

Recognising situatedness and resolving conflict: Analysing US and South African education law cases

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OPSOMMING

Erkenning van Gesteldheid en Geskilbesleging: Ontleding van Onderwysreg Hofsake in die VSA en Suid-Afrika

Hierdie artikel voer aan dat hofbeslissings, veral die wat op die hoogste vlak gemaak word, nie die produk is van neutral regsbeginsels nie, maar heel dikwels van ideologie. Deur te verwys na sake soos *Morse v Frederick* and *Parents Involved in Community Schools v Seattle School District No 1* in die Verenigde State, sowel as *Mpumalanga Department of Education v Ermelo* in Suid-Afrika, toon hierdie artikel duidelik op hierdie verskynsel wat merkwaardiglik nie algemeen aanvaar word nie. In antwoord daarop, stel die outeurs 'n leerstuk van omstandigheidsbewustheid oftewel “*situational appreciation*”, 'n leerstuk wat bewustheid van 'n besluitnemer se omstandighede in ag neem. Die omstandighede, of konteks, voorsien 'n verskaf 'n konsekwente maatstaf om die beslissende faktore in daardie Hoogste Hof- en Grondwetlike Hof uitsprake te identifiseer, verduidelik, en te bespreek. Daarby bespreek die artikel die invloed van kollegialiteit tussen regters in die hoogste howe, en beveel aan dat die Hoogste Hof in die Verenigde State en die Grondwetlike Hof in Suid-Afrika kollegialiteit beklemtoon om te verhoed dat skerp ideologiese verskille uitsprake beïnvloed, en te verseker dat uitsprake op grond van beginsels deur samewerking verwoord word. Hopenlik sal hierdie ontleding 'n noodsaaklike beskrywende en bepalende konteks verleen aan die uitsprake wat ons lewens voortdurend raak.

1 Situational Appreciation

1 1 Practical Wisdom and the Dominance of Situatedness

According to Gillies life's experiences imbue people with a type of knowledge that enables them to recognise some features of situations or issues as more important, salient, or relevant than others.¹ “Experience contributes to judgment by giving those who have seen many different situations ‘an eye’ for seeing what should be done and guides the process of deliberative specification.”² This type of knowledge – known as

1 Gillies *Getting it right in the consultation: Hippocrates' problem; Aristotle's answer* 2005 *Occas Pap R Coll Gen Pract* 19 (www.ncbi.nlm.nih.gov/pmc/articles/PMC2560890 (accessed 2011-03-08)).

2 *Ibid.*

“practical wisdom” – differs from theoretical knowledge because a person is also required to recognise particulars, actively “sort the unsorted,” and “differentiate the undifferentiated problem *within the domain of life ...*”.³ In this regard, practical wisdom is a step above theoretical or intellectual knowledge.

Bricker⁴ builds upon this insight in the context of educational leadership. He argues that leadership development in the field of education should include the development of one’s perceptual ability to pick out those features of a situation that can be salient for others. This comes from his recognition that perspectives in education law, especially those expressed in court cases, are informed by far more than theoretical legal principles. Instead, they are informed by what legal professionals know and see, and, by implication, who they are.⁵

Though Bricker uses the term “situational appreciation” in his writing, he ascribes a unique meaning to the phrase.⁶ We use the term differently. We believe that it is important to recognise, highlight, reveal or “appreciate” the relative “situation” of a decisionmaker, as this provides a more practical and effective means of resolving conflict. Because it is more instructive to refer to a decisionmaker’s relative situation than it is to refer to his or her situation in isolation, we adopt the term “situatedness.” A person’s “situatedness” is his or her highly-developed, highly-contextualised, environmentally-produced personal constitution as it exists in relation to the situations of others.

The United States Supreme Court and the South African Constitutional Court are by no means immune from this observation. A number of intrinsic and yet extra-legal factors could be considered when attempting to contextualise a particular judge’s situation, such as social background, personal characteristics and life experiences. These contributing factors are best viewed not as contrasting or conflicting ingredients, but as elements that combine to form a judge’s eventual policy preferences.

3 *Idem* 21 (emphasis added).

4 David C. Bricker, *Character and Moral Reasoning: An Aristotelian Perspective* in K.A. Strike and P.L. Ternasky (eds.) *Ethics for Professionals in Education* 13-25 (1993).

5 See *idem* 14: “[I]n specific instances of moral debate, sometimes different judgments arise from differences between what people see, and sometimes what people see is inarguable for them because it is provided by an ability to grasp the salient feature that is partly constitutive of the kind of person they are”.

6 Bricker uses the term “situational appreciation” to describe a person’s proclivity to “appreciate” certain features of a “situation”. See *idem* 15: “Being situationally appreciative is not like being a detective who hypothesises about a case on the basis of evidence. Instead, it is much like aesthetic appreciation; that is, it is a matter of letting the most striking feature of a situation catch one’s eye much as we let the aesthetically prominent features of a painting capture our attention when we perceive beauty”.

This perspective on judicial decision-making is best evidenced by the attitudinal model for judicial behaviour, which argues that justices of the US Supreme Court decide cases largely on the basis of their personal attitudes about social policy, and not on the basis of predetermined law, or precedent. As Segal and Spaeth assert, “ideological considerations have motivated the thrust of the [Supreme] Court's decisions since its inception.”⁷

The other predominant model for judicial decision-making is the legal model, which argues that legal parameters – established legal doctrines, precedent, institutional customs and traditions – better explain judicial outcomes.⁸ However, such legal considerations – textual interpretations, drafters’ intent, the precedential cases that the court is said to consider when making decisions – fail to provide consistent and accurate explanations for Supreme Court decisions. As Bond and Smith point out, “the empirical evidence from analysing judges’ behaviour supports the legal realist and attitudinal models of judicial behaviour.”⁹ It is clear that “evidence for the attitudinal model is stronger.”¹⁰ Therefore, a judge’s personal attitudes about social policy – as constructed by his or her situational history – are the most determinative influences in his or her decision-making process. Therefore, the more advanced inquiry into judicial decision-making seeks to uncover the extent to which situatedness ultimately determines judicial behaviour. While some scholars argue that only *some* judicial decisions can be explained by personal policy preferences, others consider personal ideology to be a “strong but imperfect predictor of voting,”¹¹ or at least “relevant to judicial outcomes.”¹²

