Volume 112
Issue 4 *Dickinson Law Review - Volume 112, 2007-2008*

3-1-2008

Introduction

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Symposium

Community, Diversity, and Equal Protection: The Louisville and Seattle School Cases

Introduction

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The companion cases, *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Education*,[1] decided by the United States Supreme Court last term, pose questions of interest to communitarian scholars as well as scholars of constitutional law. In these cases, the United States Supreme Court struck down efforts by the Seattle and Louisville area school districts to maintain racial balance in their schools through school assignment plans

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1. 127 S. Ct. 2738 (2007).

that employed racial criteria. Reiterating the proposition that "'[r]acial balance is not to be achieved for its own sake,'"[2] Chief Justice Roberts' plurality opinion rebuffed the justifications proffered by the two school districts and concluded, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[3] In a concurring opinion, Justice Kennedy accepted the proposition that diversity could be a compelling interest that might survive the strict scrutiny accorded racial classifications.[4] But he nevertheless determined that the school districts had failed to meet the burden of showing that their schemes were narrowly tailored to meet this interest.[5] Justice Breyer, dissenting (and joined by Justices Stevens, Souter and Ginsburg), argued that the school districts had taken legitimate measures to integrate historically segregated schools, and claimed that the Court's decision "undermine[d] *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality."[6]

The issue of whether the benefits of integration justify the use of racial classifications has been visited before.[7] But communitarian concerns are especially prominent in the Seattle and Louisville area school cases, as both cases involve efforts by local school systems to promote the community ideals of integration and diversity through school assignment plans that brought race into account.[8] Moreover, while individuals whose school choice was affected by racial classifications could claim to be "victims" of discrimination, all students, including the alleged victims of racial classification, arguably stood to benefit from the advantages of integration as contemplated under the Seattle and Louisville schemes. While these schemes differed substantially, they both used race as a criterion to achieve racial balance in schools throughout an urban school district, thereby posing the question of whether a community goal—integrated schools—trumped the individual right not to be subject to a racial classification.[9]

It was therefore only natural for the Association of American Law Schools Section on Law and Communitarian Studies to present a

2. *Id.* at 2757, citing Freeman v. Pitts, 503 U.S. 467, 494.
3. *Id.* at 2768.
4. *Id.* at 2789 (Kennedy, J., concurring).
5. *Id.* at 2789-91 (Kennedy, J., concurring).
6. *Id.* at 2800 (Breyer, J., dissenting).
7. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (racial criteria in law school admissions); Gratz v. Bollinger, 539 U.S. 244 (2003) (racial criteria in college admissions); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (racial set-asides in government construction contracts); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) (race-conscious school assignment plan).
8. *See generally Parents Involved*, 127 S. Ct. 2738.
9. *See generally id.*

program on the Louisville and Seattle school cases at the AALS 2008 Annual Meeting in New York City. The appropriateness of such a program became apparent to me even before the decision in *Parents Involved* was announced; indeed, the program was slated months prior to the June 28, 2007 Supreme Court decision. The AALS Sections on Civil Rights and Minority Groups readily signed on as co-sponsors, for which the relatively new Section on Law and Communitarian Studies is grateful. This symposium issue of the Penn State Law Review includes papers from most of the panelists at the AALS program. While another program at the AALS meeting would examine the ramifications of *Parents Involved* for law school affirmative action programs, the Communitarian Studies program would focus on the communitarian implications of these cases. The communitarian considerations, while intersecting with legal doctrine, would not involve constitutional doctrine exclusively, nor would they necessarily be limited to issues of race or even to applications inside the United States of America. The direction of the live discussion, the composition of the panel, and the articles in this symposium issue reflect the broad range of these considerations.

Communitarianism: rights and interests. Communitarians have suggested an agenda to advance commonly held social values without unduly compromising individual rights. Even in a rights-conscious society such as ours, individual rights have their limits, and carry with them concomitant responsibilities.[10] "Communitarians support basic civil liberties, but fear that our ability to confront societal problems effectively is compromised by the claims of "radical individualists" who would subordinate the needs of the community to the absolute fulfillment of individual rights."[11] Is the rights-based challenge to the Louisville and Seattle school integration schemes an example of this phenomenon, i.e., are "radical individualists," by challenging these plans, subordinating the community's legitimate needs to an inflated sense of individual rights? Are the Seattle and Louisville integration plans but continuations of laudable efforts to integrate (or avoid resegregation of) historically segregated schools? Or do the challenges to these plans represent legitimate assertions of fundamental rights—and even communitarian values—in the tradition of *Brown v. Board of Education*? In defense of the latter proposition, the Chief Justice stated:

