



2013

A Thought Experiment

Louis Michael Seidman

Georgetown University Law Center, seidman@law.georgetown.edu


Georgetown Public Law and Legal Theory Research Paper No. 13-021

This paper can be downloaded free of charge from:

<https://scholarship.law.georgetown.edu/facpub/1187>

<http://ssrn.com/abstract=2230484>

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [Legal History Commons](#)

A Thought Experiment

Louis Michael Seidman
Georgetown University Law Center

Brown v. Board of Education of Topeka, Kansas

Mr. Justice Scalia, dissenting.

The Court's somber and sonorous tones suggest that it imagines itself writing for the ages. In fact, something a good deal less portentous and more sordid is going on. The Justices of this Court have decided to sign on as a branch office of the National Association for the Advancement of Colored People.

I do not for a moment denigrate the aims of that organization. It has a right, like any other organization, to pursue its goals. This is, after all, America, and Americans have the right to file even frivolous law suits. But before today, I would not have thought that this Court has a right to foist its own trendy vision of our future on the rest of us. The American people may some day decide that a program of racial mongrelization is for them. So far as I can see, they have not decided this yet, and it is not for the Justices of this Court, isolated in their all-white enclaves, to decide it for them.

The Court is so preoccupied with rhetoric that it barely bothers to justify its conclusions. Where is the warrant for its sweeping declaration that separate is inherently unequal? In the Constitution's text? The fourteenth amendment says not a word about integrated schooling. In the intent of the framers? The Court itself concedes, as it must, that the framers intended no such thing. In our prior precedent? We have upheld the constitutionality of separate but equal facilities for half a century. In the traditions of the American people? Whether the majority of this Court likes it or not, we have a long and honored history of the separate development of the races.

No, the Court claims no support for its extraordinary holding in any of the usual sources of constitutional law. Indeed, the Court is so ashamed of the true support for its ruling that it has buried it in an obscure footnote. It would have us believe that it is justified in dismantling generations of social practice, upon which an entire society has been built, because of the color of some dolls that a few children have picked in a so-called experiment organized specifically for the purpose of winning this law suit.

Constitutional law has never known a principle such as this. I confess that I have no idea why children pick some dolls to play with rather than others. But suppose it is true that these particular children chose these particular dolls because their self-esteem is not quite what the Justices of this Court would like it to be. How can we possibly know the sources of their unhappiness? Does the Constitution, perhaps, guarantee them a free session of psychotherapy at the expense of the American taxpayers? For all we know, a different group of children, living in a different location, might pick different dolls. Is segregation then to be unconstitutional in some jurisdictions and constitutionally mandated in others?

But suppose that we pass all this and somehow assume that the fact that some students pick some dolls rather than others in fact demonstrates that segregated education effects the “hearts and minds” (not the liver and spleen?) of colored children. The Court claims that principles of equality require that the system should therefore be dismantled. This is a very odd equality indeed. Apparently, equality means that our educational system must be turned upside down so as to maximize the achievement of one group of students. The Court cares not a whit, so far as its opinion reveals, about the hearts and minds (or other bodily organs either) of other students, much less their parents. For all we know, white achievement will decline in the new, radically different environment that the Court is determined to foist upon us. This is not equal rights. It is a racial entitlement -- special rights for the colored – rights that the proud men who wrote the Constitution surely never meant to provide.

Try as I might, I cannot take seriously an argument that the “separate is inherently unequal” equation is based upon constitutional text or even on social science. I fear that the Court’s new algebra has another source entirely. In its heart (but surely not in its mind), the Court is so enamored of its own power that it believes that it can make this statement true simply by saying that it is true.

The Court claims today that its decision is about education. Do not believe it. The agenda of the NAACP is hardly limited to this sphere, and the “logic” of this Court extends far beyond this field. We can expect in the years to come the forced integration of our restaurants, our neighborhoods, and our churches. No one should be fooled. Interracial marriage is next on the Court’s hit list.

There is a judicial arrogance in pursuit of this agenda – an arrogance ultimately grounded in ignorance and intolerance.. The Court demonstrates no awareness of or concern about the great culture that it is attacking. No one claims that this culture is without fault – no culture is. But the land that Jefferson, Madison, and Calhoun loved -- that Robert E. Lee and Jefferson Davis staked their careers and lives to defend -- was also a noble and gallant place. No, it is not the land that many of the Justices of this Court happen to live in, and they, apparently, will not mourn its destruction. Perhaps it was fated to fade away in any event. But if fade away it must, I would have hoped that it would do so in its own time and on its own terms. The country will come to regret the unceremonious shove toward oblivion that the Court administers today.