This article focuses on the behaviours of judges sitting on a government’s highest court. Because the highest courts in a national government are insulated from judicial review (and, in practice, insulated from legislative and executive review as well) situatedness is likely to be expressed the strongest by those judges who sit on a country’s highest bench. To this extent, the conclusions authored here may not apply to intermediary or trial level courts without some difficulty. But when dealing with the decisions of courts of last resort, a judge’s situatedness should be understood as the single most comprehensive explanatory tool available. Thus decisions that appear to deviate from a decision-maker’s situatedness do not evidence a weakness in the explanatory power of a

7 Segal & Spaeth *The Supreme Court and the Attitudinal Model Revisited* (2002) 300.

8 Bond & Smith *The Promise and Performance of American Democracy* (2009) 571.

9 *Ibid.*

10 Farber & O’Connell *Research Handbook on Public Choice and Public Law* (2010) 39.

11 *Ibid.*

12 Cross *The Theory and Practice of Statutory Interpretation* (2009) 21.

judge's situatedness; instead, these decisions should be treated as evidence of an incomplete calculation of the judge's situatedness.¹³

Regardless of the strictness with which one adheres to the tenets of the attitudinal model, this article will show that the legal model and the legal doctrines of federalism, local control, interventionism, *stare decisis*, originalism, and living constitutionalism are wholly incapable of explaining the US Supreme Court's divergent outcomes in *Morse* and *PICS*, and the South African Constitutional Court's decision in *Ermelo*. Instead, situatedness provides the most viable explanation.

2 *Morse v Frederick*, *PICS* and the Illusion of Neutrality

2.1 *Morse v Frederick*

As the Olympic torch passed through Juneau, Alaska en route to the 2002 Winter Olympic Games in Salt Lake City, Utah, Joseph Frederick, a student at Juneau-Douglas High School, unfurled a 14-foot banner that read "BONG HiTS 4 JESUS".¹⁴ His principal, Deborah Morse, had permitted the students to attend the torch relay as a school-approved social event. Morse quickly confiscated Frederick's banner and suspended him for ten days.¹⁵ Not long thereafter, Frederick filed suit under 42 USC § 1983,¹⁶ alleging that the Juneau School District Board of Education had violated his First Amendment rights.¹⁷

13 Sarat *The Blackwell Companion to Law and Society* (2004) 275 notes how "most observers [now] acknowledge the basic point that judges make 'law and policy' in the inevitable junctures of indeterminacy that punctuate adjudication." This was once a controversial tenet of the critical legal studies movement. It is the authors' belief that, over time, the integrity of explanatory concepts such as objectivity and neutrality will wane, and instead it will be acknowledged by most observers that "[l]egal reasoning and decision-making is anything but a neutral application of principles and is instead affected by dozens of biases on the part of legal professionals that depend on the personal ethical-political values they hold and the characteristics of the sociostructural context in which they were formed". See also Mathieu Deflem *Sociology of Law* (2008) 192.

14 *Morse* 551 US 397.

15 *Ibid.*

16 Title 42, Section 1983 United States Code (USC) provides, in pertinent part: "Every person who, under colour of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured in by the Constitution and laws, shall be liable to the party injured in an action law, suit in equity, or other proper proceeding for redress ..."

17 *Morse* 551 US 399.

2 1 1 Majority decision

The Roberts majority authored by Chief Justice Roberts and joined by justices Alito, Scalia, Thomas and Kennedy – the conservative majority in *Morse* – carved out a novel exception to established First Amendment jurisprudence. The majority used the language of *Tinker v Des Moines School District*, a landmark Supreme Court precedent that emphatically supported the right of free speech by students, to ultimately limit the protections offered by the First Amendment, restating that “First Amendment rights, *applied in light of the special characteristics of the school environment*, are available to teachers and students.”¹⁸ It then took advantage of a right-of-centre opinion handed down by the conservative wing of the 1986 Supreme Court, *Bethel School District v Fraser*.¹⁹ Chief Justice Roberts focused on two issues that were developed by the *Fraser* court: First, the fact that the *Fraser* court was concerned about the *content* of the student’s speech, and second, that the court plurality “also reasoned that school boards have the authority to determine ‘what manner of speech in the classroom or in school assembly is inappropriate.’”²⁰ Using *Fraser* as a channel for the local control principle, the Court subsequently held that *Morse*’s restriction of Frederick’s speech did not constitute a violation of the First Amendment.

2 1 2 Justice Thomas’ Choice

Justice Thomas’ opinion employed an originalist interpretation of the First Amendment. “In my view,” Thomas wrote, “the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”²¹ The logical progression of Thomas’ opinion ultimately led him to support the proposition that local administrators should have control over their schools. “Historically,” he declared, “courts reasoned that only local school districts were entitled to [make judgment calls] about what constitutes substantial interference and appropriate discipline.”²² This use of originalism in *Morse*, however, did not wed him to the local control principle. His faithfulness to this principle will be examined later in this article.

2 1 3 A Tempered Concurrence from Justices Alito and Kennedy

Justice Samuel Alito, joined by Justice Anthony Kennedy, wrote a separate concurrence designed to moderate the conservatism of the plurality opinion. Instead of glossing over *Tinker* and manipulating its language, their concurring opinion reaffirmed the right of students to

18 *Idem* 403 (quoting *Tinker* 393 US 506).

19 *Bethel School District v Fraser* 478 US 675 (holding that the First Amendment permits a public school to punish a student for giving a lewd and indecent, but not obscene, speech a school assembly).

20 *Morse* 551 US 404 (quoting *Fraser* 478 US 683).

21 *Idem* 410-11 (Thomas J concurring).

22 *Idem* 421 (Thomas J concurring).

freely express commentary concerning political or social issues.²³ While the opinion does undercut *Tinker* to some extent, it is grounded in the interest of student safety, not in the principle of local control.²⁴ Because Alito and Kennedy found a different legal vehicle to reach their ends – the interest of student safety – they did not find themselves in need of explicitly advocating the local control principle.

