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## From Little Rock to Seattle and Louisville: Is "All Deliberate Speed" Stuck in Reverse?

### Cover Page Footnote

The following is one of three articles solicited by the University of Arkansas at Little Rock Law Review specifically to complement the Symposium essays that commemorate the 50th Anniversary of the Central High Crisis appearing also in this issue.

# FROM LITTLE ROCK TO SEATTLE AND LOUISVILLE: IS “ALL DELIBERATE SPEED” STUCK IN REVERSE?

*Charles J. Ogletree, Jr. & Susan Eaton\**

## I. INTRODUCTION

On Wednesday, May 17, 1954, Chief Justice Earl Warren announced a unanimous decision of the United States Supreme Court, concluding that the United States Constitution supported the desegregation of public schools that had traditionally barred black children.<sup>1</sup> Four years later, in *Cooper v. Aaron*,<sup>2</sup> the Court again spoke in a single voice. This time, the Justices ruled that the State of Arkansas could not pass legislation that would undermine the *Brown I* decision.<sup>3</sup> The plan for integration devised by the local school board in Little Rock must go forward, the High Court ruled, despite the unrest that seemed to engulf the previously all-white local high schools scheduled to begin integration by admitting black teenagers.<sup>4</sup> With *Brown I* and then *Cooper*, the country’s education system appeared poised to move from “separate but equal” to truly equal at the pace prescribed by the *Brown II* Court: “[W]ith all deliberate speed.”<sup>5</sup>

More than fifty years later, on Thursday, June 28, 2007, the Supreme Court issued a much anticipated, sharply divided opinion concerning the conscious use of a student’s “race” in plans to desegregate now de facto segregated public schools.<sup>6</sup> Chief Justice John Roberts, writing for the Court, found unconstitutional the race-inclusive methods used by the Seattle and Louisville public school officials who were attempting to create racially integrated schools.<sup>7</sup>

What has shifted in the United States over the past fifty years that moves us from the unanimous decision in *Brown I* to the fractured decision

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (“*Brown I*”).

2. *Cooper v. Aaron*, 358 U.S. 1 (1958).

3. *Id.* at 17.

4. *See id.*

5. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (“*Brown II*”).

6. *See Parents Involved in Cmty. Schools v. Seattle School Dist.*, 127 S. Ct. 2738 (2007) (“*Parents Involved*”).

7. *See id.*

in Seattle and Louisville? How do we prepare to celebrate the fiftieth anniversary of *Aaron v. Cooper*,<sup>8</sup> while at the same time facing a more recent decision that undermines the very principles articulated in *Brown I*? The tortured journey from the Supreme Court's reaffirmation of *Brown I* to the Supreme Court's decision this past June finding efforts to achieve similar goals unconstitutional compels us to make sense of this radical change.

## II. FROM *BROWN* TO *COOPER*, AND THE LITTLE ROCK NINE

Today, we know there is much to celebrate at Central High and in Little Rock, Arkansas. That was not the case fifty years ago. The 1954 *Brown* decision was issued fifty-eight long years after the Supreme Court, in *Plessy v. Ferguson*,<sup>9</sup> paved the way for continued "separate but equal" segregation at schools like Central High School across Arkansas and the nation. Central High had reason to hope, though, when the *Brown I* Court eradicated the "separate but equal" doctrine. In announcing the unanimous *Brown I* decision on May 17, Chief Justice Earl Warren famously wrote: "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? We believe that it does."<sup>10</sup> And finally, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."<sup>11</sup>

Even this strong language from the highest Court in the land would not be enough to allow the hopes of the first black students at Central High School to be realized. Pursuant to the rulings, Chief Justice Earl Warren wrote in *Cooper v. Aaron*, "Nine Negro children were scheduled for admission in September 1957 to Central High School, which has more than two thousand students. Various administrative measures, designed to assure the smooth transition of this first stage of desegregation, were undertaken."<sup>12</sup>

Warren continued his narrative:

On September 2, 1957, the day before these Negro students were to enter . . . the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school "off limits" to colored students.<sup>13</sup>

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8. 163 F. Supp. 13 (E.D. Ark. 1958), *rev'd* 257 F.2d 33 (8th Cir. 1958).

9. 163 U.S. 537 (1896).

10. *Brown I*, 347 U.S. at 493.

11. *Id.* at 495.

12. *Cooper*, 358 U.S. at 9.

