

FROM *BROWN* TO *GRUTTER*: THE DIVERSE BENEFICIARIES OF *BROWN V. BOARD OF EDUCATION*

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The Supreme Court's decision in Brown v. Board of Education was just one event that occurred in a period of economic and educational changes for many groups in the United States. In the midst of these changes, Brown was a "detonating spark" that focused the efforts of the Civil Rights Movement, made the Supreme Court the ally of social rights, increased the use of social science data in government, and prompted a counterreaction from the majority. On its face, the decision in Brown only addresses the impropriety of segregation, but it has served as a springboard for equal rights, not only among African Americans, but also among all other minority groups. In this article, the author discusses the significance of the Brown decision for multiple groups, yet shows how limited Brown has been in dealing with contemporary forms of institutionalized racism.

I. INTRODUCTION

The fiftieth anniversary of the landmark case, *Brown v. Board of Education*, provides an opportunity not only to reflect on the demise of formal, legal segregation in the United States, but also to think about the consequences of *Brown* for the advancement of different groups in U.S. society. Women (African American, White, Latina, Native, and Asian American), are beneficiaries of the *Brown* decision, as are gays, lesbians, other racial-ethnic groups, and disabled people, to name a few. *Brown* provided a judicial, political, social, and moral foundation for opening social institutions to various social groups, the benefits to whom were not envisioned in the *Brown* decision per se. As we think about the impact of *Brown*, we can think not only about its effect on race in America, but also on the experiences of all those who have benefited from this historic decision.

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To understand the impact of *Brown*, this paper first examines the context in which the Supreme Court decided *Brown*. Next, it examines the consequences *Brown* has had for race relations in the United States. We will then see how the implications of *Brown* extend beyond the law and into the social and political arenas. Finally, the paper addresses the current state of affairs following the Supreme Court's decision in *Grutter v. Bollinger*. Although there is considerable debate about the difference *Brown* made, and what changes would have resulted even without it, *Brown* is nonetheless a touchstone for assessing how far we have come, and what remains to be done.

II. THE CONTEXT OF *BROWN*

The social-historical context of the *Brown* decision is one in which vast changes were underway for many groups in U.S. society. When *Brown* was decided in the early 1950s, the United States had recently emerged victorious from World War II, and the military had been desegregated in 1948 by presidential order.¹ The nation was in the midst of the Cold War, having declared itself as the leader of the free world in its fight for democracy and against communism. The United States' declaration of itself as the symbol of democracy had an impact on thinking about the persistence of segregation. Black veterans, for example, returned home hopeful about seeing a change in U.S. race relations, as they had witnessed the fall of Nazism in Europe. Having claimed to have defeated the forces of group hatred and oppression found in Nazism and anti-Semitism, the United States was hardly in a position to maintain overt racial oppression at home.

At the same time, massive changes were underway in the labor market, affecting the social organization of gender and race within the United States. During the war, White women had entered the labor force in unprecedented numbers, and Black women had substantially improved their status in the labor market. Many Black women, who prior to the war had been domestic workers, moved into jobs during the war that were formerly closed to them.² Although Black women never received the best jobs, the number working in factories doubled; clerical, sales, and professional jobs also opened for Black women.³ Although the vast majority of Black women who were working when the war ended had in fact been doing so prior to the war, both Black and White women found enlarged opportunities for work during the war—many of which were lost at the war's end.⁴ Still, by 1950 the gap in White and Black

1. Exec. Order Nos. 9980, 9981, 3 C.F.R. 720-22 (1948).

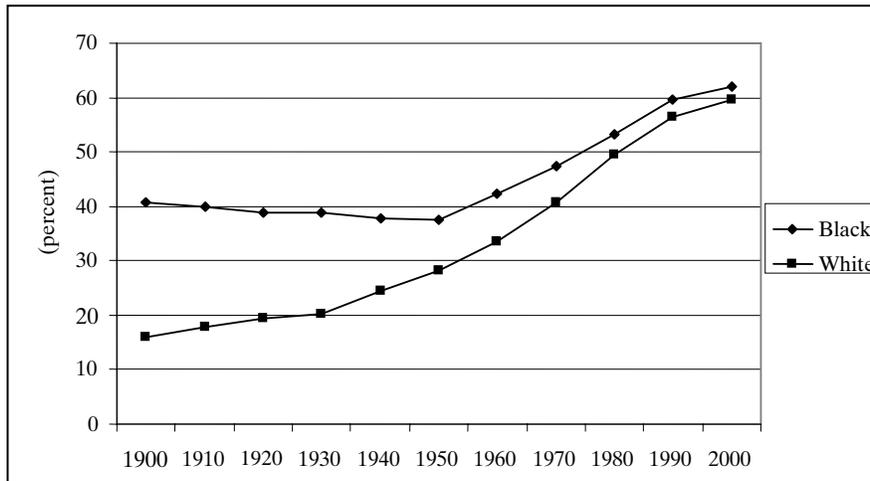
2. See ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 279 (1982) (estimating that about twenty percent of Black women who had been domestic workers were able to move into factory-based jobs during the war).

3. *Id.*

4. *Id.* at 286-87.

women's labor force participation rates had significantly closed and reached near parity by 1970 (see Figure 1).⁵

FIGURE 1
WOMEN'S LABOR FORCE PARTICIPATION: 1900–2000



Source: U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 2002 (2002).

Not only were women of both races in the 1950s more likely to be in the labor force, but the employment status of married women of both races was also changing, thereby affecting family structure. In 1954, 28% of all married women were in the labor force.⁶ By 1960, the labor force of all married women had grown to 32.3%, though Black women were still more likely than other women to be working when they had young children.⁷

Meanwhile, employment for Black men was also changing. Between 1948 and 1955, the percentage of non-White workers employed as farmers and farm operators dropped from 8.5% of the work force to 5%; the percentage of farm laborers declined from 12.5% to 9.5%.⁸ At the same time, the percentage of non-White men working in professional or technical work increased from 2.4% to 3.5%.⁹

Despite the increased employment rates for Black men and women, there was a substantial income gap between White and Black families. In 1954, the national median income was \$2410 for non-Whites and

5. TERESA AMOTT & JULIE MATTHAEI, *RACE, GENDER, AND WORK: A MULTI-CULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES* 303–18 (rev. ed., 1996).

6. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* (1956).

7. U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS (2002).

8. U.S. CENSUS BUREAU, *supra* note 6, at 209. The census did not enumerate White, Black, and other groups at the time, using instead the designators "white" and "non-white."

9. *Id.*

\$4339 for Whites, which is a 44% gap.¹⁰ Only 22% of non-White families had median incomes above the national median income.¹¹

Changes in educational attainment for women and men were also afoot in the 1950s, and were certainly spurred on as a result of *Brown*. Educational attainment for both Blacks and Whites was increasing at this time with no difference in the percentages of White and Black men between the ages of five and thirty-four enrolled in school.¹² Women were somewhat less likely than men to be enrolled in school; 46.9% of White women and 47.4% of non-White women were in school.¹³ There were, however, significant gaps between White and Black Americans in the median years of school completed, and low levels of education among older people in both populations. White men in 1950 had completed an average of 9.3 years of education; White women, ten years.¹⁴ Non-White men had completed 6.4 years; non-White women, 7.2 years.¹⁵

TABLE 1
EDUCATIONAL ATTAINMENT BY RACE, 1960–2000

	White		Black	
	High school graduate or more	College graduate or more	High school graduate or more	College graduate or more
1960	43.2	8.1	20.1	3.1
1970	54.5	11.3	31.4	4.4
1980	68.8	17.1	51.2	8.4
1990	79.1	22.0	66.2	11.3
2000	84.9	26.1	78.5	16.5

Source: U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2002 139 (2002).