2 1 4 Different Means to a Familiar End: Justice Stephen Breyer's Support of Local Control

The third concurring opinion in *Morse* was rendered by Justice Stephen Breyer, who believed that the Court should have refrained from addressing the First Amendment issue.²⁵ Instead, Breyer wrote that the Court should have found that Principal Morse was protected by qualified immunity.²⁶ Regardless of its form, Breyer's opinion essentially supported an outcome that favoured local control.²⁷

2 1 5 The Liberal Dissent

The liberal dissent in *Morse*, authored by Justice John Paul Stevens and joined by Justices David Souter and Ruth Bader Ginsburg, combined a "Greatest Hits" collection of quotations from famous Supreme Court free speech cases with a concise attack on the political underpinnings of the majority opinion. Stevens constructed a compendium of case citations and quotations that outlined the dire need for the judiciary to overpower local assessments of free speech standards.²⁸ "To the extent the Court defers to the principal's ostensibly reasonable judgment," he wrote, "it abdicates its constitutional responsibility."²⁹ According to Stevens, the First Amendment demands that the judiciary intervene in local practices, because the Court has a "responsibility" to preserve the protections contained in the Constitution.³⁰ This responsibility includes not only a duty to oversee public school districts that adopt unconstitutional policies, but also a duty to regulate those purely legislative bodies who seek to constrain constitutional rights.³¹ As a whole, Stevens drafted a virtual manifesto for the necessity of constitutional interventionism, circumscribing not only the judgments of local officials but also the "alien" legal doctrines that the majority contorts to support its ideological

23 *Idem* 422 (Alito J concurring).

24 *Idem* 425 ("Speech advocating illegal drug use poses a threat to student safety that is just as serious [as actual violence].") (Alito J concurring).

25 "Resolving the First Amendment question presented in this case is, in my view, unwise and unnecessary." *Idem* 425 (Breyer J concurring).

26 *Idem* 429.

27 "Qualified immunity applies here and entitles Principal Morse to judgment on Frederick's monetary damages claim because she did not clearly violate the law during her confrontation with the student." *Idem*.

28 *Idem* 441-444 (Stevens J dissenting).

29 *Idem* 441 (Stevens J dissenting).

30 *Idem* (Stevens J dissenting).

31 *Idem* note 6 (Stevens J dissenting).

outcome.³² This article will later examine how the liberal wing's fidelity to interventionism is ultimately superseded by its policy-making agenda.

2 2 *Parents Involved in Community Schools v Seattle School District No 1*

On the final day of its 2006-2007 term, the US Supreme Court delivered the Roberts Court's most provocative decision yet in *Parents Involved in Community Schools v Seattle School District No 1*. Two public school districts – Seattle, Washington and Jefferson County, Kentucky – had voluntarily adopted student assignment plans that took into account a student's race, so as to ensure that each school's racial makeup fell within a predetermined range.³³ Because the assignment plans required that each school obtain a racial composition that was balanced in this regard, not every student was able to attend his or her first choice school.³⁴ Parents of students who had been denied their top choice filed suit, arguing that assigning students to different public schools on the basis of race violated the Fourteenth Amendment constitutional guarantee of equal protection.³⁵

2 2 1 *Chief Justice Roberts' Plurality Opinion*

The most successful product of Chief Justice John Roberts' plurality opinion, joined by Justices Scalia, Thomas, and Alito, is its articulation of a strict scrutiny standard that would frustrate, if not ultimately invalidate, any future race-conscious remedial programs.³⁶ Because the conservative bloc's respective situatedness disfavours race-conscious integrationist mechanisms, the plurality struck down the efforts of local school administrators, and in the process eschewed the principle of local control, instead employing an expansive reading of the constitutional protections at play. Ultimately, this required the conservative wing to utilise an interventionist mechanism.

The Roberts' opinion employed a number of legal strategies in order to achieve its ends. Not only did the plurality lean heavily on conservative

32 *Idem* 442 (Stevens J dissenting).

33 *PICS* 551 US 701 709-710.

34 *Idem* 713, 716.

35 US Constitutional Amendment XIV § 1 states "No State shall ...deny to any person within its jurisdiction the equal protection of the laws".

36 To satisfy Roberts' strict scrutiny test, K-12 school districts would have to show that their racial classification systems are narrowly tailored to achieve a compelling state interest. This requires a number of novel procedural hurdles: (1) districts would have to show that they considered and rejected plans with a narrower focus; (2) that the plan is only implemented for a limited time; (3) that the plan is to be reviewed periodically; (4) that the plan does not unreasonably harm the rights of third parties; (4) the district cannot set a numerical quota or a goal that results in a *de facto* quota; (5) the district cannot have a separate admissions committee to evaluate minorities; and (6) the district cannot have different numerical cut-offs in admitting minority candidates. See *PICS* 551 US 701 720-732 (plurality opinion).

Supreme Court decisions such as *Adarand Constructors Inc v Pena*,³⁷ but it choose to address the weighty influence of the landmark *Brown v Board of Education*³⁸ case. By selecting *Brown* and its progeny as the appropriate adjudicatory framework, the plurality was forced to weave its position through the Fourteenth Amendment. In order to do so, the opinion decontextualised the language of *Brown* in order to create the appearance that the petitioners in *Brown* would somehow smile upon its use of precedent.³⁹ Though Justice Roberts acknowledged that “[t]he parties and their *amici* debate which side is more faithful to the heritage of *Brown*,” he offered absolutely no evidence to explain the ideological backflip that would be required for the proponents of *Brown* to ever decry the inclusion of more non-white students into the best public high schools available.⁴⁰

2 2 2 Justice Thomas’s Concurrence

Notable in Thomas’ analysis is his distrust for the principle of local control. “I am unwilling to delegate my constitutional responsibilities to local school boards,” Thomas wrote, because he questioned “whether local school boards should be entrusted with the power to make decisions on the basis of race.”⁴¹ Indeed, Thomas found that in this context, relying on local “elites” to pursue legitimate policy created the opportunity for an ironic outcome.⁴² Of course, the integrity of this proposed principle is itself overwhelmed by the irony that accompanies Thomas’ insistence that the judiciary enforce the Fourteenth Amendment in order to restrain those who seek to achieve racial balancing. Altogether, by employing an a contextual interpretation of the

37 *Adarand Constructors Inc v Pena* 515 US 200 (1995). *Adarand* supplies the modern conservative standard for evaluating race-conscious classification systems. It stands for the proposition that federal courts must scrutinise affirmative action programs on the basis of strict scrutiny. Interestingly, the *Adarand* court was “never confronted with the issue of diversity as a compelling interest” and yet it is often used today to stand as a judicial barrier to race-conscious programs. Daniel *Diversity in University Admissions Decisions: The Continued Support of Bakke* 2003 *J of Law and Ed* 69 73.

