

2010

## Accepting Justice Kennedy's Dare: The Future of Integration in a Post-PICS World

Daniel Kiel

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### Recommended Citation

Daniel Kiel, *Accepting Justice Kennedy's Dare: The Future of Integration in a Post-PICS World*, 78 Fordham L. Rev. 2873 (2010).

Available at: <https://ir.lawnet.fordham.edu/flr/vol78/iss6/7>

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## Accepting Justice Kennedy's Dare: The Future of Integration in a Post-PICS World

### Cover Page Footnote

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## ARTICLE

# ACCEPTING JUSTICE KENNEDY'S DARE: THE FUTURE OF INTEGRATION IN A POST-PICS WORLD

Daniel Kiel\*

*In the wake of the most important public schools case in decades, Parents Involved in Community Schools (PICS), the future of diversity in public schools is in doubt. This period of uncertainty comes at a moment when parents, educators, and employers are demanding high quality schools that prepare students for an increasingly globalized world. Justice Anthony M. Kennedy, in his PICS concurrence, recognized this discrepancy and challenged districts to continue the important work of bringing different students together without resorting to unconstitutional means. Filling the void between what is essential to public education and what is constitutionally permissible after PICS, the public schools of Jefferson County (Louisville), Kentucky, one of the districts rebuked in PICS, have accepted Justice Kennedy's dare by crafting a nuanced, but still race-conscious, student assignment plan aimed at promoting broadly defined diversity and increasing the quality of education across the district. Specifically, the district's new plan classifies neighborhoods based on student diversity, median household income, and adult educational attainment, and requires schools to consist of students from neighborhoods with diverse characteristics. The plan aims to ensure that the district's schools will be diverse racially, geographically, and socioeconomically, thereby capturing the educational benefits of diverse schools.*

*The Article argues two distinct points: first, that the new plan is a constitutionally permissible response to PICS and, second, that the new plan's broadening of both the definition of diversity and the mission of a school district represents the beginning of a new post-Brown era that is responsive to the realities of public education in the twenty-first century. By tethering its analysis of PICS—and specifically of Justice Kennedy's*

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concurrency—to a specific response to that decision, the Article provides a detailed analysis of the new constitutional framework in this area. Ultimately, the Article argues that because it is both constitutional and educationally sound, the new plan represents the future of integration for any district willing to make the commitment to providing the educational benefits of diverse public schools to its students.

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## INTRODUCTION

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. . . . Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.

– Justice Anthony M. Kennedy<sup>1</sup>

Since *Brown v. Board of Education*,<sup>2</sup> school districts across the nation have struggled to ensure that classrooms and schools reflected the diverse ethnic makeup of the communities around them.<sup>3</sup> For many districts and for many years, this task was pursued under court order.<sup>4</sup> Some districts, however, resolved to strive for the educational benefits of diverse classrooms absent a court order or to continue reaching for diversity even after such a court order was lifted.<sup>5</sup> These districts voluntarily established race-conscious student assignment plans that helped prevent a return to the racially isolated school environments confronted in *Brown*.<sup>6</sup>

In 2007, the U.S. Supreme Court struck down such voluntary plans as unconstitutional.<sup>7</sup> In the wake of this decision, many assumed that the decades-long effort to provide integrated schooling for young Americans had come to an end.<sup>8</sup>

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1. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring).

2. 347 U.S. 483 (1954).

3. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70 (1995); *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237 (1991); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968); *Robinson v. Shelby County Bd. of Educ.*, 566 F.3d 642 (6th Cir. 2009).

4. *See Charles T. Clotfelter et al., Federal Oversight, Local Control, and the Specter of "Resegregation" in Southern Schools*, 8 AM. L. & ECON. REV. 347, 383–87 (2006) (including chart, last updated in 2004, on documentation of unitary status in 100 school districts that have operated at some point under court ordered desegregation, which is also available at <http://fds.duke.edu/db?attachment-34--1621-view-282>).

5. *See, e.g., PICS*, 551 U.S. 701. In *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*, the U.S. Supreme Court considered plans from districts representing each of these types. Seattle School District, No. 1, had pursued integration despite never having been subject to a desegregation court order. *Id.* at 712–13. The other district, Jefferson County Public Schools, had been declared unitary in 2000. *Id.* at 715–16.

6. *Id.* at 711–12, 716.

7. *Id.* at 747–48.

8. *See, e.g., D. Marvin Jones, Plessy's Ghost: Grutter, Seattle, and the Quiet Reversal of Brown*, 35 PEPP. L. REV. 583, 609 (2008) (claiming that the dream that an integrated society could be achieved through law is dead); Charles J. Ogletree, Jr. & Susan Eaton, *From Little Rock to Seattle and Louisville: Is 'All Deliberate Speed' Stuck in Reverse?*, 30 U. ARK. LITTLE ROCK L. REV. 279, 285 (2008) (noting that the Court has taken away "the most effective, proven tools educators had" for achieving the aspirations of *Brown v. Board of Education*); Jesse Jackson, *Blatant Judicial Activism*, CINCINNATI POST, July 4, 2007, at

Yet, there it was. In the partial concurrence of Justice Kennedy, there was a dare—a challenge to districts who still wished to provide the educational benefits of diverse schooling in spite of the Supreme Court's rejection of two plans directed at precisely that: "The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds," Justice Kennedy wrote.<sup>9</sup> Instead, Justice Kennedy dared those directing America's public schools to "bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests" of diversity in public school education.<sup>10</sup>

In one of the districts directly rebuked by the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*,<sup>11</sup> those entrusted with directing the Jefferson County Public Schools (JCPS) have accepted Justice Kennedy's dare. Rather than submitting to the fate of losing hard-gained student diversity, JCPS has adopted a novel student assignment plan that is a model for districts seeking to capture the educational benefits of diverse schools without running afoul of the U.S. Constitution. The new plan is publicly supported, educationally grounded, and, as this Article argues, constitutionally sound. In a century when the essentiality of diverse student bodies has been recognized by educators,<sup>12</sup> employers,<sup>13</sup> and even the U.S. military,<sup>14</sup> the *PICS* decision presented a

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10A ("Outlawing voluntary local school district efforts to increase diversity in the schools, the Court imposed court-ordered resegregation."); Beverly Daniel Tatum, *Court Ruling Latest Step Toward Resegregation*, ATLANTA J. & CONST., July 1, 2007, at B4.

9. *PICS*, 551 U.S. at 798 (Kennedy, J., concurring).

10. *Id.*

11. 551 U.S. 701.

12. See Brief of the American Educational Research Ass'n as Amicus Curiae in Support of Respondents at 3, *PICS*, 551 U.S. 701 (Nos. 05-908, 05-915), 2006 WL 2925967, at \*3 ("[A] wide range of studies demonstrate[s] the benefits that accrue from racially diverse schools, as well as the harms associated with racial isolation and the resegregation of previously desegregated school systems.").

13. See Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-214, 02-516), 2003 WL 399096, at \*2 ("[O]nly a well educated, diverse work force, comprising people who have learned to work productively and creatively with individuals from a multitude of races and ethnic, religious, and cultural backgrounds, can maintain America's competitiveness in the increasingly diverse and interconnected world economy."); Brief of 3M et al., as Amici Curiae in Support of Defendants-Appellants at 4, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447), 2001 WL 34624918, at \*4 ("For these students to realize their potential as leaders, it is essential that they be educated in an environment where they are exposed to diverse ideas, perspectives, and interactions. In the experience of the amici businesses, today's global marketplace and the increasing diversity in the American population demand the cross-cultural experience and understanding gained from such an education.").

14. See Brief of Hon. Clifford L. Alexander, Jr. et al., as Amicus Curiae in Support of Respondents at 5, *PICS*, 551 U.S. 701 (Nos. 05-908, 05-915), 2006 WL 2922651, at \*5 ("The experience of the military in creating a diverse fighting force, and in voluntarily establishing integrated schools that have resulted in extraordinary levels of overall and minority achievement, demonstrate the compelling interest in maintaining and promoting integration in elementary and secondary education."); Consolidated Brief of Lt. Gen. Julius

new challenge for attaining that diversity and threatened to mandate that “state and local school authorities must accept the status quo of racial isolation in schools.”<sup>15</sup> The new JCPS plan steps in to avoid that fate and fill the void between what is constitutional and what is essential.

Rather than accepting *PICS* as the end of the quest to fulfill the ideals of *Brown*, JCPS has embraced the decision as an opportunity to imagine a new post-*Brown* era—an era in which a school’s racial makeup is important, but no longer the lone measure of whether a district is fulfilling *Brown*’s ideals. The new plan endorses not only diversity but also school quality and choice as guiding principles,<sup>16</sup> a recognition that public and parental support (and not just racial makeup) are critical to *Brown*’s directive that education be “made available to all on equal terms.”<sup>17</sup> Even on diversity, the new plan broadens the definition to include not only race, but also socioeconomic and geographic diversity.<sup>18</sup> Thus, if *PICS* is the end of anything, it is the end of reliance on racial makeup to the exclusion of all other factors in determining faithfulness to *Brown*. In this way, Justice Kennedy’s dare has provided JCPS with the opportunity to define the future of integration.

Certainly, some will disagree with the choices JCPS has made and a challenge to the constitutionality of the new plan is likely.<sup>19</sup> This Article seeks to evaluate the constitutional questions raised by a plan, like JCPS’s, that maintains a racial component in student assignment in the post-*PICS* era.

Part I of the Article provides a brief history of desegregation in JCPS, beginning with the state of schools in Louisville and Jefferson County as *Brown* was decided and continuing through the invalidation of the district’s student assignment policy in 2007. Part II parses the various Supreme Court opinions in *PICS*, focusing on three distinct constitutional questions and the guidance the opinions offer for districts moving forward: (a) application of strict scrutiny to voluntary race-conscious student assignment plans; (b) potential compelling interests; and (c) standards for narrow-tailoring analysis. Part III offers a description of the new JCPS student assignment plan, following its development from conception to adoption. Finally, Part IV offers a constitutional evaluation of the new plan,

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W. Becton, Jr. et al., as Amici Curiae in Support of Respondents at 5, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 1787554, at \*5 (“Based on decades of experience, amici have concluded that a highly qualified, racially diverse officer corps educated and trained to command our nation’s racially diverse enlisted ranks is essential to the military’s ability to fulfill its principal mission to provide national security.”).

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

16. Antoinette Konz, *Schools Adopt Guidelines for Assignment Plan: Jefferson Board Broadens Diversity*, COURIER-J. (Louisville), Sept. 11, 2007, at A1.

17. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

18. See *infra* Part III.D.

19. Indeed, the lawyer who successfully brought the *PICS* suit has already filed a lawsuit challenging the new plan. Andrew Wolfson & Deborah Yetter, *Suit Filed over School Assignments: Use of Racial Factor Is Challenged Again*, COURIER-J. (Louisville), July 3, 2009, at A1.

considering the same constitutional questions of strict scrutiny, compelling interests, and narrow tailoring discussed in Part II.

JCPS is traveling into uncharted constitutional territory with its new plan.<sup>20</sup> It has refused to eliminate race from consideration, but has developed a highly nuanced system of classification that considers educationally and demographically relevant information in order to achieve the educational benefits of diverse public schools. Other districts interested in attaining these benefits may use the JCPS experience as a model for applying the ideals of *Brown* to the educational landscape of today.

### I. A BRIEF HISTORY OF DESEGREGATION IN JEFFERSON COUNTY PUBLIC SCHOOLS

To understand the current quest to maintain racial diversity in JCPS, it is important to understand the historical context from which that quest was born.<sup>21</sup> The newly adopted student assignment plan, though significantly different from the previous assignment plans governing JCPS, is in many ways an outgrowth of those prior plans. The concepts of school clustering and defined demographic ranges for every school utilized by the new plan are nothing new to JCPS. Thus, a brief review of the district's efforts at providing the educational benefits of diversity since *Brown* is in order.

#### A. 1954–1975: Segregation and Consolidation

When *Brown* declared the practice of racially segregated schooling unconstitutional in 1954, there were two school districts in Jefferson County: the Louisville Independent School District and the Jefferson County School District.<sup>22</sup> Both districts operated separate schools for white and black students.<sup>23</sup> From 1956 to 1972, the districts substituted geography-based student assignment plans for the former race-based plans in an effort to comply with *Brown*.<sup>24</sup> However, by 1972, both the Jefferson

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20. Although not directly related, a plan in Berkeley, California, similar to that adopted by Jefferson County Public Schools (JCPS) was found to not violate California's constitutional prohibition on discrimination on the basis of race. *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (Ct. App. 1st Dist.), *cert. denied*, 2009 Cal. LEXIS 6661 (2009).

21. See *Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 755 (W.D. Ky. 1999) ("Those who have not traveled the full journey may want to understand how we arrived at this point. When Jefferson County schools were last segregated as a matter of law, many of the parents and none of the current students were yet born. So we should never assume too much about the current knowledge of the long struggle to produce a desegregated school system."). See generally *Courier-Journal.com*, Timeline: Desegregation in Jefferson County Public Schools, Jan. 29, 2008, <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20080129/NEWS0105/80128046>.

22. See *Newburg Area Council, Inc. v Bd. of Educ. of Jefferson County*, 489 F.2d 925, 927 (6th Cir. 1973).

23. *Id.* at 927, 929.

