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## Introduction: *Brown*, Triumph or Challenge?

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Henry W. McGee Jr.<sup>1</sup>

News of *Brown v. Board of Education*<sup>2</sup> reached me nearly a month before I graduated with a journalism degree from Northwestern University's Medill School of Journalism. Standing in the school's *Daily Northwestern* offices, I heard the old-style AP wire ticker tape bells noisily signal a major news story, one whose decibel level was as loud as the signal of the Titanic disaster, D-Day, the end of World War II, and other such watershed events.<sup>3</sup> Though there was a sense of elation among the few progressive white students and nearly all of the thirty or so Negro (to use fifties speech) students at Northwestern, as I remember events from this fifty year distance, there was neither general consternation nor celebration over *Brown*. Although I was not yet a lawyer, I do remember one or two white students congratulating me as though I had "won."<sup>4</sup> Back at home in Chicago's Negro community, I don't remember anyone thinking that we had anything to bank on yet.

On campus, some progressive administrators had already demonstrated impatience with the racial mores of the North and previously, during my junior year in 1953, the administrators had decided to scatter African American students through University housing, thereby ending the system of consigning us to our "own" dormitory. That year, I was voted the first African American president of my dormitory, Foster House, and I was elected as the first African American in the history of Northwestern to the Student Governing Board. These successes were limited, however. As one of only two blacks in the journalism school at Northwestern, not much changed for me with the announcement of the Supreme Court decision. As my grandmother put it, *Brown* or no *Brown*, there were just three things I

could count on as obligations in life: staying “colored,” paying taxes, and dying.

During the 1950s, and presumably for a time before, only one African American had been admitted to the journalism school about every four years.<sup>5</sup> As I neared graduation, I was the only member of my class who did not get, or who could not get, an interview when employers solicited Northwestern seniors. Thus, after a year as news editor for the Associated Negro Press, a news service that relied upon the mail to contact its subscribers, I decided to abandon plans to be a journalist. Instead, I opted for law school, which like medical or dental school, was a professional escape hatch for generations of African Americans who would otherwise be consigned to work in the “community” or, as did my father, at the Post Office.<sup>6</sup>

In other signs of the times, white students at Northwestern were supporting African Americans by insisting on service for them at some of the more well-known restaurants in Evanston and Chicago that historically served only whites. These efforts met with some success, and they prefigured the struggles of the sixties in which white and African American students waged civil disobedience against a segregated America. Well before *Brown* was implemented in many cities, the civil rights struggle was underway in both the North and South. The struggle transformed the racial landscape of the United States, even though eventually it would be argued that millions of African Americans were as segregated before *Brown* as before Dr. Martin Luther King, Jr.<sup>7</sup> Eventually, that struggle constituted a national call to action for African Americans and progressive whites to journey South to attack the visible symbols of African American oppression and degradation, namely the legally imposed racial apartheid and the extra-legal disenfranchisement of millions of African American southerners.<sup>8</sup>

Immediately upon hearing the *Brown* decision, there was a general sense of betrayal, frustration, heartbreak, and fury experienced by many southern whites and many of their political and economic leaders.<sup>9</sup> But even ten

years after the decision, only 1.17 percent of African American school children attended racially integrated schools in the eleven states that maintained *de jure* segregated schools.<sup>10</sup> The desegregation of Central High School in Little Rock, Arkansas, in 1957, had to be enforced by the 101<sup>st</sup> Airborne, which was an elite army unit that had last been deployed against the racists of Nazi Germany in Normandy in 1944.<sup>11</sup> What followed is too weary a tale, too well known to recount. But in the end, the national retreat from integration extended to the Supreme Court itself in the *Milliken v. Bradley* decision, which essentially insulated “innocent” whites and “innocent” suburban school districts from desegregation.<sup>12</sup> Legal retreat was accompanied by massive white abandonment of public school systems for private or parochial schools.<sup>13</sup>

Legal historian Michael J. Klarman has argued that *Brown* was essential in the transition from the old order but that the Court alone lacked the power to desegregate recalcitrant school systems.<sup>14</sup> For Klarman, *Brown* spurred a process in which African Americans challenged the *status quo*, and racists resorted to grotesque tactics to suppress the revolt.<sup>15</sup> As the southern white establishment generated moral outrage in the rest of the nation and throughout the world, civil disobedience and the moral example of Dr. Martin Luther King, Jr. were as important as *Brown* in dooming the legally ordained humiliation and oppression of African Americans. Thus, *Brown* was a critical phase and a condition precedent to the abolition of legalized racial segregation. But, *Brown* was as much a catalyst as it was engine of social change. Despite the prolonged interregnum between the decision and its implementation, and despite its ultimate near failure in desegregating public schools, *Brown* and its progeny vitiated the constitutional basis upon which Jim Crow was premised.<sup>16</sup>