38 *Brown v Board of Educators* 347 US 483.

39 *PICS* 551 US 701 746-48 (plurality opinion). Justice Roberts disregards the shockingly uneven allocation of educational resources that first motivated the petitioners in *Brown*, and instead focuses on the abstract ideal of racial neutrality, stating that “[i]t was not the inequality of the 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”. *Idem* 746. This legal sanitation excuses Roberts from addressing the stark inequalities that would persist absent the assignment plans.

40 Indeed, “Robert Carter, a retired judge of the Court of Appeals for the Second Circuit, and other members of the *Brown* legal team complained that their briefs had been misrepresented by Roberts and that the Court decision had misinterpreted the meaning of that 1954 unanimous decision”. Daniel, *An Essay: Not So Much a Counterpoint as a Call for Change: The Decision of Parents Involved in Community Schools v Seattle School District No. 1 and Its Impact on America’s Schools* 2008 *Ed L Rep* 511 524-525.

41 *PICS* 551 US 701 782 (Thomas J concurring).

42 *Idem* 780 (Thomas J concurring).

Fourteenth Amendment, Justice Thomas is ultimately forced to discredit the principle of local control.

2 2 3 Justice Kennedy's Ambiguous Compromise

Though Chief Justice Roberts authored the plurality opinion, it is Justice Kennedy's concurring opinion that is known as the controlling decision in *PICS*. Kennedy's concurrence sought to provide a working compromise between the two ideological endpoints. In crafting this compromise, Kennedy first eschewed the harsh strict scrutiny standard employed by the plurality, in part by stating that the plurality opinion "impl[ies] an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."⁴³ Then, Kennedy made a formal entry of his position with regard to the principle of local control: "To the extent the plurality opinion suggests the Constitution mandates that state and local authorities must accept the status *quo* of racial isolation in schools, it is, in my view, profoundly mistaken."⁴⁴ Yet in order to provide balance to his opinion, Kennedy went on to criticise the dissent's unbridled acceptance of racial classification plans, suggesting that precedent forbade such a lenient standard.⁴⁵ Kennedy then employed precedents and *stare decisis* by highlighting the "fundamental difference" between *de jure* and *de facto* segregation cases in the Court's jurisprudence.⁴⁶ Kennedy also leaned on precedents in order to balance his support for the ideals that underlie the student assignment plans with the constitutional protections that, in his mind, forbid such "crude" race-based classifications.⁴⁷ Instead, he put his faith in the local "creativity of experts, parents, administrators, and other concerned citizens" but instructed them that they cannot allocate government "benefits and burdens on the basis of racial classifications".

In sum, Kennedy's opinion employed principles of federalism,⁴⁸ as well as an expansive interpretation of the Fourteenth Amendment, in order to craft a compromise that reflected the nature of his own situatedness as the "swing vote" on the Court.

2 2 4 The Interventionists Espouse Local Control

The first dissent, penned by Justice Stevens, made no explicit mention of the principle of local control. Instead, Stevens appealed to the Constitutional guarantees granted by the Fourteenth Amendment and

43 *Idem* 787-88 (Kennedy J concurring).

44 *Idem* 788 (Kennedy J concurring).

45 *Idem* 791 (Kennedy J concurring).

46 *Idem* 794-795 (Kennedy J concurring).

47 *Idem* 798 (Kennedy J concurring).

48 "'Federalism,' as developed in the United States, is the system in which power to govern is shared between the national and state governments and where federal and state officials may respectively have powers that are once co-extensive and overlapping." Daniel & Pauken *The PICS Decision – Academic Freedom v Federalism: Consider the Constitutional Implications*, 2008 *Temp Pol & Civ Rts LR* 111 133.

articulated by *Brown's* progeny.⁴⁹ Citing a string of cases that support the use of remedial race-base classifications,⁵⁰ Stevens held high the mantle of *Brown*, and used *stare decisis* to deride the plurality's position.⁵¹

The second dissent, written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, began with an incendiary appeal to federalism: “[In the past, the Court has] understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.”⁵² In support of this proposition, Breyer recounted the well-developed relationship between federal courts and the US school districts that they governed during the era of aggressive integration: “[T]he Court left much of the determination of how to achieve integration to the judgment of local communities.”⁵³ The dissent also relied on precedent authored by its ideological ancestors. Quoting *Swann v Charlotte-Mecklenburg Board of Education*,⁵⁴ the opinion related how “School authorities are traditionally charged with broad power to formulate and implement educational policy[.]”⁵⁵ Reliance on this legal principle echoes throughout the dissent. Perhaps the most powerful appeal to this principle came at Breyer’s conclusion, as he asked “And what of respect for democratic local decision-making by States and school boards?”⁵⁶

In addition, Breyer emphasised the original intent of the Fourteenth Amendment,⁵⁷ and, like Justice Stevens, relied heavily on the doctrine of *stare decisis* with regard to *Brown*.⁵⁸ Finally, Breyer made one final thrust by employing historical context and even national ideals as a principled legal medium for expressing his opinion: “And what of the long history and moral vision that the Fourteenth Amendment itself embodies?”⁵⁹ Combined, this collection of legal strategies forcefully conveyed a finely tuned and unapologetic position.