Brown had a tremendous impact on closing the racial gap in educational attainment, although it was not the sole force doing so (see Figure 2). By 1960, 41.8% of White men and 44.7% of White women had at least a high school diploma, compared to 18.2% of Black men and 21.8% of Black women.¹⁶ This was a racial gap of 23%, and within each racial group, there was a gender gap of 3%. In 1980, twenty-six years after the *Brown* decision, the racial gap had closed to 18% for White and Black men and 17% for White and Black women.¹⁷ By 2000, the racial difference was 6.1% for men and 6.7% for women.¹⁸

10. U.S. CENSUS BUREAU, *supra* note 6. The gap is sixty-three percent today. See U.S. DEP'T OF LABOR, *supra* note 7.

11. U.S. CENSUS BUREAU, *supra* note 6.

12. *Id.* (noting that fifty-four percent of each group were enrolled in school in 1950).

13. *Id.*

14. *Id.*

15. *Id.*

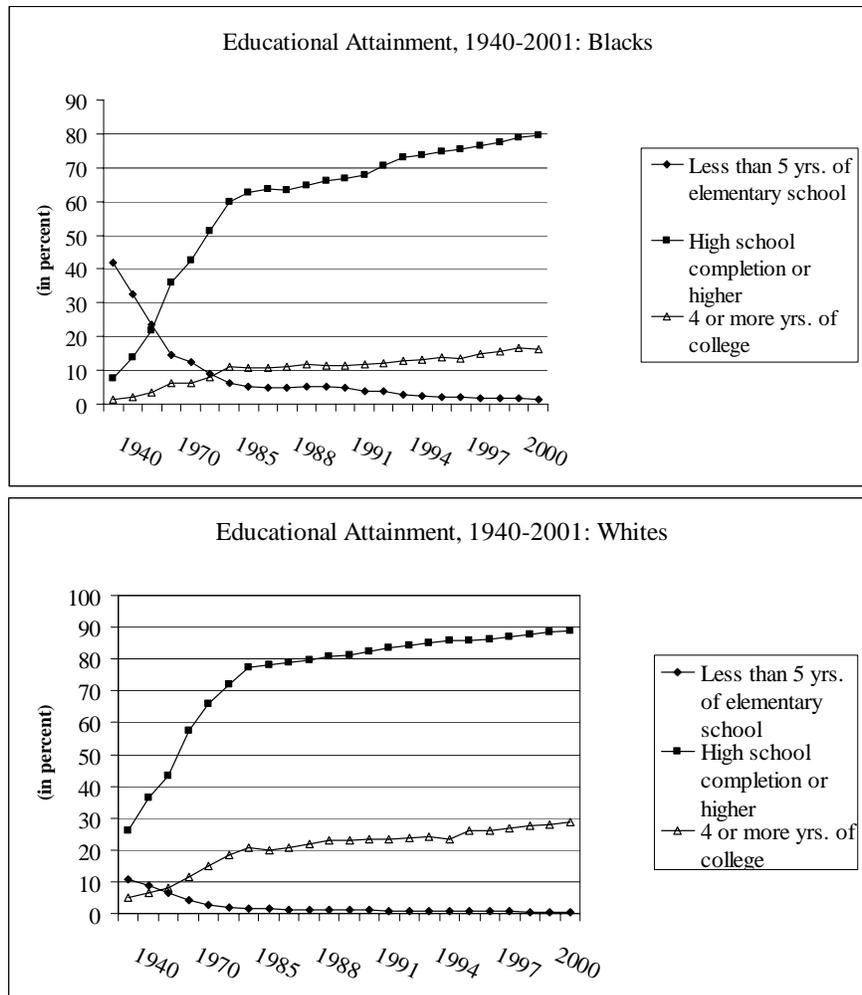
16. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 139 (2002), available at <http://www.census.gov/prod/2003pubs/02statab/edu.pdf>.

17. *Id.*

18. *Id.*

Post-*Brown* gains in education were not limited to high school. College enrollment in the post-*Brown* years was increasing both among White and Black women and men. In 1960, 2.8% of Black men and 3.3% of Black women held college degrees; this statistic increased to 8.4% and 8.3%, respectively, by 1980 and to 16.3% and 16.7%, respectively, by 2000.¹⁹

FIGURE 2



Source: NAT'L CTR. FOR EDUC. STATISTICS, 2002 DIGEST OF EDUCATIONAL STATISTICS TABLES AND FIGURES (U.S. Dep't of Educ., 2002).

19. NAT'L CTR. FOR EDUC. STATISTICS, 2002 DIGEST OF EDUCATIONAL STATISTICS TABLES AND FIGURES, at http://nces.ed.gov/programs/digest/d02_tf.as (last visited Mar. 10, 2004).

These data reflect significant changes that were underway in U.S. society at the time the *Brown* decision was made. Greater employment of women, and increased educational attainment for all groups were important because they changed people's expectations about their opportunities. Wartime work gave women a sense of accomplishment such that they could think of themselves, as we will see, as being entitled to the rights associated with full citizenship. As the trends toward more education and a greater engagement in the public sphere accelerated in the period following *Brown*, people's expectations for their life chances also swelled.

The quantitative data provide one picture of a changing society, but many of us also recall what these times were like. As a young White student in the 1950s, I attended racially segregated schools in three very different public school systems: Oakland, California, Rome, Georgia, and Boston, Massachusetts. The Rome schools were officially segregated until my senior year of high school when *Brown* was finally, although minimally, implemented. As I recall it, in 1966, three Black students entered the senior class of my public high school, a class totaling about 120 students. The separate Black schools in Rome were not closed until several years later. I had little political awareness at the time, but I remember thinking that the segregationist system in the South was wrong. But I also know that I assumed, indeed, expected, that my education would get me somewhere, though exactly where, I did not know. Looking back on it, I am sure that those first three Black students had similar expectations, and that their parents had sacrificed mightily in the hope that a good education would lead them to a better future.

Not all White people in my town shared these positive feelings about change. In the years following the *Brown* decision, new private schools were established in Rome and other southern towns. White families with the resources, and will to do so, avoided racial desegregation. For example, a Rome private school for girls, which opened in 1958, describes itself as follows: "Thornwood School for Girls opened its doors in 1958. Resting high on a hill, nestled in a quaint antebellum home, it was a world set apart."²⁰ A world set apart indeed. At the time Thornwood was established, the schools in this and other Georgia counties were still completely segregated.²¹ One of the consequences of *Brown* was fierce White resistance to desegregation, measured by the legal maneuvering that followed, a spike in White attitudes opposing the

20. See DARLINGTON SCH., THORNWOOD SCHOOL FOR GIRLS: A NOBLE LEGACY, at <http://www.darlington.rome.ga.us/academics/library/archives/places/thornwood/thornwoodschool.asp> (last visited Apr. 1, 2004).