24. In 1956, the Louisville Board of Education, like urban districts throughout the nation, substituted a geography-based student assignment plan to replace race-based student



County School District and the Louisville Independent School District remained highly segregated.<sup>25</sup> Given the lack of progress toward integration, local African American plaintiffs filed desegregation suits against both the Louisville Independent School District and Jefferson County School District. The cases were consolidated, and, in 1973, the U.S. Court of Appeals for the Sixth Circuit held that neither district had liberated itself of the “vestiges of state-imposed segregation.”<sup>26</sup> Further, the court held that the lines between the two districts could “impose no barrier” to achieving the mandate of eliminating those vestiges.<sup>27</sup> The Supreme Court vacated that judgment on the same day that it decided *Milliken v. Bradley*,<sup>28</sup> a 5-4 decision holding that state-created district lines could not be ignored in devising an appropriate desegregation plan in Detroit.<sup>29</sup> On remand, rather than separate the remedies for the two districts, the Sixth Circuit distinguished *Milliken* and again held that the lines between the Louisville Independent School District and Jefferson County School District could be crossed.<sup>30</sup>

Before the *Milliken* question of interdistrict remedies could be addressed again in court, the Kentucky State Board of Education ordered the merger of the Jefferson County School District and Louisville Independent School

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assignments in an effort to achieve integration. The plan also included an open transfer policy. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 813–14 (2007) (Breyer, J., dissenting).

25. *Id.* (noting that “[a]pproximately half the district’s public school enrollment was black; about half was white. Fourteen of the district’s nineteen non-vocational middle and high schools were close to totally black or totally white. Nineteen of the district’s forty-six elementary schools were between 80% and 100% black. Twenty-one elementary schools were between roughly 90% and 100% white”); see also *Newburg*, 489 F.2d at 929 (“A school system that has had a history of state-imposed segregation has not fully converted to a unitary system when 56% of all of its black elementary students attend three out of seventy-four elementary schools. This is particularly so when these schools are surrounded by several all-white or virtually all-white schools.”); *id.* at 930 (“The evidence indicates that over 80% of the schools in Louisville are racially identifiable . . . five out of the six academic senior high schools, nine out of the thirteen junior high schools and forty out of the forty-six elementary schools are racially identifiable schools.”).

26. *Newburg*, 489 F.2d at 932.

27. *Id.*

28. 418 U.S. 717 (1974).

29. *Id.* at 746–47. The Court instructed the U.S. Court of Appeals for the Sixth Circuit to reconsider its decision with regard to the schools in Jefferson County in light of its *Milliken v. Bradley* decision. *Bd. of Educ. v. Newburg Area Council, Inc.*, 418 U.S. 918, 918 (1974).

30. *Newburg Area Council, Inc. v. Bd. of Educ.*, 510 F.2d 1358, 1359, 1361 (6th Cir. 1974). In *Milliken*, the suburban districts in Detroit had never been found to have unconstitutionally segregated public schools. See *Milliken*, 418 U.S. at 721–22. This was in contrast to the situation in Jefferson County, where both the Louisville Independent School District and the Jefferson County School District had previously been found to have violated the Constitution. See *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000).

District on February 28, 1975.<sup>31</sup> The new district, dubbed Jefferson County Public Schools, served approximately 150,000 students, approximately 17% of whom were black.<sup>32</sup>

B. 1975–2000: *Desegregation Under Court Order*

The districts having merged and the *Milliken* question having become moot,<sup>33</sup> the district court in 1975 formulated a desegregation plan for the consolidated district that is the foundation for both the assignment plan struck down in *PICS* and for the new JCPS plan. Using the guiding principles of stability, equity, predictability, and simplicity, the 1975 order required elementary schools to enroll 12–40% black students and required secondary schools to enroll 12.5–35% black students.<sup>34</sup> By 1978, the district court was satisfied with the district's efforts to meet the targets and removed the case from the active docket.<sup>35</sup>

A decade later, demographic changes in the community had caused a number of schools to fall outside of the 1975 guidelines, and the Board of Education responded in 1984 by amending school zone boundaries and establishing magnet schools to encourage diverse enrollments.<sup>36</sup> In 1991, the district expanded magnet school opportunities and adopted a new plan, "Project Renaissance," that emphasized student choice along with the racial guidelines of the previous plan.<sup>37</sup> The racial makeup guidelines were adjusted on several occasions, and by 1996, the district required each school to have African American enrollments of between 15 and 50%.<sup>38</sup>

The strict racial guidelines imposed by the various plans applied to *all* schools, including magnet schools. Unhappy that the guidelines were limiting black enrollment at Central High School, a magnet school, six

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31. *Cunningham v. Grayson*, 541 F.2d 538, 539 (6th Cir. 1976); *see also* *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578, 580 (6th Cir. 1975).

32. *Gordon*, 521 F.2d at 581.

33. *Id.* at 580.

34. *Cunningham*, 541 F.2d at 540; *see Hampton*, 72 F. Supp. 2d at 762.

35. *Hampton*, 72 F. Supp. 2d at 772 (noting that placing the case on inactive status "will not impede this Court from enforcing such portions of its desegregation order as are of a continuing nature" (quoting *Haycraft v. Bd. of Educ.*, Nos. 7045, 7291, mem. op. at 12 (W.D. Ky. June 15, 1978))).

36. *Hampton*, 72 F. Supp. 2d at 766.

37. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 816–17 (2007) (Breyer, J., dissenting) ("[The new plan] provided that each elementary school would have a black student population of between 15% and 50%; each middle and high school would have a black population and a white population that fell within a range, the boundaries of which were set at 15% above and 15% below the general student population percentages in the county at that grade level. The plan then drew new geographical school assignment zones designed to satisfy these guidelines; the district could reassign students if particular schools failed to meet the guidelines and was required to do so if a school repeatedly missed these targets.").

38. *Hampton*, 72 F. Supp. 2d at 767–68. The new plan was called a "managed choice" plan. *Id.* at 767. School assignment zones were redrawn and greater choice was offered to parents of elementary and middle school students. *Id.*

African American parents sued in 1998 to eliminate the racial guidelines at Central.<sup>39</sup> Ultimately, in pursuing their case, the parents moved to dissolve the district court's 1975 decree, an order that had been inactive but was still in effect.<sup>40</sup> Given that it was African American parents who were asking for an end to court supervision of the district's desegregation efforts and citing the school board's "extraordinary good faith," the district court concluded that "the vestiges associated with the former policy of segregation and its pernicious effects" had been eliminated to the greatest extent practicable.<sup>41</sup>

Having so dissolved the 1975 decree, the district court ruled against the use of racial quotas in magnet programs, such as the one at Central High School, as a violation of the Equal Protection Clause.<sup>42</sup> Recognizing that the board may have "compelling reasons to continue a fully integrated school system in all other schools," the district court limited its holding to the issues presented—use of the racial guidelines in magnet schools—and explicitly did not require any other changes to the district's student assignment plan.<sup>43</sup> Looking to the future, the district court expressed confidence in the board's continued commitment to maintaining integration, suggesting that "voluntary maintenance of the desegregated school system should be considered a compelling state interest."<sup>44</sup>

### C. 2001–2007: *Voluntary Integration*

Freed from court supervision, JCPS faced a decision of how, and if, it wanted to continue pursuing the educational benefits of diversity.<sup>45</sup> By that time, JCPS was serving an increasingly diverse student body; in 2001, JCPS educated 97,000 students, 34% of whom were black.<sup>46</sup> The district chose to continue its efforts to provide integrated educational settings and voluntarily adopted a student assignment plan that continued to require African American enrollment between 15 and 50% in all non-magnet schools.<sup>47</sup> It was this plan that the Supreme Court considered in *PICS*.

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39. Courier-Journal.com, *supra* note 21. See generally Enid Trucios-Haynes & Cedric Merlin Powell, *The Rhetoric of Colorblind Constitutionalism: Individualism, Race and Public Schools in Louisville, Kentucky*, 112 PENN. ST. L. REV. 947 (2008).

40. Hampton, 72 F. Supp. 2d at 754–55, 783.

41. Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000).

42. *Id.*

43. *Id.*

44. *Id.* at 379.

45. The 2000 decision faced by JCPS is not so dissimilar from the decision facing the district after the *PICS* decision. No longer was there a court order mandating any conscious policy promoting diverse schools; any such plan would be wholly voluntary. *Id.*

46. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 551 U.S. 701, 716 (2007) (citing *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 839–40 & n.6 (W.D. Ky. 2004)).

47. *PICS*, 551 U.S. at 716.

The board divided the district into “clusters” made up of several schools.<sup>48</sup> Initially, each student was assigned, based exclusively on geography, to a school within the cluster in which he lived, and parents were asked to submit two school choices within the cluster.<sup>49</sup> Decisions to assign within each cluster were based on school capacity and the racial makeup guidelines.<sup>50</sup> Once assigned, students could apply to transfer to any non-magnet school in the district, with decisions again determined by school capacity and the racial makeup guidelines.<sup>51</sup> Finally, any student could apply to any magnet school or program in the district, and magnet decisions did not include any consideration of a student’s race.<sup>52</sup>

In 2003, after their children were not assigned to the school of their choice because of the racial makeup guidelines, a group of white parents sued to enjoin the use of the guidelines in student assignment.<sup>53</sup> Crystal Meredith, the named plaintiff, had attempted to have her son transferred to a school a mile from her home rather than the school to which he was assigned, which was ten miles from her home.<sup>54</sup> Although there was space in the nearer school, Ms. Meredith’s request was denied because “[t]he transfer would have an adverse effect on desegregation compliance.”<sup>55</sup>

The district court found that JCPS had a compelling interest in maintaining racially integrated schools and that the district’s student assignment plan was, in most respects, sufficiently narrowly tailored to withstand constitutional scrutiny.<sup>56</sup> The Sixth Circuit affirmed the district court’s decision without comment,<sup>57</sup> and the case was subsequently joined with a related case from Seattle for argument before the Supreme Court.<sup>58</sup> The Court would consider whether the districts’ use of race in making student assignment decisions was permissible under the Equal Protection Clause of the Fourteenth Amendment<sup>59</sup> and, in so doing, would define the framework for any district seeking to voluntarily establish school diversity absent a court mandate.

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 716–17.

52. *Id.* at 717 n.17. At the high school level, the district allows for open enrollment, under which any ninth-grader may apply for admission to any non-magnet high school. *Id.* at 711.

53. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 837–38 (W.D. Ky. 2004).

54. *PICS*, 551 U.S. at 717.

55. *Id.*

56. *Id.* at 717–18 (considering the narrow-tailoring analysis of *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

57. *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513, 514 (6th Cir. 2005).

58. *Meredith v. Jefferson County Bd. of Educ.*, 547 U.S. 1178 (2006) (granting writ of certiorari and joining with *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005)).

59. U.S. CONST. amend. XIV, § 7 (“No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

II. THE SUPREME COURT'S DECISION IN *PICS*

In considering the voluntary integration plans from JCPS and Seattle, the Supreme Court had the opportunity to dictate the bounds of permissible methods of achieving the educational benefits of diverse public schools in a twenty-first-century landscape. As fewer and fewer districts operate under court-ordered desegregation plans,<sup>60</sup> voluntary integration plans represent the next phase in implementation of the *Brown* quest to eliminate racial isolation in schools. This section will describe the positions of the various Justices in their *PICS* opinions as they confronted the old JCPS assignment plan in order to lay the foundation for predicting each Justice's likely response when confronted with JCPS's new plan.<sup>61</sup>

Specifically, the Article will describe where the Justices stand on the three critical questions of equal protection jurisprudence: (1) application of strict scrutiny to voluntary race-conscious student assignment plans, (2) possibilities for compelling interests to be achieved through such plans, and (3) standards for narrow-tailoring analysis. Of particular importance is the partial concurrence of Justice Kennedy, who provided the crucial fifth vote for the Court's conclusion that both districts' plans violated the Equal Protection Clause.<sup>62</sup> Justice Kennedy also provided the fifth vote for the Court's holdings that strict scrutiny will be triggered whenever an individual's race is taken into account in making a student assignment decision<sup>63</sup> and that it is a compelling state interest for a district to seek to avoid racial isolation in schools and to attain the educational benefits of diverse schools.<sup>64</sup> Although Justice Kennedy agreed with the plurality conclusion that the plans before the Court were not narrowly tailored, he seemed to apply a different standard, making the guidance on this point less clear. Given the importance of Justice Kennedy's position and vote, the analysis below will pay special attention to the areas where Justice Kennedy's partial concurrence concurs with Chief Justice John G. Roberts,

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60. See Clotfelter et al., *supra* note 4, at 383–87.

61. Five Justices submitted opinions in the case. Chief Justice John G. Roberts, Jr., authored a plurality opinion, joined in its entirety by Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito, Jr., and joined in part by Justice Anthony M. Kennedy. *PICS*, 551 U.S. at 704. Justice Thomas authored a concurrence. *Id.* at 748 (Thomas, J., concurring). Justice Kennedy authored a partial concurrence and concurred in the result. *Id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment). Justice Stephen G. Breyer authored a comprehensive dissent that was joined by Justices John Paul Stevens, David H. Souter, and Ruth Bader Ginsburg. *Id.* at 803 (Breyer, J., dissenting). Finally, Justice Stevens submitted a brief dissent. *Id.* at 798 (Stevens, J., dissenting).

62. *Id.* at 782–83 (Kennedy, J., concurring).

63. *Id.* at 783 (“These plans classify individuals by race and allocate benefits and burdens on that basis; and as a result, they are to be subjected to strict scrutiny.” (citing *Johnson v. California*, 543 U.S. 499, 505–06 (2005))).

64. *Id.* at 792, 797–98 (“A compelling interest exists in avoiding racial isolation . . . . Likewise, a district may consider it a compelling interest to achieve a diverse student population.”) (agreeing with Justices Stevens, Souter, Breyer, and Ginsburg in this conclusion).

Jr.'s, plurality opinion, where it explicitly departs from that opinion, and where it seems to agree with the dissent of Justice Stephen G. Breyer.

