

# William & Mary Law Review

---

Volume 36 (1994-1995)  
Issue 2 Symposium: *Brown v. Board of  
Education After Forty Years: Confronting the  
Promise*

---

Article 2

February 1995

## The Promise of Brown Forty Years Later: Introduction

Davison M. Douglas  
*William & Mary Law School*, [dmdoug@wm.edu](mailto:dmdoug@wm.edu)

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Civil Rights and Discrimination Commons](#), [Education Law Commons](#), and the [Race and Ethnicity Commons](#)

---

### Repository Citation

Davison M. Douglas, *The Promise of Brown Forty Years Later: Introduction*, 36 Wm. & Mary L. Rev. 337 (1995), <https://scholarship.law.wm.edu/wmlr/vol36/iss2/2>

Copyright c 1995 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/wmlr>

# William and Mary Law Review

---

VOLUME 36

No. 2, 1995

---

## THE PROMISE OF *BROWN* FORTY YEARS LATER

### INTRODUCTION

DAVISON M. DOUGLAS\*

It is beyond dispute that one of the most celebrated political and social events of this century is the Supreme Court's decision in *Brown v. Board of Education*.<sup>1</sup> In large measure, the prominence of *Brown* is due to the significance of the institution it challenged: the system of enforced racial separation in American public schools. With each passing anniversary of the *Brown* decision, scholars and commentators have revisited the issues of the decision's impact on American society and the extent to which its promise of the elimination of racial separation and oppression has been realized.<sup>2</sup> This Symposium is designed to provide

---

\* Associate Professor of Law, Marshall-Wythe School of Law, College of William & Mary. A.B., Princeton University; J.D., Ph. D., Yale University. I would like to thank my research assistant Erin Hawkins for her assistance in the preparation of this Essay.

1. 347 U.S. 483 (1954).

2. Both scholars and popular writers have used the occasion of the decision's anniversary to reconsider the decision's impact. See, e.g., Betsy Levin, *Symposium: Educational Equality Thirty Years After Brown v. Board of Education*, 55 U. COLO. L. REV. 487 (1984); David L. Norman, *The Strange Career of the Civil Rights Division's Commitment to Brown*, 93 YALE L.J. 983 (1984); Drew S. Days, *Vindicating Civil Rights in Changing Times*, 93 YALE L.J. 990 (1984); William B. Reynolds,

the opportunity for several scholars to address those issues on the occasion of the decision's fortieth anniversary.

Without question, there has been much progress during the forty years since the *Brown* decision towards improving the status of African Americans:<sup>3</sup> the elimination of de jure segregation in various aspects of American life,<sup>4</sup> improved educational opportunities for minority school children,<sup>5</sup> increased political participation as evidenced by both substantial increases in minority voter registration and the number of minority elected officials,<sup>6</sup>

*Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984); Burke Marshall, *A Comment on the Discrimination Principle in a "Nation of Minorities"*, 93 YALE L.J. 1006 (1984); Robert A. Framm, *Civil Rights Ruling Left a Mixed Legacy; 40th Anniversary of Education Case*, HARTFORD COURANT, May 17, 1994, at A1; William Celis III, *40 Years After Brown, Segregation Persists*, N.Y. TIMES, May 18, 1994, at A1; Anthony Lewis Boston, *Since 'Brown' Decision: A Remarkable 40 Years*, PLAIN DEALER, May 20, 1994, at 7B; Ronald Brownstein, *4 Decades Later, Legacy of Brown v. Topeka Is Cloudy*, L.A. TIMES, May 15, 1994, at A1.

3. Yet there has been considerable debate in the past few years about the extent to which this progress is attributable to the *Brown* decision or whether it is attributable instead to certain congressional and executive actions during the 1960s. At least two scholars have recently claimed that the importance of *Brown* has been overstated. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994). Others have disputed that assessment. See, e.g., David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151 (1994); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173 (1994).

4. In the years immediately following *Brown*, the United States Supreme Court struck down de jure segregation in several areas of public life. See *Boynton v. Virginia*, 364 U.S. 454 (1960) (restaurants); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (public golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches).

5. Throughout the South during the pre-*Brown* era, school expenditures for white schools far outpaced school expenditures for African-American schools, even though considerable gains were made by the African-American schools during the 1940s and 1950s. HARRY S. ASHMORE, *THE NEGRO AND THE SCHOOLS* 153 (1954).

