Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After *Parents Involved in Community Schools*

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> *This time he didn't even blink. The world sideslipped before his eyes, wavering like an object seen through clear running water. The walls were blackish mahogany again instead of stone blocks. The doors were* doors *and not latticed-iron drop gates. The two worlds, which had been separated by a membrane as thin as a lady's silk stocking, had now actually begun to overlap.*[1]
>
> —Stephen King
> THE TALISMAN

I. INTRODUCTION

After a half-century of slow but inexorable drift, the two doctrinal bases of court-ordered racial integration[2] collided in the companion cases *Parents Involved in Community Schools v. Seattle School District No. 1* (*PICS*) and *Meredith v. Jefferson County Board of Education*.[3] In a fractured 5-4 decision, the Supreme Court struck down race-based student assignment policies[4] voluntarily undertaken by the Seattle and Louisville school systems to distribute minority and white students more evenly among their schools. Shockwaves from the Supreme Court's decision rippled through public school systems across the nation, a significant number of which had imple-

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[1] STEPHEN KING & PETER STRAUB, THE TALISMAN 562 (1984).

[2] *See infra* text accompanying note 39.

[3] 127 S. Ct. 2738 (2007).

[4] This Article defines "race-based policies" as policies implemented by a school system that treat "each student in different fashion solely on the basis of a systematic, individual typing by race." *Id.* at 2792 (Kennedy, J., concurring). In contrast, "race-conscious policies" are defined to include policies that account for race as one of several factors in a holistic, individualized analysis and "do not lead to different treatment based on a classification that tells each student he or she is to be defined by race." *Id.* "Race-neutral policies" are defined as school system policies that do not use race as a factor.

mented, or were contemplating, school choice programs that accounted for race in allocating students, faculty, and other resources among system schools.[5] For these school systems, and for civil rights advocates generally, the challenge posed by the *PICS* decision is a pragmatic policy inquiry: to what extent, and in what manner, does the Equal Protection Clause permit school systems to incorporate considerations of race into school choice programs or other initiatives to distribute students and resources strategically among public schools? The answer, according to many academics and practitioners, is embedded in Justice Kennedy's cryptic concurring opinion, which receives much of the attention devoted to *PICS*.[6]

The impact of the *PICS* decision on school systems *voluntarily* seeking to improve educational outcomes through race-based policies is manifest. But the Court's momentous decision also unleashed a series of aftershocks among school systems *compelled* to administer race-based policies pursuant to mandatory desegregation orders entered by federal courts after *Brown v. Board of Education* (*Brown I*).[7] These aftershocks are no less important than the impact on school systems unencumbered by such orders. Nevertheless, the effect of *PICS* on school systems still governed by mandatory court orders is less appreciated and less scrutinized for several reasons.

First and foremost, Chief Justice Roberts expressly narrowed the majority opinion's[8] scope to school systems not governed by a mandatory desegregation order—indeed, neither of the respondent school systems claimed to have enacted the challenged policies pursuant to such an order.[9] Second, the issue of voluntary affirmative action[10] has long occupied a higher profile than mandatory desegregation. While relatively few people are aware that

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[5] *See, e.g.*, ARTHUR COLEMAN ET AL., NOT BLACK AND WHITE: MAKING SENSE OF THE UNITED STATES SUPREME COURT DECISIONS REGARDING RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS 10 (Sept. 2007), *available at* http://www.collegeboard.com/prod_downloads/prof/not-black-white-collegeboard.pdf (stating that *PICS* "provide[s] direction for school districts on the voluntary use of race in student assignment, just as [*PICS*] raise[s] important, unanswered questions.").

[6] *See, e.g.*, *id*. at 9; *see also* Heather Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007); Linda Greenhouse, *A Tale of Two Justices*, 11 GREEN BAG 2D 37 (2007); Michael Kaufman, PICS *in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1, 9-12 (2007); James Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 135-40 (2007); J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There is No Other Way*, 121 HARV. L. REV. 158, 169-75 (2007).

[7] 347 U.S. 483 (1954), *supplemented*, (*Brown II*) 349 U.S. 294 (1955) (collectively "*Brown*").

[8] The "majority opinion" refers to the portions of Chief Justice Roberts' "plurality opinion" joined by Justice Kennedy to form the majority. *See infra* text accompanying notes 139-141; *see also PICS*, 127 S. Ct. at 2741 ("THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C").

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

[10] "Affirmative action" is defined as those "[e]fforts that take into account membership in protected groups (race, sex, disability, and national origin) to remedy and prevent discrimination in the awarding of admission to universities and professional schools, jobs, and other social goods and services." JEFFREY A. RAFFEL, HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE 6 (1998).

judicially mandated efforts to eradicate segregation from public schools are still ongoing, the debate over racial classifications in affirmative action programs has pervaded our national consciousness through media reports, talk shows, highly publicized Supreme Court decisions, and inflamed political rhetoric.[11]

Finally, even among the practitioners and experts familiar with the continuing campaign to rid de jure segregation from public school systems, there is an emerging consensus that the desegregation orders still in effect[12] have outlived the willingness of courts to enforce them.[13] Federal district and circuit courts have expressed frustration with the continuing influence of superannuated court orders,[14] and signaled an anxiousness to return school systems to "local control" by terminating these orders in all but the most egregious circumstances.[15] Against this backdrop, commentators may per-

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[11] *See generally* James Jones, Jr., *The Rise and Fall of Affirmative Action*, *in* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 345-69 (Herbert Hill & James Jones, Jr., eds., 1993).

[12] The United States Commission on Civil Rights recently sought to determine the number of active desegregation orders:

> Although over fifty years have passed since *Brown*, many school districts are still subject to school desegregation court orders. As of May 2007, the United States remains a party to 266 suits in which school desegregation court orders are in effect. There are, of course, many more such cases to which the United States is not a party, but no comprehensive list of these cases currently exists. Moreover, many of the cases were initiated in the late 1960s and early 1970s and the original players have either moved on or in some cases passed away. In such instances, not even the school districts understand the scope of the court orders that bind them and little reliable information exists that can provide a complete picture as to the nature of ongoing court-ordered desegregation. In addition to school districts that are parties to litigation concerning desegregation, many school districts have entered into agreements with the Department of Education's Office for Civil Rights to implement desegregation plans, also known as Form 441-B plans.

U.S. COMM'N. ON CIVIL RIGHTS, BECOMING LESS SEPARATE?: SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 12 (Aug. 2, 2007) (citations omitted).

[13] *See, e.g.*, Derrick Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education*,* 49 N.Y.L. SCH. L. REV. 1053, 1053 (2005) (concluding "[the] *Brown* decision, as far as the law is concerned, is truly dead and beyond resuscitation."); David Tatel, *Judicial Methodology, Southern Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1076-77 (2004) (criticizing recent Supreme Court desegregation decisions as "flawed in multiple ways, but particularly with respect to their departure from the principles of stare decisis") (Judge Tatel is a Circuit Judge on the U.S. Court of Appeals for the District of Columbia Circuit); Mark Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 779 (1996) (concluding historians will later interpret the most recent Supreme Court school desegregation decisions as evidence that the "Court agreed with a majority of white Americans: 'We've done enough,' the justices said").

[14] *See, e.g.*, Huch v. United States, 439 U.S. 1007, 1012 (1978) (Rehnquist, J., dissenting) (dissenting from the decision to deny petitions for writs of certiorari and arguing that "District Court appears condemned to a fate akin to that of Sisyphus" in supervising a school desegregation case); United States v. Texas, 457 F.3d 472, 475 (5th Cir. 2006) (reversing the district court's judgment and vacating the injunction); San Francisco NAACP v. San Francisco Unified Sch. Dist. (*Ho*), 413 F. Supp. 2d 1051, 1063 (N.D. Cal. 2005) (denying joint motion to extend the consent decree).

[15] As Justice Thomas asserted in *PICS*, desegregation orders "are not forever insulated from constitutional scrutiny. Rather, 'such powers should have been temporary and used only

ceive little utility in assessing the impact of *PICS* on school systems still governed by mandatory desegregation orders.

Ultimately, these deterring considerations are superficial. An analysis of *PICS* from the perspective of school systems under court desegregation orders suggests that the implications of this decision extend beyond the practical question of how far autonomous school systems can go to incorporate racial considerations into educational programs. More profoundly, the *PICS* majority concluded that the Fourteenth Amendment imposes radically different conditions on the use of race-based policies to combat de facto segregation in school systems not subject to mandatory desegregation ("de facto systems")[16] and de jure segregation in school systems still governed by desegregation orders ("de jure systems").[17] For de facto systems, the majority construed the Equal Protection Clause to prohibit the use of overt racial classifications in de facto desegregation initiatives.[18] For de jure systems, however, the majority left undisturbed the corpus of Equal Protection Clause jurisprudence that may affirmatively compel the use of race-based policies to eradicate the vestiges of segregation.

This duality establishes a Fourteenth Amendment regime in which the Constitution may compel race-based policies up until the point that a district court concludes that any remaining segregation in a school system is de facto yet prohibit such policies thereafter. But while the line that separates de facto from de jure segregation is principled in theory, it is thin, hazy, and ungrounded in any discernable distinction or diagnostic test in practice.[19] Thus, after *PICS*, the essence and character of the Fourteenth Amendment can turn on a purely factual and somewhat subjective determination of whether observable segregation is the result of official (de jure) or social (de facto) causes.[20] The schizophrenic identity of the Equal Protection Clause that emerges from *PICS* injects a never-before-seen wrinkle into constitutional jurisprudence, hereafter referred to as a constitutional pivot point.

The term pivot point, as used in this Article, is the joint of a constitutional rule that bends in opposite directions to either compel or prohibit identical conduct on the basis of a narrow factual distinction. The pivot point we examine in this Article arises when school systems constitutionally required to use race-based policies to remedy de jure segregation become constitutionally prohibited from using the same race-based policies to voluntarily

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to overcome the widespread resistance to the dictates of the Constitution.'" Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738 2771 n.6 (2007) (citation omitted).

[16] De facto desegregation refers to voluntary government efforts to reduce the effects of social segregation and improve racial diversity. *See infra* text accompanying notes 92-93.

[17] De jure desegregation refers to constitutionally compelled government action to dismantle government-sponsored segregation. *See infra* text accompanying notes 28-29.

[18] *See infra* text accompanying notes 144-145.

[19] *See PICS*, 127 S. Ct. at 2795-96; *see also infra* text accompanying notes 102-110, 261-263.

[20] *See infra* text accompanying notes 95-98.

address de facto segregation. Procedurally, this moment coincides with a judicial determination that a school system has completed its transition from a system of separate minority and white schools to a single "unitary" school system for children of all races.[21] A federal court signifies this accomplishment by according the school system "unitary status" and dissolving any existing consent decrees or injunctive orders. The determination that a school system has achieved unitary status is a factual finding reviewed for clear error.[22]

This Article has two objectives. First, it explores the post-*PICS* desegregation landscape to assess the decision's effect on the legal obligations of de jure school systems. More broadly, the Article also explores the ramifications of a constitutional standard that abruptly transforms legal obligations on the basis of a subjective factual determination by a federal district court. As elaborated below, the existence of this pivot point induces bizarre effects in familiar legal processes, with unpredictable consequences.

We present the thesis in four parts. Part II provides a primer of desegregation law and reviews the landmark desegregation cases that preceded *PICS*. Part III discusses the opposing doctrines that clashed to produce the pivot point in *PICS*, and explores the nature and essence of a pivot point. Part IV analyzes the *PICS* decision, focusing particularly on the opinions authored by Chief Justice Roberts and Justice Kennedy. Finally, Part V examines three contexts that illustrate the bizarre and unpredictable effects of pivot points in constitutional rules.

II. Positioning the Pivot: An Introduction to School Desegregation Doctrine

To place the pivot point in doctrinal context,[23] we provide a brief primer of school desegregation law. Desegregation is defined in this Article as the government-sponsored removal of segregation. Segregation, in turn, is the placement of students into schools predominantly separated by the race of the student (e.g., predominantly white schools or predominantly black

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[21] *See, e.g.*, Lee v. Lee County Bd. of Educ., 476 F. Supp. 2d 1356, 1361 (M.D. Ala. 2007) (collecting cases).

[22] *See, e.g.*, Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 317-18 (4th Cir. 2001) (en banc); Brown v. Bd. of Educ., 978 F.2d 585, 588 (10th Cir. 1992); Morgan v. Burke, 926 F.2d 86, 88 (1st Cir. 1991); Flax v. Potts, 915 F.2d 155, 157-58 (5th Cir. 1990); Pitts v. Freeman, 887 F.2d 1438, 1444 (11th Cir. 1989), *rev'd on other grounds*, 503 U.S. 467 (1992); Jenkins v. Missouri, 807 F.2d 657, 666 (8th Cir. 1986) (en banc).

[23] The purpose of this Section is to summarize the relevant school desegregation legal doctrine before *PICS*. *See generally, e.g.*, Joseph Cook & John Sobieski, Jr., 3 Civil Rights Actions ¶ 16 (2007); 15 Am. Jur. §§ 281-363 (2007); 14 Corpus Juris Secundum §§ 102-142 (Glenda Harnad et al., eds. 2007); James Kushner, Government Discrimination: Equal Protection Law & Litigation § 9 (2006).

schools).[24] Segregation can result from official laws or policies (de jure segregation) or private citizen choices (de facto segregation).[25]

A. The Binary Nature of School Desegregation Doctrine

School desegregation law is binary— distinguished by the existence or absence of liability for intentional government discrimination.[26] Nearly all school desegregation occurs within the context of a mandatory or voluntary remedial plan.[27] School systems addressing the vestiges of de jure segregation are subject to mandatory plans, while systems seeking to ameliorate the effects of de facto segregation generally undertake voluntary plans.

1. Mandatory De Jure School Desegregation

De jure segregation, or segregation "from law,"[28] is "the deliberate operation of a school system to carry out a governmental policy to separate pupils in schools solely on the basis of race" that is "unconstitutional under the Equal Protection Clause of the Fourteenth Amendment."[29] Although segregation usually arose from the mandate of "a local ordinance, state statute, or state constitutional provision requiring racial separation,"[30] school systems that were never subject to an official policy of segregation could still be liable for operating a de jure segregated system if a district court concluded that the school system possessed the "purpose or intent to segregate."[31] Because only de jure segregation violates the Equal Protection Clause of the Constitution,[32] a district court can order a school system to implement a mandatory desegregation plan only if the court makes a factual finding of discriminatory intent.[33]

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[24] Although American de jure systems have excluded minorities other than blacks (e.g., Latinos, Asians), most of the published cases concerned black and white students.

[25] *See* RAFFEL, *supra* note 10, at 81. *Cf.* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 217-35 (1973) (Powell, J., concurring in part and dissenting in part) (discussing segregation caused by government discrimination or private citizen choices).

[26] *See* RAFFEL, *supra* note 10, at 81. Although racism can be unintentional, de jure school desegregation doctrine limits certain legal measures to remedying intentional government discrimination. *See* Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 364 (2007).

[27] *See* RAFFEL, *supra* note 10, at 227-29 (defining "school desegregation plans").

[28] Ronna Schneider, *Race Issues and Public Education*, *in* 1 EDUCATION LAW § 5:9 (2007).

[29] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2769 (2007) (Thomas, J., concurring) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971)). Justice Thomas limits his definition of "segregation" solely to what we term "de jure segregation." *Id.* at 2769 (Thomas, J., concurring).