> The parties and their *amici* debate which side is more faithful to the heritage of *Brown,* but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been

10. Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST. L. REV. 649, 650 (1995).
11. *Id.*

clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."[12]

Despite my role as convenor and moderator of this discussion, I must confess to a lack of neutrality on these issues. I view both the Louisville and Seattle school integration plans as benign efforts to achieve a legitimate social purpose, one that would ultimately benefit even those claiming to have been victims of race-based discrimination. That legitimate purpose, an integrated, pluralistic society, places these cases in stark contrast to *Brown v. Board of Education*, which struck down a practice that stigmatized African Americans, imposed severe hardship on members of racial minorities and supported a degrading and socially draining system of apartheid.[13] I must confess further to a preference for the Louisville plan over the Seattle plan. The Louisville school integration plan was substantially similar to a system of integration previously imposed on the city and county by court order;[14] it is difficult to see how what was mandated by law to promote integration on one day could be an illegal form of discrimination the next. It allowed for fairly broad leeway in terms of racial composition of the city's schools (from fifteen to fifty percent African-American) and used race only as one of several criteria to determine school assignments.[15] The Seattle plan, in contrast, was not only voluntarily implemented,[16] but tended to treat race in binary terms (i.e., "white" and "non-white"), ignoring the rich multicultural composition of the school district.[17] In so doing, the plan gave short shrift to important distinguishing characteristics that make Seattle such a vibrant community. In at least one case cited by in Chief Justice Roberts' majority opinion, a Seattle child was denied access to a special education program because it was offered at a school at which the racial tiebreaker precluded his attendance.[18]

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12. *Parents Involved,* 127 S. Ct. at 2767, citing Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown I,* O.T.1953, p. 15 (Summary of Argument).

13. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

14. *See* Hampton v. Jefferson Cty. Bd. of Ed., 72 F. Supp.2d 753, 762-764 (W.D. Ky. 1999)

15. *Parents Involved,* 127 S. Ct. at 2749-50.

16. Justice Breyer's dissenting opinion suggests that a series of measures taken by Seattle to integrate its schools was not truly voluntary at all, but was rather a response to a series of legal challenges. *Parents Involved,* 127 S. Ct. at 2802-06 (Breyer, J., dissenting).

17. *Parents Involved,* 127 S. Ct. at 2747-48.

18. The student was Andy Meeks, a ninth grader whose mother sought to enroll him in Ballard High School's special Biotechnology Career Academy. *Parents Involved,* 127 S. Ct. at 2748. In my mind, to deny a student his/her choice of school in order to promote

While others might view the circumstances in Seattle and Louisville as involving *rights* in conflict, some communitarians are more apt to view them as involving community efforts to adjust various *interests*, which efforts should be left undisturbed by the courts.[19] They might say that the Jefferson County, Kentucky and Seattle, Washington school boards—products of a democratic electoral process—have, in seeking the common good, adopted plans that serve the best interests of the community-at-large, and that the courts should defer to local decisions of this sort.[20] Other communitarians, however, might see the use of racial classifications as demeaning not only to the individuals involved but to the community as a whole. *Brown* and its progeny also attacked community-authored school attendance plans,[21] and the fact that the Louisville and Seattle school boards had seemingly benign intentions may not obviate or excuse the fact that they employed a suspect classification—race—to determine school assignments. The Court's decision in *Parents Involved* may have been counter-majoritarian, but so was its decision in *Brown*.

Our panel of commentators. The panelists at the AALS program and the essays in this symposium represent a broad range of perspectives. As a resident of Louisville, Professor **Enid Trucios-Haynes** (University of Louisville) sets the scene. She suggests, in communitarian fashion, that the Court has employed, in its race cases, a narrative structure of Rhetorical Neutrality, an approach that "privileges individualism over the substantive claims of historically oppressed groups."[22] Her live presentation and her essay here depict a number of competing interests in

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racial balance is one thing; to deny a student access to a distinct educational program due to his race is quite another.

19. *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

20. In his dissenting opinion, Justice Breyer noted that "the law often leaves legislatures, city councils, school boards, and voters with a broad range of choice, thereby giving "different communities" the opportunity to "try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs." *Parents Involved,* 127 S. Ct. at 2811 (Breyer, J., dissenting) (citing Comfort v. Lynn School Comm., 418 F.3d 1, 28 (C.A.1 2005) (Boudin, C.J., concurring) (citing United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring))), *cert. denied,* 546 U.S. 1061 (2005).

