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**Brown v. Board of Education: 50 Years Later**

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# BROWN V BOARD OF EDUCATION

50 YEARS LATER

by Dana L. Miller, 3L

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**In *Brown v. Board of Education*, the U.S. Supreme Court unanimously concluded that the doctrine of “separate but equal” had no place in public education. That decision on May 17, 1954 initiated educational reform throughout the country and was a catalyst in launching the modern Civil Rights movement. Though *Brown* signaled the beginning of the end of *de jure* segregation in the United States, events since reveal that – one-half century later – the work is far from complete. On Friday, October 10, 2003, scholars, students, and practitioners joined together at Saint Louis University School of Law for a full-day conference to consider the legacy of *Brown* and its impact on the whole of American society and jurisprudence.**

This important and timely conference was held in connection with, and as an expanded version of, the annual Richard J. Childress Memorial Lecture. This annual lecture is the School of Law’s premier academic event and is named in honor of Richard J. Childress, who served as dean of the School of Law from 1969 to 1976. Conference participants enjoyed the rare opportunity to learn from and interact with a diverse and distinguished group of legal and historical scholars from across the country.

William E. Nelson, Professor of Law at New York University School of Law and one of our country’s foremost legal historians, delivered this year’s keynote lecture. Professor Nelson’s work, “*Brown v. Board of Education* and the Jurisprudence of

Legal Realism,” addresses a shift in emphasis in the jurisprudence of legal realism that he argues is connected to *Brown*. A legal realist rejects formalism’s belief that judges derive decisions deductively from nonpolitical, neutral and objective sources of law. Instead, legal realists believe judges often rely on some other rationale such as philosophy or morality to reach their decisions. Professor Nelson pointed out that, although legal realists have dominated the jurisprudential landscape of the country since the 1930s, realism has not remained a stagnant concept, but has evolved and changed over the years. He used a train analogy to illustrate the shift that he argues is connected to *Brown*: On the one hand, a judge might see law as a caboose at the end of the train, with the judge’s job to keep the

caboose on the same track as the train. This type of judge sees herself as an agent of society under a duty to make law conform to the wishes of society. On the other hand, the judge might see law as the engine at the front of the train, with the judge’s job to determine the direction the train will ultimately take. This type of judge sees himself as a leader, pulling society along in the proper direction. In Professor Nelson’s view, legal thinkers saw the law as a caboose up until the time of *Brown*. Since *Brown*, however, the emphasis has shifted such that the law is viewed more as the engine, which, of course, carries a great number of implications for modern American jurisprudence.

Three distinguished scholars commented on Professor Nelson’s remarks. The first of these, Robert Cottrol, Professor of Law, History and Sociology at George Washington University, argued that carefully considering the forces that shaped the *Brown* decision can help us see that judges are themselves products of the larger cultural system in which they live. For this reason, it is important to consider the cultural context of *Brown* in any discussion of how the *Brown* court came to its ultimate decision. Cottrol argued that it is essential to look at the cultural and social forces that helped shape the decisions made by the *Brown* justices when deciding the case as they did. Also commenting on Professor Nelson’s remarks was Mary Dudziak, Professor of Law and History at the University of Southern California Law School. Professor Dudziak noted that legal scholarship on *Brown* has often isolated it from its 1950s historical context. In her view, one primary motivation for the decision was to safeguard America’s position in the Cold War by restoring the outside world’s faith in the United States justice system. Segregation, she pointed out, was a major focus of Soviet propaganda as well as a source of embarrassment for the United States abroad. Final comments came from The Honorable Louis H. Pollak of the U.S. Court for the Eastern District of Pennsylvania, author of the seminal 1959 *University of Pennsylvania Law Review* article, “Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler.” In this 1959 article that served as a response to

those questioning the validity of the *Brown* opinion, then-Associate Professor Pollak had argued that, within the constraints of that which has been decided by higher courts, it is proper for a judge to draw upon his “individual and strongly held philosophy.” In response to Professor Nelson’s idea that law is either an engine (in which a judge relies upon something other than neutral principles of law) or a caboose (in which a judge eschews morality and merely follows where society leads), Judge Pollak suggested that it is possible for the two ideas to coexist.

