Journal of Educational Controversy

Volume 2
Number 1 *Jonathan Kozol's Nation of Shame Forty Years Later*

Article 27

2007

Eviscerating the Legacy of Brown in PICS v. Seattle

Brett Rubio
American Civil Liberties Union

REJOINDER

Eviscerating the Legacy of Brown in PICS v. Seattle

Brett Rubio
American Civil Liberties Union

> *"This is a decision that the Court and the Nation will come to regret."*[1]
> -Justice Stephen G. Breyer

The Supreme Court decision in *PICS v. Seattle* came as little surprise to the many who believed that the current conservative makeup of the court would triumph over legal reasoning and precedent. The decision was 5-4 against the school districts, but the difference was 4-1-4 with liberal and conservative justices splitting evenly, and moderate conservative, Justice Anthony Kennedy, concurring with the decision of the other conservatives, but not their entire reasoning. This split reminds us that the issue of race is far from being fully resolved in the nation's highest court.

Ever since desegregating schools in the *Brown* decision, the Supreme Court has slowly moved away from using race as a source of government action. In the opinion of the court, authored by Chief Justice John Roberts, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[2]

At a time when the nation is getting more diverse, but, by many measures, public schools are becoming more segregated, Roberts' simple answer falls short of any meaningful solution to this complex problem. A more seasoned colleague on the court, Justice Kennedy, although agreeing that Seattle's and Louisville's practices are unconstitutional, chastised Roberts for an "all-too-unyielding"[3] opposition to race-based programs. Kennedy cautiously noted that in the fifty years since the *Brown* decision, this case "should teach us that the problem before us defies an easy solution."[4]

To better understand the uncompromising opinion of the court regarding race, it is important to note that the court clearly stated that any attempt at racial balancing in the school districts, such as promoting racial integration, is not a state-compelling interest and is therefore unconstitutional.[5] On this point, Kennedy again refused to follow the lead of his fellow conservatives in eviscerating the legacy of the *Brown* decision:

> "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."[6]

Essentially, Kennedy's concurrence made the decision neither a blow to the concept of racial diversity nor an obliteration of race as a factor in remedying discrimination. As the swing vote of the court, Kennedy left the door open for school districts to reinvent their flexibility and find other creative solutions to promote racial integration and diversity.

Disregarding Brown's Precedent

Justices on both sides of the decision claimed to be, in Robert's words, "faithful to the heritage of *Brown*."[7] But perhaps one of the most troubling aspects of the court's decision was the way in which

the conservatives hijacked language used in the *Brown* decision to justify their reasoning and disregard the precedent of desegregation: "[T]he position of the plaintiffs in *Brown* was spelled out in their briefs and could not have been clearer: [T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of color or race."[8]

Justice John Paul Stevens who, at the age of 88, is currently the longest serving Justice on the court, dissented with Roberts' view of *Brown* in a separate opinion and indicated that he has "rewrit[ten] the history of one of this court's most important decisions."[9] Stevens said it was his "firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision." [10] He also noted the "cruel irony"[11] of the court relying on *Brown* while robbing that landmark ruling of much of its force and spirit.

In the dissenting opinion issued by Justice Stephen Breyer, he said that 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."[12] Breyer eloquently continued by citing language used in *Bakke,* where the court upheld limited race-conscious measures in higher education: "[A]ttending an ethnically diverse school could help prepare minority children for citizenship in our pluralistic society, [while also] teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage."[13] It is in this spirit that Breyer poignantly dissented with the court's opinion.

Forgotten Promises

The obvious problem with ideological voting is that it disregards the legal precedent set by previous court decisions. In his confirmation hearings, Chief Justice Roberts assured the Senate (and the nation) that he respected precedent, *Brown* in particular; yet he eagerly set these precedents aside.

The ruling of *PICS v. Seattle* confirmed exactly what many people had feared-- that the testimony given by John Roberts in Senate hearings was nothing more than prepared statements to obtain confirmation. During those hearings, Roberts presented himself as an open-minded jurist lacking an ideological agenda. He likened a Supreme Court justice to an umpire, a neutral arbiter whose personal political views are irrelevant to decisions. He presented himself as compassionate, insisting that he would not ignore the needs and rights of the powerless.

This court decision may well serve as a powerful reminder of the importance of presidential elections in determining the composition of the court. It is also a reminder that the confirmation process is not working. Nominees come forward and murmur all the right platitudes, refusing to answer specific questions about their views. They promise to be open-minded, and they present witnesses who attest to their fairness. For Roberts, this was enough to secure his confirmation.

Be Careful What You Ask For

To conclude, many conservatives are fighting to end the use of race in all governmental action because they argue that it is a form of discrimination. Some of them agree with the use of race-neutral criteria to achieve diversity, as used by the Seattle School District in this case, and others believe that better school funding is the answer. However, without accounting for race, these alternatives by themselves often fall short in practice. Part of the reason is that many conservatives do not seem that interested in increasing educational opportunities for those marginalized because of their ethnicity and race. For

them, the job will be done when they have eliminated any acknowledgement of race from the public sphere. If their view prevails, it is entirely possible that the racial divisions they thought they were helping to eliminate could actually increase.

References

[1] Breyer's dissenting opinion at 68 in *Parents Involved in Community Schools (PICS) v. Seattle School District No. 1 et. al.*, (2007), decided June 28, 2007; http://www.supremecourtus.gov/opinions/06pdf/05-908.pdf

[2] Roberts (opinion of the court) at 40-41.

[3] Kennedy (concurring opinion) at 7.

[4] *ibid.*

[5] *See* Syllabus at 5.

[6] Kennedy at 8.

[7] Roberts at 39.

[8] Roberts at 40.

[9] Stevens (dissenting opinion) at 2.

[10] Stevens at 6.

[11] Stevens at 1.

[12] Breyer at 2.

[13] Breyer at 57.