13. *Id.*

The next morning, the Arkansas National Guard, pursuant to an order from the Governor, stood "shoulder to shoulder" in order to forcibly prevent the nine black students from entering Central High.<sup>14</sup> The Governor, via the Guard, stood his ground for the next three weeks.<sup>15</sup>

On September 20, 1957, a federal district court in Arkansas issued a preliminary injunction enjoining the Governor to allow the nine students into the high school.<sup>16</sup> The nine students were escorted into the building on the following Monday morning, September 23, by the Little Rock and Arkansas State Police Departments.<sup>17</sup> President Eisenhower dispatched federal troops that same day and the troops remained in Little Rock to protect the black students for the rest of the school year.<sup>18</sup>

The Little Rock School Board petitioned the federal courts to postpone integration as a result of the turbulence caused by the desegregation plan.<sup>19</sup> The district court granted the school board's request.<sup>20</sup> The Eight Circuit reversed, and then the United States Supreme Court granted certiorari in *Cooper v. Aaron*.<sup>21</sup>

The *Brown I* decision clearly needed some no-nonsense muscle power, and, in 1958, the Court provided it in *Cooper v. Aaron*. In response to the State of Arkansas's refusal to uphold these *Brown* principles, Chief Justice Warren wrote:

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*. That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to up-

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14. *Id.* at 11.

15. *Id.* at 11.

16. *Id.* at 11-12.

17. *Id.* at 12.

18. *Cooper*, 358 U.S. at 12.

19. *Id.*

20. *Id.* at 13.

21. *Id.* at 14.

set and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions.<sup>22</sup>

The *Cooper* Court further warned that “[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature,”<sup>23</sup> and then ruled that “[t]he right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.”<sup>24</sup> Finally, the Court emphasized the strength and solidarity behind the *Brown* decision:

The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed.<sup>25</sup>

The story of integration at Little Rock’s Central High School presents a triumphant, instructive narrative for our contemporary American society and for litigators who, in the history of great civil rights lawyers, still see the law as an instrument for social change. The integration of Little Rock’s public high school a half century ago celebrates determination, dignity, progress, and pride. It offers a story with clearly drawn good guys and bad guys. Fifty years ago, good did indeed face down a kind of bad in Arkansas. Who could forget the image of nine black teenagers bravely attempting to enter Central High School and getting turned away by the Arkansas National Guard deployed by the state’s segregationist governor, the notorious Orval Faubus? And most of us surely remember those weeks later, on September 25th, when federal troops finally escorted the nine students into school.

The nationally televised trauma tested the resolve of these nine young people: Ernest Green, Elizabeth Eckford, Jefferson Thomas, Terrence Roberts, Carlotta Walls LaNier, Minnijean Brown Trickey, Gloria Ray Karlmark, Thelma Mothershed-Wair, and Melba Pattillo Beals. Through numerous books, documentaries and media interviews, the “Little Rock Nine” have evolved, quite deservedly, into national heroes.<sup>26</sup> The integration of Central High in Little Rock is most often recounted through these deeply personal stories. In fact, it may very well be that because Little Rock so ex-

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22. *Id.* at 4 (citation omitted).

23. *Id.* at 16.

24. *Cooper*, 358 U.S. at 19.

25. *Id.*

26. See generally MELBA PATILLO BEALS, WARRIORS DON’T CRY (Washington Square Press 1994).

quisitely expressed the human side of jurisprudence and public policy, the events seared our collective consciousness so that today Central High School remains at the forefront of our minds a half century later. Even more significantly, though, Little Rock in 1957 tested the moral fiber of an entire nation, and the United States passed the test.

Looking back now, there is probably something close to universal agreement that the United States government did the right thing in Little Rock when it deployed federal troops to enforce the United States Supreme Court's unanimous *Brown I*.<sup>27</sup> In fact, there may be close to universal agreement that President Dwight D. Eisenhower, in his repeatedly evasive responses to questions that tried to gauge his support for *Brown I*, took far too long to begin enforcing the ruling.<sup>28</sup> The now iconic *Brown I* had ruled intentionally segregated schools unconstitutional just three years earlier. However, there was not a universal consensus around the morality of *Brown*, or around the need for racial integration. Thus, Little Rock could be seen as the first significant measure of the federal government's commitment to ridding the nation of Jim Crow segregation. For socially concerned litigators and scholars committed to using their intelligence and training to enhance opportunity and further social equality, it is more important than ever to remember that the United States *progressed* toward the moral clarity related to *Brown* and, by extension, the events in Little Rock in 1957. This comprehension of history, combined with a willingness to form new alliances and creatively construct legal theories, cases, and defenses that wind around significant roadblocks, will lay the groundwork for a civil rights agenda in the 21st century.

A half century after Little Rock, we find ourselves at a pivotal moment in our civil rights history. The federal courts have closed off traditional avenues of redress for inequality, most notably in the crucial and historically significant area of education, for well more than a decade. This reality forces litigators and legal scholars to survey the ground and, like the men and women who fought the pre-cursors to *Brown*, construct artful, comprehensive responses to continuing unequal opportunity for racial, ethnic, and linguistic minorities in the United States. Any civil rights legal effort in the twenty-first century will need to carefully encompass a community education component that can compellingly articulate the goals and aspirations that contribute to social cohesion and a healthier, more inclusive democracy.

