *Id.*

156. *Id.* at 494.

157. *Id.* at 494-95. For an excellent analysis of the judicial and political efforts to facilitate the resegregation of American public schools, see generally GARY ORFIELD, ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (The New Press 1996) (describing the current segregated condition of America's schools). *See also* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (Crown Publishers 1991) (describing the detrimental effects of unequal government funding to America's schools).

sake,"[158] the Plurality indicates that state desegregation efforts violate the Equal Protection Clause unless they are finely tailored to remedy proven cases of legally mandated or intentionally imposed segregation, or the compelling interest that institutions of higher education may assert in broad based diversity.[159] State programs designed to make or encourage racial integration, or even to make desegregation attractive by enhancing the quality of schools attended by African-American students violate the Equal Protection Clause, the Plurality suggests, because they treat African-American students differently from white students.[160] By this logic, African-American students are deemed to be "like" white students in all respects relevant to educational opportunity and therefore they must be treated like white students with regard to educational programs. The Plurality's rhetoric here hides its substantive judgment that any differences between the actual educational opportunities afforded white children and those afforded African-American children either do not exist or are irrelevant for constitutional purposes. The declaration that African-American students should be treated just like white students is used to legitimize the reality that their educational opportunities are not at all alike.

158. Parents Involved in Cmty. Sch. (PICS) v. Seattle Sch. Dist. No. 1, *From Lexis:* 127 S. Ct. 2738, 2757*, 168 L. Ed. 2d 508, 529, 2007 U.S. LEXIS 8670 (2007) (Roberts, J., plurality opinion). **All pagination subject to change pending release of the final published version.* (quoting Freeman v. Pitts, 503 U.S. 467, 494 (1992)). "Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority . . . of the federal courts to try to counteract these kinds of continuous and massive demographic shifts." *Freeman,* 503 U.S. at 495. *Freeman* indicates that any voluntary governmental policy designed to achieve racial balance in educational institutions generally would itself violate the principle of equality in the Equal Protection Clause. *Id.*

159. *See, e.g.*, PICS, 127 S. Ct. at 2753. *See also* Freeman, 503 U.S. at 495-96 (noting that though past wrongs have been committed to the black race, those wrongs cannot be used to exaggerate the legal consequences). Specifically, the *Freeman* court noted:

> Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. . . . But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. . . . [T]he District Court was correct to entertain the suggestion that [the school district] had no duty to achieve system-wide racial balance in the student population.

Id.; *see also* Missouri v. Jenkins, 515 U.S. 70, 88-90 (1995) (holding that efforts to integrate school district by developing attractive schools designed to equalize academic achievement are unconstitutional and beyond the scope of permissible remedies for equal protection violations).

160. *PICS*, 127 S. Ct. at 2757-2758. *See also* Jenkins, 515 U.S. at 88-89 (discussing the state program's unequal treatment of students based on race).

B. The Plurality's Presumption Against Educational Programs That Differentiate Based on Race is Contrary to Authentic Principles of Equality and Equal Protection

As Westen shows, the question of whether individuals are "alike" cannot be answered by the principle of equality, but depends on standards anterior to equality. Because no two persons are alike, the judicial system must create a mechanism for determining the significance of differences among individuals. The mechanism must have a descriptive and a normative component. The descriptive component provides a legitimate method of assessing actual, real-world conditions of relevant difference. The normative component provides a legitimate method of assessing which differences should be recognized as morally significant. The moral or normative proposition that all men are created equal, for instance, may help to explain the presumption that all individuals are like cases and thus should receive like treatment.

Yet that normative proposition is not a descriptive one. In fact, the premise that all men are created equal says nothing about whether individuals are in fact "alike" for any particular purpose. The premise that all individuals should be treated equally regardless of race permeates the Supreme Court's Equal Protection Clause jurisprudence. That premise, however, obfuscates the fact that individuals may not be alike in relevant factual ways, and creates the unfounded presumption favoring laws that treat unlike cases as if they were alike. The racial differences in educational opportunities, facilities, and outcomes are undisputed by all credible researchers.[161] Only by ignoring undisputed facts does the

161. *See* MICHAEL J. KAUFMAN, EDUCATION LAW, POLICY AND PRACTICE: CASES AND MATERIALS 414, 441, 442, 526-532 (Aspen Publishers 2005). *See also* Gratz v. Bollinger, 539 U.S. 244, 298-301 (2003) (Ginsburg, J., joined by Souter, J., dissenting) (arguing that an equal standard of review in the college admission process will not remedy an unequal society). The "detrimental effect" on African-American students from educational inequity has not dissipated since *Brown*. *Id.* (Ginsburg, J., dissenting). Racial segregation in public schools persists. *See* Grutter v. Bollinger, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (contending that a continuing affirmative action policy will not fuel an unequal college admissions policy, rather it will alleviate the need for affirmative action); ERICA FRANKENBERG, ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 1, 4 (The Civil Rights Project, Harvard Univ. 2003) (indicating that figures for the years 2000-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended schools in which minorities make up a majority of the school body); *see also* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (Oxford Univ. Press 2004) (discussing continued segregation in modern American schools); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (Public Affairs 2004) (describing how race and social class categorization can restrict upward mobility); GARY ORFIELD & CHRISTOPHER LEE, *BROWN* AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? (The Civil Rights Project, Harvard Univ. 2004) (showing that U.S. schools are

Plurality in *PICS* presume a lack of racial difference in education.

