DR. KING AND *PARENTS INVOLVED*: THE BATTLE FOR HEARTS AND MINDS

WENDY B. SCOTT*

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[1]

"[I]f physical death is the price that some must pay to free their children from a permanent life of psychological death, then nothing could be more honorable."[2]

FOREWORD

In this Symposium, we are charged to imagine what Dr. Martin Luther King, Jr. might think of the state of social justice in the twenty-first century. I have chosen to consider whether Dr. King would believe that justice was served in *Parents Involved*[3] with regard to the constitutional right of children of color to equal educational opportunity.

Dr. King's descriptions and analyses of social injustice continue to inform any query about what still needs to change in America. He spoke prophetically and profoundly about systemic social injustice and its detrimental effect on the human psyche. More importantly, his words inspired action that resulted in lasting change in American society and the world. Therefore, as you read this article, I hope his words will speak to your heart and mind.

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* Professor, North Carolina Central University School of Law. My Research Assistant Bethany Embry (NCCU) and Research Fellow Susan McCarty (Maryland) and the editors of the N.Y.U. Review of Law & Social Change provided invaluable assistance.

1. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

2. Martin Luther King, Jr., *Facing the Challenge of a New Age* (1957) [hereinafter King, *Facing the Challenge*], *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 135, 143 (James M. Washington ed., 1991) [hereinafter TESTAMENT OF HOPE].

3. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2749 (2007) (striking down the use of race as a factor in Seattle and Louisville's student assignment).

I.
INTRODUCTION

In 1954, a unanimous Supreme Court held that laws requiring dual public school systems, separated solely on the basis of race, violated the rights afforded to African American children under the Fourteenth Amendment Equal Protection and Due Process clauses.[4] *Brown v. Board of Education* marked the beginning of a judicial assault on statutory schemes and state court decisions, that the Court characterized as "an endorsement of the doctrine of White Supremacy."[5]

Both Chief Justice Earl Warren and Dr. King recognized that the practice of white supremacy did more than keep people separated. Likewise, Dr. King embraced the centrality of the heart and mind in the struggle for social justice. In *Brown,* Warren's opinion also validated the relevance of the psychic injury caused by what Dr. King often referred to as "the iron feet of oppression."[6] Warren wrote that the segregation of children solely based on race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[7] While Warren's conclusion remains hotly debated, *Brown* introduced personal stigmatic injury into school desegregation discourse.

Part II juxtaposes Dr. King's thoughts on the evils of segregation and the necessity of integration with the development of desegregation jurisprudence after *Brown.* Part III traces the short-lived efforts of the federal judiciary to integrate public schools following Dr. King's death up to the *Parents Involved* decision. Part IV summarizes the *Parents Involved* decision and compares the plurality's legal and social visions to that of *Brown* and *Plessy v. Ferguson.* Part V hypothesizes about Dr. King's reaction to *Parents Involved* and takes a closer look at the importance of the heart and mind in the *Brown* opinion and in Dr. King's thinking. In conclusion, I attempt to answer the prophetic question posed by Dr. King near the end of his life: "Where do we go from here?,"[8] to achieve and sustain racial diversity in public education.

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4. *Brown*, 347 U.S. at 495 (striking down state laws that created dual public school systems). *See also* Bolling v. Sharpe, 388 U.S. 497 (1954) (holding that segregated schools created pursuant to federal law in Washington, D.C. violated the Due Process Clause of the Fifth Amendment).

5. Loving v. Virginia, 388 U.S. 1, 7 (1967).

6. King, *Facing the Challenge*, *supra* note 2, at 136.

7. *Brown*, 347 U.S. at 494.

8. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (1968).

II.
SCHOOL DESEGREGATION DURING THE KING ERA

Dr. King was born into a segregated America and attended segregated schools. Despite his middle class upbringing, he knew from personal experience the social stigma attached to his race. In his article, *Pilgrimage to Nonviolence,* Dr. King wrote,

> I grew up abhorring segregation, considering it both rationally inexplicable and morally unjustifiable. I could never accept the fact of having to go to the back of a bus or sit in the segregated section of a train. The first time that I was seated behind a curtain in a dining car I felt as if the curtain had been dropped on my selfhood.[9]

Like most civil rights leaders of his time, Dr. King advocated for racially integrated schools.[10] He believed that "[a]ny law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality."[11] He characterized segregation as "an existential expression of man's tragic separation, an expression of his awful estrangement, his terrible sinfulness."[12]

Dr. King spoke of segregation as a theologian. He was a man of faith, action, and compassionate reason. He distinguished compassionate reason from the reason of liberalism, which he characterized as "[r]eason devoid of the purifying power of faith."[13] Dr. King's religious convictions, more than his politics, informed his worldview. His spiritual and intellectual journeys were one. In the words of his late wife, Coretta Scott King, he promoted "religious responsibility in social struggle."[14] Therefore, throughout the course of his public ministry Dr. King admonished America to obey *Brown* and reject the old order of segregation as morally wrong.[15] As King explained, "deeply rooted spiritual beliefs" were a vital

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9. Martin Luther King, JR., *Pilgrimage to Nonviolence*, 77 THE CHRISTIAN CENTURY 439 (1960) [hereinafter King, *Pilgrimage*], *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 57–58.

10. A notable exception was W.E.B. DuBois, who argued that quality education was not synonymous with integrated schools. *See* W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1935).

11. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 70 (1963) [hereinafter KING, WHY WE CAN'T WAIT].

12. Martin Luther King, Jr., *Letter From Birmingham Jail* (1963) [hereinafter King, *Letter from Birmingham Jail*], *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 294.

13. MARTIN LUTHER KING, JR., I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 56 (James M. Washington ed., 1992) [hereinafter KING, WRITINGS AND SPEECHES THAT CHANGED THE WORLD].

14. *Id.* at vii.

15. King, *Letter From Birmingham Jail*, *supra* note 12, at 294.

motivation for the embrace of nonviolence by the African American community.[16]

He also argued that true democracy and economic justice could not exist without integration.[17] He urged his followers to challenge the isolation of African Americans and the poor from the benefits of society as part of the larger problem of socioeconomic injustice.

A. King Distinguished Desegregation and Integration

In 1962, Dr. King explained his philosophy about racial integration during a speech in Nashville,[18] emphasizing the distinction between desegregation and integration. Desegregation, or simply "remov[ing] the legal and social prohibitions" on integration, was "empty and shallow."[19] Integration, on the other hand, was the true goal, because it was "more profound and far-reaching than desegregation. Integration is the positive acceptance of desegregation and the welcomed participation of Negroes into the total range of human activities."[20]

Dr. King captured the essence of the problem with stopping at desegregation, instead of seeking full integration:

> We do not have to look very far to see the pernicious effects of a desegregated society that is not integrated. It leads to "physical proximity without spiritual affinity." It gives us a society where men are physically desegregated and spiritually segregated, where elbows are together and hearts are apart. It gives us special togetherness and spiritual apartness. It leaves us with a stagnant equality of sameness rather than a constructive equality of oneness.[21]

He understood that

> the demands of desegregation are enforceable demands while the

16. KING, WHY WE CAN'T WAIT, *supra* note 11, at 21. While the spiritual foundation of Dr. King's organizing strategies has been secularized, recent scholarship has reconnected the spiritual with the political and recognized the radical nature of his message. *See, e.g.*, ANTHONY E. COOK, THE LEAST OF THESE: RACE, LAW, AND RELIGION IN AMERICAN CULTURE (1997) (explaining the importance of rediscovering and refitting spiritual foundations with progressive liberalism in contemporary politics); DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW (2004) (establishing a connection between the prophetic tradition of preaching and the defeat of segregation); THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR. AND THE STRUGGLE FOR ECONOMIC JUSTICE (2007).

17. King, *Facing the Challenge*, *supra* note 2, at 142.

18. Martin Luther King, Jr., *The Ethical Demands for Integration* (Dec. 27, 1962) [hereinafter King, *Ethical Demands*], *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 117–25.

19. *Id.* at 118.

20. *Id.*

21. *Id.*

> demands of integration fall within the scope of unenforceable demands. . . . Desegregation will break down the legal barriers and bring men together physically, but something must touch the hearts and souls of men so that they will come together spiritually. . . . True integration will be achieved by true neighbors who are willingly obedient to unenforceable obligations.[22]

In other words, while legislation and judicial decrees were "of inestimable value in achieving desegregation," they were only one step along the way to integration.[23] People must decide to act proactively to achieve full integration.