Derrick Bell’s convergence theory, reformulated in his recent book published on the occasion of the fiftieth anniversary of *Brown*, more than plausibly explains the “why” of *Brown* and the epoch in which the case was decided, even if his theory does not neatly explain every bend in the river of

racial change in the history of the United States.<sup>17</sup> Indeed, the Soviet Union and its pretensions of world domination made *Brown* a political necessity if the United States was to lead the “free world.”<sup>18</sup> Specifically, the United States could not boast of a free society if that freedom was premised on the subjugation of millions of citizens solely because they were classified as racially inferior. As a kind of silent *amicus*, the Soviet Politburo and its machinations made continued suppression of African Americans politically unsustainable if the “American way” was to win over a world in which an overwhelming number of its inhabitants were, in various hues and shades, dark of skin.<sup>19</sup>

In addition to the cold war competition with the Soviet Union, *Brown* was preceded by a growing impatience in the legal establishment with the decisions of the Supreme Court concerning the tragic farce of “separate but equal.” And in some instances, starting with *Brown v. Mississippi*<sup>20</sup> in the 1930s and culminating with *Shelley v. Kramer*<sup>21</sup> in the 1940s, the Court commenced a retreat from the shameful *Plessey v. Ferguson*<sup>22</sup> validation of racial segregation.

As the symbolic and practical outcomes of the decision demanded, the fiftieth anniversary of *Brown* was the occasion of celebrations and commemorations throughout the United States. In April 2004, the *Seattle University School of Law*, the *Seattle Journal for Social Justice*, and the *Seattle University Law Review* co-sponsored a two-day symposium entitled “From *Brown* to *Grutter*: Racial Integration and the Law in the Northwest.”<sup>23</sup> The conference examined not only *Brown*’s impact on *de facto* school segregation and race relations in Seattle and the Northwest, but it also encompassed *Brown*’s national significance and the manner in which the decision spawned legal and social change throughout the United States for both African Americans and other minority groups suffering from discrimination and other forms of diminished citizenship.

The current issue of the *Journal* features a lively cross-section of essays from this Seattle University symposium; the issue’s analysis and

explorations of the case will at once broaden and challenge the knowledge base of all readers.

Professor John C. Brittain probes the response of minority groups to white resistance to racial integration. In his telling article, *A Look at Brown v. Board of Education in 2054*,<sup>24</sup> he points out that racial minorities who are faced with *de facto* discrimination on a national scale and who are frustrated with the pace of change, have retreated from the struggle for integrated schools and shifted their efforts to other arenas including demands for increased funding, closure of the achievement gap between the races, and better educational facilities.<sup>25</sup> Professor Brittain grimly predicts a future of even greater decline in racial integration. He judiciously argues that racial and educational equality for children of color will only be realized if society views the moral imperative of educational equality as economic necessity.<sup>26</sup>

In *Neither Separate nor Equal: How Race-Sensitive Enforcement of Criminal Laws Threatens to Undo Brown v. Board of Education*,<sup>27</sup> Professor Christian Halliburton analyzes the residual impacts of *Brown* in the nation's criminal justice system. Professor Halliburton's nuanced argument is that the separate but equal doctrine subtly survives in putatively colorblind norms which are used to perpetuate the differential treatment of African Americans, Latinos, and other citizens of color.<sup>28</sup> *Brown*, he argues, was ineffective in changing the minds and hearts of the dominant majority in the United States.<sup>29</sup> After discussing the inequalities of the death penalty, Professor Halliburton focuses his attention upon the manner in which Seattle drug laws are disproportionately enforced against African Americans.<sup>30</sup> His essay closes with a provocative exploration of how black sexuality is impacted by legal institutions.<sup>31</sup>

