By Charles J. Ogletree, Jr.

The Demise of

BROWN

vs.

Board of Education?:

Creating a Blueprint to Achieving Racial
Justice in the 21st Century

"This fight for equality of educational opportunity (was) not an isolated struggle. All
our struggles must tie in together and support one another. . . We must remain on the
alert and push the struggle farther with all our might."

- Charles Hamilton Houston. 1

More than 70 years have passed since the civil rights architect
Charles Hamilton Houston wrote those words in the pages of this mag-
azine. At that moment in history, Houston, mentor to Thurgood Marshall
and other civil rights luminaries, was sternly warning supporters that though the
NAACP had won a precedent-setting graduate school desegregation case, the
fight had really just begun.

It was not time to claim victory, Houston, then vice-Dean of Howard Law School
wrote. True, he said, a federal court had admitted a black man named Donald
Murray to a state law school in Maryland and struck a withering blow to the "sep-
parate but equal" doctrine. But, Houston urged, hold off on triumphant celebrations
and instead, "cooperate in public forums. . . agitate for more truth. . . " and "along
with this educational process. . . be prepared to fight, if necessary, every step of
the way."

Historians and biographers often refer to Charles Hamilton Houston as the
"Moses" of the struggle. The institute I founded at Harvard Law School (Houston's
alma mater) in September, 2005, The Charles Hamilton Houston Institute for Race
and Justice (CHHJR; www.charleshamiltonhouston.org), honors and continues
Houston's work that used the law and scholarship as tools in creating a more
equal and just society. Houston-incisive, forward-looking legal scholar, tough litig-
igator and perhaps above all, dedicated teacher-laid the groundwork for the civil rights movement. It is this movement that still shapes America's vision of itself as a fair nation dedicated to equal justice and opportunity, inclusive educa-

brating then. It's not time for giving up now.

In the new cases before the High Court-Parents Involved in Community Schools v. Seattle and Meredith v. Jefferson County Board of Education-

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

the justices will decide as early as this Spring, whether or not school districts may employ policies specifically designed to achieve racially diverse schools. Local educators in both Louisville and Seattle had developed their desegregation policies voluntarily, without a court order on the correct belief that racial diversity holds benefits for their students and their communities.

Specifically, the educators in Louisville and Seattle sought to achieve racially mixed schools by allowing parents choices about where to send their children to school. In some rare cases, a child's first choice of school might be denied if his or her enrollment upset the racial balance. Conservative advocates then took on the cause of a handful of parents whose children had been denied their first choices and sued in federal court.

The federal courts, however, consistently decided in favor of the school districts. In the original U.S. District Court decision in the Louisville case, Chief Judge John G. Heyburn wrote that "integrated schools, better academic performance, appreciation for our diverse heritage and stronger, more competitive public schools are consistent with the

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve.
central values and themes of American culture."

Similarly, in the Seattle case, Judge Alex Kozinski, a Reagan appointee, pointed out that the district's voluntary choice plan "is not meant to oppress minorities, nor does it have that effect. . .The plan does not segregate the races; to the contrary, it seeks to promote integration."

It's crucial to understand, here, that school districts such as Seattle and Louisville have been left with few options for achieving the integrated schools of which Judges Heyburn and Kozinski approve. This is because since 1974, beginning with the 5 to 4 Supreme Court decision in Milliken v. Bradley, federal courts have been limiting Brown's power and reach. Milliken effectively prevented many northern urban school districts, where the pool of white students was already small and shrinking, from crafting desegregation plans to include predominantly white suburbs. This meant that up North, racially integrated education would be nearly impossible to achieve. Justice Thurgood Marshall penned an eloquent, angry dissent.

"We deal here with the right of all our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future. . .Unless our children begin to learn together, there is little hope that our people will ever learn to live together."

More recently, a series of High Court decisions have limited the manner in which racial segregation could be ameliorated, while eliminating or else shortening the duration of court-ordered desegregation. Public schools are now more segregated now than they were when Thurgood Marshall wrote his dissent in 1974. According to the Civil Rights Project at Harvard, the proportion of black children attending predominantly minority schools increased from 66 percent in 1991 to 73 percent in 2003. In the South, especially, districts that had been legally segregated under Brown have been released from court order and quite rapidly resegregated. In other words, more than a half century after Brown, too many school districts look exactly as they did during the shameful pre-Brown period in history during which intentional segregation was perfectly legal.

Meanwhile, as courts backed away from desegregation as a route to equal education, educators on the ground became increasingly convinced of diversity's educational benefits and segregation's harms. Hundreds of socially concerned educators across the nation, including officials in Louisville and Seattle, consciously worked to reach for Brown's aspiration through voluntary means.