2.3 The Consistency of Ideology – The Conservative Approach

The divergent opinions of Justices Roberts and Thomas in *Morse* and *Parents Involved* cannot be adequately explained by a model that suggests that justices make decisions by applying neutral principles of law. Instead, a much more comprehensive explanation is revealed through an appreciation of each Justices’ ideological situatedness.

49 See generally *ibid* 793-804 (Stevens J dissenting).

50 See *idem* 801-803 (Stevens J dissenting).

51 See *idem* (Stevens J dissenting).

52 *Idem* 803 (Breyer J dissenting).

53 *Idem* 804 (Breyer J dissenting).

54 *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1.

55 *PICS* 551 US 701 804-806.

56 *Idem* 866 (Breyer J dissenting).

57 See *idem* 829-830 (Breyer J dissenting).

58 See eg *idem* 866. See also *idem* 867-868 (Breyer J dissenting).

59 *Idem* (Breyer J dissenting).

To begin, *Parents Involved* demonstrates how justices of varying situations strategically use contextual information. For example, Chief Justice Roberts focused on facts from the *Parents Involved* record that highlight the individual, as opposed to the group. Roberts explained how when petitioner Crystal Meredith moved to the school district, “she sought to enroll her son ... in kindergarten for the 2002-2003 school year.”⁶⁰ And though young Joshua’s school was “only a mile from his new home,” he could not be placed there because it “would have an adverse effect on desegregation compliance.”⁶¹

The conservative justices in *Morse* exercised their powers of judicial review in order to protect school administrators on the basis of federalism. And yet in *Parents Involved*, both Roberts and Thomas found themselves disabusing this very notion. Justice Thomas attacked the principle of local control to such an extent that he quoted the Federalist Papers as saying “If men were angels, no government would be necessary,”⁶² only to embrace the principle of local control in *Morse*,⁶³ to condemn judicial usurpation of such control,⁶⁴ and to defend the ability of school administrators to make their own judgment calls.⁶⁵

Stare decisis also fails to provide a consistent explanation for the disparity in conservative reasoning between *Morse* and *Parents Involved*. In *Morse*, the conservative majority touted the precedential value of *Fraser* and *Hazelwood School District v Kuhlmeier*,⁶⁶ only to disregard the powerful *Tinker* precedent and to instead invent a novel interpretation of its landmark language. Similarly, and in perhaps the most alarming display of this duplicity, the plurality in *PICS* went so far as to quote *Brown* in order to disable its precedential power.⁶⁷ Thus, the plurality in *PICS* treated conflicting legal structures such as *Brown* as mere potholes on the road to policy making.

As made clear by both the conservative and liberal justices in *PICS*, judicial restraint is not the exclusive province of either ideology. The doctrinal discrepancy between *Morse* and *PICS* demonstrates that although conservative justices are typically referred to as the esteemed protectorates against judicial activism, they may in fact be “the most eager to trump legislative majorities[.]”⁶⁸ Recently, the conservative wing has “rejected congressional efforts to regulate the influence of individual or corporate wealth on the political process, breathed new doctrinal life into the Second Amendment” and, as demonstrated in *PICS*, “insisted on near or total colour-blindness in race cases.”⁶⁹ All of

60 *Idem* (plurality opinion).

61 *Idem* (plurality opinion).

62 *Idem* 782 (Thomas J concurring).

63 See *Morse* 551 US 421 (Thomas J concurring).

64 *Idem* (Thomas J concurring).

65 *Idem* (Thomas J concurring).

66 *Hazelwood School District v Kuhlmeier* 484 US 260.

67 *PICS* 551 US 701 746-48 (plurality opinion).

68 Siegal *Interring the Rhetoric of Judicial Activism* 2010 *DePaul LR* 583 583.

69 *Ibid.*

these actions required interventionist judicial activism. As Professor Neil Siegal points out, this reality illustrates that conservative justices do not in fact “typically defer to the government” or exhibit a “limited view of the role of courts in vindicating individual rights,”⁷⁰ but are instead just as human as liberal justices, and thus just as likely to be guided by their ideological predispositions when rendering decisions.

2 4 The Consistency of Ideology – The Liberal Approach

In *Regents of the University of California v Bakke*,⁷¹ Justice Harry Blackmun wrote that “In order to get beyond racism we must first take account of race. There is no other way. And in order to treat someone equally, we must first treat them differently.”⁷² This liberal ideology has persevered from the majority opinion in *Swann* to the minority dissents in *PICS* and through dozens of cases in between. Seeing this consistency in ideology, the doctrinal manoeuvring demonstrated by the liberal justices between *Morse* and *PICS* cannot be explained by any neutral principle of law.

Liberals also selectively chose those contextual circumstances that help further their agenda. While the conservatives in *PICS* avoided a deep contextual analysis of the social conditions that brought about the use of the assignment plans in Seattle and Jefferson County, the liberal dissent focused with great interest on the history surrounding the plans. For example, where Chief Justice Roberts simply described how school administrators in Seattle had adopted the race-conscious plan “in an attempt to address the effects of racially identifiable housing patterns on school assignments,”⁷³ and how as a result of the plan, more non-white students had been placed in the city’s top public high schools, the liberal dissent explained these same circumstances in a far more alarming manner. Such context was deemed “critical,”⁷⁴ and apparently so much so that Justice Breyer included throngs of demographic data in order to paint a contextualised picture.⁷⁵ History supports Breyer’s outcome to such an extent that he included an appendix detailing the racial trends of both school districts.⁷⁶ Employing a drastically different approach than the plurality, Breyer summarised the racial history of Seattle since World War II⁷⁷ and provided the racial percentages for the Jefferson County school district since 1956.⁷⁸ Indeed, his opinion uses the word “history”

70 *Ibid.*

71 *Regents of the University of California v Bakke* 438 US 265.

72 *Idem* 407 (Blackmun J concurring). In his ideological retort almost 30 years later, Chief Justice Roberts penned the conservative equivalent of Justice Blackmun’s position in stating: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *PICS* 551 US 701 748 (plurality opinion).

73 *PICS* 551 US 701 713 (plurality opinion).

74 *Idem* 804 (Breyer J dissenting).

