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Justice Stevens and the Seattle Schools Case: A Case Study on the Role of Righteous Anger in Constitutional Discourse

Andrew Siegel[*]

As Professor Reynoso mentioned, three years ago I published a piece with a very long title in the *Fordham Law Review* giving an overarching view of Justice Stevens's equal protection jurisprudence.[1] Today I want to do three things. I want to briefly summarize what I said in the *Fordham* piece in order to lay a foundation for this panel. Then I want to talk about and apply my writings to the biggest equal protection case to come down in the intervening three years, *Parents Involved in Community Schools v. Seattle School District No. 1* ("*PICS*"), a case that challenged race-conscious student assignment plans in Seattle and Louisville, Kentucky.[2] And then finally, I want to discuss the role of "righteous anger" in constitutional discourse, and in particular in the writings of Supreme Court Justices.

Righteous anger may sound like an odd subject for this Symposium but I think it is an appropriate topic for several reasons. First, I think it helps us focus on what is most notable about the *PICS* case — the case involving the schools in Seattle — which is the passion of the dissents. Second, I think it is appropriate to our location. We're here in King Hall, part of the celebration of the Fortieth Anniversary of the naming of the building after Martin Luther King, Jr., who is often cited

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[1] *See generally* Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2390 (2006) (providing summary of Justice Stevens's equal protection jurisprudence).

[2] 551 U.S. 701 (2007) (decided together with Meredith v. Jefferson City Bd. of Educ., 551 U.S. 701 (2007)).

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as the prime example of the power of righteous anger. We're here the day after the powerful oral arguments in the California Supreme Court in the California Marriage Cases, another area where righteous anger comes to the forefront.[3] Most importantly for our subject, I think focusing in on this helps us round out the portrait of Justice Stevens collectively painted by the articles and tributes in this Symposium and others like it. These symposia tend to focus on the calmness, the dispassion, the judgment of Justice Stevens, all of which are crucial aspects of his character.[4] But sometimes they focus there at the expense of what I would call his steel, his power, his conviction.

Anyone who has been a law clerk to Justice Stevens appreciates the fact that one of his defining characteristics is that all the deliberation and care he takes do not stand in the way of action. He'll sit. He'll listen to rational argument. He wants to hear what you have to say about cases. He'll talk to you. But then you'll reach a point where his countenance changes ever so slightly. His eyes set. If you don't get the hint, he'll start patting his arm. He's made up his mind; he's heard what he needs to hear, and he's decided what he wants to decide.

The power of that conviction comes through in his writings. My term — and I assume this is true in most terms — there were a handful of incidents where, against the advice of everyone else or without asking for the advice of everyone else, he repaired to his office and typed out a one-page memo, or a one-page concurrence, or a one-page dissent. Sometimes he circulated these writings, other times not. Even when he circulated them, he mostly did so without the immediate goal of persuading the Court. Whether he elicited any reaction from the Court — and sometimes he did — there was just something he had to say, some conviction he had to express. I think that focusing on that character trait and putting it into the literature about Justice Stevens helps nicely to balance the picture.

My *Fordham* piece posits a theory of Justice Stevens's equal protection jurisprudence that's focused on the fact that he both rejects the standard three-tiered equal protection framework, and then, unlike other people who reject that jurisprudence, he doesn't try to replace the framework with some equally or more complicated set of

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[3] *See generally* Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (upholding against state constitutional challenge state referendum forbidding same-sex marriage, but determining that same-sex marriages performed before effective date of referendum remain valid).

[4] See generally *Symposium: The Jurisprudence of Justice Stevens*, 74 FORDHAM L. REV. 1557 (2006), and the other works in this symposium. *Cf.* Ward Farnsworth, *Realism, Pragmatism, and Justice John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 157 (Earl M. Maltz ed., 2003).

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mediating doctrines. Instead of developing a balancing test or presumptions or multifactor lists, he practices or tries to practice something approaching what I call "unmediated constitutional interpretation."[5] He attempts as best as possible, in every case, to apply unmediated judicial judgment to the constitutional text and the constitutional values.

