

Conclusions to Justice Brennan's Lengthy Dissent:

To show that the school assignment plans here meet the requirements of the Constitution, I have written at exceptional length. But that length is necessary. I cannot refer to the history of the plans in these cases to justify the use of race-conscious criteria without describing that history in full. I cannot rely upon *Swann's* statement that the use of race-conscious limits is permissible without showing, rather than simply asserting, that the statement represents a constitutional principle firmly rooted in federal and state law. Nor can I explain my disagreement with the Court's holding and the plurality's opinion, without offering a detailed account of the arguments they propound and the consequences they risk.

Thus, the opinion's reasoning is long. But its conclusion is short: The plans before us satisfy the requirements of the Equal Protection Clause. And it is the plurality's opinion, not this dissent that "fails to ground the result it would reach in law." *Ante*, at 28.

Four basic considerations have led me to this view. *First*, the histories of Louisville and Seattle reveal complex circumstances and a long tradition of conscientious efforts by local school boards to resist racial segregation in public schools. Segregation at the time of *Brown* gave way to expansive remedies that included busing, which in turn gave rise to fears of white flight and resegregation. For decades now, these school boards have considered and adopted and revised assignment plans that sought to rely less upon race, to emphasize greater student choice, and to improve the conditions of all schools for all students, no matter the color of their skin, no matter where they happen to reside. The plans under review--which are less burdensome, more egalitarian, and more effective than prior plans--continue in that tradition. And their history reveals school district goals whose remedial, educational, and democratic elements are inextricably intertwined each with the others. See Part I, *supra*, at 2-21.

Second, since this Court's decision in *Brown*, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools. The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races. From *Swann* to *Grutter*, this Court's decisions have emphasized this distinction, recognizing that the fate of race relations in this country depends upon unity among our children, "for unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken*, 418 U. S., at 783 (Marshall, J., dissenting). See also

C. Sumner, Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts, in 2 The Works of Charles Sumner 327, 371 (1849) ("The law contemplates not only that all be taught, but that all shall be taught together"). See Part II, *supra*, at 21-37.

Third, the plans before us, subjected to rigorous judicial review, are supported by compelling state interests and are narrowly tailored to accomplish those goals. Just as diversity in higher education was deemed compelling in *Grutter*, diversity in public primary and secondary schools--where there is even more to gain--must be, *a fortiori*, a compelling state interest. Even apart from *Grutter*, five Members of this Court agree that "avoiding racial isolation" and "achiev[ing] a diverse student population" remain today compelling interests. *Ante*, at 17-18 (opinion of Kennedy, J.). These interests combine remedial, educational, and democratic objectives. For the reasons discussed above, however, I disagree with Justice Kennedy that Seattle and Louisville have not done enough to demonstrate that their present plans are necessary to continue upon the path set by *Brown*. These plans are *more* "narrowly tailored" than the race-conscious law school admissions criteria at issue in *Grutter*. Hence, their lawfulness follows *a fortiori* from this Court's prior decisions. See Parts III-IV, *supra*, at 37-57.

Fourth, the plurality's approach risks serious harm to the law and for the Nation. Its view of the law rests either upon a denial of the distinction between exclusionary and inclusive use of race-conscious criteria in the context of the Equal Protection Clause, or upon such a rigid application of its "test" that the distinction loses practical significance. Consequently, the Court's decision today slows down and sets back the work of local school boards to bring about racially diverse schools. See Part V, *supra*, at 57-63.

Indeed, the consequences of the approach the Court takes today are serious. 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.

The Court's decision undermines other basic institutional principles as well. 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 *Grutter*. The plans here are more narrowly tailored than the law school admissions program there at issue. Hence, applying *Grutter*'s strict test, their lawfulness follows *a fortiori*. To hold to the contrary is to transform that test from "strict" to "fatal in fact"--the very opposite of what *Grutter* said. And what has happened to *Swann*? To *McDaniel*? To *Crawford*? To *Harris*? To *School Committee of*

Boston? To Seattle School Dist. No. 1? After decades of vibrant life, they would all, under the plurality's logic, be written out of the law.

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 means they may find necessary.

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.

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 Justice Thomas likens the approach that I have taken to that of segregation's defenders. See *ante*, at 39-41 (plurality opinion) (comparing Jim Crow segregation to Seattle and Louisville's integration policies); *ante*, at 28-32 (Thomas, J., concurring). But segregation policies did not simply tell schoolchildren "where they could and could not go to school based on the color of their skin," *ante*, at 40 (plurality opinion); they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history, see *ante*, at 39 (plurality opinion), is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of 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 Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying "a state-mandated racial label." *Ante*, at 17 (Kennedy, J., concurring in part and concurring in judgment). 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. See *Cooper v. Aaron*, 358 U. S. 1 (1958). 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.