

Justices Limit the Use of Race in School Plans for Integration

By LINDA GREENHOUSE
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WASHINGTON, June 28 — With competing blocs of justices claiming the mantle of *Brown v. Board of Education*, a bitterly divided Supreme Court declared Thursday that public school systems cannot seek to achieve or maintain integration through measures that take explicit account of a student's race.

Chief Justice John Roberts, right, wrote the majority's decision. Justice Stephen Breyer wrote the dissent.

Majority opinion

"Classifying and assigning school-children according to a binary conception of race is an extreme approach."



Dissenting opinion

Today's result "undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality."



Voting 5 to 4, the court, in an opinion by Chief Justice John G. Roberts Jr., invalidated programs in Seattle and metropolitan Louisville, Ky., that sought to maintain school-by-school diversity by limiting transfers on the basis of race or using race as a "tiebreaker" for admission to particular schools.

Both programs had been upheld by lower federal courts and were similar to plans in place in hundreds of school districts around the country. Chief Justice Roberts said such programs were "directed only to racial balance, pure and simple," a goal he said was forbidden by the Constitution's guarantee of equal protection.

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," he said. His side of the debate, the chief justice said, was "more faithful to the heritage of *Brown*," the landmark 1954 decision that declared school segregation unconstitutional. "When it comes to using race to assign children to schools, history will be heard," he said.

The decision came on the final day of the court's 2006-7 term, which showed an energized conservative majority in control across many areas of the court's jurisprudence.

Chief Justice Roberts's control was not quite complete, however. While Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. joined his opinion on the schools case in full, the fifth member of the majority, Justice Anthony M. Kennedy, did not.

Justice Kennedy agreed that the two programs were unconstitutional. But he was highly critical of what he described as the chief justice's "all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."

In a separate opinion that could shape the practical implications of the decision and provide school districts with guidelines for how to create systems that can pass muster with the court, Justice Kennedy said achieving racial diversity, "avoiding racial isolation" and addressing "the problem of de facto resegregation in schooling" were "compelling interests" that a school district could constitutionally pursue as long as it did so through programs that were sufficiently "narrowly tailored."

The four justices were "too dismissive" of the validity of these goals, Justice Kennedy said, adding that it was "profoundly mistaken" to read the Constitution as requiring "that state and local school authorities must accept the status quo of racial isolation in schools."

As a matter of constitutional doctrine and practical impact, Justice Kennedy's opinion thus placed a significant limitation on the full reach of the other four justices' embrace of a "colorblind Constitution" under which all racially conscious government action, no matter how benign or invidious its goal, is equally suspect.

How important a limitation Justice Kennedy's opinion proves to be may become clear only with time, as school districts devise and defend plans that appear to meet his test.

Among the measures that Justice Kennedy said would be acceptable were the drawing of school attendance zones, "strategic site selection of new schools," and directing resources to special programs. These would be permissible even if adopted with a consciousness of racial demographics, Justice Kennedy said, because in avoiding the labeling and sorting of individual children by race they would satisfy the "narrow tailoring" required to meet the equal protection demands of the 14th Amendment.

Justice Stephen G. Breyer, who wrote the principal dissenting opinion, was dismissive of Justice Kennedy's proposed alternatives and asserted that the court was taking a sharp and seriously mistaken turn.

Speaking from the bench for more than 20 minutes, Justice Breyer made his points to a courtroom audience that had never seen the coolly analytical justice express himself with such emotion. His most pointed words, in fact, appeared nowhere in his 77-page opinion.

"It is not often in the law that so few have so quickly changed so much," Justice Breyer said.

In his written opinion, Justice Breyer said the decision was a "radical" step away from settled law and would strip local communities of the tools they need, and have used for many years, to prevent resegregation of their public schools. Predicting that the ruling would "substitute for present calm a disruptive round of race-related litigation," he said, "This is a decision that the court and the nation will come to regret."

Justices John Paul Stevens, David H. Souter and Ruth Bader Ginsburg signed Justice Breyer's opinion. Justice Stevens wrote a dissenting opinion of his own, as pointed as it was brief.

He said the chief justice's invocation of *Brown v. Board of Education* was "a cruel irony" when the opinion in fact "rewrites the history of one of this court's most important decisions" by ignoring the context in which it was issued and the Supreme Court's subsequent understanding of it to permit voluntary programs of the sort that were now invalidated.