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27. 347 U.S. 483 (1954).

28. RICHARD KLUGER, *SIMPLE JUSTICE* 174 (Vintage Books 1975).

### III. FIFTY YEARS AFTER THE CENTRAL HIGH CRISIS: SEATTLE AND LOUISVILLE AFFIRMATIVE ACTION DECISIONS

Triumphant Central High, along with other schools and school districts across the nation that pioneered integration over the past half century, now has reason to doubt a sustained hope for a truly equal public school system. That is precisely because of this long-awaited, sharply divided consolidated decision in *Parents Involved in Community Schools v. Seattle School District* (“*Parents Involved*”).<sup>29</sup>

A little more than fifty years after *Brown*, Chief Justice John Roberts reduced the noble ideal of an integrated society in which all children have equal educational opportunities, to a base, undesirable construct called “racial balancing” and declared it unconstitutional.<sup>30</sup> He trampled on hopes and aspirations of a generation working to manifest the ideal of an integrated society, stating:

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.<sup>31</sup>

The Supreme Court issued the consolidated decision from Seattle and Louisville the same year we prepare to celebrate the 50th anniversary of *Cooper v. Aaron*. It probably took the Eisenhower Administration too long to take action in enforcing *Brown I*. However, the government at least did finally act on the side of integration. In contrast, the Bush Administration filed a brief in *Parents Involved*, arguing, “that racial integration of public schools has never been an important enough goal to justify school districts’ use of race-conscious measures in their communities.”<sup>32</sup>

At issue in the Seattle and Louisville cases was whether or not locally developed policies that use race as one of several factors in assigning students to elementary and secondary schools were constitutional.<sup>33</sup> The broader question was whether or not the legacy of *Brown v. Board of Education of Topeka*, in which desegregation was, at least implicitly, a goal for our society, would be affirmed as a guiding principle in jurisprudence and our politi-

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29. 127 S. Ct. 2738 (2007).

30. *Id.* at 2743.

31. *Id.* at 2758.

32. See Anurima Bhargava & Brian Dees, *Leaving Integration Behind* (Nov. 29, 2006), available at <http://www.naacpldf.org/content.aspx?article=1123>.

33. *Parents Involved*, 127 S. Ct. at 2738.

cal and social life.<sup>34</sup> Ultimately, the resulting decision revealed deep tension within the Court.

In part a reflection of such tension, *Parents Involved* produced a seemingly incongruous result: The High Court ever so barely reaffirmed the promise and spirit of *Brown* while at the same time taking away the most effective, proven tools educators had for reaching the shared aspiration manifested in *Brown I* and the poignant events of Little Rock in 1957. The following sections will consider the following: (1) the recent Supreme Court decisions regarding school district plans in Louisville and Seattle; (2) the immediate, practical effects of those decisions; (3) the most urgent concerns following the decisions; and (4) finding a solution and building alliances in post-*Parents Involved* America.

#### A. The Seattle and Louisville Decisions

In order to understand the full impact of the Supreme Court's recent decisions regarding school desegregation, we must first consider the Seattle and Louisville plans and the Court's reasoning. The following section will (1) consider the desegregation plans in the school districts in Seattle and Louisville and (2) analyze the Supreme Court's reasoning.

##### 1. *The School Districts' Plans*

Louisville's (in Jefferson County) choice-based voluntary plan grew out of a previous court-order to desegregate, which had been in effect from 1975 until 2000. After Jefferson County's schools were released from court jurisdiction, educators attempted to maintain diversity and avoid segregation by allowing students to transfer from schools to which they had been assigned based on their place of residence. In deciding whether or not to grant such transfer requests, educators in Louisville employed a guideline to ensure that no school became less than 15% black or more than 50% black. However, race was only one of several factors that contributed to educators' decisions about whether or not to grant a transfer. In fact, "race" would come into play only after consideration of other variables, such as school proximity and whether or not a child already had a sibling at the school to which he wished to transfer.

The plan at issue in Seattle, Washington, was somewhat different from Louisville's. Before entering ninth grade in Seattle, each student was provided a choice of ten public high schools and ranked them in order of preference. Sometimes there were more students who chose a school than there were available seats. In such instances, Seattle officials considered several

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34. *Id.*

factors in deciding whether or not to grant requests. If a student had a sibling attending a school, the student would be given preference. Officials then assigned students based on proximity except in cases in which a school's overall racial makeup differed from the district average by more than fifteen percentage points. In cases such as this, a student's race might "tip the balance" in decisions about whether or not to grant a request.

