HAND-DOWN STATEMENT

Parents Involved in Community Schools v. *Seattle School District No. 1*, No. 05-908

Meredith v. *Jefferson County Bd. of Ed.*, No. 05-915

Thursday, June 28, 2007

BREYER, J., dissenting

Justice John Paul Stevens, Justice David Souter, Justice Ruth Bader Ginsburg, and I dissent. More than 50 years ago, this Court declared racial segregation in public schools unlawful. Since then, school districts, using many different plans over many years, have tried to integrate their public schools. Louisville and Seattle are two such districts. They began with racially segregated schools; they sought remedies, they tried forced busing, they feared or experienced "white flight," they faced concerns of de facto resegregation, and they have ended up with plans that end busing and rely heavily upon student *choice*. In both cities, all students choose; the majority of students receive their first choice school; but school district efforts to keep schools racially mixed, e.g., no more than 85% white in Louisville, somewhat similar in Seattle, mean that some students do not receive their first choice

(though in Seattle such a student can transfer to a preferred school after one year). These plans are not affirmative action plans. School placement has nothing to do with any student's merits. The schools here are not magnet schools; they are roughly equivalent. Student preferences over the years have varied. They are plans adopted democratically by school boards that seek partly remedial, partly educational, partly civic goals.

Until today the law has allowed school districts to implement these kinds of plans. The majority is wrong to hold the contrary. In a dissent — twice as long as any other I have written — we explain why.

First, detailed examination of history shows the typical pattern I have described: segregation, remedial plans with busing, white flight, resegregation concerns, and new plans. Compared to earlier plans the present plans rely less upon

race, emphasize greater student choice, and seek to improve the conditions of all schools for all students, no matter the color of their skin, no matter where they happen to reside.

Second, a detailed examination of the law makes clear that, since *Brown*, this Court has consistently approved of measures like these, indeed, it has approved far more "race conscious" measures to combat harmful racial separation in the schools. Consider, for example, what this Court said in *Swann v Charlotte-Mecklenberg Bd. of Ed.*, 402 U. S. 1, 16 (1971) (emphasis added), written 35 years ago:

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

There are many similar cases. Indeed, the cases uniformly recognize a critical Equal Protection Clause difference between, on the one hand, exclusionary racial discrimination that seeks to divide us (Justice Thurgood Marshall pointed out that the Constitution is virtually always "fatal in fact" to such plans); and inclusive "race conscious" plans that seek to bring the races together. Our cases, whatever the language of the linguistic tests they propose, have always read the Clause, *not* as "fatal in fact" to such a plan, but as granting school districts significant practical leeway to adopt an inclusive kind should school districts decide that such a plan (to paraphrase Justice Marshall) will help "our children begin to learn together" with the "hope that our people will . . . learn to live together." Milliken v.

Bradley, 418 U. S. 717, 783 (1974) (dissenting opinion).

Third, as long as we keep in mind the law's distinction – between that which excludes and that which seeks to include – then whatever linguistic test we apply, the plans here pass with flying colors. Must we find a "compelling interest" (that is language taken from *Grutter*, the case in which this Court upheld the University of Michigan's affirmative action law school admissions program)? Here the school board's objectives include efforts to eradicate the remnants of primary and secondary school segregation; they include efforts to create school environments that provide better educational opportunities for all children; they include efforts to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our constitution foresees.

If an educational interest that combines these three elements is not "compelling," then what is?

Must we find that the boards' plans are "narrowly tailored" to achieve those compelling interests? (That is *Grutter's* affirmative action language too). Here the plans limited and diminishing use of race, the plans' strong reliance upon other non-race-conscious factors, the history of their development, the comparison with earlier plans, and the lack of reasonable evident alternatives -- together, these show that the plans are narrowly tailored, indeed far more so than were plans that this Court upheld in *Grutter* and other prior cases.

Let me deviate and give one example. The majority says that Seattle and Louisville have failed to try less race-conscious alternatives – or show that they wont work. Justice Kennedy lists some, namely:

> "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Ante*, at 8.