21. See MICHELLE BRATTAIN, THE POLITICS OF WHITENESS: RACE, WORKERS, AND CULTURE IN THE MODERN SOUTH 226–27 (2001).

Brown decision,²² and the White suburban flight that continues to plague the process of school desegregation.²³

But for many, these were optimistic times. Looking back, we can see multiple changes unfolding, not the least of which was the impact of the *Brown* decision. Schooling was increasing; the United States was not at war; and women were entering the public sphere. For both White and Black Americans, the old regime was changing. As Lewis Killian wrote: “A revolution does not begin with a declaration of war and frontal assault on the Old Regime. It begins with incidents that, although noteworthy, are not fully appreciated for their long-run significance.”²⁴ One of those incidents was the *Brown v. Board of Education* decision on May 17, 1954.

III. THE CONSEQUENCES OF *BROWN*

It is impossible to gauge the specific consequences of any given court decision, given that such decisions occur within a larger social context. The impact of *Brown* is so intertwined with the incipient Civil Rights Movement on which it was based, and which it further inspired, that it is hard to untangle the effects of the two. Nonetheless, understanding that connection, we can see numerous consequences of *Brown*, such as the inspiration for social movements that it provided.

A. *The “Detonating Spark”*

Perhaps the most immediate consequence of the *Brown* decision was the optimism it generated, and the platform it created, for the mobilization of the Civil Rights Movement. *Brown* did not, however, come out of the blue. It followed a long period of mobilization and organization by groups like the NAACP, the Brotherhood of Sleeping Car Porters, the Congress of Racial Equality (CORE), the National Council of Churches of Christ, and other organizations working to eliminate Jim Crow segregation.²⁵ Years of legal work, various court challenges, community organizing, and wrangling with school officials, preceded this momentous decision. After all, it was not *Brown* per se that overthrew the social order of Jim Crow segregation, but the mass mobilization of Black people and their White allies. *Brown* added hope to the discon-

22. Julie Ray, *Reflections on the “Trouble in Little Rock,” Part II*, THE GALLUP POLL, Mar. 4, 2003, at 71–72.

23. See James W. Guthrie, *American Education Reform: What is Needed is ‘National’ Not Federal*, 17 ST. LOUIS U. PUB. L. REV. 125, 136 (1997).

24. LEWIS M. KILLIAN, *THE IMPOSSIBLE REVOLUTION? BLACK POWER AND THE AMERICAN DREAM* 40 (1968).

25. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 226–27 (1976); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 93–100 (1998).

tent that Black people had long felt.²⁶ *Brown* provided a “detonating spark”²⁷ to a long campaign by the NAACP and others to end segregation.

In retrospect, we can see that *Brown* provided a necessary, but not sufficient, condition for abolishing Jim Crow. We cannot dissect the impact of *Brown* without simultaneously recalling the social action that was the Civil Rights Movement. As sociologist Aldon Morris has argued, overthrowing the social order of Jim Crow through disruptive civil disobedience was “the genius of the Civil Rights Movement.”²⁸ Let us briefly recall what happened in the years immediately following *Brown*:

- 1955: Emmett Till murdered for purportedly whistling or speaking disrespectfully to a White woman; his mother showcases his brutally disfigured body in the national media;²⁹
- 1955: The Montgomery Bus Boycott and the subsequent rise of Martin Luther King as the leader of the Civil Rights Movement;³⁰
- 1956: The Tallahassee Bus Boycott, inspired by the success in Montgomery;³¹
- 1957: Black students enroll in Little Rock Central High School, but are withdrawn after rioting ensued;³²
- 1958: Little Rock schools remain closed, although the court of appeals orders the school board to carry out integration;³³
- 1959: Sit-ins in Nashville department stores;³⁴
- 1960: Student sit-ins in Greensboro, North Carolina, and other cities throughout the South;³⁵ nationwide boycott of Woolworth’s;³⁶
- 1961: Freedom Rides begin;³⁷ first phases of the Albany, Georgia movement with mass meetings and marches;³⁸
- 1962: court of appeals supports James Meredith’s right to admission at University of Mississippi;³⁹

26. KILLIAN, *supra* note 24, at 42–43.

27. LERONE BENNETT, JR., *THE NEGRO MOOD* 17 (1964).

28. Aldon Morris, *The Genius of the Civil Rights Movement: Can It Happen Again?*, in *UNDERSTANDING SOCIETY* 503–08 (Margaret L. Andersen et al. eds., 2001).

29. *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEAR, A READER AND GUIDE* 37 (Clayborne Carson et al. eds., 1987) [hereinafter *EYES ON THE PRIZE*].

30. *Id.* at 47.

31. *Id.*

32. *See id.* at 97–103.

33. *Id.*

34. *Id.*

35. *Id.* at 114.

36. *Id.* at 123.

37. *Id.* at 108.

38. *Id.* at 133.

39. *Id.*

- 1963: Birmingham campaign; national media coverage of Sheriff Bull Connor using dogs and fire hoses against Black demonstrators, including children;⁴⁰ the assassination of Medgar Evers;⁴¹ nearly one-quarter million people participate in March on Washington;⁴² four Black girls killed in bombing of Birmingham church;⁴³
- 1964: Passage of the Civil Rights Act.⁴⁴

This is but a brief list of the mass mobilization that characterized the Civil Rights Movement in the ten years following the *Brown* decision. Despite its brevity, it shows the massive mobilization that took place in the aftermath of *Brown* and led to the passage of the Civil Rights Act of 1964. Thus, one of the major consequences of the *Brown* decision was that it was a catalyst for hope and mobilization, rousing the most vigorous and sustained movement for change ever mounted in the United States. The *Brown* decision generated the optimism that laid the path for the subsequent mobilization that was to benefit Black Americans as well as other groups as diverse as White women, gays and lesbians, the aged, and the disabled.⁴⁵

B. “*God Has Spoke[n] from Washington, D.C.*”⁴⁶

The *Brown* decision declared that the highest authority of the nation was on the side of change, rather than in defense of the status quo.⁴⁷ Before *Brown* Jim Crow segregation had been sustained via state power, power that accrued from the practices and beliefs of White supremacy. By pronouncing Jim Crow segregation unconstitutional, the Supreme Court brought the moral and judicial authority of the U.S. government to the struggle for change. As recalled by one young Black man, serving in the Marine Corps at the time:

On this momentous night of May 17, 1954, I felt that at last the government was willing to assert itself on behalf of first-class citizenship even for Negroes. I experienced a sense of loyalty that I had never felt before. I was sure that this was the beginning of a new era of American democracy.⁴⁸

Prior to *Brown*, many groups had used the courts to seek racial justice. Often these rested on claims of citizenship, such as the case of

40. *Id.* at 136.

41. *Id.* at 160.

42. *Id.* at 138.

43. *Id.*

44. *Id.* at 204.

45. See *infra* text accompanying notes 97–99.

46. LOUIS LOMAX, *THE NEGRO REVOLT* 83 (1962) (quoting a Black woman in Montgomery following the U.S. Supreme Court decision that made segregated seating on busses unconstitutional).

47. KILLIAN, *supra* note 24, at 40–64.

48. ROBERT F. WILLIAMS, *NEGROES WITH GUNS* (1962), reprinted in *EYES ON THE PRIZE*, *supra* note 29, at 29.

Ozawa v. United States.⁴⁹ Takao Ozawa arrived in California in 1894, graduated from high school there, and attended the University of California, Berkeley.⁵⁰ Following college, Ozawa worked for an American company while living with his family in the U.S. territory of Hawaii.⁵¹ In 1922, the U.S. Supreme Court denied his eligibility for citizenship because he was of Japanese descent.⁵² As with Ozawa's case, other appeals to the courts by racial-ethnic groups were typically unsuccessful, and never resulted in the overthrow of a state-sponsored system of segregation, as *Brown* did. This may have been one of the greatest achievements of *Brown*: showing multiple groups that government and the law could be used to pursue social justice.

