A Personal Reflection

on the Importance and Meaning of the United States Supreme Court's Decision in Brown v. Board of Education

NATHANIEL R. JONES

BIOGRAPHICAL STATEMENT

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Nathaniel R. Jones was born in Youngstown, Ohio and attended the public schools there. After service in the United States Army Air Corps in World War II, he was educated at Youngstown State University, receiving his A.B. in 1951 and his L.L.B. in 1956. He was admitted to the Ohio Bar in 1957.

From 1956 to 1959, he was Executive Director of the Fair Employment Practices Commission of the City of Youngstown. He then began private practice, and a year later was appointed as an Assistant United States Attorney for the Northern District of Ohio in Cleveland. In 1967 he served as Assistant General Counsel to President Johnson's National Advisory Commission on Civil Disorders, also known as the Kerner Commission. In 1969, Judge Jones was invited to assume the responsibility as general counsel of the NAACP. He held that position from 1969 to 1979.

On May 17, 1979, at a White House ceremony, President Carter announced his intention to appoint Nathaniel Jones to the United States Court of Appeals for the Sixth Circuit. Judge Jones took his oath of office on October 15, 1979.

Following his retirement from the Sixth Circuit in March 2002, Judge Jones assumed a position as Senior Counsel with Blank Rome LLP. He also participates in a variety of activities and serves as co-chairman of the National Underground Railroad Freedom Center, member of the Toyota Motor Manufacturing, North America, Inc. Diversity AdvisoryBoard, member of the KnowledgeWorks Foundation Board of Trustees, and chair of the Cincinnati Youth Collaborative. He has taught at several law schools and is the holder of 17 honorary degrees.

An internationally renowned civil rights activist, Judge Jones played an important role in furthering the abolition of apartheid in South Africa. The drafters of South Africa's new constitution and laws consulted him, and he conferred with Nelson Mandela upon Mandela's release from 27 years of imprisonment.

Judge Jones has authored numerous articles and papers and has been the recipient of many honors and awards. Those awards include the Ohio Bar Medal from the Ohio State Bar Association, the prestigious 2002 Professionalism Award for the Sixth Circuit by the American Inns of Court; the 2002 Thurgood Marshall Award from the National Bar Association's Judicial Council, induction into the National Bar Association Hall of Fame, a Distinguished Service Citation from the National Conference for Community and Justice in May 2000 and the Millennium International Volunteer Award from the United States Department of State in March 2000. He recently was honored by radio station WCIN and The Fifth Third Bank as one of "The Fifty Most Influential Blacks in Cincinnati in the Last Half Century" and in February 1997, he was recognized by the Chamber of Commerce as one of the "Great Living Cincinnatians."

Judge Jones is married to the former Lillian Hawthorne. They have four children and six grandchildren.

On February 20, 2003, the United States Congress passed H.J.Res.2, officially naming the Nathaniel R. Jones Federal Building & United States Courthouse in Youngstown, Ohio.

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Brown v. Board of Education was the most profound Supreme Court pronouncement of the 20th century. Only those who do not understand the times in which it was delivered, and the issue it addressed, would quarrel with that statement. Nonetheless, although the context of the court's ruling is crucial to its proper understanding, the *Brown* decision has been decontextualized, rendering many salutes to it, by courts and commentators alike, merely ritualistic. Observances of *Brown's* golden anniversary, such as this one, afford an opportunity for the court's momentous decision to be placed in proper perspective and better understood.

After the doctrine of "separate but equal" was approved in *Plessy v. Ferguson* at the close of the 19th century, the doctrine withstood challenges for decades. Accordingly, advocates for Black children did not try to end segregation but instead fought to effectuate *Plessy's* implied promise that education for Black children would be equal. However, as the 20th century progressed, and as the venomous effects of segregation, especially on young children, became more and more painfully manifest in the United States, groups of dedicated lawyers became convinced that integration of schools could be achieved through a judicial remedy. A school of jurisprudence developed, known as the Houstonian School of Jurisprudence, which would eventually topple the legally sanctioned systems of segregation. Under the strategy devised, attorneys Charles Hamilton Houston, Thurgood Marshall, and their colleagues tackled segregation at the graduate and professional schools in the 1930s and 1940s.