## 2. *Analysis of the Court's Reasoning*

Justice Kennedy joined his more conservative fellow justices, including Chief John Roberts, Antonin Scalia, Samuel Alito and Clarence Thomas, in striking down the Seattle and Louisville plans.<sup>35</sup> Kennedy softened the decision's blow, however, by refusing to go as far as his colleagues in the plurality would have.<sup>36</sup>

For months before the ruling, the civil rights community's hopes had hung on the often inscrutable Justice Kennedy. In the end, Kennedy's parting of ways with the plurality was keenly significant. First, he refused to subscribe to Chief Justice Roberts's plurality opinion that racial diversity in K-12 education is not a compelling government interest.<sup>37</sup> Justice Kennedy acknowledged that the United States does indeed have a "moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."<sup>38</sup>

Second, Kennedy offered some constitutionally sound, racially conscious alternatives for achieving diversity and avoiding segregation. He wrote: "School boards may pursue the goal of bringing together students . . . through other means, including strategic site selection . . . drawing attendance zones . . . [and] recruiting students and faculty . . ."<sup>39</sup> The energy that educators must now spend harvesting Kennedy's opinion for practical solutions to achieve diversity will no doubt be enormous. Unfortunately, past experience suggests that more race neutral alternatives, including some offered by Kennedy, have simply not been successful in achieving significant amounts of racial diversity or preventing segregation.<sup>40</sup>

For school districts, the *Parents Involved* decision surely creates an urgent need to apply newly established legal principles to existing and future desegregation plans.

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35. *Id.* at 2798.

36. *Id.*

37. *Id.* at 2797.

38. *Id.*

39. *Id.* at 2792.

40. Erica Frankenberg, *Voluntary Integration After Parents Involved: What Does Research Suggest About Available Options?* (unpublished paper, on file with the Charles Hamilton Houston Institute for Race and Justice).

However, the words of the dissenters in *Parents Involved* provide the clearest sense of what is truly at stake in the cases over the long-term in the United States. The contemporary civil rights community should look here to find instructions for the future. In fact, the dissenters manage to succeed at something that has long eluded many civil rights litigators. In particular, Justice Breyer and Justice Stevens compellingly articulate the values and uniquely American aspirations underlying school integration efforts. By doing this, they take an active stance against the plurality's radical refashioning of the very meaning and purpose of the *Brown* decision and, implicitly, the entire civil rights movement.

This is not a matter of merely academic concern or semantics, as such arguments help determine which side gets to stake out the moral high ground within the public consciousness. Who is living up to the shared aspirations of a nation "indivisible"? Is it educators like those in Louisville and Seattle who were attempting to create and maintain integrated schools in an increasingly diverse, yet still highly stratified society? Or is it conservative Supreme Court Justices who cast the goal of racial integration as being at odds with our fundamental social principles? Looking back at *Brown* and Little Rock, it is exceedingly easy to see who was standing on that moral high ground. Sensing this, Justice Roberts goes to great lengths to accomplish brazen contortions of logic and history so as to place himself and his fellow conservative jurists on the same ground as *Brown's* lawyers and the Little Rock Nine heroes.

Specifically, Roberts's words, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"<sup>41</sup> serve up an appealing notion, and not merely because it would fit on a bumper sticker and win easy applause. Its power derives from its implication of morality. Even as it endorses segregation and strikes down policies designed to bring about integration, the phrase still manages to cast the speaker as a crusader for racial equality—the true heir to the *Brown* and Little Rock legacies. That Roberts's decision will surely hasten *segregation*, rather than *Brown* mandated school *integration*, a not so minor inconsistency that seems lost on our Chief Justice.

So, this is a laughable Orwellian absurdity. Also, it underscores a danger that socially concerned progressive litigators must take seriously. Those of us who actually do apply the civil rights analysis underlying *Brown* to our work in law and scholarship must not let Roberts's words wind their way unexamined into the national discourse around race.

Commentators have pointed out repeatedly that Chief Justice Roberts's slogan incorrectly asserts that race is of no consequence in American society. His words suppose that past discrimination has no present day effects and

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41. *Parents Involved*, 127 S. Ct. at 2768.

that racial stereotypes, bias, and embedded inequalities do not infect our social institutions. The danger comes not merely from the fact that those words would have us do nothing about the segregation that has become a defining feature of our schools and neighborhoods. By Roberts's logic, doing absolutely nothing transforms him and his conservative colleagues into the true moral heroes striving for racial justice. Suddenly, they are standing with Thurgood Marshall on the Supreme Court steps. Magically, Chief Justice John Roberts has superimposed his image on Little Rock, Arkansas, 1957. He is walking with the Little Rock Nine even though he has never been invited.

Justice Thomas, meanwhile, even goes so far as to characterize segregation—long shown to misshape lives, overwhelm institutions and squander potential—as organic. “Individual schools will fall in and out of balance in the natural course,”<sup>42</sup> he writes.