To take these one by one: building new schools ("strategic site selection"): Seattle has built one new high school in the last 44 years. When are they supposed to build again? "Drawing" new "attendance zones" on a racial basis? They tried it – and it worked *when accompanied by forced busing*. "Allocating resources for special programs?" That seems to mean "magnet schools." Seattle and Louisville have tried them, and still are trying them; they have worked to a degree *but not alone*. "Recruiting faculty?" Ask a school administrator about how easy that is. "Tracking enrollments, performance and other statistics by race." I'm sorry: tracking *measures* a problem; it does not *cure* the problem.

The upshot is that, in striking down plans, the Court forbids, or dramatically narrows the leeway open to the school districts, to use "race-conscious" plans for inclusive reasons. Some members of the majority would outright forbid their use, treating the Equal Protection Clause as "colorblind." Other members of the majority, in part through what they say, but more importantly through their result striking down the plans at issue here, would withdraw the practical leeway that we have previously said the Constitution offers those who would institute inclusive plans. Regardless, their interpretation of the Equal Protection Clause would prove either always, almost always, or far too often, "fatal in fact" to districts who seek to use "race conscious" means for inclusive ends.

Fourth, the consequences: race-related legal controversy as school districts, and others, seek

to unravel the meaning of today's several opinions; delay and set back in respect to the work of local school boards seeking to bring about racially diverse schools, trying to deal with threats of de facto resegregation, and trying to unify education in communities divided by poverty correlated with race. These consequences are serious.

The conclusion of all this is simple: Yesterday, the plans under review were lawful. Today, they are not. Yesterday, the citizens of this Nation could look for guidance to this Court's unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a full range of means to combat segregated schools. Today, they do not.

There is more: What has happened to stare decisis? The history of the plans before us, their educational importance, their highly limited use of race -- all these and more -- make clear that the

compelling interest here is stronger than in, for example, *Grutter*, where we upheld a race conscious law school admissions program. The plans here are more narrowly tailored. And what has happened to the cases that made very clear that in the context of K-12 public schools, this kind of program is constitutionally permissible? What has happened to *Swann*? To *McDaniel*? To *Crawford*? To *Harris*? To *School Committee of Boston*? To *Seattle School Dist. No. 1*? The plurality's logic writes these cases out of the law. It is not often in the law that so few have so quickly undone so much.

And what of respect for democratic local decisionmaking by States and school boards? For several decades this Court has rested its public school decisions upon *Swann*'s basic view that the Constitution grants local school districts a significant degree of leeway where the inclusive use of race-conscious criteria is at issue. Now

localities will have to cope with the difficult problems they face (including resegregation) deprived of one important means that they believed would help.

And what of law's concern to diminish and peacefully settle conflict among the Nation's people? Instead of accommodating different good-faith visions of our country and our Constitution, today's holding upsets settled expectations, creates legal uncertainty, and threatens to produce considerable further litigation, aggravating race-related conflict. Difficult problems surround race relations in the United States. The people of this Nation hold in good faith different views on how best to address them. The plurality may question the wisdom of the districts' approach toward improving race relations in public schools. But the fourteen members of the school boards in Seattle and Louisville hold a different view about

the way to include children of all races in their schools; they believe their way will work to bring about racial inclusion in their own communities; they do not seek to impose it upon others.

The Constitution does not dictate a single answer to this kind of question. Rather, it grants citizens considerable freedom to debate and develop solutions for themselves. This Court should leave them free to do so.

And what of the long history and moral vision that the Fourteenth Amendment itself embodies? The plurality cites in support those who argued in *Brown* against segregation, and some compare the approach I have taken to that of segregation's defenders. But historical segregation did not simply tell schoolchildren, as the plurality suggests, "where they could and could not go to school based on the color of their skin"; they perpetuated a caste system rooted in the

institutions of slavery and 80 years of legalized subordination. The lesson of history is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. And it is a cruel distortion of that history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day -- to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of petitioner Joshua McDonald (whose request to transfer to a school closer to home was initially declined) (let alone a Seattle student who must spend but a year at a school he does not prefer). It may be, as some here state, that there is a cost in applying "a state-mandated racial label." But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.

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Finally, what of the hope and promise of Brown? For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality -- not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of

racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

I must dissent.