Dr. Thomas T. Romero II explores the implications of the sometimes overlooked, but critically important, decision in *Keyes v. School District No. 1*.<sup>32</sup> He suggests that much more was involved than just the classic case of white/black schools, and that, in fact, Mexican Americans articulated a much different vision of integration than African Americans had fought for

in the South.<sup>33</sup> In his article, *Our Selma is Here*,<sup>34</sup> Dr. Romero contends that the Denver School Board made school boundary decisions and formulated attendance policies that exacerbated the effects of residential segregation in multicultural districts, but the School Board never contemplated issues created by decision makers and judges in thrall to a black/white paradigm.<sup>35</sup> Dr. Romero demonstrates that *Keyes* and its application in Denver collapsed the cultural and ideological differences between the competing ethnic groups in the city while presciently warning that the color line<sup>36</sup> problems of the twenty-first century are issues of tri/multi ethnicity.<sup>37</sup>

A month after Seattle University's symposium, to commemorate the *Brown* decision, the Loren Miller Bar Association of Seattle<sup>38</sup> held a series of panel discussions at Seattle University and a ceremony at the University of Washington in which the nine Justices of the Washington State Supreme Court reenacted the deliberations of the United States Supreme Court on the day that *Brown* was argued.<sup>39</sup> The distinguished trial lawyer, Mr. Lembhard Howell,<sup>40</sup> stood in the role of the architect of desegregation, Thurgood Marshall. In addition, the Honorable John C. Coughenour of the United States District Court for the Western District of Washington played the role of John W. Davis, one of the most renowned constitutional lawyers in the United States who represented precedent, the legal consensus of the day, and the forces of segregation.

Although the logistics of staging the two events were significant, more difficult still was reaching a consensus among the Bar Association's planners on how to describe *Brown*. In the "half-empty, half-full" discussion about *Brown's* impact on African Americans that preceded the selection of its eventual title, "*Brown: An American Triumph—Past, Present and Future*," a difference of opinion arose among Seattle's African American lawyers over the significance and the impact of *Brown*. The passionate but collegial discussions revealed marked differences of opinion as various people grappled with the question that concerns this issue of the

*Journal*. As the planners contemplated the success of *Brown*, they debated whether it was a momentous leap forward, or an unfulfilled promise whose effects have been ephemeral, symbolic, and transient. As NAACP Legal and Educational Fund lawyer Derrick W. Black has argued,

For those advocates who brought *Brown* to fruition, it was the culmination of several incremental steps aimed at reversing the social order and abolishing the misconception—from schools to the segregated train cars of *Plessey*—that this nation could be “separate but equal” . . . . The battle was waged in schools . . . yet [schools] still symbolized wide-spread segregation in society. Understanding this context, the legacy of *Brown* cannot be evaluated merely by the history and current status of desegregation and equal opportunity on our schools. Rather, we must account for how the racial caste system in America has changed . . . .<sup>41</sup>

Issues of caste and class were at the heart of the Bar Association’s discussions about *Brown*, and the decision about what to name the event was not reached quickly. *Brown* was truly momentous if it undermined the legal foundations of racial discrimination and robbed the American caste system of its constitutional underpinnings. But, as long as it was “legal” to subject African Americans to social ostracism and institutionalized deprivation of economic and social resources, African Americans were doomed to remain “outcaste.” In Nobel Laureate Toni Morrison’s powerful words,

If there were no black people in this country, it would have been Balkanized. The immigrants would have torn each other’s throats out, as they have done everywhere else. But in becoming an American, from Europe, what one has in common with other immigrants is contempt for me—it’s nothing else but color. Wherever they came from, they would stand together. They could all say, “I am not that.” So in that sense, becoming an American is based on an attitude: an exclusion of me.<sup>42</sup>

True, the segregation of African Americans neither began nor ended with segregation’s legal or constitutional status. But outlawing segregation did

not lead to racial integration for the great majority of African Americans, in schools or out. Indeed, *Brown* and the civil rights struggle have split, even splintered, African America, and for its majority, produced a social order which remains essentially segregated. For example, the Harvard University Civil Rights Project concludes the following:

While public school enrollment reflects the country's growing diversity, our analysis of the nation's large school districts indicates a disturbing pattern of growing isolation, . . . decreasing black and Latino exposure to white students is occurring in almost every large district as well as declining white exposure to blacks and Latinos in almost one-third of large districts. Black and Latino students display high levels of segregation from white students in many districts. This is due in part to small white percentages in these districts.<sup>43</sup>

Indeed, nearly all of the major school systems are overwhelmingly composed of minorities, with no meaningful white enrollment.<sup>44</sup>