Trust that the federal government would be an ally in dismantling segregation was soon eroded, however. As civil rights leaders and others were soon to learn, the federal government intervened to dismantle segregation only reluctantly, and only then under intense pressure from movement activists. Even then the government acted modestly and only if it seemed absolutely necessary to maintain social order.⁵³ Still, some faith in the federal government's enforcement of equal rights remained. This led many groups to seek redress through appeals to various government institutions.

Groups that followed in the footsteps of *Brown* relied on a strategy of legal reform by appealing to the federal government through the courts, public policy, and Congress to redress social wrongs. Following the example set by these groups, the National Organization for Women, the National Gay and Lesbian Task Force, the Older Women's League, and multiple other groups have used similar legal strategies to challenge various modes of segregation that denied groups full and equal benefits in educational and other social institutions.

C. Undoing Harm Done to "Hearts and Minds"

Brown's framework rested on the argument that racial segregation harmed Black children.⁵⁴ Stemming from the model of social pathology that dominated social science thinking at the time, this argument saw segregation as detrimental to the psychological and social development of children.⁵⁵ This model of pathology defined Black society as inferior to White society because of racial segregation. Eliminating segregation would eliminate the "harm done" to those victimized by segregation.⁵⁶

49. 260 U.S. 178 (1922).

50. *Id.* at 189.

51. See RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 208 (1989).

52. *Ozawa*, 260 U.S. at 189-98; see also TAKAKI, *supra* note 51, at 208.

53. See EYES ON THE PRIZE, *supra* note 29.

54. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-94 (1954).

55. *Id.* at 494 nn.10-11.

56. *Id.* at 494-95.

Chief Justice Warren wrote: “To separate them [i.e., Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their *hearts and minds* in a way unlikely ever to be undone.”⁵⁷

The Court’s concern was solely on the impact of segregation on the hearts and minds of Black children. The Court never pointed out the harm done by the deprivation of rights. Also, the decision included nothing about the hearts and minds of White Americans. Yet, the social scientists whose work was used in the *Brown* decision thought that racial integration would lessen racial prejudice. Changing minds, which they believed would follow from eliminating segregation, was thought to be the key to transforming race relations. This determination was based in part on the influence of Myrdal’s *An American Dilemma*, which concluded that that racial prejudice was a problem in the hearts and minds of White Americans.⁵⁸ Although no one was so naïve as to believe that attitudes could be changed by legislation, the idea was that increased interracial contact would reduce racial prejudice, a view which is supported by at least some social science evidence.⁵⁹

In the short run, this was wrong. A longer term examination of public opinion data, however, shows that there has been a massive change in public attitudes since the *Brown* decision.⁶⁰ Although not solely the result of *Brown*, there has been a dramatic transformation in public consciousness about race subsequent to the *Brown* decision.

This was no easy path, because of the counterreaction to *Brown* that is discussed below. But in 1954 when the case was decided, 55% of Americans approved of the decision and 40% disapproved.⁶¹ Three years later, in the aftermath of *Brown*, there was a spike of disapproval of the Court decision with 43% of the nation and 83% of Southerners disapproving.⁶² However, national disapproval leveled off by 1959 to levels similar to 1954.⁶³ In 1994, the last time the question was asked, 87% of Americans approved of the Court’s ruling and only 11% disapproved.⁶⁴ A 1948 survey used in the Court briefs found that 90% of the public thought that enforced segregation harmed Blacks; 83% thought it harmed Whites.⁶⁵

57. *Id.* at 494 (emphasis added).

58. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA*, at xlvii (1944).

59. See JOHN P. JACKSON, JR., *SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION* (2001).

60. Ray, *supra* note 22, at 71–72.

61. *Id.* at 71. Disapproval of the *Brown* decision was greatest in the South where seven in ten Southerners disapproved. *Id.*

62. *Id.* at 71–72.

63. *Id.*

64. *Id.*

65. JAMES B. MCKEE, *SOCIOLOGY AND THE RACE PROBLEM: THE FAILURE OF A PERSPECTIVE* 311 (1993).

Other opinion polls also show the impact of change in the years since *Brown*. The South has changed the most. A 2003 survey of regional attitudes about U.S. race relations found little difference in Southerners' opinions about race relations compared to people in the East and West.⁶⁶ Moreover, by 2003, Blacks living in the South did not differ in their perceptions of experiencing discrimination compared to Blacks in other regions of the country.⁶⁷ One would be hard pressed to attribute such changes in attitudes directly to the Supreme Court's decision, but possibly one of the greatest impacts of *Brown*, and the subsequent movements, is the reduction of overtly expressed prejudice. Reduced racial prejudice can lead to greater acceptance of equal rights for many groups. Thus, public opinion data shows a much greater willingness for the public to support equal rights for gays and lesbians, women, the aged and others since the 1950s. Though *Brown* was not singly responsible for these changes, it was a watershed event in the transformation of public thinking.

D. *It Is So Ordered: The Counterreaction*

The optimism spawned by *Brown* was tempered by the fierce resistance that it sparked. The *Brown* decision crystallized White resistance that was previously cloaked under White paternalism. Sociologist Aldon Morris wrote that the *Brown* decision "thrust the NAACP into the limelight and crystallized the emerging massive resistance movement dedicated to systematically destroying the NAACP across the South."⁶⁸ Whites mounted direct and indirect opposition to integration through violence, through legal maneuvering to thwart the implementation of *Brown*, and through withdrawal from public educational institutions. In many Southern communities Whites who could afford to do so enrolled their children in private schools. Some Whites also founded new private schools, promising to offer a "quality" education but in reality offering parents the opportunity to avoid having their children in school with Black students.⁶⁹

Resistance to *Brown* took many forms—overt and subtle—including the creation of White citizens' councils and also the move toward suburbanization and the greater use of private education as illustrated in Figure 3. In the years since *Brown* White resistance to desegregation has flared up in opposition to bussing and to other plans for desegregating the schools. For the most part, however, resistance has now become more passive—cloaked in behaviors that seem on their face to be benign, such as seeking a "quality education" for children or main-