In an effort to move "hearts and souls" and encourage the will to act, Dr. King offered several ethical justifications for integration. First, he argued that the "sacredness of human personality" and our entitlement to "a legacy of dignity and worth" required integration;[24] second, that the denial of integration was the denial of freedom and of life itself;[25] third, that every person deserved to be treated with dignity; fourth, that freedom (achieved through equality) is a requirement for life itself; and fifth, that "integration is recognition of the solidarity of the human family."[26] Finally, he proclaimed that integration is right because "integration alone is consonant with our national purpose."[27]

Dr. King knew that integration would not occur without struggle. And so he repeatedly called for African American citizens and their supporters to seek the ballot, advocate for legal change, finance the movement for freedom and justice, and "develop intelligent, courageous, dedicated leadership."[28] He sought leaders who were "in love with justice" and humanity, not with publicity and money.[29] In order to achieve freedom and justice, he called people "to rise above the narrow confines of individualistic concerns to the broader concerns of all humanity,"[30] and to strive for "excellence in our various fields of endeavor."[31] Above all, Dr. King called for "love, mercy and forgiveness" to "stand at the center of our lives."[32]

Coretta Scott King noted that her husband had a "global vision for the future."[33] He saw the twentieth century as a time when we were "standing

22. *Id.* at 123–24.
23. *Id.* at 124.
24. *Id.* at 118–19.
25. *Id.* at 119–21.
26. *Id.* at 121.
27. *Id.* at 123.
28. King, *Facing the Challenge*, *supra* note 2, at 142–43.
29. *Id.* at 143.
30. *Id.* at 138.
31. *Id.*
32. *Id.* at 139.
33. KING, WRITINGS AND SPEECHES THAT CHANGED THE WORLD, *supra* note 13, at viii.

between two worlds—the dying old and the emerging new."[34] The dying world was the world of colonialism and imperialism where a Euro-American minority oppressed the majority people of color across the globe. The emerging world would include new nations coming from under "the iron feet of oppression" in Africa, Asia, the Middle East, and Eastern Europe.[35] It would also include the end of apartheid in America. Dr. King envisioned a "beloved community" based on interdependence, love, equality, and hope.[36]

B. King's Pragmatic View of Law

In discussing this vision for the future, Dr. King assessed many tools for creating change, including the significant role of litigation.[37] Part of the Civil Rights Movement strategy was to use the law creatively to extend the desegregation mandate of *Brown* to other areas of public accommodation.[38] Dr. King often wove references to important pre-*Brown* precedent such as *Dred Scott v. Sandford*[39] and *Plessy v. Ferguson*[40] into his messages, showing that he understood the power of the law to shape the social order.[41]

Initially for Dr. King, *Brown v. Board of Education* was more than a decision declaring segregated schools unconstitutional. In his 1956 address at the First Annual Institute on Non-Violence and Social Change, he heralded the decision as part of the changes that were ushering in a "new order of freedom and justice."[42] Speaking of the significance of *Brown*, he said,

> Along with the emergence of a "New Negro," with a new sense of dignity and destiny, came that memorable decision of May 17, 1954. In this decision, the Supreme Court of this nation unanimously affirmed that the old *Plessy* doctrine must go. This decision came as a legal and sociological death blow to an evil that had occupied the throne of American life for several decades. It affirmed in no uncertain terms that separate facilities are inherently unequal and that to segregate a child because of his race is to deny him equal protection of the law. With the coming of this great decision we

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34. King, *Facing the Challenge*, *supra* note 2, at 135.

35. *Id.* at 136.

36. COOK, *supra* note 16, at 111–39 (1997) (discussing the spiritual and social dimensions of the "beloved community" concept).

37. *See, e.g.*, KING, WHY WE CAN'T WAIT, *supra* note 11, at 23 (acknowledging the effective use of litigation by the NAACP to secure the long-denied recognition and enforcement of the constitutional rights of African American citizens).

38. *Id.* at 34.

39. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

40. Plessy v. Ferguson, 163 U.S. (19 How.) 537 (1896).

41. *See, e.g.*, King, *Facing the Challenge*, *supra* note 2, at 136–37 (referring to these cases as contributing to the "old order" of "tragic inequalities and ungodly exploitation" of blacks).

42. *Id.* at 138.

> could gradually see the old order of segregation and discrimination passing away, and the new order of freedom and justice coming into being.[43]

He characterized the call for the nullification of *Brown* in southern legislatures and the interposition against federal authority as "death groans from a dying system."[44] This decision was one of many factors that led African Americans to a "new sense of dignity and self respect."[45]

While King advocated for full integration after *Brown*, in 1963, he began to express frustration with the half-hearted efforts to enforce the desegregation mandate. Dr. King complained that at the beginning of 1963, only nine percent of southern black children were attending integrated schools.[46] He attributed the dilatory pace of progress to the Supreme Court's decision to return remedial power to states with a mandate to act "with all deliberate speed."[47]

> The Negro, has been deeply disappointed over the slow pace of school desegregation. He knew that in 1954, the highest court in the land handed down a decree calling for desegregation of schools 'with all deliberate speed.' He knew that this edict from the Supreme Court had been heeded with all deliberate delay. . . . If this pace were maintained, it would be the year 2054 before integration in southern schools would be a reality.[48]

Moreover, virtually no efforts were in progress to dismantle segregation in northern school systems.[49] In 1965, Dr. King observed that even in northern cities, "[s]chool segregation did not abate but increased" after *Brown*.[50]

In one of his last publications in 1967, *Where Do We Go From Here: Chaos or Community?,* Dr. King wrote, "we are now able to see why the Supreme Court decisions on school desegregation, which we described at the time as historic, have not made history."[51] The continuing disparity in

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43. *Id.* at 137–38.

44. *Id.* at 138.

45. Martin Luther King, Jr., *The Rising Tide of Racial Consciousness* (1960), *reprinted* in A TESTAMENT OF HOPE, *supra* note 2, at 145.

46. KING, WHY WE CAN'T WAIT, *supra* note 11, at 5.

47. *Id.* at 4 (citing Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (also known as *Brown II*)).

48. *Id.* at 5.

49. Gary Orfield, *Turning Back to Segregation* [hereinafter Orfield, *Turning Back*], *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 1, 7–8 (Gary Orfield & Susan E. Eaton eds., 1996) [hereinafter DISMANTLING DESEGREGATION].

50. Martin Luther King, Jr., *Next Stop: The North* (1965), *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 189.

51. Martin Luther King, Jr., *Where Do We Go from Here: Chaos or Community?* (1967) [hereinafter King, *Where Do We Go I*], *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at

financial resources allotted to predominantly black schools also hindered the fulfillment of the desegregation mandate.[52]

By 1968, fourteen years after *Brown*, Congress had declared illegal and the federal courts had declared unconstitutional the practice of racial segregation that encompassed every aspect of life in America.[53] Yet Dr. King saw parallels between the failed efforts to enforce civil rights during Reconstruction with the slow enforcement of civil rights in the 1960s, stating, "Just as the Congress passed a civil rights bill in 1868 and refused to enforce it, the Congress passed a civil rights bill in 1964 and to this day has failed to enforce it in all its dimensions."[54] In an essay published posthumously, Dr. King prophesied that

> [j]ustice for black people will not flow into society merely . . . from fountains of political oratory . . . . White America must recognize that justice for black people cannot be achieved without radical changes in the structure of our society. The comfortable, the entrenched, the privileged cannot continue to tremble at the prospect of change in the status quo.[55]

On April 4, 1968, the day of Dr. King's death, the status quo of segregation in public schools was still the norm.[56]

555, 561 (explaining that, according to the Southern Regional Council, twelve percent integration existed in the South as a whole and only two percent in the Deep South).

52. *Id.* at 559.

53. Congress passed major civil rights legislation in 1957, 1964, 1965, and 1968 to outlaw segregation in public accommodations, voting, housing, employment, and education. 1957 Civil Rights Act, Pub. L. No. 85–315, 71 Stat. 634 (codified as amended in scattered sections of 28 and 42 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.); Fair Housing Act of 1968, Pub. L. No. 90–284, tit. VIII, 82 Stat. 73, codified at 42 U.S.C. §§ 3601–31 (2000).