[30] *Id.* at 2769 n.1 (Thomas, J., concurring).

[31] *See, e.g.*, *Keyes*, 413 U.S. at 191 & n.1, 200, 208.

[32] *See*, *e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[33] Discriminatory intent is a factual finding reviewed for clear error. *E.g.*, Pullman-Standard v. Swint, 456 U.S. 273 (1982) (Title VII case).

a. Unclear Standards

Brown I[34] is perhaps the most celebrated Supreme Court case.[35] In the Supreme Court's "finest hour," *Brown I* "challenged" the nation's history of segregation and "helped to change it."[36] Fifty years later, there is little dispute that *Brown I* succeeded in its mission to outlaw government-sponsored, racially-segregated, separate-but-equal facilities in elementary and secondary schools.[37] Culturally, *Brown I* laid the groundwork for a universal consensus that government-sponsored race discrimination has no place in public schools. From a remedial perspective, de jure segregated dual school systems had to be integrated[38]—by force if necessary—so that school systems could no longer separate students by race. However, *Brown I* was silent as to whether it found the doctrinal justification for the required remedy in anticlassification principles—where "government may not classify on the basis of race"—or antisubordination principles—where government cannot "engage in practices that enforce the inferior social status of historically oppressed groups."[39] Unclear standards continue to plague desegregation doctrine.[40]

b. Remedying Constitutional Violations Versus Practicability

Desegregation law has always reflected a doctrinal tension between the recognized need to eliminate de jure segregation with haste and the practical obstacles to doing so. Although *Brown I* overruled *Plessy v. Ferguson*[41] by holding that all school systems operating de jure segregated "dual sys-

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[34] 347 U.S. 483 (1954).

[35] *See* WHAT *Brown v. Board of Education* Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision ix, 3-5 (Jack Balkin ed., 2001) [hereinafter WHAT *Brown* Should Have Said]; Martha Minow, *Surprising Legacies of* Brown v. Board, 16 WASH. U. J.L. & POL'Y 11, 12 (2004); Steven Winter, Brown *as Icon*, 50 WAYNE L. REV. 849, 849-54 (2004).

[36] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2836 (2007) (Breyer, J., dissenting).

[37] *See* WHAT *Brown* Should Have Said, *supra* note 35, at 8.

[38] *See supra* text accompanying notes 30-33.

[39] Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1470-73 (2004).

[40] *See generally* David Crump, *From* Freeman *to* Brown *and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 WASH. L. REV. 753 (1993); Monika Moore, *Unclear Standards Create an Unclear Future: Developing Better Definition of Unitary Status*, 112 YALE L.J. 311 (2002); Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283 (2002); Siegel, *supra* note 39, at 1546; Ryan Tacorda, *Acknowledging Those Stubborn Facts of History: The Vestiges of Segregation*, 50 UCLA L. REV. 1547 (2003); G. Scott Williams, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM. L. REV. 794 (1987); Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 656 (1987); Doug Rendleman, Note, *Brown II's "All Deliberate Speed" at Fifty: A Golden Anniversary of Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy*, 41 SAN DIEGO L. REV. 1575 (2004).

[41] 163 U.S. 537 (1896).

tems"[42] were guilty of a constitutional violation, the Supreme Court postponed its determination of remedies for another year.[43] In *Brown II*, the Court recognized that because desegregation cases are fact-specific—arising "under different local conditions" and "involv[ing] a variety of local problems"—the same school system that had previously perpetuated the unconstitutional dual system would have the "primary responsibility for elucidating, assessing, and solving" its own constitutional violation in front of the same district courts in close "proximity to local conditions."[44] The district court would approve and oversee the school system's implementation of a desegregation order intended to dismantle the de jure system.[45] In approving and supervising such desegregation orders, the district court would be guided "by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[46] In *Brown II*, the Court embodied this flexibility in the term "practicable"[47] and adopted the infamous remedial standard of "all deliberate speed."[48] In practice, this approach allowed school systems to postpone efforts to desegregate almost indefinitely.[49]

In rejecting the *Brown* plaintiffs' request for more immediate relief,[50] the Court recognized a clear constitutional violation but required the victims of de jure segregation to wait an indeterminate period for the remedy. Only fourteen years later would the Supreme Court realize the futility of the "all deliberate speed" standard and require de jure segregated schools systems to remedy segregation "now."[51]

Although this tension between remedy and practicability developed *ad hoc* through decades of cases,[52] desegregation jurisprudence eventually

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[42] Whereas a dual system denotes "a school system which has engaged in intentional segregation of students by race," a unitary system denotes "a school system which has been brought into compliance with the command of the Constitution." Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 246 (1991).

[43] *Brown I*, 347 U.S. at 495. After hearing oral argument in December 1952, the Supreme Court ultimately took three years to decide *Brown* and its companion cases. WHAT *Brown* Should Have Said, *supra* note 35, at 32-41. *Brown*'s four companion cases were *Briggs v. Elliott* (South Carolina); *Davis v. County School Board* (Virginia); *Gebhart v. Belton* (Delaware); *Brown I*, 347 U.S. at 486 n. 1; and *Bolling v. Sharpe* (District of Columbia), 347 U.S. 497 (1954).

[44] *Brown II*, 349 U.S. at 299.

[45] *Id.*

[46] *Id.* at 300.

[47] *Id.*

[48] *Id.* at 301.

[49] *See generally* Rendleman, *supra* note 40.

[50] *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality 730-33 (2004) (discussing the plaintiffs' request for immediate relief).

[51] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam) (holding *Brown II*'s "standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible" and that instead "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools").

[52] *See generally* Tacorda, *supra* note 40.

evolved into the modern requirement that a de jure system must eliminate the vestiges of segregation "to the extent practicable."[53] The term "vestige" remains largely undefined.[54] While the Supreme Court has never explicitly defined vestige,[55] lower courts understand the term to mean "a policy or practice which is traceable to the prior de jure system of segregation and which continues to have discriminatory effects."[56] Thus, the question of vestiges "boils down to a question of causation: Are the current racial/ethnic disparities the result of past intentional discrimination?"[57] A greater passage of time between the de jure segregated system and the present day makes it "less likely" that a "current racial imbalance" in a school system is a "vestige of the prior de jure system."[58]

When determining whether the school system has eliminated vestiges, courts look at the six *Green v. County School Board of New Kent* factors that represent "every facet of school operations":[59] (1) student assignment (how students are assigned to individual schools within the system); (2) faculty assignment (how teachers are assigned);[60] (3) staff assignment (how staff other than teachers and administrators are assigned);[61] (4) transportation (how students are bused to schools);[62] (5) extracurricular activities (whether there is equal educational opportunity to participate in all extracurricular activities);[63] and (6) facilities (how schools are built, renovated, and maintained).[64] "The *Green* factors need not be a rigid framework."[65] They "may be related or interdependent[,] . . . intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well."[66]

School systems need not eliminate all vestiges of segregation. Instead, a district's obligation is to eliminate the vestiges of past discrimination only "to the extent practicable."[67] Courts have expressly refused to require school

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[53] Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325, 1337 (11th Cir. 2005) (internal quotation marks and citation omitted).

[54] *See* San Francisco NAACP v. San Francisco Unified Sch. Dist. (*Ho*), 413 F. Supp. 2d 1051, 1065 (N.D. Cal. 2005).

[55] *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 498 (1992) (Scalia, J., concurring).

[56] United States v. Yonkers, 123 F. Supp. 2d 694, 700 (S.D.N.Y. 2000).

[57] *Ho*, 413 F. Supp. 2d at 1065.

[58] *Freeman*, 503 U.S. at 496.

[59] *Ho*, 413 F. Supp. 2d at 1065. *See* Green v. County Sch. Bd. of New Kent, 391 U.S. 430, 435 (1968). Courts have also "considered an additional factor that is not named in *Green*: the quality of education being offered to the white and black student populations." *Freeman*, 503 U.S. at 473.

[60] *See Green*, 391 U.S. at 435.

[61] *See id.*

[62] *E.g.*, Price v. Austin Indep. Sch. Dist., 729 F. Supp. 533 (W.D. Tex. 1990).

[63] *See* Reed v. Rhodes, 455 F. Supp. 569, 600 (N.D. Ohio 1978), *aff'd*, 607 F.2d 714 (6th Cir. 1979).

[64] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971).

[65] Freeman v. Pitts, 503 U.S. 467, 492-93 (1992) (Scalia, J., concurring).

[66] *Id.* at 497.

[67] Manning v. Sch. Bd. of Hillsborough County, 244 F.3d 927, 943 (11th Cir. 2001) (quoting Lockett v. Bd. of Educ., 111 F.3d 839, 842 (11th Cir. 1997)). However, the *Manning* court

systems to achieve "maximum desegregation"[68] or desegregation to the "maximum extent practicable."[69] Because the practicability or impracticability of a desegregation plan is a judgment that falls within a district court's discretion, courts have considerable power to determine practicability under the particular facts of a school desegregation case.[70]

c. Race-Based Policies Are Constitutionally Required

In the course of eliminating the vestiges of segregation, a de jure system is not just permitted to use race-based policies, but rather it is constitutionally required to do so. In the immediate aftermath of *Brown I*, courts commonly interpreted de jure desegregation as "not mean[ing] that there must be intermingling of the races in all school districts," but rather "mean[ing] only that they may not be prevented from intermingling or going to school together because of race or color."[71] Nevertheless, de jure school desegregation law ultimately rejected school systems' race-neutral policies[72] in favor of an "affirmative duty" for school systems to use race-based policies.

(1) The Race-Neutral Interpretation of Brown

In overruling *Plessy*, *Brown I* implicitly relied upon the signature statement in Justice John Harlan's famous *Plessy* dissent: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[73] Because *Brown I* did not specify whether more was required from de jure systems than stopping government-sponsored intentional discrimination, the district courts charged with implementing *Brown I*[74] and its companion case *Briggs v. Elliott* initially construed *Brown I* in a race-neutral manner.[75] In 1955 the *Briggs* court interpreted *Brown I* as limited to the cessation of intentional discrimination:

> Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools

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and the U.S. Supreme Court have both explicitly rejected the notion that school systems must eliminate vestiges of segregation "to the *maximum* extent praticable." *Id.* (emphasis in original); Missouri v. Jenkins, 515 U.S. 70, 101 (1995) (explaining that the proper judicial inquiry is whether the district has remedied vestiges of de jure segregation "to the extent practicable," not to the maximum potential); *see also* Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325, 1337 (11th Cir. 2005).

[68] *See, e.g.*, Anderson v. Canton Mun. Separate Sch. Dist., 232 F.3d 450, 455 (5th Cir. 2000) (quoting Monteilh v. St. Landry Parish Sch. Bd., 848 F.2d 625, 632 (5th Cir. 1988)).

[69] *See Manning*, 244 F.3d at 943 n.28 (quoting *Jenkins*, 515 U.S. at 81).

[70] *See, e.g.*,Yonkers Branch NAACP v. City of Yonkers, 251 F.3d 31, 39 (2d Cir. 2001).

[71] Brown v. Bd. of Educ. of Topeka, 139 F. Supp. 468, 470 (D. Kan. 1955).

[72] This Article defines "race-neutral policies" as school system policies that do not use race as a factor. *See supra* note 4.

[73] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[74] *Brown*, 139 F. Supp. at 469-70.

[75] Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955).

> they attend. *The Constitution, in other words, does not require integration. It merely forbids discrimination.* It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.[76]

Because no party ever appealed the district court opinion, the *Briggs* dictum was very influential until 1968, when *Green* rejected its race-neutral interpretation of *Brown I*.[77]

(2) The Rejection of Race-Neutral Desegregation Plans in Favor of an Affirmative Duty

In the wake of *Brown*'s mandate to desegregate and interpretations of *Brown* such as the *Briggs* dictum, it is not surprising that many de jure systems took the path of least resistance in adopting race-neutral "freedom-of-choice" plans.[78] A freedom-of-choice plan allows "every student, regardless of race" to "'freely' choose" a school to attend from among all of the schools in the school system.[79] Perhaps just as unsurprising, under a freedom-of-choice plan, white students continued to attend formerly segregated white schools and black students continued to attend formerly segregated black schools.[80] As a result, the all-white and all-black schools of the dual system tended to survive under this type of plan.

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[76] *Briggs*, 132 F. Supp. at 777 (emphasis added).

[77] 391 U.S. 430 (1968). The "U.S. Supreme Court in *Green v. County School Board of New Kent County* rejected this *Briggs* Dictum . . . and required school integration, not simply nonracial assignments. To conservatives the abandonment of the *Briggs* Dictum in *Green* was the federal judiciary's most significant move from color blindness to color consciousness." RAFFEL, *supra* note 10, at 29 (citations omitted).

The Supreme Court and the circuit courts have discredited the *Briggs* dictum. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 200 n.11 (1973) (noting *Green* rejected the *Briggs* interpretation of *Brown*); *Green*, 391 U.S. at 441-42 (1968) (holding that Virginia's "freedom-of-choice plan," which allowed school choice regardless of race, violated *Brown* because the schools remained segregated in a "dual system"); Walker v. County Sch. Bd. of Brunswick County, 413 F.2d 53, 54 n.2 (4th Cir. 1969) (citing *Green*, the Fourth Circuit noted, "The famous *Briggs v. Elliott* dictum . . . is now dead"); United States v. Jefferson County Bd. of Ed., 372 F.2d 836 (5th Cir. 1966), *reh'g granted*, 380 F.2d 385 (5th Cir. 1967) (en banc), *cert. denied*, 389 U.S. 840 (1967); Singleton v. Jackson Mun. Separate Sch. Dist., 355 F.2d 865, 869-70 (5th Cir. 1966); Singleton v. Jackson Mun. Separate Sch. Dist., 348 F.2d 729, 730 n.5 (5th Cir. 1965).

[78] Robert McKay, *"With All Deliberate Speed" A Study of School Desegregation*, 31 N.Y.U. L. REV. 991, 1053 (1956).

[79] *Green*, 391 U.S. at 437 (1968).

[80] Freedom of choice was usually illusory for minority students and parents who were often understandably afraid of voluntarily attending all-white schools; on occasion, black students who tried to attend all-white schools were threatened with violence. *E.g.*, Coppedge v. Franklin County Bd. of Educ., 394 F.2d 410, 411-12 (4th Cir. 1968). The Supreme Court, nevertheless, declined to hold that all freedom-of-choice plans were unconstitutional. *Green*, 391 U.S. at 439-41.

Because de jure segregated dual systems separated students solely by race, initial desegregation unavoidably required some integration of white and minority students to form a unitary system.[81] As Justice Thomas observed in *PICS*, "[s]ustained resistance to *Brown* prompted the Court to authorize extraordinary race-conscious measures (like compelled racial mixing) to turn the Constitution's dictate to desegregate into reality."[82] The controversial question that remains unanswered today is whether such initial integration must (or should) be maintained and, if so, how, and for how long?

In *Green*, the Supreme Court held that race-neutrality was merely the beginning of desegregation: the fact that a de jure system "opened the doors of the former 'white' school to [black] children and of the ['black'] school to white children merely begins, not ends, our inquiry into whether the Board has taken steps adequate to abolish its dual, segregated system."[83] Former de jure systems were then "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[84] A de jure system could not satisfy this affirmative duty through race-neutral means alone—race-based policies were required.[85] However, the Court

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[81] For one explanation of the distinction between "integration" and "desegregation," see Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 How. L.J. 795, 797 (2004).