66. Josephine Mazzuca, *U.S. Race Relations by Region: The South*, THE GALLUP POLL, Nov. 19, 2002, at 80.

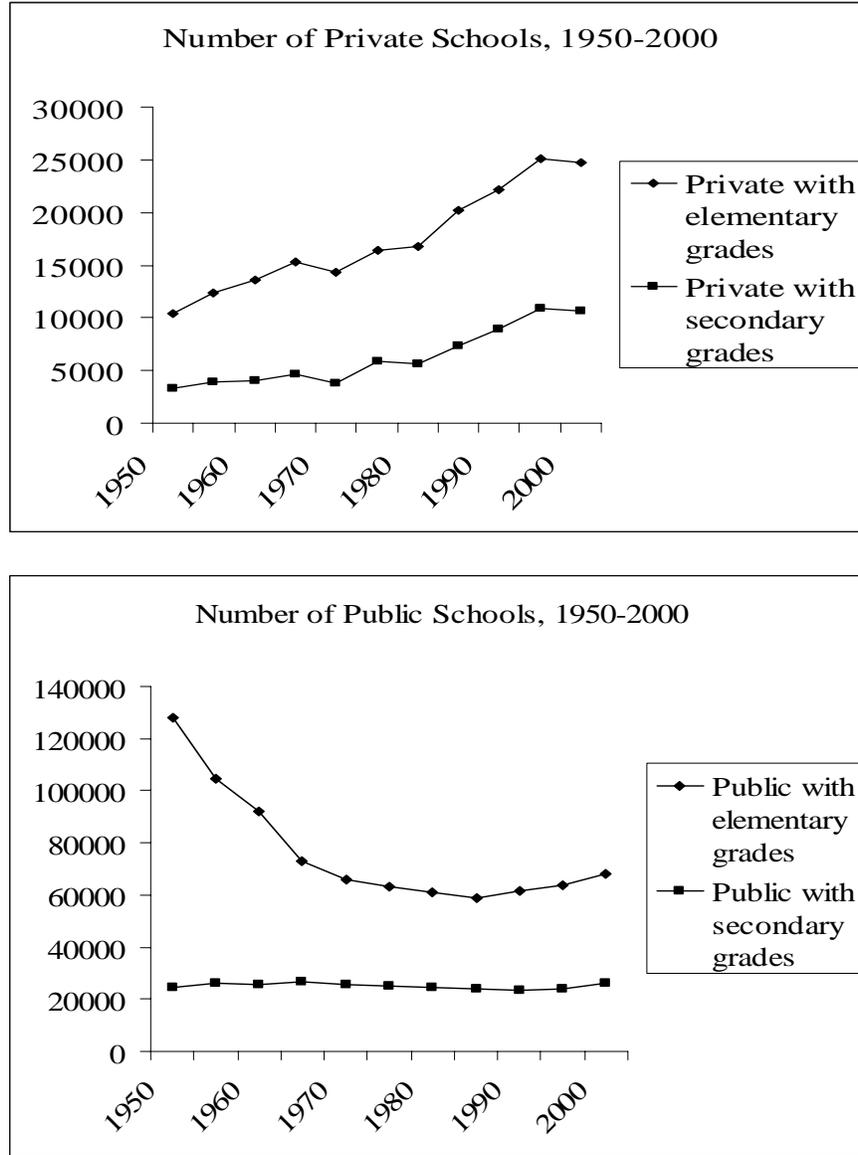
67. *Id.*

68. MORRIS, *supra* note 28, at 25.

69. See *supra* notes 20–23 and accompanying text.

taining property values. In the years following *Brown*, old forms of southern racial paternalism have been replaced with new forms of color-blind racism that claim no prejudice, but nonetheless protect White race and class privilege.

FIGURE 3



Source: NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATIONAL STATISTICS (U.S. Dep't of Educ., 2002).

E. “A Right Which Must Be Made Available to All on Equal Terms”⁷⁰

Brown never went so far as to guarantee equal rights to all citizens. Despite decrying the pathology segregation presumably creates, the *Brown* decision only addressed equal educational opportunities. Still, it provided the legal roots from which later forms of equal opportunity could grow.

Brown has its basis in liberal, democratic philosophy. Such a framework assumes that equality of opportunity is fundamental to the rights of all citizens. Furthermore, as stated in *Brown*, and later echoed in Justice O’Connor’s majority opinion in *Grutter v. Bollinger*,⁷¹ the foundation of citizenship is education.⁷² The removal of formal obstacles to equal opportunity is a fundamental requirement in democratic societies. Where *Brown* stopped short of promising full equal opportunity, the Civil Rights Act of 1964 stepped in and established the strong legal foundation for numerous other groups to pursue equal rights.⁷³ In sum, the *Brown* decision:

- kindled the hope and optimism that fueled a mass movement for racial change;
- generated faith in the power of federal government institutions to conquer racial oppression;
- acknowledged the harm done by racial segregation and legitimated the use of social science evidence in social change;
- signaled the change in public attitude that was to come, while also rousing a strong White supremacist counterreaction;
- helped reestablish equality before the law as a major principle of American society.

IV. “WHAT CAN *BROWN* DO FOR YOU?”: THE EXTENDED IMPLICATIONS OF *BROWN*

Given the consequences and assumptions of the *Brown* decision, what can we conclude about its implications for diverse groups? Although it is impossible to separate the impact of *Brown* from the other events that surrounded and followed it, it is hard to imagine the history that would have unfolded had *Brown* not been in place. Despite its limitations, both the direct and indirect effects of *Brown* resulted in substantial changes for African Americans and other groups.

One direct effect was realized by Mexican Americans, who were relegated to segregated schools in many areas of the country prior to *Brown*. In Texas, for example, Mexican Americans were often forced

70. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

71. 539 U.S. 306 (2003).

72. *Id.* at 331.

73. See *infra* notes 78–95 and accompanying text.

into separate schools.⁷⁴ They presented numerous challenges to segregationist practices by arguing that they were “other Whites,” but the courts generally upheld a strict Black/White color line with those labeled as “brown” or “yellow” being excluded from the category of White.⁷⁵ In the very month that *Brown* was decided, on May 3, 1954, the U.S. Supreme Court ruled in *Hernandez v. Texas* that Mexican Americans constituted a separate group subject to the full protection of the Fourteenth Amendment.⁷⁶ In addition to dismantling de jure school segregation for Mexican Americans, *Hernandez* also stopped the previously legal practice of excluding Mexican Americans from juries in Texas, a practice that had been upheld in prior Texas opinions.⁷⁷

Other effects of *Brown* for diverse groups may not be so direct, but they nonetheless show the wide-ranging implications of the decision. These implications fall into three arenas: legal, political, and social.

A. *The Legal Implications of Brown*

Legally, the implications of *Brown* may be more narrow than the social revolution it inspired. Although legal scholars debate how effective *Brown* has been,⁷⁸ the *Brown* decision is linked to the emergence of claims to equal rights by numerous groups who followed in its wake.

Legal scholars have pointed out that, other than overturning legal racial segregation, the profound legal implications of *Brown* lie in its expanded interpretation of the Fourteenth Amendment.⁷⁹ A central question in *Brown* was historic intent and the context of the Fourteenth Amendment. The opinion rejected the argument that the historical circumstances surrounding the passage of the Fourteenth Amendment were pertinent to the present time.⁸⁰ Furthermore, the Court concluded that it could not determine with any certainty what the Framers of the Fourteenth Amendment had in mind.⁸¹ As Chief Justice Warren wrote, “we cannot turn the clock back”⁸² As a result, *Brown* defined Black

74. Vilma S. Martinez, *Chicanos and Equal Educational Opportunity*, in THE CONTINUING CHALLENGE: THE PAST AND THE FUTURE OF *BROWN V. BOARD OF EDUCATION*: A SYMPOSIUM 59, 59 (Howard Glickstein ed., 1975).

75. *Id.* at 60.

76. 347 U.S. 475, 479–80.

77. See Martinez, *supra* note 74; Sanchez v. State, 181 S.W.2d 87, 90–91 (Tex. Crim. App. 1944).

78. See, e.g., ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION (2003); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Michael Klarman, Brown, *Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994). See generally RACE, LAW, AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* (Austin Sarat ed., 1997) [hereinafter RACE, LAW, AND CULTURE]. It is not my intent to engage in a constitutional argument.

79. See Paul Gewirtz, *The Triumph and Transformation of Antidiscrimination Law*, in RACE, LAW AND CULTURE, *supra* note 78, at 110–34.

80. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

81. *Id.*

82. *Id.* at 492.

children as citizens with the full and equal protection of the Fourteenth Amendment.

