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Backpedaling Toward Plessy

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The Supreme Court constrains the meaning of Brown and education

By Robert Lowe

The Supreme Court has been known to add drama to a major judgment by delaying its announcement until the last day of the term. It did just that in June with its widely awaited decision, known as *Parents Involved in Community Schools v. Seattle School District No. 1*, that overturned voluntary desegregation plans in both Seattle and Jefferson County, Ky. (metropolitan Louisville). Why this case drew so much attention is not completely obvious, however, since desegregation has long been receding from public policy and public interest.

Facing little protest, the Court issued a series of decrees in the 1990s that eased the release of many districts — especially large ones — from desegregation orders, regardless of whether schools had reseggregated or soon would become reseggregated. Moreover, fewer than 1,000 of the 15,000 school districts in the country engage in voluntary desegregation to any extent. Not only has segregation been increasing nationwide in recent years, but also a number of urban districts have so few white students that meaningful desegregation is simply unattainable within city boundaries. Not surprisingly, No Child Left Behind, probably the most important federal educational legislation in decades, is a post-desegregation policy that assumes that all children can become academically proficient without respect to the racial demographics of the schools they attend.

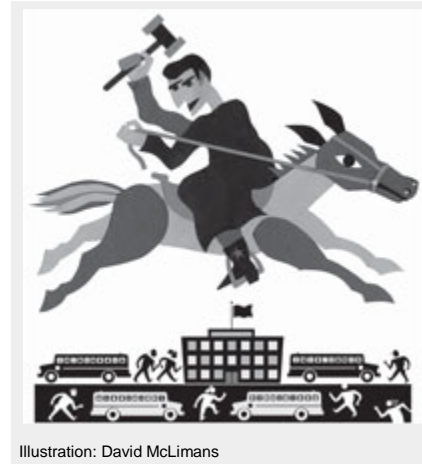


Illustration: David McLimans

In addition to the failure of desegregation to inspire much interest nationally, it was a foregone conclusion that the Court would vote to topple the plans. There was no other reason to take them up since the Courts of Appeals had affirmed both plans, and a third Court of Appeals upheld a similar one. Furthermore, the replacement of the moderately conservative Sandra Day O'Connor with very conservative Samuel Alito guaranteed a right-wing majority. Nonetheless, if the outcome was preordained, how the ruling was made had implications for the future of affirmative action in higher education as well as for *Brown v. Board of Education*. Perhaps it was the connection of the desegregation cases with the former that spurred the greatest interest, since affirmative action remains a highly divisive issue.

The decision could have undermined *Grutter*, the 2003 Supreme Court decision that upheld affirmative action as it was practiced by the University of Michigan Law School. It left *Grutter* alone, however, by claiming it had no bearing on the cases, and it did not, practically speaking, close the door on *Brown*, though it came perilously close to imposing an impossibly restrictive meaning on it. The decision, in short, could have been a much more drastic assault on equality of educational opportunity. It was an assault, nonetheless, and the way the cases were framed and decided supports the twisted view that desegregated schools are constitutionally more suspect than segregated ones.

Both Seattle and Jefferson County only modestly employed race in promoting desegregation. In the former, which never technically had been found guilty of sponsoring segregation,¹ student admission was foremost based on parental choice in a plan that was restricted to 10 high schools. In the final year the program was in place before a lower court suspended it, five schools had more applicants than openings. Siblings got first preference, and then, if the school either was more than 75 percent students of color or more than 55 percent white, race was used in order to promote integration. Most students got their first choice.² According to Chief Justice John Roberts, "[T]he district could only identify 52 students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignments to a school they had not listed as a preference and to which they would not otherwise have been assigned."³

Jefferson County did practice state-enforced segregation and desegregated under court order in 1975. A district court lifted the order in 2000, but Jefferson County has continued to adhere to a desegregation plan that requires all but magnet schools to have a percentage of African-American students that ranges between 15 and 50 percent. Parental choice operates here as well, but race is resorted to when choice pushes a school beyond the desired range. Similar to Seattle, Chief Justice Roberts noted that race does not come into play significantly, however, since 95 percent of children get their first or second choice of school, and, apparently only 3 percent of children are affected by the racial guideline.⁴ It seems ironic that programs that so modestly use race to promote integration would reach the Supreme Court, let alone be held illegal by it. But it is even more ironic that the Court turned such a sparing use of race against the two districts by claiming it demonstrated that race did not have to be used at all. This is despite the fact that racial segregation has increased in Seattle schools since its plan was suspended in 2001 and that the attorney for the party seeking to overturn Jefferson County's plan predicted that doing so would swiftly result in reintegration.⁵

If the modest use of race in Seattle and Jefferson County made them unlikely fodder for sustained legal assaults, perhaps more troubling has been the framing of the cases as an affirmative action matter, with the implication that the desegregation plans favor

African-American and other students of color. In oral argument, Justice Antonin Scalia explicitly called Seattle's effort an affirmative action plan, but the conservative justices alone are not responsible, since the media have widely used the same language. Although this can partly be explained by the defendant districts' emphasis on the parallels between their interest in promoting diversity and the promotion of diversity that passed constitutional muster in *Grutter*, affixing the language of affirmative action onto desegregation is novel and inappropriate. It distorts both the history of desegregation and the nature of the two plans.