A. *Application of Strict Scrutiny to Voluntary Race-Conscious Student Assignment Plans*

1. Opinions of the PICS Court

The first clash among the Justices was whether to apply strict scrutiny to the race-conscious assignment plans in JCPS and in Seattle. Although racial classifications do typically trigger strict scrutiny, Justice Breyer made the case that the context of that use may call for a less strict standard. Specifically, Justice Breyer argued that where the context involves racial classifications that seek “not to keep the races apart, but to bring them together,” the standard ought not to be strict scrutiny, but, rather, the Court ought to “examine carefully” such classifications.<sup>65</sup>

However, the Court’s majority concluded that strict scrutiny would apply. With little elaboration, Chief Justice Roberts explained (in a section joined by Justice Kennedy), “It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”<sup>66</sup> Chief Justice Roberts went on, writing only for a plurality, to outright reject Justice Breyer’s contextual argument, noting that cases “clearly reject the argument that motives affect the strict scrutiny analysis.”<sup>67</sup> To allow a more lenient standard based on alleged good motives would merely transform “separate but equal” into “unequal but benign,”<sup>68</sup> an unacceptable Court endorsement of discrimination.

Although he did not join the plurality in its outright rejection of Justice Breyer’s contextual argument, Justice Kennedy suggested that strict

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65. *Id.* at 835–36 (Breyer, J., dissenting). In addition to considering the contextual difference between the use of race to exclude and the use of race to include, Justice Breyer was willing to allow some deference to democratically elected local authorities to exercise “the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways.” *Id.* at 834. Justice Stevens likewise criticized the “wooden reading” of the Equal Protection Clause that led to application of strict scrutiny, noting that such “rigid adherence to tiers of scrutiny obscures *Brown*’s clear message.” *Id.* at 800–01 (Stevens, J., dissenting).

66. *Id.* at 720 (majority opinion) (citing *Johnson v. California*, 543 U.S. 499, 505–06 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995)). Justice Thomas agreed, stating that the Court had made it “unusually clear that strict scrutiny applies to every racial classification.” *Id.* at 758 (Thomas, J., concurring) (citations omitted).

67. *Id.* at 741 (Roberts, C.J., plurality) (citing *Johnson*, 543 U.S. at 505; *Adarand*, 515 U.S. at 227).

68. *Id.* at 742 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 638 (1990)). Chief Justice Roberts further rejected any deference to local school boards, concluding that such deference is “fundamentally at odds with our equal protection jurisprudence.” *Id.* at 744 (quoting *Johnson*, 543 U.S. at 506 n.1) (“We put the burden on state actors to demonstrate that their race-based policies are justified.” (quoting *Johnson*, 543 U.S. at 506 n.1)).

scrutiny would apply to any race-conscious plan regardless of the local authorities' stated purpose.<sup>69</sup> For Justice Kennedy, the reduction of an individual to an assigned racial identity would always trigger strict scrutiny.<sup>70</sup> Although the plans before the Court clearly did so reduce individual students, Justice Kennedy usefully provided a list of race-conscious policies that would not, including "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."<sup>71</sup> While the plurality explicitly expressed no opinion on such other means,<sup>72</sup> there is a clear majority (consisting of Justice Kennedy, along with Justice Breyer, Justices Ruth Bader Ginsburg and John Paul Stevens, who signed Justice Breyer's dissent, and Justice Sonia Sotomayor<sup>73</sup>) for a lowered level of scrutiny for these policies.

## 2. Guidance: When Will Strict Scrutiny Be Triggered?

As an initial matter, the *PICS* holding does not apply to student assignment policies aimed at achieving diversity or avoiding racial isolation that do not consider race. Such plans may consider non-racial factors, such as socioeconomic status or geography, without triggering the strict scrutiny standard. While districts should—indeed, must—first consider such race-neutral alternatives, the experiences of several districts that have attempted to implement such plans demonstrate that these policies often fail to achieve or maintain racial diversity.<sup>74</sup>

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69. *Id.* at 783 (Kennedy, J., concurring) ("[T]here is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion))).

70. *Id.* at 795 ("Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake.").

71. *Id.* at 789.

72. *Id.* at 745 (Roberts, C.J., plurality) ("These other means—*e.g.*, where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta.").

73. Although there is nothing in her record that directly suggests that Justice Sonia Sotomayor would agree with the thrust of Justice Breyer's dissent, her appointment by a President whose position is typically in stronger agreement with the *PICS* dissenters suggests that Justice Sotomayor would vote—as Justice Souter did—with Justices Breyer, Ginsburg, and Stevens.

74. See Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1556–58 (2003) (noting that in the year following elimination of a race-conscious plan in Charlotte, the percentage of black students in racially isolated schools jumped eleven percentage points); CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, DENVER PUBLIC SCHOOLS: RESEGREGATION, LATINO STYLE 9 (2006), available at

Districts committed to diverse schools may therefore be tempted to use race in some way in making student assignments. For assignment plans that do consider a student's individual race, the guidance is unambiguous: motives for making the racial classifications are not relevant; strict scrutiny will always be applied. However, some race-conscious plans that do not make individual racial classifications will not trigger strict scrutiny.<sup>75</sup> Such policies may explicitly consider the racial makeup of a geographic area in drawing attendance zones or selecting sites for new schools; so long as they do not classify individuals based on race, they will not be subjected to strict scrutiny.<sup>76</sup>

*B. Possibilities for Compelling Interests To Be Achieved Through Such Plans*

1. Opinions of the *PICS* Court

Prior to *PICS*, the Supreme Court had recognized two distinct compelling interests that could satisfy the strict scrutiny triggered when a state actor uses race in making decisions related to education. The post-*Brown* desegregation cases established that race could constitutionally be considered to remedy the effects of past intentional discrimination.<sup>77</sup> More recently, the Court had recognized that race could be considered in admissions programs aimed at achieving the compelling interest of diversity in higher education.<sup>78</sup> The *PICS* majority, including Justice Kennedy, held that neither of these interests was directly applicable to the student assignment plans from Seattle or Jefferson County.<sup>79</sup> A new compelling interest would be required to justify the plans' use of racial classifications.<sup>80</sup> Five Justices found such an interest.

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[http://www.civilrightsproject.ucla.edu/research/deseg/Denver\\_Reseg.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Denver_Reseg.pdf) (describing increase in racial isolation in Denver following elimination of race-conscious assignment plan).

75. *PICS*, 551 U.S. at 789 (Kennedy, J., concurring).

76. *Id.* (providing a list of race-conscious plans that would not trigger strict scrutiny).

77. *See, e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

78. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

79. *PICS*, 551 U.S. at 720–21 (Roberts, C.J., plurality). Chief Justice Roberts read these two interests narrowly, concluding that the remedial interest could only apply after a formal judicial finding of state-sponsored segregation in schools and only before a formal judicial finding of unitary status within a school district. *Id.* at 721. The Chief Justice considered the diversity interest identified in *Grutter* to be strictly limited to the context of higher education. *Id.* at 722–25.

80. Seattle declared its interest to be reducing racial concentration in schools, while JCPS claimed its interest to be in providing a racially integrated school environment. *See id.* at 725.



Although Justice Kennedy agreed that neither of the Court's previously articulated compelling interests were directly applicable in *PICS*,<sup>81</sup> it is on the compelling interest point that he departs most explicitly from the plurality. Specifically, Justice Kennedy identified two distinct compelling interests a school district may pursue: avoiding racial isolation in schools and achieving a diverse student population.<sup>82</sup> Justice Breyer echoed the sentiment, finding a valid compelling interest in the two districts' quest for racial "integration," which he defined as "eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience."<sup>83</sup>

Even Chief Justice Roberts did not directly foreclose the possibility that such an interest could be constitutionally compelling. Instead, he looked to the tailoring of the two plans and found that they were not actually aimed at achieving the interests proffered by the districts.<sup>84</sup> "In design and operation," Chief Justice Roberts wrote, "the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."<sup>85</sup> Since, in the Chief Justice's opinion, neither plan genuinely sought to achieve the compelling interest of diversity or avoiding racial isolation, there was no need to comment on whether such interests could be constitutionally compelling. Although the plurality opinion seems extraordinarily skeptical that an assignment plan that considers race could ever be anything but an impermissible attempt at racial balancing,<sup>86</sup> the opinion leaves the door open to a new compelling interest in racially diverse schools—so long as the plan is truly and narrowly tailored to that interest.

## 2. Guidance: Are Racially Integrated Schools a Compelling Interest?

School districts seeking to capture the educational benefits of diverse learning environments or to avoid racial isolation in their schools are on firm constitutional footing. A majority of the Court (consisting of Justice Kennedy, Justice Sotomayor, and the three remaining Justices who signed Justice Breyer's dissent) found such goals compelling in *PICS*. Diversity, however, cannot be limited to racial diversity. Justice Kennedy explicitly

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81. *Id.* at 791 (Kennedy, J., concurring) ("[T]he compelling interests implicated in the cases before us are distinct from the interests the Court has recognized in remedying the effects of past intentional discrimination and in increasing diversity in higher education.").

82. *Id.* at 797–98 ("[A] district may consider it a compelling interest to achieve a diverse student population.").

83. *Id.* at 838 (Breyer, J., dissenting).

84. *Id.* at 726 (Roberts, C.J., plurality).

85. *Id.*

86. *See id.* at 732 ("While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.").

instructs that “[r]ace may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”<sup>87</sup> Districts seeking diversity, therefore, must begin with a definition broader than simply racial diversity.

For districts seeking to avoid racial isolation, some consideration of race may be appropriate. However, Justice Kennedy makes clear that pursuit of that compelling interest still does not permit classifying individual students by race or, more significantly, assigning students to schools based on such classifications.<sup>88</sup> Again, to the extent a district does make individual classifications for the purposes of assignment, these classifications cannot be based solely on race.

Regardless of the stated goals of a district’s assignment program, the district must be deliberate in both identifying those goals and ensuring that the plan itself promotes them. Chief Justice Roberts displayed a willingness to look beyond the declared goals in evaluating whether a plan promotes a compelling interest. Plans that can be demonstrated to have no evidentiary relationship to the educational benefits of diversity will be vulnerable as unconstitutional attempts to achieve or maintain racial balance.<sup>89</sup> The most constitutionally firm plans will be those that are tailored with evidence to their stated compelling interest.

### C. Standards for Narrow Tailoring Analysis

#### 1. Opinions of the *PICS* Court

The Court’s starting point in its narrow tailoring analysis is *Grutter v. Bollinger*,<sup>90</sup> the 2003 case in which a 5-4 Supreme Court held a law school admissions program that considered the race of individual applicants to be constitutional.<sup>91</sup> Specifically, in the context of pursuing the compelling interest of diversity in higher education, *Grutter* set forth four criteria for considering whether a race-conscious plan is narrowly tailored: (1) there had been a serious and good-faith consideration of race-neutral alternatives prior to adopting a race-conscious plan; (2) the program uses race in a flexible, nonmechanical manner; (3) the program does not place an undue

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87. *Id.* at 798 (Kennedy, J., concurring).

88. *See id.* at 790 (“[I]ndividual racial classifications employed in this manner may be considered legitimate only if they are a last resort . . . .”); *id.* at 798 (“What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification.”).

89. *Id.* at 732 (Roberts, C.J., plurality) (“Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”).

90. 539 U.S. 306 (2003).

91. *Id.*

burden on nonminority applicants; and (4) there are periodic reviews of the program's continued necessity.<sup>92</sup>

Before a district may consider an individual's race, it must first consider, in good faith, race-neutral alternatives that will achieve the district's goals.<sup>93</sup> Though the *PICS* opinions do not delve into the race-neutral alternatives the boards in Seattle and JCPS should have considered, both Chief Justice Roberts and Justice Kennedy were struck by the small number of instances in which race actually played a role in the districts' assignment decisions. Such minimal employment of race seemed to suggest to them that a race-neutral plan could have achieved the same outcome—the consideration of race, perhaps, was not necessary at all.<sup>94</sup> Careful not to suggest an endorsement of *greater* use of race, Chief Justice Roberts contrasted the minimal impact of the districts' racial classifications with the indispensable nature of the race-conscious plan in *Grutter*, a plan that more than tripled minority representation at the University of Michigan Law School.<sup>95</sup> In dissent, Justice Breyer searched for a policy that could have considered race *less* than the plans before the *PICS* Court while achieving the same results.<sup>96</sup> Finding none, Justice Breyer accused the majority of imposing a narrow-tailoring standard that could not be met.<sup>97</sup>

Not relying solely on the first narrow-tailoring criterion, the *PICS* Court also considered whether the plans used race in a flexible, nonmechanical manner as required by *Grutter*.<sup>98</sup> Chief Justice Roberts dismissed the suggestion that the presence of other factors, such as choice and geography, in the assignment process meant that race was used in a permissibly flexible manner. Under each plan, the Chief Justice wrote, “when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor.”<sup>99</sup> Justice Kennedy was likewise troubled by the assignment of immutable individual racial classifications: “Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake.”<sup>100</sup>

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92. *See id.* at 333–43.

93. *Id.* at 339.

94. *PICS*, 551 U.S. at 733–34 (Roberts, C.J., plurality) (noting that only fifty-two students in Seattle were adversely affected by the racial tiebreaker and that the racial guidelines in JCPS accounted for only 3% of assignments); *see also id.* at 790 (Kennedy, J., concurring) (calling it “noteworthy” that the number of students affected is small and agreeing with the plurality that “the small number of assignments affected suggests that the schools could have achieved their stated ends through different means”).

95. *Id.* at 734–35 (Roberts, C.J., plurality).

96. *Id.* at 850 (Breyer, J., dissenting).

97. *Id.*

98. *Id.* at 723 (Roberts, C.J., plurality); *see also Grutter*, 539 U.S. at 334 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

99. *PICS*, 551 U.S. at 723.