[82] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2771 n.6 (2007).

[83] *Green*, 391 U.S. at 437.

[84] *Id.* at 437-38.

[85] Justice Brennan, *Green*'s author, supposedly told his law clerks that he wanted "to sweep away much of the dogma that has grown up in de jure litigation to hinder desegregation efforts: the *Briggs* dictum [and] the semantic distinction between 'desegregation' and 'integration.'" Bernard Schwartz, *Swann*'s Way: The School Busing Case and the Supreme Court 59-60 (1986).

In *Keyes v. School District No. 1*, the Supreme Court confirmed the implication of *Green* and again rejected the "*Briggs* Dictum":

> [The dissent argues] that *Brown* . . . did not impose an 'affirmative duty to integrate' the schools of a dual school system but was only a 'prohibition against discrimination' 'in the sense that the assignment of a child to a particular school is not made to depend on his race[']. . . . That is the interpretation of *Brown* expressed 18 years ago by . . . *Briggs* . . . . But *Green* . . . rejected that interpretation.

413 U.S. 189, 200 n.11 (1973). *See also* United States v. Fordice, 505 U.S. 717, 729 (1992) ("We do not agree . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system.") (discussing higher education desegregation); Brown v. Bd. of Educ. of Topeka, 978 F.2d 585, 591 (10th Cir. 1992) (holding that if "current racial identifiability" is a vestige "then the school system has not fulfilled its affirmative duty"); United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 389 (5th Cir. 1967) (en banc) (per curiam) (holding affirmative duty required "integration of faculties, facilities, and activities, as well as students"); David Armor, Forced Justice: School Desegregation and the Law 27-28 (1995) (commenting that *Green* required "the rule of affirmative integration" and "equated that integration with racial balance"); Kevin Brown, Race, Law and Education In The Post-Desegregation Era: Four Perspectives on Desegregation and Resegregation 32 (2005) (stating *Green* required racial mixing); Lino Graglia, Disaster by Decree: The Supreme Court Decisions

failed to provide clear standards, stating that courts should judge desegregation plans by their "effectiveness" without clearly defining how to measure such effectiveness.[86]

Although a school system's affirmative duty remained rather amorphous, three relevant components eventually emerged: (1) an in-effect (if not by law) presumption that a present racial imbalance was a vestige of de jure segregation;[87] (2) unlike other types of civil litigation where a defendant is usually only required to comply with the court's order, mere compliance with an "ineffective" court-ordered desegregation plan would not satisfy a de jure system's affirmative duty[88] because the "process of desegregation . . . is often one of trial and error;"[89] and (3) "racial balancing" is a critical starting point to determine whether vestiges of the de jure segregated system remain.[90]

ON RACE AND THE SCHOOLS 73 (1976) (noting that after *Green* "dual system now meant . . . not assignment by race to separate schools but simply insufficient racial mixing"); CHRISTINE ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING 6-8 (1990) (commenting that *Green* required "racial mixing"); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978 116-17 (1979) (stating *Green* placed the onus of integration on school systems and encouraged racial balancing).

[86] *See* Green v. County Sch. Bd., 391 U.S. 430, 437-42 (1968).

[87] *See, e.g.*, United States v. Fordice, 505 U.S. 717, 745 (1992) (Thomas, J., concurring).

[88] United States v. Lawrence County Sch. Dist., 799 F.2d 1031, 1037 (5th Cir. 1986).

[89] United States v. Hinds County Sch. Bd., 560 F.2d 1188, 1191 (5th Cir. 1977).

[90] Racial balancing is the process of trying to remedy racial imbalance by manipulating the ratio of students by race at each school such that the proportion of white and minority students at each school closely parallels the proportion of white and minority students in the school system as a whole. *See* ARMOR, *supra* note 85, at 158-59.

For example, if a school system is composed of 80% white students and 20% black students overall, an individual school whose students are 80% white and 20% black is perfectly racially balanced whereas another school whose students are 90% white and 10% black is +10% white and -10% black racially imbalanced. For a discussion of other less commonly used numerical measures of integration, *see* Byron F. Lutz, Post *Brown vs. the Board of Education*: The Effects of the End of Court-Ordered Desegregation 9-9 (Dec. 19, 2005) (unpublished working paper, on file with The Finance and Economics Discussion Series, Divisions of Research and Statistics and Monetary Affairs, Federal Reserve Board) (explaining the "dissimilarity index" and "exposure index").

"Racial imbalance" is defined:

> [T]he failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large. . . . Racial imbalance is not segregation. Although presently observed racial imbalance might result from past de jure segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices. . . . Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself.

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2769 (2007) (Thomas, J., concurring) (citations omitted). "[W]here the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district." Freeman v. Pitts, 503 U.S. 467, 474 (1992); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971). By implication, the district court does not need to closely scrutinize for vestiges a school that is racially balanced. *Freeman*, 503 U.S. at 474. In other words, de jure desegregation *assumes* that racial balance is positive, even desirable.

Considering the amorphous nature of affirmative duty and the dearth of clear desegregation standards, many courts understandably adopted racial balancing measures in their court-ordered desegregation plans because racial balance was easily measured and appeared objective.[91]As *PICS* demonstrates, those same characteristics made racial balance popular in the de facto context as well.

2. *Voluntary De Facto School Desegregation*

De facto segregation, literally meaning segregation from facts,[92] is "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities."[93] Because of the lack of government action, courts cannot force a de facto system to desegregate.[94]

a. *Race-Based Policies Are Not Constitutionally Required*

Because unintentional or de facto segregation does not violate the Constitution, a district court cannot require a de facto system to implement a desegregation plan.[95] As a result, unlike a de jure system, a de facto segregated school system is under no constitutionally-imposed, affirmative duty to remedy racial imbalances.[96] As Justice Kennedy explained in *PICS*, "School districts that had engaged in de jure segregation had an affirmative constitutional duty to desegregate; those that were de facto segregated did not."[97] De facto desegregation can only occur voluntarily.[98]

Although racial balancing is a critical starting point, "even when remedying the effects of de jure segregation, the Constitution does not require rigid racial ratios. The purpose of federal supervision is not to maintain a desired racial mix at a school." NAACP, Jacksonville Branch v. Duval County Sch., 273 F.3d 960, 967 (11th Cir. 2001) (citations omitted); *see also* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 433-34 (1976).

[91] *See* Christine Rossell, *The Evolution of School Desegregation Plans Since 1954*, *in* THE END OF SCHOOL DESEGREGATION? 52-53 (Stephen Caldas & Carl Bankston eds., 2003).

[92] Ronna Schneider, *Race Issues and Public Education*, *in* 1 EDUCATION LAW § 5:9 (2007).

[93] *Swann*, 402 U.S. at 17-18. The California Supreme Court explained a common justification for de facto desegregation focused upon the ostensible victim: "Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be." Crawford v. Bd. of Educ., 17 Cal.3d 280, 295 (1976) (quoting U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 193 (1967)) (internal quotations omitted).

[94] Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 745 (1974); Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 208-09 (1973).

[95] *See, e.g.*, *Swann*, 402 U.S. at 16; COOK & SOBIESKI, *supra* note 23, at ¶ 16.02.

[96] *Compare infra* notes 85-88 and accompanying text.

[97] 127 S. Ct. 2738, 2795 (2007) (Kennedy, J., concurring).

[98] A de facto segregated school system can desegregate in two ways: either voluntarily without a lawsuit or through a settlement agreement that resolves a pending lawsuit. For a discussion of desegregation settlements, see *infra* text accompanying notes 196-227.

b. Voluntary Desegregation

On occasion, de facto systems desegregated without the impetus of a lawsuit by voluntarily taking measures to integrate schools. Considering *Green*'s mandate for race-based policies and de jure desegregation doctrine's implicit assumption that a racially-balanced school is desirable,[99] it is not surprising that school systems believed that the constitutional requirement to integrate represented a minimum floor that school systems could voluntarily exceed and not a constitutional ceiling. As Justice Breyer observed in *PICS*, *Brown I* and its progeny "long ago promised" a "racially integrated education" and the Supreme Court "has repeatedly required, permitted, and encouraged local authorities to undertake" de jure desegregation, while "[understanding] that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so."[100] Moreover, for over thirty years school systems have relied upon the following dicta in *Swann v. Charlotte-Mecklenburg Board of Education* regarding de facto desegregation through racial balancing:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of [black] to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities*.[101]

Decades later, the limits of racial balancing became clearer with the demarcation of a clear boundary line between de jure and de facto desegregation.

B. The Boundary Line Between De Jure and De Facto Desegregation: Unitary Status

The actual dividing line between de jure and de facto desegregation is "unitary status." As it has currently evolved, unitary status occurs when a school system operating under a desegregation order has successfully dismantled its prior de jure school system.[102] The district court then enters an order finding the school system unitary and dismissing the de jure school desegregation case. At the time the court enters the order and dismisses the de jure case, there is a constitutionally significant moment when the school system transforms from a de jure segregated system under federal court su-

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[99] *See supra* note 91.

[100] *PICS*, 127 S. Ct. at 2800 (Breyer, J., dissenting).

[101] 402 U.S. 1, 16 (1971) (emphasis added).

[102] *See, e.g.*, Lee v. Lee County Bd. of Educ., 476 F. Supp. 2d 1356, 1361 (M.D. Ala. 2007).

pervision into a unitary system returned to local school control.[103] Unitary status is a factual finding reviewed for clear error.[104]

1. The Unitary Status Test

Although the meaning and determination of unitary status remained unclear for decades after *Brown*,[105] the Supreme Court finally articulated a two-part test for unitary status in 1991.[106] The test asks whether the de jure system: (1) has demonstrated "good-faith compliance" with the governing desegregation orders for "a reasonable period of time;"[107] and (2) has eliminated the "vestiges of de jure segregation . . . as far as practicable."[108] This unitary status test "requires a district court to examine not just process (compliance with the decree)," but also "outcome (vestiges of de jure [] segregation)."[109] When determining whether the school system has eliminated all of the vestiges of de jure segregation to the extent practicable, the district court examines the six *Green* factors.[110]

2. Partial Unitary Status

Although a de jure system must attain unitary status in each of the *Green* factors for the entire school system to return to local control, a "federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control" because "[p]artial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities."[111] Factors considered by a court in determining partial unitary status include: (1) "whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn;" (2) "whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system;"

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[103] Bd. of Educ. of Okla. Pub. Schs. v. Dowell, 498 U.S. 237, 250 (1991) (stating that a school system granted unitary status "no longer requires court authorization for the promulgation of policies and rules").

[104] *See, e.g.*, Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 317 (4th Cir. 2001) (en banc).

[105] Courts have been inconsistent in their use of the words "unitary" and "unitary status." *Dowell*, 498 U.S. at 245-46; *see generally* Deborah Sprenger, Annotation, *Circumstances Warranting Judicial Determination or Declaration of Unitary Status with Regard to Schools Operating Under Court-ordered or -supervised Desegregation Plans and the Effects of Such Declarations*, 94 A.L.R. FED. 667 (2007).

[106] *See Dowell*, 498 U.S. at 250.

[107] Freeman v. Pitts, 503 U.S. 467, 498 (1992).

[108] *Dowell*, 498 U.S. at 250.

[109] San Francisco NAACP v. San Francisco Unified Sch. Dist. (*Ho*), 413 F. Supp. 2d 1051, 1065 (N.D. Cal. 2005).

[110] *See supra* text accompanying notes 59-66.

[111] *Freeman*, 503 U.S. at 489.

and (3) whether the school system "has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance."[112] We next examine the pivot point created by *PICS*.

III. The Birth of the Pivot Point

A. Cracks in the Foundation

In 1890, Louisiana's general assembly enacted a law requiring all railway companies to "provide equal but separate accommodations for the white and colored races."[113] The Supreme Court infamously affirmed the constitutionality of this statute in *Plessy v. Ferguson*.[114] Rejecting the petitioner's Equal Protection challenge to the separate accommodations requirement, the Court held that while the Fourteenth Amendment prohibited governments from bestowing preferential civil or political privileges upon a favored race, the Constitution did not mandate social equality among citizens of different races: "If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."[115]

In a dissenting opinion that augured the Supreme Court's rejection of the "separate but equal" doctrine in *Brown I*,[116] Justice Harlan derided the majority's dichotomy between civil and political rights parceled in equal measure to citizens of all races and social rights entrusted to the vagaries of contemporary attitudes and prejudices:

> State enactments regulating the enjoyment of civil rights upon the basis of race . . . can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country.[117]

Though observers rightfully heralded *Brown I* as the harbinger of a new era in race relations,[118] the civil rights landscape forged by the Court's repudiation of *Plessy* was pristine on the surface only. The Court's forceful but doc-

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[112] *Id.* at 491.
[113] Plessy v. Ferguson, 163 U.S. 537, 540 (1896).
[114] 163 U.S. 537 (1896).
[115] *Id.* at 548, 551-52.
[116] 347 U.S. 483 (1954).
[117] *Plessy*, 163 U.S. at 560-61 (Harlan, J., dissenting).
[118] The announcement of *Brown I* led *Time* magazine to declare: "In its 164 years the court had erected many a landmark of U.S. history. . . . None of them except the Dred Scott case (reversed by the Civil War) was more important than the school segregation issue. None

trinally equivocal decisions in *Brown I* and its Fifth Amendment companion case *Bolling v. Sharpe*[119] created a fault line through the constitutional foundation of desegregation. This fault line partitioned the legal basis for integration into two alternative rationales, neither of which the twin decisions championed or dismissed.

Adherents to the antisubordination school argued that the true purpose of the Equal Protection Clause was to elevate the historically oppressed black race to co-equal status with the historically privileged white race.[120] Those who hewed to the anticlassification school believed the Fourteenth Amendment's literal language precluded governments from legislating any differential treatment on the basis of race even if the effect of a particular law was to benefit disadvantaged blacks in order to level the playing field between the two races.[121]

These competing theories were the twentieth-century incarnation of the unfinished dialogue between Justice Harlan and his brethren in *Plessy*. Justice Harlan's view of the Equal Protection Clause as a constitutional lever for inducing social harmony resurfaces in the post-*Brown* assertion of antisubordinationists that the Equal Protection Clause functions not only as a restraint on Jim Crow regulations,[122] but also as a license for states to act affirmatively to fashion an egalitarian dynamic among historically favored and disfavored racial groups.[123]

For the *Plessy* majority, the Fourteenth Amendment cast the government in the role of impartial referee, prohibited from throwing its civic or political weight behind one racial group to the detriment of others, but free to ignore—or even codify—social prejudice against blacks so long as the government did not upset the existing pretense of institutional equality.[124] Though few would attribute racist undertones to the modern anticlassification school, it similarly perceives governments as neutral arbiters in the so-

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of them directly and intimately affected so many American families." KLUGER, *supra* note 50, at 712 (internal quotation marks and citation omitted).

[119] 347 U.S. 497 (1954).

[120] *See* Siegel, *supra* note 39, at 1472-73.

[121] *See id.* at 1470. *But see* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (arguing that the "scope of the two principles overlap, that their application shifts over time in response to social contestation and social struggle, and that antisubordination values have shaped the historical development of anticlassification understandings").