Just as students of society know that race still matters, students of American history understand that ghetto and barrio schools are not natural, but manmade. They grew from a tangled mix of forces. This includes the blatant racial discrimination in housing and seemingly “race-neutral” zoning, and mortgage lending and real estate practices that over many decades corralled people of color and the poor into what are now overburdened communities and schools.<sup>43</sup> These schools and the children who attend them will not become part of America's mainstream of opportunity just by us sitting around, doing nothing.

We should take direction from the four dissenters, most notably Justice Stephen Breyer and Justice John Paul Stevens. They would not permit Roberts to get away either with recasting *Brown* as being about something called “racial balancing” or with casting *Parents Involved* as a grand moral victory. Justice Breyer penned a seventy-seven page, passionate dissent sure to secure his and *Brown*'s proper place in history. He writes that

[The plurality] distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive

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42. *Id.* at 2773.

43. See, e.g., DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID* (Harvard University Press, 1993). See also, Reynolds Farley, Suzanne Bianchi, & Diane Colasanto, *Barriers to the Racial Integration of Neighborhoods: The Detroit Case*, in 441 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 97–113 (1978); SUSAN EATON, *THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL* (Workman 2007); Alexander Polikoff, *Racial Inequality and the Black Ghetto*, 13 POVERTY & RACE 6 (Nov.–Dec. 2004), available at <http://www.pprac.org/mobility/polikoff.pdf>; Gregory Squires, *The Indelible Color Line: The Persistence of Housing Segregation*, 10 AMERICAN PROSPECT 42 (Jan.1999), available at [http://www.prospect.org/lis/articles?article=The\\_indellible\\_color\\_line](http://www.prospect.org/lis/articles?article=The_indellible_color_line).

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.<sup>44</sup>

Justice Breyer saves his strongest words for the Chief Justice's attempt to equate the inconvenience of students denied their first choices under voluntary school desegregation with the barbarism of intentional segregation that had banned blacks from white schools. "[I]t is a cruel distortion of history," Breyer wrote, "to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown . . . to the circumstances of Joshua McDonald (whose school transfer to a school closer to home was initially declined)."<sup>45</sup> The small inconveniences that might arise from a race-conscious plan "does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation."<sup>46</sup>

Justice Stevens's far shorter, but equally passionate dissent further sets the record straight on *Brown*. He pointed out, a bit wryly, even, that the Chief Justice, in his opinion for the Court, conveniently ignored all context of the United States' long practice of racial segregation in education practiced specifically and purposefully against black students. Stevens wrote:

There is a cruel irony in the Chief Justice's reliance on our decision in *Brown v. Board of Education*. The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "The majestic equality of the law, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions.<sup>47</sup>

## B. Immediate, Practical Effects of *Parents Involved*

The consolidated *Parents Involved* decision had the immediate effect of rendering illegal the voluntary school desegregation plans at issue in Louisville and Seattle. Under the school districts' plans, officials had some-

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44. *Parents Involved*, 127 S. Ct. at 2801 (Breyer, J., dissenting).

45. *Id.* at 2836.

46. *Id.*

47. *Id.* at 2797–98 (Stevens, J., dissenting).

times considered a student's race as one factor when making school assignments through the granting or denying requests for school transfers.

Though both plans were wholly voluntary in nature—in other words they were not ordered by a court—a five-person majority of the High Court ruled that the plans were not “narrowly tailored” enough to permit the government's use of individual racial classifications under the exacting “strict scrutiny” standard of review.<sup>48</sup> The plans, the majority ruled, did not articulate a justification for using race in a mechanical way.<sup>49</sup>

Justice Kennedy, who joined the plurality opinion only in part, wrote that Seattle's racial distinction between white and non-white students was too “blunt” and that officials failed to articulate exactly how the use of race furthers the interest of avoiding segregation.<sup>50</sup> Kennedy went on to say that Louisville officials' justifications for why they were using race were simply too “broad and imprecise.”<sup>51</sup> More generally, both plans, Kennedy complained, simply did not offer sufficient evidence that would have supported the need for making racial classifications.<sup>52</sup> The districts, Kennedy speculated, could have achieved the stated end of “diversity” and avoiding segregation through other, non-racial means.<sup>53</sup> As the opinion of the Court, written by Chief Justice John Roberts states: “The districts failed to show that they considered methods other than explicit racial classifications to achieve their stated goals . . . .”<sup>54</sup>

No civil rights organization has made a definitive count of schools or districts affected by the *Parents Involved* ruling. However, there seems to be a general agreement among civil rights experts that officials in hundreds of districts were forced back to the drawing board in an effort to construct desegregation plans that comply with the new principles set forth in the decision.<sup>55</sup>

It appears the first federal court to react to *Parents Involved* was in Tucson, Arizona. On August 21, 2007, United States District Judge C. Bury, a George W. Bush nominee, relied heavily upon *Parents Involved* in stating that the court intended to let the Tucson Unified School District (TUSD) out of a desegregation order issued in 1978 following a class action suit from

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48. *Id.* at 2770.