54. MARTIN LUTHER KING, JR., THE MARTIN LUTHER KING, JR. COMPANION: QUOTATIONS FROM THE SPEECHES, ESSAYS, AND BOOKS OF MARTIN LUTHER KING, JR. 47–48 (1993).

55. Martin Luther King, JR., *A Testament of Hope* (1968), *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 314.

56. *See* Gary Orfield, *The Southern Dilemma: Losing* Brown, *Fearing* Plessy [hereinafter Orfield, *Southern Dilemma*], *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 1, 8 (John Charles Boger & Gary Orfield eds., 2005) [hereinafter SCHOOL RESEGREGATION] (showing the percentage of Southern black students in majority white schools from 1954–2002).

III.
NORMATIVE VISIONS OF DESEGREGATION: FROM INTEGRATION TO UNITARY STATUS

A. The Integration Norm

After the Court's remedial command in *Brown v. Board of Education II* to desegregate "with all deliberate speed,"[57] state officials and local school boards resisted the idea that the Fourteenth Amendment required compulsory integration.[58] In furtherance of that resistance, school boards throughout the South devised race-neutral desegregation policies intended to delay integration.[59] Lower courts charged with enforcing *Brown* condoned the use of race-neutral plans,[60] despite their obvious and intentional failure to achieve integration. But on May 27, 1968, almost two months after Dr. King's death, the Supreme Court finally demanded the affirmative and race-conscious enforcement of *Brown*.[61]

In *Green v. County School Board*, the Court rejected the county school board's race neutral "freedom of choice" plan, which allowed students to choose where to enroll. The Court accused the school board of the "deliberate perpetuation" of racially segregated schools.[62] The justices called eleven years of delay "intolerable" and ordered "meaningful and immediate progress."[63] While these plans were not per se unconstitutional, the Court promised to strike down any plan that

57. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

58. For an example of one of the original cases consolidated with *Brown*, see Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (finding that *Brown* did not require integration and did not "forbid such segregation that occurs as a result of voluntary action").

59. For a brief discussion of the origins of "freedom of choice" plans, and their effect on desegregation, see Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity,* 60 TENN. L. REV. 63, 97–100 (1992).

60. *See, e.g.*, Green v. County Sch. Bd., 382 F.2d 338 (4th Cir. 1967), *rev'd*, 391 U.S. 430, 441 (1968) (striking down a typical race-neutral desegregation plan that had been upheld by the district court and court of appeals. In the New Kent County, Virginia, school system, children were given the option of choosing between the county's two elementary schools: one all white, the other all African American. The Court noted that in three years of operation under the plan, "not a single white child has chosen to attend [the black school] and 85% of Negro children still attend the all-Negro school."); Bowman v. County Sch. Bd., 382 F.2d 326, 328 (4th Cir. 1967) (holding that a racial integration plan was not required and that freedom of choice plan that gave black children an unrestricted right to attend any school in the system did not violate their constitutional rights); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385, 391 (5th Cir. 1967) (expressly abolishing certain types of freedom of choice plans).

61. *Green*, 391 U.S. at 437–48.

62. *Id.* at 438.

63. *Id.* at 439.

perpetuated segregation and to uphold plans intended to convert segregated school systems to unitary school systems.[64]

Green defined unitary status as the creation of "just schools" within one school system. The Court mandated that recalcitrant school boards "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[65] Justice Brennan concluded that school boards operating racially segregated dual school systems at the time of the *Brown I* and *Brown II* decisions had been "clearly charged with the affirmative duty to take whatever steps may be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[66]

The Court next affirmed the broad scope of the federal courts' remedial power to order effective remedies. In *Swann v. Charlotte-Mecklenberg Board of Education,* decided three years after Dr. King's death, the Supreme Court once again warned recalcitrant Southern school districts to cease their "deliberate resistance" to judicial mandates.[67] This time, Justice Burger wrote to "amplify guidelines" for schools to follow to meet their constitutional obligations to move from dual to unitary school systems.[68] Specifically, the Court called for school boards to "eliminate invidious racial distinctions" which existed in "transportation, supporting personnel, and extracurricular activities . . . [as well as] the maintenance of buildings and the distribution of equipment."[69] Further, schools were instructed to pay special attention to teacher assignment.[70]

As a result of the Court's aggressive, albeit delayed, intervention, the number of racially integrated schools increased. After *Swann,* more than 100 districts implemented desegregation plans.[71] Northern states came under scrutiny by the Court and were ordered to desegregate as well.[72] Schools in the South "maintained the relatively high levels of school integration under *Green, Swann,* and civil rights regulations through 1988."[73] Unfortunately, Dr. King was not alive to see the beginning of real progress towards desegregation.

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64. *Id.* at 441–42.
65. *Id.* at 442.
66. *Id.* at 437–38.
67. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 13 (1971).
68. *Id.* at 14.
69. *Id.* at 18.
70. *Id.* at 18–19.
71. Orfield, *Turning Back, supra* note 49, at 14.
72. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (ordering desegregation of *de facto* dual school systems).
73. Orfield, *Turning Back, supra* note 49, at 15.

B. From Integration to the Unitary Status Norm

Judicial support for integration quickly waned. Between 1971 and 1995, judicial assault on *Green* and *Swann* came from several directions as part of the Rehnquist federalism revolution intended to favor state over federal or judicial control generally.[74] In the meantime, former advocates of school integration also began to question the efficacy of the approach.[75]

As the Supreme Court became increasingly more conservative,[76] more justices began to emphasize the importance of allowing lower courts to return school boards to local control, even if schools within the system remained racially identifiable. Supervising courts could declare school systems "unitary," even if schools within the system remained segregated, as long as the school board proved it had "complied in good faith with the desegregation decree" and that "vestiges of past discrimination had been eliminated to the extent practicable."[77] As long as school boards did not return to *de jure* segregation, or intentionally create segregated schools in some manner, the Court would not intervene.[78]

In a series of contentious decisions, the Court, by a bare majority, slowly withdrew the authority of the federal judiciary to achieve meaningful integration of students.[79] The first assault on aggressive remedial measures to achieve integration began with the 1974 decision

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74. *See generally* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001); Herman Schwartz, *The Supreme Court's Federalism: Fig Leaf for Conservatives*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 119 (2001).

75. *See, e.g.*, Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 516 (1976) (calling for "civil rights lawyers to end their single-minded commitment to racial balance, a goal which, standing alone, is increasingly inaccessible and all too often educationally impotent").

76. Justice Stevens makes the point as he concludes his dissent in *Parents Involved*:

> The Court has changed significantly since it decided School Comm. of Boston in 1968. It was then more faithful to Brown and more respectful of our precedent then it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2800 (2007) (Stevens, J., dissenting).

77. "Vestiges" refer to remaining policies and practices traceable to a prior *de jure* dual system of education. Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991).

78. Washington v. Davis, 426 U.S. 229, 239 (1976) (requiring proof of intentional discrimination for claimed violations of the Fourteenth Amendment Equal Protection Clause). *Dowell* held that *Washington v. Davis* would apply to post-unitary status claims of intentional race discrimination in school assignment. *Dowell*, 498 U.S. at 250.

79. The unanimity in favor of desegregation during the Warren Court era of school desegregation litigation began to wane in the 1970s during the Burger Court and flipped to 5-4 decisions hostile to desegregation in the 1990s during the Rehnquist Court. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, *in* SCHOOL RESEGREGATION, *supra* note 56, at 29, 31 (discussing the change in the Court and its effect on increased segregation during the 1990s).

Milliken v. Bradley.[80] Realizing that racially integrated schools could not be achieved within the largely black Detroit school system, lower courts approved a desegregation plan that included the surrounding white suburban schools. However, the Supreme Court rejected the plan as an unconstitutional exercise of remedial power by the lower courts, because an interdistrict remedy that included school systems that had not practiced *de jure* segregation exceeded the equitable power of the federal courts. *Milliken* severely limited the scope of the district courts' equitable remedial powers for the first time.[81]

Second, the Court foreclosed the possibility of urban and suburban school districts working together voluntarily.[82] In *Missouri v. Jenkins* the Kansas City schools, under court order to desegregate, sought to attract white students voluntarily from the surrounding suburban school districts (since *Milliken* forbade court intervention) as a means of integrating the schools that were sixty-eight percent black. Nonetheless, the Supreme Court claimed that the pursuit of "desegregative attractiveness" could not be reconciled with *Milliken* and other cases that limited the district court's remedial authority.[83]

The Court reasoned that since minority children attended schools "equipped with facilities and opportunities not available anywhere else in the country," the district court should seek to restore state and local control of the still racially segregated school system.[84] In many respects, *Jenkins* assured the perpetuation of "separate but equal" schools absent creative measures by local school boards to avoid resegregation. The plans scrutinized by the Court in *Parents Involved* represented efforts by local school boards to operate creatively within the narrow confines of *Jenkins* and *Milliken.*

Third, the Court held that the constitutional mandate of *Brown* did not call for achieving racially balanced schools. According to *Milliken,* the constitutional right of a Negro child is "to attend a unitary school system" in their district,[85] not a racially balanced school within the system.[86] Rather, when schools acted in "good faith" to eliminate "the vestiges of past discrimination . . . to the extent practicable," a court-ordered desegregation

80. Milliken v. Bradley, 418 U.S. 717, 752 (1974) (rejecting the district court-ordered inclusion of suburban school districts in a plan to create racial balance in the Detroit school system).