[122] The "Jim Crow" states were southern states that enacted segregation laws in response to the post-Civil War Reconstruction Era. JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 141-42 (2000).

[123] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2773 (2007) (plurality) (rejecting dissent's argument that racial classifications that seek to "include" should not be subject to strict scrutiny); *see also* Siegel, *supra* note 39, at 1478-1500.

[124] *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991). However, Chief Justice Roberts and Justice Thomas in *PICS* construed Harlan's dissent in *Plessy* to embody an anticlassification rationale. *See PICS*, 127 S. Ct. at 2758 n.14 (majority), 2782 (Thomas, J., concurring).

cial sphere rather than active modulators of racial groups' relative social progress.[125]

As civil rights advocates began the fight to extend the rationale of *Brown I* to cases alleging discrimination in public facilities and accommodations, the Equal Protection battleground was initially confined to cases that did not expose the tension between the antisubordination and anticlassification theories.[126] However, as federal courts succeeded in eliminating the most oppressive vestiges of Jim Crow laws, the tenor of Equal Protection jurisprudence changed palpably. Uncomfortable with the seemingly indefinite duration of race-based policies to equalize opportunity among blacks and whites,[127] the dearth of objective metrics to assess the success of affirmative action programs (and their continued necessity),[128] and the rising incidence of claims by white plaintiffs alleging reverse discrimination,[129] courts engaged in a heated dialogue over the *raison d'être* of the Equal Protection Clause in a series of cases situated along the fault line between the antisubordination and anticlassification rationales.[130] These cases foreshadowed the clash of the antisubordination and anticlassification ideologies in *PICS*, where the Supreme Court grappled with the question of which doctrine should define the contours of the Equal Protection Clause.

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[125] *See PICS*, 127 S. Ct. at 2758 (plurality) ("The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action.") (citation omitted); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

[126] The Supreme Court cited to *Brown I* without further explanation in a series of summary per curiam opinions that outlawed segregation in a variety of public facilities and accommodations. *See, e.g.*, Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (prisons); Schiro v. Bynum, 375 U.S. 395 (1964) (municipal auditorium); Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom seating); Turner v. City of Memphis, 369 U.S. 350 (1962) (airport restaurant); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (athletic events); New Orleans City Park Dev. Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf course); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public bathhouses and beaches); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city lease of park facilities).

[127] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 341-43 (2003) (stating that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race" and concluding accordingly that race-conscious policies must "have a termination point") (internal quotation marks and citations omitted).

[128] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505-06 (1989) (discussing the difficulty of quantifying and comparing discrimination findings).

[129] *See, e.g.*, Cavalier v. Caddo Parish Sch. Bd., 403 F.3d 246 (5th Cir. 2005); Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005); Anderson *ex rel.* Dowd v. City of Boston, 375 F.3d 71 (1st Cir. 2004); Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001) (en banc); Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738, 745 (2d Cir. 2000); Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (per curiam); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998).

[130] *See generally* Siegel, *supra* note 39.

B. The Pivot Point

The *PICS* Court was aware that the majority decision grafted a pivot point onto the Equal Protection Clause. As Justice Breyer noted in his dissent:

> Louisville's history makes clear that a community under a court order to desegregate might submit a race-conscious remedial plan *before* the court dissolved the order, but with every intention of following that plan even after dissolution. How could such a plan be lawful the day before dissolution but then become unlawful the very next day? On what legal ground can the majority rest its contrary view?[131]

However, it is unclear whether the Court appreciated the structural significance of the pivot point.[132] The apparent concern of the dissenters was the post-*PICS* ramifications for school systems that had previously shed their desegregation orders (like Louisville), or were never governed by such orders (like Seattle).[133] For the dissenters the pivot point was a useful rhetorical device to illustrate the infirm logic of the majority opinion. Yet a broader perspective that encompasses both de jure and de facto systems reveals the pivot point to be more than just a tool of critique but a singular constitutional abnormality that produces baffling and unpredictable consequences.

An analogy from the physical world exemplifies the essence of a pivot point. Within a black hole there is a distinct, though largely indiscernible boundary known as the event horizon that divides space into two regions, one where gravity is powerful and another where it is all-consuming.[134] Once matter crosses the event horizon, it enters a domain where the laws of relativity and quantum mechanics that govern the rest of the physical universe suddenly lapse, producing oddities and unpredictable effects.[135]

The pivot point in the Equal Protection Clause demarcates an area of constitutional space that resembles the region beyond the event horizon of a black hole. Both phenomena result from the exertion of tremendous force onto a confined area. Within a star, the source of this pressure is gravity. In the Equal Protection Clause, two powerful and opposing forces clashed to produce the pivot point—the anticlassification conviction that underlies the majority and plurality opinions in *PICS*, and the residual vitality of the an-

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[131] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2881 (2007) (Breyer, J., dissenting).

[132] *See id.* at 2797 (Kennedy, J., concurring) ("[I]f this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it.").

[133] *See id.* at 2797-2800 (Stevens, J., dissenting), 2800-42 (Breyer, J., dissenting).

[134] JAMES B. HARTLE, GRAVITY: AN INTRODUCTION TO EINSTEIN'S GENERAL RELATIVITY 261 (2003).

[135] *Id.* at 289.

tisubordination legacy from *Brown I*,[136] which precluded the majority from imposing its restrictive approach to race-based policies onto existing de jure desegregation orders.

A second similarity flows from the concentration of this extreme pressure in a small and discrete region. Event horizons emerge within black holes only after a collapsing star is orders of magnitude smaller than its size prior to initial decline.[137] Similarly, the forces that produced the pivot point operate within the narrow interstices that separate de jure from de facto segregation. As elaborated below, the distinction between de jure and de facto segregation, now weighted with additional constitutional ballast, is difficult to define and subject to inconsistent application.[138]

Finally, and most significantly, event horizons and pivot points delimit space in which axiomatic principles and norms cease to operate, producing bizarre and unpredictable consequences. Familiar legal processes adopt warped characteristics at the pivot point that not only complicate the administration of extant desegregation orders, but also illustrate the consequences of allowing rights-based analysis to predominate over structural considerations in constitutional law. In Part V, we discuss three particular processes impacted by the pivot point: (1) remedying segregation through consent orders and settlement agreements; (2) determining the proper level of scrutiny for evaluating the constitutionality of policies implemented by de jure systems; and (3) applying the appropriate standard of review to unitary status determinations.

IV. THE *PICS* DECISION

Much has been written about the *PICS* decision and the diverging views of the Justices who filed separate opinions, with particular emphasis on the opinions that are likely to shape the subsequent jurisprudence in this area.[139]

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[136] *See supra* text accompanying note 40.

[137] HARTLE, *supra* note 134, at 289.

[138] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2795-96 (2007) (Kennedy, J., concurring); *see also infra* text accompanying notes 261-263.

[139] *See*, *e.g.*, COLEMAN, *supra* note 5; E. Christi Cunningham, *Exit Strategy for the Race Paradigm*, 50 HOW. L.J. 755 (2007); Samuel Estreicher, *The Non-Preferment Principle and the "Racial Tiebreaker" Cases*, 2007 CATO SUP. CT. REV. 239 (2007); Gerken, *supra* note 6; Linda Greenhouse, *supra* note 6; Kaufman, *supra* note 6; Ryan, *supra* note 6; Edward C. Thomas, *Racial Classification and the Flawed Pursuit of Diversity: How Phantom Minorities Threaten "Critical Mass" Justification in Higher Education*, 2007 BYU L. REV. 813 (2007); William E. Thro, *An Essay: The Roberts Court at Dawn: Clarity, Humility, and the Future of Education Law*, 222 ED. LAW REP. 491 (2007); J. Harvie Wilkinson III, *supra* note 6; Mark E. Wojcik, *Race-Based School Assignments After* Parents Involved in Community Schools, 95 ILL. B.J. 526 (Oct. 2007); Comment, Parents Involved in Community Schools v. Seattle School District No. 1: *Voluntary Racial Integration in Public Schools*, 121 HARV. L. REV. 98 (2007); Ronald Dworkin, *The Supreme Court Phalanx*, 54 N.Y. REV. OF BOOKS No. 14 (Sept. 27, 2007); Gary Orfield & Chungmei Lee, The Civil Rights Project, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies* (Aug. 2007), http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf. *But see* Stephan J. Caldas & Carl L. Bankston III, *A Re-Analysis of the Legal, Political, and Social Landscape of Deseg-*

While this discussion traverses some of the same ground, it does so from the vantage point of de jure systems still attempting to remedy the effects of past intentional discrimination.[140] Viewed through this lens, the two opinions of immediate practical consequence—the majority/plurality opinion authored by Chief Justice Roberts and the concurring opinion of Justice Kennedy—illustrate the doctrinal tension that created the pivot point.

A. Chief Justice Roberts' Opinion

From the beginning of his opinion,[141] Chief Justice Roberts frames the salient legal inquiry in terms that minimize the relevance of traditional desegregation jurisprudence to the Court's evaluation of the Louisville and Seattle's voluntary choice programs: "Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race."[142] In narrowing the Court's focus, Roberts observes that "Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation."[143] Similarly, he notes that while the Jefferson County Public Schools previously operated under a desegregation decree entered in 1975, "the District Court dissolved the decree [in 2000] after finding that the district had achieved unitary status by eliminating '[t]o the greatest extent practicable' the vestiges of its prior policy of segregation."[144]

Having placed de jure racial segregation outside the Court's purview, the majority forecloses the possibility that the Louisville and Seattle school systems could validate their voluntary choice programs by citing a compelling interest in remedying the effects of past intentional discrimination.[145] By confining the scope of the decision to school systems with no ongoing legal obligation to combat de jure segregation, the Court limits the reach of the *PICS* decision to school systems like Louisville and Seattle that use race-based policies to address voluntarily the effects of de facto segregation. But

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regation from Plessy v. Ferguson *to* Parents Involved in Community Schools v. Seattle School District No. 1, 2007 BYU EDUC. & L.J. 217 (2007); Craig Heeren, *"Together at the Table of Brotherhood:" Voluntary Student Assignment Plans and the Supreme Court*, 24 HARV. BLACKLETTER L.J. (forthcoming 2008) (manuscript on file with authors); Wendy Parker, Valuing Integration: Lessons from Teachers (2007) (unpublished manuscript, on file with authors) (all discussing de jure desegregation).

[140] *See supra* text accompanying note 7 (concerning the number of de jure systems currently governed by desegregation orders or consent decrees).

[141] Parts I, II, II-A and III-C constituted the majority opinion because Justice Kennedy joined these portions of Chief Justice Roberts' opinion (Justices Scalia, Thomas, and Alito joined Roberts' entire opinion). *PICS*, 127 S. Ct. at 2741, 2743.

[142] *Id.* at 2746 (majority); *see also id.* at 2768 (plurality); *id.* at 2796 (Kennedy, J., concurring).

[143] *Id.* at 2746 (majority).

[144] *Id.* at 2749 (citing Hampton v. Jefferson Cty. Bd. of Ed., 72 F. Supp. 2d 753, 762-64 (W.D. Ky. 1999)).

[145] *Id.* at 2752.

are de jure systems using race-based policies to eliminate the vestiges of segregation truly exempt from *PICS*' rationale and holding?

Read literally, the majority opinion should neither control nor influence the calculus of federal district courts reviewing a school system's compliance with desegregation orders or consent decrees. Unlike the Louisville and Seattle school systems, de jure systems with unmet legal obligations imposed by desegregation decrees or court orders presumably maintain a compelling interest in "remedying the effects of past intentional discrimination."[146] Moreover, Roberts employs the analysis and discussion in his majority opinion strictly to resolve his underlying legal question, which implicates the range of race-based policies available to school systems *not* governed by a de jure desegregation order.[147] Therefore, any broader implication that the Equal Protection Clause imposes constraints on the remedial use of race by de jure systems is dicta.[148]

To excerpt language from a decision and brand it dicta, however, does not render that language nugatory. The Supreme Court regularly strays from the straight path between legal issue and legal outcome in order to address tangential points of law and policy.[149] Because the Court accepts certiorari in only a handful of cases each year,[150] lower federal courts occasionally fill the void of controlling precedent by invoking dicta to resolve legal questions that fall outside the narrow ambit of a Court holding but within broader parameters delimited by the commentary in germane precedent.[151]

Indeed, there is expansive language in Roberts' opinion that potentially limits the program options available to de jure systems complying with desegregation orders. For example, in holding that strict scrutiny is the relevant test for determining the constitutionality of the defendants' voluntary choice programs, the majority states that

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[146] *Id.* at 2742 (majority).

[147] *See id.* at 2746.

[148] *See* Marks v. United States, 430 U.S. 188, 193 (1977) (stating that in a fragmented Supreme Court opinion "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"). "As the divergent opinions of the lower courts demonstrate, however, '[t]his test is more easily stated than applied to the various opinions[.]'" Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (citation omitted). *See also* Hart v. Cmty. Sch. Bd. of Brooklyn, New York Sch. Dist. No. 21, No. 72-CV-1041 (JBW), 2008 WL 508002, at *7-*9 (E.D.N.Y. Feb. 28, 2008) (Weinstein, J.).

[149] *See generally, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

[150] *See generally* Kevin Scott, *Shaping the Supreme Court's Federal Certiorari Docket,* 27 JUST. SYS. J. 191 (2006).

[151] For decisions reviewing the constitutionality of voluntary race-based or race-conscious K-12 student assignment plans before *PICS* and relying upon various Supreme Court dicta, see generally Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005); Anderson *ex rel.* Dowd v. City of Boston, 375 F.3d 71 (1st Cir. 2004); Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000); Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (per curiam); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998). *See also* Heeren, *supra* note 139 (manuscript at 45-57).

> [i]t 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. . . . As the Court recently reaffirmed, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[152]

However, as discussed in Part II, court orders and consent decrees often obligate de jure systems to classify students on the basis of race.[153] Prior to *PICS*, courts typically evaluated such race-based policies only by their utility in eliminating the vestiges of de jure segregation.[154] Accordingly, a race-based policy that was effective in eliminating the vestiges of de jure segregation would not fail on the ground that it was not narrowly tailored to achieve a compelling state interest. Roberts, however, fails to qualify his sweeping application of strict scrutiny with any exception, or safe harbor, for race-based policies implemented by de jure school systems.

Later in the opinion, Roberts (writing for the plurality) asserts that a school system has no legitimate interest in calibrating the racial makeup of its schools unless such efforts are tethered to some compelling educational benefit.[155] Read without limitation, this language undermines the basis for using race-based policies to further ongoing de jure desegregation efforts. The hallmark of dual school systems was single-race schools;[156] it is therefore natural to gauge the success of de jure desegregation efforts by analyzing the racial balance of individual schools. School demographics that approximate the racial breakdown of a school system's overall student population signal that the civic and political institutions that produced segregated schools are being dismantled.[157] In the de jure desegregation regime, measuring the current racial balance provides the predominant methodology to determine vestiges of de jure segregation.[158] By limiting the permissible use of racial classifications to policies that confer a compelling educational benefit, the plurality alters the paradigm of race-based education reform from a platform for social and civic advancement to a tool of last resort for improving educational outcomes.

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[152] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2751-52 (2007) (citation omitted); *see also id.* at 2764 (citing Johnson v. California, 543 U.S. 499, 505 (2005)).

[153] *See supra* text accompanying note 72.