49. *Id.*

50. *Id.* at 2790 (Kennedy, J., concurring).

51. *Parents Involved*, 1275 S. Ct. at 2790 (Kennedy, J., concurring).

52. *Id.*

53. *Id.* at 2792 (Kennedy, J., concurring).

54. *Id.* at 2760.

55. Gary Orfield & Erica Frankenberg, *The Integration Decision*, EDUCATION WEEK (July 18, 2007).

Latino and black parents.<sup>56</sup> Attorneys at the Mexican American Legal Defense and Educational Fund (MALDEF) responded the same day and submitted a Motion to Reconsider arguing that Bury's ruling was based upon a misunderstanding of *Parents Involved*, which allowed for race-conscious measures in remedying de jure segregation, which was exactly the case in Tucson.<sup>57</sup> The Tucson school board, however, responded to Bury's order by ending their school desegregation program by a three to two vote.<sup>58</sup>

Less than a week after the High Court ruling in *Parents Involved*, a Boston attorney sought to re-open a challenge to a voluntary school desegregation plan in Lynn, Massachusetts.<sup>59</sup> That plan had been ruled constitutional on appeal in 2005, and the Supreme Court refused to hear it.<sup>60</sup> The Massachusetts Attorney General, Martha Coakley, filed her own brief arguing that the United States District Court should deny the request to re-open the Lynn case.<sup>61</sup>

Desegregation advocates also fear that *Parents Involved* might cause school officials to quietly abandon desegregation plans so as to avoid future lawsuits. This would be an unfortunate and unnecessary outcome because Justice Kennedy, by refusing to join the plurality opinion in whole, permitted the use of race in some circumstances. His controlling opinion, joined with the opinions of the dissenters, affirms that a "compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population."<sup>62</sup>

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56. *End of TUSD's Desegregation Order Appears Close*, THE ARIZONA DAILY STAR, Aug. 22, 2007, available at <http://www.fox11az.com/news/topstories/stories/kmsb-20070822-snjc-desegregation.5e0fbba9.html>.

57. *Fischer v. Tucson Unified School Dist. No. One*, 4:74-cv-00090-DCB (D. Ariz. 2007), available at [www.azd.uscourts.gov/azd/courttopinions.nsf/1465EFA821087FE50725733F005AB1C9/\\$file/74-0090-1239.pdf?openelement](http://www.azd.uscourts.gov/azd/courttopinions.nsf/1465EFA821087FE50725733F005AB1C9/$file/74-0090-1239.pdf?openelement).

58. *Tucson Schools End 1960s-Era Desegregation Policy*, THE ASSOCIATED PRESS, Aug. 29, 2007, available at <http://www.fox11az.com/news/topstories/stories/KMSB-Zoop-0829-apbp-desegregation.80A8f106.html>. Under the plan, the TUSD had, in some circumstances, denied requested school transfers if the move would have exacerbated racial segregation. *Id.*

59. Jason Szep, *School Desegregation Case Flares in Massachusetts*, REUTERS, July 17, 2007, available at <http://www.reuters.com/article/domesticNews/idUSN1725074920070718>.

60. *Id.*

61. *Id.*

62. *Parents Involved*, 127 S. Ct. at 2797.

### C. The Most Urgent Concerns After *Parents Involved*

Piles of social science evidence unequivocally demonstrate the worth of doing all we can to achieve diversity.<sup>63</sup> Research shows that the chances of school failure are disproportionately high for children who live in poverty. But the chances of failing and dropping out of school are even higher for poor children in high-poverty schools.<sup>64</sup> Generally, high-poverty schools employ less qualified teachers, have higher rates of teacher turnover and higher rates of expulsions. By the time a student reaches high school, it is unlikely that the higher level Advanced Placement courses routinely offered in middle-class schools would be available.<sup>65</sup> In many urban districts that educate disproportionate shares of children of color, graduate rates commonly sink to the 30% to 40% range.<sup>66</sup>

Clearly, school districts that employ race conscious measures in operation of their voluntary school desegregation plans will, in many cases, need to refashion such plans. It is unclear, however, how many districts will be able to accomplish this through race-neutral means. In addition to providing technical and legal assistance to such districts, it is crucial that researchers and lawyers work together to document the effects of worsening segregation that is likely to occur in many school districts.