"We don't want to go backwards," Francis Mellen, the attorney for the Louisville Schools, told the Supreme Court during the December 4th oral arguments. "We have a voluntary plan and we think it works."

I attended these oral arguments. Walking into the Supreme Court building, I was heartened by the chants along First Street Northeast, emanating from a crowd of young people, parents, teachers and activists. They'd gathered below the Supreme Court steps in cold, windy weather to voice their support for policies that help the nation achieve
racially diverse schools. High school and college students from across the country, I knew, had ridden buses to march from the Supreme Court to the Lincoln Memorial, where they'd listen to speeches, hold signs reading "Save Brown v. Board of Education," and "Integrate Don't Segregate." The NAACP enjoyed a strong presence at the 300-person-strong rally, as members continued their pivotal role in a struggle that began in 1909 with the organization's founding.

But about two hours later, in the Supreme Court, I listened to the justices ask the lawyers in the case some telling questions. The arguments were wrapping up. The hopefulness I'd felt looking out at that vital, youthful civil rights gathering faded away.

It's no surprise that the conservative members of the High Court expressed skepticism about the school districts' attempts to achieve diversity. But most dispiriting was that the potential swing vote, Anthony Kennedy, also revealed his distaste for the school districts' policies. To hear Justice Kennedy express dismay not with the goal of racial diversity per se, but with the particular means by which it's being achieved—that is, by taking race into account in school assignments—seemed to seal Brown's fate.

All this leads me to predict, sadly, that the High Court might very well abandon the aspiration of integration and equal life chances manifest in Brown and in the civil rights movement Americans hold so dear. I hope I'm wrong. But I suspect that in years to come, we in the civil rights community will be mourning Brown, even while the nation, at least in its heart, continues to celebrate it.

What does this mean? Where do we go next? With our guiding light Brown all but snuffed out, how will we shape the sort of society—one with equal life chances and true citizenship for all—to which Americans still aspire? It's at moments like these that the lessons and life of Charles Hamilton Houston offer some guidance and some hope. What would Charles Hamilton Houston do? Where would he locate the roadblocks to racial justice today?

Seventy years ago, Charles Hamilton Houston, his students and colleagues viewed legalized segregation and the resulting unequal educational opportunity as roadblocks to full citizenship for African Americans. In the 21st century, legalized, state-sponsored segregation is off the books. But huge inequalities and roadblocks still stand in the way of full, equal citizenship.

The nation's persistent racial inequalities show up particularly clearly in schools. Several recent and rigorous studies demonstrate that the minority/white and middle-class/poor achievement gaps show few, if any
signs of closing. Test-score gaps generally show up on the first day of kindergarten, and sadly, seem to only get wider during a child's 12 years in public school. For example, the Northwest Evaluation Association, based in Oregon, recently analyzed math and reading scores from a half-million students in 24 states. Researchers concluded that "for each score level at each grade in each subject, minority students grew less than (white students) and students from poor schools grew less than those from wealthier ones."

Charles Hamilton Houston would surely remind us that it is not merely an educational problem we are looking at, here. Neither, Houston would say, is it an insurmountable one. Inequalities in education are a reflection of larger inequalities that exist in every segment of American society. The problems we face are multifaceted and stem from a variety of tangled forces. Solutions require the cooperative, connected work of socially concerned scholars, litigators, activists and people on the ground working in local communities to overcome a variety of challenges both inside and outside of schools.

At CHHIRJ, our four distinct missions-improving educational achievement among racial minority students, reducing the numbers of children entering the juvenile justice system, improving opportunities for formerly incarcerated individuals returning home and finally, eliminating the death penalty—are related and connected in the broad pursuit of securing full citizenship and participation in a fairer, more just democracy.

We know, for example, that far too many children of color begin a tragic journey in segregated, impoverished schools that ends in juvenile halls and adult prisons. Young people of color traveling through this school-to-prison pipeline are too often taught by unqualified teachers in overburdened schools, forced to learn sub-standard curriculum, tested on material they were never taught, held back in grade, removed to separate and inadequate special education programs, suspended, expelled and even arrested for relatively minor offences. Black and Latino youth are, in fact, far more likely than their white counterparts to be suspended, expelled, placed in special education classes and assigned to so-called "alternative" schools of poor academic quality. Only about half of the nation's Black, Latino and American Indian students even graduate from high school on time, compared with 78 percent of whites. In many of the nation's large urban districts, serving overwhelmingly minority student bodies, average high school graduation rates drop into the 30 to 40 percent range.