This reading of the Fourteenth Amendment has allowed multiple groups to construct themselves as citizens with equal rights based on constitutional claims to equal protection under the law. This social construction was also encouraged by the social changes underway at the time. Seen in this light, *Brown* did more than eliminate de jure segregation; it allowed the construction of diverse political communities who could appeal to the Constitution to protect their rights. *Brown* signaled that the Constitution need no longer be narrowly read, thus putting the federal courts on the side of groups identified as social minorities.

In this sense, legal analysts suggest that *Brown* was a precursor to various legal decisions and statutes, including decisions as diverse as *Griswold v. Connecticut*,⁸³ which provided rights to women for the use of birth control, *Roe v. Wade*,⁸⁴ and the Americans with Disabilities Act,⁸⁵ among others.⁸⁶ The aged, for example, could now be defined as a minority group with rights that, although certainly not directly promised by *Brown*, result from the expanded interpretation of the Fourteenth Amendment on which *Brown* relied.

Paul Gewirtz, argues that *Brown* was a “triumph of antidiscrimination law.”⁸⁷ He claims that *Brown* helped to create a new world in which various groups could demand equal treatment.⁸⁸ He posits that a variety of precedent-setting cases for diverse groups came as the result of the Court’s reading of the Fourteenth Amendment in *Brown*.⁸⁹ For example, the Age Discrimination in Employment Act of 1967⁹⁰ protects the elderly from discrimination in employment,⁹¹ and sexual harassment law stems explicitly from Title VII of the Civil Rights Act of 1964,⁹² following the Supreme Court’s decision in *Meritor Savings Bank v. Vinson*,⁹³ giving statutory authority to the argument that sexual harassment constitutes sex discrimination.⁹⁴ Each stems from the “non-discrimination model” initiated by *Brown*, and later supported by the Civil Rights Act of 1964.⁹⁵

83. 381 U.S. 479 (1965).

84. 410 U.S. 959 (1973).

85. 42 U.S.C. § 12101 (2000).

86. See Peggy Cooper Davis, *Performing Interpretation: A Legacy of Civil Rights Lawyering in Brown v. Board of Education*, in RACE, LAW, AND CULTURE, *supra* note 78, at 23–48; David J. Garrow, *From Brown to Casey: The U.S. Supreme Court and the Burdens of History*, in RACE, LAW, AND CULTURE, *supra* note 78, at 74–88; Gewirtz, *supra* note 79, at 110–34.

87. Gewirtz, *supra* note 79, at 111.

88. *Id.*

89. *Id.* at 111–15.

90. 29 U.S.C. § 621 (2000).

91. Gewirtz, *supra* note 79, at 114.

92. 42 U.S.C. § 2000e (2000).

93. 477 U.S. 57 (1986).

94. *Id.*

95. Gewirtz, *supra* note 79, at 112.

In sum, *Brown* changed how we think about citizenship in the United States. Diverse groups could now define themselves as citizens with equal rights. This resulted in a new assertiveness fueling social and political change in the years to come.

B. The Political Implications of Brown

In addition to legal and social changes, *Brown* provided a model for many groups, most of whom probably do not trace their political origins to *Brown* per se, but who, nonetheless, were influenced by the strategy and tactics of the *Brown* case. We have already discussed the mobilization of the Civil Rights Movement that *Brown* ignited and the counter-reaction that it also inflamed.⁹⁶ But beyond these immediate actions, *Brown*, and the social context in which it emerged, mobilized many groups to seek equal protection before the law. Although it is difficult, probably impossible, to separate the impact of *Brown* from the impact of the Civil Rights Movement, *Brown* and the Civil Rights Movement provided a model for political organizing in subsequent years.

As a result, common events today, such as “Take Back the Night” demonstrations and various marches on Washington, owe a debt to the mobilization of civil rights leaders. Sociologist Aldon Morris argues that the “brilliance of the Civil Rights Movement” was its strategy of organized, sustained, and disruptive action.⁹⁷ This spawned numerous other social movements and groups throughout the 1960s and beyond. The feminist movement, La Raza, the United Farm Workers, the American Indian resistance movement, the gay and lesbian movement, and, later the disability rights movement all used some of the same tactics and strategies of civil action that characterized the strategies used in the *Brown* campaign and the Civil Rights Movement.

Each of these movements is more complex in organization, ideology, and strategy than the early movements, which had a singular focus on equal rights. Nonetheless, equal rights is now a common theme, derived from the framework of *Brown*. Furthermore, some groups, such as the NOW Legal Defense Fund, take their name directly from the NAACP Legal Defense Fund.⁹⁸ In addition, we can trace the emergence of parts of these movements directly to the Civil Rights Movement following the *Brown* decision. The feminist movement, as well as others, was partially inspired by the work of women in civil rights.⁹⁹ The new

96. See *infra* text accompanying notes 68–69.

97. Morris, *supra* note 28.

98. See Gewirtz, *supra* note 79, at 111.

99. See generally SARA EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT (1980) (discussing the women most critical to the feminist movement in the 1960s); DOUGLAS MCADAM, FREEDOM SUMMER (1990) (discussing the roles of women in the 1964 Mississippi Freedom Summer Campaign).

leadership that emerged following the *Brown* decision changed the course of history for many.

C. *The Social Implications of Brown*

The legal implications of *Brown* are important, but from a sociological point of view, what matters is not just what *Brown* said, but what people do and expect in its aftermath. By declaring segregation legally and morally wrong, *Brown* opened the door for many more groups to claim equal rights. Though Chief Justice Warren may not have envisioned the identity politics that emerged, the legal and social benefits of *Brown* extend to many.

Following *Brown*, various groups used the courts and the law to seek group rights based on such diverse group identities as age, gender, sexual orientation, disability, and religion. This happened not only in the legal arena, but also in the social identities created when a group is identified as a protected class. After all, “[l]egal rights are empowering even if one never goes to court.”¹⁰⁰ But *Brown* and the social movements that followed made group rights a matter of social justice; the implications of this extend to multiple and diverse social groups.

There was also a large and dramatic transformation of public attitudes about race, segregation, and equal opportunity. This cannot be attributed solely to *Brown* because it was also generated by the social changes underway in U.S. society. Nonetheless, *Brown* is a benchmark for the sea change in attitudes that has occurred since.

Consider the following: since the *Brown* decision, support for racial segregation has dramatically declined. In 1942, 68% of the American public supported racially segregated schools; by 1985 that number had dropped to 7%.¹⁰¹ By the 1980s, so few people were willing to endorse racial segregation that the question was dropped from national surveys.¹⁰² In the time period since *Brown*, the public has expressed very high levels of support for school integration and equal access to jobs—attitudes that have affected all groups, not just African Americans.¹⁰³ As one sociologist puts it, these changes have been “large, steady, and sweeping.”¹⁰⁴

Yet, these are expressed attitudes. When it comes to actual practice and policy changes, public opinion is less encouraging. For example, 64% of Whites in 1964 supported integrated schooling, but only 38% thought the federal government had a role to play in achieving this

100. Gewirtz, *supra* note 79, at 116.

101. Lawrence D. Bobo, *The Color Line, the Dilemma, and the Dream: Race Relations in America at the Close of the Twentieth Century*, in *CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II*, at 36 (John Higham ed., 1999).

102. *Id.*

103. *See id.* at 36–39.