Space does not permit a discussion of all of the other disadvantages that accrue to the vast majority of African Americans. Among these disadvantages is the grim reality that there are more African American men in prison than are enrolled in institutions of higher learning.<sup>45</sup>

Harvard Professor Charles J. Ogletree, Jr. writes that

*Brown I* [was] a momentous decision both for what it says and for what it has achieved. . . . *Brown I* should be celebrated for ending *de jure* segregation in this country—a blight that lasted almost four hundred years and harmed millions of Americans of all races. Far too many African-Americans, however, have been left behind, while only a relative few have truly prospered. For some, the promise of integration has proved ephemeral. For others, short-term gains have been replaced by setbacks engendered by new forms of racism.<sup>46</sup>

The tension between the formal abolition of legalized caste and the quotidian routine of African Americans, no matter their class, indeed was the crux of the debate between those members of the Seattle African

American Bar Association who thought *Brown* was a triumph, and those who thought America remained racially-challenged. The triumph was celebrated by name in the program, but members of the Bar agreed that the triumph is complex.

For instance, though many African Americans earn salaries comparable to white Americans, Melvin Oliver and his colleague Thomas Shapiro have described the plight of an upper middle class black as high in salary, low in assets.<sup>47</sup> While superstars such as Secretary of State Colin Powell and Supreme Court Justice Clarence Thomas command national authority, and famed athletes and motion picture celebrities too numerous to mention grace advertisements on television screens, poverty and lack of resources plague most urban areas. Meanwhile, the situation in rural areas does not differ greatly as the loss of farmland among African American farmers continues apace.<sup>48</sup>

Perhaps it can be argued that the elimination of caste and the institution of opportunity for a very few was a necessary prelude to change, no matter how glacial, for the many. There can be no doubt that *Brown* changed much in the United States. The distinguished constitutional scholar, Cass Sunstein has written that attending all-black schools differs from “. . . living under a legal system that announces on a daily basis that some children are not fit to be educated with others. *Brown* ruled that . . . states may not humiliate a class of people that way.”<sup>49</sup> Thus, Sunstein declares that *Brown* justifies a “celebration” even if it does not “justify triumphalism.”<sup>50</sup>

What follows gives readers a chance to participate in the question that is *Brown*. The articles ponder the depth and significance of the case and its ramifications for race relations in the United States. What W.E.B. Du Bois called the enduring question of the past century, the question of the color line, is now the challenge of the twenty-first century.<sup>51</sup>

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<sup>1</sup> Henry W. McGee Jr. is Professor of Law at Seattle University School of Law and Professor *Emeritus* at the University of California, Los Angeles. He received his B.S. in

Journalism from Northwestern University in 1954; his J.D. from DePaul University in 1957; and his LL.M. from Columbia University in 1970.

<sup>2</sup> 347 U.S. 483 (1954). This introductory article concerns *Brown I* and covers *Brown II*, 349 U.S. 294 (1955) by implication. In *Brown II*, the Supreme Court undermined *Brown I* by making the sphinx-like declaration that desegregation must proceed “with all deliberate speed.” *Brown II*, 349 U.S. at 301. As the Introduction and the articles that follow in this volume make clear, “all deliberate speed” meant to some “as slowly as possible,” and to others, “never.” Michael Klarman observes that

[*Brown II*] was a solid victory for white southerners. Although they did not convince the Court to repudiate [*Brown I*] or to explicitly authorize district judges to delay desegregation based on hostile community sentiment, they won on every other issue. The Court-approved gradualism imposed no deadlines for beginning or completing desegregation, issued vague guidelines, and entrusted (southern) district judges with broad discretion. Southern politicians lauded [*Brown II*] as a ‘very definite victory for the South,’ and newspapers called it, ‘a distinct triumph for the southern viewpoint.’

MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 318 (2004).

<sup>3</sup> J. Harvie Wilkinson contends that “*Brown* may be the most important political, social, and legal event in America’s twentieth century history. Its greatness lay in the enormity of the injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew.” J. HARVIE WILKINSON III, FROM BROWN TO BAAKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 6 (1978).