75 *Idem* 805-06 (Breyer J dissenting).

76 *Idem* (Breyer J dissenting).

77 *Idem* 807 (Breyer J dissenting).

78 *Idem* 814 (Breyer J dissenting).

no less than twenty-four times.⁷⁹ This wealth of context provides Breyer with a powerful means of framing and furthering his position.

Most significantly, the liberal wing's contradictions across *Morse* and *PICS* cannot be adequately explained by the doctrine of federalism. Where the liberal wing advocated fidelity to an expansive First Amendment interpretation in *Morse* – one that works to upend the localised policies of school administrators – it then seamlessly adopted a position in *PICS* that not only affirms, but in fact *encourages* a policy of local control.

Mirroring the conservative justices' approach to decision-making, the liberal justices remain similarly undeterred by *stare decisis*. Though proud declarants of precedents that represent liberal victories, the liberal justices are quick to abandon former decisions that reach conflicting ideological ends. In *PICS*, Justice Breyer went to great lengths to articulate how a contextual history of the Fourteenth Amendment and *Brown* supported a decision in favour of the school districts. Yet in finding precedential support for this conclusion, Breyer leapt entire decades of Supreme Court jurisprudence, writing off *Adarand* and its progeny as 5-4 decisions and condemning the past twenty years of racial classification cases as wrongly decided. From an analysis of this jurisprudence, one fact becomes clear: the sole constant in the liberal decision-making formula is not a legal methodology, but a results-driven policy predisposition that seeks to further a liberal agenda.

This evidenced observation, that situatedness prevails over legal mechanics in judicial decision-making, is not unique to the American legal system. And unfortunately, sharply divided high court decisions are not either. These two realities produced a controversial decision in 2009, as a high court sitting some 8,000 miles away from the US Supreme Court demonstrated how situatedness can be applied, especially when the prospect of social progress hangs in the balance.

3 Situational Appreciation in *Mpumalanga Department of Education v Ermelo*

After being forced by the provincial department of education to admit 113 black 8th graders who required instruction in English, the Afrikaans school known as *Hoërskool Ermelo* brought suit in the Pretoria High Court in 2007.⁸⁰ Thus began the journey behind *Mpumalanga Department of Education v Ermelo*, a landmark case in modern times that concerned the right of a South African to receive an education in the official language of his or her choice in a public school.⁸¹ The case is remarkable for a

79 *Idem* 803-69 (Breyer J dissenting).

80 See Jansen *Knowledge in the Blood* (2009) 288 n 43.

81 *Mpumalanga Department of Education v Hoërskool Ermelo* 2009 1 ZACC 32 (CC).

number of reasons, but perhaps most importantly because it stands as one instance of where the act of being selective on the basis of language was ultimately found to be unacceptable.⁸² Though white parents rallied against the admission of the black students,⁸³ the values of the South African Constitution remained resilient. And so equity, practicability, and the need for a redress of the historical “scars”⁸⁴ of apartheid – together, the means by which the Constitution assessed language policy – ultimately compelled the transformation of *Hoërskool* Ermelo from a single-language public school into a two-language public school.⁸⁵

3 1 Exclusion in the Aftermath

The Ermelo case captured the efforts of the South African judiciary to address school placement in South African society. Apartheid had not spared South Africa’s public school system, and though *de jure* segregation had been outlawed with the passage of the 1996 Constitution, *de facto* segregation still lingered. So when black parents tried to remedy a massive school overpopulation crisis by attempting to enroll their students in neighbouring traditionally white schools, it came as no surprise when the embers of racial tension flamed anew.

School overpopulation had been a growing problem in Ermelo, a town of about 40,000 in the far eastern province of Mpumalanga. In response, the Department of Education (“DOE”) identified *Hoërskool* Ermelo, a majority-white, Afrikaans-language school, as a school with space available to help remedy the emerging crisis.⁸⁶ *Hoërskool* Ermelo was built for 1,200 students, and yet its enrollment stood at 589.⁸⁷

The governing board of *Hoërskool* Ermelo – comprised of parents of Ermelo students and members of the local community – responded by asserting the school’s right to only instruct in Afrikaans.⁸⁸ By law, a governing board “exercises defined autonomy over some of the domestic affairs of [a] school,”⁸⁹ and thus has the power to select a language policy. When the DOE pushed back, Ermelo’s board responded with appeasement: while refusing to admit the black students, Ermelo would provide space at an unused building – a nearby laundry facility – for 113 stranded black students.⁹⁰ Parents of the stranded students and the DOE felt that this compromise was insufficient, and the DOE responded by flexing its administrative muscles. The department displaced Ermelo’s governing body and established an interim governing committee that immediately changed the school’s language policy to one

82 See Woolman & Fleisch 79.

83 *Idem* 209.

84 *Ermelo* par 45.

85 See Woolman & Fleisch 78.

86 See Minow *In Brown’s Wake* (2010) 174.

87 See Woolman & Fleisch 206.

88 See Minow 174.

89 *Ermelo* par 56.

90 *Ibid.*

that offered instruction in both Afrikaans and English.⁹¹ Outrage ensued, and Ermelo's administrators challenged the action by filing suit in the North Gauteng High Court in Pretoria,⁹² asking for an urgent interim order that would set aside the DOE's decision and restrain the department's newly-created interim committee from altering Ermelo's single-language policy.⁹³

3 2 In the Courts

In Pretoria, the full bench of the North Gauteng High Court dismissed the school's application for review, but permitted the school to appeal this decision.⁹⁴ In ruling against the school, the High Court stated that the Ermelo governing body had "unreasonably refused" to review its language policy.⁹⁵ Under section 22 of the Schools Act, an unreasonable refusal would allow the DOE to revoke the governing body's power to autonomously determine its own language policy.⁹⁶ From there, section 25 of the Schools Act gave the DOE the ability to transfer this power to an interim committee.⁹⁷ The High Court refrained from qualifying its conclusions, offering no condolences to the Ermelo administrators.