81. *Id.* at 777 (White, J., dissenting) (accusing the majority of "incapacitating the remedial authority of the federal judiciary").

82. Missouri v. Jenkins, 515 U.S. 70 (1995) (undermining the possibility of urban and suburban cooperation to address the problem of segregated schools).

83. *Id.* at 98.

84. *Id.* at 102.

85. *Milliken*, 418 U.S. at 746.

86. *Id.* at 740–41 (interpreting *Swann* to mean that "desegregation does not require any particular racial balance in each school, grade, or classroom").

decree could be dismissed even when racial imbalance or single-race schools persisted in a school district.[87] Therefore, a finding of unitary status ended the local school board's legal obligation to integrate schools.

Finally, the Court rejected arguments that racial segregation in housing contributed to racial segregation in schools.[88] The Court rejected evidence which established a causal connection between state action and the creation of segregated housing.[89] This prevented school officials from accounting for changing residential demographics in crafting desegregation plans.

Eventually school boards across the country began to argue that the multitude of court-ordered local integration plans had succeeded in creating "unitary systems." The post-*Milliken* jurisprudence of the Court opened the way for hundreds of school districts to be released from court-ordered desegregation. School boards, however, continued to struggle with the question of racial imbalance and financial inequity. In other words, by releasing school boards from judicial supervision, the Court set in motion a retreat to separate but equal.

C. The Persistence of Financial Inequity

After *Brown,* Dr. King decried both racial segregation and the continuing disparity in financial resources allotted to predominantly black schools. Following his death, the Supreme Court addressed the issue of

87. Bd. of Educ. v. Dowell, 498 U.S. 237, 246 (1991) (holding that lower courts should apply a good faith test in determining whether a school board has achieved unitary status); Freeman v. Pitts, 503 U.S. 467, 489 (1992) (permitting incremental or partial withdrawal of court supervision and control); Milliken v. Bradley, 418 U.S. 717, 740–41, 746 (defining the constitutional right of black children as the right to attend school in a unitary district without regard to any particular racial balance in each school, grade, or classroom).

88. *Milliken*, 418 U.S. at 721, 751 (rejecting district court finding that state action, combined with private action, established and maintained the pattern of residential segregation in Detroit and surrounding suburbs that made intra-district desegregation impossible); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435–36 (1976) (reasoning that school districts are not required to address the "normal pattern of human migration" that creates the racial mix of housing and therefore schools); Missouri v. Jenkins, 515 U.S. 70, 94–96 (1995) (rejecting reliance on "white flight" as a justification for expansion of a remedial plan to attract suburban students to urban schools); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2758 (2007) (characterizing the effect of racially identifiable housing patterns on perpetuating racially isolated schools as societal discrimination that is beyond the scope of the school board's authority to address).

89. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (documenting the devastating impact of residential segregation on African American socioeconomic advancement). *See generally* Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program,* 71 TUL. L. REV. 413 (1996) (attributing entrenched housing patterns to widespread government housing discrimination). *See also* Gary Orfield, *Segregated Housing and School Resegregation* [hereinafter Orfield, *Segregated Housing*], *in* DISMANTLING DESEGREGATION, *supra* note 49, at 291, 292–95 (chronicling the inconsistent position of the Supreme Court on the role of state action in housing patterns that perpetuate school segregation).

unequal funding of schools in *San Antonio School District v. Rodriguez.*[90] Suit was filed on behalf of school children from poor, mostly minority families living in school districts with low property tax revenues, who complained that school districts with higher property values had greater financial resources. The plaintiffs sought the equitable distribution of tax revenues to create parity among school districts. In *Rodriguez,* the Court rejected the claim that there is a fundamental constitutional right to education that prohibits "relative differences in spending" between school districts.[91]

Following *Rodriguez,* civil rights groups filed suits in various state courts throughout the nation to challenge inequities in public school financing. The arguments in these cases were based on state constitutions, which provided for a fundamental constitutional right to quality education. Plaintiffs proffered evidence to establish a clear pattern of revenue disparities between property-rich and property-poor school districts, which result in disparities in district spending per student. In cases where a court found that insufficient funding had resulted in a state's failure to meet its constitutional duty, the court ordered the state to restructure its state public school funding system.[92]

Interestingly, the fiscal equity litigation accepted the status quo of racial segregation, focusing instead on parity in financing and the quality of education received. The approach in these cases was strikingly similar to the NAACP Legal Defense Fund's pre-*Brown* strategy of challenging the "equal" prong of the "separate but equal" doctrine to remedy disparities in teachers' salaries, book budgets, and money spent on school buildings.[93]

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90. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

91. *Id.* at 37.

92. In *Tennnessee Small School Systems v. McWherter,* 91 S.W.3d 232 (Tenn. 2002), the Supreme Court of Tennessee held that the public school funding system failed to comply with the state's constitutional obligation to formulate and maintain a system of public education affording a substantially equal educational opportunity to all students. In *Campaign for Fiscal Equity, Inc. v. New York,* 801 N.E.2d 326 (N.Y. 2003), the New York Court of Appeals held that New York City schoolchildren were not receiving their constitutionally-mandated opportunity for a sound basic education. High courts in Connecticut, Texas, West Virginia, New Jersey, and North Carolina have also based decisions on school equity on the fundamental right to education guaranteed under those states' constitutions. *See, e.g.,* Sheff v. O'Neill, 678 A.2d 1267, 1273 (Conn. 1996) (striking down Connecticut's school finance scheme and requiring the state to examine financial inequities in light of racial isolation in the school systems); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989) (ruling that Texas's school financing system violated the state constitutional requirement for an "efficient" system of public education); Horton v. Meskill, 486 A.2d 1099, 1107 (Conn. 1985) (declaring the state system of educational financing to achieve statewide equity constitutional).

93. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 118–19 (1994) (chronicling the development and execution of legal strategies to end segregation); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND

But while arguing for schools to be "equal" was part of the overall strategy in the 1940s and 1950s to confront apartheid and reverse *Plessy's* "separate but equal" doctrine, the fiscal equity litigation started in the 1970s did not seek to directly challenge schools' status as racially separate.[94]

IV.
THE ROBERTS COURT SPEAKS ON SCHOOL DESEGREGATION

In 2007, the plurality of a fractured Supreme Court held that school boards seeking to perpetuate racial diversity violated the Equal Protection rights of a small number of white children denied admission to already predominantly white schools.[95] Although a majority of the Court, through concurrence and dissent, found the use of race-conscious remedies to perpetuate diversity constitutional,[96] the plurality's approach would virtually end the federal judiciary's desegregation mandate. The plurality conflated the use of race conscious remedies to end unconstitutional segregation in education, with the use of race in numerous local school boards across America to maintain the racial integration achieved after *Green* and *Swann,* and to prevent resegregation.

A. A View of Segregation, South and North

Cases challenging legal segregation from Delaware, South Carolina, Virginia, and Kansas were consolidated to comprise the *Brown* decision. The post-*Brown* remedies primarily targeted school systems in the former states of the confederacy, including Kentucky. Northern and western states, like Washington, would eventually grapple with the reality of *de facto* segregation that produced the same results as segregation by law. Ultimately, the mandate of *Brown* to desegregate schools reached across the entire nation leaving virtually no state untouched.

