The Seattle/Louisville Decision and the Future of Race-Conscious Programs

by Philip Tegeler

By now, most readers of *Poverty & Race* will have had the chance to absorb some of the commentary on the Supreme Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1* (the consolidated ruling in challenges to "voluntary" school integration programs in Louisville and Seattle)—and the important message that a) the legal justifications for racial integration are still in place, b) school districts can still take a variety of steps to promote racial integration, and c) we are one Supreme Court Justice away from a radical rollback of state and local power to undertake race-conscious programs of any kind.

A Divided Court

The *good news* in this decision is that despite the obviously adverse result and an extremely troubling plurality opinion (Justices Roberts, Alito, Thomas and Scalia), at the end of the day a narrow majority of five justices, including Justice Kennedy, supported the principle that reduction of racial isolation (also referred to as the interest in diversity or integration) constitutes a compelling governmental interest, and that government can take race-conscious steps to achieve these goals so long as they do not classify *individuals* on the basis of race in a way that allocates educational benefits.

The *bad news* is not so much the adverse result (or the new and stricter scrutiny of individual racial classifications dictated by Justice Kennedy's concurring opinion), but rather the plurality opinion's barely concealed hostility to any kind of remedial race-conscious measure, whether or not it includes an individual racial classification.

As Justice Breyer eloquently points out, the plurality opinion ignores the long-standing duality of equal protection jurisprudence—where much stricter scrutiny is applied to racial classifications that *exclude* members of racial minority groups than to those programs that seek to *include* them.

The plurality opinion's failure to observe this distinction between exclusion and inclusion is related to their rewriting of the history of the 14th Amendment not as a compensatory response to slavery but as a prescription for a color-blind society—and their re-reading of the arguments in *Brown v. Board of Education* to stand not for racial integration of formerly excluded Black students but for the elimination of all racial assignments in public schools (a re-reading that prompted protests from the advocates who argued *Brown–NY Times* 6/29/07).

The plurality opinion fails to observe the distinction between exclusion and inclusion.

And, in a willful misuse of precedent, the plurality opinion seeks to conflate what school districts may be required to do by the courts with what districts are permitted to do on their own: referring to the long-standing principle that court-*ordered* racial remedies under the 14th Amendment are permitted only in response to "de jure" (or intentional) segregation, the plurality conjures this same de jure principle as a necessary predicate to voluntary use of racial classifications by local districts—without acknowledging their judicial sleight-of-hand and without acknowledging the long-standing precedent permitting such voluntary measures.

The arguments raised by PRRAC and others in their "Amicus Brief of Housing Scholars and Research and Advocacy Organizations" were not directly cited by the court, but the underlying arguments of the amicus brief—regarding the government's role in creating and sustaining residential segregation, and the relationship between housing and school segregation (including the positive effect of school integration on stable integrated housing patterns)—were recognized in both the concurrence and the dissent.

Justice Kennedy, casting the crucial "ninth vote" (5-4) that will ultimately define the meaning and application of this decision, writes that "the decision today should not prevent school dis-

Philip Tegeler (ptegeler@prrac.org) is PRRAC's Executive Director.

Congrats, National Housing Law Project!

Our sister/brother organization, the National Housing Law Project in Oakland, Calif. has won one of the 8 "Building Creative & Effective Institutions" awards from The MacArthur Foundation (only 3 of which were to US groups—the Woodstock Inst. in Chicago is another winner). NHLP has for decades done wonderful work around the full range of progressive housing issues. Beyond the honor and well-deserved recognition, the award includes $500,000, which the Project will use to create a cash operating reserve, develop new talent and upgrade its telecommunications system. www.nhlp.org is their website.

tricts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole." And Justice Breyer observes: "Cities that have implemented successful school desegregation plans have witnessed increased interracial contact and neighborhoods that tend to become less racially segregated," and that school integration plans are "helpful in limiting the risk of 'white flight'," citing studies from Marvin Dawkins, Jomills Braddock and Gary Orfield (a member of PRRAC's Social Science Advisory Board).

Responding to the Court's Ruling

In response to the Court's ruling, there may be a temptation to abandon the goal of racial integration in favor of either separate-but-equal enhancements to racially isolated schools, or integration on socioeconomic grounds alone. The former approach is always an important and valuable goal, but can never stand alone—and while the latter is a promising approach, we cannot rely solely on economic integration to address the real educational harm that involves educational isolation on the basis of both race and poverty.

This is not the time to retreat. Justice Kennedy's concurrence—supported by four dissenting Justices—authorizes new and creative efforts to reduce racial isolation in the public schools, and we should take advantage of this moment of opportunity to expand choice for racially isolated students. Advocates who have successfully advanced educational adequacy claims in a dozen or more states should consider the role of racial and economic isolation in the design of their remedial plans. Metropolitan, interdistrict public school choice programs in Boston, Hartford, St. Louis and Minneapolis should be replicated in other cities as a means of easing racial isolation. The federal government should expand its funding of interdistrict magnet schools in the most racially segregated regions of the country. New federal, state and local programs to "affirmatively further fair housing" should take a more prominent role in addressing racial isolation in the public schools, using expanded housing mobility programs, inclusionary zoning, regionally targeted use of housing trust fund expenditures, and site selection guidelines for assisted family housing that look explicitly at school performance and school racial and economic isolation.

The relationship between housing and school segregation was recognized in both the concurrence and dissent.

Looking beyond the decision's immediate impact on public education, we must also consider the vulnerability of race-conscious programs in the areas of housing, health, environmental regulation, employment and criminal justice, and develop a plan to protect and expand programs designed to attack long-standing racial disparities in these areas.

There is an important research agenda here, which PRRAC has already begun, to identify work that is needed both to protect race-conscious programs by ensuring that they are narrowly tailored to achieve their goals, and to develop alternative approaches that take race into account but also weigh other factors (including alternative definitions of poverty and poverty concentration) in targeting persistent racial disparities.

The Court and International Law

Finally, it is ironic that *Parents Involved in Community Schools* has been issued while the United States is in the midst of a UN review of its compliance with the Convention on the Elimination of All Forms of Racial Disparities (see *P&R* 16:1, March/April 2007), a treaty that expects detailed internal assessments of racial segregation and racial disparities, and requires affirmative (and even race-conscious) measures by state parties to remedy both governmental discrimination and general societal discrimination and disparities. What will the CERD Committee think of the Court's plurality opinion—which can fairly be read as a rejection of the entire concept of the treaty? This will not be the first time that the United States is out of step with world opinion, but in the area of human rights and civil rights, the US has sometimes prided itself on being in the lead. Perhaps one day soon the Court will return to the precedents and international obligations it is on the verge of rejecting. In the meantime, we need to keep moving forward in our organizing and advocacy, in the shadow of this fragile 5-4 ruling. ❑

New on PRRAC's Website

"Housing Mobility Plus": A series of best practices convenings to highlight connections between housing mobility and health, employment and education/youth development

PRRAC is co-hosting a series of 2007 forums, with invited experts, practitioners and funders in health, employment and education, to explore policies and programs that can more effectively connect families who are participating in housing mobility programs with opportunities in their new communities. The materials from the May housing mobility and health forum are now posted on PRRAC's website (www.prrac.org/projects/housingmobility.php), and the materials from our recent housing mobility and employment forum are posted on the website of Inclusion, our co-convenor of that forum (www.inclusionist.org/employmentandhousing). The third and final forum, on housing mobility and education, will be held later this year.