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The Spirit of Brown?

By Joan Indiana Rigdon

Just three years ago, as the nation celebrated the 50th anniversary of the landmark case Brown v. Board of Education, there was little argument over what it all meant. Politicians, historians, and civil rights lawyers hailed it as the case that outlawed public school segregation and led, eventually, to integrated schools where black and white children could sit on the same school bench.

Of course, none of those changes came easily. There were riots and rebellions, with recalcitrant governors and local officials on one side, and court orders and armed federal troops on the other. In 1971, when it was apparent that not much progress was being made in complying with Brown, the U.S. Supreme Court decided that the federal courts had broad authority to oversee and produce remedies for state-imposed segregation. In that decision, Swann v. Charlotte-Mecklenburg Board of Education, the Court also suggested remedies, including the use of mathematical ratios or quotas as “starting points.”

For decades school districts followed that advice. Over time they reached “unitary status,” and were no longer subject to supervision by the federal courts.

Even so, many school boards continued to make it a point to establish and maintain integrated schools. To do this they relied on the method the Supreme Court had condoned in Swann: they took into account the race of their students when deciding where to assign them.

That may soon change. The Supreme Court is now reviewing two cases—Parents Involved in Community Schools v. Seattle School District No. 1 and Meredith v. Jefferson County Board of Education—in which school boards, to achieve racial integration, used race as a

factor in deciding who gets assigned to certain public schools.

This practice is called racial balancing. It’s unclear how many school boards do it, but the practice is believed to be widespread. The school boards say they do it in the name of maintaining the integration that some of them have been laboring toward for the last half century, sometimes under court order. (That is especially true of the Jefferson County Board of Education in Louisville, Kentucky, which until 2000 was under court order to desegregate.)

But critics, including the Bush administration, say racial balancing is just another form of racial discrimination. They say it violates the equal protection clause of the Fourteenth Amendment—and the spirit of Brown—by denying certain students their choice of school because of the color of their skin.

The question the Supreme Court must now decide is whether these school integration plans indeed violate the Fourteenth Amendment.

For an answer to that, lawyers had expected the justices to look primarily to Grutter v. Bollinger and Gratz v. Bollinger, the race-based University of Michigan admissions cases the Court decided in 2003. In those cases, with Justice Sandra Day O’Connor as the swing vote, the Court found that a race-based admissions program violates the Fourteenth Amendment if it automatically gives preference to minorities, but not if it individually and holistically reviews applicants on several criteria in addition to race.

Although Grutter and Gratz played a major role during the oral arguments in the Seattle and Louisville cases last December, the justices seemed more keenly interested in Brown. Both sides took cover under it, claiming it supported their opposing positions.

The conservative justices argued that the school board plans are inconsistent with Brown, because Brown requires the government to be colorblind in assigning

students to schools. The liberal justices countered that Brown supports the school board plans, because Brown says that schools that aren't integrated deprive students of their equal protection rights under the Fourteenth Amendment.

At one point, Justice Ruth Bader Ginsburg remarked that given Louisville's history as a district that spent decades under a court order to desegregate, if its voluntary integration program is not constitutional, that means "[w]hat's constitutionally required one day is prohibited the next day. That's very odd."

At the outset of the arguments, it appeared likely that the outcome of the case could depend on Justice Anthony Kennedy, the new swing vote, now that O'Connor has retired. By the end of the morning, it seemed almost certain that Kennedy would join the four conservative justices in striking down the programs.

"Kennedy virtually said that he could not approve a plan that used race as explicitly as these plans did. That was the ballgame, as far I'm concerned," says William Taylor, a Brown-era civil rights lawyer whose first law job was for the NAACP Legal Defense and Educational Fund in 1954. He has since served as lead counsel for black students in several desegregation cases, and is now chair of the Citizens' Commission on Civil Rights, a Washington, D.C., group that monitors civil rights practices and policies of the federal government.

"It was a dreadful argument. All of my friends and colleagues who were there came away very dispirited by what they heard."

Stuart TaylorStuart Taylor, a lawyer who writes a law column for the National Journal and has covered the Supreme Court for many years for many publications, agrees with most observers that there are probably five votes against the racial balancing plans.

