

# Introduction

Philippa Strum

In the last decade, a number of scholars have challenged the belief that the Supreme Court's school desegregation decision in *Brown v. Board of Education*<sup>1</sup> made any difference to racial equality in the United States. The leading work, Gerald Rosenberg's *The Hollow Hope: Can Courts Bring About Social Change?*<sup>2</sup> argues that the major social changes of the late twentieth century in the areas of civil rights, women's rights, and abortion occurred in spite of or without regard to Supreme Court action and that, more generally, courts can almost never be effective producers of social reform. There is a particular moment in history when things are going to happen anyway, Rosenberg states, no matter how courts behave. Because the Court's decisions are not self-implementing, he adds, its rulings in areas of social change are irrelevant. Unless the other branches of government are interested in moving in the same direction, no change takes place. And if those branches want change, they will achieve it without reference to the courts.

Rosenberg's thesis has been picked up by a great many people in the legal profession and the social sciences. Judge Richard Posner, for example, a legal theorist and scholar as well as a member of the Seventh Circuit Court of Appeals, wrote in a blurb for the cover of *The Hollow Hope*, "Rosenberg's book sets a new standard for studies of judicial impact and will cause many lawyers to revise their view of the relation between law and society."

Rethinking has indeed occurred as scholars discuss exactly what led to integration (or, perhaps, desegregation, which is of course not the same thing). Was it the Court, or other governmental institutions, or the correct societal moment that ended segregation laws, or was it some combination of those? How much of an impact did the Supreme Court's decisions have?

More fundamentally, one may ask what the real purpose is of having integrated or desegregated schools. What is the aim, and how does one

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assess success? If the goal is to get black and white children sitting side-by-side in schools, the measurement of success or failure is as relatively simple as establishing what is meant by “black” and “white,” and then counting heads. That kind of integration would seem to have been the motivation for the Court’s decision in *Brown*. If the goal is to improve the quality of education, however, a different measurement becomes necessary.

Any assessment of the impact of *Brown v. Board*, then, must revolve around a number of questions: what were both the goal of and societal expectations for *Brown v. Board*? Was either achieved, or were both, and by what measurement?

Those questions are addressed in *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*, written by former Woodrow Wilson Center Fellow James T. Patterson.<sup>3</sup> The Division of U.S. Studies convened a seminar on January 9, 2002 to discuss the book and its conclusions. The edited proceedings comprise the first three essays in this collection.

Professor Patterson argued that *Brown*’s impact on public opinion, racial protest, and national politics was minimal at best. Roger Wilkins, a civil rights activist as well as a professor of history, replied that it changed the expectation of black Americans in ways that ultimately had profound consequences for the nation. Douglas Reed, a political scientist, maintained that the levels of both racial oppression and racial conflict were altered by the decision.

While the panelists disagreed about whether *Brown v. Board of Education* really mattered, then, they all acknowledged that the public school system today is neither racially integrated nor equitably funded. If those were the goals of *Brown v. Board*, then the decision was a failure. The reasons are numerous. One is the flight of wealthier and politically adept whites out of urban areas and their school systems. But whatever the causes of educational inequities and continued *de facto* segregation may be, Roger Wilkins, one of the panelists, commented that it is time for the country’s focus to change. Integration may remain the ideal, but it is so far from achievement that the country’s current goal should be to make public schools in black neighborhoods as good as possible.

Perhaps the greatest problem in achieving that goal is the national policy of funding public schools through property taxes. As African American neighborhoods are disproportionately poor, with lower property tax bases, less money is available for schools in those areas. The question of how good public schools in African-American neighborhoods can be looms large.

That is the problem addressed in Douglas Reed’s *On Equal Terms: The Constitutional Politics of Educational Opportunity*,<sup>4</sup> the focus of a follow-up

conference held on March 11, 2002. Recognizing that funding rather than race may be the key to quality education, Reed acknowledges the devastating effects on educational equity of two other Supreme Court decisions.

In one of the cases, *San Antonio v. Rodriguez*, the Supreme Court held that there is no federal constitutional right to an education.<sup>5</sup> There is, therefore, no federal constitutional right to an equally funded education. In the second and perhaps more devastating case, *Milliken v. Bradley*, the Court struck down a plan that would have consolidated the Detroit school district with surrounding suburbs.<sup>6</sup> Lower federal courts had found that if the Detroit area was treated as a separate entity, it would always be segregated, and that prospect warranted consolidation. The Supreme Court, however, held that because there was no showing that the white suburban school districts had ever engaged in legal segregation, it was impermissible to order their inclusion in a solution to what the Court viewed as Detroit's dilemma.

Faced with these obstacles to invoking the U.S. constitution, some advocates of equity turned to litigation based on state constitutions. The litigation's successes and failures are detailed in Professor Reed's book, and in the fourth essay here, he analyzes his findings. In the fifth essay, Professor Jeffrey Henig examines the state electoral considerations that affect educational equity; in the sixth, Professor Judith Winston, former director of President Clinton's Initiative on Race, suggests the limits of the ability of the presidency to address the problem.

## NOTES

1. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education* (commonly referred to, and cited below, as *Brown II*), 349 U.S. 294 (1955). While the decisions technically involved only segregated schools, they are generally acknowledged to have constituted the first step in the eventual end to all formally segregated publicly funded institutions.

2. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago, 1991).

3. *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford University Press, 2001).

4. Douglas S. Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* (Princeton University Press, 2001).

5. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

6. *Milliken v. Bradley*, 418 U.S. 717 (1974).