Authentic principles of equality therefore cannot support Justice Robert's presumption against the unconstitutionality of laws that treat students differently based on race unless the Court determines—contrary to all evidence—that such students are in fact alike. The Plurality declares that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."[162] Yet, Justice Roberts does not perform any serious analysis of whether the persons affected by the law are in fact like cases. The *Carolene Products* footnote, which was designed to justify treating some classes differently from others, has led Justice Roberts to presume that those classes *should* be treated the same as others. Perhaps the assumption that persons should be treated the same regardless of race has led the Chief Justice to presume that they are in fact the same. Accordingly, he presumes that governmental programs that classify persons based on race are unconstitutional absent a showing that the different treatment is finely tailored to achieve a compelling interest. Yet, Justice Roberts never really determines whether the persons treated are in fact like cases. He is willing to engage in moral determinations about whether differential legal treatments are appropriate, but generally is unwilling to engage in factual determinations about whether persons affected by governmental programs are actually different. Any serious analysis of the question of whether educational opportunities available to white Americans are like those available to African-Americans would result in the unassailable conclusion that the dramatic difference in their opportunities

becoming more segregated); James E. Ryan, *Schools, Race and Money*, 109 YALE L.J. 249, 273-74 (1999) (discussing the difficulties of achieving racial integration); KEVIN CAREY, THE FUNDING GAP: LOW INCOME AND MINORITY STUDENTS STILL RECEIVE FEWER DOLLARS IN MANY STATES 1, 9 (The Education Trust 2003) (indicating that thirty-seven states provide significantly fewer cost-adjusted resources to those school districts which educate mostly underrepresented minority students and that throughout the nation, *each* student in a district which educates primarily underrepresented minorities receives an average of $1,030 less in annual educational resources than students who are educated in a primarily white district).

Ironically, the Court is careful to consider relevant facts when it conducts its far less exacting review of legislation under the rational basis standard. Even in facial equal protection challenges to legislation, the Supreme Court has made clear that rational basis analysis cannot be conducted without considering the factual circumstances surrounding the legislation. In *Romer v. Evans*, 517 U.S. 620, 632-33 (1996), the Supreme Court reviewed the factual circumstances surrounding Colorado's enactment of a Constitutional amendment that precluded governmental action designed to enable persons of "gay, lesbian or bisexual orientation" to pursue legal claims. Significantly, the Court explained that when a governmental enactment passes the rational basis test, it does so because the Court has found that the law is "grounded in a sufficient *factual context* for [the Court] to ascertain some relation between the classification and the purpose it served." *Id.*

162. *PICS*, 127 S. Ct. at 2762 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1993)).

cannot justify a presumption of like treatment.

C. A Majority of the Justices in *PICS* Recognize That Actual Racial Differences in Educational Opportunities Are Relevant to Authentic Equal Protection Analysis

Together with the four dissenters, Justice Kennedy subtly rejects the Plurality's understanding of the Equal Protection Clause and its premise that racial differences do not exist in educational opportunities.

1. A Majority of the Court Would Not Apply Strict Scrutiny to Race-Conscious Integration Strategies

Justice Breyer and the dissenters make explicit that they would reject strict scrutiny analysis for racial classifications that are designed to *include*, rather than exclude, African Americans in educational programs. In doing so, the dissenters observe a trend in the Supreme Court's recent opinions toward recognizing that Equal Protection Clause analysis does not require strict scrutiny of all racial classifications. The Supreme Court recently has recognized that the "fundamental purpose" of strict scrutiny review is to "take relevant differences" between "fundamentally different situations . . . into account."[163] The Court also has made clear that "[s]trict scrutiny does not trea[t] dissimilar race-based decisions as though they were equally objectionable."[164] Moreover, the fact that a law "treats [a person] unequally because of his or her race . . . says nothing about the ultimate validity of any particular law."[165] Indeed, the Supreme Court, using the same phrase that Justice Marshall had used to describe strict scrutiny's application to any *exclusionary* use of racial criteria, has tried to "*dispel the notion* that strict scrutiny" is as likely to condemn *inclusive* uses of "race-conscious" criteria as it is to invalidate *exclusionary* uses.[166] That is, it is *not* in all circumstances "'strict in theory, but fatal in fact.'"[167] More recently, the Court in *Grutter* elaborated: "Strict scrutiny is not 'strict in theory, but fatal in fact.' . . . Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . ."[168]

According to the dissenters, a subtler standard than strict scrutiny would not signal abandoning judicial efforts to carefully consider the

163. *Id.* at 2817 (Breyer, J., dissenting) (quoting Adarand, 515 U.S. at 228 (internal quotation marks omitted)).

164. *Id.*

165. *Id.* (quoting Adarand, 515 U.S. at 229-230 (internal quotation marks omitted)).