[154] *See* Freeman v. Pitts, 503 U.S. 467, 485 (1992); *see also supra* text accompanying notes 84-90.

[155] *PICS*, 127 S. Ct. at 2757 (plurality).

[156] *See, e.g.*, United States v. Texas, 457 F.3d 472, 480 (5th Cir. 2006) ("A central purpose of desegregation decrees was to prevent, to the extent practicable and not attributable to demographic changes, the continued existence of one-race schools.").

[157] *See supra* note 90.

[158] *See, e.g.*, *Freeman*, 503 U.S. at 474 (stating that when determining compliance with a de jure desegregation order, "a critical beginning point is the degree of racial imbalance"); *see also supra* text accompanying note 90-91.

B. Dicta or Dictate?

An important question is whether the dicta from the majority and plurality portions of Roberts' opinion bear on the constitutionality of de jure race-based policies. One could argue that Roberts' statements should have limited force outside their original context. During his confirmation hearings, the Chief Justice expressed a desire to decide cases on the narrowest feasible grounds[159] and to employ a disciplined approach to opinion drafting that minimizes the use of dicta.[160] Nevertheless, in the plurality opinion he delivers a protracted refutation of Breyer's dissent, which he disparages at several junctures for relying upon dicta to support critical arguments.[161] Applying the rationale of the majority or plurality opinion to de jure systems remaining under court order would conflate the contexts of de jure and de facto segregation, thereby committing the same sin that, in his view, contaminates Breyer's dissent.[162]

On the other hand, there are signs that the plurality had aspirations for *PICS* that extended beyond the controversy at hand. Roberts controversially invokes *Brown* at the end of his opinion to justify the majority's decision to strike down Louisville and Seattle's voluntary choice programs:

> It was not the inequality of facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954 . . . . Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.[163]

In arrogating the mantle of *Brown* for the anticlassification school, the plurality engages the dissent in a vigorous dispute over *Brown*'s meaning.[164] The Justices' tug-of-war over the legacy of this hallowed decision[165] infuses *PICS* with a seminal quality that potentially enhances the significance of dicta in the majority and plurality opinions. As discussed in Part III, this dicta may

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[159] *See* Cass R. Sunstein, *The Minimalist*, L.A. TIMES, May 25, 2006, at B11 (describing Chief Justice Roberts' minimalist jurisprudential approach).

[160] *See generally id.*

[161] *PICS*, 127 S. Ct. at 2761-62, 2764.

[162] *See id.* at 2761 (plurality).

[163] *Id.* at 2767-68.

[164] *See id.* at 2765-66 (plurality). As Professor Martha Minow has observed, "Perhaps the most powerful legacy of *Brown v. Board* is this: opponents in varied political battles fifty years later claim ties to the decision and its meaning." Martha Minow, *Surprising Legacies of* Brown v. Board*,* 16 WASH. U. J.L. & POL'Y 11, 12 (2004).

[165] *See, e.g.*, Joel Goldstein, *Approaches to* Brown v. Board of Education: *Some Notes on Teaching a Seminal Case*, 49 ST. LOUIS U. L.J. 777, 777 (2005).

eradicate the remaining traces of antisubordination philosophy from Equal Protection Clause jurisprudence.[166]

C. Justice Kennedy's Opinion

The impact of Justice Kennedy's opinion on de jure desegregation law is not solely a function of its content. As the deciding fifth vote that secured the majority's outcome but tempered its rationale, Kennedy's concurrence holds important clues to the meaning of *PICS*.

For de facto systems like Louisville and Seattle, the primacy of Kennedy's concurring opinion arises out of its guidance to school systems that use or have contemplated the use of racial classifications. His opinion reaffirms that school systems may pursue a compelling interest in combating the effects of de facto segregation,[167] and distinguishes (albeit obliquely) constitutionally offensive policies that rely on overt racial classifications from programs that are permissible insofar as they accomplish similar objectives more indirectly through various facially neutral mechanisms.[168]

The impact of Justice Kennedy's concurrence on de jure systems is less obvious but still significant. The most important part of the opinion is his rebuttal to Justice Breyer's argument that the Equal Protection Clause should not adopt a split personality to address the effects of de jure and de facto segregation:[169]

> Our cases recognized a fundamental difference between those school districts that had engaged in de jure segregation and those whose segregation was the result of other factors. School districts that had engaged in de jure segregation had an affirmative constitutional duty to desegregate; those that were de facto segregated did not. . . . Where there has been de jure segregation, there is a cognizable legal wrong, and the courts and legislatures have broad power to remedy it. . . . The limitation of this power to instances

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[166] *See supra* text accompanying notes 120-123.

[167] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2792 (2007) (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."). *Accord Hart*, 2008 WL 508002, at *7-8.

[168] Justice Kennedy listed five policies that "are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Id.* Those five policies are: (1) "strategic site selection of new schools;" (2) "drawing attendance zones with general recognition of the demographics of neighborhoods;" (3) "allocating resources for special programs;" (4) "recruiting students and faculty in a targeted fashion; and" (5) "tracking enrollments, performance, and other statistics by race." *Id.* In light of Justice Kennedy's concurrence, we define such policies as "race-conscious policies." *See supra* note 4.

[169] *See id.* at 2823-24 (Breyer, J., dissenting). Justice Breyer also argued that "because the diversity [the school systems] seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone." *Id.*

> where there has been de jure segregation serves to confine the nature, extent and duration of governmental reliance on individual racial classifications.[170]

In demarcating the constitutional boundary between de jure and de facto segregation, Kennedy speaks as if the distinction between social and government-endorsed segregation is self-evident. To paraphrase his concurrence, there is an inherent evil in using the machinery of government to distinguish individuals overtly on the basis of their race. If, however, government previously misappropriated this machinery to single out and injure a particular group on the basis of race, government may use it again to the limited extent necessary to identify and make whole the injured group.[171] The currency used to compensate the aggrieved group takes the form of political benefits dispersed according to the same selective criteria applied to inflict the injury in the first instance.[172]

Kennedy's de jure/de facto distinction presupposes an injury that can be traced definitively to a government (de jure) or non-government (de facto) source.[173] Yet, as even Kennedy acknowledges, the injuries caused by segregation are not readily shoehorned into this taxonomy:

> From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within

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[170] *Id.* at 2795-96 (Kennedy, J., concurring).

[171] *See* Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 280-81 (1977) (explaining the restitutionary purpose of a desegregation order).

[172] In this paradigm, there is a superficial logic to a pivot point that distinguishes the proper use of race-based remedies (to undo the effects of official segregation) from the improper use of such remedies (to address the effects of social segregation). However, this logic breaks down under closer scrutiny. Setting aside the adverse structural consequences of the pivot point, it strains credulity to argue that the stigmatic effects of race-based policies are mild enough to warrant their use in de jure systems but too severe to address the equally injurious impacts of social segregation. *See* Anderson v. Sch. Bd. of Madison County, No. 06-60902, 2008 WL 353203, at *11 (5th Cir. Feb. 11, 2008) (Stewart, J., concurring) ("[T]he cruel irony is that racial isolation, albeit not as the product of de jure segregation, largely remains as foreboding and potentially deleterious as it was when federal court supervision began."). Indeed, the difficulty of tracing segregation to a de jure or de facto source underscores the capriciousness of a binary constitutional rule that mandates or prohibits the consideration of race in educational programs on the basis of an unobservable distinction.

Those who advocate for a Fourteenth Amendment standard that pivots on the distinction between de jure and de facto segregation are also hard-pressed to distinguish in theory these two species of segregation as they exist in a democracy. In a political system designed to reflect the will of the people, de jure segregation, at its core, is simply social segregation expressed through the political process. *Cf.* Plessy v. Ferguson, 163 U.S. 537, 560-61 (1896) (Harlan, J., dissenting) ("The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.") (internal quotation omitted). Where the people and their government segregate with one voice, as they did for decades in Jim Crow America, disentangling the effects of social segregation that were political as opposed to non-political in nature is a wobbly axis around which to orient weighty constitutional policy.

[173] *See supra* text accompanying notes 29, 93.

> the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. . . . Yet, like so many other legal categories that can overlap in some instances, the constitutional distinction between de jure and de facto segregation has been thought to be an important one.[174]

Kennedy nonetheless ascribes legal and normative significance to this distinction that is incongruous with the amorphous factual picture that confronts district courts seeking to determine whether a school system is unitary.[175] An interesting question therefore arises as to whether federal district courts will feel pressure after *PICS* to reconcile this contradiction by attempting to resolve ambiguous factual circumstances into ideations of de jure and de facto segregation that would serve as proxies for a rigorous application of the *Green* factors.[176]

It would be difficult to fault this reaction. With appellate courts agitating to restore school systems to local control,[177] and Kennedy pronouncing the existence of bright line standards that separate de jure and de facto systems, there is a none-too-subtle suggestion that courts should apply *Green*'s affirmative duty standard[178] in a more lenient and holistic fashion to ascertain whether residual segregation is de jure or de facto. Coupled with a standard of appellate review for desegregation decisions that may become less deferential after *PICS*, Kennedy's remarks could impel district courts to adopt a legal framework that lowers the threshold for unitary status.[179]

The courts tempted to move in this direction may fasten upon dicta in the majority and plurality decision to vindicate their approach. Indeed, they could rely upon the two aforementioned suggestions in Roberts' opinion—that desegregation law should be brought within the tent of strict scrutiny, and that racial balancing can never be an end in itself—to establish the clarity between de facto and de jure segregation that Justice Kennedy presumes in his concurrence.

Of course, district courts might also take Chief Justice Roberts and Justice Kennedy at their words when they cabin the scope of the *PICS* decision to include only school systems that have no legal obligation to remedy the

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[174] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2795-96 (2007) (Kennedy, J., concurring).

[175] *See supra* text accompanying notes 87-89.

[176] *See supra* text accompanying notes 83-86.

[177] The Supreme Court has made clear that one of the end purposes of de jure desegregation is "to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." Freeman v. Pitts, 503 U.S. 467, 489 (1992) (citing Milliken v. Bradley, 433 U.S. 267, 280-81 (1977)). "Federal judicial supervision of local school systems was intended as a 'temporary measure.'" *Id.* (quoting Bd. of Educ. v. Dowell, 498 U.S. 237, 247 (1991)).

[178] *See supra* text accompanying note 72.

[179] *See id.*

vestiges of de jure segregation. For these courts, the dicta in *PICS* would be unlikely to influence the adjudication of unitary status hearings or motions for further relief under existing orders. However, few federal district courts are likely to ignore *PICS.* Supreme Court decisions in the desegregation realm are rare in the twenty-first century, and broad disregard for *PICS* by federal district courts would almost certainly provoke the federal courts of appeals to intercede and assume the task of incorporating *PICS* into de jure Fourteenth Amendment jurisprudence.

This discussion suggests that federal district courts administering de jure desegregation orders could conceivably respond to the *PICS* decision in one of three ways. First, they could ignore it completely on the theory that the decision is expressly limited to school systems with no legal obligation to desegregate. Second, courts might conclude that while *PICS* does not modify desegregation law, the decision should increase the burden on school systems seeking to end desegregation orders since race-based policies become off-limits to school systems once a court declares them unitary. Finally, courts might take the opposite tack and conclude that the precedential impact of the *PICS* decision is not confined to its factual context and it requires lower courts to restrict the range of race-based policies available even to school systems governed by desegregation orders.

D. Early Returns from Federal District Courts

De jure desegregation decisions issued by federal district courts in the aftermath of *PICS* reflect all three approaches. A recent decision by the United States District Court for the Western District of Tennessee featured *PICS* prominently.[180] In addressing a joint motion for unitary status by all parties,[181] the Court offered the following comments on the *PICS* decision:

> In the Supreme Court's most recent foray into issues of racial diversity in the public schools, the Court determined that use of race-based student assignment in the public schools must be "narrowly tailored" to achieve a "compelling" government interest. The Court made clear that what was constitutionally allowed, and even required, under a desegregation decree, may be prohibited where a school district is not under such a decree.
>
> These most recent cases do not impact the present case directly, since Shelby County is under an existing desegregation decree. However, the Supreme Court's holdings do underscore the momentous, irreversible nature of this Court's pending decision as to whether the County has achieved unitary status.[182]

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[180] Robinson v. Shelby County Bd. of Educ., No. 63-4916, slip op. (W.D. Tenn. July 26, 2007).

[181] *Id.* at 1.

[182] *Id.* at 10-11 (citation omitted).

After noting the "momentous [and] irreversible" effect of declaring a school system unitary, the court denied the school system's motion for unitary status in the areas of student assignment and faculty hiring.[183] Eschewing the *PICS* plurality's disdain for racial balancing, the court found that "the racial composition of the majority of the County schools is substantially disproportionate to that of the district as a whole. The Board has made no showing that racial balance is infeasible either generally or with regard to certain schools."[184]

Similarly, and more recently, on February 28, 2008, another federal district court rejected the argument that *PICS* modified de jure desegregation doctrine. In *Hart v. Community School Board of Brooklyn, New York School District #21*,[185] Judge Jack Weinstein, who helped litigate *Brown* and its companion cases as a Columbia law school professor,[186] rejected a request by proposed intervenors that the Court eliminate "race-based quotas" used by the de jure system after granting the school system unitary status.[187] The court rejected the intervenors' argument "that the law has changed making the 1974 remedial order invalid," concluding that "[i]f the facts were the same today as they were in 1974, the same decree would issue because the plaintiffs proved both de facto and de jure segregation" and that "*Brown* still rules."[188]

Not all courts, however, are skittish about restricting the remedial options for de jure systems. On August 21, 2007, in *Fisher v. United States*, the United States District Court for the District of Arizona prohibited the Tucson Unified School District ("TUSD") from continuing a race-based student transfer program intended to increase the racial diversity of the system's schools after making a "*preliminary* finding that any vestiges of de jure segregation in student assignments were eliminated to the extent practicable."[189] Without finding the school system unitary, the court nonetheless

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[183] *Id.* at 56-62.

[184] *Id.* at 53.

[185] No. 72-CV-1041 (JBW), 2008 WL 508002 (E.D.N.Y. Feb. 28, 2008) (Weinstein, J.).

[186] Jack B. Weinstein, Speech, Brown v. Board of Education *After Fifty Years*, 26 CARDOZO L. REV. 289, 289-90 (2004) (stating that he "became the most junior associate, doing research, writing and minor legal chores" with the NAACP Legal Defense Fund). Judge Weinstein has publicly criticized the *PICS* majority for failing to recognize that the Seattle and Louisville school systems "were using racial classifications *to help, rather than*, as in pre-*Brown*, to *denigrate* Blacks" and concluded that *PICS* "corrodes *Brown* by preventing desegregation in fact by school district's [*sic*] seeking to remedy real-on-the ground problems." Jack B. Weinstein, The Role of Judges in a Government of, by, and for the People: Notes for the Association of the Bar of the City of New York, The Fifty-Eighth Cardozo Lecture 217-19 (Nov. 28, 2007) (citations omitted and emphasis in original), *available at* http://www.nyed.uscourts.gov/pub/JBW-2007-Cardozo_Lecture_NOTES.pdf (last visited March 12, 2008).

[187] *Hart*, 2008 WL 508002, at *1, *5 (denying the intervenors' motion as moot).

[188] *Id.* at *10.