In July 1935, the brilliant Charles Houston joined the staff of the NAACP as special counsel. His task was to expand the scope of the association's legal department, established in 1911. He believed that "since education is a preparation for the competition of life," the segregated education to which Black children were exposed was a road to failure. He declared: "Equality of education is not enough. There can be no true equality under a segregated system."

In *Brown v. Board of Education*, Houston and Marshall attacked state laws in Kansas, South Carolina, Delaware, and Virginia that mandated segregation of children in public schools. They openly sought to overturn *Plessy*, arguing that segregated education was inherently unequal. On behalf of Black children across America, they urged the Supreme Court to remedy the evils of segregating children, which had been described eloquently by Roy Wilkins:

> *The shocking statistics of inequality over the decades cannot, of course, tell us how many hundreds of thousands of Negro youngsters ... have been cheated and crippled as men and as citizens by being deprived, wholesale, of the education of their white fellow citizens.*

(The states) insisted and wove into a smothering pattern a thousand different personal humiliations, both public and private, based upon color. Through legal and extra legal machinery, through unchallenged political power, and through economic sanctions, a code of demeaning conduct was enforced and cast down on children, before they could dream, and eroded manhood after it came of age.

Powerful evidence in support of Wilkins' thesis was provided by the doll studies conducted by social psychologists Dr. Kenneth Clark and Dr. Mamie Clark of New York. One of their reports, "Segregation as a Factor on the Racial Identification of Negro Pre-School Children," showed the crippling effect of segregation on the minds of Black children. This research so impressed the Supreme Court that, in its opinion in Brown, the court cited the report in the now famous footnote 11.

In the cases leading up to *Brown* in the 1940s and early 1950s, teams of Houstonian-influenced lawyers raised numerous issues in challenging school segregation. In *Brown*, these issues were distilled into a single question. The Supreme Court phrased that question as follows:

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?

The court then answered this question in the affirmative: "We believe that it does." The court's ruling was succinct:

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated ... (b)y reason of the segregation complained of, (are) deprived of the equal protection clause guaranteed by the Fourteenth Amendment.

Reversing *Plessy*, the Supreme Court had struck down segregation laws on the basis of the 14th Amendment's guarantee of equal protection of the law. A new age in civil rights was dawning, or appeared to be.

In the wake of the *Brown* pronouncement, the Supreme Court addressed, in a subsequent holding, the method by which its decision would be implemented. Rather than ordering immediate desegregation of the offending school districts, it propounded a principle of "all deliberate speed." I was a law student at that time, and I watched the struggle as district after district exploited the vague principle of "all deliberate speed," seeking to weaken the impact of the court's ruling and delay its implementation. After many bitter battles, it became clear to the

Supreme Court that these Southern states were not acting in good faith; the court had miscalculated the willingness of these states to comply with its ruling in good faith.

Implementation efforts were concentrated in the Southern states because they had mandated segregation by statute and constitutional revision. Massive resistance and numerous forms of delay, including so-called "freedom of choice" plans, finally led the court to abandon the "all deliberate speed" mandate and to order immediate desegregation of school districts across the South. The NAACP Legal Defense Fund and other NAACP lawyers achieved major victories toward abolishing systems of segregation in decisions such as *Green v. New Kent County in 1968, Alexander v. Holmes County in 1969,* and *Swann v. Charlotte-Mecklenburg* in 1970.

LEARNING FROM THE PROS

I was not a child of the South but instead grew up in northeastern Ohio. Long before I attended law school, I was fortunate to have as a mentor J. Maynard Dickerson, a prominent Black lawyer with numerous leadership roles in the community, including that of president of the Ohio State Conference of NAACP branches. While the strategies of Houston, Marshall, and the NAACP were unfolding in the South, Dickerson was among the lawyers taking parallel steps to dismantle segregation in the North. Thus, from my teen years I had the rare privilege of attending strategy sessions of the leading lawyers of the NAACP. These discussions dealt with strategies and methods for keeping communities informed of legal developments in various courts.

