



A TALE OF TWO JUSTICES

Linda Greenhouse

THIS IS A TALE OF TWO JUSTICES, two cases, and the future of the Supreme Court.

My Justices are two who are not usually considered as a pair. Yet on the surface, at least, Harry Blackmun and John Roberts have a good deal in common — two Republican sons of the Midwest, two summa cum laude graduates of Harvard College, two Harvard Law School graduates, two appointees of Presidents determined to wrench the Supreme Court out of the middle of the road and turn it to the right.

They were two generations apart: Harry Blackmun, raised in St. Paul, Minn., was born in Nashville, Ill. in 1908, and John Roberts, who grew up in Indiana, came into the world in Buffalo, N.Y. in 1955. John Roberts did not join the Supreme Court until 11 years after Blackmun's retirement and six years after his death. Nonetheless, the two were certainly acquainted, even if only slightly. Roberts clerked for William Rehnquist during the 1980 Term and, following the Court tradition in which each chamber's law clerks are invited to lunch by each of the eight other justices, we can assume that the two broke bread at least once. Roberts was a frequent ad-

Linda Greenhouse is the Supreme Court correspondent for the New York Times. This essay is a slightly modified version of a speech she gave at the annual dinner of the Twin Cities Cardozo Society in Minneapolis on October 7, 2007.

vocate before the Court during Blackmun's tenure, both as a lawyer in the Office of the Solicitor General and later in private practice.

My point is not to speculate about their personal relationship, but rather to focus on two events that occurred at the Supreme Court exactly 29 years apart. On June 28, 1978, the Court decided *Regents of the University of California v. Bakke*,¹ preserving affirmative action in public university admissions. The vote was 5 to 4, with Justice Lewis Powell writing his famous solitary and dispositive opinion on behalf of racial diversity in higher education. But, of course, every vote counts in a 5-to-4 decision, and one of those votes on behalf of affirmative action was Harry Blackmun's. At only six pages, Blackmun's separate opinion was the shortest of the six opinions that were filed in the case. His succinct statement of his position has endured as perhaps the most famous quotation from all of *Bakke*. "In order to get beyond racism, we must first take account of race," Blackmun wrote, adding: "There is no other way."²

Exactly 29 years later, on June 28 of this year, the Court issued its decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.³ This decision invalidated voluntary integration plans that Seattle and Louisville, along with dozens or hundreds of other public school systems, had adopted in order to preserve the hard-won accomplishment of school integration.⁴ The vote was also 5-to-4. Chief Justice Roberts wrote for a four-member plurality, having

¹ 438 U.S. 265 (1978).

² *Id.* at 407 (Blackmun, J.).

³ 127 S. Ct. 2738 (2007).

⁴ In Jefferson County, Ky. (Louisville), the plan applied to kindergarten through 12th grade. Students were assigned to neighborhood schools. Requests for transfers were granted as long as the transfer would not result in a school becoming less than 15 percent or more than 50 percent black. The Seattle plan applied only to the city's 10 high schools. Students could apply to attend any high school, and requests were usually accommodated. But when there were more requests than there were places, a racial "tiebreaker" was used in an effort to keep the school within 15 percent of the district's overall racial makeup, which was 60 percent non-white.

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failed to persuade Justice Kennedy, who provided the fifth vote for the judgment, to join his opinion.⁵

Five justices filed opinions in *Parents Involved*, but the most famous sentence to emerge from the case was the final one of the Chief Justice's 41-page explanation of why, in his view, the 14th Amendment prohibits school officials from intervening to prevent the all-but-inevitable resegregation that results from neighborhood housing patterns and from the psychology of tipping points. Plans that take account of race in school assignments are impermissible, the Chief Justice said, even those plans that, as in these cases, use a child's race only as a tie-breaker that affects the assignment of a relative handful within the overall context of a plan based on student choice. And then, at the end, came the punch line: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁶

The story of how each Justice arrived at his view suggests something important not only about the two men as individuals, but about the judicial process and about the new Supreme Court that is now revealing itself. In the contrast between those two pithy sentiments lies the distance the Court has traveled over the intervening decades and a roadmap – as some hope and others fear – for the future. It suggests why President Richard Nixon's plan to turn the Supreme Court around succeeded only at the margins, while President George W. Bush appears well on the way to accomplishing his goal.