The governing board appealed. The reviewing court, the Supreme Court of Appeal, found that the power to withdraw functions under section 22(1) and (3) of the Schools Act may be exercised *only* in relation to those functions allocated to a governing body by the terms of section 21.⁹⁸ That is to say that unless a function was first allocated to Ermelo's governing body as prescribed by section 21, the DOE could not revoke and subsequently control that function. The Court of Appeal then surveyed case law in order to determine which functions were or were not allocated under section 21. The Court's list was limited to the following:

[M]aintaining and improving school property, buildings and grounds; determining the extra-mural curriculum of the school and choice of subject options; purchasing text books and other educational materials or equipment; paying for services to the school; providing an adult basic education and training class or centre; and other functions consistent with the Schools Act and any applicable provincial law.⁹⁹

Language policy was missing.

Thus, according to the court, section 21 did not delegate the power to set language policy to a provincial department of education.¹⁰⁰

91 *Ibid.*

92 *Ibid.*

93 *Ermelo* par 28.

94 *Idem* par 29.

95 *Idem* par 31.

96 *Ibid.*

97 *Ibid.*

98 *Ibid* par 34.

99 *Ibid.*

100 *Ibid.*

Therefore, the DOE could not have legally revoked and assumed a power that it had never been delegated in the first place. Instead, the Supreme Court of Appeal found that section 6(2) of the Schools Act exclusively vested the power to determine language policy in Ermelo's governing body.¹⁰¹

The case was appealed to the South African Constitutional Court, where a majority of the justices believed that the outcome should hinge not on the content of the school's language policy, but rather on whether the DOE had properly exercised its administrative power.

Writing for a unanimous court, Deputy Chief Justice Dikgang Moseneke first outlined the explicit education policies contained in the South African Constitution. As Moseneke described, "section 29(1) entrenches the right to basic education and a right to further education which, through reasonable measures, the state must make progressively accessible and available to everyone."¹⁰² Next, Moseneke focused on the "crucial provision" for the case – section 29(2) – which provides that:

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.¹⁰³

In explaining the interplay of this constitutional language, Moseneke noted that a public school's governing body has primary power to determine its language policy; however, such power must be exercised "subject to the limitations" laid down by "the Constitution and the Schools Act or any provincial law."¹⁰⁴ At this juncture the Court disagreed with the Supreme Court of Appeal and found that under section 22 of the Schools Act the DOE *did* have the power to revoke the governing body's function of setting a language policy.¹⁰⁵ However, the exercise of the DOE's power had been "vitiating by [the] procedural

101 *Ibid.*

102 *Idem* par 47. S 29(1) Constitution provides as follows: "Everyone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible".

103 S 29(2) Constitution.

104 *Idem* par 61. Indeed, not subjecting this power to the limitations of the Constitution and the Schools Act could result in "an insular construction [that] would in certain instances frustrate the right to be taught in the language of one's choice and therefore thwart the obvious transformative designs of section 29(2) of the Constitution". *Ibid* par 77.

105 *Idem* par 61.

unfairness”¹⁰⁶ through which the DOE had appointed the interim committee, and through which the interim committee had established the revised language policy.¹⁰⁷

So while the DOE was authorised to withdraw a school’s language policy “on reasonable grounds,”¹⁰⁸ it nevertheless had lacked the legal ability to dissolve Ermelo’s governing body. According to the Court, the two provisions at hand – one that spoke to the DOE’s power to withdraw a school’s language policy and another that permitted the DOE to dissolve a local governing body – in effect “regulate two unrelated situations and may not be selectively or collectively applied” in order to achieve a purpose not authorised by the Schools Act.¹⁰⁹ That is, “Section 22 regulates the withdrawal of a function, but only on reasonable grounds. Its purpose is to leave the governing body intact but to transfer the exercise of a specific function to the [DOE] for a remedial purpose.”¹¹⁰ In essence, although the DOE had these two independent powers, it “unlawfully conflated the requirements of section 22(1) and of section 25 by withdrawing the function and at the same time establishing an interim committee under section 25.”¹¹¹ Simply put, the DOE had no power to establish the interim committee. In turn, the interim committee therefore did not have the requisite power to fashion the new language policy for the school.¹¹² Thus, the DOE’s imposition of the new language policy had been unlawful.

Yet in almost the same breath, the Court exercised its constitutional ability to “make any order that is just and equitable”¹¹³ and directed the now-restored Ermelo governing body to “reconsider” its single-language policy “in the light of the considerations set out in this judgment.”¹¹⁴ In other words, given that the demand for English instruction in the Ermelo community was likely to increase, the Court ordered the school administrators to take the black community’s interest into account by revisiting the school’s language policy.¹¹⁵ The Court also charged the Ermelo administrators with pursuing means of accommodating the

106 *Ibid.*

107 *Ibid.*

108 *Idem* par 71. A contrary construction of this DOE power would “in certain instances frustrate the right to be taught in the language of one’s choice and therefore thwart the obvious transformative designs of section 29(2) of the Constitution”. *Ibid* par 86.

109 *Idem* par 88.

110 *Ibid.*

111 *Idem* par 93.

112 *Idem* par 93.

113 *Idem* par 96.

114 *Idem* par 98.

115 See Minow 174.

inevitable influx of new students who would wish to enroll the following year.¹¹⁶

3.3 Situatedness Expressed Through Procedure

Though the Constitutional Court in *Ermelo* focused on the language differences or preferences between whites and blacks, its members were certainly well aware of the fact that such language differences were the products of a highly racialised social structure. Indeed, it is difficult to separate the linguistic history of South Africa from the history of the black struggle against apartheid. Though Afrikaans and English are but two of eleven official languages recognised by the South African government,¹¹⁷ the language of Afrikaans is not simply a regional dialect in South Africa. Genetically and structurally a Germanic language with roots in 17th century Dutch,¹¹⁸ it is instead a language that, during the black struggle against apartheid, “became linked with White power politics” and was traditionally known to black South Africans as the “language of the oppressor.”¹¹⁹