21. Brown v. Bd. of Educ., 347 U.S. 483 (1954), invalidated locally-developed school assignment plans in Kansas and South Carolina. *See also, e.g.,* Milliken v. Bradley, 418 U.S. 717 (1974) (addressing inter-district segregation in Detroit area); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (challenging locally developed school attendance plan in North Carolina); Griffin v. County School Board, 377 U.S. 218 (1964) (holding unconstitutional Virginia school board's decision to close local public school and grant vouchers to students to attend private white-only schools).

22. Enid Trucios-Haynes and Cedric Merlin Powell, *The Rhetoric of Colorblind Contsitutionalism: Individualism, Race and Public Schools in Lousiville, Kentucky,* 112 PENN ST. L. REV. 947 (2008) (*infra*).

the Louisville school scene, asserting a variety of rights and entitlements through a series of legal challenges, and a school board trying to wend its way through a political and legal thicket to fashion a plan that could be tolerated, if not embraced, by these interests. To some, the array of interests and rights asserted in the Louisville litigation represents the American judicial process at its best, in which a rights-based adjudicative forum allows an assortment of voices to be heard. It is better to take to the courts than to the streets, some would say; indeed, I have elsewhere suggested that resort to the courts to resolve disputes can be seen as a confirmation of the legitimacy of American legal institutions and an affirmation of community.[23] But others, including Professor Trucios-Haynes, question the cacophony of voices resorting to judicial process to thwart decisions by elected majorities, turning what should be regarded as political controversies into legal ones. Must every interest in America boil down to a right? And must every issue in America be resolved through a lawsuit? Or can we defer to democratic, community-based decision-making?

I asked Professor **Aderson Francois** (Howard University) to join the panel because he had written an eloquent *amicus* brief in *Parents Involved*, a brief replete with communitarian themes.[24] Professor Francois' presentation was perhaps the most provocative of those heard by our live audience. A sympathetic disposition toward the Louisville and Seattle school integration efforts would be but a forlorn hope without legal doctrine to support it, he suggested. And where might that doctrine be found in a rights-oriented legal system? Through a *right to community*, a right that might prevail over the more individually-focused rights asserted by the petitioners in *Parents Involved.* I could not help but comment on the irony that communitarian principles might find their legal expression only through the minting of a new "right," a practice generally discouraged by Amitai Etzioni and other communitarian commentators.[25] But Professor Francois' analysis brought a fresh insight to the debate, and his work carried in this issue should ignite discourse and debate for some time to come.

The live presentation and article by Professor **Michael Wells** (University of Georgia) recognize the difference between the *political*

23. Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 55 (2002).

24. Brief for Civil Rights Clinic at Howard University School of Law as Amicus Curiae Supporting Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 and Meredith v. Bd. of Educ., 127 S. Ct. 2738 (No. 05-915).

25. *See, e.g.*, ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, LAW AND COMMUNITY: THE CASE OF TORTS 250 (2004); AMITAI ETZIONI, THE SPIRIT OF COMMUNITY 5 (1993) ("the incessant issuance of new rights, like the wholesale printing of currency, causes a massive inflation of rights that devalues their moral claims").

discourse of libertarians and communitarians and the *legal* discourse with which the Court must grapple in *Parents Involved.* To Professor Wells, it is the distinction between de facto and de jure segregation that holds the balance, at least for the Court's majority. While the Court had long recognized the legitimacy of race-based remedies for de jure discrimination, de facto discrimination required the advocates of race-conscious plans to surmount the burden of strict scrutiny. To communitarians, for whom the de facto/de jure distinction—or the public/private distinction, for that matter—is less compelling, it is easier to justify the remedies for racial imbalance utilized by the school districts. Professor Wells ultimately argues that "a range of policy considerations should be brought to bear on the issue of whether the segregation in a given school district should be characterized as de jure or de facto." He thereby creates a means by which the Justices (and in particular, the swing-voting Justice Kennedy) could adopt a less rigid approach to cases such as these.

Two of the panelists were unable to contribute written papers for this symposium. Nevertheless, in order to provide a well-rounded sense of our live program, I have summarized their remarks here, with their help. Professor **Neil Siegel** (Duke University) began his presentation by taking note of the basic communitarian insights that personal identity is a social identity and social identity is formed in significant measure by education. It follows from those points, he suggested, that a key question in *Parents Involved* was how the institution of public education in American should go about performing its formation function—that is, what the social mission of public education in America should be. Siegel suggested that Justice Kennedy's own answer to that question provides one criterion against which to assess the advisability of the constitutional constraints he imposed. Siegel perceived in Kennedy's concurring opinion a statesmanlike effort to fashion a form of law that could sustain the allegiance of a divided nation. Nonetheless, he concluded that Kennedy's stated understanding of public education as an engine of interracial socialization and community counseled against barring almost all use of racial classifications, when it is presently uncertain whether communities can accomplish meaningful levels of racial integration without them.