100. *Id.* at 795 (Kennedy, J., concurring).

Chief Justice Roberts went further to equate the use of racial ratios based upon the racial demography of the school district—as both districts had done—to efforts at racial balancing that placed an impermissible burden on nonminority students.<sup>101</sup> By insulating minority students from comparison against all other students, both plans failed to satisfy this aspect of narrow-tailoring analysis.<sup>102</sup> The Chief Justice cited a lack of evidence supporting the conclusion that the racial makeup necessary to achieve the benefits of diversity had anything to do with the overall racial makeup of the district.<sup>103</sup> Without such evidence, it was clear that the plans were tailored only to achieve a desired racial makeup in schools. “[R]ather than working forward from some demonstration of the level of diversity that provides the purported benefits,” as the law school had permissibly done in *Grutter*, the plans in *PICS* worked backwards “to achieve a particular type of racial balance.”<sup>104</sup> According to Chief Justice Roberts, working backward is a “fatal flaw” under the Court’s equal protection precedents.<sup>105</sup>

Pointing to the broad ranges for racial makeup allowed by each plan, Justice Breyer argued that neither could realistically be considered a quota aimed to produce a particular racial balance.<sup>106</sup> Although race may have been determinative in a small number of student assignments, the dominant factor in both plans was not race, but choice.<sup>107</sup> As such, where Chief Justice Roberts and Justice Kennedy had seen a constitutional flaw in minimal use of race because it demonstrated a lack of necessity of using race at all, Justice Breyer saw proof that the plan had been narrowly tailored to the maximum amount because the use of race did not place an undue burden on the nonfavored population.

## 2. Guidance: What Makes a Plan Narrowly Tailored?

Districts seeking to tailor student assignment policies narrowly can use the *PICS* opinions as a roadmap, albeit a fuzzy one. Before any race-conscious plan is adopted, districts must seriously consider race-neutral alternatives and establish an evidentiary record of both the consideration of each alternative and the reason each race-neutral alternative was not enacted. A thorough record of consideration of such alternatives will

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101. *Id.* at 726 (Roberts, C.J., plurality) (“In design and operation, the plans are directed only to racial balance, pure and simple . . .”).

102. *See Bakke*, 438 U.S. at 319 (“No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, [nonminority applicants] are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats.”).

103. *PICS*, 551 U.S. at 727.

104. *Id.* at 729.

105. *Id.*

106. *Id.* at 846 (Breyer, J., dissenting).

107. *Id.*

demonstrate the good faith required by *Grutter*<sup>108</sup> and could lead some districts to even opt against race-conscious plans, a result that would allow districts to avoid strict scrutiny entirely. Further, districts should consider race-conscious policies of the sort described by Justice Kennedy that do not make individual classifications before adopting any plan that does make such classifications and similarly develop the evidentiary record of the consideration of those plans.<sup>109</sup>

However, the opinions of Chief Justice Roberts and Justice Kennedy create a paradoxical situation for school districts. On one hand, districts are to use race in only the narrowest manner required, yet if race does not play a factor in a significant number of instances—as was the case in Seattle and JCPS—then the Court may look upon the use of race as unnecessary. It seems that if districts do a good job of narrowly tailoring the use of race in student assignments, they potentially undermine their own case. The best way to avoid this conundrum is to seriously consider race-neutral alternatives and keep an evidentiary record of why the use of race is necessary, even if it only applies in a small number of instances.

In addition, if diversity is the stated goal of the plan, districts should develop an evidentiary record tying the demographic makeup sought by a race-conscious assignment plan to the educational benefits of diverse schools. Rather than working backward from a prescribed school makeup, districts ought to research what level of diversity is required to achieve educational benefits and work forward to get there. According to Chief Justice Roberts, failure to do so constitutes a “fatal flaw” in an assignment plan.<sup>110</sup>

Another potentially fatal flaw is insulating any student from competition against all other students in allocating benefits, such as school assignments. This problem can be avoided by defining diversity broadly and avoiding making race the dominant characteristic of a student profile.<sup>111</sup> To the extent individual classifications are required, districts must use race as only one component of their definition of diversity in order to satisfy the requirement that race be used in a flexible, nonmechanical way.<sup>112</sup> Under

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108. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (“Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

109. *PICS*, 551 U.S. at 789 (Kennedy, J., concurring) (listing strategic site selection of new schools, drawing attendance zones with demography considered, allocating resources for special programs, targeted recruiting policies, and tracking data by race).

110. *Id.* at 729 (Roberts, C.J., plurality).

111. *Grutter*, 539 U.S. at 336–37 (“When using race as a ‘plus’ factor in university admissions, a university’s admissions program 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.”).

112. See *PICS*, 551 U.S. at 790 (Kennedy, J., concurring) (noting that districts may use “a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component”); *Grutter*, 539 U.S. at 338 (describing the various diversity

*Regents of University of California v. Bakke*<sup>113</sup> and *Grutter*, it is not necessary that all diversity components be given equal weight.<sup>114</sup> However, where an individual racial classification becomes outcome determinative in even a small number of cases, a district should anticipate disapproval from a majority of the Court.<sup>115</sup>

Finally, assignment plans should have a mechanism for continued evaluation to ensure that they are sufficiently flexible to continue to fit the district's goals. Although the Justices did not reach this element of narrow-tailoring analysis, the *Grutter* Court made clear that race-conscious policies must be limited in time.<sup>116</sup> In *Grutter*, Justice Sandra Day O'Connor suggested that the use of sunset provisions and periodic reviews to determine the continued necessity of considering race would satisfy this criterion.<sup>117</sup>

With the guidance from *PICS* in hand, those charged with drafting a new student assignment plan for JCPS had the opportunity to craft a plan that would both remain faithful to the district's commitment to diverse school environments and comply with the constitutional standards of a majority of the Supreme Court.

### III. ACCEPTING THE DARE: THE NEW JCPS STUDENT ASSIGNMENT PLAN

When asked whether the *PICS* decision tossing out her district's student assignment plan could lead to anything positive, JCPS executive director of student assignment Pat Todd replied with exasperation, "No. We're *already doing* what we should be."<sup>118</sup> Todd's comments reflected the frustration of a school district oft-recognized for and genuinely proud of its largely successful racial integration being ordered by the Supreme Court to develop a new assignment plan.<sup>119</sup> Other districts that had abandoned the

criteria considered by the law school); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (describing use of race as a "plus" factor).

113. 438 U.S. 265.

114. *Grutter*, 539 U.S. at 334 ("[A]n admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, *although not necessarily according them the same weight.*'" (quoting *Bakke*, 438 U.S. at 317 (emphasis added))).

115. *PICS*, 551 U.S. at 723 (Roberts, C.J., plurality) ("[W]hen race comes into play, it is decisive by itself."); *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting) (noting likelihood that race would be outcome determinative for some students under law school's plan).

116. *Grutter*, 539 U.S. at 342 (majority opinion).

117. *Id.*

118. Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES MAG., July 20, 2008, at 38, 38.

119. See JEFFERSON COUNTY PUB. SCH., NO RETREAT: THE JCPS COMMITMENT TO SCHOOL INTEGRATION 2 (2008) [hereinafter NO RETREAT], available at <http://www.jcpsky.net/Pubs/NoRetreatBro.pdf> (explaining new student assignment plan to JCPS parents and stating that "JCPS is often cited as the best-integrated school system in the nation"); Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest? Evidence from Louisville*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111, 136-37 (Gary Orfield ed., 2001); Kristie J.R. Phillips et al.,

use of race in making student assignments found that their schools quickly became more racially isolated.<sup>120</sup> Many feared the same result for JCPS under the new constitutional framework.<sup>121</sup> How could a district maintain hard-achieved racial integration without considering individual racial classifications? That is the question left open by *PICS* and the question Justice Kennedy dared some district to answer. JCPS has accepted that challenge by adopting a new Student Assignment Plan (SAP).

The task of developing the new SAP coincided with the arrival of a new superintendent to JCPS, Sheldon Berman. Following the Supreme Court's ruling, Berman said of the district he would be taking over less than a week later, "This community really values an integrated school system. It is a core value within Jefferson County. . . . We will find some creative ways to continue to model that."<sup>122</sup> Thus, from the outset, it was clear that JCPS would not shrink from the dare laid down by Justice Kennedy's opinion to come up with a way to maintain integration without running afoul of the Supreme Court. Superintendent Berman recognized immediately the chance his district had to imagine the future of public school integration: "Kennedy's opinion provides [the district] with the opportunity to create that."<sup>123</sup>

#### A. *Developing the New SAP*

Confronting realities more complex than the arduous but straightforward task of dismantling state sponsorship of segregated schools, the new plan broadens both the definition of diversity and the goals the plan seeks to achieve.<sup>124</sup> Within ten weeks of the *PICS* decision, the district's newly assembled Student Assignment Work Team had settled on six guiding principles that were unanimously approved by the school board on September 10, 2007: (1) Diversity, (2) Quality, (3) Choice, (4)

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Integrated Schools, Integrated Futures? A Casestudy of School Desegregation in Jefferson County, Kentucky 1 (2008) (unpublished article, on file with author) (integration efforts were "voluntarily upheld by residents of the county and viewed with pride as a landmark achievement for the school system").

120. Chris Kenning, *Systems in California, N.C. See Varied Results*, COURIER-J. (Louisville), Jan. 29, 2008, at A5.

121. Editorial, *Thwarting Equity*, COURIER-J. (Louisville), June 29, 2007, at A10 ("As a result [of the Supreme Court's decision], the near total racial isolation and educational despair that pervade so many American cities today are considered constitutionally just; the racial diversity and educational opportunity that Jefferson County has voluntarily and proudly attained are rejected as constitutionally unjust. A more bitter or unjustified blow is hard to conceive.").

122. Antoinette Konz, *New School Chief Sees No Return to Segregation*, COURIER-J. (Louisville), June 29, 2007, at K6.

123. *Id.*

124. See generally Jefferson County Pub. Sch., Promoting Diversity Across the District (on file with author) (internal document of JCPS Student Assignment Work Team) [hereinafter Promoting Diversity].

Predictability, (5) Stability, and (6) Equity.<sup>125</sup> The Work Team added diversity, quality, and choice to the original guidelines adopted in the 1975 desegregation decree,<sup>126</sup> additions that represent a three-tiered goal of the new SAP—to maintain and enhance diversity within the new constitutional framework; to improve educational quality across the district; and to provide parental choice in a way that maintains public support for the system.

This three-tiered goal represents the future of integration. No longer can integration be the sole or defining goal of a student assignment plan as it had been in the immediate post-*Brown* era. In an era where fewer districts are operating under judicial desegregation decrees, educational quality and public support maintained through parental choice have emerged as priorities for running a successful school district. This is good for education. The question is whether the new era is going to be bad for diversity. Specifically, can JCPS continue to provide the educational benefits of diversity to its students while simultaneously embracing a commitment to quality and choice? This is the task the new SAP undertakes.

### B. *Consideration and Rejection of Alternative*

Following the adoption of the guiding principles, the district's Student Assignment Work Team gathered information from other districts and from experts, both national and local, as well as from district principals.<sup>127</sup> Ultimately, school administrators analyzed a handful of options, including neighborhood schools, open enrollment programs, an assignment lottery, geography-based integration, and income-based integration, before presenting four potential plans to the JCPS board on January 28, 2008: (1) a neighborhood schools plan, (2) an open enrollment plan, (3) a "contiguous plan" with multitiered diversity guidelines, and (4) a similar "non-contiguous plan" with diversity guidelines.<sup>128</sup> Of the four, the assignment teams only recommended two for adoption, rejecting the neighborhood schools and open enrollment plans.<sup>129</sup>

The neighborhood schools plan would have simplified student assignment and reduced the district's transportation costs, but based on the county's residential segregation, would have quickly resulted in a loss of

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125. Konz, *supra* note 16.

126. *Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 762 (W.D. Ky. 1999) (describing the 1975 desegregation decree and its original guiding principles of stability, equity, predictability, and simplicity).

127. Promoting Diversity, *supra* note 124. School administrators interviewed officials from Cambridge, Massachusetts; Charlotte-Mecklenburg, North Carolina; Wake County, North Carolina; Berkeley, California; and consulted with Gary Orfield, John Powell, Anurima Bhargava, and Ron Crouch. Chris Kenning, *District Consulted National Experts*, COURIER-J. (Louisville), Jan. 29, 2008, at A8.

128. Kenning, *supra* note 127; Promoting Diversity, *supra* note 124.

129. Promoting Diversity, *supra* note 124.



both racial and income diversity in JCPS schools.<sup>130</sup> Under the neighborhood schools plan,<sup>131</sup> enrollment at twenty-three elementary schools would increase overnight to greater than 50% African American.<sup>132</sup> Median household income at elementary schools would range widely from \$8363 to \$101,000.<sup>133</sup> In addition, more than 20% of JCPS students would be reassigned for 2009–2010 under a neighborhood schools plan, a disruption the district did not want to endure.<sup>134</sup>

Under the open enrollment plan, parents would have chosen a school for their children among all schools in the district, subject only to space limitations. The open enrollment plan was considered “impractical.” Without anything guiding assignment except parental choice and school capacity, the plan removed much of the district’s ability to ensure diverse schools and classrooms. Only the creation of additional magnet programs aimed at drawing diverse populations to particular schools could address the principle of diversity, an option dismissed based on both the high cost of developing magnet programs and the unpredictability of the plan’s results.<sup>135</sup>

### C. The Recommended Plan

The district’s student assignment team presented two other plans that it did recommend to the JCPS board. The two plans—known as the Contiguous and Non-contiguous plans—differed only in the specific drawing of attendance clusters.<sup>136</sup> The board subsequently requested that the assignment team recommend a single plan, and the Contiguous plan was ultimately recommended.<sup>137</sup>

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130. Antoinette Konz, Berman: *Simple Plans Would Segregate*, COURIER-J. (Louisville), Jan. 29, 2008, at A8.