A little more concretely, what do I mean by that? Well, first of all, he spends a lot of time focusing on developing and articulating a normative vision of the Equal Protection Clause and puts his normative formulations at the heart of his opinions, often at the very front of those opinions. He does it slightly differently in every case, but I think that the formulation that is most prominent is his belief that ultimately the Equal Protection Clause is a test of whether a particular law is the kind of law that an impartial sovereign would adopt. He treats that question as the polar star in his interpretation and his analysis; he never really deviates very far from it.

In answering that question, he gives us detailed and case specific inquiry into whether that standard is met. In every significant equal protection case, he provides a comprehensive, lawyerly examination of the plausible rationales for the statute, probing to determine whether an impartial legislature would have adopted such a policy. His analysis goes beyond the statute's text; he uses real evidentiary eclecticism. Depending on the case, he might look at the drafting history, the history of regulations of this type, the social history of the burdened group, the consequences of the law, or any combination of those things. He's got a commitment to resolve each case based on a holistic assessment of whether the government has acted as would an impartial sovereign.

Part of his theory, or part of his method, leads him to express explicit frustration with the rigidity of his colleagues' equal protection methodology. He gets genuinely upset that the tiered method of inquiry precludes his colleagues from taking into account salient pockets of evidence, and he often derides the majority's approach, even sometimes when he agrees with their conclusion, using words like "wooden," "sterile," and "misleading."[6] He thinks that the formal inquiry at the heart of modern equal protection jurisprudence focuses our energy on the wrong questions.

That's a short and dirty summary of the article with the long title.

In the Seattle and Louisville schools case, my thesis is that Justice Stevens's methodology allows him to see something that was obscured

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[5] Siegel, *supra* note 1, at 2339.

[6] *See* Siegel, *supra* note 1, at 2349 & nn.49-51.

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to a lot of people: it allows him to see that this was an easy case.[7] Why do I say this is an easy case? That is obviously a controversial statement. After all, lots of people way more accomplished than me who ultimately agree with me that the decision was wrong have written sophisticated works talking about how hard this case was.[8]

To explain why I think this was an easy case, we need to follow Justice Stevens's lead, step back from the doctrinal categories, and simply ask, "What happened in Seattle?"[9] A lot of the relevant history is in Justice Breyer's tour-de-force dissent.[10] In Seattle, African Americans have historically lived primarily in the central part of the city.[11] Even there, they lived in a patchwork of white and black micro-neighborhoods. The residential segregation in Seattle, historically, is a result of the same combination of public and private actions and public and private factors that created residential segregation in most major northern cities. Back in the middle of the twentieth century and before, the Seattle School District took any number of actions to ensure minimal integration of their schools. Their decisions — on where to locate schools, how to size them so as to make sure they didn't overlap neighborhoods, how to draw attendance zones, what teachers to assign — all contributed to that end. The public involvement in creating racially imbalanced schools was such that in 1956, in an internal memo that Justice Breyer references in his dissent, the school board said that official district policies were responsible for

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[7] *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798-804 (2007) (Stevens, J., dissenting).

[8] *See, e.g.*, Neil Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 1010 (2008) (describing Justice Kennedy's concurring opinion as "a statesmanlike effort to express social values inclusively and to sustain social solidarity in the face of irreconcilable yet reasonable value conflict," while ultimately disagreeing with his vote to strike down Seattle and Louisville assignment plans); *cf.* Kevin Brown, *Reflections on Justice Kennedy's Opinion in* Parents Involved: *Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 735 (2008) ("conceding" soberly that Justice Kennedy's simultaneous rejection of plans at issue and embrace of subtler race-conscious school assignment mechanisms accurately reflect degree of integration "American society is willing to accept," notwithstanding dissenters' strong(er) theoretical arguments).

[9] My focus is on Seattle primarily because I live there and know more about the underlying facts. The dissenting opinions make a strong case, however, that, when placed in its proper context, the Louisville program was equally unobjectionable.

[10] *Parents Involved*, 551 U.S. at 803, 807-13 (Breyer, J., dissenting).

[11] On the history of African-Americans in the "Central District," see Henry W. McGee, Jr., *Seattle's Central District, 1990-2006, Integration or Displacement?*, 39 URB. LAW. 167, 167-236 (2008).