6. Today, there are almost 8,000 African-American elected officials in the United States; in 1954 there were virtually none. See Tom Teepen, *Brown v. Board of Education: America Reaps a Rich Reward*, ATLANTA CONSTITUTION, May 17, 1994, at A11; see also LET FREEDOM RING: A DOCUMENTARY HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT 256 (Peter B. Levy ed., 1992). Whereas less than one quarter of the African-American adults in the South were registered to vote in 1954, by 1970, over two thirds had registered to vote. HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY 1954-1992*, at 220 (1993). Moreover, the black vote played an increasingly critical role in elections not involving black candidates. Southern African-American

and an expanding black middle class.<sup>7</sup>

Yet forty years later, America still confronts profound racial divisions that suggest that the legacy of discrimination and oppression that *Brown* first addressed remains with us. In the past few years, an increasing number of observers have explicated the ongoing racism and lack of equality that neither *Brown* nor the civil rights movement could overcome.<sup>8</sup> The Kerner Commission feared in 1968 that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal”;<sup>9</sup> in many ways, as suggested most dramatically by the Los Angeles riots, that fear has come to pass. The occasion of the fortieth anniversary of the *Brown* decision is therefore a time for celebration of a central event in this country’s moral and political history, and yet also a time for somber reflection at the ways in which the promise of that decision has gone unmet. The authors of the articles and essays in this issue of the *William and Mary Law Review* have sought to examine various aspects of the *Brown* decision and its contemporary legacy as a way of gaining greater insight into the problem of race in America.

Jerome Culp, in his essay *Black People in White Face: Assimilation, Culture, and the Brown Case*,<sup>10</sup> and Richard Delgado and Jean Stefancic, in their essay *The Social Construction of Brown*,<sup>11</sup> both argue that notwithstanding the *Brown* decision, America has failed to eliminate the vestiges of racial segregation

---

votes, for example, proved decisive in Jimmy Carter’s 1976 slim electoral victory over Gerald Ford, prompting Andrew Young to comment that “[t]he hands that picked the cotton finally picked the President.” *Id.* at 214.

7. See, e.g., BART LANDRY, *THE NEW BLACK MIDDLE CLASS* (1987); JAMES P. SMITH & FINIS R. WELCH, *CLOSING THE GAP: FORTY YEARS OF ECONOMIC PROGRESS FOR BLACKS* (1986).

8. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); ANDREW HACKER, *TWO NATIONS: BLACK, WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992); CORNEL WEST, *RACE MATTERS* (1993); Derrick Bell, *Racial Realism*, 24 *CONN. L. REV.* 363 (1992).

9. U.S. KERNER COMM’N, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 1 (1968).

10. Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the Brown Case*, 36 *WM. & MARY L. REV.* 665 (1995).

11. Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 *WM. & MARY L. REV.* 547 (1995).

and oppression. For Delgado and Stefancic, *Brown* failed because of institutional limitations on the ability of courts to effectuate meaningful cultural and political change. For Culp, *Brown* failed because of misguided assumptions about the willingness of white society to comply with its mandate and the implicit view among many white Americans that the *Brown* mandate requires the assimilation of African Americans into the dominant white culture. The pessimism of Culp, Delgado, and Stefancic is not shared by all of the authors in this issue. Christine Rossell, in her essay *The Convergence of Black and White Attitudes on School Desegregation Issues*,<sup>12</sup> relies on extensive opinion poll research to conclude that there has been a dramatic increase in the acceptance of racial integration among white Americans during the forty years since *Brown*, a tribute to "the moral leadership of the civil rights movement."<sup>13</sup>

In some measure, the debate over the success of *Brown* depends on one's view concerning the meaning of the decision. If *Brown* meant merely the elimination of mandatory racial school segregation, then *Brown* had succeeded by the mid- to late-1960s, by which time virtually every southern school district had stopped assigning students to school explicitly on the basis of their race.<sup>14</sup> On the other hand, if *Brown* meant the end in this country to racial division and inequality more broadly defined, then the ongoing social, economic, political, and even geographic division between black and white suggests that the promise of *Brown* remains unrealized.

One particularly troubling event in recent years has been the resegregation of America's schools. Although school integration significantly increased in the late 1960s and early 1970s due to

---

12. Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV. 613 (1995).

13. *Id.* at 637.