131. In JCPS terminology, this plan is referred to as a “resides school plan.” For the sake of clarity, the author has used the term “neighborhood schools” rather than the JCPS-specific term.

132. Konz, *supra* note 130.

133. *Id.*

134. *See id.* (noting that 23,000 students will be reassigned under the new plan); Antoinette Konz & Chris Kenning, *Jefferson Schools Unveil Plan To Keep Diversity: Income, Race, Education Criteria for Assignments*, COURIER-J. (Louisville), Jan. 29, 2008, at A1 (stating that the total number of students in the district is 98,000).

135. *Id.*

136. A cluster is a group of schools among which any student residing within that cluster can initially choose to attend without making a transfer request. As under the previous plan, each student would have a designated “resides” school within the cluster that would be the primary place of assignment. Under the Non-contiguous plan, the district’s existing clusters were modified, but in some cases remained, as the name suggests, non-contiguous with one another. For example, schools among one of the clusters may be located in differing parts of the city. In contrast, under the Contiguous Plan, clusters were more significantly modified, but each cluster would be situated within an uncut geographical border. *See generally* Steve Reed, *How the Plan Would Work*, COURIER-J. (Louisville), Jan. 29, 2008, at A6.

137. Antoinette Konz, *School Board Requests Single Attendance Plan*, COURIER-J. (Louisville), Apr. 29, 2008, at A1.

The new plan called for the district to be split into two geographic areas, labeled Geographic Area A and Geographic Area B, with differing demographic characteristics.<sup>138</sup> Neighborhoods, in the form of census blocks, would be classified as either Area A or Area B based upon three criteria: (1) percentage of minority students, (2) average median household income per household member, and (3) average educational attainment of people aged twenty-five or older.<sup>139</sup> Areas to be labeled Geographic Area A would be neighborhoods with majorities below the average median household income, below the district average for educational attainment of people aged twenty-five or older (high school diploma with some college), and above the district average for the percentage of minority students.<sup>140</sup> The definition of “minority” was changed from “black” under the pre-*PICS* plan to “non-white,” a classification that would include 47.9% of the district’s students.<sup>141</sup> Areas that do not satisfy any one of the income, educational attainment, or minority criteria would be labeled Geographic Area B.<sup>142</sup> Reflecting the old plan’s student population guidelines, the new proposals would require that each school<sup>143</sup> contain a population of no fewer than 15% and no greater than 50% students from Geographic Area A.<sup>144</sup>

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138. Jefferson County Public Schools, About Us, <http://www.jcpsky.net/AboutUs/StudentAssigPlan.html> (last visited Apr. 3, 2010) [hereinafter About Us]; see also NO RETREAT, *supra* note 119.

139. See NO RETREAT, *supra* note 119.

140. *Id.*; see also Konz & Kenning, *supra* note 134.

141. Konz & Kenning, *supra* note 134.

142. See *infra* p. 2897 fig.1.

143. Alternative, magnet, and special schools are not bound by the student population guidelines. Similarly, students enrolled in self-contained exceptional child education or English as a Second Language classes do not count toward a school’s makeup under the guidelines. See generally About Us, *supra* note 138.

144. *Id.*

Figure 1: Classification Criteria Under JCPS Student Assignment Plan<sup>145</sup>

Geographic Area A: Neighborhoods where . . .	Geographic Area B: Neighborhoods where . . .
<i>More than 47.9%</i> of JCPS Students living in the neighborhood are Minority Students	<i>Less than 47.9%</i> of JCPS Students living in the neighborhood are Minority Students
AND	OR
Average Median Household Income in Neighborhood is <i>Less Than \$41,000</i>	Average Median Household Income in Neighborhood is <i>More Than \$41,000</i>
AND	OR
Average Adult Educational Attainment in Neighborhood is <i>Less than high school diploma + some college</i>	Average Adult Educational Attainment in Neighborhood is <i>More than high school diploma + some college</i>

In practice, the district would be divided into six clusters of eleven to fifteen schools each.<sup>146</sup> As under the previous plan, each student would have a designated “resides” school that serves her physical address.<sup>147</sup> Elementary school students would choose and rank four schools within their cluster, two of which must be located in Area A neighborhoods.<sup>148</sup> Students would be initially assigned to one of the schools within the cluster, and assignments would be impacted by both school capacity and the diversity guidelines.<sup>149</sup> In addition, a student would have the ability to apply for placement in magnet or optional schools or for transfer to any school.<sup>150</sup> Assignment of middle and high school students was not covered by the initial proposal, though middle and high schools would remain governed by the 15–50% diversity guideline.<sup>151</sup>

145. The specific benchmarks (e.g., 47.9%, \$41,000, high school diploma plus some college) are based on the statistics in Jefferson County for the 2008–2009 school year. These benchmarks will change as the district’s demographic makeup changes.

146. Antoinette Konz, *Superintendent Supports ‘Contiguous’ School Proposal*, COURIER-J. (Louisville), May 9, 2008, at A1.

147. Chris Kenning, *What Do These Terms Mean?*, COURIER-J. (Louisville), Jan. 29, 2008, at A8.

148. Antoinette Konz, *Diversity Goal: JCPS Less than Halfway There*, COURIER-J. (Louisville), Jan. 17, 2010, at A1.

149. *Id.*

150. About Us, *supra* note 138.

151. *Id.* In December 2008, the district presented to the JCPS board an initial version of an assignment plan for middle and high schools. Under the new plan, each middle and high school will have two enrollment areas, one encompassing the school itself and another with different demographic characteristics—the two areas may or may not be contiguous. Each

In addition to the student assignment and school makeup aspects of the new SAP, the proposals included other changes meant to promote the guiding principles of quality and choice. The district proposed to create two new district-wide magnet elementary schools and pledged to develop additional magnet programs to provide greater parental choice and increased educational quality.<sup>152</sup> In addition, the district committed to staff development to ensure that staff had been trained to deal with diverse student populations, implementation of effective and innovative instructional strategies, creation of strategically placed tutorial and enrichment services, and active searching for more teachers, counselors, and administrators from diverse backgrounds.<sup>153</sup>

In the months since the district's executive director of student assignment had dismissed any suggestion that the *PICS* decision would lead to anything positive, the district had carefully considered how best to proceed and arrived at a new plan some thought even bested the old plan. Upon submission of the Contiguous plan to the board, Superintendent Berman remarked, "In the long term, I believe [the student] assignment plan will help improve the quality of Jefferson County Public Schools . . . . I think we'll have a better balance across the system and that it will give us the opportunity to do some things that we haven't been able to do before—like reduce class sizes and expand the number of magnet programs and schools that we have."<sup>154</sup>

#### D. Adoption of the New SAP

Following the initial presentation of the new SAP to the school board and the community, the district made additional effort to solicit feedback. Through a half dozen community forums, multiple meetings with constituency groups, and public opinion surveys, the district gathered further information and made slight modifications to the original proposals.<sup>155</sup> The poll results in particular revealed the soundness of the district's belief that the community would support its effort to maintain JCPS's diversity. When asked whether they agreed that it was important to bring together students from different races and backgrounds to learn, 88%

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school would be governed by the 15–50% guideline and several additional magnet programs would be created. The new plan would consolidate the district's current secondary school zones, reduce transportation costs, and would "grandfather" students into their current schools as the elementary school plan did. Chris Kenning, *JCPS Gets Look at New Plan: Attendance Shifts Won't Uproot Kids*, COURIER-J. (Louisville), Dec. 9, 2008, at B1. Implementation of the plan for middle and high schools, however, has been postponed until 2011–2012. Antoinette Konz, *Student-Assignment Progress Seen*, COURIER-J. (Louisville), Mar. 23, 2010, at B1.

152. Promoting Diversity, *supra* note 124.

153. *Id.*

154. Antoinette Konz & Chris Kenning, *JCPS To Consider Diversity Proposal*, COURIER-J. (Louisville), May 28, 2008, at A1.

155. Promoting Diversity, *supra* note 124.

of privately polled JCPS parents answered “yes.”<sup>156</sup> In addition, 90% said that diversity should include racial diversity.<sup>157</sup>

On May 28, 2008, eleven months to the day after the *PICS* decision, the JCPS board unanimously voted to approve the Contiguous Plan for assignment of elementary school students.<sup>158</sup> For 3400 students who would otherwise have been reassigned under the new plan, the board decided to allow those students to remain in their current schools unless they chose otherwise or subsequently relocated their residence.<sup>159</sup>

### E. Early Results

The new plan took effect at the outset of the 2009–2010 school year. The School Board elected to exempt students currently enrolled rather than disrupting such students’ schooling, thus avoiding some backlash while taking on some additional transportation costs.<sup>160</sup> As a result, the diversity guidelines would most impact the incoming first grade students. Once initial assignments were made, the district received 1295 transfer requests from kindergarten and first grade students, a figure more than double the number from the previous year.<sup>161</sup> Nearly half of the requests were granted. The public trepidation evidenced by such a high number of transfer requests has also begun to influence the thinking of JCPS board members, with some saying they are “willing to consider loosening” the 15–50% diversity guidelines.<sup>162</sup> These board members are suggesting that choice, rather than diversity, be the driving principle of the assignment plan.<sup>163</sup>

In January 2010, the district took stock of its progress toward the new diversity guidelines, finding that only forty-two of ninety elementary schools fell within the range of student population between 15% and 50% from Area A.<sup>164</sup> Even looking solely at the first grade figures (the only grade unaffected by the “grandfathering” of currently enrolled students), only forty-three elementary schools were within the diversity guidelines range.<sup>165</sup> Several schools saw extremely high concentrations of students from either Area A or Area B neighborhoods—at least three had student

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156. Chris Kenning, *Poll: Parents Back Diversity in Schools*, COURIER-J. (Louisville), Apr. 15, 2008, at A1.

157. *Id.*

158. Antoinette Konz, *School Board OKs Assignment Plan*, COURIER-J. (Louisville), May 29, 2008, at A1.

159. *Id.*

160. Konz, *supra* note 148.

161. *Id.*

162. Antoinette Konz, *Board Members May Tweak JCPS Plan: They Won't Swap Diversity for Neighborhood Schools*, COURIER-J. (Louisville), Mar. 14, 2010, at A1.

163. *Id.* (“I don’t think diversity should be what drives this plan. It should be choice.” (quoting board member Linda Duncan)); *id.* (“I would like our plan to be more of a choice plan and not a dictated plan.” (quoting board member Joe Hardesty)).

164. Konz, *supra* note 148.

165. *Id.*

populations of more than 80% from Area A neighborhoods; a similar number had student populations of more than 94% from Area B neighborhoods.<sup>166</sup> Still, Superintendent Berman noted that two-thirds of schools were ““trending toward meeting the new diversity goal.””<sup>167</sup>

These results suggest some of the nonlegal challenges that will face the district as the plan is implemented. Specifically, maintaining parental support for the plan even as children are assigned to schools other than their first choice and continuing to monitor the diversity makeup of each school will require consistent work on the part of the district. Ultimately, each of these can be accomplished only by raising the educational bar at all schools in JCPS, a goal the district is pursuing by increasing school choice options for parents and students.<sup>168</sup>

The district thus faces challenges beyond the question of the new SAP's constitutionality. It may ultimately be the educational soundness, ability to maintain parental and community support, and effectiveness at delivering the diversity sought that determines the success or failure of the new plan. In other words, a constitutional plan does not necessarily equal a successful plan. Still, an unconstitutional plan will certainly not succeed, so the question of constitutionality is discussed below.

#### IV. EVALUATION

Although there is broad public support for the new JCPS SAP,<sup>169</sup> a challenge to its constitutionality is likely. The attorney who represented the plaintiffs in the suit that ultimately led to the old plan's termination has already repeatedly and publicly criticized the JCPS board for seeking to undermine the Supreme Court's mandate in *PICS*.<sup>170</sup> In July, he brought suit.<sup>171</sup> Thus, evaluation of the legal, educational, and political merits of the new SAP is in order.

The lawsuit challenging the new SAP is likely to be brought by a parent or a group of parents of students living in neighborhoods designated as Area B whose children were not assigned to the school of their choice because that school had reached the maximum percentage of Area B students, or 85%.<sup>172</sup> Though the precise situation of the plaintiff or

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166. *Id.* (noting that Roosevelt Perry, Atkinson, and Portland elementary schools had more than 80% of students from Area A and that Audobon, Greathouse/Shyrock, and Wilt elementary schools had more than 94% of students from Area B neighborhoods).

167. *Id.*

168. Sheldon H. Berman, *JCPS: The Superintendent's Report*, COURIER-J. (Louisville), Jan. 17, 2010, at H1.

169. Kenning, *supra* note 156.

170. Teddy B. Gordon, *Attorney Faults JCPS 'Arrogance,'* COURIER-J. (Louisville), Feb. 10, 2008, at H3.

171. Wolfson & Yetter, *supra* note 19.

172. It is also plausible, though less likely, that a suit would be brought by a student living in an Area A neighborhood who was not assigned to their top choice school because that school had reached the maximum percentage of Area A students, or 50%. The reason

plaintiffs cannot be predicted, it is probable that they will be white, and that the neighborhood in which they live is likely to have a higher than average median household income or adult educational attainment or both.<sup>173</sup>

This section will consider the merits of an equal protection claim brought by such a plaintiff challenging the new SAP. Drawing from the various opinions in *PICS* and applying their analysis to the new SAP, the section will consider whether the new plan is likely to trigger strict scrutiny, whether it promotes a compelling state interest, and whether it is sufficiently narrowly tailored to survive constitutional scrutiny.<sup>174</sup> Applying this analysis to the new JCPS SAP using the opinions of the various Justices in *PICS*, several questions emerge. First, does the new plan, with its classifications based on geography, trigger strict scrutiny at all? And if so, is the plan tailored narrowly enough to a compelling interest to withstand that scrutiny?

