the South that the Court understood the emotional wrench desegregation would cause and was therefore granting the region some time to get accustomed to the idea; and (3) invite the South to participate in the entombing of Jim Crow by joining the Court's efforts to fashion a temperate implementation decree—or to forfeit that chance by petulantly abstaining from the Court's further deliberations and thereby run the risk of having a harsh decree imposed upon it. It was such dexterous use of the power available to him and of the circumstances in which to exploit it that had established John Marshall as a judicial statesman and political tactician of the most formidable sort. The Court had not seen his like since. Earl Warren, in his first major opinion, moved now with that same sure purposefulness ...

... It was 1:20 P.M. The wire services proclaimed the news to the nation. Within the hour, the Voice of America would begin beaming word to the world in thirty-four languages: In the United States, schoolchildren could no longer be segregated by race. The law of the land no longer recognized a separate equality. No Americans were more equal than any other Americans.

52

CHARLES OGLETREE

From All Deliberate Speed

The impact of the Supreme Court case, Brown v. Board of Education, certainly did not end in 1954 when the decision was handed down. Legal scholar Charles Ogletree picks up the story of Brown with the events after the landmark decision. Ogletree looks at Brown II, the subsequent decision that required school desegregation "with all deliberate speed." Contrary to common belief, the real meaning of this phrase, Ogletree asserts, is that change could come slowly, not right away. Ogletree then takes readers decades ahead to three classic civil rights cases based on affirmative action. He explores the 1978 Bakke decision and the more recent 2003 Gratz and Grutter cases from the University of Michigan: the issues in all three involve the value of diversity and the means to achieve it. To close the excerpt, Ogletree looks ahead to the way in which all these cases may affect education in the United States in the coming decades. The meaning of "all deliberate speed" has proven crucial to the lives of millions of American young people.

On May 17, 1954, an otherwise uneventful Monday afternoon, fifteen months into Dwight D. Eisenhower's presidency, Chief Justice Earl Warren, speaking on behalf of a unanimous Supreme Court, issued a historic ruling that he and his colleagues hoped would irrevocably change the social fabric of the United States. "We conclude that in the field of public education the doctrine of 'separate-but-equal' has no place. Separate educational facilities are inherently unequal." Thurgood Marshall, who had passionately argued the case before the Court, joined a jubilant throng of other civil rights leaders in hailing this decision as the Court's most significant opinion of the twentieth century. The New York Times extolled the Brown decision as having "reaffirmed its faith and the underlying American faith in the equality of all men and all children before the law."...

At the time, no one doubted the far-reaching implications of the Court's ruling. The Brown lawyers had apparently accomplished what politicians, scholars, and others could not—an unparalleled victory that would create a nation of equal justice under the law. The Court's decision seemed to call for a new era in which black children and white children...
would have equal opportunities to achieve the proverbial American Dream. It did not come too soon for the families whose children were victims of segregation. . . .

Having broadly proclaimed its support of desegregating public schools, the Supreme Court shortly thereafter issued a second opinion [Brown II]—the opinion that legitimized much of the social upheaval that forms the central theme of this book. Fearful that southern segregationists, as well as the executive and legislative branches of state and federal governments, would both resist and impede this courageous decision, the Court offered a palliative to those opposed to Brown's directive. Speaking again with one voice, the Court concluded that, to achieve the goal of desegregation, the lower federal courts were to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.

As Thurgood Marshall and other civil rights lawyers pondered the second decision, they tried to ascertain what the Court meant in adding the crucial phrase "all deliberate speed" to its opinion. It is reported that, after the lawyers read the decision, a staff member consulted a dictionary to confirm their worst fears—that the "all deliberate speed" language meant "slow" and that the apparent victory was compromised because resisters were allowed to end segregation on their own timetable. These three critical words would indeed turn out to be of great consequence in that they ignore the urgency on which the Brown lawyers insisted: When asked to explain his view of "all deliberate speed," Thurgood Marshall frequently told anyone who would listen that the term meant S-L-O-W....

Nearly twenty-five years after the landmark Brown decision, a major challenge to its underlying principles of equality in education was emerging. The timing was significant for me in that I was among the large wave of first-generation African-Americans going to college and graduate school. Even though Brown paved the way by removing the barrier of segregated educational systems, it remained to be seen who would now have the opportunity to attend the prestigious institutions that had been substantially, if not completely, closed to African-Americans. While the battle for integration continued in the courtrooms around America, the shocking assassination of Martin Luther King, Jr., in April 1968, triggered a chain reaction of nationwide black protest; it also forced many institutions to open their doors much faster than they had contemplated. Harvard Law School was no different. A private institution, it claimed that its doors had always been open to people regardless of color (although wrong...
program that considered an applicant's race, the immediate admission of those whites who were allegedly qualified and denied admission, and money damages. . . .