To translate the two sentiments into prose that is somewhat more blunt: Harry Blackmun was asking the country to confront its tragic racial history in the course of deciding how best to move beyond it. John Roberts was asking the country to pretend that the history never happened.

⁵ Id. at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

⁶ Id. at 2768 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ.).

I feel little compunction about putting words into the Justices' mouths, because it turns out that in neither case did the words they themselves used actually originate with them. Both lifted – or, to put it more politely, borrowed – their language, almost exactly, from someone else, although neither acknowledged that fact by citation or otherwise. Harry Blackmun, as I learned to my surprise when examining his papers at the Library of Congress, took his phrasing almost word for word from an article by McGeorge Bundy, the former Harvard dean and national security adviser to Presidents Kennedy and Johnson, that appeared in *The Atlantic Monthly* in November 1977, shortly after the Court heard the *Bakke* argument.⁷ One of Blackmun's law clerks brought the article to his attention in early May 1978, as the Justice, far behind the others, was working on his opinion and feeling acute pressure to produce a draft for circulation. Entitled "The Issue Before the Court: Who Gets Ahead in America," the article "has been acclaimed by some as the best piece to appear on the subject," the law clerk wrote in a memo forwarding a copy to Blackmun.

In his article, Bundy made a strong case for affirmative action. "To get past racism, we must here take account of race," he wrote. "There is no other present way." As was his practice, Blackmun noted on his copy of the article the date on which he read it: May 6, 1978. At the time, Blackmun was drafting his opinion in longhand on a legal pad, incorporating various thoughts and phrases taken from his reading. Whether he realized, by the time his opinion appeared on June 28, that its most salient phrase had originated with McGeorge Bundy is impossible to say. As far as I have been able to determine, Bundy never said anything about it before his death in 1996.

The origin of the phrase that John Roberts used to express his view of what the country should do and not do about race is not so obscure. The Chief Justice lifted it almost word for word from Judge Carlos Bea's opinion dissenting from the Ninth Circuit deci-

⁷ Linda Greenhouse, *Becoming Justice Blackmun* (Times Books 2005), 132-133. The article appeared in the November 1977 issue of *The Atlantic Monthly*, pp. 41-54.

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sion in the very same case – that is, the dissenting opinion that the Supreme Court majority vindicated by reversing the Ninth Circuit. “The way to end racial discrimination is to stop discriminating by race,” Judge Bea wrote, explaining why, in his view, Seattle’s plan for using race as a student-choice tiebreaker in trying to maintain a rough racial balance in its high schools was unconstitutional.⁸ Chief Justice Roberts provided no citation. But Justice Breyer, in his dissenting opinion, found a sly way to call attention to the proper attribution, referring to what he called “the plurality’s slogan” and then, quoting the original language, identifying Judge Bea as the author.⁹

If Justice Blackmun and Chief Justice Roberts shared an affinity for benign plagiarism, they seemed to share little else as each turned his attention to a case that would define, for its time, the boundaries of permissible race-conscious government action in the place where any such action carries the special burden of history – in the public schools.

For Harry Blackmun, the answer to the question that *Bakke* posed was far from obvious. He struggled with the case for months and, it is plausible to assume, breathed a sigh of relief when McGeorge Bundy’s words finally helped to crystallize his own evolving thoughts.

Blackmun’s papers reveal the dimension of his struggle. The California Supreme Court had struck down the University of California’s affirmative action program for admission to the new medical school at the Davis campus, a program that reserved for minority applicants 16 out of the 100 places in the entering class. When the state’s petition reached the United States Supreme Court, Blackmun voted to deny certiorari because he believed the case had been correctly decided, and by no less than “a liberal state court of high repute” at that, as he described the California Supreme Court

⁸ *Parents Involved in Community Schools v. Seattle School Dist. No. 1 (VII)*, 426 F. 3d 1162, 1222 (CA9 2005) (Bea, J. dissenting.)