<sup>4</sup> According to Richard Kluger:

The reaction [to *Brown*] in the African American community was muted. There was no dancing on the tables in Harlem. Race leaders such as Ralph Bunche were pleased but cautious in their comments. Commendatory editorials appeared throughout the black press, to be sure, along with calls for prayers of thanksgiving, but the mood of overall wariness in black America was suggested by the *Courier*’s columnist Nat D. Williams, writing out of Beale Street in Memphis. ‘There was no general ‘hallelujah,’ ‘tis done’ hullabaloo on Beale Street in Memphis over the Supreme Court’s admission that segregation in the public schools is wrong,’ wrote Williams. . . . Too many proclamations of white America’s good intentions had reached African American ears in the past to permit premature celebration now.

RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 713 (First Vintage Books Ed. 2004) (New York: Knopf 1976).

<sup>5</sup> The African American who was a freshman while I was a graduating senior, Dr. Troy Duster, is now the President of the American Sociological Association and a professor of sociology at New York University as well as Chancellor’s Professor at the University of California, Berkeley. Like me, he did not pursue journalism as his life’s work.

<sup>6</sup> In 1966, President Lyndon Johnson appointed Henry W. McGee Sr., with consent of the Senate, to be Postmaster of Chicago. He was the first African American named to be Postmaster of a major metropolitan facility, and is thought to be the first person of any

race in the U.S. to have entered the postal system as a clerk and raised to the rank of Postmaster.

<sup>7</sup> See H. W. McGee Jr., *The Dream That Will Not Die: Martin Luther King, Jr. and the Continuing American Revolution*, 21 U.C. DAVIS L. REV. 453 (1988) (book review). “Real desegregation began only when the democratic process demanded it—through the 1964 Civil Rights Act and aggressive enforcement by the Department of Justice, which threatened to deny federal funding to segregated school systems.” Cass R. Sunstein, *Did Brown Matter?*, NEW YORKER MAG., Apr. 29, 2004, at 103. See KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN (2004) (The assault on racial segregation can be traced to Franklin D. Roosevelt. Because of the South’s importance to the Democratic Party, Roosevelt did not openly challenge political views of segregationists, but in his appointments to the federal bench he severed the historic influence the South had on the federal judiciary. Even before World War II, the Roosevelt Justice Department moved against lynching, police violence, and voting restrictions in the South. Federal judges also began to protect Negroes.). After President Roosevelt died, President Truman abolished segregation in the armed forces in 1948, thus establishing equality of treatment and opportunity in the Armed Services. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948). See also *Brown v. Mississippi*, 297 U.S. 278 (1936) (citing the Due Process clause of the Fourteenth Amendment to reverse a conviction based on a coerced confession in which the defendant was brutally tortured).

<sup>8</sup> For example, in the summer of 1964, hundreds of black and white students went South for the Mississippi Summer of Freedom, spearheaded by the Student Non-Violent Coordinating Committee and the National Lawyers Guild. The author was granted leave by the Chicago law firm of Jesmer and Harris to serve in Mississippi as a lawyer representing students and residents who had demonstrated, and in some cases students and residents who had attempted to register to vote. For compelling accounts of the heroic struggle of blacks and whites against southern apartheid, see HOWARD ZINN, SNCC, THE NEW ABOLITIONISTS (1964) and Nicholas Lehmann, *The Long March*, NEW YORKER MAG., Feb. 10, 2003, at 86.

<sup>9</sup> Daniel M. Berman wrote that

[c]ongressmen from the South launched a campaign to annul the decision of the Supreme Court. Their efforts were climaxed in 1956 by the issuance of a Declaration of Constitutional Principles, signed by more than one hundred Representatives and Senators. In the strongest terms, the Southern Manifesto, as this document came to be called, recommended that a major effort be made “to bring about [the] reversal of the 1954 decision. That decision, it charged, was devoid of any legal basis and directly ‘contrary’ to the Constitution.” Not content to condemn the decision, . . . the signers of the Manifesto also sought to discredit the Court that had rendered [the decision]. The Justices, they said, had been guilty of a “clear abuse of judicial power”; they had “substituted their personal, political, and social ideas for the established law of the land” [and] they had exercised “naked judicial power” . . . it was probably no accident that organizations like the Ku Klux Klan experienced a dramatic revival.

DANIEL M. BERMAN, *IT IS SO ORDERED: THE SUPREME COURT RULES ON SCHOOL SEGREGATION* 124–125 (1966).

<sup>10</sup> Cass R. Sunstein asked

[i]n 1960, on the sixth anniversary of the *Brown* decision, how many of the 1.4 million African American children in the Deep South states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina attended racially mixed schools? Answer: Zero. Even in 1964, a decade after *Brown*, more than ninety-eight percent of African American children in the South attended segregated schools.