"It is my firm conviction that no member of the court that I joined in 1975 would have agreed with today's decision," Justice Stevens said. He did not mention, nor did he need to, that one of the justices then was William H. Rehnquist, later the chief justice, for whom Chief Justice Roberts once worked as a law clerk.

Justice Clarence Thomas was equally pointed and equally personal in an opinion concurring with the majority.

"If our history has taught us anything," Justice Thomas said, "it has taught us to beware of elites bearing racial theories." He added in a footnote, "Justice Breyer's good intentions, which I do not doubt, have the shelf life of Justice Breyer's tenure."

The justices had been wrestling for over a year with the two cases. It was in January 2006 that parents who objected to the Louisville and Seattle programs filed their Supreme Court appeals from the lower court decisions that had upheld the programs.

The Louisville case was *Meredith v. Jefferson County Board of Education*, No. 05-915, filed by the mother of a student who was denied a transfer to his chosen kindergarten class because the school he wanted to leave needed to keep its white students to stay within the program's racial guidelines.

The Seattle case, *Parents Involved in Community Schools v. Seattle School District No. 1*, No. 05-908, was filed by a group of parents who had formed a nonprofit corporation to fight the city's high school assignment plan.

Because a single Supreme Court opinion resolved both cases, the decision carries only the name of the Seattle case, which had the lower docket number.

The appeals provoked a long internal struggle over how the court should respond. Months earlier, when Justice Sandra Day O'Connor was still on the court, the justices had denied review in an appeal challenging a similar program in Massachusetts. With no disagreement among the federal appellate circuits on the validity of such programs, the new appeals did not meet the criterion the court ordinarily uses to decide which cases to hear. It was June of last year before the court, reconfigured by the additions of Chief Justice Roberts and Justice Alito, announced, over the unrecorded but vigorous objection of the liberal justices, that it would hear both appeals.

By the time the court ruled on Thursday, there was little suspense over what the outcome would be. Not only the act of accepting the appeals, but also the tenor of the argument on Dec. 4, gave clear indications that the justices were on course to strike down both plans.

The cases were by far the oldest on the docket by the time they were decided; the other decisions the court announced on Thursday were in cases that were argued in March and April. What consumed the court during the seven months the cases were under consideration, it appears likely, was an effort by each side to edge Justice Kennedy closer to its point of view.

While it is hardly uncommon to find Justice Kennedy in the middle of the court, his position there this time carried a special resonance. He holds the seat once occupied by Justice Lewis F. Powell Jr. who, 29 years ago to the day, announced his separate opinion in the Bakke case. That solitary opinion, rejecting quotas but accepting diversity as a rationale for affirmative action in university admissions, defined the law for the next 25 years, until the decision was refined and to some degree strengthened in the University of Michigan Law School decision.

Justice Kennedy was a dissenter from that 2003 decision. But, surprisingly, he cited it on Thursday, invoking it to rebut the argument that the Constitution must be always be, regardless of context or circumstance, colorblind.

Excerpts From Opinions on the Use of Race in Public School Admission Policies

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Following are excerpts from opinions by Chief Justice John G. Roberts Jr. and Justice Anthony M. Kennedy in the court's 5-to-4 decision yesterday that public school systems cannot seek to achieve or maintain integration through measures that take explicit account of a student's race. Also included are excerpts from the dissent by Justice Stephen G. Breyer.

From Chief Justice Roberts

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 clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this court for the plaintiffs in Brown put it: “We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no state has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”

There is no ambiguity in that statement. And it was that position that prevailed in this court, which emphasized in its remedial opinion that what was “[a]t stake is the personal interest of the

plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis,” and what was required was “determining admission to the public schools on a nonracial basis.” What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again — even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

From Justice Kennedy

Our nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

This is by way of preface to my respectful submission that parts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality’s postulate that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*’s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

The statement by Justice Harlan that “our Constitution is color-blind” was most certainly justified in the context of his dissent in *Plessy v. Ferguson*. The court’s decision in that case was a grievous error it took far too long to overrule. *Plessy*, of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan’s axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

From Justice Breyer

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, Ark., and federal troops were needed to enforce a desegregation decree.

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.

The Same Words, but Differing Views

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The five opinions that made up yesterday's decision limiting the use of race in assigning students to public schools referred to *Brown v. Board of Education*, the landmark 1954 school desegregation case, some 90 times. The justices went so far as to quote from the original briefs in the case and from the oral argument in 1952.