Racial disparities within the juvenile justice system parallel those found in schools.

In fact, a 2003 U.S. Department of Justice study concluded that a black man born in 1991 stood a 33 percent chance of going to prison. It's no coincidence that 75 percent of inmates in the nation's state prisons are high school dropouts and 59 percent of the country's federal inmates did not finish high school.

The impoverished, disenfranchised schools and communities that send children and adults to prison are often the same ones to which former prisoners will return in the coming years. And let's remember that many times, the returning former prisoners are the brothers, sisters, mothers and fathers of
the children in the public schools. According to Jeremy Travis of John Jay University, more than 630,000 people (1,700 a day) left federal and state prisons in 2002, compared with 150,000 30 years ago. Helping these men and women make smooth transitions back into family life, work and the community not only increases their own life chances, but improves the quality of life in communities often overburdened with the challenges that come with poverty and discrimination.

Finally, the death penalty is the most tragic end to lives of disenfranchise-ment and unequal life chances. Though just 12 percent of the nation is African-American, 57 percent of defendants executed since 1976 were African-Americans. As of April 2006, 3,370 men and women awaited execution on death row. Forty-two percent of these are African-Americans.

At the Harvard-based institute that bears Charles Hamilton Houston's name, we bring together the most original thinkers from what are often considered separate and discrete arenas of scholarship, jurisprudence, political activism and community-level programming. Those of us concerned about the future of civil rights can no longer afford to work in separated, isolated spheres. More than ever, it's vital that we come together, united in developing a clear strategy that addresses social inequities in every structure and segment of society-schooling, public health, criminal justice, voting, community enfranchisement. Then, it's imperative that we, step-by-step, put in place the building blocks for a grand, workable strategy that will enhance the work of people on the ground in communities just as much as it will improve the arguments of civil rights litigators in the courtrooms.

Schoolteachers, for example, deeply understand the nature of children's lives and can inform the work of civil rights litigators and juvenile court judges. Meanwhile, scholars can inform the work of the probation officer or the activist working to develop an employment center for former prisoners returning home. Youths caught in a juvenile justice system have something to teach policymakers and the civil rights litigators hoping to help them.

As the long desegregation struggle demonstrates, the well-trodden avenues of the federal courts seem increasingly closed to us. We must attack the problem of inequality and second-class citizenship of racial minorities on other fronts - in the classrooms, in the courtrooms, in employment training centers, on the streets and in Congress and state legislature, in public forums, the airwaves and the pages of newspapers.

With this grand ambition in mind, CHHIRJ works to unite the worlds of scholarship and action through convenings, special reports and programs that support and enhance the on-the-ground-work going on in communities.

It's with the hope of starting an important, national dialogue about the future of racial justice in the United States that CHHIRJ this April will convene a two-day event to commemorate the 150th anniversary of the 1857 Supreme Court decision, Dred Scott v. Sanford. This decision, among other things, formally denied citizenship and basic human and civil rights to African American slaves. We observe this anniversary to recall our history and to take honest stock of where we stand on the road...
toward full, true citizenship 140 years after the end of slavery. We still face a long, uphill climb.

However, remember that the obstacles Charles Hamilton Houston and his colleagues faced in the 1930s were daunting, too. The national economy was failing. The NAACP had been formed, but there was no groundswell, popular movement fighting for the rights of blacks. There were no legal precedents to bolster Houston's social justice orientation. Indeed, as the journalist Richard Kluger writes in his book, Simple Justice, "At a moment when the national economy began falling apart and (African-Americans), scarcely the beneficiary of America's bounty even in good times, were viewed as more expendable than ever, only a fool or a man of extraordinary determination would have undertaken the battle for racial justice. Charles Houston was no fool."

History reminds us, then, that even in the face of defeat that very well may get handed to us this spring by the Supreme Court, Houston, his students and his colleagues would have kept working, thinking, acting and looking for that new road to equality. Houston wouldn't have given up until he found an opening, no matter how small. Neither, then, should we.

Professor Charles J. Ogletree, Jr., is the Jesse Climenko Professor of Law, and the Executive Director of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School. Professor Ogletree is the author of From Lynch Mobs to the Killing State: Race and the Death Penalty in America (NYU Press 2006).

Part II of Professor Ogletree's analysis of the Supreme Court's decision regarding Brown vs. Board of Education and voluntary integration efforts will appear in the July/August 2007 NAACP special edition issue of The Crisis.

1 "Don't Shout Too Soon," published in Crisis, March, 1936.
3 Id.