

## BROWN'S DEMISE

ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION*. By Charles J. Ogletree, Jr.\* New York: W.W. Norton & Company, 2004. Pp. 311. \$25.95.

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### INTRODUCTION

We live in a nation where equality and integration have proven, and continue to prove, evasive. In 2005, despite the Supreme Court's 1954 pronouncement in *Brown v. Board of Education (Brown I)*,<sup>1</sup> our public schools remain largely segregated, and there are few signs of improvement.<sup>2</sup> Admittedly, African Americans are on the whole better off today than they were in 1954, but one only need observe *any* sector of society to realize that we have yet to reach *Brown's* full potential.<sup>3</sup> Indeed, some commentators have labeled *Brown's*

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<sup>1</sup> 347 U.S. 483 (1954) (*Brown I*).

<sup>2</sup> See, e.g., James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 272 (1999) ("Roughly two-thirds of black students attend elementary and secondary school in central-city districts. These central-city schools, in turn, are populated primarily by minority students—both African-American and Hispanic.").

<sup>3</sup> See Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 945 (2004) ("[I]n 2004, thousands of African-American students in inner-city schools are impoverished for want of a decent elementary and secondary education."). As Professor R.A. Lenhardt notes, it is difficult to miss those individual African Americans who have "assume[d] positions of prominence in business, medicine, law, and government." R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 806 (2004). However, studies have shown that African Americans, as a group, still "lead lives that are qualitatively different from those enjoyed by Whites." *Id.* Justice Ginsburg also recognized this in *Gratz v. Bollinger*, 539 U.S. 244 (2003):

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. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions.

*Id.* at 299–300 (Ginsburg, J., dissenting) (citations and footnotes omitted).

promise of equality through the desegregation of our public schools a "discredited goal."<sup>4</sup> Alas, *Brown's* promise has become *Brown's* demise.

In *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education*, Harvard Law School Professor Charles J. Ogletree, Jr. captures this unfortunate reality by taking the reader through an in-depth account of the fifty years since the Supreme Court decided *Brown*. While appreciative of his and other "*Brown babies*"' good fortune, Ogletree presents a disturbing story of how America has consistently failed to fulfill *Brown's* assurance of racial equality and desegregation. According to Ogletree, by inserting the phrase "all deliberate speed" into the *Brown II*<sup>5</sup> decision, the Supreme Court compromised *Brown I's* potential transformative quality (p. xv). These three simple words have given courts, legislatures, and the executive branch "all of the reason they needed to ignore and resist" *Brown I's* forceful directive of equality (p. 307).

Through a combined autobiographical and historical perspective, Ogletree appears to address an audience beyond legal scholars, despite drifting into legal complexities at times.<sup>6</sup> Yet Ogletree's sensible, albeit inherently subjective, understanding of the last fifty years would leave any reader with more questions than answers about how to fulfill the *Brown* legacy and the role integration should play in that pursuit. *All Deliberate Speed* is, nonetheless, a decisive admonition that "[w]e cannot afford to wait another fifty years to find meaningful remedies to address the problems" of racism and segregation (p. xv).

## I

### BROWN'S DEMISE: AN AUTOBIOGRAPHICAL PERSPECTIVE

Organized into six parts, the book opens with an autobiographical narrative of Ogletree's life as a self-proclaimed "*Brown baby*" (Chs. 1–5). While demonstrating how *Brown* shaped his own educational opportunities, Ogletree simultaneously paints a picture of how *Brown* failed to provide many students in his generation with equal educational opportunities. He laments, "In our graduating class of several hundred students, only a few of the dozens of black students were attending a four-year college" (p. 40).

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<sup>4</sup> See, e.g., William D. Henderson, *Demography and Desegregation in the Cleveland Public Schools: Toward a Comprehensive Theory of Educational Failure and Success*, 26 N.Y.U. REV. L. & SOC. CHANGE 457, 460 (2000–01).

<sup>5</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

<sup>6</sup> See *infra* Part II (describing Ogletree's assessment of Supreme Court decisions that have undermined *Brown*).

Similarly, Ogletree recounts his undergraduate days at Stanford University as a time of struggle and protest for African American students. He recalls, "Nearly twenty years since *Brown* and six years after the assassination of Martin Luther King, Jr., we found ourselves confronting the same demons that we thought Marshall's success in *Brown* and King's death had eliminated" (p. 48). Serving as a model of W.E.B. Du Bois's "Talented Tenth,"<sup>7</sup> Ogletree ultimately remembers this period as a "call to service as the next generation of leaders" (p. 56).