"That doesn't mean that they will erect an absolute rule that you can't ever do this," he says. "They will

very probably say that these plans are not narrowly tailored enough and strike them down, and in the process make it pretty hard to justify a race-based student assignment plan.”

The Cases

Brown v. Board of Education put blacks in the same schools as whites. But sociologists say that now, more than 50 years later, segregation is increasing nationwide in districts whose integration efforts are no longer under court supervision. In 2004 a report by Harvard University’s Civil Rights Project concluded that there had been “a substantial slippage toward segregation in most of the states that were highly desegregated in 1991.”

The admissions programs now before the Supreme Court were designed to increase integration and, in Louisville’s case, prevent resegregation.

The programs are similar, though they affect students of different ages. In Seattle the board’s aim was to racially balance certain high schools so they would reflect the district’s overall student population of 40 percent white and 60 percent nonwhite.

To do this, the board allowed students to choose their schools. Certain schools were popular and became oversubscribed. To decide between applicants, the school board used a system of tiebreakers.

First, the board gave preference to students with siblings already in the school, and then to students who lived closest. After that, it considered race, giving preference to those students whose admission would bring the school closer to the district’s overall racial mix.

In Louisville, where 35 percent of the students are black, the school board’s goal was to have a black student population of no less and no more than 50 percent at each school. The program began in first grade. As in Seattle, students had a choice of schools, and when a school became oversubscribed, the board

considered several tiebreakers, including race, with an eye to meeting its target ratio.

Strict Scrutiny

Under the Fourteenth Amendment, any government law or policy that discriminates on the basis of race is subject to “strict scrutiny,” which is the most rigorous form of judicial review. The test is so strict that it is often called “strict in theory, but fatal in fact” (a phrase coined by legal scholar Gerald Gunther in the Harvard Law Review in 1972). To pass the test, the government must show that the law or policy is necessary to achieve a “compelling” state interest, and that it is narrowly tailored.

Strict scrutiny is “a very difficult burden,” says Susan Low Bloch, professor of constitutional law at Georgetown University Law Center. “[The federal government] is saying, ‘We don’t want anything distributed according to race.’ ”

In Brown the state’s compelling interest was remedying past discrimination. In Grutter the Supreme Court upheld the idea that diversity in public universities is a compelling state interest. But the Court has never ruled on whether diversity in kindergarten through the 12th grade, or K–12, is a compelling state interest.

John PaytonJohn Payton, a WilmerHale partner who served as lead counsel for the University of Michigan in both Grutter and Gratz, does not think the justices will find a compelling interest in the Seattle and Louisville cases. “There will be five justices that say this isn’t Grutter. They’re going to say the compelling interest in Grutter stands, but that’s not the compelling interest that was asserted by these two school districts.”

If a majority on the Court does find a compelling interest, it’s unlikely that the justices will find the program is narrowly tailored. “I’m quite sure there are four votes on the Supreme Court who think this program is fine, because they basically applaud what [the school boards] are doing, trying to make the schools

more diverse," says Bloch, referring to Justices Stephen Breyer, Ginsburg, David Souter, and John Paul Stevens. "The problem with this case is finding a fifth vote, and it was O'Connor.

"In some ways," she adds, "these programs might not have even passed O'Connor's test, considering that she liked the nuanced part of the law program and voted against the undergraduate program, which was in her view too formulaic."

Bloch thinks O'Connor would have viewed both districts' mathematical ratios as too rigid to be narrowly tailored.

Even before the arguments, Bloch thought it would be especially difficult for the Seattle program to pass strict scrutiny, because it's unclear how well the program actually works.

Although the Seattle school board submitted statistics showing that its program increased integration districtwide while it was in force (the board dropped the program in 2002, during litigation), most of the gains were concentrated in oversubscribed schools, where the racial tiebreaker came into play. As for the undersubscribed schools, "the formula doesn't come into play with them," says Bloch.

In a few instances, students who were denied entry to their first-choice schools were bused across the district, to help integrate schools there. But there weren't enough of them to substantially change the makeup of the less desirable schools. Some schools in the district remained racially isolated. "Nothing about this program was going to make them more integrated," says Bloch.

Kozinski's Argument

When the Seattle case was in the U.S. District Court of Appeals for the Ninth Circuit, Judge Alex Kozinski, a former clerk to Justice Kennedy, suggested that the program should not be subject to strict scrutiny

because it is “far from the original evils at which the Fourteenth Amendment is addressed.”