As already noted, Thurgood Marshall helped teams of lawyers across the country press for desegregation, and he often joined in these discussions in Ohio. Whenever he was due to visit, a buzz of anticipation arose. The word would spread quickly—*"Thurgood's coming."* These discussions were held in homes and law offices in cities such as Youngstown, Akron, Cleveland, Toledo, Columbus, Dayton, and Cincinnati. The optimistic tone of the discussion by these lawyers was immensely impressive. Marshall, in particular, with his sense of humor, kept the spirit of the lawyers buoyed. At the end of the day, when Marshall was present, the hosts would lay out a huge meal, together with libations.

As I listened to these brilliant leaders discussing ways in which segregation might be defeated, many of the great lawyers associated with the *Brown* case became known to me, including Thurgood Marshall and his eminently able assistant, Robert Carter, who is now a federal district judge in New York. I also listened to their boss, the late Walter White, and many others, including the late William H. Hastie, who became the first Black judge appointed under Article III, and the renowned A. Leon Ransom and William L. Coleman, Jr. I also met Kenneth Clark, whose research helped prove the damaging effects of segregation.

The discussions became even more intense as the *Brown* cases proceeded through the courts. Excitement and hope rose to a fever pitch when *Brown* and its companion cases were argued before the U.S. Supreme Court. In 1954, when the decisions were handed down, Americans of color reacted with joyous disbelief. Preachers preached about it. The Black press—Pittsburgh's *Courier, The Chicago Defender, The Cleveland Call and Post,* and the paper on which I worked, *The Buckeye Review*—reported the news in bold

headlines. For many who had been following the cases, the announcement sparked the same strong emotions they had felt when Joe Lewis won victory or when Jackie Robinson was signed by the Brooklyn Dodgers.

As a law student, I was often asked in my community to explain the decision. I recall that, at times, I was disappointed by the degree of disinterest, resulting from a belief that this case involved a Southern matter. Many people thought that *Brown's* reach went no further than Southern states of the Old Confederacy, along with border states and the District of Columbia, where segregation was mandated by law. When pupils were segregated in Northern and Western communities, their local governments perceived no need to comply with *Brown* and accordingly made no efforts to modify the separate and inferior education to which Black children were subjected.

In the North, segregation may not have been mandated by law, but it existed nonetheless. Before *Brown* was decided, there had been sporadic efforts to challenge Northern-style segregation but with little success. In defense of segregation, school boards and other defendants had absorbed the legal fiction of *de jure* and *de facto* segregation and argued it successfully. On the occasions that racial segregation was challenged in the North, defendants contended that separation of the races was not imposed by state law but resulted from other causes, unrelated to law, and that therefore the federal courts lacked authority to remedy the evils of segregation, however visible they might be.

I observed the efforts of Northern lawyers to advance Houstonian principles of jurisprudence before *Brown*, and they devised ways of tackling segregation in their various communities. Yet it was not until *Brown* was handed down that these advocates had judicial support and precedential ammunition with which to press forward the fight against segregation with far greater force.

An example is Hillsboro, Ohio, a small town in southwestern Ohio that maintained a policy of school segregation. Civil rights advocates had struggled for years to eliminate the blatant policy with no success. However, with the *Brown* decision, these advocates believed they could now challenge the pervasive segregation successfully, and, in fact, they did. In 1955, they filed a lawsuit, the first Northern case brought under *Brown*. Although the trial court denied relief initially, plaintiffs eventually prevailed in the U.S. Court of Appeals for the Sixth Circuit, and segregation of the elementary school was eliminated. Ironically, Justice Potter Stewart, who at the time of the Hillsboro case had recently been appointed as judge of the Sixth Circuit, played a major role in ending Hillsboro's segregation, but he defaulted in the Supreme Court's decision in *Milliken v. Bradley*, which has so adversely affected the ability to eliminate Northern school segregation.

However, many Northern communities challenged after *Brown* continued to maintain the legal fiction that segregation was merely *de facto,* not *de jure*. Appellate courts backed them in *Bell v. School Board City of Gary, Deal v. Cincinnati Board of Education,* and *Cragget v. Cleveland Board of Education,* among others.