Sunstein, *supra* note 7, at 103.

<sup>11</sup> In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Supreme Court held that the constitutional right to equal protection may not be denied because of violent opposition or the possibility of disorder. President Eisenhower, who did not lend his personal support to integration efforts, nonetheless had no alternative but to order the army division to escort nine black teenagers into Little Rock, Arkansas' Central High School. See W.H. Lawrence, *Eisenhowerirate: Says Federal Orders 'Cannot Be Flouted With Impunity'*, N.Y. TIMES, Sept. 24, 1957, at 1.

<sup>12</sup> See *Milliken v. Bradley*, 418 U.S. 717 (1974) (the Court insulated “white flighters” from integrated schools, holding five-to-four that suburban school districts could not be forced to integrate their schools with schools within the city limits that they bordered). Professor Laurence Tribe notes this as the first time that the Supreme Court allowed a segregated result where it found a constitutional violation. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1495 (2d ed. 1988). Derrick Bell describes the decision as a “double blow.” DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 567 (3d ed. 1992). “It not only upset a carefully prepared program designed by integration proponents to effectively desegregate large, increasingly black urban school districts, but also broke the Court’s two-decade-old record of not reversing an affirmative school desegregation order [by a lower court].” *Id.*

<sup>13</sup> A friend of Professor Mari Matsuda wrote the following to her:

Very few of us sent our kids to our neighborhood public elementary schools, especially if those schools have high percentages of poorer kids, immigrants, and limited-English kids. Here’s what most our friends did: 1. sent their kids to private schools; 2. moved to a district that had good public schools; 3. used superior knowledge and connections to send their kids to better alternative public schools and magnet schools. . . . The folks I’m talking about are public interest lawyers, NLG members, partners in minority law firms, founders and board and staff of community organizations, etc., and me.

Mari Matsuda, *Beyond Black, White, and Brown: A Forum*, NATION MAG., May 3, 2004, at 17, 18–19.

<sup>14</sup> KLARMAN, *supra* note 2, at 443–468.

<sup>15</sup> *Id.*

<sup>16</sup> “Jim Crow” was the mythical name given to the institution of racial segregation, in which the combined forces of physical brutality, social coercion, economic deprivation and political disenfranchisement were instruments in the subjugation and degradation of African Americans. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW*

(3d ed. 1974). Nicolas Lehman laments that “[i]t seems almost too obvious to mention that during Jim Crow black people in the South did not have reliable recourse to the legal system; even if most whites were benign, those who weren’t could do anything they wanted to a Negro and get away it.” Lehmann, *supra* note 8, at 88.

In general, the Court in *Brown* narrowed its discussion to school segregation, but in one of the most often quoted passages of its decision, even the Court hinted that it was confronting a racial hierarchy and, at the very least, made clear that it was deciding an issue that went to the core of basic opportunity in our society. . . . [Passages in the decision] illustrated that *Brown* would be about more than just education: it would determine whether African Americans were going to have the opportunity to participate as full citizens in this society.

Derrick W. Black, *Beyond Brown: Its Impact Upon American Education and Culture*, NAT’L B. ASS’N MAG., Mar./Apr. 2004, at 14.

<sup>17</sup> See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004). Bell first articulated his convergence theory in *Brown v. Board and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980), where he argues that racial progress in the United States is precisely synchronized (and limited) to the occasions that racial equity is in the interests of whites. In the case of *Brown*, the timing was such that school segregation could hardly be maintained if the United States was to win the propaganda war with the Soviet Union. *See id.*

<sup>18</sup> See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 101 (2000).

<sup>19</sup> Dudziak chronicles how in the Justice Department’s brief in *Brown*, Secretary of State Dean Acheson claimed that racial discrimination gave unfriendly governments “the most effective kind of ammunition for their propaganda warfare,” and remained “a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations.” *Id.* at 100, 101. *See also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 110 (Richard Delgado ed., 1995). The distinguished constitutional law scholar Cass R. Sunstein finds support for the Bell thesis in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the case which upheld the University of Michigan’s affirmative action program promoting racial and ethnic diversity declaring that such a program serves a compelling state interest. *See* Sunstein, *supra* note 7, at 105. Sunstein points out that the Supreme Court referred to briefs it had received from businesses and former military leaders, arguing that affirmative action was necessary for both corporate success and national defense. *Id.*

<sup>20</sup> 297 U.S. 278 (1936).