In contrast to “stacked deck” programs that oppress members of some races by granting automatic preferences to members of others, the Seattle program reshuffles interchangeable seats for the purpose of increasing integration, Kozinski reasoned.

Civil rights lawyers hoped that Kozinski’s views would sway his former boss, but there was no evidence of that during the oral arguments.

Payton agrees with Kozinski’s approach. Kozinski, he says, “would have abandoned strict scrutiny” in this case. “I concur. I don’t think we should have even gone through the trouble of strict scrutiny.”

Payton is surprised that Kozinski’s argument “is just sitting out there. None of the parties are arguing that in Supreme Court.”

Kozinski suggested that in lieu of strict scrutiny, the Seattle program should be subject to a “robust and realistic” rational-basis review. Under that test, the least rigorous level of judicial review, the school board would only have to prove that its program is a rational means of achieving its goal, and that the goal is legitimate.

Applying Affirmative Action

One of the questions that lawyers focused on going into the arguments was whether the Court would hold the Seattle and Louisville programs to the same standards as Grutter and Gratz, in which the Court decided that each applicant should be considered as an individual.

The emphasis on individual consideration was laid out by former justice Lewis Powell in the 1978 case Regents of the University of California v. Bakke. In that case Allan Bakke, a white medical school applicant, sued the university, saying it breached his Fourteenth Amendment rights by rejecting his application in favor of those of minority candidates with lesser academic

credentials. A splintered Court ordered the medical school to accept Bakke, but upheld race-conscious university admissions plans as constitutional. In his opinion, Powell wrote that a race-conscious admissions plan can be constitutional if each applicant is considered as an individual, as opposed to a member of a racial group.

The Seattle and Louisville school boards argue that they should not be held to the standards of Grutter and Gratz because their programs are substantially different: public schools are not elite universities that accept some students and not others. Instead, everyone is guaranteed a seat in some school, and according to the school boards, all the schools are equal.

Payton agrees. “You just can’t conceptualize [the Seattle or Louisville program] as an affirmative action case. You just can’t do it. No one is more qualified or less qualified to attend [public high school]. It’s, how old are you?”

Instead, says Payton, these cases are about school assignments. Regardless of whether the students get their choice, they get equal placements. “It’s the same schools, the same books, the same classes.”

During the oral arguments, Justice Ginsburg took up this issue, asking how it was possible to review a kindergartner holistically. But Justice Antonin Scalia insisted the plans do use affirmative action, because some students get the seats they desire, and some don’t, on the basis of race. At one point, Scalia browbeat the Seattle parents’ counsel for appearing to agree with Ginsburg that the Seattle case is not an affirmative action case.

Susan Low BlochBloch sees a difference between the university and school board admissions programs, but thinks a majority of the justices will not. In the Seattle case, the fact that several high schools are oversubscribed and several are undersubscribed would seem to indicate that there is a disparity between the

schools in the program. “Some schools are better than others, and some kids are getting to go there on the basis of their race,” says Bloch.

Race, she says, may not be the first factor in deciding who gets in, but it’s a factor nonetheless. “If you believe, as some do, that the Constitution is colorblind, then race should just not be in there.”

The Colorblind Approach

Bloch believes that ultimately the law should be colorblind. But not yet. “Given that our history in this country is one of slavery, and the law was not colorblind for so long, we have to tolerate remedial measures. It would be better if we were colorblind, but we’re not. For now, we have to do it. But we have to be sensitive to the disadvantages of it.”

Payton acknowledges that the school board plans deny some students their first choice of school. In fact, at least one Seattle student who was not assigned a nearby school told local media she had to catch a 5:30 a.m. bus to commute to her appointed school.

Overall, in a district of about 46,000 students, only 300 were denied their first choices, and those denied included students of all races.

“Almost all the kids get to go to their local school if that’s what they want to do,” says Payton. “[As for those] who want to go to a different school but don’t get their first choices, what’s that burden compared to what the school district gets out of having diversity?”

He argues that the benefits are far more important. As in Brown, proponents of integration in the school board cases have pointed the Court toward several studies enumerating the benefits of diversity in lower education. “There is a huge body of social science learning that makes it pretty clear just how significant the educational benefits are if you have diverse classrooms in K–12,” says Payton.