Sitting at the feet of illustrious lawyers and listening to their legal strategies in the 1940s and 1950s, and watching these efforts unfold, little did I know that one day I would be

sitting in the seat that Thurgood Marshall occupied at the NAACP. In 1969, I assumed the position of general counsel and found myself responding, as he had, to urgent requests for guidance from local NAACP branches. Dozens of communities were pressing the national office for help in confronting segregation, which was increasing.

Pressure against segregation continued to mount in the Northern states from those who were convinced that the distinction between *de facto* and *de jure* segregation was illusory with respect to public schools. We were convinced that segregated conditions, however they came about, must be exposed and abolished, and that we must find a way to invoke the remedial power of the federal courts. In order to do so, it became clear that we must develop a theory to show that segregation in the North was also caused by state action, not precisely in the same way as in Southern states with specific laws, but because of a fundamentally similar array of racial policies and practices.

By the early 1970s, when I assumed my responsibilities at the NAACP, a number of cases were already in the pipeline. We knew that before any remedy could be obtained, we must prove intentional acts of segregation, in the form of policies and practices, by school officials and their state governments. Further complicating the problem for Northern plaintiffs was the necessity of engaging in enormous research and discovery to demonstrate the causes of segregation, stemming at times from complicity between public officials and private sectors. We realized the powerful tools that school officials were able to summon to resist the claims we were making on behalf of plaintiffs. For example, the school districts had financial resources to employ top legal talent to engage in forceful legal resistance in the courts. In addition, they had ready access to the media and the ability to exert considerable political leverage. Further, through a variety of means, school districts could trigger resistance within the minority community, exploiting concerns of pupil reassignments or loss of jobs by teachers and administrators that they feared could be ordered as part of particular remedies if school districts were held in violation of *Brown*.

Nevertheless, plaintiffs in the North were determined to challenge segregation in schools, and the effort moved forward. We decided on a strategy, concluding that we could overcome the *de facto* argument by presenting a historical analysis of school district policies. To prove that systemic segregation was caused and supported by state action, plaintiffs presented historical evidence of school board policies relating to school construction, district boundary changes, feeder pattern changes, grade level changes, faculty assignments, and other administrative practices. Plaintiffs also established the interdependence of housing segregation and school segregation, demonstrating how housing and employment policies affected school board policies. Gathering such evidence and establishing these patterns was complicated, costly, and time-consuming. Carrying out this immense work with limited resources, in cases across the country, was a formidable challenge for the NAACP teams that we assembled.

In arguing the law, we built upon precedents established in the Southern cases. For instance, we relied frequently on the opinion of Chief Justice Warren Burger in *Swann v. Charlotte-Mecklenburg Board of Education*, wherein he wrote:

Absent a constitutional violation, there would be no basis for judicially ordering assignments of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system.

In the Northern cases, we proved that the school districts had been "deliberately constructed and maintained to enforce racial segregation." In each successful case, the trial court made specific findings of facts regarding the extent to which segregation existed and the methods by which it had been achieved. With respect to the remedy required, we contended that the court then had a duty to order desegregation, even if it might be, in the words of *Swann*, "administratively awkward, inconvenient and even bizarre." In *Green v. New Kent County*, the court held that school officials "are clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

VICTORY THEN BACKLASH

The resources of the NAACP were stretched thin in pursuing the enormous tasks of discovery and research that were crucial in the Northern cases. However, through the support of the NAACP, foundations, and other contributors, plaintiffs in a number of cases were able to pursue the indispensable but expensive research. Such efforts permitted our attorneys to present convincing proofs to the courts, and we achieved a long string of victories in Columbus, Dayton, Cleveland, Kalamazoo, Boston, Detroit, and other Northern communities.

However, those successes in establishing the causes of Northern segregation and in obtaining court orders to desegregate triggered a tremendous political backlash. President Richard Nixon, U.S. Attorney General John Mitchell, Secretary of Health, Education, and Welfare Robert Finch, Alabama Govenor George Wallace, and numerous other political figures, including members of Congress, led the resistance against desegregation. However, while this pressure and resistance were successfully repelled for a period of time, support for court orders and desegregation began to wane in the face of this onslaught.