<sup>21</sup> 334 U.S. 1 (1948). In *Shelley*, the Supreme Court declared unconstitutional the ubiquitous restrictive covenants which forbade property owners from selling their property to “Negroes,” and often other persons of color. *See id.* at 20.

<sup>22</sup> 163 U.S. 537 (1896). *Plessy* placed the *imprimatur* of the Supreme Court on racial segregation/discrimination in its holding that “separate but equal” was not a violation of the 14th Amendment’s “Equal Protection” clause, and therefore it was perfectly legal for a conductor on a railroad train to eject Plessey, a colored passenger, before the train reached a station. *See id.* at 548, 549. Ironically, Mr. Plessey was a New Orleans

“mulatto” who appeared to be racially white, but it is thought that the train conductor either recognized him or otherwise had it called to his attention that the passenger was illegally sitting in a coach reserved only for whites.

<sup>23</sup> The symposium was held at Seattle University School of Law, April 2–3, 2004, and was presented by the *Seattle Journal for Social Justice* and the *Seattle University Law Review*.

<sup>24</sup> John Brittain, *A Look at Brown v. Board of Education in 2054*, 3 SEATTLE J. SOC. JUST. 29 (2004).

<sup>25</sup> *Id.* at 32.

<sup>26</sup> *Id.* at 39.

<sup>27</sup> Christian Halliburton, *Neither Separate nor Equal: How Race-Sensitive Enforcement of Criminal Laws Threatens to Undo Brown v. Board of Education*, 3 SEATTLE J. SOC. JUST. 45 (2004).

<sup>28</sup> *Id.* at 46.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 53.

<sup>31</sup> *Id.* at 56.

<sup>32</sup> 413 U.S. 189 (1973).

<sup>33</sup> *Keyes* was an early and important decision in the early post-*Brown* epoch as the Court set about to dismantle the structures of racial segregation. In the context of the African American struggle for racially integrated schools, *Keyes* has long been thought to stand for the proposition that *de jure* segregation could exist even if not as a function of explicit legislation. *Keyes* was also the first segregation case after *Brown* outside of the states of the Confederacy, and has traditionally stood for the proposition that school board assignments and gerrymandering of districts constitute official and unconstitutional segregation regardless of the silence of legislation on the issue. *But cf.* *Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that Mexican Americans represented a class of jurors who could not be excluded from a jury in which a member of that class had been systematically excluded). The case was published in the same volume as *Brown*, on the pages just preceding the school desegregation case. *See University of Houston Law Center and Arte Publico Press Sponsor Conference on Hernandez v. Texas at Fifty*, available at <http://www.law.uh.edu/Hernandez50> (last visited Nov. 4, 2004).

<sup>34</sup> Thomas T. Romero II, *Our Selma is Here*, 3 SEATTLE J. SOC. JUST. 73 (2004).

<sup>35</sup> *Id.* at 74. The “black/white paradigm” suggests that the dominant (white) population thinks of racial problems in terms of the age-old struggle for emancipation and full citizenship for the freedmen, and assimilates racial conflict in terms of the historic relationships between persons of African descent and the white “race” in the United States. Thus the racial complexity/heterogeneity of Latinos is collapsed into the same psycho-sociological framework as that of African Americans. This limited perspective arguably leaves Latinos essentially unrepresented in civil rights discussions. *See* Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 LA RAZA L.J. 387, 397–98 n.56, 57 (2002). Important discussions of the problem are in Kevin R. Johnson, *Latinas/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917 (2002); Devon W. Carbado, *Race to the Bottom*, 49 U.C.L.A. L. REV. 1283, 1305–12 (2002); and Sylvia R. Lazos Vargas, *The Latina/o and*

*APIA Vote Post-2000: What Does It Mean to Move Beyond "Black and White" Politics?*, 81 OR. L. REV. 783 (2003).

<sup>36</sup> The phrase, "[t]he problem of the 20th century is the problem of the color line," is perhaps the most often quoted from W.E.B. Du Bois's *THE SOULS OF BLACK FOLK* 13 (1973).

<sup>37</sup> Romero, *supra* note 34, at 111.

<sup>38</sup> Loren Miller was a famous Civil Rights lawyer who represented one of the plaintiffs in *Shelley*. One of the cases resolved by the Court in *Shelley* originated in Los Angeles. See H. W. McGee Jr., *Afro-American Resistance to Gentrification and the Demise of Integrationist Ideology in the United States*, 23 URB. LAW. 25 (1991).