[189] Nos. CV 74-90 TUC DCB, CV 74-204 TUC DCB, 2007 WL 2410351, at *13-15 (D. Ariz. Aug. 21, 2007) (emphasis added).

concluded that "[u]nder [*PICS*] this is unconstitutional segregation unless aimed at remedying de jure segregation."[190]

The district court also held that "[s]pecific policies, decisions, and courses of action *that extend into the future* must be examined to assess the school system's good faith"[191] and ordered the TUSD to submit an "exit plan, which will ensure the public and this Court that [the TUSD] is committed to the constitutional principles that were the predicate for this Court's intervention."[192] Such "future plans and provisions" were required to ensure the TUSD's "future good faith and [were] not remedial measures."[193] In contrast, in *Hart* Judge Weinstein did not require any such exit plan, stating that the de jure desegregation case was closed and that any future discriminatory challenge "requires an independent action."[194]

The decisions in *Shelby County* and *Hart* are consistent with the theory that *PICS* does not apply to de jure systems because the legal question addressed by the decision was defined to exclude school systems that had not achieved unitary status. *Fisher*, however, applied *PICS* to pierce the veil of an ongoing desegregation order and imposed strict scrutiny to invalidate one component of the school system's remedial plan.[195] Taken together, these decisions illustrate the absence of uniform interpretation of *PICS* at the district court level and may portend future uncertainty among school systems moving toward unitary status.

V. Beyond the Event Horizon

As discussed below, the oddities and unpredictable effects that occur around the pivot point impact all phases of a desegregation case, including (1) pre-trial settlement consent decrees; (2) the level of scrutiny applied to race-based policies at summary judgment or trial; and (3) the standard of review on appeal.

A. Consent Decrees at the Pivot Point

The first structural oddity created by the pivot point implicates the practice of remedying de jure segregation through voluntary consent decrees be-

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[190] *Id.* at *12-14 (citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2752 (2007)).

[191] *Id.* at *14 (emphasis added).

[192] *Id.* at *15.

[193] *Id.*

[194] *Hart*, 2008 WL 508002, at *10. The court did "request a letter from the Chancellor" to "reassure parents" that "[s]tudents currently attending satisfactorily will be permitted to graduate on schedule" and that the school "will continue to be conducted as a superior magnet school" and will "continue to be conducted as a desegregated school." *Id.* However, the court did not require any additional information or assurances be submitted, finding that based on the record the defendants "are acting in good faith and that they intend to continue the school along its present excellent lines." *Id.*

[195] *See Fisher* at *11.

tween plaintiffs and school systems.[196] While remedies for de jure segregation exist in a variety of formats, ranging from private settlement agreements to judicial orders, consent decrees are a popular and ubiquitous legal device[197] used by parties in desegregation cases to dispense with issues of liability and establish remedial plans outside of court.[198] Consent decrees are a hybrid of private contract law and public law adjudication; they incorporate the contractual features of private settlement agreements but bear the imprimatur of judicial authority that emanates from a court order.[199] Because consent decrees resemble a contract, the parties to the decree can negotiate equitable remedies for alleged de jure segregation unencumbered by the atmosphere of adversarial litigation or the constraints of rigid legal principles.

Plaintiffs in school desegregation cases find consent decrees attractive for several reasons. Plaintiffs can achieve expedited results through a consent decree at substantially reduced expense because consent decrees obviate the need for protracted litigation. Perhaps more importantly, the voluntary nature of a consent decree[200] grants plaintiffs the latitude to bargain for remedies that exceed what the Constitution would require a defendant to under-

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[196] Because federal courts lacked the resources to enjoin every school system in the nation, federal district courts "encouraged voluntary plans for integration" and looked favorably on school systems "that worked with courts to produce integration plans and maintained them over time without court supervision." PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISION MAKING 101 (5th ed. Supp. 2007). Moreover, the U.S. Department of Health, Education, and Welfare (the predecessor of the current U.S. Department of Education) encouraged voluntary out-of-court private desegregation settlement agreements with de jure systems called Form 441-B plans. *See supra* note 12.

As a result, many de jure systems desegregated voluntarily. For example, in *McDaniel v. Barresi*, a Georgia school system voluntarily adopted race-based policies to dismantle its dual system without any court order or even a pending lawsuit. McDaniel v. Barresi, 402 U.S. 39, 40 (1971). Although the Supreme Court of Georgia had sided with parents who had obtained a state court order enjoining the operation of the voluntary, race-based school desegregation plan, the Supreme Court reversed, concluding that "[i]n this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' . . . Any other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel*, 402 U.S. at 41. In *PICS*, Chief Justice Roberts commented that "no one questions that the obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect." 127 S. Ct. at 2761.

[197] *See, e.g.*, Maimon Schwarzchild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 888 (1984) (describing the frequency with which school desegregation cases result in consent decrees).

[198] One report indicates that as of 1994, 1,094 school districts were involved in segregation lawsuits after *Brown I*. JOHN LOGAN & DEIRDRE OAKLEY, LEWIS MUMFORD CTR. FOR COMPARATIVE URBAN AND REGIONAL RESEARCH, THE CONTINUING LEGACY OF THE *BROWN* DECISION: COURT ACTION AND SCHOOL SEGREGATION, 1960-2000 (Jan. 28, 2004).

[199] *See, e.g.*, Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992) ("A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees."); United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

[200] Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 521-22 (1986).

take.[201] Finally, plaintiffs seeking remedies tailored to their alleged injuries are in a better position to procure those remedies in the informal context of a consent decree negotiation than in open court, where a judge could order relief that differs from the plaintiff's preferred remedy.[202]

For defendants, consent decrees offer a means of resolving a plaintiff's grievances without conceding liability.[203] Defendants wary of the adverse publicity accompanying liability findings, or who wish for strategic reasons to reserve their right to contest liability at a later date, may opt to enter into a consent decree as an alternative to litigating their liability in court. Significantly, the absence of liability findings in the decree does not weaken the binding effect of a consent decree.[204] Defendants that enter into consent decrees while disclaiming liability must abide by the terms of the decree (and any additional legal obligations that flow from those terms) just as if they had been found liable by a court.[205]

While the parties to a desegregation lawsuit have strong incentives to enter into consent decrees, the federal courts charged with implementing *Brown* have recognized that consent decrees are also a boon to their own enforcement efforts. Aside from increased judicial economy, the movement to memorialize desegregation remedies in consent decrees, as opposed to court orders, has assuaged the fears of federal judges that school systems would resist complying with desegregation plans imposed unilaterally after an adversarial proceeding.[206] The Fifth Circuit has observed that settlement is a "method of resolving school desegregation matters that is preferable to complete litigation"[207] because "'the spirit of cooperation inherent in good faith settlement is essential to the true long-range success of any desegregation remedy.'"[208] After approving a consent decree, the court retains jurisdiction to enforce the terms of the agreement,[209] to modify it in appropriate

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[201] *See* Wendy A. Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 543 (1999) ("A consent decree is not confined to the minimum requirements of the decisional law at issue, and thus the parties can agree to terms that the court could not have ordered after establishing liability.").

[202] *Id.*

[203] *See* 18A CHARLES WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4443 (3d ed. 2007) ("[T]he central characteristic of a consent judgment is that the court has not actually resolved the substance of the issues presented.").

[204] *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 604 (2001) ("Although a consent decree does not always include an admission of liability by the defendant, it nonetheless is a court-ordered change in legal relationships between the plaintiff and the defendant.") (internal citations omitted).

[205] *See, e.g.*, *id.* (reasoning that consent decrees represent a court-ordered change in legal relationship between parties and so can provide basis for award of attorney's fees); 18A WRIGHT, *supra* note 203 (explaining that consent decrees have preclusive effect on later litigation if parties agree to such terms).

[206] *See* BREST ET AL., *supra* note 196, at 101.

[207] Jones v. Caddo Parish Sch. Dist., 704 F.2d 206, 222 n.25, (5th Cir. 1983), *aff'd on reh'g*, 735 F.2d 923 (5th Cir. 1984).

[208] *See Jones*, 704 F.2d at 221 (internal citation and quotation omitted).

[209] *See* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992).

circumstances,[210] and to terminate the decree once the parties have satisfied its conditions.[211]

Although consent decrees adopt the qualities of a court order once approved by a judge, they are distinguishable from other judicial orders in one subtle but crucial respect. While the basis for enforcing a court order is the legal violation that prompted the lawsuit, the Supreme Court has held that judicial authority to enforce a consent decree derives exclusively from the contractual bargain struck by the parties, and not "from the force of the law upon which the complaint was originally based."[212] Accordingly, if a court is asked to enforce a consent decree, its remedial powers are limited to ensuring that both parties receive the benefit of their bargain; it lacks the authority to alter the parties' agreement by invoking the law that formed the predicate of the plaintiffs' lawsuit.[213]

Since parties negotiate consent decrees—like any other contract—against the backdrop of existing statutory and constitutional law, a decree cannot compel parties to violate a law or constitutional provision.[214] If a contract purports to contravene public law, it is void and unenforceable as contrary to public policy.[215] These constraints maintain an orderly hierarchy of law in which parties can contract to create private obligations that go beyond the dictates of public law but may not contractually absolve each other of duties imposed by state or federal law.

This hierarchy functions smoothly when public law is transparent and consistent. If the Supreme Court had affirmed the voluntary choice programs in *PICS*, or ruled that race-based policies in both de jure and de facto systems were subject to the same strict scrutiny requirements, then parties and courts would have little difficulty engineering remedial plans consistent with the Court's stable interpretation of the Equal Protection Clause. Instead, the Court fashioned a pivot point that dramatically alters the constraints imposed by the Equal Protection Clause in de jure and de facto systems.

Under this regime, the level of scrutiny used to evaluate race-based policies depends upon whether observable segregation is de jure or de facto.[216] However, this determination is not conclusive unless it takes the form of a liability finding. The pivot point thus produces significant tension

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[210] *See id.* at 383-84 (handing down standards for modifying consent decrees).

[211] *See* Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 249-50 (1991) (describing findings necessary to terminate consent decree).

[212] Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522 (1986).

[213] *Id.* at 522.

[214] RICHARD LORD, ED., 6 WILLISTON ON CONTRACTS §§ 12:1, 12:4 (4th ed. & Supp. 2007).

[215] *See* McMullen v. Hoffman, 174 U.S. 639, 654-55 (1899) ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way toward carrying out the terms of an illegal contract."); *see also* Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 357 (1931) ("In determining whether the contract . . . contravenes the public policy of [the state], the Constitution, laws, and judicial decisions of that state . . . are to be considered.").

[216] *See infra* notes 229-257 and accompanying text.

between the dual-natured Fourteenth Amendment, now construed through the lens of liability findings, and the contractual attributes of consent decrees, which permit parties to negotiate remedial plans without resolving or even addressing liability.[217]

This tension produces bizarre effects that warp the traditional relationship between public and private law. Consider a consent decree entered prior to *PICS* that requires a school system to implement race-based policies, but contains no finding that the school system is liable for operating a de jure system.[218] Suppose a third party, citing *PICS*, challenges the consent decree on grounds that any remaining segregation in the school system is exclusively de facto, and hence the race-based policies ordered by the decree violate the Equal Protection Clause. Since the court's enforcement jurisdiction does not derive from public law but rather from the parties' contractual bargain,[219] the consent decree is not rendered unenforceable simply because the law that furnished the basis for the plaintiff's claim was altered by the Supreme Court. Similarly, because the school system remains bound by the court order, *PICS* would not entitle the defendant school system unilaterally to disband its race-based policies in violation of the consent decree.[220]

In extraordinary circumstances an intervening change in the law can prompt a court to modify the terms of a consent decree.[221] However, under the standard promulgated in *Rufo v. Inmates of Suffolk County Jail*, a party seeking to modify a consent decree bears the burden of establishing that the change in legal circumstances is significant enough to warrant revising the terms of the parties' original bargain.[222] It is unlikely that *PICS* qualifies as such a transformative legal event, since *PICS* does not expressly modify the legal obligations of de jure systems.

A third party claiming injury from a race-based policy sanctioned by a consent decree must either argue that the consent decree entered by the court

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[217] *Cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2810 (2007) (Breyer, J., dissenting) ("A court finding of de jure segregation cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated *by law* voluntarily desegregated their schools *without a court order*—just as Seattle did.").

[218] *See generally* Dean v. City of Shreveport, 438 F.3d 448 (5th Cir. 2006) (ruling "race-conscious" remedial programs implemented under a consent decree need not be accompanied by a "formal finding of past discrimination"); San Francisco NAACP v. San Francisco Unified Sch. Dist. (*Ho*), 413 F. Supp. 2d 1051 (N.D. Cal. 2005).

[219] Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522 (1986).

[220] *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 439 (1976) ("[T]his Court has held that even though the constitutionality of the Act under which the injunction issued is challenged, disobedience of such an outstanding order of a federal court subjects the violator to contempt even though his constitutional claim might later be upheld.") (citing United States v. Mine Workers, 330 U.S. 258 (1947)).

[221] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383-85 (1992).

[222] *Id.*

lacked an adequate factual basis,[223] or that the court should terminate the decree because an analysis of the *Green* factors indicates the school system has achieved unitary status.[224] While both arguments offer a legal justification for invalidating portions of a remedial plan, they are a poor substitute for strict scrutiny, which would hold the proponents of race-based policies to a much higher standard to justify their continued implementation.[225]

As this scenario illustrates, the legal significance of a consent decree cannot be overstated. By contracting around the issue of de jure liability, the parties effectively insulated the decree from strict scrutiny review, which *PICS* mandates for race-based policies in de facto systems. Had the issue of liability been litigated, a judicial finding of no liability would almost certainly have precluded the school system from using race-based policies to address segregation after *PICS*. The pivot point therefore has the bizarre effect of allowing parties to manipulate the level of constitutional scrutiny applied to race-based policies by contractually agreeing to implement such policies without a formal finding of liability. Not only does this phenomenon invert the hierarchy of public and private law, but it may unjustly immunize certain race-based policies in consent decrees from viable Equal Protection challenges.

Theoretically, school systems like Louisville and Seattle that wish to implement race-based policies to alleviate segregation but are pessimistic that these initiatives would survive strict scrutiny review after *PICS* could exploit this structural flaw. By aligning with like-minded plaintiffs and stipulating to de jure liability in a consent decree, the school system could avail itself of the more favorable affirmative duty standard that applies to de jure systems.[226] Justice Breyer anticipates this possibility in his dissent and wonders whether Seattle could evade the impact of *PICS* and preserve its voluntary choice plan by conceding liability: "Is Seattle free on remand to say that its schools were de jure segregated, just as in 1956 a memo for the School Board admitted?"[227]

The pivot point leaves federal courts with two unattractive options after *PICS*. First, courts could refuse to enter consent decrees that order race-based policies without an express judicial finding of de jure liability. Aside

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[223] *See Dean*, 438 F.3d at 455 ("It is when a remedial program is challenged that a trial court must make a factual determination that there was a strong basis in evidence for the conclusion that remedial action was necessary.").

[224] *See supra* text accompanying notes 59-66.

[225] *See infra* text accompanying notes 235-238.

[226] An interesting question arises as to whether a lawsuit filed collusively for the purpose of memorializing race-based policies in a consent decree would satisfy the case or controversy requirement of Article III. One commentator has noted that "[t]he Supreme Court . . . has rejected the argument that consent decrees do not meet the case or controversy requirement." Randolph D. Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1819 n.47 (1986) (citing Swift & Co. v. United States, 276 U.S. 311, 326 (1928)).