14. Race-based pupil assignments continued in the South notwithstanding the *Brown* decision until the Office of Education used the threat of fund cutoffs in the mid-1960s to compel the termination of those assignment practices. See, e.g., J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 102-08 (1979); Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 129 (1994).

pressure by the Office of Education and the federal courts,<sup>15</sup> during the past decade American schoolchildren have increasingly attended school primarily with children of their own race. Today, more than two thirds of African-American students attend schools with a majority minority population—the highest figure since 1968.<sup>16</sup> Confronted with a return to segregated schools, many communities have searched for new alternatives to achieving meaningful pupil mixing, such as voluntary magnet schools as opposed to the more traditional mandatory reassignment plans that relied on extensive use of school busing.<sup>17</sup>

Christine Rossell concludes on the basis of polling data that the parents of both white and black children favor neighborhood schools to mandatory reassignment plans.<sup>18</sup> Others, however, such as Marilyn Yarbrough in her essay *Still Separate and Still Unequal*,<sup>19</sup> while recognizing that many African-American parents have indeed become willing to forego racial balance in favor of educational quality when the two seem incompatible,<sup>20</sup> fear that abandonment of racial balance as an educational priority will eventually lead to a return to separate and unequal schools that *Brown* sought to eliminate.

The integrationist vision of *Brown* has proved particularly difficult to achieve in higher education, exacerbated by increas-

15. Following enactment of Title VI of the Civil Rights Act of 1964, the Office of Education used the threat of fund cutoffs to increase desegregation levels in southern school districts, while the courts in the early 1970s required school boards throughout the country to engage in extensive pupil reshuffling to overcome segregated residential patterns. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

16. GARY ORFIELD, *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968* (1993); Ronald Brownstein, *4 Decades Later, Legacy of Brown v. Topeka Is Cloudy*, L.A. TIMES, May 15, 1994, at A1.

17. See generally CHRISTINE H. ROSSELL, *THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING* (1992).

18. Rossell, *supra* note 12.

19. Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 WM. & MARY L. REV. 685 (1995).

20. Some African Americans have questioned the traditional emphasis on pupil mixing in school desegregation cases since the early 1970s. See, e.g., Brief for CORE as Amicus Curiae, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 2 (1971); Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

ing instances of racially motivated intimidation and harassment on college campuses.<sup>21</sup> Clay Smith and Lisa Wilson, in their essay *Brown on White College Campuses*,<sup>22</sup> outline the various difficulties confronting minority students on white college campuses; in his essay, Jerome Culp concludes that many of these difficulties arise from the mistaken insistence that minority students assimilate into the majority culture in order to gain acceptance in the academy.<sup>23</sup> Nathan Glazer, in his essay *Levin, Jeffries, and the Fate of Academic Autonomy*,<sup>24</sup> examines the particularly difficult free speech issues that arise from attempts to control racially offensive speech on university campuses.

In the forty years since its momentous *Brown* decision, the United States Supreme Court has continued to play an important role in giving definition to the rights of racial minorities in American life. John Nowak, in his article *The Rise and Fall of Supreme Court Concern for Racial Minorities*,<sup>25</sup> and Mark Tushnet, in his article *The Supreme Court and Race Discrimination, 1967-1991*,<sup>26</sup> argue that the Court has retreated from its commitment to the elimination of racial inequality articulated in the *Brown* decision, as evidenced by the Court's decisions in a number of areas, including voting rights and affirmative action. Finally, Juan Perea, in his essay *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*,<sup>27</sup> suggests that the Court has not paid sufficient attention to issues of ethnicity in its equal protection jurisprudence and that the time is ripe for the Court to appreciate that race in America is no longer

---

21. Dale Russakoff, *At Penn, Can Frank Talk Make Racial Tension Walk?*, WASH. POST, Nov. 19, 1993, at A2; see Isabel Wilkerson, *U. of Michigan Fights the Taint of Racial Trouble*, N.Y. TIMES, Jan. 15, 1990, at A12; *Yale Investigates Hate Mail Sent to Black Students*, N.Y. TIMES, Sept. 23, 1990, at 37.

22. J. Clay Smith, Jr. & Lisa C. Wilson, *Brown on White College Campuses: Forty Years of Brown v. Board of Education*, 36 WM. & MARY L. REV. 733 (1995).

23. Culp, *supra* note 10.

24. Nathan Glazer, *Levin, Jeffries, and the Fate of Academic Autonomy*, 36 WM. & MARY L. REV. 703 (1995).

25. John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345 (1995).

26. Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers*, 36 WM. & MARY L. REV. 473 (1995).

27. Juan Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995).

a bipolar configuration.

The *Brown* decision remains worthy of celebration, as a central and defining moment when this country attempted to come to terms with the inherent contradiction between the American dream of equality of opportunity and this country's treatment of racial minorities. But amid the celebration should come consideration of the ongoing failure of African Americans to secure full and complete racial equality. America has come a long way in matters of race since May 1954, but there is much ground yet to be traveled before the full promise of the *Brown* decision is realized.