166. *Id.*

167. *Id.* (quoting Adarand, 515 U.S. at 237).

168. *Id.*

rationality and tailoring of race-conscious criteria in light of legitimate school district needs. The dissenters also caution that a court must examine carefully the race-conscious program at issue, and a reviewing judge must be fully aware of "potential dangers and pitfalls."[169]

But, unlike the Plurality, such a judge also would be aware that a legislature or school board, which is ultimately accountable to the electorate, could properly conclude that a racial classification sometimes serves a compelling purpose such as helping to end racial isolation or helping to achieve a diverse student body in public schools.[170] The dissenters would ask the judge to examine the program's details to determine whether the use of race-conscious criteria is proportionate to the important ends it serves. In the dissent's view, therefore, a *contextual* approach to scrutiny is appropriate. The Equal Protection Clause requires application of a standard of review that is not "strict" in the traditional sense of that word.[171]

Significantly, Justice Kennedy *agrees* with the dissenters that not all race-conscious educational strategies should be subjected to strict scrutiny:

> Apparently JUSTICE KENNEDY also agrees that strict scrutiny would not apply in respect to certain "race-conscious" school board policies. . . . ("Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races").[172]

A majority of the Court, therefore, has concluded that not all racial classifications should be judged the same way under the Equal Protection Clause. Indeed, significant race-conscious strategies designed to serve compelling interests in racial integration need not be subjected to strict scrutiny.

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169. *Id.* at 2819.

170. *Id.*

171. *See* Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., joined by Souter, J., dissenting); *Adarand,* 515 U.S. at 242-249 (Stevens, J., joined by Ginsburg, J., dissenting); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,, 426 F.3d 1162, 1193-1194 (2005) (Kozinski, J., concurring).

172. *PICS,* 127 S. Ct.. at 2819 (Kennedy, J., concurring in part and concurring in the judgment).

2. *A Majority of the Court Would Not Presume Racial Equality in Educational Opportunities*

A majority of the Court also rejects the Plurality's understanding of the principle of equality within the Equal Protection Clause. Justice Kennedy declares that it would be a profound mistake to ignore the reality of racial segregation in the nation's schools.[173] He and the four dissenters acknowledge that the educational opportunities available to African-American students are different from those available to white students because of their different history of injury from a legally enforced "racial caste system" in education, their different condition of injury from "conscious and unconscious race bias," their different condition of injury from educational segregation, and their different condition of injury from inadequate educational resources. As Justice Ginsburg has recognized, "[o]ur jurisprudence ranks race a 'suspect' category, 'not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.'"[174]

Put another way, racial classifications should not be presumed to be "impermissible" where they are designed to eradicate rather than to maintain the actual condition of racial inequality. Governmental programs that treat races differently are not invalid under the Constitution if there is a legitimate determination that the races are in fact different in a respect that is relevant to the precise issue confronting the Court. For Justice Ginsburg, and a majority of the Court, the starting point for a serious Equal Protection Clause analysis is whether the individuals who are affected by a governmental program are in fact different.

Justice Kennedy, along with Justice Ginsburg and the *PICS* dissenters, recognizes the relevance of racial differences in the application of equal protection. He acknowledges "the reality [that race] too often does" matter.[175] Contrary to the Plurality's "unyielding insistence that race cannot be a factor" in governmental programs, Justice Kennedy declares that race and racial differences "may be taken into account," particularly where school districts seek to "reach *Brown*'s objective of equal educational opportunity."[176] According to Justice Kennedy, the Plurality's willingness to ignore the *fact* of racial segregation and subordination,

173. *Id.*

174. *Gratz*, 539 U.S. at 301 (Ginsburg J., dissenting) (quoting Norwalk Core v. Norwalk Redev. Agency, 395 F.2d 920, 931-32 (2d Cir. 1968)).

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

176. *Id.*

therefore, is "profoundly mistaken."[177] Ultimately, Justice Kennedy rejects the Plurality's push toward an entirely "color-blind" principle of equality in the Constitution: "[A]s an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle."[178]

VI. Conclusion

In *PICS*, a majority of the Supreme Court reaffirms the constitutionality of a school district's use of race-conscious strategies designed to achieve the compelling benefits of a racially diverse student body. The Majority rejects the Plurality's effort to write into the constitution an Equal Protection Clause that disregards race. Instead, a majority of the Court seriously questions whether governmental actions that recognize and remediate real racial differences in educational opportunities should be subjected to strict scrutiny.

Indeed, the Majority seems to have recognized the authentic principle of equality within the Equal Protection Clause. In many cases, African-American children in fact are not like white schoolchildren in their educational opportunities. A school district's program that recognizes those differences and treats African-American schoolchildren differently from white school children in order to achieve the goal of ultimately eradicating those differences is true to the principle of equality.

Accordingly, the Court actually rejects Justice Roberts' vacuous statement that the way to stop racial discrimination is to stop discriminating based on race. Instead, a majority of the Court recognizes that the way to provide equal educational opportunities to children of all races is to allow school districts to provide equal educational opportunities to children of all races.

177. *Id.*

178. *Id.* at 2792.