⁹ 127 S. Ct. at 2834 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.).

in a memo to himself after cert was granted. “Let race be one factor, but not to justify a separate admissions process,” he noted to himself.¹⁰

This, of course, was ultimately Lewis Powell’s view: that the Davis program, which established a separate admissions process for minorities, was a rigid quota that could not be upheld, but that the 14th Amendment did permit a more holistic approach, in which race was one factor among others, in recognition that diversity in the classroom served the social and educational interests of all students.

What is notable is that Blackmun ultimately came to reject Powell’s starting premise – the very premise that he himself had begun with – that the Davis program itself was unconstitutional. To be sure, Blackmun remained uncomfortable with the medical school’s 16 percent minority set-aside. He preferred the Harvard program that Powell cited as an example of the proper approach, in which race was one factor among others, without a fixed quota. But Blackmun noted in his opinion that “I am not convinced, as Mr. Justice Powell seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant.”¹¹

Both involved subjective judgments best made by educators, Blackmun said. Both were constitutional, although the Davis program was “perhaps barely so.”¹² While universities might be reluctant to concede the fact, Blackmun observed, racial and ethnic background “has always been there” as a factor in admissions, “a part of the real world of which we are all a part.” Then he added: “The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.”¹³ Getting beyond ra-

¹⁰ Blackmun papers, Box 679, folder 5 (conference vote on certiorari), Box 261, folder 7 (Blackmun note to himself).

¹¹ 438 U.S. at 406 (Blackmun, J.)

¹² *Ibid.*

¹³ *Ibid.*

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cism, in other words, would take good will, hard work and – an element that Blackmun seemed to especially prize – candor.

What moved Blackmun from his initial, instinctive response to the case? One factor, certainly, was the work he put into the effort. This was typical for Harry Blackmun. He rarely started from the premise that he knew the right answer. As he prepared for argument in every case, he worked his way through his preparatory reading by jotting down questions and trying out different answers. These notes are an invaluable part of the case files that make up the heart of his collected papers at the Library of Congress. In effect, he conducted an interior monologue with himself as he and the Court confronted the great issues of the last quarter of the 20th century.

The notes Blackmun made in preparation for the *Bakke* argument, hand-written on sheets torn from a yellow legal pad, show that he read all 42 of the amicus curiae briefs filed on behalf of the university as well as the 14 briefs filed for the plaintiff, Allan Bakke. As he read the briefs, Blackmun listed the various arguments on a chart.

A further element in Blackmun's evolving view of the case was his background in the medical world, especially his pre-judicial service as general counsel of the Mayo Clinic that left him particularly attuned to the needs and perspective of the medical profession. His notes to himself include mention of the dearth of black doctors in the United States and of the obstacles that African American students had encountered in trying to gain admission to medical schools other than the two that had been established to train black doctors, Meharry Medical College in Nashville and Howard University's medical school in Washington, D.C.¹⁴ These were observations from the "real world" that Blackmun wanted the Court to take into account. I think it is safe to say that they proved important factors that moved him toward his ultimate conclusion.

Obviously, I do not have access to the papers of Chief Justice Roberts – to his judicial papers, that is. But following his nomination to the Supreme Court in July 2005, the world did get a close

¹⁴ *Becoming Justice Blackmun*, 130.

look at the paper trail from an early phase of his legal career, when he worked as a lawyer in the Reagan administration, both in the Justice Department and the White House counsel's office. As a special assistant to Attorney General William French Smith, for example, the young John Roberts, fresh from his clerkship with Associate Justice Rehnquist, wrote a series of memos urging policy positions to advance what he described as "our anti-busing and anti-quota principles."¹⁵ This basically meant eliminating race-conscious remedies except in the narrow circumstance of compensating an identified victim of proven discrimination. The "effect of race-conscious remedies" in general, he warned in one memo in 1981, was "reverse discrimination."¹⁶