It is important to remember as well, though, that in *Parents Involved*, a majority of the Justices concluded that diversity and the avoidance of segregation are compelling interests and something districts could pursue.<sup>67</sup> In Justice Kennedy's words, "A compelling interest exists in avoiding racial

63. See, e.g., Brief for the National Education Ass'n, et al. as Amici Curiae Supporting Respondents, *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915); Brief for The American Psychological Ass'n & the Washington State Psychological Ass'n as Amici Curiae Supporting Respondents, *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915); Brief for The American Educational Research Ass'n as Amici Curiae Supporting Respondents, *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-015).

64. See also, RICHARD O. KAHLBERG, *ALL TOGETHER NOW* (The Brookings Institution Press 2001).

65. See CHRISTOPHER B. SWANSON, *PROJECTIONS OF 2003–04 HIGH SCHOOL GRADUATES: SUPPLEMENTAL ANALYSIS BASED ON FINDINGS FROM WHO GRADUATES? WHO DOESN'T?*, The Urban Institute (2004), available at [http://urban.org/UploadedPDF/411019\\_2003\\_04\\_HS\\_graduates.pdf](http://urban.org/UploadedPDF/411019_2003_04_HS_graduates.pdf). (Detroit: 21.7%; Baltimore: 38.5%; New York City: 38.9%; Milwaukee, 43.1%; Cleveland, 43.8%; Los Angeles, 44.2%).

66. See generally, *id.*; See also, Douglas N. Harris, *Ending the Blame Game on Educational Inequity: A Study of 'High Flying' Schools and NCLB*, EDUC. POLICY STUDIES LAB. (Mar. 2006), available at <http://asu.edu/educ/eps1/EPRU/documents/EPSTL-0603-120-EPRU.pdf>; RICHARD ROTHSTEIN, *CLASS AND SCHOOLS* (Economic Policy Institute 2004).

67. *Parents Involved*, 127 S. Ct. at 2797.

isolation, an interest that a school district, in its discretion and expertise may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population."<sup>68</sup> This provides an opportunity for the many school districts that are rapidly diversifying to create assignment or organizational plans designed to construct racial diversity and avoid segregated pockets. This is especially relevant for the scores of traditionally white communities being reshaped by immigration.<sup>69</sup>

School officials will need more than legal advice and desegregation plan architects in their efforts to maintain their current levels of diversity or proactively create new plans for diversity in response to demographic change. After *Parents Involved*, it seems that two types of community-based education are necessary.

Immediately after the ruling, the Pew Research Center for the People and the Press found that less than one-quarter of those surveyed followed news stories about it "very closely."<sup>70</sup> Given the complexity of the case and the rulings, public officials, educators, and residents would benefit from clear explanations about exactly what the *Parents Involved* decision did and did not say and how it might apply to the particular situation in their communities.

The amicus briefs submitted by a variety of organizations provide an education in and of themselves. The plurality may have tried to dismiss or overlook their content but, nevertheless, the evidence they provide about the educational benefits of diversity and the harm of segregation and concentrated poverty is nothing short of overwhelming.<sup>71</sup> The briefs did not succeed in swaying the more conservative justices of the Supreme Court. However, if presented in compelling ways and placed within the moral and historical context of civil rights, the material carries enormous potential for

68. *Id.*

69. See generally BRUCE KATZ & ROBERT LANG, REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000 (Brookings Institution Press/Brookings Metro Series 2003); William H. Frey, *Melting Pot Suburbs: A Census 2000 Study of Suburban Diversity*, The Brookings Institution (2002), available at [http://www.brookings.edu/reports/2001/06demographics\\_frey.aspx](http://www.brookings.edu/reports/2001/06demographics_frey.aspx); John Logan, *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America*, Lewis Mumford Center for Comparative Urban and Regional Research (Oct. 13, 2002), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/1a/a2/6c.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/a2/6c.pdf).

70. June 29–July 2, 2007 *New Interest Index Omnibus Survey Final Topline*, Pew Research Center (2007), available at <http://people-press.org/reports/questionnaires/341.pdf>. Pew Research Center for the People and the Press compiles a Pew News Interest Index each week. In this case, 1,065 adults were surveyed. Margin of error: 0.035. *Id.*

71. *Id.* at 38.

enhancing understanding and winning support for integration policies on the ground in local communities.

#### D. Finding a Solution: Building New Alliances After *Parents Involved*

As crucial as it is to maintain diversity by aiding school districts immediately, let us not allow the urgency to obscure a perhaps even greater challenge for people who believe schools have a vital role in helping to create a fairer, more cohesive society. In the post-*Parents Involved* America, our long-term success will hinge not merely on crafting new constitutionally sound desegregation plans. It will depend upon our ability to construct civil-rights remedies that build alliances with a wider community of educators, especially those working in high-poverty, hyper-segregated districts in which educators no longer see desegregation as an option.