Ogletree's personal struggle with equality and justice did not end at Stanford University, but rather continued and intensified at Harvard Law School, where he was one of only a few black students. Witnessing the violent resistance to busing around the nation, Ogletree felt a continuing obligation to help decelerate the gradual demise of the *Brown* decree in Boston. Although his initial efforts were well intended to further *Brown*'s mandate of integration, they provoke Ogletree to ask some critical questions in hindsight:

Why were black children being forced to go to white schools, without anyone's raising the question of more resources for black schools? Why did I fail to see the parallel with the 1960s policy by which black and brown children were bused across town to attend the predominately white schools, but scarcely any white children came across the tracks to our schools? Did anyone ask whether the black parents were getting the best for their children by sending them into white schools and neighborhoods where the chance to study and learn, given the intense racial hostility, was marginal at best? What message were we sending to our children, having them leave their neighborhood schools and sending them to white, presumably better, schools?

(pp. 77-78).<sup>8</sup> Throughout his legal career, Ogletree constantly confronted the question of how to "carry the torch," often pondering whether he and other *Brown* babies had actually contributed to *Brown*'s demise (pp. 87-88).<sup>9</sup>

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<sup>7</sup> See W.E.B. DU BOIS, *The Talented Tenth*, in W.E.B. DU BOIS: WRITINGS 842, 842 (Nathan Huggins ed., 1986) (arguing that privileged blacks should help black community to achieve success).

<sup>8</sup> Professor Derrick Bell also "wonder[s] whether the long school desegregation effort was an unintended but nonetheless contributing cause of current statistical disparities." DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFILLED HOPES FOR RACIAL REFORM* 180 (2004).

<sup>9</sup> Describing his experiences in a prestigious public defender's office in Washington, D.C., Professor Ogletree asked:

Had I moved from being someone grateful for the opportunities given to me in the post-*Brown* period by the Stanfords and Harvards to someone who, when placed in a position to aid the next generation of aspiring African-Americans,

Acknowledging in detail the astonishing legal and nonlegal strategies of civil right leaders such as Thurgood Marshall, Martin Luther King, Jr., and Charles Hamilton Houston, Ogletree frequently reminds the reader that upholding the *Brown* mandate in a post-*Brown* world means more than simply not taking a small step backwards. Rather, it means not dismantling the legal precedent and the moral conscience of a nation that these leaders fought to secure in order to win, arguably, the most important decision in American legal history.

## II

### BROWN'S DEMISE IN THE SUPREME COURT

In a very real sense, the nation has already taken the bold leap backwards from a society committed to *Brown* to a society apathetic to it. Ogletree charges that an increasingly conservative Supreme Court—with the collaboration of Southern politicians who opposed *Brown I*'s mandate of equality—has effectively reversed *Brown I* by, ironically, employing *Brown II*'s all-deliberate-speed approach.<sup>10</sup> He goes further in stating, "Given the *Brown* Court's lack of firm resolve, as evidenced in its express refusal to order an immediate injunction against segregation and in its 'all deliberate speed' modification, public resistance was inevitable" (p. 124).

To illustrate this point, Ogletree points to a number of notable cases narrowing *Brown*'s holding.<sup>11</sup> In *Milliken v. Bradley*,<sup>12</sup> for example, the Court held that, despite the reemergence of segregation in one school district as a result of "white flight,"<sup>13</sup> a federal court is

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held them to an unachievably high standard? Rather than being part of the solution, had I become part of the problem?" (pp. 87–88).

<sup>10</sup> See generally GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *Brown v. Board of Education** (1996) (canvassing effects of *Brown* and arguing that *Brown*'s efforts have largely failed); The Honorable David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071 (2004) (arguing that Court never explained reasons for departing from *Brown*).

<sup>11</sup> See, e.g., *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (holding that Constitution "does not require integration," but "merely forbids the use of government power to enforce segregation"). For two significant decisions where the Court furthered *Brown*, see *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), holding that where efforts by local authorities have failed, federal courts have broad power to remedy segregation, and *Green v. County School Board*, 391 U.S. 430 (1968), holding that "freedom-of-choice" plans may not be used where more effective means of integrating school systems are reasonably available.

<sup>12</sup> 418 U.S. 717 (1974).