What was interesting to me was the way the school districts ceased mounting their main line of defense at the barricades of causation and liability. They stopped denying that segregation existed or that it was unconstitutional. They would "tip their hats" to *Brown* and then line up their strongest forces of resistance at the remedy phase of the litigation. In doing so, they argued vehemently against correction of segregation on grounds that it was "too costly" or that it

would require the use of transportation, which they termed "busing." Although state law mandated the transportation of students who lived a sufficient distance from their school, even if this meant maintaining segregation, a strong opposition arose in such cities as Dayton and Cleveland to desegregation orders. Those districts and others viewed transportation of students to achieve integration as absolutely intolerable. They would, as a strategy, characterize these cases as "busing" cases rather than cases aimed at vindicating constitutional rights. When the label of "busing" became attached to these lawsuits, public support for desegregation of Northern schools began to decline.

Many of us argued that when the school boards attacked the remedy, they were in reality challenging *Brown*. Although *Brown* had declared the right of children under the 14th Amendment to an equal education, without segregation, the school boards were denying Black children their right to a remedy. It should be plain to anyone, however, that a right without a remedy is no right at all.

The case that we thought had taken us to the point where we could sense an end to segregated urban education was the Detroit case of *Milliken v. Bradley.* In that case, the NAACP and Black plaintiffs prevailed at every level—until the case reached the U.S. Supreme Court. Following a trial of 41 days, the Honorable Stephen Roth issued a decision in 1971, declaring defendants' specific intent to segregate. He stated, among other things:

> *Pupil racial segregation ... and the residential segregation resulting primarily from public and private racial discrimination are interdependent phenomena. The affirmative obligation of the defendant board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into school systems the effects of residential segregation. The board's building upon housing segregation violates the Fourteenth Amendment.*

Judge Roth concluded that a remedy limited to the district's boundaries would not result in elimination of segregation "root and branch." He ordered a remedy that would go beyond the district lines of the city to achieve an equal education without segregation.

The *Milliken* plaintiffs prevailed in the Sixth Circuit, which rendered an *en banc* decision affirming the District Court. The Supreme Court, however, affirmed only in part. It upheld the findings of segregation as having been caused and maintained by both the school board and the State of Michigan, but, when it came to the remedy, the court retreated from its pronouncements in *Swann* and *Green*. The court ruled that the record did not support a remedy that would go beyond the school district lines of the city of Detroit.

The court reversed the District Court and the Sixth Circuit on the remedial issue. It found no basis for an order that would draw suburban districts into the desegregation plan, despite the fact that the State of Michigan had been found an equal wrongdoer with the school district and indeed the state was shown to be responsible for drawing

the school districts lines.

Not surprisingly, Justice Thurgood Marshall strongly dissented, and his dissent has proven to be prophetic. He wrote:

> *Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our nation's childhood and adolescence are not quickly thrown aside (but) just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from (the) enforcement of constitutional principles at issue.*
>
> *Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is a product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities, one White, the other Black—but it is a course, I predict, our people will ultimately regret.*

Not only was Justice Marshall correct in his prediction, but others expressed similar concerns about the fate that would befall our urban areas if courts were prohibited from developing remedies that would effectively address pervasive racial segregation. Justice William O. Douglas wrote in his dissenting opinion in *Milliken*: "When we rule against the metropolitan area remedy we take a step that will likely put the problem of the Blacks and our society back to the period that antedated the separate-but-equal regime of *Plessy v. Ferguson*." Justice Byron White's dissent was equally prescient.

Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit foresaw the negative effect that an adverse ruling would have. Speaking at the Harvard Law School on the occasion of the 20th anniversary of *Brown*, just prior to the Supreme Court's decision in *Milliken*, Judge Wright addressed the issue of desegregation remedies that crossed district boundaries. He declared that if the Supreme Court were to hold the metropolitan plans impermissible, "the national trend toward residential, political, and economic apartheid" would not only be "greatly accelerated," but it would be "rendered legitimate and irreversible by force of law." Events have proven the four dissenting justices and Judge Wright were correct.

SCHOOL DESEGREGATION: WHAT NOW?

