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The Brown Symposium – An Introduction

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We all know that *Brown v. Board of Education*[1] is far more than simply a "landmark" Supreme Court decision. *Brown* is that singular case for our constitutional era that actually pales the over-used term of "landmark" decision. *Brown* symbolizes not only a legal and social revolution, namely the dismantling of the Jim Crow system, it also embodies the spirit of modern constitutional law. *Brown* links in the minds of constitutional thinkers a connection between the Constitution and our evolution to a more just society. We are still debating the precise nature of the promise held out in *Brown*, the Civil Rights movement that it has also come to symbolize, and precisely what we must do, under the Constitution and as a society today, to more fully realize that promise in practice. But that is a topic for another day.

Important and intensely practical issues of substance continue to be raised by the Court's decision in *Brown*. Some thoughtful scholars and lawyers, with the benefit of hindsight gleaned from the nation's experience during the last forty years, have doubts as to whether the precise holding in *Brown* has necessarily served the cause of equal education, let alone of equal justice. *Brown* thus inspires ongoing dialogue about the precise approaches the nation should take in dismantling the two-tier society that was so carefully constructed by the Jim Crow system.

Precisely because of its political and social significance, *Brown* has also surpassed the term "landmark" in the role it has come to play in the debate over the role of the Supreme Court and the process of constitutional interpretation. *Brown* presented us with critical questions about methodology. In its decision, the Court grappled with the question of the role of history in constitutional interpretation and decision-making. Further, its opinion raised questions about the use of social science evidence in deciding issues about our fundamental constitutional values. Chief Justice Warren's opinion even raises issues about the purpose of judicial opinions, as some have suggested that the opinion was written mainly to further the extra-legal purpose of providing a non-accusatory and objective-sounding defense for the decision to impose this seismic social change.

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

During the last two decades, *Brown* has become a centerpiece in the debate over the sources that legitimately inform the enterprise of constitutional interpretation. Particularly since the Supreme Court's decision in *Roe v. Wade*,[2] scholars have debated the issue of how the Court maintains fidelity to constitutional text and history under the terms of "interpretivism" and "noninterpretivism" and "orginalism" and "nonoriginalism." Defenders of the modern Court's fundamental rights cases have contended that under the canons by which some have criticized *Roe*, *Brown* would also stand condemned. For many, *Brown* stands as a kind of litmus test for theories of constitutional interpretation. It has been deemed as sufficient to condemn a theory of constitutional interpretation if it cannot be harmonized with the Supreme Court's decision in *Brown*. *Brown* has thus served as a kind of "reality check" in the minds of many scholars; if your views call *Brown* into doubt, they cannot be plausible either descriptively or normatively.

One important purpose of this symposium, then, was not only to take *Brown* seriously, but also to look back to that decision as a means of taking constitutional theory seriously as well. It is perhaps easier to talk of fidelity to constitutional meaning when that talk has no real bite. Revisiting the *Brown* decision gives us the opportunity to test competing views of our constitutional order with the responsibility of deciding a great case, one with enormous moral, political, and social significance.

We have therefore asked a distinguished panel of modern legal thinkers to reconsider the case of *Brown*. We have asked each panel member to consider any or all of the following questions: How would you have decided *Brown*? What opinion would you have written? Can you justify its outcome by traditional standards of the judicial role, or by any appropriate standards? Would a different holding have served the cause of civil rights more effectively? These questions will be addressed by several scholars in the form of a proposed opinion for the case, as if we were deciding the case today. We have asked other panelists to comment on their colleagues' efforts to grapple with *Brown*. I am certain that we will find much to disagree about; it is my hope, though, that we will also illuminate the larger questions which *Brown* raises and which are important questions for the future of constitutional decision-making in this nation.

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2. 410 U.S. 113 (1973).