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much of the segregation in the city's schools. They thought that they were going to have to adhere to *Brown* for that reason.[12]

In the two decades after *Brown*, the school district faced multiple legal challenges accusing it of intentionally maintaining a two-track school system.[13] The complaints raised strong allegations along the lines that I've just spelled out. Those challenges were all settled by the school district, as they were by any number of southern school districts, and the school district took voluntary efforts to desegregate using most of the methodologies available in the day, including pretty significant bussing. Sometime in the 1980s, along with many other districts across the country, the school district gradually moved to a "school choice" plan or model out of a combination of frustration with bussing, the desire to stem white flight to the suburbs and private schools, and the desire to achieve and balance other educational objectives.

The various school choice models that they used made modest use of race in their plans, nothing more than an attempt to limit backsliding on the integration efforts, as they're balancing these other goals, as they're shifting the methodology. The reality of the Seattle schools today is that, particularly at the elementary level, Seattle still operates — for complicated public and private reasons — as a two-track school system. Particularly in the central cluster where I live, which is the most racially and ethnically diverse area of the city, there are mostly white schools and there are mostly black schools. This is in large part a legacy of district policies to build small elementary schools near each other to draw attendance zones in particular ways. It's exacerbated by a byzantine choice system that allows high social capital parents to migrate out of a local school if it's perceived to be undesirable, but also establishes strong entitlements to attend that school if it is deemed desirable. In large measure, the scheme combines two highly segregative mechanisms: it mirrors residential segregation but allows high social capital parents to opt out of what would otherwise be their residentially-assigned school.[14]

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[12] For Justice Breyer's reference to the memo, see *Parents Involved*, 551 U.S. at 807-08 (Breyer, J., dissenting). *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (declaring unconstitutional state law that mandated separate public schools for black and white students).

[13] The National Association for the Advancement of Colored People ("NAACP") filed a federal lawsuit in 1969 and a complaint with the Department of Health, Education, and Welfare's Office for Civil Rights in 1977. *See Parents Involved*, 551 U.S. at 808.

[14] The Seattle School District recently approved a new school assignment plan that makes some significant changes in assignment practices. Advocates for the plan claim

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A series of policies that the schools have today marks the schools, lets people know immediately which of the two tracks the schools are on, and discourages people from sending children to schools on the other track. Uniform policies tend to be different at predominantly white and black schools. Particularly in the central part of the city, predominantly white elementary schools have a lot more recess than predominantly African-American schools; some of the predominantly African-American schools don't even have recess. The discipline policies are different at predominantly white and predominantly African-American schools. The expectations that are imbued in the students are different. So, there really is this ongoing problem of publicly facilitated segregation going on in the Seattle schools.

In this historical context, the minor efforts of the school district to ameliorate the re-segregative effects of the school choice plan were, in many ways, the least that they could do. The quirk of the litigation posture of this case was that it was in no one's interest to tell this story. The Seattle School District, who was trying to defend the constitutionality of their own efforts, in no way wanted to drag their own history before the Court and to trash their predecessors, as might have been necessary to put the racial tiebreakers in proper context. Certainly, the plaintiffs had no interest in that because they didn't want to establish that the schools may have been historically segregated. To their credit, all four of the dissenters in this case figured out this history, understood the deeper context. Justice Breyer's tour-de-force dissent was in many ways an attempt to go back to the record in Seattle and do a similar thing in Louisville and to explain the true context of this case.

To return to Justice Stevens after this digression into the details of Seattle's past, the contrast between his dissent and Justice Breyer's is interesting.[15] Though they agree on the history, and they ultimately agree on most of the law, the case is easier for Justice Stevens. He can do in five pages what it takes Justice Breyer seventy-seven pages to do. Justice Stevens's methodology allows him to go right to the evidence,

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that it will increase equity by, among other things, permitting students who live in desirable residence zones to attend their neighborhood schools even if they miss early enrollment deadlines. Critics of the plan conversely claim that it will decrease equity by reducing the ability of parents to move their children out of undesirable schools. While the ultimate consequences of the new plan remain conjecture, at the macro-level, it does not disturb the troubling structure described above: school assignment in Seattle reflects persistent patterns of racial segregation and then reinforces that problem by allowing parents with sufficient knowledge and fortitude to opt out of undesirable schools.

[15] *See Parents Involved*, 551 U.S. at 798 (Stevens, J., dissenting).

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to go right to what's at stake, whereas the other dissenters have to struggle to figure out how all of this information fits into the preexisting framework, into preexisting distinctions between "de jure" and "de facto" segregation, into preexisting categories of strict scrutiny versus lesser levels of scrutiny.