[227] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2810 (2007) (Breyer, J., dissenting).

from undermining judicial economy and increasing the acrimony and expense of institutional reform litigation, such hearings could produce the unseemly spectacle of school systems indicting their own official policies over the objections of students who stand to suffer harm from the race-based policies at issue. Alternatively, federal courts could maintain the status quo, and permit stipulated liability provisions to artificially suppress the Equal Protection claims of students in the racial majority. Like other consequences of the pivot point, the proper role of consent decrees in segregation lawsuits is unlikely to reach resolution in the immediate future.

B. Applying the Appropriate Constitutional Test to De Jure and De Facto Systems After PICS*: Affirmative Duty Versus Strict Scrutiny*

Prior to *PICS*, the legal standards governing race-based policies for addressing de jure and de facto segregation were distinct. An affirmative duty framework governed race-based policies to ameliorate de jure segregation, while race-based policies in the de facto realm were subject to a strict scrutiny framework.[228] *PICS* muddies the clarity of this dichotomy by merging elements of both frameworks at the pivot point.[229]The proximity of these competing legal rules at the point of unitary status may permit strict scrutiny considerations to bleed into the evaluation of race-based policies in de jure systems previously subject only to the more lenient affirmative duty framework. The difficulties inherent in diagnosing segregation as de jure or de facto compound this concern, particularly as the effects of Jim Crow segregation continue to recede while newer but more subtle forms of discrimination take root.

The choice of rule is often dispositive of litigation over a de jure system's race-based policies because they are substantially more likely to satisfy affirmative duty than strict scrutiny. Indeed, the major distinction between these standards is the allocation of burdens between the proponents and opponents of a race-based policy; Justice Scalia has observed that "allocation of the burden of proof foreordains the result in almost all" of the de jure desegregation cases.[230]

Affirmative duty incorporates the presumption, "often irrebuttable in practice, that a presently observed [racial] imbalance has been proximately caused by intentional state action during the prior de jure era."[231] This pre-

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[228] Heeren, *supra* note 139 (manuscript at 17).

[229] *See supra* text accompanying notes 170-179.

[230] Freeman v. Pitts, 503 U.S. 467, 503 (1992) (Scalia, J., concurring).

[231] United States v. Fordice, 505 U.S. 717, 745 (1992) (Thomas, J., concurring) (citations omitted); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971) (stating that "in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition").

sumption operates to protect a race-based policy that benefits the minority victims of the de jure system, even if the policy's effect is to subject white and minority students to unequal treatment.[232] The decision in *Green* that promulgated the affirmative duty framework actually invalidated a race-neutral student assignment plan that comported with an anticlassification view of the Fourteenth Amendment[233] but violated antisubordination principles that reigned supreme in the Equal Protection jurisprudence of that period.[234]

Strict scrutiny, by contrast, is presumptively "fatal in fact" to policies that incorporate racial classifications.[235] In *PICS*, Roberts reiterated that "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny" and explicitly rejected Breyer's argument that "motives affect the strict scrutiny analysis."[236] The Court's historically aggressive application of the compelling interest and narrow tailoring prongs of the strict scrutiny test[237] reflect Roberts' anticlassification credo that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[238]

1. Strict Scrutiny in De Jure Desegregation Law

Though the affirmative duty framework has long enjoyed primacy in de jure desegregation law, the Supreme Court has sporadically invoked strict scrutiny principles to assign liability and establish remedial limits in de jure

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[232] Justice Thomas has commented, "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior." Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

[233] Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 440 (1968).

[234] *Accord* William Rich, Brown*, Dominance, and Diversity*, 43 WASHBURN L.J. 311, 324 (2004).

[235] Gerald Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Joseph Brunner, *Square Pegs Into Round Holes? Strict Scrutiny and Voluntary School Desegregation Plans*, 75 U. CIN. L. REV. 791, 791 (2006) ("For most of the second half of the twentieth century, applying strict scrutiny to a challenged statute or policy meant that the statute at issue would be held unconstitutional."). *But see, e.g.*, Grutter v. Bollinger, 539 U.S. 305, 326 (2003) ("Strict scrutiny is not strict in theory, but fatal in fact.") (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995)) (internal quotations and citation omitted).

[236] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1 (*PICS*), 127 S. Ct. 2738, 2764-65 (2007) (plurality) (internal quotations omitted), 2762 n.16 (plurality) (agreeing that strict scrutiny of *all* racial classifications has been "definitively determined"), 2774 (Thomas, J., concurring) ("We have made it unusually clear that strict scrutiny applies to *every* racial classification.").

[237] As a doctrinal matter, remedying past intentional discrimination in systems governed by desegregation orders qualifies as a "compelling interest" to satisfy this heightened standard of review. *PICS*, 127 S. Ct. at 2752 ("[O]ur prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination.") (quoting *Adarand*, 515 U.S. at 227).

[238] *Id*. at 2768; *accord* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 115-16 (5th ed. 2004); Kimberly Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 435 & n.227 (2006).

cases. On the day the Warren Court announced its decision in *Brown I*, the Court applied strict scrutiny to strike down the District of Columbia's federal de jure education system in *Bolling v. Sharpe*.[239] Though the Warren Court summarily cited *Brown I* in a number of subsequent *per curiam* opinions outlawing segregation in public facilities and accommodations,[240] it later invoked strict scrutiny principles to invalidate antimiscegenation statutes in *McLaughlin v. Florida*[241] and *Loving v. Virginia*.[242]

While strict scrutiny never replaced affirmative duty in de jure segregation cases, echoes of strict scrutiny appear in opinions handed down by the Burger and Rehnquist Courts. In *Milliken II*[243] and *Jenkins*,[244] the Court required that remedial policies in desegregation plans exhibit some nexus with the underlying constitutional violation that triggered the remedy,[245] a rule reminiscent of the narrow tailoring prong of the strict scrutiny standard. In *Freeman v. Pitts*, the Court discussed the temporal limitations implicit in de jure remedial plans, observing that as "the de jure violation becomes more remote in time . . . it becomes less likely that a current racial imbalance in a school system is a vestige of the prior de jure system."[246] The finite duration of race-conscious policies is a constraint closely associated with strict scrutiny jurisprudence; as the Court would later note in *Grutter*, all race-conscious policies "have a termination point" that should be less than 25 years.[247]

The slow creep of strict scrutiny in de jure jurisprudence arguably weakened the affirmative duty framework, but did not supplant it. In 1995, the Court rejected an opportunity to substitute strict scrutiny for the affirmative duty standard in *Missouri v. Jenkins*,[248] a desegregation case decided the same day as *Adarand Constructors, Inc. v. Peña*.[249] *Adarand* is a seminal employment law decision that established the uniform application of strict

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[239] Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.") (citing Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[240] *See supra* note 126.

[241] 379 U.S. 184, 192 (1964) (citing *Brown II*, 349 U.S. at 294; *Bolling*, 347 U.S. at 499; *Korematsu*, 323 U.S. at 216; *Hirabayashi*, 320 U.S. at 100).

[242] 388 U.S. 1, 11-12 (1967) (citing *McLaughlin*, 379 U.S. at 198 (Stewart, J., joined by Douglas, J., concurring); *Korematsu*, 323 U.S. at 216; *Hirabayashi*, 320 U.S. at 100); *see also* Siegel, *supra* note 39, at 1502-04.

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

[244] Missouri v. Jenkins, 515 U.S. 70 (1995).

[245] *Id.* at 88 (quoting *Milliken II*, 433 U.S. at 280-81).

[246] 503 U.S. 497, 496 (1992). In light of *Freeman*, a panel of the Tenth Circuit reiterated the applicability of affirmative duty to de jure desegregation despite the passage of time in the original *Brown* case. Brown v. Bd. of Educ., 978 F.2d 585, 590-91 (10th Cir. 1992).

[247] Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

[248] 515 U.S. 70 (1995).

[249] 515 U.S. 200 (1995); *cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1 (*PICS*), 127 S. Ct. 2738, 2762 (2007) (plurality) ("[W]hen *Swann* was decided, this Court had not yet confirmed that strict scrutiny applies to racial classifications like those before us.").

scrutiny to all racial classifications.[250] Justice O'Connor's concurring opinion in *Jenkins* attempts to reconcile the Court's endorsement of two competing legal standards in the education and employment contexts by arguing that racial classifications in legislation should face more searching scrutiny than racial classifications imposed by federal courts in the exercise of their remedial authority.[251]

2. *The End of Affirmative Duty?*

The *PICS* decision unambiguously establishes strict scrutiny as the relevant test for evaluating race-based policies in de facto systems,[252] and arguably insinuates that district courts should evaluate remedial plans in de jure systems against the same standard.[253] The possible absorption of strict scrutiny principles into de jure education jurisprudence[254] raises two interesting

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[250] *PICS*, 127 S. Ct. at 2751-52 (majority), 2762 n.16 (plurality), 2774 (Thomas, J., concurring) (all citing or quoting *Adarand*); BELL, *supra* note 238, at 115-16.

[251] *See Jenkins*, 515 U.S. at 112 (O'Connor, J., concurring). Similarly, Justice Scalia stated earlier in *Richmond v. J.A. Croson Co.*:

> While thus permitting the use of race to *de* classify racially classified students, teachers, and educational resources, however, we have also made it clear that the remedial power extends no further than the scope of the continuing constitutional violation. . . . And it is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race.

488 U.S. 469, 525 (1988) (Scalia, J., concurring) (citations omitted). In one of the Rehnquist Court's later decisions, *Johnson v. California*, Justice O'Connor applied strict scrutiny to government-sponsored racial segregation in a state prison while citing to *Brown I*. 543 U.S. 499, 506 (2005) (citing *Brown I*, 347 U.S. at 483). Comparing *Johnson* to the Warren Court's summary per curiam opinions that outlawed segregation in related contexts, *see supra* note 126, one might conclude that *Johnson* "curiously reopened the segregation question by replacing the post-*Brown* ban on racial segregation with the strict scrutiny standard of review afforded to all other racial classifications, thereby muddying the once clear doctrinal waters." Brandon N. Robinson, Johnson v. California: *A Grayer Shade of* Brown, 56 DUKE L.J. 343, 343 (2006) (citations omitted).

Although never examined by the Supreme Court, the lower federal courts have examined with mixed results the situation when strict scrutiny and affirmative duty must co-exist: when a de jure system utilizes a racial classification in the area where the system is partially unitary. *See* Cavalier v. Caddo Parish Sch. Bd., 403 F.3d 246, 260 (5th Cir. 2005) (finding race-based magnet admissions policy adopted after termination of a consent decree not narrowly tailored to remedy the present effects of past segregation despite no explicit finding of partial unitary status with regard to magnet schools); Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 343-45 (4th Cir. 2001) (en banc) (Traxler, J., concurring in part and dissenting in part) (applying strict scrutiny to magnet admissions policy adopted by then-de jure system); Wessmann v. Gittens, 160 F.3d 790, 794-95, 800 (1st Cir. 1998) (applying strict scrutiny and employment discrimination standard requiring a "strong basis in evidence" to justify compelling interest "to eradicate the effects of past discrimination" and rejecting the school system's argument that the challenged admissions policy was "a means of redressing the vestiges of past discrimination"). In *Cavalier*, the dissent is notable because it argues that the majority incorrectly applied the strict scrutiny framework instead of the affirmative duty framework. 403 F.3d at 271 (Wiener, J., dissenting); *see also supra* text accompanying notes 110-111.

[252] *See supra* note 238.

[253] *See id.*; *supra* text accompanying notes 154-158.

[254] *See also* Fisher v. United States, Nos. CV 74-90 TUC DCB, CV 74-204 TUC DCB, 2007 WL 2410351, at *11-14 (D. Ariz. Aug. 21, 2007).

questions. First, can the affirmative duty framework adjust to fit within the two-pronged strict scrutiny framework? Second, what standard should apply to race-based policies purporting to remedy new occurrences of de jure segregation?

Roberts' majority opinion in *PICS* appears to assimilate the affirmative duty framework into the strict scrutiny framework by characterizing the goal of all de jure systems—"remedying the effects of past intentional discrimination"—as a compelling interest under the first prong of the strict scrutiny analysis.[255] Because all de jure systems appear to satisfy the compelling interest prong, the critical inquiry becomes whether the narrow tailoring requirement would function as a meaningful constraint on the use of race-based policies by de jure systems. The purpose of narrow tailoring is to ensure a proper means-end fit between the race-based policy and a valid compelling interest.[256] The requirement is difficult to satisfy because, as Kennedy notes in his concurring opinion, it generally compels the proponents of race-based policies to prove that racial classifications are necessary to achieve the compelling interest and that race-neutral alternatives are demonstrably ineffective.[257]

Moreover, the retrospective compelling interest of remedying past discrimination differs markedly from prospective interests recognized as compelling in *PICS*, such as attaining *Brown*'s promise of equal educational opportunity or alleviating racial isolation.[258] Unlike these forward-looking objectives, which yield benefits no matter when they are realized, the longer it takes to achieve the backward-looking objective of remedying past discrimination, the more the value of that compelling interest is diminished.[259] As the Court noted in *Bradley*, "delays in desegregating school systems are no longer tolerable."[260] If school systems can only meaningfully achieve this compelling interest by achieving it quickly, then race-neutral policies that seek to remedy the vestiges of de jure segregation would fail to provide the requisite means-end fit unless they could succeed as quickly as race-based policies. Accordingly, proponents of race-based policies may be able to argue, somewhat counterintuitively, that in this context the narrow tailoring requirement is coterminous with the affirmative duty framework. By extension, neither standard should invalidate race-based policies designed to remedy past discrimination.

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[255] *PICS*, 127 S. Ct. at 2752 (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

[256] *See* Michael J. Kaufman, *(Still) Constitutional School De-Segregation Strategies: Teaching Racial Literacy to Secondary School Students and Preferencing Racially-Literate Applicants to Higher Education*, 13 MICH. J. RACE & L. 147, 153 (2007) (citing Wygant v. Jackson Bd. of Educ., 467 U.S. 267, 280 n.6 (1986)).

[257] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1 (*PICS*), 127 S. Ct. 2738, 2793-94 (2007) (Kennedy, J., concurring).

[258] *Id.* at 2791-92.

[259] *See Freeman*, 503 U.S. at 496.

[260] Bradley v. Sch. Bd. of Richmond, 382 U.S. 103, 105 (1965).

The second question raised by the potential assimilation of strict scrutiny principles into de jure jurisprudence is the standard federal courts should apply to evaluate race-based policies intended to address new occurrences of de jure segregation that are not traceable to the Jim Crow era.[261] Justice Thomas, concurring in the result of *PICS*, argues that the affirmative duty framework cannot exist to validate race-based policies indefinitely: "Even if these measures were appropriate as remedies in the face of widespread resistance to *Brown*'s mandate, they are not forever insulated from constitutional scrutiny."[262] In his view, "the further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation."[263] This begs the question of how new instances of de jure segregation differ in substance, kind or effect from Jim Crow era de jure segregation, such that affirmative duty should govern the latter while strict scrutiny should control the former.

C. The Standard of Review for Unitary Status Determinations

The level of deference that an appellate tribunal accords the rulings of a lower court, otherwise known as the standard of review, is a foundational element of our judicial system. Standards of review define the relationship between courts in the federal system by dividing power between trial courts and appellate courts.[264] As discussed below, the pivot point may suspend or distort the standard of review for unitary status determinations, with pernicious consequences.