#### A. Application of Strict Scrutiny

The Justices disagreed in *PICS* on whether to apply strict scrutiny to JCPS's previous assignment plan.<sup>175</sup> On one end of the spectrum, Justice Breyer (along with Justices Ginsburg, Souter, and Stevens) would have applied an "examine carefully" standard to evaluate benign racial classifications that seek "not to keep the races apart, but to bring them together."<sup>176</sup> On the other extreme, Justice Thomas appeared ready to apply strict scrutiny to "every racial classification."<sup>177</sup> The majority, including Justice Kennedy, agreed that strict scrutiny would apply to all

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this suit would be less likely is that one object of the SAP is to avoid the negative educational effects of racially—and socioeconomically—isolated schools. The higher the percentage of students from Area A neighborhoods, the closer a school gets to these negative effects. Thus, the perceived top non-magnet schools that would be most desirable to parents seeking to avoid such effects will be those not approaching the 50% Area A threshold. More likely, these schools would be near the 85% Area B threshold, making a plaintiff from Area B more likely.

173. The littering of this description with "likely" and "probable" is a function of the plan's broad criteria that ensures that no single individual student characteristic, other than address, will determine a student's school assignment. Interestingly, it is plausible to find a minority student from a household with below average educational attainment and below average household income who would, based on address, be classified as Area A. This student, perhaps, would be the most sympathetic potential plaintiff. It would be difficult, however, for such a plaintiff to argue that her race was the deciding factor in the district's assignment decision.

174. This section is written on the assumption that the current nine Supreme Court Justices will hear the challenge to the new plan. Although that may not be so, the balance of the Court seems unlikely to change at least prior to 2013. In any event, Justice Kennedy's place as the deciding fifth vote for either side seems assured for the foreseeable future.

175. See *supra* Part II.A.

176. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 835–36 (2007) (Breyer, J., dissenting).

177. *Id.* at 758 (Thomas, J., concurring) (citing *Johnson v. California*, 543 U.S. 499, 505 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

*individual* racial classifications.<sup>178</sup> Justice Kennedy was particularly vociferous on the point that individual classifications always trigger strict scrutiny, claiming that “[r]eduction of an individual to an assigned racial identity . . . is among the most pernicious actions our government can undertake.”<sup>179</sup> The first question, therefore, in evaluating the new SAP, is whether it involves an individual racial classification that would trigger strict scrutiny for a majority of the Justices. A strict reading of the plan and of the Court’s precedents suggests that it should not. However, in an area as critical as student assignment and with an issue as controversial as state-imposed racial classifications, the analysis will not stop with a simple reading of the plan. Although the plan does not make individual racial classifications, its use of race in classifying neighborhoods as Area A or Area B is likely to trigger strict scrutiny for a majority of the Justices.

The new JCPS SAP classifies geographic areas rather than individuals. Geographic classifications do not typically trigger strict scrutiny analysis.<sup>180</sup> However, the analysis here is not so simple. In classifying an area as Area A or Area B, the SAP explicitly considers race.<sup>181</sup> Indeed, it considers each individual student’s race in determining whether an area has the requisite percentage of minority students to be classified as Area A. Justice Thomas would certainly utilize strict scrutiny to evaluate a plan using race in even this way.

Justice Kennedy, however, expressly stated that drawing geographic attendance zones with general recognition of neighborhood demographics would *not* trigger strict scrutiny.<sup>182</sup> It is, of course, not possible to draw zones with neighborhood demographics in mind without first knowing what those neighborhood demographics are. At some level, even with this race-conscious tool, individual student racial characteristics must be ascertained. To equate such ascertainment with the classifications Justice Kennedy condemns in *PICS* would render his statement that districts are free to use these plans meaningless. Thus, if the SAP is simply an assignment plan that draws geographic attendance zones with race and other demographics in mind, then Justice Kennedy may not apply strict scrutiny to it. Along with the lowered scrutiny that Justices Stevens, Breyer, and Ginsburg would likely apply,<sup>183</sup> the Court that hears a challenge to the SAP will consider the plan using something less than strict scrutiny.

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178. *Id.* at 720 (majority opinion); *id.* at 784 (Kennedy, J., concurring); *Johnson*, 543 U.S. at 505–06; *Adarand*, 515 U.S. at 224.

179. *PICS*, 551 U.S. at 795 (Kennedy, J., concurring).

180. *Bush v. Vera*, 517 U.S. 952, 958 (1996) (“Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.”).

181. *See supra* Part III.

182. *PICS*, 551 U.S. at 789 (Kennedy, J., concurring).

183. Again, it is not known what Justice Sotomayor’s position is on this particular question, but it is assumed that her view would be most closely in line with Justices Breyer, Ginsburg, and Stevens.



Although the SAP arguably fits Justice Kennedy's model of a plan that would not trigger strict scrutiny—the argument is that Geographic Areas A and B are merely attendance zones drawn with neighborhood demographics explicitly in mind—Geographic Areas A and B do not fit the typical definition of an attendance zone. Students in Geographic Area A are not assigned to a particular school based solely on where they live. Instead, the Geographic Areas operate in some ways more like an individual classification—a student is classified as an Area A student and assignment is affected by that classification. As a result, the plaintiffs will argue that the plan falls beyond the scope of policies Justice Kennedy noted would not trigger strict scrutiny. Indeed, individual students *are* given classifications—a student is classified as being from Area A or Area B—and those classifications *do* affect student assignment. The inquiry in determining which tier of scrutiny to apply, however, is whether those individual classifications are individual *racial* classifications.

Race is explicitly part of the equation. Classification of a neighborhood as Area A or Area B depends in part on the minority population of that area.<sup>184</sup> Only neighborhoods with a minority population above the district average can be classified as Area A.<sup>185</sup> In addition, there is a correlation between race and the other two criteria used in classifying Area A, median household income and average educational attainment.<sup>186</sup> Finally, the plan was developed with the intent of maintaining diversity that had been achieved through a race-based plan. Because the intent is to maintain diversity and the criteria relate to race either explicitly or by correlation, there is room for argument that the classifications of Area A and B are

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184. See *supra* note 139 and accompanying text.

185. See Konz & Kenning, *supra* note 134 and accompanying text. However, not every such neighborhood will necessarily be labeled Area A. A neighborhood with a JCPS student population made up of 65% minority population with either higher than average median household income or higher than average parental educational attainment or both would be classified as Area B.

186. According to the 2000 census, roughly 43% of African Americans in Jefferson County have a high school diploma or higher, compared to 54.8% of the total county population and 58.1% of the county's white population. The median household income for African Americans in Jefferson County is \$24,548, compared to \$39,457 for the entire county and \$42,913 for white county residents. See U.S. Census Bureau, Jefferson County, Kentucky—Fact Sheet for a Race, Ethnic, or Ancestry Group, [http://factfinder.census.gov/servlet/ACSSAFFacts?\\_event=Search&geo\\_id=01000US&\\_geoContext=01000US&\\_street=&\\_county=jefferson+county&\\_cityTown=jefferson+county&\\_state=04000US21&\\_zip=&\\_lang=en&\\_sse=on&ActiveGeoDiv=geoSelect&\\_useEV=&pctxt=fph&pgsl=010&\\_submenuId=factsheet\\_0&ds\\_name=ACS\\_2008\\_3YR\\_SAFF&\\_ci\\_nbr=null&q\\_r\\_name=null&reg=null%3Anull&\\_keyword=&\\_industry=](http://factfinder.census.gov/servlet/ACSSAFFacts?_event=Search&geo_id=01000US&_geoContext=01000US&_street=&_county=jefferson+county&_cityTown=jefferson+county&_state=04000US21&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=010&_submenuId=factsheet_0&ds_name=ACS_2008_3YR_SAFF&_ci_nbr=null&q_r_name=null&reg=null%3Anull&_keyword=&_industry=) (follow “Fact Sheet for a Race, Ethnic, or Ancestry Group” hyperlink; then choose “Black alone” or “White alone” and follow the “Go” hyperlink) (last visited Mar. 9, 2010) (providing race-specific data); see *also id.* (follow “Fact Sheet” hyperlink; then follow “2000” hyperlink) (providing overall average county data).

proxies for racial classifications. Proxies for racial classifications may trigger strict scrutiny.<sup>187</sup>

However, the SAP's classifications differ substantially from the classifications in both *Grutter* and *PICS* that triggered strict scrutiny. Although race is part of the equation in making a classification, an individual's race is not. This is vividly demonstrated by considering the fate of the plaintiff challenging the plan. In the event that a JCPS school has reached the extremes of the diversity guidelines under the new SAP—85% of the student population is from Area B—the Area B plaintiff could not be assigned there and may bring suit. However, it would not matter whether that Area B student was white or not. For that student complaining of unconstitutional treatment, individual race is not only not determinative, it is not relevant. Certainly, given the demographic realities in Jefferson County, a student from Area B is statistically more likely to be white, but such a statistical probability is weak support for the argument that the geographic classifications are a proxy for race that merit strict scrutiny.<sup>188</sup>

With knowledge of the difficulty in overcoming strict scrutiny, those who developed the SAP likely attempted to avoid triggering this level of constitutional analysis. By eliminating individual racial classifications and using demographic-conscious geography as the primary mechanism for classification, the SAP should avoid strict scrutiny analysis. However, there is undoubtedly some racial component in the plan. Since the Justices considered plans that *did* make individual racial classifications in both *Grutter* and *PICS*, it is an open question whether a plan that uses race in this more removed way might also trigger strict scrutiny. Although strict scrutiny does not seem appropriate in evaluating the new SAP under the Court's existing precedent, the importance of education and the contentiousness that accompanies any use of racial data by the government may lead the Court to apply strict scrutiny anyway.<sup>189</sup> Although this

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187. See *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was 'motivated by a racial purpose . . .'" (quoting *Miller v. Johnson*, 515 U.S. 900, 913 (1995))); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("A racial classification . . . is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is [a] . . . pretext for racial discrimination." (citations omitted)); see also Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 *BAYLOR L. REV.* 289, 290–92 (2001).

188. In fact, the statistical probability is not necessarily that high. As of the date of the SAP's adoption, it was possible that a neighborhood with only 47.9% nonwhite student population would be classified as Area A. Thus, in some instances, it is possible that a majority white neighborhood be classified Area A, undercutting the proxy argument even further. Similarly, an Area B neighborhood could even be 100% nonwhite if either the median household income or adult educational attainment levels or both were above the county average. Admittedly, these situations, though theoretically possible, are not likely in reality, and the author does not have the data necessary to determine if they in fact occur in Jefferson County.

189. Even if the Court does not apply strict scrutiny, it could choose to apply some heightened scrutiny to these plans based on the context. The author does not venture to

Article ultimately concludes that strict scrutiny should not be applied to the new SAP, the balance of this section continues under the assumption that the Court *will* nevertheless apply strict scrutiny and turns to the questions of compelling interest and narrow tailoring.

### B. *Compelling State Interest*

Based on the *PICS* opinions, a majority of Justices are ready to find diversity in public education to be a compelling governmental interest sufficient to overcome this hurdle of the strict scrutiny analysis. The three remaining Justices who signed Justice Breyer's dissent, along with Justice Kennedy, recognized this compelling interest in *PICS* itself.<sup>190</sup> As the controlling vote, Justice Kennedy's explicit endorsement of both increasing diversity and avoiding racial isolation in schools as valid compelling interests solidifies the Court's majority on this point.

Justice Kennedy concluded that a "compelling interest exists in avoiding racial isolation,"<sup>191</sup> and that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."<sup>192</sup> The new JCPS plan pursues these interests and does so with the interconnected goals of enhancing broadly defined school diversity while improving educational quality. According to Superintendent Berman, "Our new goal was to design not just a plan for diversity but also a plan that reached deeper and improved every aspect of schooling."<sup>193</sup> These interests satisfy the Court's standard and evidence a district that is pursuing diversity not merely for the sake of diversity, but as part of its overall educational mission.

The analysis, of course, does not end there. Most significantly, the diversity sought by a plan must be broader than merely racial diversity.<sup>194</sup> Justice Kennedy allows districts to perform a nuanced, individualized

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guess at what the Court may come up with, but rather continues with the analysis using the Court's existing tiers of scrutiny.

190. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 838 (2007) (Breyer, J., dissenting) (recognizing the district's interest in "eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience"). Again, it is assumed that Justice Sotomayor would agree with the result advocated in Justice Breyer's dissent.

191. *Id.* at 797 (Kennedy, J., concurring).

192. *Id.* at 783, 797-98 ("[A] district may consider it a compelling interest to achieve a diverse student population.").

193. *NO RETREAT*, *supra* note 119, at 2; *see also* *Promoting Diversity*, *supra* note 124, at 2-3 ("[T]he proposed Student Assignment Plan provides the district with an opportunity to improve integration across racial, ethnic and socio-economic lines, as well as the overall quality of the school district.").

194. *PICS*, 551 U.S. at 788 (Kennedy, J., concurring) ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, *one aspect of which is its racial composition.*" (emphasis added) (citing *Grutter v. Bollinger*, 539 U.S. 306, 387-88 (2003) (Kennedy, J., dissenting))).

evaluation of student characteristics that might include race as a component.<sup>195</sup> Although the starting point for which characteristics make up diversity is the Court's analysis in the higher education admissions cases *Bakke*<sup>196</sup> and *Grutter*,<sup>197</sup> according to Justice Kennedy, "the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools."<sup>198</sup> By broadening its diversity definition to include not only racial diversity, but also geographic and socioeconomic diversity,<sup>199</sup> the new SAP creates a multifaceted diversity goal that follows closely Justice Kennedy's requirements.

