

JUSTICE AND RACE

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The recent Supreme Court decision concerning the legitimate means for promoting ethnic diversity in our schools (*Parents . . . v. Seattle School District No. 1 et al*) should have led to a searching discussion of what ethnic integration means for this country, how we have tried to achieve it in the past, and what we need to do to achieve it in the future. It did not. The initial furor—that was dominated by cartoonish posturing from knee-jerk rightists and leftists alike—subsided quickly, another casualty of our (understandable) inability to focus seriously, or for long, on anything but the debacle in Iraq and of our (equally understandable) unwillingness to confront the issue of ethnic integration in a meaningful way.

The Court was torn over the issue, as was indicated by the 5-4 decision (although with Justice Kennedy's partial concurrence, it was probably more like 4 3/4-4 1/4) and by the length of the opinions of the justices clarifying their votes.

In addition to Chief Justice Roberts's statement of the opinion of the court (41 pages), other justices felt strongly enough to weigh in: Thomas concurring (36 pages), Kennedy concurring partially (18 pages), Stevens dissenting (6 pages), and Breyer (joined by Stevens, Souter, and Ginsburg) dissenting (77 pages).

Reading the full opinions (185 pages, including the 7-page introductory "Syllabus"), I was as torn as the Court. On the one hand, I agreed with much, perhaps even most, of what was said by Justice Breyer, a person whose blend of gentleness, humor, compassion, and erudition makes him stand out even on this Court. On the other hand, I also agreed with much of what was said by Chief Justice Roberts, a person whose blend of toughness, principle, and rationality is as impressive in its way as Breyer's is in his.

I have struggled for weeks to express my thoughts about the decision in a clear-headed way. This has been difficult for two reasons, personal and professional.

The personal difficulty is rooted in my aversion to the pervasive use of the word "race" to categorize an ethnic group. I was born and raised a Jew during World War II and its aftermath, when we Jews became painfully aware of the pernicious consequences that eventuate when race and ethnicity are confused. To this day, too many—with no tinge of Nazism—still consider "Jewish" the name of a race. In actuality, it designates a religion that encompasses an ethnic diversity ranging from the swarthy Sephardim of Spain to the pallid Ashkenazim of eastern Europe and the black Falashas of Ethiopia.

This awareness of Jews as Jews did not prevent Jews as assimilated Americans from adopting the erroneous racial usage when speaking of other ethnic groups. This was an inconsistency that, even as a child, I could not abide.

Therefore, in my teaching career—especially in my high school Sociology and Psychology classes—I took great pains to make students aware that with respect to humans, biologically, there is only one race, the human race. Therefore, the 'races' to which we so cavalierly refer in our public discourse are social constructs (fictions) designed to satisfy certain psychological needs, and they do not correspond to the way that things truly are. Why humans have felt obliged to construct a social world so at variance with the natural world is beyond the scope of this column.

I then faced the professional challenge presented because those who have reported or commented on the decision revealed only a superficial knowledge of its historical background, without understanding the subtleties and nuances of that background. Without that, the canvas on which both Roberts and Breyer were careful to paint their statements is invisible.

That canvas contains three post-Civil War amendments to the U. S. Constitution and two landmark U. S. Supreme Court decisions.

The constitutional history involves: the XIIIth amendment's abolition of slavery (1865); the XIVth amendment's guarantee of citizenship, due process, and equal protection (1866-1868); the XVth amendment's guarantee of the right to vote to all citizens regardless of "color, or previous condition of servitude" (1869-1870).

Then, in *Plessy v. Ferguson* (1896), Justice Henry Brown presented the opinion of the court under Chief Justice Melville Fuller regarding segregated seating on the East Louisiana Railway. The court upheld the constitutionality of "equal but separate accommodations" (a locution that Brown used twice). If he had not added the criterion of race, the court's opinion would be unassailable. There is nothing unconstitutional about "equal but separate," as the existence of same-gender schools indicates. In his presciently brilliant dissent, Justice John Harlan put his finger immediately on the problem. In his first sentence, he alludes to "separate but equal accommodations," thereby reversing the key phrase and giving primacy to separateness. Where separateness is the governing factor, the doctrine—he argues—is unconstitutional. He adds, "[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* Case." He was right.

The decision stood until the Court heard *Brown v. Board of Education of Topeka, Kansas* (1954). The arena now was education. Chief Justice Earl Warren presented the unanimous opinion of the court: "[I]n the field of public education the doctrine of 'separate but equal' has no place."

I urge you to consider this background when you read—as you should—the full decision of the Court. Chief Justice Roberts argues from the perspective of legality, Justice Breyer from that of morality.

Which one is right? You decide. However, think deeply before you do.

Bob Zaslavsky is a retired teacher of our much-neglected humanities.