In the federal system, determining the appropriate standard of review for a district court decision on appeal is normally straightforward. Under the Federal Rules of Civil Procedure, the appeal of a pure issue of fact is reviewed for clear error.[265] If the appellant argues that the court failed to apply the correct law, the standard of review is de novo. There is some disagreement in the circuits over the proper standard of review for mixed questions

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[261] Although the possibility of future segregated schools may appear remote, private plaintiffs alleged the present operation of segregated public schools in 1998. Thomas County Branch of NAACP v. Thomasville Sch. Dist., 299 F. Supp. 2d 1340 (M.D. Ga. 2004) (finding system not in violation of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964). *See also* Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325 (11th Cir. 2005). Fifty years after *Brown*, researchers found that segregationist laws and laws used to support segregation remained in Georgia, Louisiana, Mississippi, South Carolina, Virginia, and West Virginia statutes. Jim Crow Study Group, University of Arizona James E. Rogers College of Law and Eller College of Management, *Still on the Books: Jim Crow and Segregation Laws Fifty Years After* Brown v. Board of Education: *A Report on Laws Remaining in the Codes of Georgia, Louisiana, Mississippi, Missouri, South Carolina, Virginia, and West Virginia*, 2006 MICH. ST. L. REV. 460 (2006).

[262] *PICS*, 127 S. Ct. at 2771 n.6 (Thomas, J., concurring).

[263] *Id.* at 2773.

[264] *See generally* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, 1 FEDERAL STANDARDS OF REVIEW 1-2, 1-3 (3d ed. 1999).

[265] FED. R. CIV. P. 52(a).

of law and fact;[266] some circuits apply a deferential "clear error" standard while other circuits review these questions de novo.[267] Ultimately, however, the appropriate standard of review reveals itself once the appellate court fixes the contested ruling at the proper point along the fact-law spectrum.

Perhaps no rulings receive as much deference from appellate courts as the decisions issued by district courts in desegregation cases. For both historical and pragmatic reasons, courts of appeals perceive remedial orders and unitary status determinations as lying within the heartland of pure factual issues reviewed only for clear error.[268] This high level of deference is not only a function of the fact-intensive nature of a unitary status determination[269] and the superior perspective of local trial judges with experience overseeing a particular school system,[270] but also reflects the breadth of the district court's equitable powers to remedy the effects of de jure segregation after the inception of a court order.[271]

Prior to *PICS*, it was difficult to envision circumstances that could shake this strong tradition of deference to a district court's unitary status rulings. With the creation of the pivot point, however, the significance of a unitary status determination is no longer limited to a one-dimensional inquiry of whether a school system has satisfied its legal obligation to desegregate its schools and eradicate the vestiges of de jure segregation.[272] In holding that the Equal Protection Clause forbids school systems from using race-based policies to address the effects of de facto segregation, the *PICS* majority determined that non-minority students have a constitutional right *not* to be subject to race-based policies once their school system achieves unitary status.

This holding adds a second dimension to unitary status rulings. Now the determination of whether a school system has achieved unitary status is no longer just a referendum on a school system's progress in eliminating de jure segregation, but also a legal determination of whether that system is constitutionally permitted to maintain policies that discriminate against students

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[266] Mixed questions of law and fact arise when the facts of the case are settled and the law is undisputed, but the losing party argues that the court misapplied the agreed-upon law to the agreed-upon facts. *See* Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

[267] *See* Evan Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991).

[268] Jenkins v. Missouri, 807 F.2d 657, 666-67 (8th Cir. 1986) ("The Supreme Court has emphasized the importance of the clearly erroneous rule in civil rights cases, and, more particularly, in school desegregation cases.") (citations omitted); *see also* Anderson v. Sch. Bd. of Madison County, No. 06-60902, 2008 WL 353203, at *2 (5th Cir. Feb. 11, 2008); Brown v. Board of Educ., 978 F.2d 585, 589, 594 (10th Cir. 1992); Flax v. Potts, 915 F.2d 155, 157-58 (5th Cir. 1990); Pitts v. Freeman, 887 F.2d at 1438, 1444 (11th Cir. 1989).

[269] *See* Morgan v. Burke, 929 F.2d 86, 88 (1st Cir. 1991) ("The determination that a school system has or has not reached a point of 'maximum practicable desegregation' in the composition of its faculty and staff is a fact-intensive one. Findings are reversible only if clearly erroneous.") (citations omitted).

[270] *See Anderson*, 2008 WL 353203, at *2; *Flax*, 915 F.2d at 157-58.

[271] *See* Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 15, 31 (1971).

[272] *See supra* text accompanying notes 87-90.

on the basis of race. And while appellate deference reaches its apex in desegregation decisions, appellate courts apply a de novo standard of review when a challenged law or policy impinges on fundamental rights, thereby triggering strict scrutiny.[273] So if, as Chief Justice Roberts states in *PICS*, "[i]t 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,"[274] a district court's decision to deny a school system unitary status and continue the operation of race-based policies should receive de novo review.

Unitary status determinations straddle two areas of Equal Protection Clause jurisprudence with diametrically opposing qualities—de jure desegregation cases, which are fact intensive and reviewed for clear error, and de facto race-based affirmative action cases, which are subject to strict scrutiny and reviewed de novo by appellate courts. These determinations now simultaneously adopt the character of both a pure question of law *and* a pure question of fact. Thus, the pivot point introduces a bizarre wrinkle into the exercise of applying the proper standard of review, and raises the question of whether appellate courts are limited to reviewing unitary status determinations for clear error after *PICS*.

Theoretically, the issue of unitary status could reach an appellate court via two different paths. In a lawsuit between the original plaintiffs and the school system, the party adversely affected by a district court's unitary status ruling could appeal the decision on grounds that the court incorrectly awarded or withheld unitary status on the basis of an erroneous application of the multi-factor *Green* test.[275] In this traditional posture, the issue on appeal appears to raise an issue of fact subject to clear error review.

On the other hand, new plaintiffs arguing that a de jure system's race-based classifications violate the Equal Protection Clause could intervene in a desegregation case to argue that those policies are unconstitutional because the school system has satisfied the conditions for unitary status notwithstanding the district court's decision or the absence of any formal declaration from the court.[276] Phrased this way, the issue on appeal implicates a legal error. However, selecting a standard of review on the basis of how the alleged error is characterized elevates form over substance and ignores the reality that the question is the same in both instances: has the school system

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[273] *See, e.g.*, Smith v. Univ. of Wash., 392 F.3d 367, 371 (9th Cir. 2004) ("A district court's conclusions regarding the sufficiency of the facts in meeting strict scrutiny are reviewed de novo.") (citation omitted); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2751-52 (2007) (applying de novo review).

[274] *PICS*, 127 S. Ct. at 2751-52 (citing Johnson v. California, 543 U.S. 499, 505-06 (2005); Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Adarand Constructors v. Peña, 515 U.S. 200, 224 (1995)).

[275] *See supra* text accompanying notes 59-66.

[276] *See, e.g.*, San Francisco NAACP v. San Francisco Unified Sch. Dist. (*Ho*), 413 F. Supp. 2d 1051, 1051-53 (N.D. Cal. 2005).

eliminated, to the extent practicable, the vestiges of de jure segregation, such that any remaining segregation is exclusively de facto?[277]

If the characterization of the district court's error fails to illuminate the proper standard of review in desegregation cases, perhaps policy considerations suggest a preference for centralizing authority in district courts as opposed to appellate courts, or vice-versa. Yet the debate between the plurality and the dissent in *PICS* illustrates that compelling policy considerations underscore both the antisubordination and anticlassification positions. Anticlassificationists might argue that injuries arising from race-based classification schemes are equally harmful whether they occur in a de facto or de jure system. Therefore, appellate courts should exercise de novo review to standardize the protocols for unitary status determinations across all school systems. Antisubordinationists could retort that the vestiges of de jure segregation in court-ordered school systems continue to repress minority students, and appellate courts that have comparatively little familiarity with the history or circumstances of a particular school system should not lift the court orders that mandate the removal of these vestiges.[278]

In the end, the appropriate standard of review for unitary status determinations may hinge on a philosophical question: Is unitary status a state that a school system achieves at the moment that all traces of de jure segregation are eliminated, or is it a status that only a federal court, after applying the *Green* factors, can bestow on a school system?[279] There was no reason to pose this question before *PICS*, since the sole significance of unitary status was to end the existence of desegregation orders that a court would never terminate absent an appropriate inquiry and factual findings. Now, however, unitary status is the boundary that separates those school systems that must continue to classify students overtly on the basis of race from those that are constitutionally prohibited from doing so. Accordingly, if a system can technically attain unitary status prior to a district court's formal recognition of this fact, aggrieved students have a legal basis to contest the continued operation of race-based policies prior to a judicial endorsement.

Decisions from the Supreme Court and courts of appeals suggest, but do not expressly hold, that a school system cannot achieve unitary status until it receives the blessing of a district court.[280] If a district court's factual findings are still integral to the attainment of unitary status after *PICS*, then it is difficult to argue that the deferential standard of review that has always

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[277] *See supra* text accompanying note 59-66.

[278] Note that earlier, when district courts were not forcing de jure systems to desegregate fast enough under "with all deliberate speed," the Supreme Court prohibited district courts from amending any desegregation order unless the amendment was first approved by the court of appeals. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 21 (1969). As a result, the courts of appeals temporarily assumed many of the functions normally assigned to the district court.

[279] *See supra* text accompanying notes 59-66.

[280] *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237, 247-50 (1991); Liddell v. Bd. of Educ. of St. Louis, 121 F.3d 1201, 1216 (8th Cir. 1997).

governed these findings should be displaced. If, however, unitary status is not the product of a district court's factual findings, but defined exclusively by the existence or absence of de jure segregation, the determination of how a court should classify any remaining segregation may well be a legal question subject to de novo review.

VI. Conclusion

What makes the pivot point so troubling? To argue that the Equal Protection Clause functions differently in dissimilar contexts is hardly a revelation; the impact of any legal rule is sensitive to circumstance. One overly suggestive comment from an undercover agent can transform criminal solicitation into police entrapment.[281] Omitting a single piece of prior art in a patent application may turn legitimate efforts to protect intellectual property into illegal conduct under antitrust law.[282] The search of a suspect's apartment may be legal or illegal under the Fourth Amendment depending on whether the police officer knocked on the door before entering.[283] In short, it is not unusual for small factual distinctions to have large legal consequences.

The impact of a pivot point is unique because it implicates the role of law in governing human behavior. The nature of law is to establish boundaries between zones of permissible conduct and prohibited conduct. In the zone of prohibited conduct the law imposes consequences for the malfeasor, but within the zone of permissible conduct, the law does not purport to dictate social behavior. A law that establishes a speed limit of thirty miles an hour proscribes individuals from driving faster than thirty miles an hour, but does not otherwise compel individuals to drive at any particular speed. Put differently, laws facilitate the exercise of free will within the zone of permissible conduct, and micromanage only activity that falls within the zone of prohibited conduct.

Legal rules with a pivot point also divide conduct into two zones. But unlike other legal rules, neither zone established by a pivot point provides a sanctuary where the affected parties can act freely. Under the Equal Protection Clause, a school system that has not achieved unitary status may be forced to use race-based policies to undo the effects of de jure segregation.[284] Once a school system achieves unitary status, the same Equal Protection Clause forbids school systems from using the same race-based policies to address the effects of de facto segregation. The entities affected by this pivot point—school systems moving toward unitary status—enjoy no safe haven

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[281] *See generally* Francis C. Amendola, et al., 22 C.J.S. *Criminal Law* § 75 (2007).

[282] *See, e.g.*, Hydril Co. v. Grant Prideco LP, 474 F.3d 1344, 1349 (Fed. Cir. 2007) (holding that the failure to disclose material piece of art can strip patent-holder of exemption from antitrust laws).

[283] *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927, 930-31 (1995) (holding the knock and announce principle to be part of the Fourth Amendment's reasonableness inquiry).

[284] *See supra* text accompanying notes 77-91.

in which they can operate free from the concern that they are running afoul of the Constitution either by considering race too much or not enough.[285] If a primary function of law is to create spheres in which regulated parties enjoy both autonomy and repose, the post-*PICS* Equal Protection Clause has failed de jure systems.

This failure is exacerbated by the second hallmark of a pivot point—the inexact, indiscernible quality of the boundary line between the two zones established by the governing rule. Unitary status determinations are fact-intensive inquiries oriented around a multi-variable standard that is inherently subjective.[286] While the driver of an automobile can mold her behavior to the speed limit by consulting the car's speedometer, a school system cannot necessarily predict with confidence how a federal district court will apply the *Green* factors to resolve a petition for unitary status.

This uncertainty renders school systems peculiarly ill-equipped to conform their conduct to the relevant Equal Protection Clause standard. The version of the Equal Protection Clause that governs the de jure segregation zone reflects an antisubordination ethos that presumptively validates race-based policies with at least nominal effectiveness in eradicating the vestiges of de jure segregation.[287] By contrast, the face of the Equal Protection Clause in the de facto segregation zone is strict scrutiny—an anticlassification standard that presumptively prohibits race-based policies unless they satisfy criteria that are "strict in theory, but fatal in fact."[288]

The cognitive dissonance reflected in the dual zones of the Equal Protection Clause may be singular among constitutional rules, and its consequences are manifest. The pivot point establishes pockets of legal uncertainty that warp the implementation of familiar judicial processes. Further, even school systems that consciously cross the threshold of the pivot point into the de facto zone experience an awkward phase of policy adjustment. Families that purchased homes relying on attendance zone lines and student assignment policies under the de jure regime may experience disarray after the school system achieves unitary status. Two brothers could be forced to attend different high schools because majority-to-minority trans-

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[285] The Fourth Circuit noted:

> [I]f the school board fails to carry out the court desegregation order, it can be cited for contempt or held not to have achieved unitariness. But if the Board acts aggressively to implement the court order, it risks facing judicial condemnation and the threat of litigation on the grounds that it was acting *ultra vires*. This is not the kind of quandary into which we should force institutions that are . . . under judicial decree.

Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 354 (4th Cir. 2001) (Wilkinson, J., concurring).

[286] *See supra* text accompanying notes 59-66.

[287] *See supra* text accompanying notes 120, 122, 130, 167, 232, 277.

[288] *See supra* text accompanying notes 235-238.

fers became unconstitutional between the time the older brother and younger brother matriculated from middle school.[289]

Since *Brown*, the federal courts have addressed race discrimination through a rights-based framework that relies upon increasingly fine distinctions to define the privileges and restrictions that emerge from an individual's racial identity. In its zeal to alter the trajectory of *Brown I* and eliminate constitutional sanction for policies that account for the racial identity of students, the *PICS* majority overlooked the structural impact of *PICS* on de jure systems governed by a very different vision of the Equal Protection Clause. The resulting pivot point is a testament to the dangers of parsing individual rights too finely at the expense of maintaining stability in legal structure and process.

[289] A "majority-to-minority" transfer program is a commonly-used de jure desegregation race-based policy allowing students to transfer from a school at which they are in the majority race to another school at which they are in the minority race. NAACP, Jacksonville Branch v. Duval County Sch., 273 F.3d 960, 985-87 (11th Cir. 2001) (Barkett, J., concurring in part and dissenting in part).