The civil rights community and those private and public universities committed to maintaining a diverse pool of applicants for their institutions learned some painful lessons from the Bakke case, and they decided to develop a more focused effort this time around. More than 150 groups filed briefs in support of the Michigan diversity plan; they included law schools, universities, members of Congress, and corporations. Retired members of the armed forces, reporting that the military could not have credibility without an affirmative action plan that recruited minority officers into its ranks, filed a highly influential brief. Their brief caused a stir, in that it went against the public position of President George W. Bush, who filed a brief opposing the Michigan plan and labeled it a quota. There were further splits within the Republican ranks, as the highest-ranked and best-known African-Americans in the Bush administration, Colin Powell and Condoleezza Rice, also supported diversity and, in Powell's case, supported Michigan explicitly. Despite all of this external agitation, only nine votes counted, and I was carefully counting to see whether we could muster five votes. . . .

In Gratz v. Bollinger and Grutter v. Bollinger, the Supreme Court answered the central question, debated since Bakke, of the propriety of university or college affirmative action programs. The results were, at best, a moderate success for affirmative action. They remain, in the context of the Court's jurisprudence on race- and economic-based educational programs, an important setback to the mission established in Brown. By a vote of 5 to 4, the Court upheld the Michigan Law School's affirmative action plan. By a vote of 6 to 3, it held that the undergraduate program was tantamount to a quota system, and unconstitutional. It was a day to celebrate, largely because a contrary decision in the law school case would have been unfathomable.

In Grutter, O'Connor presented a robust endorsement of the principle of diversity as a factor in university admissions. Justice O'Connor not only endorsed Justice Powell's broad mandate in Bakke but went even further in embracing the significance of diversity in the Grutter decision:

Justice Powell emphasized that nothing less than the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."

So long as the admissions program does not constitute the type of quota system of "racial balancing" outlawed by Bakke, it may admit a "critical mass" of minority students in an effort to obtain a racially diverse student body. Educational institutions are permitted to use race as a factor (in the words of Bakke, quoted in Grutter, as a "plus") in minority admissions, so long as the decision to admit the student is "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."

In the Gratz opinion, Chief Justice Rehnquist, writing for a 6 to-3 majority, found the undergraduate admissions program unconstitutional. He was joined by the conservative justices Scalia, Kennedy, O'Connor, and Thomas. The centrist justice Breyer concurred in the judgment of the Court while not joining the chief justice's opinion. The chief justice found that awarding a blanket score—in this case, 20 points, or just over 13 percent of the maximum 150 points used to rank applicants—ensured that the university would admit all qualified minority applicants. He held that "the scoring system, "by setting up automatic, predetermined point allocations for the soft variables [including race], ensures that the diversity contributions of applicants cannot be individually assessed." The university's failure to consider individualized features of the diversity of each applicant rendered its affirmative action plan unconstitutional and required the Court to strike it down.

Grutter held that attainment of the educational benefits flowing from diversity (such as promoting cross-racial understanding that breaks down racial stereotypes) constitutes a compelling interest, and deferred to the university's determination that diversity is essential to its educational mission. The law school's position was further bolstered by numerous expert studies and reports, as well as the experience of major American businesses, retired military officers, and civilian military officials. Finally, universities and, more especially, law schools are training grounds for future leaders, and "the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity."

Moreover, the individualized consideration, the absence of quotas, and the recognition of diversity stemming from sources other than race (all of which resemble the Harvard approach that Justice Powell praised in Bakke) render the plan narrowly tailored. However, affirmative action must be limited in time, and the Court expects it will no longer be necessary twenty-five years from now. . . .

Collectively, Grutter and Gratz preserved the institution of affirmative action in American higher education and, to that extent, are important. Nonetheless, both cases—Grutter by what it did not say and Gratz by what it did say—are troubling in that they 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... ... My fear that Brown's vision is being accomplished only with “all deliberate speed” is now supplanted by my greater fear that resegregation of public education is occurring at a faster pace. While we celebrate the Michigan decision as a vindication of the principles articulated in Brown, we must also be vigilant to make sure that the progress of fifty years is not compromised any further.

Racial segregation today is the result of a complicated mix of social, political, legal, and economic factors, rather than the result of direct state commands ordering racial separation. Yet, whatever the causes, it remains overwhelmingly true that black and Latino children in central cities are educated in virtually all-minority schools with decidedly inferior facilities and educational opportunities. Even when students in suburban and rural schools are included, a majority of black and Latino students around the country still attend predominantly minority schools.

The effective compromise reached in the United States at the close of the twentieth century is that schools may be segregated by race as long as it is not due to direct government fiat. Furthermore, although Brown I emphasized that equal educational opportunity was a crucial component of citizenship, there is no federal constitutional requirement that pupils in predominantly minority school districts receive the same quality of education as students in wealthier, largely all-white suburban districts. Though these suburban districts appear as healthy as ever, the public school system in many urban areas is on the brink of collapse. Increasing numbers of parents who live in these urban areas are pushing for charter schools, home schooling, or vouchers for private schools in order to avoid traditional public school education. At the start of the twenty-first century, the principle of Brown seems as hallowed as ever, but its practical effect seems increasingly irrelevant to contemporary public schooling.