While Louisville and Seattle both voluntarily sought to perpetuate and further integration gains achieved during the *Green/Swann* era, they started from different ends of the country. Desegregation efforts in some areas of the North and West rivaled those in the South. As Dr. King discovered traveling across the nation, "the straightjackets of race prejudice and discrimination do not wear only southern labels. The subtle, psychological technique of the North has approached in its ugliness and

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BLACK AMERICA'S STRUGGLE FOR EQUALITY 134–36 (1975) (describing the evolution of the separate is not equal argument).

94. *But see Sheff,* 678 A.2d at 1278 (making the connection and ordering remedies to address the inequitable distribution of state educational funds and severe racial segregation).

95. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

96. *Id.* at 2788 (Kennedy, J., concurring); *Id.* at 2797 (Stevens, J., dissenting); *Id.* at 2800 (Breyer, Ginsburg, Stevens, JJ., dissenting).

victimization of the Negro the outright terror and open brutality of the South."[97] The history of school desegregation in Seattle shows, as King discovered, that negative attitudes about integration generally associated with southern cities like Louisville were not confined to the South.

Seattle had never operated under a court order to desegregate, but segregated housing patterns made it necessary for the school board to use race as a factor in school assignments to achieve diversity and avoid racial isolation within the school system.[98] In fact, in 1989, state housing officials permitted a tax credit for low- and moderate-income homebuyers who bought homes in places that would aid school integration.[99] After *Jenkins*, however, the Seattle School Board unanimously voted between 1996 and 1998 to end mandatory busing.[100] By 1999, Seattle school populations continued to mirror the pattern of segregated housing.[101] In a continuing effort to desegregate schools, Seattle implemented a student assignment plan that used race as a "tie-breaker" between 1998 and 2002 in the school assignment lottery.[102]

After *Brown*, the Jefferson County public schools in Louisville, Kentucky continued to operate segregated schools until placed under a court-ordered desegregation plan from 1975–2000.[103] In 2000, the district court declared that the school board had, "to the extent practicable," achieved unitary status.[104] However, a year after being released from the decree, the school board chose to create a "managed choice plan" to maintain integrated schools.[105]

Parents Involved addressed whether local school boards in both cities could voluntarily remedy the existence of racially isolated schools without a new finding of intentional discrimination. The Court also looked at whether the Constitution allows local school officials to include consideration of racial diversity in student assignment plans. Respondents argued that promoting diversity to maintain integration and avoiding

97. KING, WHY WE CAN'T WAIT, *supra* note 11, at 14.

98. *Parents Involved*, 127 S. Ct. at 2747.

99. Orfield, *Segregated Housing*, *supra* note 89, at 327.

100. *Seattle School Board Votes to End Mandatory Busing for Desegregation in Elementary Schools*, HistoryLink.org: The Official Encyclopedia of Washington State History (N.D.) (on file with author).

101. Thirty-three percent of the district's elementary schools "had 80% or more minority students." *Id.*

101. *Parents Involved*, 127 S. Ct. at 2740–41.

103. *Id.* at 2749.

104. *Id.*

105. The plan required all nonmagnet schools to maintain an enrollment of African American students between fifteen and fifty percent. After their initial assignment, students had the option to transfer between nonmagnet schools in the district unless the school was already at capacity or the transfer would violate the racial composition guidelines as established by the school board. *Id.* at 2749–50.

resegregation constitute compelling state interests. The Court splintered on both issues.

B. A Fractured Court Grapples With Race

The decision included two "majority" opinions and one "plurality."[106] The Roberts majority, including Justice Kennedy, struck down both plans as not narrowly tailored to the educational goals asserted by the school districts.[107] The parts of Roberts's opinion that Justice Kennedy did not join avoided deciding whether diversity and avoiding resegregated, racially isolated schools were compelling state interests that justified considering race in K-12 school assignments.[108] First, Roberts distinguished the diversity interest approved in *Grutter v. Bollinger* from the diversity interest in the present case.[109] Second, he reasoned that the alleged compelling interests were merely a restatement of the concept of "racial balancing."[110] However, the Breyer dissenters,[111] coupled with Justice Kennedy's concurring opinion,[112] formed a majority view that diversity in K-12 education and avoiding resegregated or racially isolated schools are compelling state interests.

Doctrinally, the Roberts plurality approached the issues with narrow, mechanical application of *stare decisis*.[113] The plurality saw no need for the Seattle and Louisville school systems to remedy the continued existence of segregated schools, despite the educational disadvantages attributed to the perpetuation of racially isolated schools. According to the plurality, achieving unitary status in the Louisville schools under the *Dowell/Freeman* criteria removed the "remedying the effects of past

106. I refer to the parts of Chief Justice Roberts's opinion in which he is writing for only four justices as the "plurality" opinion even though Justice Breyer's dissent garnered the same number of votes and even though five justices disagreed with some of its contentions.

107. *Parents Involved*, 127 S. Ct. at 2753–55.

108. *Id.* at 2757–59 (Roberts, J., writing for four).

109. *Id.* at 2754, 2757 (claiming that these are "considerations unique to institutions of higher education" and that "working backward" to achieve racial balance, rather than "working forward" from a demonstrated level of beneficial diversity, constituted "a fatal flaw" in the local school boards' plans).

110. *Id.* at 2758–59. ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.").

111. *Id.* at 2800–37 (Breyer, J., dissenting).

112. *Id.* at 2788–97 (Kennedy, J., concurring).

113. *See id.* at 2816 (Breyer, J., dissenting) (chastising the plurality for using "rigid," "technical," and "mathematical logic" and for mischaracterizing as dicta, language in *Swann* and other cases endorsing race-conscious remedies).

intentional discrimination" justification that would make race-conscious admissions decisions constitutionally permissible.[114] Chief Justice Roberts reasoned that "the Constitution is not violated by racial imbalance in the schools, without more."[115] Thus, the plurality opinion carried the potential to permanently institutionalize separate and unequal racially identifiable public schools.[116] Moreover, as Justice Stevens's dissent explained, the plurality "rewrites the history"[117] of *Brown* by implying that *de jure* segregation invidiously denied equal education to white children.[118] This revisionist colorblind interpretation of school desegregation jurisprudence exemplified disloyalty to *Brown.*[119]

Justice Kennedy's concurrence ensured that promoting diversity and avoiding racial isolation in America's public schools can be compelling state interests in narrowly tailored school assignment plans. Justice Kennedy characterized the plurality's view as "an all-too-unyielding insistence that race cannot be a factor" and "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."[120] He declined to endorse the Chief Justice's opinion, which he viewed as "open

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114. *Id.* at 2752–53 (Roberts, C.J., plurality).

115. *Id.* at 2752 (quoting Milliken v. Bradley, 433 U.S. 267, 280, n.14 (1977)).

116. *See, e.g.*, T. Keung Hui, *Schools Relax Goals on Student Diversity,* THE NEWS & OBSERVER, SEPT. 25, 2007, at B1 (reporting plans to relax nationally recognized economic diversity policy); Sam Dillon, *Alabama School Rezoning Plan Brings Out Cry of Resegegation,* N.Y. TIMES, Sept. 17, 2007, at A1 (discussing the plan in Tuscaloosa to transfer black children in integrated schools to lower performing, all black schools after white parents complained of overcrowding); Joseph Berger, *A Successful Plan for Racial Balance Now Finds Its Future Uncertain,* N.Y. TIMES, Aug. 22, 2007, at B7 (describing community concerns over the constitutionality of White Plains's successful "controlled choice" plan to achieve racial balance).

117. *Id.* at 2798 (Stevens, J., dissenting). Justice Breyer agrees, writing:

> The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local government to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.

Id. at 2800–01 (Breyer, J., dissenting).

118. Citing the Chief Justice's opinion, Justice Stevens compares the statement that "before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin," (*id.* at 2767–68) to Anatole France's observation, "[T]he majestic equality of the law, forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." *Id.* at 2798 (Stevens, J., dissenting). *See also* Goodwin Liu, *"History Will Be Heard": An Appraisal of the* Seattle/Louisville *Decision,* 2 HARV. L. & POL'Y REV. 53, 53 (2008) (discussing "the tension between legal formalism and fidelity to history and social facts").

119. *Parents Involved,* 127 S. Ct. at 2800 (Stevens, J., dissenting).