The main motive for desegregation was to provide black students access to schools, generally with much greater resources, they had been denied because of their race. Massive resistance to desegregation for nearly a decade and a half after *Brown* prompted the Supreme Court in *Green v. New Kent County* to require districts to act affirmatively in dismantling segregated schools, but desegregation was never meant to favor black students, and it did not. The terms of desegregation typically did the opposite. Almost invariably it was black schools that were closed, black teachers and principals who lost their jobs, black students who bore the disproportionate burdens of busing, tracking into the lowest-level classes, disciplinary action, and exclusion from competitive magnet schools that often were designed specifically to lure white children into urban schools. In addition, the hostile reaction African-American students faced when they tried to desegregate in the 1950s, most poignantly represented by the white siege of Central High School in Little Rock, Ark., was slow to dissipate as the searing violence that nearly two decades later met desegregation in Jefferson County and Boston attests. It is small wonder that early evaluations of desegregation did not clearly show achievement gains for black students. That the bulk of research currently does show gains may suggest improvement in the way black students are treated in desegregated schools, but it also suggests how unequal segregated schools still tend to be.⁶

If desegregation historically has been solicitous of whites at black expense, the affirmative action label suggests the opposite. In Seattle and Louisville attention has focused on the presumed disadvantages whites have faced. In the former this particularly has been symbolized by Jill Kurfist, whose son did not get into his school of choice and who helped organize the mostly white Parents Involved in Community Schools, the group that filed suit. Similarly, in the latter the plight of a white parent, Crystal D. Meredith, has received considerable publicity because she is the one who brought suit against Jefferson County.

However legitimate was their disappointment and the disappointment of other white parents in not getting their children into their schools of choice, the emphasis on the presumed injustice of their situations obscures the fact that parents have no legal right to a particular school, and a number of parents of color were denied their choices as well. Further, due to the high degree of housing segregation and the location of most of its highly regarded high schools in a predominantly white area of Seattle, the neighborhood schools approach to attendance that Parents Involved in Community Schools advocates would absolutely deny most students of color the option to attend those schools. Without school desegregation, the prevalence of residential segregation severely limits meaningful choice of schools for students of color not only in Seattle, but also in Louisville and the rest of the nation.

Contrary to the disadvantages a neighborhood schools approach would impose on students of color in both districts, the two desegregation plans, as Justice Stephen Breyer stated in his dissent, do not "impose burdens unfairly upon members of one race alone."⁷ In fact, since the plans are not imposed by the federal government but chosen by popularly elected school boards, it is unlikely that whites, who constitute two-thirds of the population of Jefferson County and the single largest group in Seattle, would permit plans that disadvantage them as a class. In addition, unlike affirmative action programs, no parent in either district can claim that merit was trumped by race. As Justice David Souter noted in oral argument, "The point of the affirmative action case is that some criterion which otherwise would be the appropriate criterion of selection is being displaced by a racial mix criterion. This is not what is happening here. This is not an affirmative action case."⁸ In other words, race has not substituted for qualifications like grades or test scores. Nonetheless, the association of the cases with affirmative action sustains the notion that discrimination against whites has been remedied by the Court's decision.

What the decision ultimately means for *Brown v. Board of Education* is not perfectly clear. Had the opinion of the four most conservative justices held sway, *Brown* essentially would be emptied of meaning. Writing for this group, Chief Justice Roberts maintained that the use of race to promote diversity and diminish racial isolation in districts that are legally innocent of discrimination is itself discriminatory. He concluded with this apparent truism: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁹ His notion of discrimination, however, rests on a view of the 14th Amendment as colorblind. This is a misreading of the Amendment. As the amicus brief of 60 prominent historians demonstrated, the 14th Amendment was not colorblind, but rather was meant to incorporate African Americans into society, and the Congress that enacted the Amendment used various race-conscious practices to accomplish this.¹⁰ In addition, Justice Breyer in his dissent noted that the 14th Amendment "has always distinguished between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races."¹¹ A colorblind approach, given rampant housing segregation throughout the country, has little prospect of bringing the races together. Ironically, districts like Jefferson County that once resisted desegregation — and now embrace it — would face compulsory segregation.