In his discussion of compelling interests in *PICS*, Chief Justice Roberts evidenced a willingness to look beyond a district's stated goals to the causal relationship between an assignment plan and the achievement of those goals.<sup>200</sup> In *PICS*, that analysis resulted in the Chief Justice's dismissal of the districts' stated goals as merely linguistic camouflage for the impermissible goal of dictating racial balance in schools.<sup>201</sup> It is likely that the Chief Justice will apply a similarly searching inquiry if a challenge to the new SAP reaches the Court. Regardless of the fact that the district professes to be after multifaceted diversity, under Chief Justice Roberts's standard, if that is merely cover for pursuing an otherwise impermissible goal, then the Chief Justice would argue that the district is not pursuing a constitutionally compelling interest at all. The Chief Justice only needs one additional Justice beyond those who joined the *PICS* plurality—most likely, Justice Kennedy—to be convinced by this line of reasoning to muster a majority for the conclusion that the compelling interest element is not met.

Although Justice Kennedy was not sympathetic on this point in *PICS*,<sup>202</sup> the district position is strengthened to the extent evidence shows that the new SAP promotes the very objectives it professes to—enhancing multifaceted school diversity while increasing educational quality. In developing the plan, the district consulted local and national experts to compile such evidence.<sup>203</sup> The criteria the district ultimately decided to utilize for classifying neighborhoods as Area A or Area B—minority student population, median household income, and adult educational

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195. *Id.* at 790.

196. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

197. *Grutter*, 539 U.S. 306.

198. *PICS*, 551 U.S. at 790 (Kennedy, J., concurring).

199. *See supra* Part III.D.

200. *PICS*, 551 U.S. at 732–34 (Roberts, C.J., plurality).

201. *Id.* at 732.

202. *Id.* at 787–88 (Kennedy, J., concurring) ("The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.").

203. Kenning, *supra* note 127 (noting consultation with John Powell, Executive Director of the Kirwan Institute for the Study of Race and Ethnicity, Anurima Bhargava, a lawyer with the NAACP's Legal Defense Fund, and Ron Crouch of the Kentucky State Data Center); *see also* Promoting Diversity, *supra* note 124, at 1 (providing a more comprehensive list of consulted experts).

attainment—can be tied with research to not only diversity, but also quality.<sup>204</sup>

In addition, the specific drawing of the six school clusters<sup>205</sup> under the new plan will provide for a more equitable distribution of students using the multiple diversity criteria than did the previous plan.<sup>206</sup> For example, the wealthiest cluster under the new plan has a median household income (using data from the 2000 census) of \$50,009, while the poorest cluster's median household income is \$32,639—a range of \$17,370.<sup>207</sup> Under the previous plan that considered only race, the gap between the richest and poorest cluster was \$8000 larger.<sup>208</sup> Likewise, the range of adult educational attainment between the clusters was tightened, and even the variance among minority students in each cluster decreased with the newly drawn cluster lines.<sup>209</sup>

In short, the district has developed a plan grounded in research on how to achieve its stated goals (increased diversity and quality) and implemented that plan in such a way as to maximize equity across the district. This helps establish the record that the goals the district professes to pursue are in fact the same goals the plan addresses. Such a record strengthens the district's case that it is genuinely pursuing the compelling governmental interests of providing schools that are broadly diverse and of high quality. A majority of the Court is likely to agree.

204. NO RETREAT, *supra* note 119, at 2 (noting that research has shown that the demographic criteria used by the new SAP have an impact on student success).

205. A cluster is a group of schools among which a student living in the cluster can initially choose. *See supra* note 136.

206. NO RETREAT, *supra* note 119, at 2.

207. The following chart details the makeup of each cluster under the new SAP using data from the 2000 census. The information was compiled by JCPS and is available at <http://www.courier-journal.com/assets/B2106844426.PDF>. Adult Educational Attainment is expressed using numerical values corresponding to a specific level of educational attainment. For instance, high school graduation is given the numerical value of 3.0.

Cluster #	Median Household Income	Adult Educational Attainment	% Minority
1	\$34,314	2.9	47.8%
2	\$32,639	2.9	47.8%
3	\$35,166	2.9	48.3%
4	\$45,812	3.2	49.3%
5	\$45,484	3.3	47.2%
6	\$50,009	3.4	45.5%
Range	\$17,370	0.5	3.8%

208. NO RETREAT, *supra* note 119, at 3.

209. *Id.*; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 551 U.S. 701, 790 (2007).

### C. *Narrow Tailoring*

Once the district establishes that the new JCPS SAP pursues a compelling state interest, the plaintiff challenging the plan will be left to argue that the plan is not narrowly tailored to achieve that interest. In *PICS*, the Justices established four criteria to consider when performing narrow-tailoring analysis, and those criteria will guide the analysis in a challenge to the new SAP as well. Those criteria, drawn from *Grutter*, include whether (1) there has been a serious and good-faith consideration of race-neutral alternatives prior to adopting a race-conscious plan; (2) the program undertakes a holistic, individualized review of each applicant where race is used in a flexible, nonmechanical manner; (3) no undue burden is placed on nonminority students; and (4) there are periodic reviews of the program's continued necessity.<sup>210</sup> Each of these criteria will be considered in turn.

#### 1. Consideration of Race-Neutral Alternatives

In *Grutter*, the Court noted that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.<sup>211</sup> Rather, according to *Grutter*, narrow tailoring “require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity [sought].”<sup>212</sup> Justice O’Connor’s majority opinion rejected any claim that a race-neutral alternative that would defeat the objective of the plan being considered or that would negatively impact academic quality need be considered.<sup>213</sup> Plans that undermine the compelling interest are not rightfully labeled “alternatives.” This criterion, therefore, merely requires a district to give serious good-faith consideration to race-neutral alternatives that would equally achieve the same compelling governmental interest as the plan adopted.

In *PICS*, Justice Kennedy broadened the plans a district should consider before adopting a plan that makes individual racial classifications. Since race-conscious plans that do not make such individual classifications would not trigger strict scrutiny in Justice Kennedy’s view—plans that include race-conscious school zone boundary lines<sup>214</sup>—a district should also give good faith consideration to those plans before adopting a policy utilizing

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210. *Grutter v. Bollinger*, 539 U.S. 306, 339–43 (2003).

211. *Id.* at 339.

212. *Id.*

213. *Id.* at 340 (noting that the alternative mentioned by the district court would “require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both” and rejecting that the law school need consider them as alternatives).

214. *PICS*, 551 U.S. at 788–89 (“If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way without treating each student in different fashion solely on the basis of a systematic, individual typing by race.”).

individual racial classifications.<sup>215</sup> This is the standard with which this criterion of narrow tailoring will be judged.

For the new JCPS SAP, the initial answer must be that the new plan itself is actually the type of race-neutral plan that the *Grutter* opinion compels consideration of. The district did not merely consider a race-neutral alternative; it adopted one. If not precisely race-neutral, the plan is at least the type of race-conscious plan imagined in Justice Kennedy's *PICS* concurrence in that it makes no individual racial classifications. The fact that the Area B plaintiff challenging the plan's constitutionality could be white, African American, Latino, Asian, or any other ethnicity evidences this race-neutrality.<sup>216</sup>

In addition to the race-neutral plan it adopted, JCPS considered at least two other race-neutral alternatives before adopting the new SAP.<sup>217</sup> A neighborhood schools plan that would simply assign students based on neighborhood was considered and rejected. Such a plan would have had several negative impacts, both educational and demographic. As an initial matter, changing to a neighborhood schools plan would have required 20% of the district to be reassigned in 2009–2010,<sup>218</sup> a major disruption to the district as well as to students and their families.<sup>219</sup> In addition, the neighborhood schools plan would have resulted in twenty-three elementary schools with a greater than 50% African American enrollment, thus defeating the compelling interest of avoiding racial isolation.<sup>220</sup> The racial isolation at such schools was likely to only get worse over time.<sup>221</sup> In addition, median incomes at elementary schools would vary widely, from \$8363 to \$101,000,<sup>222</sup> meaning that the compelling interest of diverse public schools (with diversity to include income and race) would likewise be defeated. Given the high correlation between median income at a school and educational quality,<sup>223</sup> the potential for schools with a high

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215. *Id.* at 790.

216. *See supra* Part IV.A. Although this is essentially the strict scrutiny argument reiterated (i.e., because the plan makes no individual racial classifications, strict scrutiny should not be applied), even if strict scrutiny *is* triggered, the neutrality as to an individual student's race is still relevant to narrow tailoring analysis.

217. *See* Konz, *supra* note 130.

218. *See id.*; Konz & Kenning, *supra* note 134.

219. There are many negative effects with the disruption on students' lives that occur due to changing schools. For example, students who change schools frequently are at greater risk of dropping out. Russell W. Rumberger & Katherine A. Larson, *Student Mobility and the Increased Risk of High School Dropout*, AM. J. EDUC., Nov. 1998, at 1.

220. Konz, *supra* note 130.

221. *See, e.g.*, David Card, Alexandre Mas & Jesse Rothstein, *Tipping and the Dynamics of Segregation*, 1 Q.J. ECON. 177 (2008) (studying dynamics of racially "tipping" neighborhoods and comparing findings to study of racially "tipping" schools, and concluding that schools and neighborhoods that reached a "tipping point" were likely to quickly become racially isolated).

222. Konz, *supra* note 130.

223. *See generally* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 274 (1999) (noting research indicating that where a majority of students in a school are below

concentration of impoverished students would have frustrated the district's mission to provide quality education. Under *Grutter*, the existence of such self-defeating plans will not impact narrow-tailoring analysis.<sup>224</sup>

In addition to the neighborhood schools option, the district also considered and rejected a broad open enrollment plan that would have allowed students to choose from all schools, subject only to space limitations.<sup>225</sup> Although the demographic impact of such a plan was impossible to project because of the prevalence of parental choice in assignment, this plan was rejected as "impractical."<sup>226</sup> Under such a policy, the district would be unable to adequately promote its compelling interests of avoiding racial isolation or providing diverse schools. Under an open enrollment plan, the only mechanism for achieving these compelling interests would be the creation of multiple magnet schools or programs, a financially costly endeavor that would not, in any event, guarantee diversity or necessarily avoid racial isolation.<sup>227</sup>

The depth to which the district's Student Assignment Work Team considered other race-neutral alternatives before making its recommendations to the school board is not clear. Specifically, it is not clear the extent to which the team considered the strategies explicitly endorsed in Justice Kennedy's opinion, such as race-conscious school zoning, strategic site selection for new schools, or targeted recruiting.<sup>228</sup> Likewise, it is not clear whether the district considered a plan similar to the new SAP but without the racial component. For instance, a plan could have similarly divided the district into Area A and Area B neighborhoods, but classified those neighborhoods based only upon average adult educational attainment and median household income. Both Chief Justice Roberts and Justice Kennedy thought it significant that the plans at issue in *PICS* very rarely resorted to the racial classification.<sup>229</sup> Although the data is not yet available, it is possible that, just as the racial classification affected only approximately 3% of student assignments to keep each school in the prescribed racial makeup range under the old plan,<sup>230</sup> the racial component of the new area classifications would not affect assignment in a way that makes it essential to the district's mission. The burden will be on the

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poverty level, the number of students who do not meet the "basic" level on national tests is two-thirds).

224. See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

225. Konz, *supra* note 130.

226. *Id.*

227. *Id.*

228. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).

229. *Id.* at 734–35 (Roberts, C.J., plurality) (comparing the minimal impact of the JCPS racial classifications to the tripling of minority representation achieved by the plan approved in *Grutter*); *id.* at 790 (Kennedy, J., concurring) ("[T]he small number of assignments affected suggests that the schools could have achieved their stated ends through different means.").

230. See *id.* at 734 (Roberts, C.J., plurality).



district to provide data demonstrating the necessity of using the race-conscious area classifications to achieve and maintain the educational and demographic outcomes sought by the SAP. To the extent a completely nonracial plan could be demonstrated to achieve educational and demographic outcomes similar to the new SAP, the new plan could be vulnerable.

## 2. Race Used in a Flexible, Nonmechanical Manner

Drawing on the analysis in *Bakke*, the *Grutter* Court concluded that truly individualized consideration of students demands that race be used in a flexible, nonmechanical manner.<sup>231</sup> Justice O'Connor noted that racial quotas, separate admission tracks for applicants of different races, and insulation of applicants from competition with the entire pool of applicants would not meet this standard.<sup>232</sup> However, *Grutter* does permit the use of race as one factor in the context of an individualized consideration of each applicant.<sup>233</sup>

In ruling against JCPS in *PICS*, Chief Justice Roberts pointed out that although race did not come into play for every student assignment, when it did come into play, it was not flexible, but rather decisive.<sup>234</sup> A plaintiff challenging the new SAP will argue that the race-conscious neighborhood classifications are likewise decisive and therefore unconstitutional. The Court's conclusion, however, is likely to be different under the new plan.

The diversity sought by the SAP is undoubtedly multitiered. Specifically, the SAP seeks to achieve a combination of geographic, racial, and socioeconomic diversity.<sup>235</sup> Under the SAP, each school must have between 15% and 50% students from neighborhoods classified as Area A. In order to be classified Area A, a neighborhood must meet *all* three of the following criteria: (1) median household income in the neighborhood is below the district average (\$41,000, presently); (2) median educational attainment for persons twenty-five and older in the neighborhood is below the district average (high school diploma with some college, presently); and (3) racial makeup of the neighborhood's JCPS students includes a percentage of minority students higher than the district's average (47.9%, presently).<sup>236</sup> Race is not the dominant factor considered; rather, it is equal

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231. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

232. *Id.*

233. *Id.*

234. *PICS*, 551 U.S. at 723 (“[U]nder each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision . . .”).