There is an elegant simplicity to Justice Stevens's dissent. What his dissent says is: this is an easy case. An impartial sovereign is acting in a responsible way to deal with complicated problems and ameliorate an ongoing historical wrong in which it was complicit. We should not only allow it, but we should applaud it. He says that the only excuse for treating this as anything other than an easy case is the "wooden" formalism — and here he uses the same words that I talked about in the *Fordham* article — of modern equal protection analysis.[16] That jurisprudence allows the Court to ignore the obvious, to refuse to acknowledge important pockets of evidence, and requires them to rigidly adhere to doctrinal categories even when those categories push the Court to a result that is antithetical to the text and the values of the Equal Protection Clause. I think that this dissent is a powerful example of the wisdom, the common sense as some have said, of Justice Stevens's methodologies.

So what do you do with that if you're Justice Stevens, or even if you're Justice Breyer who, in this case, ultimately ends up in the same place? What's their reaction, what's their emotion in this case, how did they behave? I like to characterize their dissents in this case as being different from many other cases because they express what I call a "righteous anger." How do you define that? What are requisites of righteous anger? Well, righteous anger is a belief that, in a crucially important case, the Court got things really wrong for reasons that are related to some deeper flaw in their values, their ideology, or their jurisprudence, and that they should have known better. Those are, I believe, the intellectual requisites, but there's something more to it than that; those are necessary, but they're not sufficient. There's also a subjective element — a genuine feeling of actual provocation or anger that characterizes cases of righteous anger — and I think you can see that in the Justices' opinions, in their dissents. But it is interesting how it expresses itself. When Justices feel that way, when they have this kind of righteous anger (or other constitutional thinkers have this kind of righteous anger), how do they proceed? How should they proceed?

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[16] *Id.* at 800.

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Well, there's a fundamental choice that a Justice has to make at the beginning: do you harness or suppress this indignation? You can understand why sometimes it's important to let the world know the stakes in a particular case, but you can also understand why it pushes against traditional notions of the judicial role. I think in recent years Justices on both sides of the Court's ideological divide increasingly have tried to harness their righteous indignation or righteous anger in constitutional cases.[17] Their goals appear to be varied: to keep the issues alive within the Court, to draw the attention of the general public to cases, to draw Congress's attention if it's a statutory case, to draw the attention of later Courts, and largely, I think, to appeal to the court of history — to say that we knew that this was wrong, we knew that this was putting us on the wrong course.

But then that leads to the question, how do you express that righteous anger? How is a responsible common law judge, someone who really believes in the role — believes in the decorum of the Court — to express that? You can, if you want, follow the path of Justice Scalia: let sarcasm come into your opinion, let invective characterize your writing, fill your opinions with attacks on the integrity and the ability of your colleagues. And, if we are honest, we all slip into that to some extent; few commentators, few judges or Justices, uniformly escape that tone.

I want to submit that Justice Stevens represents another approach. When the stakes are high and the Court goes sufficiently off course, he is not one to stifle his righteous anger. But his method of expressing that anger is different. I think he's the master of using formalized lawyerly mechanisms for expressing righteous anger — using small breaches of protocol and other forms of subtle signaling to indicate to people in the know just how angry he is.

What are some of the mechanisms of formalized righteous anger? What does a judge do to signal to people in the know how angry he or she is?

(1) Well, one of the things that we have seen recently is an increasing use of oral dissents — dissents from the bench — and some people have written provocatively about that.[18]

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[17] Why this has happened is an interesting question. We might attribute it to a changing culture on the Supreme Court, or to an increasing attention to hot-button issues, or to something about the confirmation process. If you prefer, you can lay blame with the Reagan Justice Department or, if you think big personalities set institutional tones, with Justice Scalia.