120. *Id.* at 2791 (Kennedy, J., concurring).

to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling."[121] He concluded that the plurality was "profoundly mistaken" to suggest that the Constitution mandates that state and local school authorities accept the status quo of racial isolation in schools.[122] Most notably, Justice Kennedy rejected the plurality's colorblind constitutionalism.[123] "In the real world, it is regrettable to say, [constitutional colorblindness] cannot be a universal constitutional principle."[124]

Justice Stevens accused the plurality of misusing precedent, citing the mischaracterization of some of his past opinions as an example.[125] Justice Stevens contended that he and several other justices consistently adhered to the view that "a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason."[126] He pointed out that the only precedent employed to support the plurality's claim that strict scrutiny must apply in evaluating all uses of race by the government were other plurality decisions.[127]

Another point of contention among the justices was the meaning of *Swann.* Justice Breyer quoted extensively from *Swann* to support the view of the dissenters that the Equal Protection Clause permits local school boards to use race-conscious criteria even when they are not compelled to do so by the Constitution. Specifically, he pointed out that in *Swann,* a unanimous Court wrote,

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well

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121. *Id.*

122. *Id.*

123. *See also* Grutter v. Bollinger, 539 U.S. 306, 392–93 (2003) (Kennedy, J., dissenting on the grounds that the law school's admissions plan was not narrowly tailored and explaining that "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity").

124. *Parents Involved,* 127 S. Ct. at 2792. *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1972) (Brennan, J., dissenting) ("[W]e cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."); *id.* at 401–02 (Marshall, J., dissenting) ("It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.").

125. *Parents Involved,* 127 S. Ct. at 2798–99 (Stevens., J., dissenting).

126. *Id.* at 2798 n.3.

127. *Id.* at 2798 (explaining that "[t]he only justification for refusing to acknowledge the obvious importance of that difference is the citation of a few recent opinions—none of which even approached unanimity—grandly proclaiming that all racial classifications must be analyzed under 'strict scrutiny'").

> conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion of the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.[128]

The plurality considered this language to be dicta and only relevant in cases involving judicial findings of *de jure* segregation.[129] Conversely, the dissenters viewed this language as stating "a basic principle of constitutional law."[130]

By rejecting the Seattle and Louisville plans, the opinion created the impression that colorblind constitutionalism holds sway in the entire Court. But in fact the opinion did not declare the goal of diversity in public schools unconstitutional. Ultimately, the Court extended *Grutter* to establish the proposition that diversity in all public education constitutes a compelling state interest, which justifies the consideration of race in student assignment. In addition to diversity and remedying the effects of past discrimination,[131] five justices also accepted as compelling the use of race in decision-making to avoid *de facto* resegregation. Thus, the fractured Court sent the nation's school boards back to the drawing board to use diversity in school assignment decisions in a more narrowly tailored plan.

C. The Spirit of Plessy Resurrected

The doctrinal schism on the Roberts Court created some uncertainty for local school boards. But these cases resonated more loudly because of the spirit and tone of the plurality opinion and the opposition to that spirit by Justice Kennedy's concurrence and Justices Stevens's and Breyer's dissents.

Unlike *Brown,* the *Parents Involved* plurality expressed no concern for the "hearts and minds" of children. Instead, their opinion resurrected the spirit of *Plessy v. Ferguson.*[132] The *Plessy* Court, like opponents of affirmative action, considered the idea that segregation generated feelings of inferiority a fallacious assumption.[133] The justices asserted that segregation "stamps the colored race with a badge of inferiority . . . solely

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128. *Id.* at 2811–12 (Breyer, J., dissenting) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

129. *Id.* at 2816 (Breyer, J., dissenting).

130. *Id.* at 2812.

131. City of Richmond v. Croson, 488 U.S. 469, 486–94 (1989) (affirming that remedying the effects of past discrimination is a compelling state interest that justifies the narrowly tailored use of race in state action).

132. 163 U.S. 537 (1896). Liu claims that the plurality embraces the legacy of *Plessy* by adopting a "radical formalism of constitutional interpretation in the face of contrary social facts" by ignoring the social meaning of segregation. Liu, *supra* note 118, at 60.

133. *Plessy*, 163 U.S. at 551.

because the colored race chooses to put that construction on it."[134] The *Brown* Court, conversely, accepted the rudimentary social science research of the time establishing a causal relationship between racial segregation and a sense of inferiority in the heart and mind.[135] Since *Brown,* "the social science evidence on the educational benefits of integrated education for all students has become more definitive."[136] The preponderance of findings from the long-range social science, behavioral, and educational research demonstrates that "racial composition matters for educational outcomes."[137]

The Roberts Court reviewed this extensive research on the benefits of integrated education submitted in the *Brief of 553 Social Scientists as Amici Curiae in Support of Respondents.*[138] The brief concurred with the school boards that race-conscious student assignment policies are necessary to maintain racially desegregated schools. The social scientists submitted extensive documentation to establish that racial integration promotes cross-racial understanding, reduces racial prejudice, improves critical thinking and academic achievement, affords greater life opportunities, reduces residential segregation, increases parental involvement, and better prepares students for a diverse workforce. Their research also showed that students in racially isolated minority schools experienced higher teacher turnover, lower teacher quality, less beneficial cross-cultural exposure, and lower educational outcomes.[139] The plurality, however, considered this evidence inconclusive.[140]

V.
DR. KING AND THE BATTLE FOR HEARTS AND MINDS

We come now to the question of whether Dr. King would consider that justice was served in *Parents Involved* with regard to the

134. *Id.* at 551.

135. Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

136. Rosalyn A. Mickelson, *The Social Science Evidence on the Effects of Diversity in K-12 Schools,* 16 POVERTY & RACE RESEARCH ACTION COUNCIL 8, 8 (Sept./Oct. 2007) (summarizing the positive effects of desegregated schools on critical thinking and problem solving skills, achievement in mathematics and language and the harmful effects of racial isolation).

137. *Id.* at 9.

138. Brief of 553 Social Scientists as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915).

139. *Id.*

140. *Parents Involved,* 127 S. Ct. at 2755 (deciding that the debate over the benefits of racial diversity in elementary and secondary schools need not be resolved, since the plans were not narrowly tailored). Justice Breyer points out that even the social science research cited by Justice Thomas conceded some educational benefit in having diversity in the classroom. *Id.* at 2824 (Breyer, J., dissenting).

constitutional right to equal educational opportunity. Clarence Jones suggested that Dr. King always looked for answers "by working backwards to find the source of the problem."[141] For Dr. King, the problem of segregated and underfunded education was part of the larger problem of poverty, racial hierarchy, and injustice. In answering the question, "Where do we go from here?," Dr. King stated, "[W]e must honestly face the fact that the [Civil Rights M]ovement must address itself to the question of restructuring the whole of American society."[142]

Dr. King taught that oppression and social injustice crushed the inner spirit. He tied racism, economic exploitation, and war together as the "triple evil"[143] that resulted in oppression and injustice. He believed that these evils caused injury to the heart and mind. The idea of "heart and mind" refers to our entire mental and moral activity. His concern for the heart and mind far exceeded even that of the *Brown* Court and flowed from his call to preach the Gospel.

He repeatedly described how centuries of rationalizing the inferiority of Africans and other people of color led Europeans to believe their own socially constructed lies about their racial supremacy. Dr. King wrote,

> In their relations with Negroes, white people discovered that they had rejected the very center of their own ethical professions. . . . White men soon came to forget that the southern social culture and all its institutions had been organized to perpetuate this rationalization. They observed a caste system and quickly were conditioned to believe that its social results, which they had created, actually reflected the Negro's innate and true nature.[144]

In other words, the socially constructed paradigms of racial inferiority and racial superiority became the entrenched norms from colonial America to the present. In *Loving v. Virginia* the Court finally acknowledged that the struggle for racial equality was not simply against segregation; the struggle was against white supremacy.[145] Recent displays of racial domination, such as the spate of people hanging nooses in public, suggest the internalized sense of superiority that continues to influence the hearts and minds of some white Americans today.[146]

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141. CLARENCE B. JONES & JOEL ENGEL, WHAT WOULD MARTIN SAY? 87 (2008).

142. Martin Luther King, Jr., *Where Do We Go from Here?* (Aug. 16, 1967) [hereinafter King, *Where Do We Go II*], *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 250.

143. *Id.*

144. Martin Luther King, Jr., *Our Struggle* (1956) [hereinafter King, *Our Struggle*], *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 75.

145. Loving v. Virginia, 388 U.S. 1, 7 (1967).

146. Ashley Fantz, *Noose Incidents: Foolish Pranks or Pure Hate?*, CNN, Nov. 1, 2007, http://edition.cnn.com/2007/US/11/01/nooses/ (reporting between forty and fifty suspected hate crimes involving nooses following the Jena, Louisiana demonstration).