<sup>13</sup> "The term 'white flight' refers to a massive exodus of white homeowners from predominantly white neighborhoods following the entry of a handful of black families."

prohibited from employing multidistrict remedies. Effectively, the *Milliken* decision meant that “[a]s white suburbanization increased, the desegregation envisioned by *Brown* moved further out of reach” (p. 133).

Ogletree further points to *Regents of the University of California v. Bakke*<sup>14</sup> as one extended and significant step back from *Brown*. While initially deemed a victory for African Americans, *Bakke*—by holding that race may be considered in admissions for diversity but not for remedial purposes<sup>15</sup>—ignored *Brown*’s forceful order to end state-imposed segregation by its “root and branch” (pp. 163–64). *Bakke*, Ogletree proclaims, marked a new era in America’s commitment to ending segregation, one that “would focus on diversity and colorblindness and significantly slow the process of reaching the goal of actual equal treatment under the law that *Brown* had promised” (p. 163).

Ogletree also cites Justice Thomas’s Supreme Court appointment as evidence of the Court’s changing ideology and diminished loyalty to *Brown*. Rather than interrupting the quiet reversal of *Brown*, Thomas’s conservative ideology, Ogletree argues, “has provided a reliable vote to reverse the import of *Brown* and its progeny” (p. 236).

After many disappointments, Ogletree believes that society has begun to settle for less than what *Brown* originally aspired to in 1954.<sup>16</sup> For instance, Ogletree interprets the decisions in *Grutter v. Bollinger*<sup>17</sup> and *Gratz v. Bollinger*<sup>18</sup> as evidence of the Court’s and society’s lack of commitment to *Brown*’s legacy. “Both cases,” Ogletree reluctantly proclaims, “will likely fail to be the catalysts for dispensing with the ‘all deliberate speed’ mentality adopted in *Brown*. With the decisions, the Court did not erect a further barrier in the path of the struggle to true integration and equality; it also did little to promote that struggle” (p. 246).

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Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1968 n.12 (2000).

<sup>14</sup> 438 U.S. 265 (1978).

<sup>15</sup> *Id.* at 310–12, 320.

<sup>16</sup> See, e.g., Ryan, *supra* note 2, at 251 (“It seems unfashionable these days, if not atavistic, to talk seriously about ways to increase racial integration.”). Instead, many advocates have “settled” for goals other than integration. See *id.* at 253 (“[T]hose who are currently dissatisfied with desegregation—an ecumenical and ever-growing group composed of both liberals and conservatives, blacks and whites—believe that reform efforts should be directed solely at improving the education that minority students receive, regardless of whether those students are in integrated or segregated schools.”).

<sup>17</sup> 539 U.S. 306 (2003).

<sup>18</sup> 539 U.S. 244 (2003).

## III

*BROWN TODAY AND TOMORROW: ADDRESSING  
BROWN'S FAILURES*

While Ogletree is hardly clear on his precise position regarding the continuing vitality of integration, his systematic exploration of its failures over the past fifty years—as well as his examination of solutions that are not focused on integration—leaves the reader with a strong impression that he has rejected integration as a practical ideal. Noting the demise of historically black colleges and universities (HBCUs), Ogletree seems to question whether integration has at times actually harmed the black community (pp. 309–11). Ogletree also offers compelling statistics on the composition of today's public schools: “[W]hite children attend schools where 80 percent of the student body is also white . . . . Even more striking is the fact that over 37 percent of black and Latino students attend 90–100 percent minority schools” (p. 261). Resegregation of our public schools, he reminds the reader, has often been accompanied by “higher concentrations of poverty and much lower average test scores, lower levels of student and teacher qualifications, and fewer advanced courses” (p. 262).

By the book's end, Ogletree offers proposals to address *Brown's* failures (Chs. 16 & 17). One proposal—building independent educational systems—is modest, while his other proposal—reparations—is a slightly more revolutionary alternative. In defending the establishment of independent educational systems, Ogletree takes the reader through some remarkable success stories signifying that the black community can, and indeed *has*, compensated for many of *Brown's* failures by launching successful charter schools (Ch. 16). Similarly, Ogletree concludes that reparations would provide a “way to finally move beyond the idle promises of full integration and to invest in our communities in ways that will generate solutions that are transformative” (p. 293).