Roberts' views on the government's proper stance toward race were consistent on a variety of fronts. He was a strong in-house advocate of resisting congressional efforts to broaden the 1965 Voting Rights Act. He regarded civil rights enforcement by prior administrations as wrong-minded and viewed with suspicion the career lawyers in the Civil Rights Division of the Reagan Justice Department. A particular target of his displeasure was the Equal Employment Opportunity Commission, which he complained in one memo was taking positions that were too solicitous of discrimination claims and "totally inconsistent" with the administration's policies.¹⁷

Based on the paper trail that we have, I think it is both plausible and fair to make an assumption about the one we don't have, and to assume that the arrival on the Court's docket of petitions for certiorari in the Louisville and Seattle voluntary integration cases gave the new Chief Justice an opportunity he had long been waiting for. Or to put a slightly finer point on the sequence of events – the motive was pre-existing, and the opportunity was provided by Justice

¹⁵ R. Jeffrey Smith, et al., "A Charter Member of the Reagan Vanguard," *The Washington Post*, Aug. 1, 2005, A1, at A5.

¹⁶ Seth Stern, "Civil Rights Groups, Democrats Assail Roberts' Record on the Issue," *Congressional Quarterly Today*, Sept. 12, 2005.

¹⁷ R. Jeffrey Smith and Charles Babington, "Roberts Memo Urged Laws Prohibiting Busing, Quotas," *The Washington Post*, Aug. 30, 2005, at A2.

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O'Connor's retirement in January 2006, the same month that the two petitions arrived at the Court. Just a month earlier, with Justice O'Connor still present and voting at conference, the Court had denied cert in an almost identical case from Lynn, Mass., in which the First Circuit had upheld a voluntary integration plan aimed at maintaining racial balance in the city's public schools.¹⁸ It is most unlikely that Justice O'Connor would have wanted to review or reverse the First Circuit opinion, having suggested in her opinion for the Court two years earlier in *Grutter v. Bollinger*,¹⁹ the University of Michigan Law School affirmative action case, that the courts should give American society 25 years to deal with race and the public schools without further judicial intervention.

But with Justice O'Connor gone, replaced by Justice Alito, everything changed. The Louisville case²⁰ was ready first, and went to conference in March 2006. The Seattle case²¹ was ready for the Justices' consideration in April. From the public record on the Court's electronic docket, we see that after the Justices' initial look at the Louisville petition, the two cases were considered together. The internal battle over what to do with them was prolonged and vigorous. That there was a battle was scarcely surprising; the stakes were apparent to everyone. The Louisville petition asked directly and provocatively whether *Grutter v. Bollinger* should be overturned. Further, the cases lacked the single most important marker of cert-worthiness, a conflict in the circuits; both the Sixth and the Ninth Circuits had upheld the challenged plans, as had the First Circuit in the Lynn case. The only conflict was with the Supreme Court's own precedents. The Court listed the Louisville case for conference seven times and the Seattle case six, before granting them both on June 5. This prolonged consideration at the cert stage is highly un-

¹⁸ *Comfort v. Lynn School Committee*, 418 F. 3d 1 (CA1 2005); 05-348, cert. den. Dec. 5, 2005.

¹⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁰ *Meredith v. Jefferson County Bd. of Ed.*, No. 05-915.

²¹ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, No. 05-908.

usual, strongly suggesting that the Court was polarized from the moment it began considering these cases.

When the Court heard argument in the two cases, on December 4, 2006, the Chief Justice made no effort to hide his strong view that the two programs were unconstitutional. He led the charge, as demonstrated by this colloquy with Michael F. Madden, the lawyer defending the Seattle plan.

Mr. Madden was trying to save the Seattle plan by distinguishing it from a typical affirmative action plan in which access to a scarce resource is awarded on the basis of race. In Seattle, “everyone gets a seat” in schools that were “basically comparable,” he explained to the Court. It was a “distributive system,” he said, the opposite of “a selective or merit-based system where we adjudge one student to be better than the other.”

