COMMENT

PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1: VOLUNTARY RACIAL INTEGRATION IN PUBLIC SCHOOLS

> In *Brown* . . . , this Court . . . recognized . . . that remedying decades of segregation in public education would not be an easy task. Subsequent events, unfortunately, have seen that prediction bear bitter fruit.
>
> — Justice Thurgood Marshall[1]

In 1954, a unanimous Supreme Court issued *Brown v. Board of Education*,[2] holding that public schools cannot be segregated on the basis of race.[3] But integration did not suddenly occur. By 1964, only 2.3% of black students in the South attended majority white schools.[4] For several years thereafter, the federal government and the Supreme Court actively enforced a policy of desegregation,[5] and by 1970 33.1% of black students in the South attended majority white schools.[6] Since 1970, however, the Court has issued a number of decisions that have had the effect of increasing segregation.[7] More than fifty years after *Brown*, public schools in the United States are even less integrated than they were in 1970.[8] Approximately 26% of black students in the

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[1] Milliken v. Bradley, 418 U.S. 717, 781–82 (1974) (Marshall, J., dissenting) (citation omitted).

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

[3] *Id.* at 495.

[4] GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? 19 tbl.7 (2004), http://www.civilrightsproject.ucla.edu/research/resego4/brown50.pdf.

[5] *See id.* at 18.

[6] *Id.* at 19 tbl.7.

[7] In *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court held that racial discrimination within a single, urban district did not warrant *interdistrict* integration remedies, *id.* at 744–45, even though according to the district court statewide interdistrict discrimination had played a significant role in the segregation at issue, *id.* at 797 (Marshall, J., dissenting). In *Board of Education v. Dowell*, 498 U.S. 237 (1991), the Court authorized a district court to terminate a desegregation order, *id.* at 249–50, even though that order had been in place for only thirteen years and had come after sixty-five years of segregation, *id.* at 251 (Marshall, J., dissenting). In *Freeman v. Pitts*, 503 U.S. 467 (1992), the Court held that desegregation orders could be terminated one component at a time. *Id.* at 489–90. In *Missouri v. Jenkins*, 515 U.S. 70 (1995), the Court held that a district court had exceeded its authority in examining student achievement levels to determine unitary status and in ordering salary increases to teachers in urban schools. *Id.* at 100–01.

[8] GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, UCLA, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 24 tbl.8 (2007), http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf (indicating that in 2005 only 27% of black students in the South attended majority white schools). White students are the most isolated of all racial groups, attending on average

Midwest and 23% of black students in the Northeast attend schools that are 99% to 100% minority.[9] Nationwide, 38% of black students attend schools that are 90% to 100% minority.[10]

Local school districts have attempted to deal with the problem of racial segregation in a variety of ways. In *Parents Involved in Community Schools v. Seattle School District No. 1*,[11] the Supreme Court considered voluntary efforts by school districts in Seattle, Washington, and Jefferson County, Kentucky, to achieve more racially integrated public schools.

Although Seattle was never under a court-imposed desegregation order,[12] its school board adopted a mandatory busing program in 1978 as part of a settlement with the NAACP.[13] In 1988, the board replaced that busing program with a plan that allowed students to choose schools subject to certain race-based constraints.[14] Under the most recent version of this plan, which took effect in 1999, students were classified as either white or nonwhite, and the classification was used as a tiebreaker for entry into oversubscribed schools whose ratio of white to nonwhite students was outside of a range centered on the district's overall ratio.[15] After one year at an assigned school, students could transfer without regard to race.[16]

Parents Involved in Community Schools, a nonprofit organization of parents whose children were or could be assigned under the Seattle plan, filed suit in the Western District of Washington.[17] The district court awarded summary judgment to the school district, finding that the assignment plan was consistent with state law and survived strict scrutiny under the Fourteenth Amendment's Equal Protection Clause.[18] A panel of the Ninth Circuit reversed on the federal consti-

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schools that are 83% white. *Id.* at 26 tbl.9A. Black students on average attend schools that are 54% black, while Latino students on average attend schools that are 52% Latino. *Id.*

[9] GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 10 (2006), http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf (indicating figures for 2003–2004).

[10] *Id.* Fifty-one percent of black students in the Northeast attend such schools. *Id.*

[11] 127 S. Ct. 2738 (2007).

[12] *Id.* at 2747.

[13] *Id.* at 2804 (Breyer, J., dissenting).

[14] *Id.* at 2805.

[15] *Id.* at 2805–06. During the 2000–2001 school year, the district's student population was about 41% white and 59% nonwhite (including about 23.8% Asian-American, 23.1% African-American, 10.3% Latino, and 2.8% Native-American). *Id.* at 2747 & nn.1–2 (majority opinion).