Noticeably absent, however, from Ogletree's proposals is any indication of how, and indeed *if*, integration should play a role. While Ogletree's discussion of success stories illustrates how the African American community has addressed *Brown's* empty promise of educational equality, these stories—as well as his discussion of reparations—fail to adequately address *Brown's* promise of an integrated society. To be fair, Ogletree does seem to question whether integration continues to be the proper avenue for fostering social and racial equality for African Americans (pp. 294–303). Yet he neglects to explain how educational equality absent integration could have any

chance of creating a society built on social and racial equality. Integration provides a level of meaningful social contact that serves to break down the prejudices and stereotypes that white people consciously or subconsciously carry about the black race, and vice versa.<sup>19</sup> It is doubtful that equalizing “racially isolated schools . . . [can] replicate the social benefits of racially integrated schools.”<sup>20</sup> In this sense, integration may be a *necessary* means of building social and racial equality among the races as well as a means of equalizing education.

We also must consider the negative psychological consequences that separate-but-“equal” schools may produce: Segregated schools—even *voluntarily* segregated schools—“perpetuate[ ] the idea that black and white America should be considered two separate societies.”<sup>21</sup> Considering white America’s historical perception of the black race and its treatment of blacks under segregation, the “black society” inevitably would be deemed inferior, regardless of whether African Americans obtain an equal education or not.<sup>22</sup> Any minimum social contact that does in fact result under segregated school systems would be merely superficial or “casual contacts” that would simply reinforce social prejudices.<sup>23</sup> The inquiry, therefore, is not only

<sup>19</sup> Psychologist Gordon Allport explains:

Prejudice . . . may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom, or local atmosphere), and provided it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.

GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 281 (1954); see also *infra* note 23 and accompanying text.

<sup>20</sup> Ryan, *supra* note 2, at 256.

<sup>21</sup> Book Note, *The Desegregation Dilemma*, 109 HARV. L. REV. 1144, 1148 (1996) (reviewing DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995)). Professor Ryan found that “students—both black and white—who graduate from desegregated schools are more likely to live in integrated neighborhoods and work in integrated environments as adults[,] . . . to have interracial friendships and to have children who attend desegregated schools.” Ryan, *supra* note 2, at 303.

<sup>22</sup> To illustrate this point, one could point to blacks who have received an equal education. For example, Judge Harry T. Edwards, an African American, recalls that despite graduating from a prestigious law school and earning top grades, his *equal* education—indeed, superior education—failed to earn him a social status equal to that of his white peers. He recounts:

I interviewed with large firms in Chicago, Detroit, Los Angeles, San Francisco, and Washington, D.C., but I was told quite frankly by some of the partners that, despite my impressive record, the firm would not hire a Negro. In other words, *despite my qualifications* on the law firms’ own measures of merit, I was rejected *because of my race*.

Edwards, *supra* note 3, at 955–56. Judge Edwards’s experience is certainly not unique and supports the view that equal education alone fails to shatter social prejudices.

<sup>23</sup> Psychologist Allport explains, “Where segregation is the custom[,] contacts are casual, or else firmly frozen into superordinate-subordinate relationships. . . . [E]very

whether the black community is equipped to provide black children with an equal education, although Ogletree and many other scholars have focused on that issue.<sup>24</sup> Rather, we also must seriously consider whether the African American community would achieve *social and racial* equality in the absence of integration.<sup>25</sup> As Justice Marshall explained in *Milliken v. Bradley*, “[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together.”<sup>26</sup>

In spite of this critique of Ogletree’s proposals, it is difficult to ignore the failures of integration in the past fifty years. In addition to discussing the massive resistance to *Brown*, Ogletree reminds the reader that during the “integration” period, when many black students enrolled in suburban schools but far fewer white students enrolled in urban schools, scores of black teachers lost their jobs and many HBCUs closed. As a result, inner-city schools have been neglected and today face deep institutional problems: inadequate funding; a lack of qualified, enthusiastic teachers and administrators; increased school violence and drug use; and lower average test scores, higher drop-out rates, and fewer academically challenging programs than many suburban schools.<sup>27</sup> Professor Ogletree is certainly correct to point out these failures.