Proponents of the colorblind approach say that the best way to stop discrimination is to stop discriminating. Payton thinks that slogan is too simple. “I think the way the school districts would look at it, . . . to shed the problems associated with race, is to start in K–12, by having kids educated in classrooms that are diverse, so that the stereotypes that otherwise would develop do not develop,” he says. “That’s the best way to deal with race. . . . It’s almost a response on the merits.”

If the Supreme Court insists that school boards be colorblind, that “basically says that the only way of assigning children to public schools will be the so-called neighborhood school, which is still a product, in my judgment, and the research shows, . . . of racial considerations,” says William Taylor.

“I think if we were to have decisions in Seattle and Louisville that say you cannot consider race at all [when trying to integrate], we would be making it more difficult to keep those schools that have desegregated [from becoming resegregated].”

Famously, Justice O’Connor wrote in Grutter: “It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

Bloch doesn’t see the 25 years as a deadline. “I read it as, ‘Hopefully, in 25 years, we won’t need to do this.’ But we need to be open to the possibility that 25 years from now, we’ll say, ‘Whoa, this is a lot more intractable than we thought.’ ”

Race Neutral Versus Race Conscious

Conservatives have long argued that racial preferences are unnecessary because racial integration can be achieved through race-neutral means, such as through

magnet schools and other programs that encourage students to leave their home schools.

Bloch believes that even if the Court agrees that the Seattle and Louisville programs are trying to achieve a compelling interest and are narrowly tailored, a majority of the justices will find that the school boards have not tried to use race-neutral programs. “I think there are going to be people on the Court who say achieving diversity is a compelling . . . interest, but this isn’t the way to do it. There are other ways to do it without considering race.”

Indeed, less than two minutes into the first argument, in the Seattle case, Justice Kennedy let loose a volley of questions on the constitutionality of a school board picking a school site to draw a more integrated student body.

Within another minute, Justices Ginsburg and Scalia piled on, pressing the Seattle parents’ counsel, Harry Korell, on whether it is constitutional for a school board to have racial integration as a goal. Korell said he thought not, absent past discrimination, and held his ground even when Scalia asked, in disbelief, if Korell was saying that he would object to magnet schools. Hoping to get back to his argument, Korell then suggested, “That type of hypothetical isn’t even necessary for the Court to reach.”

Signaling his willingness to write a far-reaching decision, Justice Kennedy retorted, “Well, it may not be necessary for you, but it might be necessary for us when we write the case. We’re not writing just on a very fact-specific issue.”

Justice Kennedy then suggested it would be “odd” if it were constitutional for a school district to have racial integration as a goal, but unconstitutional for the district to use racial means to achieve the goal.

From his remarks during the argument, it appears that Justice Kennedy does not oppose all race-conscious measures, just ones that classify individual students.

“The problem is, that unlike strategic siting, magnet schools, special resources, special programs in some schools, you’re characterizing each student by reason of the color of his or her skin,” he told the Seattle school board counsel.

“Kennedy is saying it’s okay to draw lines among school districts in ways designed to produce racial integration. But to say this student gets to go to school X, even though the kid next door doesn’t get to go to school X because of his race, that is almost never justified. And it’s not justified on the facts of the Seattle and the Louisville cases,” says Stuart Taylor.

Payton got the same message from Kennedy’s remarks. “I think that avenue will be left wide open,” he says of Kennedy’s suggestion about strategic school siting.

Justice Scalia left no doubt that he would oppose the plans. “He’s saying, no matter how admirable the goal of school integration, . . . you still can’t use race to get to it,” says Payton.

Scalia questioned whether the school boards are always acting with the best intentions. “How do we know these are benign school boards? Is it stipulated that they are benign school boards?” he asked, during arguments.

Socioeconomic Balancing

Opponents of racial balancing say that school districts could achieve a high level of integration through socioeconomic balancing—assigning students to schools on the basis of family income instead of race.

Unlike racial balancing, socioeconomic balancing is “perfectly legal,” says Richard Kahlenberg, a senior fellow at the Century Foundation, a free-market think tank based in the District. “Under a long line of precedents, if the government classifies people by race, it is held to the strictest standard. But if people are categorized by economic status, that’s perfectly fine.” He cites the progressive income tax as an example.