This brings me to the question of what we are left with now with regard to school desegregation—what we must confront in light of the court's decision in *Milliken*. We are left with the difficult if not impossible task of trying to fashion remedies that will not only rectify decades of pervasive denial of constitutional rights but will also fit within administrative units that we call "single school districts." I doubt that such remedies are being fashioned or, indeed, that they

can be. As a result, segregation is not being effectively addressed. In fact, resegregation is occurring. The societal costs are significant, and these costs are now prompting state and federal officials to entertain a variety of so-called reform strategies to bridge the enormous gaps leading to educational disparities between rich and poor, Black and White, in our urban schools.

Two prominent strategies are school vouchers and charter schools. My great fear is that each of these strategies has become a Trojan horse for resegregation of urban schools. Simply put, charter schools are a new network of pseudo-public schools, educational institutions funded by the public yet free of the standards and accountability required of regular public schools. These schools apply a double impetus to resegregation. First, many charter schools are disproportionately Black. Second, they drain resources and role models from existing public schools where most poor and Black children remain. In fact, many charter schools reportedly have racial disproportions and physical disparities that would expose a public school to legal action for being in violation of *Brown*. Likewise, voucher programs have tended to undermine the accountability that rests on, and should rest on, the shoulders of the public school system.

Some aspects of these so-called "education reforms" are nothing more than attempts to circumvent the desegregation requirement of *Brown*. Given that the 14th Amendment and the *Brown* decision were written to protect the rights of Black Americans, some of these "reforms" virtually turn the Constitution on its head. We are witnessing nothing less than a hijacking of the 14th Amendment. Courts—particularly the Supreme Court—pay homage to *Brown* and then impose a tougher standard of scrutiny that nullifies the ability to vindicate rights guaranteed by the 14th Amendment and affirmed in *Brown*.

To me, it is disingenuous for the Supreme Court and other courts and political leaders to cite *Brown* as an admirable precedent that cleansed American apartheid from the country's schools and then impose a remedial jurisprudence that hobbles all attempts to meaningfully implement it. I speak of the standard of strict scrutiny imposed on lower courts by the U.S. Supreme Court on school desegregation and affirmative action plans that limit the exercise of judicial remedial power in cases involving racial discrimination.

Supreme Court Justice Clarence Thomas, who occupies Justice Marshall's seat, exemplifies this contradiction in *Adarand Constructors, Inc. v. Pena*, which encourages federal judges to apply the brakes to *Brown*. He wrote, in one part of his opinion:

> *All one needs to do is to read Plessy v. Ferguson's separate-but-equal decision of 1896 and the claims of Black plaintiffs, the precedential cases leading up to Brown, and then Brown itself, to know that those cases were brought under a strategy devised by Charles Hamilton Houston, Thurgood Marshall, and their colleagues on behalf of the NAACP, to challenge the denial of rights to Black people. This approach to using the Fourteenth Amendment to rectify historic discrimination came to be known as the*

Houstonian School of Jurisprudence and was refined and executed by Houston's protégé, Thurgood Marshall, who assembled teams of lawyers to press cases in crucial forums all across the country.

On the other hand, Thomas inexplicably argues:

I believe that there is a moral (and) constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.

... (A)s far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.

This is the very antithesis of Houstonian jurisprudence and the spirit of *Brown*. It defies understanding how one could laud Houstonian jurisprudence and then assert in the next breath that race cannot be taken into account to obtain redress for violations of the 14th Amendment.

AFFIRMATIVE ACTION SHOWDOWN

Other political and legal attacks have been launched in an attempt to weaken *Brown* and limit educational advances for Blacks. For example, following the 1968 decision in *Regents of the University of California v. Bakke*, universities across the country built admissions policies on the standard that race could be considered as one of the criteria of admissions plans without violating the 14th Amendment. This advance was jeopardized, however, when the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas* decided that *Bakke* was no longer good law with respect to the University of Texas Law School. The Fifth Circuit was followed by a disturbing number of other federal courts. The stage was set for a showdown when several White students attacked the University of Michigan's affirmative action plans for its undergraduate and graduate schools. The question was crucial: whether the 14th Amendment absolutely barred the use of race as a factor in admissions policies.

In *Grutter v. Bollinger*, the majority of the Supreme Court issued a far-reaching decision that upheld the affirmative action policies of the law school. Justice Sandra Day O'Connor, writing for the majority, posed the question whether "the use of race as a factor in student admission ... is unlawful." The answer was a compelling "no." The reason propounded by Justice O'Connor is interesting. She wrote:

The equal protection clause does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. The judgment of the Court of Appeals for the Sixth Circuit is affirmed.