Our last two panelists were asked to look beyond the presenting issue in *Parents Involved*—that of race-conscious efforts to integrate American schools—to explore integration, segregation, and race-consciousness in other contexts. Professor **Rosemary Salomone** (St John's University), who was unable to submit a written article, addressed two other traits—language and sex—that have been used for assigning students to schools and programs, specifically in the contexts of bilingual education and single-sex schooling. Both have proven controversial and have built on the Court's race jurisprudence. Both underscore the dilemma of "difference" with all its inherent benefits and burdens. Yet unlike the benign use of race, where the point is to integrate, minority parents in particular continue to push for language and sex to be used in ways that separate, albeit for benign purposes.

Using language as a proxy for race or national origin, Professor Salomone explored whether there are sufficiently compelling reasons for developing in students their home language as well as English, justifications that consider the child's home language not as a negative but as a personal and national resource. She suggested that here is where community and diversity come into play, the first shaping identity and the second, as in the case of race, promoting the common good both nationally and globally. She discussed research findings demonstrating a positive connection between native language use and the transmission of cultural norms, values, and traditions within the family, on the one hand, and student academic achievement, family cohesion, self esteem, and educational aspirations on the other. She also discussed her own interviews with second-generation immigrant law students who underscore the importance of language as a critical factor in shaping their identity and as a means of building an intergenerational alliance within immigrant families. At the same time, she noted how allowing immigrant children to maintain the linguistic tools they need to participate meaningfully in their communities in turn produces well-adjusted citizens who can also cross over linguistic borders and bridge cultural gaps in the national interest.[26]

Professor Salomone further explored single-sex schooling where, unlike the situation involving language, separation in fact is at the heart of the matter. She discussed how a substantial number of newly formed single sex charter schools are designed and operated as an antidote to failing schools. These schools represent a commitment on the part of communities to forego the values and social benefits of gender integration in order to achieve more long-term benefits for their children. She noted that many of these programs for both girls and boys have long wait lists for admission, high attendance and low dropout rates, high achievement scores, and dramatic increases in college attendance among their students. Professor Salomone noted that while at least a majority of the Court currently recognizes that school officials can make decisions

26. These measures might help create both bonding *and* bridging social capital. Political scientist Robert Putnam describes "bonding" social capital as inward-looking, cementing homogenous groups. ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22 (2000). He describes "bridging" social capital as outward-looking and encompassing people across diverse social cleavages. *Id.*

using race as one factor among others in order to achieve diversity or to avoid racial isolation, other classifications such as language and sex present differences and historical considerations that suggest other permissible justifications that may in the interim result in isolation or separation, but in the long term benefit both the individual and society.

Finally, Professor **Paul van Seters** (Tilburg University, Tilburg, Netherlands) has provided, in his live presentation and essay, a comparative perspective that focuses on the Netherlands experience—one that may serve as a caution to Professor Salomone's suggestions. The Dutch, he explains, have addressed the problem of equality of educational opportunity through a constitutional guaranty of state funding for schools of every religious denomination. That guaranty, cautions Professor van Seters, has exacerbated the alienation of recent immigrant groups—most notably those of the Muslim faith—from Dutch life. As a consequence, a nation known for harmony and tolerance has recently suffered through the sad experience of minority group estrangement, recrimination, and even political assassination. The Dutch experience should buttress the arguments of those who see integrated public schools as a foundation of citizenship and civic engagement.

Professor van Seters concludes his essay by distinguishing between three types of communitarianism: *conservative communitarianism*, which "views human beings as greatly though not exclusively influenced by their social, cultural, and political environment"; *liberal communitarianism*, which "presupposes a close relationship between the individual's autonomy, the goal of leading a rich and fulfilling life, and the rights and duties attached to membership in a particular community"; and *egalitarian communitarianism* (alternatively called *universalism* or *liberalism*), which "claims that humanity as a whole is the most important, decisive community affiliation."[27] The programs described by Professor Salomone may be seen as embracing the second of these categories, while the Louisville and Seattle integration plans appear to be premised on the third. The choice for American courts, and ultimately American society, is whether our more universalistic instincts will win out over individualism and even clannishness, so that we may construct a diverse but integrated society with justice and opportunity for *all*.

27. Van Seters derives these distinctions from the German constitutional law scholar Winfried Brugger. *See* Winfred Brugger, "Protection of Prohibition of Aggressive Speech? Arguments from the Liberal and Communitarian Perspectives," *in* PAUL VAN SETERS, COMMUNITARIANISM IN LAW AND SOCIETY 163, 176-77 (Paul van Seters ed., Rowman and Littlefield, Publishers, Inc. 2006).

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