[16] *Id.* at 2806 (Breyer, J., dissenting).

[17] *Id.* at 2748 (majority opinion).

[18] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001).

tutional question,[19] holding that although attaining racial diversity and avoiding racial isolation were compelling interests, the plan was not narrowly tailored to achieve those interests.[20] After granting rehearing en banc, the Ninth Circuit overruled the panel and upheld the plan.[21]

Unlike Seattle, Jefferson County was under a court-imposed desegregation order starting in 1975.[22] Under the district court's supervision, the county's school board initially operated a mandatory busing program and later replaced that program with a plan that combined student choice and racial distribution requirements.[23] In 2001, after the district court had dissolved the desegregation order,[24] the board adopted the most recent version of the choice plan, according to which new students would indicate their preferences among schools in a "cluster" near their homes and be assigned to their preferred school unless it had no available space or (in the case of nonmagnet schools) such assignment would cause the school's percentage of black students to fall below 15% or rise above 50%.[25] Transfer requests were granted or denied based on the same factors — space and race.[26]

Crystal Meredith, the mother of a Jefferson County student whose transfer request was denied because of the racial distribution requirement, filed suit in the Western District of Kentucky.[27] The district court held that the Jefferson County plan was narrowly tailored to its compelling interest in maintaining racially diverse schools.[28] The Sixth Circuit affirmed in a brief opinion adopting the district court's reasoning.[29]

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19 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 980 (9th Cir. 2004). The Ninth Circuit had initially enjoined the district's use of the tiebreaker based on its interpretation of Washington law, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 285 F.3d 1236, 1257 (9th Cir. 2002), but later vacated the injunction and certified the question to the Washington Supreme Court, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 294 F.3d 1085, 1086–87 (9th Cir. 2002). The Washington Supreme Court concluded that state law did not prohibit "racially neutral" programs like the one at issue, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 72 P.3d 151, 153 (Wash. 2003), and returned the case to the Ninth Circuit for further proceedings, *id.* at 167.

20 *Parents Involved*, 377 F.3d at 980.

21 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1166 (9th Cir. 2005) (en banc).

22 *Parents Involved*, 127 S. Ct. at 2806 (Breyer, J., dissenting).

23 *Id.* at 2807–08.

24 The school board opposed the dissolution, *see* Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 359 (2000), apparently because it believed that the county had not yet eliminated the effects of systemic racism.

25 *Parents Involved*, 127 S. Ct. at 2749–50.

26 *Id.* at 2750.

27 *Id.* at 2751.

28 McFarland v. Jefferson County Public Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004).

29 McFarland ex rel. McFarland v. Jefferson County Public Sch., 416 F.3d 513, 514 (6th Cir. 2005) (per curiam).

In a consolidated opinion, the Supreme Court struck down both plans. In parts of his opinion that were supported by a majority of the Court, Chief Justice Roberts[30] reasoned that because the plans involved racial classifications, they violated the Equal Protection Clause unless they were "'narrowly tailored' to achieve a 'compelling' government interest."[31] The Chief Justice distilled from precedent two compelling interests in the schools context: "remedying effects of past intentional discrimination" and "diversity in higher education."[32] The first was unavailing, he argued, because the Seattle schools "ha[d] not shown that they were ever segregated by law" or "subject to court-ordered desegregation decrees," and Jefferson County had "achieved unitary status" and thus had "remedied the constitutional wrong that allowed race-based assignments."[33] The second was unavailing because when race "c[a]me[] into play" under the plans, it did so "not . . . as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints,'" but as the "decisive" factor.[34] Moreover, the racial classifications' minimal effects on student assignments and the districts' failure to consider race-neutral alternatives proved that the plans were not narrowly tailored to achieve even their stated goals.[35]

In parts of his opinion that were joined by only three other Justices, the Chief Justice dismissed the districts' contention that the plans were constitutional because of their connection to "educational and broader socialization benefits."[36] In his view, the plans were narrowly tailored not to achieve any purported educational benefits, but rather to achieve some racial balance,[37] and "[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society" with "'no logical stopping point.'"[38] "The way to stop discrimination on the basis of race," the Chief Justice concluded, "is to stop discriminating on the basis of race."[39]

Justice Thomas filed a concurring opinion, cautioning against the conflation of racial imbalance with past de jure segregation and argu-

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[30] Justices Scalia, Thomas, and Alito joined Chief Justice Roberts's opinion in full. Justice Kennedy joined it only in part.

[31] *Parents Involved*, 127 S. Ct. at 2752 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

[32] *Id.* at 2752–53.

[33] *Id.* at 2752.

[34] *Id.* at 2753 (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).

[35] *Id.* at 2759–60.

[36] *Id.* at 2755 (opinion of Roberts, C.J.).