104. *Id.* at 38.

goal.¹⁰⁵ By 1986, 93% supported school integration, but only 26% supported government efforts to increase it.¹⁰⁶ Current data show a very large gap in Black and White perceptions of race in America. To illustrate, 81% of Whites, but only 50% of Blacks, think Black children have as good a chance as White children to receive a good education in their community.¹⁰⁷ Moreover, Blacks remain pessimistic; only 50% believe that their children are able to get a good education, compared to 53% in 1962 and 68% at the beginning of the 1990s.¹⁰⁸

Though events subsequent to *Brown* have reduced overt prejudice in America, now other forms of racism, variously labeled as “laissez faire racism,” “colorblind racism,” or “systemic racism,” permeate American society.¹⁰⁹ This reveals a changed consciousness about race, but still demonstrates Whites’ unwillingness to change systems of racial privilege.

One irony of the *Brown* decision is that it, together with equal rights legislation, has created a fundamental contradiction. Multiple groups now vie for rights based on their particular identities even while the law establishes blindness to these identities as its fundamental principle. The implications for this contradiction are enormous.

V. THE CURRENT CONUNDRUM: FROM *BROWN* TO *GRUTTER*

The implications of *Brown* are so vast that it has been labeled the “case of the century.”¹¹⁰ Few doubt the far-reaching implications of this decision, even when they debate its specific effects. How can we evaluate the state of affairs for different groups in the post-*Brown* world? We have seen that the aftermath of *Brown* was marked by increased optimism; faith in the federal government to be an ally in reducing inequality; acknowledgement of the harm done by racial segregation; change in public consciousness about equal rights; the reestablishment of equality before the law and in major social institutions; and the legitimacy of social science evidence to direct progressive social change. Where do we now stand in these regards?

First, while *Brown* elevated optimism about the possibilities for change now there is widespread pessimism about the possibilities for change, and deep political cynicism about the effectiveness of main-

105. See *id.* at 39.

106. See *id.*

107. Heather Mason, *Equal Opportunity Education: Is It Out There?*, THE GALLUP POLL, July 1, 2003, at 79.

108. *Id.* at 80.

109. See Bobo, *supra* note 101, at 38–42; EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2003); MICHAEL BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003); JOE FEAGIN, *RACIST AMERICA: ROOTS, FUTURE REALITIES, AND RACIAL REPARATIONS 20–21* (2000); Charles A. Gallagher, *Color-Blind Privilege: The Social and Political Functions of Erasing the Color Line in Post Race America*, in 10 *RACE GENDER & CLASS* J. 22, 22–37 (2003).

110. WILLIAMS, *supra* note 25, at 209.

stream politics to address problems for disadvantaged groups. The optimism that characterized the time of *Brown* is hard to find when young people worry they will not do as well as their parents, when downward social-economic mobility is as likely as upward mobility, when the media's framing of political news actually encourages political cynicism, and when people feel that their votes do not matter.¹¹¹ Feelings of increased political alienation have affected voter turnout, including among African Americans whose political alienation results from thinking that political institutions and public policies are not responsive to their needs.¹¹²

Second, the faith in federal institutions that was inspired by *Brown* has dissipated. Surveys find that few Americans have confidence in many of the major social institutions, particularly Congress and the Supreme Court. Confidence in Congress declined from 42% in 1973 to 29% in 2003. Only 47% of Americans have "a lot" of confidence in the Supreme Court—a figure that has been quite steady since 1973.¹¹³ While *Brown* had a "profound impact on the way Americans think about law's role in promoting social justice,"¹¹⁴ now there is reduced confidence that the federal government and the courts are on the side of racial justice. Although certainly many organizations that work on behalf of diverse groups continue to use the courts to address various inequities,¹¹⁵ progressive groups are struggling against a massive conservative turn in the courts, and the executive and congressional branches of government.

Third, *Brown* rested on the argument that segregation did harm. Now, it seems necessary to show actual intent to discriminate, which is hard to prove because institutional racism operates in such a covert way.¹¹⁶

Furthermore, as evidenced in the *Grutter* decision, concerns about harm have shifted to the harm done to Whites by such measures as affirmative action.¹¹⁷ Thus, even though the *Grutter* case upheld affirmative action within narrowly tailored boundaries, Justice O'Connor speculated in her majority opinion that "even remedial race-based governmental action generally remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons

111. See Joseph N. Cappella & Kathleen Hall Jamieson, *News Frames, Political Cynicism, and Media Cynicism*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 71, 84 (1996); Thomas J. Espenshade & Katherine Hempstead, *Contemporary American Attitudes Toward U.S. Immigration*, 30 INT'L MIGRATION REV. 535 (1996); Robert Hariman, *Prophecy, Phenomenology, and Democratic Politics: A Review of Hart's Seducing America*, 13 CRITICAL STUD. MASS COMM. 180 (1996).

112. See Franklin D. Gilliam, Jr. & Karen M. Kaufman, *Is There an Empowerment Life Cycle? Long-Term Black Empowerment and Its Influence on Voter Participation*, 33 URB. AFF. REV. 741 (1998); Cedric Herring et al., *Racially Based Changes in Political Alienation in America*, 72 SOC. SCI. Q. 123, 124 (1991).

113. GALLUP ORG., CONFIDENCE IN INSTITUTIONS (2003), at <http://www.gallup.com>.

114. RACE, LAW, AND CULTURE, *supra* note 78, at 4.

115. A recent example is the decision by the Massachusetts Supreme Court to legalize gay marriage and the decision by San Francisco Mayor Gavin Newsom to recognize gay marriage.

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

117. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

competing for the benefit.”¹¹⁸ Citing an earlier dissenting opinion in *Metro Broadcasting Inc. v. FCC*, Justice O’Connor also wrote that a race-conscious admissions program must not “unduly burden individuals who are not members of the favored racial and ethnic groups.”¹¹⁹ How ironic that, whereas in *Brown* the harmed were seen to be Black children, now dominant groups think that the harmed are innocent White people. Meanwhile, racial minorities are perceived as favored. Moreover, the *Grutter* decision shifts the benefits of programs like affirmative action to dominant institutions instead of specifically to minorities, as the argument in *Grutter* about the compelling state interest in achieving diversity in the student body makes clear.¹²⁰

Fourth, the *Brown* decision rested on the use of social science evidence. No matter how flawed that evidence may have been, its use legitimated the application of social science in the pursuit of social justice.¹²¹ The Supreme Court has continued to use such expertise, as, for example, in the pivotal role that social science played in the recent *Grutter* decision.¹²² However, in other arenas, most notably federal policy, social science evidence is often ignored. Conservative groups rely instead on long disproved assumptions about the cultural inferiority of racial groups, such as in claims that welfare dependency results from the absence of work values, not the absence of work.¹²³

Fifth, *Brown* helped put a legal framework in place, promising equal rights and equal opportunity. Now, failures are viewed by the dominant group as the fault of the groups who fare poorly. Whereas in years past failure would have been seen as proof of biological inferiority, or the natural order of things, it is now seen as evidence of the cultural inferiority or poor values of oppressed groups. This is despite the fact that social science evidence consistently shows this not to be the case.¹²⁴

Finally, in the years surrounding the *Brown* decision, Jim Crow segregation and racial prejudice were seen as matters of the greatest concern. Now, colorblind racism has neutralized efforts to address persistent gender, race, and class inequality. Many Whites claim that race no longer matters, which has led analysts to conclude that “new racism practices are subtle, institutional, and apparently nonracial.”¹²⁵ There is nothing new about the “new racism” because that racism has always been embedded in the structure of dominant social institutions; the ascendance of colorblind racism and gender-blind sexism show the reluctance

118. *Id.*

119. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting).