This political dimension to language had particular significance in the context of South African schools. As the ancestors of the Europeans that had first colonised the country, whites in South Africa benefited from a history of discriminatory treatment. This treatment extended to South Africa’s public schools, where white public schools were reserved for relatively affluent whites. While these institutions were well-funded – either by their respective communities or by the government – black public schools were poorly resourced and funded stingily by the apartheid government.¹²⁰ When apartheid began in 1948, Afrikaner nationalism dominated, and the Afrikaner majority subsequently imposed the Afrikaans language on black public schools. This language policy was famously rejected by the Soweto riots, which forced the withdrawal of Afrikaans as a medium of instruction in black schools.¹²¹

Thus it could be argued that *Ermelo*’s language policy provided a race-neutral means of excluding black students. Yet it could also be argued that the policy represented the solemnisation of the South African Constitution’s recognition of eleven languages. According to the Court, though South African educational policy was traditionally determined by local administrators,¹²² “the usual reliance on decentralised control ... hit a limit [in *Ermelo*], as the racial impact of local governance ... was unacceptably unresponsive to the needs of black students.”¹²³ Although

116 *Ibid.*

117 See Rodrigo *Topics in Language Resources for Translation and Localisation* (2008) 91.

118 *Ibid.*

119 Fardon & Furniss *African Languages, Development and the State* (1994) 100.

120 See *Ermelo* par 46.

121 See Fardon & Furniss 100.

122 *Idem* 175.

123 *Ibid.*

the Constitutional Court emphasised the principle of legality and the importance of the proper exercise of administrative law, the Court's ultimate order is most accurately viewed as a reflection of the racial context of the dispute. On the surface, the Court pays little attention to the racial overtones of the case: when summarising the position taken by the DOE, the Court wrote "[The DOE] contend[s] that the core of the dispute is the appropriateness of the school's language policy which in effect has a disparate impact of excluding learners who choose to be taught in English. On the facts of this case, these are exclusively black learners."¹²⁴ Yet with the exception of this statement and two introductory remarks made in passing,¹²⁵ the Court does not employ any race-conscious language in deciding *Ermelo*.

Altogether, the Constitutional Court crafted a grand and somewhat ambiguous compromise: while the familiar tenets of local control would be preserved in procedural form, the Constitution's ambitious spirit of equality would nevertheless be vindicated. By concluding that the interests of Ermelo's current students and their parents must be balanced by the interests of the broader community and by the integrationist ideals of the Constitution itself, the Court ultimately exhibited its ability to use procedural neutrality as a means of reforming South Africa's public schools.

In *Ermelo* – just as in *Morse* and *PICS* – situatedness determined the outcome. And there is little to suggest that the power of situatedness on courts of last resort is waning. In the end, this is an unfortunate result. Not just for the parties and judges directly involved in the all-or-nothing decision-making process, but also for those who subscribe to the policy preferences of the minority faction of the court. Though situational appreciation provides a means of explaining and predicting judicial behaviour, it does not offer a means of remedying the polarising consequences of such behaviour. But this polarisation is by no means inevitable. One former judge, now a legal scholar, advocates a process that helps "create the conditions for principled agreement," a process that offers a means of preventing divisive outcomes that beget controversy.

4 Collegiality and the Resolution of Conflict

"[C]ollegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions," writes Judge Harry T. Edwards in "The Effects of Collegiality on Judicial Decision Making."¹²⁶ In short, collegiality is a means of influencing a decision-maker's

¹²⁴ *Ermelo* par 38.

¹²⁵ The Court relates how "Apartheid has left us with many scars" and that "The cardinal fault line of our past oppression ran along race, class and gender." *Idem* par 45.

¹²⁶ Edwards *The Effects of Collegiality on Judicial Decision Making* 2003 *U Pa LR* 1639 1640-1641.

situatedness by “allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another” in order to alter a judge’s situation, which ultimately “helps ensure that results are not preordained” by each judge’s policy preferences.¹²⁷

Edwards does not deny the powerful effect that situatedness plays in the judicial decision-making process. In fact, he builds his argument for collegiality in response to this reality. According to Edwards, who served as the Chief Judge of the US Court of Appeals for the District of Columbia Circuit for seven years, ideological policy preferences can be transcended through the “crucial variable” of collegiality in order to find “the best answer (not the best ‘partisan’ answer) to the issues raised” in a particular case.¹²⁸

However, Edwards is clear in limiting the applicability of his collegiality argument to the US Courts of Appeals, and he does not attempt to extend his proscriptions for good judging to the United States Supreme Court.¹²⁹ He refrains from making this analytical leap for a number of reasons. First, he notes that decisions in the US’s highest court are most often “very hard” cases that require the exercise of discretion. Second, he recognises that lower appellate courts are constrained far more by high court decisions. Third, he states that because the Supreme Court sits *en banc* for every case, collegiality on the high court no doubt operates very differently than it does in intermediary appellate courts.¹³⁰ These distinguishing features are no less true for South Africa’s Constitutional Court.

Nevertheless, Edwards’ recommendations identify a highly practical and immediately useful formula for combating the influence of situational predispositions. Thus, where situational appreciation helps explain and predict the ideologically-fractured outcomes of high court judicial behaviour, collegiality offers a means of avoiding this behaviour’s polarising consequences.

5 Conclusion

This article has endeavoured to exhibit a more accurate description of judicial decision-making, and to demonstrate the determinative power that situatedness wields. By eschewing the fictions of doctrinal restraints and the mechanical application of “neutral” principles of law, the analyses of the contradictory legal positions opined in *Morse* and *PICS*

¹²⁷ *Idem* 1645.

¹²⁸ *Idem* 1643, 1649.

¹²⁹ “I limit my own observations on collegiality to the circuit courts, because it is what I know best and, also, because I am inclined to believe that the differences between the Supreme Court and circuit courts may be too substantial to generalise from one to the other.” *Idem* 1644.

¹³⁰ *Ibid.*

illustrate the ease and consistency with which the doctrine of situational appreciation can be applied to cases. And as evidenced by *Ermelo*, decisions are not produced by a formalistic adherence to compulsory legal prescriptions, but are very much influenced by situational conditions. It is this appreciation for context, for situation, that can provide an accurate and consistent means of identifying, explaining, and addressing the true determinants of those court decisions that direct our shared future.