Dr. King also examined the impact of long-term systemic racial injustice and brutality on African Americans. Physical slavery ended, but "mental slavery" continued.[147] "In time," he wrote, "many Negroes lost faith in themselves and came to believe that perhaps they really were what they had been told they were—something less than men."[148] It concerned Dr. King that numbers of African Americans, especially in the South, had internalized this belief in their own inferiority to keep "racial peace."[149] Moreover, he characterized life for African Americans in Northern inner cities as living in the "triple ghetto" of race, poverty, and human misery.[150]

So much of the pathology Dr. King described in his early writings continues to resonate in American society.[151] Dr. King might agree that there is a causal connection between the deterioration of the black family, artistic expressions that degrade women and glorify crime, and the internalized sense of unworthiness he often discussed. Jones, Dr. King's lawyer and long-time friend, believes that the still-wounded hearts and minds that manifest in the form of intra-community violence would "overwhelm" Dr. King.[152]

Dr. King hoped that the struggle for civil and human rights would result in a more self confident, less fearful people emerging from the black community to fight against inequality.[153] He embraced aspects of Black Power that promoted recovery from the burdens of perpetual oppression. In a 1968 interview, before the annual convention of the Rabbinical Assembly, Dr. King explained that Black Power was desperately needed in the black community. "Black people have been ashamed of themselves,"[154] because they have been characterized as inferior for centuries.[155] And so the man of faith called for love-centered, nonviolent revolution.[156]

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147. King, *Facing the Challenge*, *supra* note 2, at 137. *See generally* CARTER G. WOODSON, THE MIS-EDUCATION OF THE NEGRO (1933).

148. King, *Our Struggle*, *supra* note 144, at 75.

149. *Id.*

150. Transcript of "Face to Face" Television News Interview (July 28, 1967), *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 394, 396.

151. For a recent debate on the question of personal versus societal responsibility for these phenomena, see ERIC MICHAEL DYSON, IS BILL COSBY RIGHT?: OR HAS THE BLACK MIDDLE CLASS LOST ITS MIND? (2006) (arguing for societal accountability for the continued existence of racial discrimination), and BILL COSBY WITH ALVIN F. POUSSAINT, COME ON PEOPLE: ON THE PATH FROM VICTIM TO VICTORS (2007) (arguing for blacks to take personal responsibility for the deterioration of the black family).

152. JONES & ENGEL, *supra* note 141, at 83–84.

153. "The extreme tension in race relations in the South today is explained in part by the revolutionary change in the Negro's evaluation of himself and his destiny and by his determination to struggle for justice." King, *Our Struggle*, *supra* note 144, at 75–76.

154. Conversation with Martin Luther King (March 25, 1968), *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 657, 663–64.

155. *Id.* at 664.

156. Martin Luther King, Jr., *Nonviolence and Racial Justice* (1957), *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 6–8.

Dr. King challenged Americans to have the moral courage to stand united to free our children from "a permanent life of psychological death"[157] caused by the message of inferiority aimed at the heart and mind. Dr. King considered education as one benefit that would forestall a "psychological death" for many African American and poor children. Therefore, Dr. King would most likely view the plurality decision as having wounded the cause of social justice generally and racial justice specifically.

The principle of heart-and-mind injury in law is referred to as stigmatic injury. The notion of stigmatic injury in school desegregation and affirmative action case law has been critiqued for its use and misuse. On the one hand, contemporary social scientists overwhelmingly reject the stigmatic injury theory, in part because it has been used to imply that African Americans and predominately black educational institutions are in fact inferior.[158] On the other hand, opponents of affirmative action appropriated the stigmatic injury theory to argue that affirmative action, not discrimination, has engendered a sense of inferiority in minority students.[159] In response, proponents argue that affirmative action removes the stigma of inferiority by opening the door to opportunities for more interaction across racial lines.[160]

Controversy continues to surround claims like those of Dr. King and the *Brown* Court that slavery, subsequent *de jure* segregation, and the resulting societal discrimination created a sense of inferiority about and among the oppressed.[161] While Dr. King supported efforts to empower African Americans economically and politically, he repeatedly and effectively stressed the importance of acknowledging the adverse psychological effects that resulted from the deeply entrenched legal paradigm of white superiority and black inferiority.[162] Given his emphasis

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157. King, *Facing the Challenge*, *supra* note 2, at 143.

158. Wendy Brown-Scott, *Justice Thurgood Marshall and the Integrative Ideal*, 26 ARIZ. ST. L.J. 535, 541–42 (1994) (explaining how Marshall used the stigmatic injury theory to support the injury claim in *Brown*).

159. For a typical expression of opposition to affirmative action and diversity programs, see THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 16, 37–60 (1984) (arguing against race-based differential treatment because it is premised on a belief in the "innate inferiority" of blacks). *See also* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 5–9 (2000) (summarizing the affirmative action debate); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 481 (2004) (arguing that "blacks are the victims of affirmative action, not the beneficiaries").

160. *See, e.g.*, CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES 78–83 (1996) (summarizing several justifications for supporting or opposing affirmative action).

161. For an in-depth analysis of the adverse psychological effects of colonization, see generally FRANTZ FANON, THE WRETCHED OF THE EARTH (1963).

162. The Supreme Court relied on the principle of white superiority and supremacy in numerous cases. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Plessy v. Ferguson, 163 U.S. (19 How.) 537 (1896). Even the dissent in *Plessy*, which disagreed with the endorsement of the separate but equal doctrine as a matter of

on affirming the value of human dignity, the Roberts Court's plurality opinion would fall short in his eyes on that count.

Dr. King, of course, was pragmatic about the inability of the law to change hearts and minds. While he applauded the major role of legislation and judicial decrees in the social justice movement, he often noted that "[m]orality cannot be legislated," but "behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless."[163] Perhaps, then, the *Parents Involved* plurality's failure to take into account the evidence of the social and psychological benefits that flow from racial diversity in the classroom, especially in early education, would have disappointed but not surprised Dr. King.

But disappointment would never allow Dr. King to abandon the quest for racial diversity in elementary and secondary education. Certainly, the changed landscape of public education since 1968 and the fact that schools now voluntarily strive for diversity would likely encourage Dr. King.[164] And so, despite his frustrations, Dr. King would promote enforcement of the cobbled-together *Parents Involved* "majority" decision as a matter of principle.

Above all, Dr. King called for reshaping fundamental attitudes and beliefs about the worth of people of color, who are likely to be the majority of Americans in less than fifty years.[165] These changing demographics create an urgent need to reshape our educational system to accomplish "transformative desegregation" of the heart and mind, consistent with Dr. King's spoken and written messages. Transformative desegregation is "intellectual desegregation,"[166] intended to go beyond the models of desegregation that emphasize simply putting children of different races in close physical proximity, or avoiding harm to whites.[167]

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constitutional law, concurred that whites were superior to blacks. *Id.* at 559 (Harlan, J., dissenting).

163. *See e.g.*, King, *Ethical Demands*, *supra* note 18, at 124.

164. *See, e.g.*, Stephanie Francis Ward, *Schools Cast About for New Diversity Plans*, A.B.A. J. E-REPT., July, 6, 2007 (discussing the strong support for diversity in public education) (on file with author); Antoinette Konz & Chris Kenning, *Desegregation: The New Proposal; Jefferson Schools Unveil Plan to Keep Diversity*, COURIER-JOURNAL, Jan. 29, 2008 (describing the new plan for Louisville intended to maintain racial, ethnic, and economic diversity); Keung Hui, *Wake and Brown v. Board of Education*, THE NEWS & OBSERVER, July 8, 2007, at A26 (discussing interest of other school boards in Wake County, North Carolina's approach to "keep the dream of *Brown* . . . alive after the recent Supreme Court ruling"); William Yardley, *Seattle Schools Take Stock After Justices Issue Ruling*, N.Y. TIMES, July 1, 2007, at A19 (viewing the decision as helping school officials find new ways to move towards diversity).

165. In fact, according to some experts, two significant causes of the declining percentage of white students in the South are the influx of African Americans and international migration. Orfield, *Southern Dilemma*, *supra* note 56, at 10.

166. Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER, RACE & JUST. 315, 382 (1999).

167. *Id.* at 370–73 (discussing the evolution of various judicial concepts of desegregation).