[37] *Id.* at 2755–56.

[38] *Id.* at 2757–58 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989)).

[39] *Id.* at 2768.

ing that "a school cannot 'remedy' racial imbalance in the same way that it can remedy segregation."[40] Justice Thomas stressed that the Constitution's colorblind principles are not so malleable as to embrace "today's faddish social theories."[41]

Concurring in part and concurring in the judgment, Justice Kennedy criticized the Chief Justice's opinion for minimizing the importance of diversity in public education.[42] In Justice Kennedy's view, the plans failed not because the districts lacked a compelling interest, but rather because they failed to explain how their blunt binary distinctions furthered any educational goals.[43] Justice Kennedy identified several integration strategies that were "race conscious" but did not "defin[e students] by race,"[44] and urged school districts to "continu[e] the important work of bringing together students of different racial, ethnic, and economic backgrounds."[45]

Justice Breyer dissented,[46] arguing that both school districts had experienced periods of "severe racial segregation" and that the current plans were conscientious and permissible remedial efforts.[47] In Justice Breyer's view, attempts to draw constitutional lines on the basis of a distinction between de jure and de facto segregation were "futil[e]."[48] Affirming the "broad discretionary powers of school authorities" to use race-conscious criteria to achieve positive race-related goals,[49] Justice Breyer insisted that the majority's application of strict scrutiny misinterpreted settled law.[50] In any event, Justice Breyer maintained, the plans were narrowly tailored to achieve compelling remedial, educational, and democratic interests.[51] Justice Breyer concluded that the majority had departed from the "long history and moral vision" of the Fourteenth Amendment[52] and "threaten[ed] the promise of *Brown*."[53]

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[40] *Id.* at 2773 (Thomas, J., concurring); *see also id.* (noting that remedying racial segregation involves a one-time "redress of a discrete legal injury inflicted by an identified entity.").

[41] *Id.* at 2787.

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

[43] *Id.* at 2790–91.

[44] *Id.* at 2792.

[45] *Id.* at 2797.

[46] Justices Stevens, Souter, and Ginsburg joined Justice Breyer's dissent. Justice Stevens also authored a separate dissent, calling Justice Breyer's opinion "eloquent and unanswerable," *id.* at 2797 (Stevens, J., dissenting), and objecting to "rigid adherence to tiers of scrutiny" in equal protection jurisprudence, *id.* at 2799.

[47] *Id.* at 2809 (Breyer, J., dissenting).

[48] *Id.* at 2810.

[49] *Id.* at 2812 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)) (internal quotation mark omitted).

[50] *See id.* at 2812–20.

[51] *See id.* at 2820–30.

[52] *Id.* at 2836.

[53] *Id.* at 2837.

Fifty-three years after *Brown*, this decision forces another public discussion about the proper role of race-conscious decisionmaking in America's public schools. Fifty-three years later, a heated debate still exists over the meaning of just a handful of words of in Section 1 of the Fourteenth Amendment. The following comments try to make sense of those words — they try to enrich that debate.

In *Justice Kennedy and the Domains of Equal Protection*, Professor Heather Gerken argues that the long quest for racial justice will continue to be incomplete unless we can find new and nuanced ways of discussing race that appeal to all those genuinely interested in improving our society, including mainstream conservatives. Justice Kennedy's concurring opinion may provide crucial assistance in this effort, she suggests, because it shows that the Justice himself, by thinking about race in different ways, has come to new and different conclusions. Carefully tracing Justice Kennedy's evolving discussion of race, Professor Gerken demonstrates how situating discussions of race within other domains, such as voting or education, leads to important insights.

In *The Supreme Court and Voluntary Integration*, Professor James Ryan offers important insights into both the practical impact of the Court's decision and its place within the Court's desegregation jurisprudence since *Brown*. He outlines the changing nature of the debates over public education in recent years and the inconsistency, inattentiveness, and ultimate irrelevance of the Court in much of contemporary educational decisionmaking that actually affects children and schools. Professor Ryan concludes that although the decision will have relatively little impact on the ground, it stands as a strong and troubling symbol of a society's inconsistent journey and, to some, the Court's betrayal of an ideal.

In *The Seattle and Louisville School Cases: There Is No Other Way*, Judge J. Harvie Wilkinson III argues passionately that we must accept the challenge to rid our world of racial prejudice. Judge Wilkinson examines each of the cases' opinions, arguing that while our tragic history of racial subordination must not be denied, the state's use of overt racial distinctions is anathema to the kind of world imagined in our shared values and in our Constitution, leaving the Justices with no choice but to strike down the local programs. Instead of relying on odious racial categorizations, Judge Wilkinson argues, we must work hard to combat in other tangible ways the evils of poverty and inadequate education that plague many of our communities.