What smacks of a return to the separate-but-equal doctrine of *Plessy v. Ferguson* (1896) to some degree was mitigated by the opinion of Justice Anthony Kennedy. Although his was the swing vote in overturning the desegregation plans, he held that race might be used if other means to promote diversity were exhausted or, as *Grutter* affirmed in higher education, if it were employed as only one factor in promoting diversity. What this will mean on the ground remains to be seen. On the one hand, it indicates that voluntary programs other than the two addressed by the Court have not automatically been invalidated. On the other hand, it is likely to further invigorate conservative groups like the Pacific Legal Foundation that did the legal work for Parents Involved in Community Schools. In any case, the ruling on voluntary desegregation will hardly provide an incentive for more districts to pursue desegregation.

The Supreme Court certainly has broken new ground by interfering for the first time in voluntary desegregation plans, and in doing so perhaps the biggest irony is its violation of the conservative commitment to local control. Whereas in the 1990s restoring local control was a rationale for releasing districts from desegregation orders, now local control is suspect when districts choose to desegregate schools. Nonetheless, to label the decision "radical" as Justice Breyer¹² and other liberals did is to miss the trajectory

of increasingly conservative decisions that extend not merely back to the 1990s cases that diminished government oversight of desegregation, but further back to the 1970s when *Milliken v. Bradley* severely limited interdistrict desegregation and *San Antonio v. Rodriguez* in the name of local control released the federal government from any responsibility for equalizing funding between school districts. Moreover, even the more liberal courts of the past refused to address the ways race-based federal policy has engendered housing segregation and suburbanization, which have strongly contributed to school segregation, to say nothing of enduring race-based differentials in wealth.¹³

Although it is not a radical step backward, the desegregation decision does further constrain the meaning of *Brown* and the meaning of public education as well. Horace Mann, the first major promoter of public education, saw public schools as places where people from all stations of life would come together and learn to be citizens together. This mid-19th century vision took hold, but the practice fell far short.

Early public schools essentially were Protestant institutions that insulted Catholics, belittled many immigrant groups, and first excluded and later segregated most African Americans. The most important struggles around public education were aimed at severing public education from its ethnocentric roots and creating schools for all on equal terms. *Brown*, the product of black legal genius and protracted black struggle, represents a crucial moment in that effort, and *Brown* inspired further struggle to give the decision real clout. The current ruling of the Court is one of a series of legal steps taken in recent years that diminishes *Brown*'s promise of equal education for all. The decision is blind to race-based forms of unequal education beyond acknowledging the value of diversity, and it casts suspicion — perhaps fatal in most instances — on meaningful ways of achieving even that.¹⁴

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ENDNOTES:

1. Seattle initially desegregated in response to a federal suit, and it subsequently took further action in a settlement with the Office for Civil Rights. Had it not done so, the district may have been found legally culpable for segregated schools.
2. According to Justice Breyer, 80-90 percent received their first choice over the two years this program was in force. See 551 U.S. ____ (2007) (Breyer, S., dissenting), p. 12. Available at www.supremecourtus.gov/opinions/06.pdf/05-908.pdf.
3. 551 U.S. ____ (2007), p. 26. Available at www.supremecourtus.gov/opinions/06.pdf/05-908.pdf.
4. *Ibid.*
5. *Parents Involved in Community Schools v. Seattle School District No. 1*, oral argument before the Supreme Court, Dec. 4, 2006, pp. 38-39. Available at www.supremecourtus.gov/oral-arguments/arguments_transcripts/05-908.pdf; "Schools' Efforts on Race Await Justices' Ruling," *New York Times*, June 24, 2006.
6. See, for instance, National Academy of Education, "Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases" (Washington, D.C., 2007), pp. 20-23, 47-48. This report, however, suggests that the more equivocal results — often produced by early studies — may trace to less adequate data and research designs.
7. Breyer, dissenting, p. 34.
8. *Parents Involved in Community Schools*, oral argument, p. 8.
9. 551 U.S. ____ (2007), pp. 40-41.
10. Brief of Historians as Amici Curiae in Support of Respondents. Available at http://supreme.lp.findlaw.com/supreme_court/briefs/05-915/05-915_mer_ami_hist.pdf. Also, see James D. Anderson, "Race-Conscious Educational Policies Versus a 'Color-Blind Constitution': A Historical Perspective," *Educational Researcher* 36 (June/July, 2007), pp. 249-257.
11. Breyer, dissenting, p. 64.
12. *Ibid.*, p. 30.
13. See Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (New York, 1985), pp. 190-230; Michael K. Brown et al., *Whitewashing Race: The Myth of a Color-Blind Society* (Berkeley, 2003), pp. 77-79, 91-94.
14. Note the distinction between diversity and equality in Eric Foner, "Diversity Over Justice," *The Nation*, July 14, 2002. Available at www.thenation.com/doc/20030714/toner.