Under the Bush administration, the U.S. Department of Education's Office for Civil Rights published a paper of race-neutral alternatives to both school integration and affirmative action in higher education. "They are clearly on record as saying that it is legal to use socioeconomic status" to ensure a diversity of viewpoints among students in the same school, says Kahlenberg.

According to four decades of research, socioeconomic balancing improves educational outcome more than racial balancing does, says Kahlenberg. "All kids do better in middle-class schools. While the focus traditionally has been on racial integration, it's really a matter of class. It's not that black kids do better sitting next to whites. It's rather that low-income kids do better in middle-class environments."

That is because middle-class (and upper-class) schools have more students who expect to go to college, and those students can have a positive influence on peers who don't, says Kahlenberg. Moreover, middle-class parents are more active in school functions, putting the schools under additional pressure to perform well.

That idea of socioeconomic balancing has been assailed by the left, which says it doesn't do enough to increase racial integration, and by the right, which prefers a system of local schools or school vouchers.

"It's a phantom," Payton says of socioeconomic balancing. "It turns out that a lot of school districts have experimented with using that, and almost every single one that has has shut it down because it had unforeseen negative consequences."

Payton says that in racial balancing students don't feel stigmatized by being recognized by race. "No one wants to be labeled as poor," he says.

He adds that it's very difficult for a school to accurately assess a student's family income, and even if it can, income is not necessarily an indication of

savings and other wealth. Basing the assessment on tax returns would require too much time and paperwork, and would also raise the hackles of the parents, he says.

Some school districts do socioeconomic balancing by trying to evenly distribute students who are eligible for free lunch. That doesn't work either, says Payton, because "there is a certain stigma attached with having free lunch." If a low-income student were to attend a high-income school, and turned out to be among the 5 percent of the students eligible for free lunch, that status becomes embarrassing. "It's like wearing a scarlet letter."

Payton says that, overall, socioeconomic balancing is not an effective way to increase racial integration. Kahlenberg agrees that it doesn't always work, especially in communities where there is a strong black middle class, or a large percentage of lower-income whites.

Richard Kahlenberg"Socioeconomic status by itself won't produce [racial] integration," says Kahlenberg. "That's why I argue for socioeconomic balancing first, but holding in reserve the right to use race as a last resort. To my mind, that may be something Justice Kennedy [may agree with]."

He points out that during the oral arguments, Kennedy said that characterizing individual students by skin color "should only be, if ever allowed, allowed as a last resort."

Although it's uncertain how the Court will decide, Kahlenberg guesses it "may say something along the lines of 'You need to try to integrate using race-neutral methods. Try that first and that will produce some racial diversity. If it doesn't produce enough, then you can use race as a last resort.' "

The Outcome
Many of those who have been following the Seattle and Louisville cases expect the Supreme Court to strike down both programs. They differ only on the outcome.

Stuart Taylor guesses the Court will move gradually, rather than precipitously, in justifying any kind of racial preference plan. “I don’t think [Chief Justice John] Roberts wants people to think that suddenly the Court has been dramatically changed.”

Taylor doesn’t expect much to change following the Court’s decision. “There are so many interests and so many lower court judges who are passionately attached to various preference plans. Unless the Supreme Court unambiguously slams the door, the impact in the real world will be quite limited.”

Payton says that in striking down both programs, the Court would be undermining the spirit of Brown. “The most worrisome ramification would be the take-away that some people would have, that the Court has turned its back on integration as something that is in the national interest and is a national goal. If you polled people today, they would tell you they understood Brown to be about the country valuing integration as a national goal.”

“I have to say that I don’t think any of us who were around in the Brown days thought that the course would be so difficult and tortuous as it has been,” says William Taylor. “Thurgood Marshall and others who knew how difficult the course could be were very optimistic in those days, because Thurgood had an almost religious faith in law. He thought that the courts would prevail.

“The Court now has a majority that appears to be hostile to claims of discrimination. I’m not proclaiming despair. They may leave the door open to ways to [integrate] without specifically using race. . . .

“I’m not saying the game is over. But it is pretty discouraging, I have to say, for somebody who has been around as long as I have.”

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