<sup>39</sup> See UWLS News, *50th Anniversary of Brown v. Board of Education: Re-enactments, panel discussions commemorate steps to end segregation*, May 7, 2004, at <http://www.law.washington.edu/news/Articles/2003Archive/BrownVsBoard.html> (last visited Nov. 8, 2004).

<sup>40</sup> Mr. Howell was named by the Washington State Bar Association as Washington State Trial Lawyer of 1986. The Washington Chapter of the American Board of Trial Advocates named him Trial Lawyer of 1994. See SEATTLE MAG., Jan. 1999, at 39, 44 (where Mr. Howell is interviewed and named as one of Seattle's Best Lawyers).

<sup>41</sup> Black, *supra* note 16, at 14–15.

<sup>42</sup> Bonnie Angelo, *The Pain of Being Black: Toni Morrison, Winner of the Pulitzer Prize for her Gritty Novel Beloved, Smolders at the Inequities that Blacks and Women Still Face*, TIME MAG., May 22, 1989, at 120, available at <http://www.time.com/time/community/pulitzerinterview.html> (last visited Nov. 4, 2004). The outcaste of African Americans runs like a scarlet thread through American history, which abounds with instances of their consignment to the lowest rung of the social order. The most outrageous example perhaps is the Supreme Court's Dred Scott decision in which the Chief Justice of the United States Supreme Court declared that "[blacks] had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." Scott v. Sanford, 60 U.S. 393, 407 (1856). See generally EDMUND S. MORGAN, *AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 5–6 (1975) (Professor Morgan suggests that "[t]he connection between slavery and freedom is evident at many levels if we care to see it. . . . American reliance on slave labor must be viewed in the context of the American struggle for a separate and equal station among the nations of the earth. . . . To a large degree it may be said that Americans bought their independence with slave labor. . . . It was Virginia slaves who grew most of the tobacco that helped to buy American independence. And Virginia furnished the country's most eloquent spokesmen for freedom and equality."). See also BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 235 (1967) ("The presence of an enslaved Negro population in America became a political issue . . . . The contrast between what political leaders in the colonies sought for themselves and what they imposed on, or at least tolerated in, others became too glaring to be ignored. . . . The reality of plantation life was too harsh for such fictions."); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 12

(rev. ed. 1991) (he discusses W.E.B. Du Bois's BLACK RECONSTRUCTION, and observes that the decision of workers to define themselves by their whiteness [is] understandable in terms of short-term advantages. In some times and places, he argues, such advantages showed up in pay packets, where the wages of white, native-born skilled workers were high, both compared with those of Blacks and by world standards. But vital for the white workers Du Bois studied most closely was, as he puts it in a brilliant, indispensable formulation, that even when they 'received a low wage [they were] compensated in part by a . . . public and psychological wage' . . . 'They were given public deference . . . because they were white.'").

<sup>43</sup> See Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, THE CIVIL RIGHTS PROJECT, Aug. 2002, at [http://www.civilrightsproject.harvard.edu/research/deseg/reseg\\_schools02.php](http://www.civilrightsproject.harvard.edu/research/deseg/reseg_schools02.php) (last visited Nov. 24, 2004).

<sup>44</sup> *Id.* at 22.

<sup>45</sup> "[As in England], a recent study . . . found that there were more than 30 percent more black men in prison than in colleges or universities. . . . [There has been] a 500 percent rise in [the last] 20 years for the black prison population, while there has been only a 30 percent rise in those going to college." David Cracknell & Yuba Bessaoud, *Twice as Many Blacks in Jail as at University*, TIMES (London), Dec. 14, 2003, at 7. See *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and Its Impact on African American Men*, Justice Policy Institute, at <http://www.justicepolicy.org/downloads/coc.pdf> (last modified Sept. 18, 2002).

<sup>46</sup> CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 311 (2004).

<sup>47</sup> See MELVIN OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (2d ed. 1997). See also Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199 (2001); Silja J.A. Talvi, *The Long Way Home*, COLORS NW MAG., Mar. 2004, at 9.

<sup>48</sup> Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership*, 95 NW. U. L. REV. 505 (2001).

<sup>49</sup> Sunstein, *supra* note 7, at 106.

<sup>50</sup> *Id.*

<sup>51</sup> DU BOIS, *supra* note 36, at 13.