[18] *See, e.g.*, Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008) (arguing that oral dissents from Court spurs ordinary people to action);

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Justice Breyer held court for a long time, one of the longest oral dissents in history, in this very case.[19]

(2) Justices also at times express their anger by making unusually explicit appeals to other branches; you saw that, for example, in the *Ledbetter* case from the same term.[20]

(3) You can express righteous anger by expressly marking decisions as so deviant that you won't give them stare decisis effects. This card can't be played too often, but, if used sparingly, can be an effective signal of righteous anger. Certainly, for example, the Court's more liberal members have used this tool to indicate their continued indignity at the Rehnquist Court's sovereign immunity revolution.[21]

(4) A Justice might mark a case as unusually important and unusually frustrating by filing an opinion at an unusual procedural stage or captioning an opinion in an unusual way. The dissenting and concurring opinions that accompanied the grant of an injunction stopping the Florida vote count in *Bush v. Gore* are a classic example.[22] The best illustration of the degree to which an unusually timed opinion might signal that something is rotten at the Court is the famed — though never filed — dissent from the relisting of the cert petition in *Casey*,[23] prepared when that case was being held in conference for allegedly political reasons.[24] Threatening to speak at times when Justices normally don't can be a powerful tool for the expression of passion.

Timothy R. Johnson et al., *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560 (2009) (analyzing whether announcing dissents from bench has effect on legal policy and Supreme Court decisionmaking).

[19] *See* Guinier, *supra* note 18, at 8-9 (narrating courtroom scene during Justice Breyer's dissent).

[20] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (Ginsburg, J., dissenting). Congress took Justice Ginsburg's advice in the Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

[21] *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 92, 97 (2000) (Stevens, J., dissenting) ("Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent.").

[22] *See* Bush v. Gore, 531 U.S. 1046, 1046 (Scalia, J., concurring on issuance of stay); *id.* at 1047 (Stevens, J., dissenting on issuance of stay).

[23] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[24] *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 202 (2005).

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(5) One formalized expression of righteous anger that is perhaps overblown in the popular press but certainly carries some weight is the decision by a dissenting Justice to leave out the word "respectfully" when expressing their dissent. For the most part, it is an old wives tale — or whatever the lawyerly equivalent of that is — to suggest the Justices always say "I respectfully dissent" except when they are angry. But you definitely see Justices writing around the locution "I respectfully dissent" in cases where they can't muster the stomach to say that.

(6) A Justice might also express righteous anger by writing at disproportionate length or marshaling evidence that goes beyond the record, both of which Justice Breyer did in the *PICS* case.

(7) Finally, a Justice might express such anger by making uncharacteristic references, comments, or personal asides intended to draw attention to the uniqueness of a case. In the end, that is what Justice Stevens's dissent in the *PICS* case is going to be most famous for. His five pages will be most remembered for three references. First is his quotation at the beginning of the opinion of Anatole France's observation that "the majestic equality of the la[w] forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."[25] Second is his conspicuous personalized references to opinions by leading Republican-appointed federal appellate judges Alex Kozinski and Michael Boudin strongly disagreeing with the majority's approach; his reference to them as "two of our wisest federal judges" is simultaneously accurate and snide.[26] Finally, it will be famous for its unusual concluding salvo insisting that "[i]t is my firm conviction that no members of the court that I joined in 1975 would have agreed with today's decision."[27]

I think in sum, what both Justices Breyer and Stevens did in the *PICS* case is use lawyerly tools to mark this as a case where righteous indignation, righteous anger is the appropriate response. Now, these kinds of stylized expressions of anger are subject to criticism from

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[25] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 800 (2007), (Stevens, J., dissenting) (quoting ANATOLE FRANCE, LE LYS ROUGE (THE RED LILY) 95 (W. Stephens trans., 6th ed. 1922)).

[26] 551 U.S. at 800.

[27] *Id.* at 803.

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both sides. On one hand, there certainly is an argument that this kind of signaling is inappropriate, it's not the way that judges speak, it goes too far. On the other hand, you can make the argument that it is too subtle, too inside baseball, that it doesn't go far enough. You can use *Bush v. Gore* as an example here. Everyone in liberal circles loved Justice Stevens's famous dissent in that case.[28] Still, many people whom I encountered were in shock that the dissenting Justices did not put up more of a fuss. To paraphrase their comments, they wondered "Wait. They just stole the Presidency and all you can do is leave out the word 'respectfully'?"

In articles that follow I want to explore those criticisms from both sides and interrogate my intuition that Justice Stevens hits the right middle tone in cases like the *PICS* case. But for today, all I really wanted to do is to highlight the issue. I appreciate the opportunity you have given me to do so.

[28] Bush v. Gore, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

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