Judge Pollak’s comments were followed by Jack Greenberg, Professor of Law at Columbia University Law School and a former visiting professor at the Saint Louis University School of Law. Professor Greenberg has argued 40 civil rights cases before the U.S. Supreme Court, including *Brown*, and has participated in human rights missions all over the world. He emphasized that his recent consulting experience with Columbia Law School’s Public Interest Law Initiative on school desegregation for Roma children in Budapest has helped to shape his views on the role of *Brown* in American history. Unlike the desegregation efforts he witnessed in Eastern Europe, desegregation in America was deeply conflicted and took place in an inhospitable environment that resisted a disruption of the existing political order. As Professor Greenberg pointed out, the historical contexts in which these two segregation efforts took place help to explain their very different results.

Conference activities also included two very timely panel discussions. The first of these focused on affirmative action and featured remarks from Evan Caminker, Dean and Professor of Law at the University of Michigan Law School and member of the defense team for the recent *Grutter* and *Gratz* cases; Joel K. Goldstein, Associate Dean of Faculty and Professor at Saint Louis University School of Law; and William LaPiana, Professor of Wills, Trusts, and Estates at New York Law School. Drawing upon his unique personal experience as a member of the defense litigation team for the two cases, Dean Caminker emphasized that – like *Brown* – the *Grutter* and *Gratz*

cases were part of a carefully created legal campaign to end the use of affirmative action strategies in higher education. He went on to explain several key weaknesses in Plaintiff’s litigation strategy. Importantly, *Grutter* and *Gratz* recognize a significantly broader rationale for using racial preferences than the Court had previously recognized. Professor Goldstein argued that this expanded rationale will likely make it easier to defend affirmative action policies in the future and may affect how we think about the role of racial preferences in American society. In the view of Dean Caminker and Professor Goldstein, the *Grutter* and *Gratz* decisions bring us one step closer to the society that the *Brown* court envisioned.

The affirmative action discussion also focused on the ways in which the LSAT marked an important advance in promoting diversity in legal education. Professor LaPiana explained that the pool of potential law school applicants increased drastically after the Second World War, in part as a result of the fact that veterans could take advantage of financial aid for higher education. The LSAT was created as a means of allowing law schools to sort out this increased number of applicants in some uniform manner. This laid the foundation for a professional class more broadly representative of American society than before.

A separate panel discussion focused on aspects of the aftermath of the *Brown* decision and featured remarks from Kevin Kruse, Assistant Professor of History at Princeton University; Tomiko Brown-Nagin, Assistant Professor of Law and History at Washington University in St. Louis; and Anders Walker, Assistant Professor at John Jay College of Criminal Justice in New York. Professor Kruse’s work focuses on the ways in which segregationists at the state level worked to thwart the implementation of the *Brown* ruling in Georgia. He argued that, in much of their legal and political resistance, these segregationists insisted that “forced integration” was an example of the federal government imposing its will on local people in abrogation of their individual rights. Importantly, these state-level segregationists were actually the ones

guilty of this very charge, as they demanded complete conformity from Georgia’s white population, constraining their individual liberties in defense of segregation. Professor Brown-Nagin’s recent work also considers desegregation efforts in Georgia. Specifically, she has studied the legal and social history of desegregation efforts in Atlanta in an effort to recover the full history of the landmark *Brown* decision – in all of its complexity – so as to understand the socio-legal significance of the decision. She pointed out that there was actually a significant degree of dissonance between the goals of the national-level NAACP and local-level African-American Atlanta leaders, which acted as an impediment to change in the legal and social order of the state. According to Professor Walker, *Brown* also affected the structure of the southern political apparatus. By examining the intersection between *Brown* and the southern judiciary (including both the southern bar and the courts), we can see how the decision catalyzed innovations in political and judicial technology. Professor Walker argues that *Brown* led to changes in the southern judiciary that made it more difficult for NAACP attorneys to bring civil rights cases, while at the same time catalyzing the system’s modernization.

The legacy of *Brown* has shaped American jurisprudence and society in many important and fascinating ways in the nearly fifty years since the Court decided that landmark case. As the fiftieth anniversary of *Brown* draws near, scholars and others will undoubtedly continue to debate whether, as Judge Pollak predicted in 1959, “the judgment in the segregation cases will as the decades pass give even deeper meaning to our national life.” The important and diverse scholarly work presented on October 10, 2003 provides strong evidence that this work of deciphering the meaning of *Brown* and its implications for American jurisprudence and society is not yet complete.

\* The work presented at the 2003 Richard J. Childress Memorial Lecture and Conference will be published in a forthcoming volume of the Saint Louis University Law Journal. Orders for the forthcoming Childress volume may be placed by contacting Susie Lee at 314-977-3964.