120. *Grutter*, 539 U.S. at 315–16.

121. JACKSON, *supra* note 59.

122. *Grutter*, 539 U.S. at 364.

123. See SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM* 34–35 (2003).

124. *See id.*

125. BONILLA-SILVA, *supra* note 109, at 3.

of powerful groups to take measures that would alter systems of privilege and disadvantage.¹²⁶

VI. FROM "HEARTS AND MINDS" TO COLORBLIND RACISM

The original evils which *Brown* sought to rectify are now not so clear. There is no longer a visible, single target such as Jim Crow segregation to finger as the major source of racial oppression. Overtly expressed prejudice no longer fuels the operation of racial oppression. The obstacles to change are now more abstract, which makes the mobilization of a mass movement for change far more challenging. Moreover, the complexity of organizing on behalf of multiple groups is difficult in a context where ideological frames contend that race, gender, and class do not matter, even when inequality along multiple lines is growing.¹²⁷ As Justice Ginsburg wrote in her dissent in the *Gratz* opinion,

In the wake "of a system of racial caste only recently ended," large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. . . . Irrational prejudice is still encountered in real estate markets and consumer transactions. "Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."¹²⁸

In the years since *Brown*, it has become clear that the benefits that accrue to certain groups as the result of institutionalized race, class, and gender privileges, and not just the harm done to victimized racial minorities, are the problem. The more radical Black Power movement challenged the assumption in *Brown* that the problem of racism was in the pathology it created among Black people.¹²⁹ Instead, current analyses have concluded from the more radical movement that the pathology lies in the structure of systematic racism, not in minority communities.¹³⁰

The legal reasoning of *Brown* gave no recognition to the benefits that accrue to Whites because of racial segregation; thus, those benefits were never challenged by *Brown*. Blacks were seen as benefiting from the elimination of segregation only insofar as *Brown* rested on the agreement that segregation caused harm. The brilliance and the dilemma of *Brown* is that it helped establish colorblindness as the law of the land,

126. See Margaret L. Andersen, *Restructuring for Whom? Race, Class, Gender and the Ideology of Invisibility*, 162 SOC. F. 181, 201 (2001).

127. *Id.*

128. *Gratz v. Bollinger*, 539 U.S. 244, 299–301 (2003) (internal citations omitted).

129. See generally Davison M. Douglas, *Justifying Racial Reform*, 76 TEX. L. REV. 1163, 1174–76 (1998) (reviewing DARYL M. SCOTT, *CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996* (1997)).

130. See FEAGIN, *supra* note 109, at 16–21.

but we now see that colorblind, gender-blind, and class-blind strategies are limited in their ability to reduce social inequality.

Brown established a moral framework for justice, but as the arena for establishing group rights has shifted from eliminating overt discrimination to overcoming the inequities in more systemic structures, we have an even more difficult challenge. The challenge is to dismantle the systemic privileges that come from multiple and overlapping forms of oppression, such as those stemming from race and class and gender and age and sexual orientation, and so forth.¹³¹ Furthermore, doing so happens where context matters, as Justice O'Connor wrote in the *Grutter* decision, echoing Cornel West's assertion that "race matters."¹³² That context now includes:

- increased diversity in the U.S. population brought in part through large-scale immigration of Latinos and Asian Americans and a globalizing economy;¹³³
- fewer men and more women in the labor market in most racial-ethnic groups;¹³⁴
- substantial growth of the Black, Latino, and Asian American middle class;¹³⁵
- growing class inequality—both across and within racial groups;¹³⁶
- a movement toward the privatization of most major social institutions (education, health care, prisons, and others);¹³⁷
- extensive resegregation of schools both in the South and all other regions;¹³⁸
- increased college attendance among Black Americans, with a marked decline in the presence of historically Black colleges and universities;¹³⁹

131. RACE, CLASS, AND GENDER: AN ANTHOLOGY (Margaret L. Andersen & Patricia Hill Collins eds., 5th ed., 2004).

132. CORNEL WEST, RACE MATTERS (1993).

133. See ALEJANDRO PORTES, IMMIGRANT AMERICA (1996); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2003 (2004).

134. See U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS (2004).

135. See MARY PATTILLO-MCCOY, BLACK PICKET FENCES: PRIVILEGE AND PERIOD AMONG THE BLACK MIDDLE CLASS (1999).

136. See Carmen DENAVAS-WALT ET AL., US. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 2002 (2002), <http://www.census.gov/prod/2003pubs/p.60-221.pdf>.

137. See Alex Molnar, *The Corporate Branding of Our School*, 60 EDUC. LEADERSHIP 74, 74–78 (2002); Amy Cheung, *Prison Privatization and Use of Incarceration*, THE SENTENCING PROJECT (2002), available at <http://www.sentencingproject.org>.

138. See Erika Fankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, HARVARD CIVIL RIGHTS PROJECT, at <http://www.civilrightsproject.harvard.edu> (Aug. 8, 2002).

139. See *Minorities in Higher Education 2002–2003*, AM. COUNCIL ON EDUC. (2003).

- fewer opportunities for upward mobility through employment in the manufacturing sector;¹⁴⁰
- growth of a substantial and influential conservative movement.

Within this context, groups may purportedly have equality of opportunity, but they do not live in a condition of equality. Moreover, the United States seems to be losing its status as a symbol of democracy with the sympathy of other nations. Huge differences in the economic, social, and political resources of Blacks, Latinos, Native Americans, Asian Americans, and Whites; women and men; the working, middle, and elite classes are making the promise of equality more a dream than a near reality. *Brown* may have forbidden separate but equal, but it surely did not dismantle White supremacy or racial inequality.

VII. CONCLUSION

In conclusion, it is impossible to separate the impact of *Brown* from the social movements and social context that surrounded it. Nonetheless, *Brown* laid a path for raised expectations and new demands from multiple groups for a more just society. In short, it helped establish a limited legal framework for the realization of many dreams.

There is significant debate among scholars about the legal utility and significance of the *Brown* decision.¹⁴¹ This debate will no doubt be augmented by the fifty-year retrospective that the anniversary provided. No matter what conclusions are made about the legal and social impact of the *Brown* decision, there is no doubt that it is a touchstone for studying social change in the later half of the twentieth century. As we recognize the anniversary of *Brown*, we can remind ourselves that:

racism and discrimination are continuing and ongoing problems in this society, but it is almost impossible to argue that our present problems of racism would be less severe if legal segregation still existed. . . . [T]he elimination of legal segregation was a necessary step on the road toward racial equality. That the road is a long and difficult one should not blind us to the necessity and value of that very important step.¹⁴²

Just as *Brown* was marked by optimism, faith in federal government, mass mobilization, and legitimate use of social science, now it is fair to say that the current climate is one of cynicism and pessimism, declining faith in dominant institutions, and the absence of a mass movement for change. The counterreaction from a conservative movement that dominates the public discourse about race, gender, and class has fro-

140. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

141. See, e.g., JACK M. BALKIN, *WHAT BROWN SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* (2002); COTTROL ET AL., *supra* note 78.

142. JACKSON, *supra* note 59, at 225.

zen progressive change. Equal opportunity is in place in the law but not in practice. The roots of institutional racism were never weeded out by the framework of *Brown*.

We can be reminded of the words of the man to whom we owe a great debt for the legal challenge to segregation. Thurgood Marshall said, "We can always stick together when we are losing, but tend to find means of breaking up when we're winning."¹⁴³ Since we seem to be losing, surely we should stick together.

143. GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 180 (1984).