With those clear words, Justice O'Connor "dispatched to their graves"—to use a phrase Justice Thurgood Marshall used in his final opinion before retiring—the intentions stated in *Hopwood* that the holding in *Bakke* was dead. Justice O'Connor made clear beyond peradventure that, under the U.S. Constitution, race may be taken into account as a means of achieving the ends set forth in the 14th Amendment and the civil rights statutes enacted pursuant to it. The court's decision in *Grutter* recognized what Justice Blackmun contended consistently in his opinions, namely that to get beyond race you must first take account of race.

The vitality of *Brown v. Board of Education* showed through once again. To me, as a former civil rights lawyer and one who sat and heard the foremost civil rights lawyers strategize on how to overturn *Plessy v. Ferguson,* and as a lawyer who believes in the efficacy of law as an instrument of change, I was impressed to note Justice O'Connor's citation of *Brown* in her opinion in *Grutter*.

> *This Court has long recognized that 'education ... is the very foundation of good citizenship'... (and that) the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.*

Moreover, she cited *Sweatt v. Painter,* the University of Texas Law School case that was the immediate forerunner to *Brown*, wherein the Court explained that:

> *In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.*

With those words, Justice O'Connor returned to the essential core of *Brown* and to the fundamental philosophy of the Houstonian School of Jurisprudence.

I feel certain that two experiences compelled Justice O'Connor to conclude as she did. First, she has often alluded to the many conversations she had with Justice Marshall that impressed her with the difficulties faced by and the courage and brilliance of the lawyers who advanced the Houstonian brief to the Supreme Court in *Brown*. Second, I believe that Justice O'Connor not only accepted the Supreme Court's rationale in *Brown* but understood that, whatever the state of knowledge may have been at the time of *Plessy* with regard to race and the justification for segregation, the principles supporting segregation were emphatically and wholeheartedly rejected in *Brown*. Moreover, Justice O'Connor took note of the fact that change has occurred in the world and that the United States, operating in a global economy, needs the best possible minds of every race.

The University of Michigan's success was a signal achievement. I submit that the kind of preparation, research, and strategy demonstrated by the university's legal team must be used again and again if advocates for racial justice are to turn back the tide of resegregation in American public schools, a trend that clearly flouts *Brown v. Board of Education.*

Despite the discouraging trends we have witnessed in the last two decades, I am confident that many of the substantial changes wrought by *Brown* are not likely to be reversed. Following *Brown*, demands for an end to segregation became louder and more insistent. The direct action campaigns that followed dramatically and forcefully confronted segregation at its very source—in the streets, on buses, in restaurants, in neighborhoods, on campuses, in city halls, in voting booths, in courthouses, and in statehouses. *Brown* indeed was a launching pad for direct action campaigns that changed the face of America. Calls for equal treatment under law reached a crescendo all across the states of the South as well as the North. Congress responded to the crescendo of public outcry by enacting, among other laws, the 1964 Civil Rights Act with its well known Title VI and Title VII, the 1965 Voting Rights Act, and the 1968 Omnibus Bill. I believe that *Brown* also helped give tone to the historic report of The Kerner Commission of 1968, which sought answers to the causes of civil disorders of the 1960s. Commission members were sobered by the gap between the lofty principles enunciated by the Supreme Court and the harsh realities of daily life for Black Americans. The *Brown* decision became the benchmark that led the commission to declare that American society was deeply implicated in the ghetto—creating and perpetuating it.

In addition, I am encouraged that the vitality of *Brown* was reaffirmed in the *Grutter* decision. The court's conclusion that "quality education" is not only fundamental to the ability of individuals to succeed but also to the nation's interest as a whole provides a theme that can be embraced and developed. Through innovation, energy, and creativity, in the tradition of Charles Hamilton Houston, Thurgood Marshall, William Hastie, and their colleagues, a way can be found to mobilize public and political support to implement *Brown v. Board of Education* and move the Supreme Court away from its historically erroneous view that the 14th Amendment prohibits the use of race when attempting to overcome the effects of long-standing and pervasive racial discrimination.