235. *See supra* Part III.A. Although socioeconomic diversity may not be based on an individual student's socioeconomic status, the concentration of families with similar socioeconomic status in neighborhoods makes this diversity achievable by classifying neighborhoods rather than individuals.

236. *About Us*, *supra* note 138; *Konz & Kenning*, *supra* note 134; *see supra* note 186.

to the other facets of diversity considered by the plan.<sup>237</sup> Thus, requiring a range of students to come from Area A neighborhoods ensures that each school will achieve multitiered diversity as follows:

*Geographic Diversity:* between 15–50% of students from Area A neighborhoods; between 50–85% of students from Area B neighborhoods;

*Socioeconomic Diversity:* between 15–50% of students come from neighborhoods with below average median household income; between 50–85% of students come from neighborhoods with above average median household income;

*Educational Attainment:* between 15–50% of students come from neighborhoods with average educational attainment below high school plus some college; between 50–85% of students come from neighborhoods with average educational attainment above high school plus some college;

*Ethnic Diversity:* between 15–50% of students come from neighborhoods with more than 47.9% nonwhite students; between 50–85% of students come from neighborhoods with more than 52.1% white students.

It is worth noting that this diversity will not necessarily lead to ranges of nonwhite or low-socioeconomic-status students between 15% and 50% in each school. For instance, although 15–50% of students must come from *neighborhoods* with median household income below average, there is no requirement that 15–50% of individual students have median household income below average. So, a student from a family with an *above* average household income living in a census block with a *below* average median household income would count toward a school's Area A student numbers even though her household income may be more in line with that of students living in Area B. The same analysis could be applied to ethnicity or educational attainment.

On one hand, this classifying by neighborhood rather than individual may frustrate the quest for diversity in some cases. However, it also assures that for the plaintiff challenging the SAP, race was not the decisive factor in her school assignment.<sup>238</sup> Justice Kennedy's concern about reducing students

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237. In other words, a neighborhood's failure to meet the Area A percentage of minority students has no more and no less of an effect on the neighborhood's classification than does the neighborhood's failure to meet either of the criteria.

238. One admittedly far-fetched scenario in which an individual's race may in fact be the decisive factor: Imagine a neighborhood with a lower than average median household income and parental educational attainment level and a minority student population right on the line of the district's average. This neighborhood would be classified as Area A. If one additional white student would put the minority population in the neighborhood *below* the district average, that student's race would result in the entire neighborhood being classified as Area B. Then, if that white student were subsequently denied admission to a school because that school had 85% Area B students already, then it could theoretically be said that the student's individual race was the decisive factor in her school assignment.

to an assigned racial identity is absent. Race is one part of the district's diversity consideration, but other demographic and geographic factors are considered.<sup>239</sup> In addition, there is no differential treatment of individuals based on race.<sup>240</sup> The plan, therefore, seems to fit Justice Kennedy's standard for using race in a flexible and nonmechanical way.

However, there remain areas of concern. Chief Justice Roberts drew a firm distinction between the hard ranges required by the plans considered, and ultimately invalidated, in *PICS*, and the "critical mass" sought by the constitutional policy in *Grutter*.<sup>241</sup> For the Chief Justice, the hard ranges evidenced a quota aimed solely at achieving racial balance.<sup>242</sup> As proof for this conclusion, Chief Justice Roberts noted that it was not possible to assert that a school's racial makeup must approximate the district's racial makeup in order to achieve the educational benefits of diversity without proof that those benefits had any relationship to the district's racial makeup. For instance, Chief Justice Roberts pondered how the same benefits of diversity required at least 31% white students in Seattle but at least 50% white students in Jefferson County.<sup>243</sup> To Chief Justice Roberts, this demonstrated that it was not diversity that drove the assignment plans, but rather the goal of balancing each school's racial makeup to reflect the district's demographics.<sup>244</sup> Ultimately, Chief Justice Roberts was concerned that the districts had chosen a range and worked backward rather than identified the range required to achieve the educational benefits of diversity and worked forward. The new SAP may be similarly vulnerable. The plan, after all, does utilize the same ranges, defined differently, as the previous plan had.

Again, the initial response is to point out that, whereas the ranges at issue in *PICS* were *racially* defined, those utilized under the new SAP are prescribed *geographical* ranges. Thus, whereas a student's race could have been determinative under the old plan, it is the classification of the student's neighborhood that could be determinative under the new plan. The distinction is a constitutionally significant one. It is race, not geography, that triggers strict scrutiny and narrow-tailoring analysis.

To bolster its position, JCPS can present educational evidence showing that the ranges here are relevant to the benefits sought under the new

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239. See *PICS*, 551 U.S. at 798 (Kennedy, J., concurring) ("Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.").

240. See *id.* (directing school officials to find a way to achieve diversity without resorting to governmental allocation of benefits and burdens on the basis of racial classifications).

241. *Id.* at 722–23 (majority opinion); *Grutter v. Bollinger*, 539 U.S. 306, 335–36 (2003).

242. *PICS*, 551 U.S. at 726 (Roberts, C.J., plurality) ("In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.").

243. *Id.*

244. *Id.* at 726–27.

SAP.<sup>245</sup> For instance, data showing the negative educational effect of schools populated with high concentrations of students from disadvantaged socioeconomic circumstances and/or students with parents who have below average educational attainment would help justify the use of the ranges to achieve those benefits.<sup>246</sup> In addition, the district can point to data on the positive educational effects of racially integrated schools and the difficulty of maintaining racial diversity once a school's minority population reaches a certain "tipping point" as evidence justifying the consideration of race and the ranges imposed.<sup>247</sup> Ultimately, to satisfy Chief Justice Roberts's strict scrutiny (assuming such would be applied), the district must be able to show that its ranges are tailored specifically to the educational benefits of diversity or to avoiding racially isolated schools—i.e., they are not simply aimed at guaranteeing a prescribed racial makeup of a school. A significant argument in the district's favor on this point is that the new plan does *not* guarantee any particular *racial* makeup in any school—it is theoretically possible, though not realistic, to have a single-race school that complies with the 15–50% geographic guidelines.<sup>248</sup>

Whether the new plan satisfies the Chief Justice's stricter standard for narrow tailoring or not, the facts that students are not assigned to a school based on individual racial classifications and that race is only one part of the district's concept of diversity are enough to establish that race is used in a flexible manner. The plan satisfies this prong of narrow-tailoring analysis.

### 3. No Undue Burden on Nonminority Students

Both *Bakke* and *Grutter* suggest that flexibility in consideration of individual applicants is the most effective way to avoid placing an undue burden on students disadvantaged by racial classifications. Under *Bakke*, it

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245. The Student Assignment Work Team did gather information from other districts and consult national experts in developing the new plan. See Kenning, *supra* note 127 (noting that officials from Cambridge, Massachusetts; Charlotte, North Carolina; Wake County, North Carolina; and Berkeley, California, were interviewed and local and national experts were consulted).

246. See generally Ryan, *supra* note 223, at 274 (noting research indicating that where a majority of students in a school are below poverty level, the number of students who do not meet the "basic" level on national tests is two-thirds).

247. For positive effects of integrated schools and negative effects of racially isolated schools, see generally Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *PICS*, 551 U.S. 701 (Nos. 05-908, 05-915) (summarizing social science data on these topics and compiling detailed studies in appendix to brief). For data on the "tipping point" phenomenon, see *supra* note 221.

248. Although this may suggest that the plan is therefore not tailored to the interest it professes to seek, the plan should not be judged based on all the theoretical possibilities it creates but rather on how it applies to the county within which it will be implemented. The requirement of periodic reviews, discussed *infra* Part IV.C.4, ensures that were this outcome realistically possible in Jefferson County, the district would have ample opportunity to adjust its assignment plan to avoid such an outcome (i.e., a single-race, but compliant, school).

is a fatal flaw in a program to distribute benefits and burdens without weighing each individual fairly and competitively and to foreclose from consideration certain applicants simply because they are not members of a particular racial or ethnic group.<sup>249</sup> Likewise in *Grutter*, the importance of individualized considerations where race or ethnicity is not a defining feature of an application is “paramount.”<sup>250</sup> Without the flexibility of a holistic, individualized consideration of each applicant, a race-conscious plan may place an undue burden on nonfavored students by foreclosing benefits based solely on race.

The concept of the final available space was used in *Bakke* and *Grutter* to demonstrate the need for flexibility. Where an applicant is not foreclosed from consideration for that last spot based on race, she would have no basis to complain of unequal treatment under the Fourteenth Amendment.<sup>251</sup>

As an initial matter, it is worth noting that the benefits at issue in *Bakke* and *Grutter*—admission to an institution of higher education—are fundamentally different from the benefits at issue in *PICS* and in a challenge to the new SAP—assignment to a particular public school. The burdens associated with the programs are similarly distinct. In the context of higher education admissions, a nonfavored student will be excluded from a state benefit if rejected under a race-conscious admissions policy. In contrast, a nonfavored student in the public school student assignment plan will not be excluded from a state benefit at all. A race-conscious student assignment plan does not exclude, but rather dictates to which school a student will be assigned. It is a plan for arrangement, not exclusion, of students. The burden on nonfavored students under any assignment plan is thus less severe than under an admissions plan.

Beyond the contextual difference, the burdens under the new SAP do not fall upon an individual because of race. The plaintiff in a challenge to the new SAP is likely to sue because she was denied assignment to the final space in a desired school on the basis of living in an Area B neighborhood. The Area B designation could have been given to her neighborhood for a variety of reasons; either the neighborhood has a higher than average median household income or adult educational attainment, or the percentage of JCPS students in the neighborhood who are white is higher than the district average. It is possible that the neighborhood’s racial makeup was not relevant and undoubtedly, the student’s individual race is not relevant at all.<sup>252</sup> In other words, race is certainly not *the* factor by which burdens are distributed. Thus, not only are the burdens less harsh to begin with, but also

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249. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978).

250. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

251. *See Bakke*, 438 U.S. at 319–20; *see also Grutter*, 539 U.S. at 338 (noting that the law school “frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants” as proof that race does not foreclose consideration).

252. Of course, the student’s individual race is relevant in the sense that it was considered in ascertaining the neighborhood’s student racial makeup.

they are not distributed based on race. The purpose of this factor in narrow tailoring is to ensure that no citizen is made to bear an undue burden because of race. The plaintiff's race being irrelevant to the burden she bears under the new SAP, this prong of the analysis is satisfied.

#### 4. Periodic Reviews

The final prong of the narrow-tailoring analysis is also likely the easiest to satisfy. Neither Chief Justice Roberts nor Justice Kennedy reached the requirement for periodic reviews. In *Grutter*, Justice O'Connor noted that the durational requirement could be met by sunset provisions or periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.<sup>253</sup> The SAP requires the JCPS superintendent or designee to "monitor implementation of the Student Assignment Plan" and "make periodic reports to the board regarding implementation."<sup>254</sup> So long as the district continually monitors the effectiveness and necessity of the SAP in achieving its stated goals, this narrow-tailoring criteria will be satisfied.

#### CONCLUSION

"No Retreat" is the title of the district's parental newsletter explaining the new SAP.<sup>255</sup> Indeed, even in the wake of a Supreme Court rebuke, JCPS has refused to retreat from its commitment to providing all of its students with the educational benefits of diverse schools. The parents of Jefferson County recognize these benefits in their increasingly diverse community, nation, and world. Their public support for the district's efforts to accept Justice Kennedy's dare and provide JCPS students with these benefits affirms the district's recommitment to diversity as a central aspect of its educational mission.

The new plan, however, is not focused solely on diversity, nor is that diversity defined simply as racial diversity. By integrating diversity into a mission that includes school quality and parental choice, JCPS has devised a post-*PICS* assignment plan that more adequately addresses the educational issues of the 21st century than even the plan it was designed to replace.<sup>256</sup> Sadly, these issues continue to include the primary issue of *Brown*—racial isolation in schools.<sup>257</sup> However, they are far broader. The essentiality of public support for public education was demonstrated by the negative effects school districts suffered after implementing busing plans to

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253. *Grutter*, 539 U.S. at 342.

254. About Us, *supra* note 138.

255. NO RETREAT, *supra* note 119.

256. Though it remains to be seen whether the new plan can successfully deliver either diversity or quality. See Konz, *supra* note 148; *supra* Part III.E.

257. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 551 U.S. 701, 787 (2007) (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that too often it does.").

comply with *Brown*. The demand for broad educational choices for parents has been demonstrated by the growth of magnet-type programs and charter schools across the country. The absolute necessity that every school be of high quality is reflected in the ideals upon which laws mandating measurement and providing remedies for students in inadequate schools, laws such as the No Child Left Behind Act,<sup>258</sup> rest. Alongside these requirements for a successful school district is the demand for diverse schools in diverse districts. The new SAP recognizes these various interests and endeavors on a new quest to achieve *Brown*'s forgotten goal of equal educational opportunities.

JCPS has devised a constitutional plan that ensures both that its schools do not become racially isolated and that its students enjoy the benefits of high quality schools that are geographically, socioeconomically, and racially diverse. It has done so despite a Supreme Court opinion that many thought signaled the end of integration. In short, JCPS has accepted Justice Kennedy's dare to "bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications."<sup>259</sup> And, in so doing, JCPS has helped define the future of integration for any district seeking to pursue it.

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258. 20 U.S.C. § 6301 (2006).

259. *PICS*, 551 U.S. at 798 (Kennedy, J., concurring).

*Notes & Observations*