Indeed, the United States has been in a period of resegregation for some time now. Resegregation is strongly correlated with class and with poverty. Today, white children attend schools where 80 percent of the student body is also white, resulting in the highest level of segregation of any group. Only 15 percent of segregated white schools are in areas of concentrated poverty; over 85 percent of segregated black and Latino schools are. Schools in high-poverty areas routinely show lower levels of educational performance; even well-prepared students with stable family backgrounds are hurt academically by attending such schools.

U.S. public schools as a whole are becoming more nonwhite as minority enrollment approaches 40 percent of all students, nearly twice the percentage in the 1960s. In the western and southern regions of the country, almost half of all students are minorities. In today's schools, blacks make up only 8.6 percent of the average white student's school, and just over 10 percent of white students attend schools that have a predominantly minority population. Even more striking is the fact that over 37 percent of black and Latino students attend 90-100 percent minority schools.

This trend has led to the emergence of a substantial number of public schools where the student body is almost entirely nonwhite. The 2000 United States Department of Calculation data showed that there has been a very rapid increase in the number of multiracial schools where three different racial groups comprise at least one-tenth of the total enrollment. However, these schools are attended by only 14 percent of white children. Most of the shrinking white enrollment occurs in the nation's largest city school systems.

Minority segregated schools have much higher concentrations of poverty and much lower average test scores, lower levels of student and teacher qualifications, and fewer advanced courses. They are often plagued by limited resources and social and health problems. High-poverty schools have been shown to increase educational inequality for the students who attend them because of such problems as a lack of resources, shortage of qualified teachers, lower parent involvement, and higher teacher turnover. Almost half of the students in schools attended by the average black or Latino student are poor or nearly poor. By contrast, less than one student in five in schools attended by the average white student is classified as poor. As Gary Orfield, co-director of the Civil Rights Project (CRP) at Harvard University, and Susan E. Eaton, researcher at CRP, note, “Nine times in ten, an extremely segregated black and Latino school will also be a high-poverty school. And studies have shown that high-poverty schools are overburdened, have high rates of turnover, less qualified and experienced teachers, and operate a world away from mainstream society.”

Certainly, there must be some form of social change on the education front. Whether this occurs through separation or in an integrated environment is a matter of great consequence for American society. Our experiment with integration started with a pronouncement, half a century ago in Brown, that integration was an important value with positive social consequences that should be embraced by all Americans. Twenty years later, real action to integrate our schools had only just started. We are but one generation into an integrated society, and the signs are that the ma-
viority of the population is tired with the process. Those at the top want to stay there, and those in the middle would rather hold on to what they have than give a little to get a lot. We have to decide whether this is a country that is comfortable with discrimination. Are we satisfied with the fact that many whites find minorities so repellent that they will move and change their children's schooling to avoid us? For, make no mistake, that is what underpins the supposedly "rational" decisions based on racial stereotyping: an inability on the part of the majority of Americans to acknowledge that minority citizens are "just like us."

There is little surprise in acknowledging that there was substantial resistance by the white community to integration and later to affirmative action. But the theory of interest convergence suggests that most Americans cannot be bothered to engage that problem unless it directly affects them. They would rather turn away, uninterested, and perpetuate racial disadvantage than acknowledge it, let alone confront it. We have witnessed the Brown decision, followed by Bakke and, more recently, Grutter v. Bollinger. We have witnessed Dr. King's historic "I Have a Dream" speech and his subsequent assassination. We have heard the powerful words of President Johnson in his commitment to affirmative action, and President Bush's criticism of the Michigan plan as a program promoting racial preferences. We have seen diversity plans approved by the Supreme Court and, in the same year, some HBCUs [historically black colleges and universities] lose their accreditation and close. We continue to make progress, and suffer setbacks, in grappling with the persistent problem of race in America. But we must remain vigilant in our commitment to confront racial inequalities, even when we face persistent, even increasing resistance.

The decision in Brown I, ending segregation in our public schools—and by implication de jure segregation everywhere—is justly celebrated as one of the great events in our legal and political history. Precedent did not compel the result, nor was the composition of the Court indicative of a favorable outcome. There is no doubt that the circumstances of many African-Americans are better now than they were before the Brown decision. But the speed with which we have embraced the society made possible by Brown I has indeed been all too deliberate. It has been deliberate meaning "slow," "cautious," "wary," as if Americans remained so convinced of the integration ideal. It has been deliberate in the sense of "ponderous" or "awkward," as if each step had been taken painfully and at great cost. Yet the speed with which we have embraced integration has not been deliberate in the sense of "thoughtful" or "reflective"—on the contrary, our response has been emotional and instinctive, perhaps on both