Chief Justice Roberts: “So saying that this doesn’t involve individualized determinations simply highlights the fact that the decision to distribute, as you put it, was based on skin color and not any other factor. . . . I mean, everyone got a seat in *Brown* as well; but because they were assigned to those seats on the basis of race, it violated equal protection. How is your argument that there’s no problem here because everybody gets a seat distinguishable?”

Mr. Madden: “Because segregation is harmful.” . . .

Chief Justice Roberts: “It’s an assignment on the basis of race, correct?”²²

And that was, for the Chief Justice, the entire argument. His 41-page opinion, with its 17 footnotes, was more nuanced only in a formal sense. Assuming strict scrutiny to be the proper standard of review, he said that neither Louisville nor Seattle could provide a compelling state interest to justify their use of race. He noted that

²² Transcript of Argument, *Parents Involved in Community Schools v. Seattle School District No. 1*, at *47-*51, 2006 WL 3486958 (Dec. 4, 2006). Linda Greenhouse, “Court Reviews Race as Factor in School Plans,” *The New York Times*, Dec. 5, 2006, at A1.

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the Louisville schools, once segregated by law and having been under federal court supervision for 25 years, had been declared “unitary” seven years earlier – as if that wiped out any memory of the past or any valid concern about the viability of integration going forward. The Seattle schools, of course, had never been segregated by law, a fact that enabled the Chief Justice to deem irrelevant the years of litigation and efforts, which included mandatory busing, to overcome the effects of segregated housing patterns. In other words, his opinion proceeded as if history had not happened in either place.

His opinion led Justice Kennedy, a Justice with an unbroken record of disapproval of government race-conscious policies, to object that “[t]he plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.” He continued:

The plurality’s postulate that “the 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. . . . 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.²³

Justice Kennedy went on to say that the two schools district did have a compelling interest in preventing resegregation, but that the particular plans failed the narrow-tailoring prong of strict scrutiny review. Hundreds of school systems around the country are now trying to figure out what they have to do to meet with Justice Kennedy’s approval.²⁴

²³ 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

²⁴ Joseph Pereira, “Rollback: School Integration Efforts Face Renewed Opposition,” *The Wall Street Journal*, Oct. 11, 2007, at 1.



I began with a brief biographical comparison between Harry Blackmun and John Roberts. Blackmun, of course, became the paradigmatic Justice who changed, going from “Minnesota twin” to the most liberal member of the Supreme Court during his 24-year tenure. Can we expect the same of John Roberts?

Substantial recent scholarship suggests that the answer is a decided “no.” For example, Lawrence Baum, a political scientist at Ohio State University, observed last year in a study of judicial behavior that among Republican-appointed Supreme Court Justices since Earl Warren, those who came from outside Washington drifted to the left, while those who arrived at the Court as Washington insiders maintained the ideological orientation they brought with them.²⁵ Michael Dorf, a law professor at Columbia, framing the same inquiry slightly differently, concluded that Republican Justices with service in the federal executive branch – the Justice Department or the White House – (citing Burger, Rehnquist, Scalia, and Thomas) remain stable in their ideological preferences, while those lacking such experience tend to become more liberal (citing Blackmun, Powell, Stevens, O’Connor, Kennedy, and Souter.)²⁶ There are obvious reasons for this interesting dichotomy. A move to Washington in mid-life to take up a demanding and highly visible new position, in an unfamiliar place and culture, is a profound personal disruption that not implausibly makes someone receptive to new ideas and influences. And on the other hand, service in the executive branch is the product of a process of self-selection and political dues-paying that both reinforces and demonstrates loyalty to a set of principles, whether political or jurisprudential or both.

By either measure, or indeed by any other I can think of, John Roberts is not a candidate for “preference change” or “ideological

²⁵ Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006), 144.

²⁶ Michael C. Dorf, “Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices ‘Evolve’ and Others Don’t?”, *1 Harv. L. & Pol. Rev.* 457-458 (2007).

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drift,” to use two political science buzz words. What we saw last Term is likely to be what we will see for many terms to come. What that means for the Court and the country depends on whether there are four Justices who agree with him. Whether the Roberts Court turns out to be a “tale of five Justices” remains to be seen.