Transformative desegregation first requires that students unlearn the racial superiority/inferiority model, a process described by bell hooks as "decolonization."[168] Second, transformative desegregation requires curricula changes in public education to undo the harm caused by the distorted images of people of color shaped in the crucible of oppression. Finally, Dr. King would promote equity in school financing to transform the learning environment into one that recognizes the human dignity and worth of each child.[169] In other words, he would embrace strategies to achieve both transformative desegregation and financial equity.

VI.
A CONCLUDING PRAYER FOR RELIEF: COMMUNITY, NOT CHAOS

While the end of legal segregation during Dr. King's lifetime marked a major paradigm shift, it also exposed the seemingly intractable and tangled roots of racism and the resulting political disenfranchisement, economic disparities, and other social injustices. In the field of education, the Court, after years of calculated delay, charged local school boards with the affirmative duty to eliminate racial discrimination "root and branch."[170] But although the Civil Rights Movement cut the branches of *de jure* segregation, the roots of racism run deep throughout the nation's past and present. Glaring vestiges of the Jim Crow era still remain in the racially segregated and underfinanced public school systems that struggle to educate students in both the North and South.

Dr. King's last writings suggest his weariness with recalcitrance, yet he died in the midst of struggle. As a pastor and civil rights leader, Dr. King modeled his action and teaching after the Old Testament prophetic messengers who he frequently wrote about as a theology student.[171] Dr. King admired the Old Testament's biblical prophets because they challenged the failure of the political and social order of their time and sparked "rebellion and renewal motivated by prophetic truth."[172] Like the biblical prophets, Dr.

168. *Id.* at 321.

169. Dr. King's last writing suggested a subtle move towards addressing financial equity with less emphasis on integration: "[o]n the educational front, the ghetto schools are in bad shape in terms of quality, and we feel that a program should be developed to spend at least a thousand dollars per pupil. Often, they are so far behind that they need more and special attention, the best quality education that can be given." *Id.* at 67.

170. Green v. County Sch. Bd., 391 U.S. 430, 437 (1968).

171. CHAPPELL, *supra* note 16, at 46 (discussing King's 1948 essay on the "rebel prophet" Jeremiah). Of course King was also heavily influenced by earlier proponents of the social gospel and Mahatma Gandhi. *See, e.g.*, King, *Pilgrimage*, *supra* note 9, at 56–60.

172. CHAPPELL, *supra* note 16, at 47. The modern prophetic tradition employed by King influenced African American political rhetoric and the development of liberation theology. *See, e.g.*, JAMES H. CONE, A BLACK THEOLOGY OF LIBERATION 37 (20th anniversary ed. 1990) (giving credit to King for building the foundation for liberation on "the theological character of the black community"); DWIGHT N. HOPKINS, SHOES THAT FIT

King criticized the moral decline and institutional failures that resulted from what he described as "the complexity of human motives and the reality of sin on every level of man's existence . . . [and of] collective evil."[173] Dr. King's leadership over the Montgomery Improvement Association's 381-day bus boycott, which resulted in economic and judicial forces coming to bear to end segregation in local public transportation,[174] and his final speech in Memphis exemplified his role as a prophetic messenger.[175]

Near the end of his life, Dr. King challenged individuals and societies to escape from the deeply entrenched social and economic injustice that resulted in wounded spirits. He sought to show low-income white Americans the need to join with African Americans to petition the government for an economic bill of rights, calling for "an all-out world war against poverty."[176] He demanded that black clergy and the black middle class join in the struggle for an end to racism and economic injustice in the public and private sectors.[177] But his charge to every American was to

> be dissatisfied until those that live on the outskirts of hope are brought into the metropolis of daily security . . . until the dark yesterdays of segregated schools [are] transformed into bright tomorrows of quality, integrated education . . . until integration is not seen as a problem but as an opportunity to participate in the beauty of diversity.[178]

And so Dr. King would motivate us to continue to demand a just society—"if democracy is to live, segregation must die."[179]

OUR FEET: SOURCES FOR A CONSTRUCTIVE BLACK THEOLOGY 170–206 (1993) (analyzing King's use of Christianity to expose social inequality); COOK, *supra* note 16, at 139 (explaining the importance of rediscovering and refitting spiritual foundations of progressive liberalism in contemporary politics); IVAN PETRELLA, THE FUTURE OF LIBERATION THEOLOGY: AN ARGUMENT AND MANIFESTO (2004) (providing a new interpretation of the current state and future potential of liberation theology in Latin America). *See also* BLACK THEOLOGY: A DOCUMENTARY HISTORY (James H. Cone & Gayraud S. Wilmore eds., 1993); CORNELL WEST, PROPHETIC THOUGHT IN POSTMODERN TIMES: BEYOND EUROCENTRISM AND MULTICULTURALISM (1993); JIM WALLIS, THE SOUL OF POLITICS: A PRACTICAL AND PROPHETIC VISION FOR CHANGE (1994); BRUCE L. FIELDS, INTRODUCING BLACK THEOLOGY: THREE CRUCIAL QUESTIONS FOR THE EVANGELICAL CHURCH (2001).

173. King, *Pilgrimage*, *supra* note 9, at 56.

174. Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956) (striking down the ordinance requiring segregated public transportation).

175. Martin Luther King, Jr., *I See the Promised Land* (1968), *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 279.

176. King, *Where Do We Go I*, *supra* note 51, at 624.

177. *Id.* at 587, 614–17 (discussing how to overcome the racial prejudice that has deluded poor whites into rejecting an alliance with poor blacks in the war on poverty).

178. King, *Where Do We Go II*, *supra* note 142, at 245, 251.

179. King, *Facing the Challenge*, *supra* note 2, at 142.

In the field of education, Dr. King was not calling for a few years of court-supervised desegregation and affirmative action. He called people to nonviolently demand systemic change, which required teaching new paradigms of racial equality and social and economic justice. Moreover, for Dr. King, and even for the Court in *Brown,* the *de jure/de facto* distinction relied on in *Parents Involved* was not the decisive factor in the quest to dismantle vestiges of the old paradigm of racial hierarchy "branch *and* root."[180] What mattered was protecting children from psychological and spiritual death.

Dr. King's prolific writing provides a roadmap. Published after his death, he authored an essay laying out plans for a reinvigorated nonviolent campaign for an economic bill of rights.[181] He embraced the positive meaning of Black Power,[182] but insisted that violence would not lead to genuine economic and social equality. As Dr. King came to terms with the more militant Black Power movement, he continued to encourage African Americans to see their struggle as one against the ideology of racism and not against white Americans. He insisted that nonviolent demands for change by a multiracial "coalition of conscience" would achieve more than violence.[183]

Finally, Dr. King the preacher would encourage us to strengthen our inner selves for battle. He would pray for strength to act. He would push to reconnect the spiritual with the political. As Cook explains, "The substantive religious and spiritual principle of love for the least of these was communicated [by Dr. King] to both religionist and humanist in a way that put each in harmony with the other."[184] He would reclaim the moral high ground by returning to the first principles of the Civil Rights Movement: justice, peace, equality, and love. He would resist any

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180. "Segregation of white and colored children in public schools has a detrimental effect upon colored children. The impact is greater when it has the sanction of law." Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). *See also* Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (desegregating predominantly Latino schools using proof of *de facto* segregation). Justice Breyer echoed similar sentiments in his dissent in *Parents Involved.* "[T]he distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, *e.g.*, by housing patterns or generalized societal discrimination) is meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2802 (2007) (Breyer, J., dissenting).

181. King, *Showdown for Nonviolence* (1968) [hereinafter King, *Showdown for Nonviolence*], *reprinted in* A TESTAMENT OF HOPE, *supra* note 2, at 66.

182. King, *Where Do We Go I*, *supra* note 51, at 569–97 (engaging in an in-depth critique of the positive and negative aspects of Black Power). King argued that Black Power embodied a call to manhood and collective self-esteem to repair wounded hearts and minds and an opportunity to pool black political and economic resources to achieve legitimate power. *Id.*

183. King, *Showdown for Nonviolence*, *supra* note 181, at 68–69.

184. COOK, *supra* note 16, at 14.

tendency to lean away from justice. He would reject colorblind constitutionalism as a neutral legal principle.

And so, our prayer for relief should request Dr. King to say, "Amen," to the justices in *Parents Involved* who demonstrated fidelity to the principle of racial diversity in public education.