All of the justices on both sides of yesterday's 5-to-4 decision claimed to be, in Chief Justice John G. Roberts Jr.'s phrase, "faithful to the heritage of Brown."

But lawyers who represented the black schoolchildren in the Brown case said yesterday that several justices in the majority had misinterpreted the positions they had taken in the litigation and had misunderstood the true meaning of Brown.

And as those reactions make clear, yesterday's decision has reignited a societal debate about the role of race in education that will almost certainly prompt divisive lawsuits around the country. Indeed, the decision has invited a fundamental reassessment of Brown itself, perhaps the most important Supreme Court decision of the 20th century.

"There is a historic clash between two dramatically different visions not only of Brown," said Laurence H. Tribe, a law professor at Harvard, "but also the meaning of the Constitution."

The four conservatives on the court said Brown and the 14th Amendment's equal protection clause required the government to be colorblind in making decisions about placing students in public schools in all circumstances. The four liberals said Brown meant to allow school districts to take account of race to achieve integration.

In the middle was Justice Anthony M. Kennedy, whose concurring opinion, at once idiosyncratic, enigmatic and decisive, was perhaps the least engaged with Brown, saying little more than that the case "should teach us that the problem before us defies" an "easy solution." Justice Kennedy's concurrence, which split the court 4-1-4 on a crucial point, sharply limited the role race could play in school assignments but did not forbid school districts from taking account of race entirely.

Charles J. Ogletree Jr., a law professor at Harvard and an authority on Brown and its aftermath, applauded that concurrence. "The hidden story in the decision today is that Justice Kennedy refused to follow the lead of the other four justices in eviscerating the legacy of Brown," Professor Ogletree said.

Writing for the other four justices in the majority, Chief Justice Roberts took a harder line. In an unusual effort to cement his interpretation of Brown, he quoted from the transcript of the 1952 argument in the case.

"We have one fundamental contention," a lawyer for the schoolchildren, Robert L. Carter, had told the court more than a half-century ago. "No state has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."

Chief Justice Roberts added yesterday, "There is no ambiguity in that statement."

But the man who made that statement, now a 90-year-old senior federal judge in Manhattan, disputed the chief justice's characterization in an interview yesterday.

"All that race was used for at that point in time was to deny equal opportunity to black people," Judge Carter said of the 1950s. "It's to stand that argument on its head to use race the way they use is now."

Jack Greenberg, who worked on the Brown case for the plaintiffs and is now a law professor at Columbia, called the chief justice's interpretation "preposterous."

"The plaintiffs in Brown were concerned with the marginalization and subjugation of black people," Professor Greenberg said. "They said you can't consider race, but that's how race was being used."

William T. Coleman Jr., another lawyer who worked on Brown, said, "The majority opinion is 100 percent wrong."

"It's dirty pool," said Mr. Coleman, a Washington lawyer who served as secretary of transportation in the Ford administration, "to say that the people Brown was supposed to protect are the people it's now not going to protect."

But Roger Clegg, the president and general counsel of the Center for Equal Opportunity, a research group in the Washington area that supports colorblind government policies, disagreed, saying the majority honored history in yesterday's decision.

"There is no question but that the principle of Brown is that a child's skin color should not determine what school he or she should be assigned to," Mr. Clegg said.

Chief Justice Roberts wrote that Brown not only supported but also required yesterday's decision striking down student assignment plans in Seattle and Louisville, Ky., meant to ensure racially balanced schools.

Justice John Paul Stevens, in dissent, said Chief Justice Roberts's discussion of Brown "rewrites the history of one of this court's most important decisions." Justice Stephen G. Breyer, also dissenting, said the opinion "undermines Brown's promise of integrated primary and secondary education" and "threatens to substitute for present calm a disruptive round of race-related litigation."

Professor Greenberg said he was also wary of the reaction to yesterday's decision. "Following Brown, there was massive resistance" that lasted some 15 years, he said. "This is essentially the rebirth of massive resistance in more acceptable form."

Mr. Clegg, by contrast, said the decision's practical consequences should be minimal. "Kennedy does leave the door open to some degree of consideration of race," he said, "but it's not very clear what that would be."

As a consequence, Mr. Clegg said, most prudent school districts would shy from any use of race in assigning students for fear of costly and disruptive litigation.

Professor Greenberg suggested that more than law was at play in yesterday's decision.

"You can't really say that five justices are so smart that they can read the law and precedents and four others can't," he said. "Something else is going on."