

# Foreword

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I am delighted to contribute just a few words to this important Symposium Issue commemorating the civil rights work of so many lawyers, scholars, and activists since the Supreme Court's decision thirty years ago in *McCleskey v. Kemp*.<sup>1</sup> This is a tremendous issue, filled with insights from a wide group of leading scholars, and I hope it will reward interested readers as well as capture a key moment in time, 2018, when we continue to struggle to realize the promise of civil rights in all of its legal, political, and economic dimensions.

The occasion of this *Law Review* Symposium raises an issue that is tacit in this endeavor but worth reflecting upon for just a moment: What is the role of scholarly commentary in a world in which decisions are made in legislatures and courts and in which the battle for civil rights is carried out in the streets and in the halls of power? Meaningful progress, more often than not, emerges from direct political action and calibrated legal and political strategy. Revolution, said Mao, is not a dinner party. I suppose it is also not a law review symposium!

And yet, the reflections of scholars and practicing lawyers offer valuable, impactful contributions to not only the debates over these central issues, but also considered strategies and even tactics. The structure of the legal efforts to destroy state-sanctioned discrimination in education (*Brown v. Board of Education*<sup>2</sup>), to eradicate malapportionment of legislative districts (*Baker v. Carr*<sup>3</sup> and *Reynolds v. Sims*<sup>4</sup>), and, to focus on the issue of jury discrimination as implicated in *McCleskey*, to challenge racially motivated peremptory challenges (*Batson v. Kentucky*<sup>5</sup>), grew in no small part out of the careful work of legal scholars and social scientists. The collaborations between skilled lawyers and wise scholars have been an important part of the civil rights movement going back many decades.

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<sup>1</sup> 481 U.S. 279 (1987).

<sup>2</sup> 347 U.S. 483 (1954).

<sup>3</sup> 369 U.S. 186 (1962).

<sup>4</sup> 377 U.S. 533 (1964).

<sup>5</sup> 476 U.S. 79 (1986).

To be sure, this collaboration is not limited to the area of civil rights; nor is it ideologically slanted in one clear direction. For example, as to constitutional interpretation more generally, a couple generations of conservative scholars have succeeded in changing the conversation in the interpretive debates, advancing important theories of so-called “constitutional originalism” and making a clear impact on the direction of American jurisprudence with their efforts. Likewise, the law and economics movement forged a half century or so ago has influenced legislation and case law, in ways salutary or deleterious, depending upon one’s perspective. Social science, when considered more generally, has expanded the toolkit of lawyers aiming to influence the course of the law. Indeed, reliance on so-called extralegal sources of guidance and illumination—whether crafted through theories, empirical work, or some combination of both—is now commonplace.

For these trends—these impacts on judicial, legislative, and administrative decision-making—we can thank journals, including leading student-edited law journals such as the *Northwestern University Law Review*. For it is by providing a venue for rich, rigorous scholarly exchange and, as in the case of this Symposium, an opportunity for students and faculty, for new and established scholars, to contribute their reflections and their best analysis, that we can advance the thinking that undergirds legal strategy.

One other comment in this vein: the editors have shrewdly brought together, in two parts, a collection of doctrinal and empirical articles on *McCleskey* and discrimination. The good message here is that both genres of scholarship are valuable, and both shed meaningful light on complex social and legal phenomena. The collaboration between doctrinal and empirical scholars is a work in progress, one engaging a diverse group of scholars with disparate training and, indeed, different methodological commitments. But it is an essentially important collaboration, and the best progress in connecting scholarship to impact—*difference-making* scholarship—will require dialogue between doctrinalists and empiricists. This Symposium is an excellent example of this dialogue.

I commend the editors for their excellent work in mobilizing this impressive lineup of contributors, and I admire these scholars for their thoughtful reflections here, as well as their great scholarship more generally. Here is to the hope that the next thirty years bring the lamp of justice to a nation that aspires to equality and human flourishing.