Nevertheless, it is important to recognize that these notable points do not alone necessitate a retreat from integration as an unworthy or impractical goal. The fact that integration has thus far

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superficial contact we make with an out-group member could by the ‘law of frequency’ strengthen the adverse mental association that we have [about the out-group].” ALLPORT, *supra* note 19, at 263–64. This is because “we are sensitized to perceive signs that will confirm our stereotypes. . . . Casual contact, therefore, permits our thinking about out-groups to remain on an autistic level. We do not effectively communicate with the outsider, nor he with us.” *Id.* at 264 (footnote omitted). Allport concludes that this “le[aves] matters worse than before.” *Id.* “In contrast to casual contacts,” Allport reports that “most studies show that true acquaintance lessens prejudice.” *Id.*

<sup>24</sup> Judge Robert Carter, who helped represent the plaintiffs in *Brown*, has argued that *Brown* should be interpreted as requiring equal education for black schools, not integration per se. BELL, *supra* note 8, at 115.

<sup>25</sup> To be clear, the argument that blacks may in fact benefit from integration in terms of social and racial equality is not meant to imply that blacks are inferior and thus *need* to integrate with white people. In fact, this criticism ignores a critical aspect of the argument: Both blacks *and* whites benefit from integration. One only needs to recall instances where the black community has thrived in the absence of integration—such as the building of the “Black Wall Street” in Tulsa, Oklahoma in 1921 (pp. 108–09)—to realize that the black community clearly does not *need* integration. However, if our goal is to live in a racially harmonious society, both blacks and whites equally may stand to benefit from integration. Hence, although the Black Wall Street “made it” without integration, it was not part of a racially harmonious society, as evidenced by the Tulsa race riots of 1921 (pp. 109, 284–85).

<sup>26</sup> 418 U.S. 717, 783 (1974).

<sup>27</sup> See generally Ryan, *supra* note 2.



not achieved equality does not imply that integration *cannot* work. Rather, the past fifty years may indicate that a reevaluation of our *approach* to integration is necessary, not a reevaluation of integration itself.<sup>28</sup> For instance, Professor Derrick Bell's Interest Convergence Theory suggests that the black community will only gain social advancements when its interests collide with the elite's interests.<sup>29</sup> If Professor Bell's insight is correct, society should work to replace the false perception of integration as a "one-way street" with acknowledgement that genuine integration has long-term benefits for both blacks and whites. Ogletree acknowledges that integration may theoretically work, but he avoids considering any innovative approaches to accomplishing it, opting instead to focus on less-than-integrated "solutions."<sup>30</sup>

### CONCLUSION

One of Professor Ogletree's goals in *All Deliberate Speed* is to press the reader to reflect on his own past with racism and segregation and consider how *Brown* has changed it for the better—and where *Brown* has failed. In the book, Ogletree provides a collection of his childhood photos. In one of the photos, young Ogletree stands with his 1963 fifth-grade class, comprised of all black and Latino students.

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<sup>28</sup> Professor Ryan explains:

[T]here is a crucial difference . . . between effective policies and politically feasible ones. Mandatory integration is politically implausible at the moment because of significant popular opposition, among both white and black parents, to "forced" busing. This popular opposition, however, is too often taken for proof that racial and socioeconomic integration are ineffective as a matter of educational policy. . . . [T]he goal of integration remains a worthwhile one, particularly as compared to school finance equalization, even if the traditional means of achieving integration (mandatory busing) is no longer a viable option. . . . [T]he appropriate question . . . is not what goal should be substituted for integration but rather which method holds the most promise for achieving integration.

Ryan, *supra* note 2, at 257–58 (footnote omitted).

<sup>29</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20, 22 (Kimberlé Crenshaw et al. eds., 1995).

<sup>30</sup> For solutions that take account of integration, see, for example, SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 289–332 (2004), concluding that integration of schools and workplaces is necessary to the continued vitality of American democracy; Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 *HARV. L. REV.* 1334 (2004), arguing that integration of schools by economic class is a way to implement the goals of *Brown*; Ryan, *supra* note 2, at 307, suggesting two approaches for increasing integration: "reorient[ing] school 'finance' cases to seek racial and socioeconomic integration as a remedy" and "mak[ing] a concerted effort to structure school choice programs in ways that will best ensure that disadvantaged students benefit from choice plans."

When I saw that picture, I could not help but recall my own fifth-grade class photo, taken in 1990—almost forty years after *Brown*. With reluctance, I noticed that my fifth-grade class also consisted of all black and Latino students. *All Deliberate Speed* is a stark reminder of the failures of the past fifty years. However, if we are ever to restore the full vision of *Brown*, we must renew our commitment to strive for equality *and* integration—notwithstanding our past failures in the pursuit of both.