Entrenched housing segregation, federal court decisions backing away from desegregation, and economic forces driving the middle-class from cities created hyper-segregated districts in which educators have no time for hopeful discussions about racial integration, even if they do comprehend the benefits of diversity. However, every teacher, principal, and superintendent in such districts profoundly understands that the vast majority of their students are “segregated,” “excluded,” and “cut-off,” not from white children, but from opportunities to experience, interact in, and understand the mainstream that does not flow by their neighborhoods. No matter how high a teacher in an urban district might get the test scores, this most basic separation still threatens her students’ life chances. The problem here is not that school desegregation did not work in these school districts. In many cases, especially in the North, it was not even tried.

Traditional forms of desegregation might have been taken off the table in the most racially isolated, high poverty school districts. But No Child Left Behind’s<sup>72</sup> narrow mandate to nudge up test scores in inherently unequal schools has proven an inadequate substitute. The harms of segregation—and its attendant, concentrated poverty—are hardly ever acknowledged in education policy-making circles anymore. Rather, politicians, cued by the federal government’s No Child Left Behind legislation, focus incessantly upon test-scores, as if the basic instability and palpable “apartness” of overburdened, poor, often violent neighborhoods did not affect a child’s ability to live up to his full potential.

Two fields—housing and public health—have responded to some extent to decades of findings about the harms of concentrated poverty. In housing, in particular, some government policies grew from concentrated poverty research—scattered site developments, Section 8 revisions, and the Moving

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72. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

To Opportunity Demonstration project that allowed some poorer residents to move to less poor neighborhoods.<sup>73</sup>

Amazingly, though, the well-known harm of concentrated poverty and segregation—and the well-documented benefits of desegregation and attendance at predominantly middle class schools—has not transferred into contemporary education policy or rhetoric. It is not because the segregation/isolation problem is solving itself. The opposite is true. Levels of concentrated poverty in neighborhoods and schools have been on the rise since the 1970s.<sup>74</sup>

Georgetown Law Professor Sheryl Cashin shows in her research that the “overall direction of census trends since 1970 . . . has been one of growing economic segmentation of American life space.”<sup>75</sup> Demographic studies show a small decline in class segregation during the 1990s, likely the result of a robust economy, Cashin notes.<sup>76</sup> The number of residents living in high-poverty neighborhoods dropped from the 10.4 million peak in 1990 to 7.9 million in 2000.<sup>77</sup> It looked like—and was—progress of a sort. But as demographic analyses demonstrate, the level of concentrated poverty in 2000 actually represents an increase from 1970 levels.<sup>78</sup> Since 1970, the approximate number of neighborhoods with forty percent poor residents has nearly doubled, from about 1,100 in 1970 to 2,200 in 2000.<sup>79</sup>

Public schools mirror and magnify trends in the larger society. Statistically, children of all racial groups are generally more segregated than adults. Although some racial minority children might not live in technically high-poverty neighborhoods, they still, in many cases, attend high-poverty schools. This is because childless white people are far more likely than families with school-age children to live in integrated settings. As of 2003, a typical black or Latino student attended a school where nearly half the students were poor. This is more than twice the share of poverty found in the school of a typical white student, where 80% of his or her classmates will also be white. Asian American children, our most integrated group, both by

73. Margery Austin Turner & Lynette A. Rawlings, *Overcoming Concentrated Poverty and Isolation*, The Urban Institute (July 29, 2005), available at [http://urban.org/UploadedPDF/311204\\_Poverty\\_Brief.pdf](http://urban.org/UploadedPDF/311204_Poverty_Brief.pdf).

74. *Id.*

75. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 97 (Public Affairs 2004).

76. *Id.*

77. Paul A. Jargowsky, *Stunning Progress, Hidden Problems: The Dramatic Decline of Concentrated in the 1990s*, Living Cities Census Series, Brookings Inst. 4 (May 2003), available at [http://www.brookings.edu/~media/Files/rc/reports/2003/05demographics\\_jargowsky/jargowskypoverty.pdf](http://www.brookings.edu/~media/Files/rc/reports/2003/05demographics_jargowsky/jargowskypoverty.pdf). See also, Polikoff, *supra* note 43.

78. Jargowsky, *supra* note 77, at 4.

79. Polikoff, *supra* note 43, at 2.

race and social class, are most likely to be living the multiethnic American reality.<sup>80</sup>

This new school year will surely bring renewed hand-wringing over the much-maligned achievement gap. But let us focus, with at least equal vigor, on the opportunity gap that perpetuates differences in learning outcomes. We define the opportunity gap as the difference between a child's potential/effort and the ability of that child's social environment and accessible social institutions to harness that potential and prepare the child to fully participate in the social, political and economic life in the United States. This is a gap we will close only by continually identifying and remedying the numerous structural barriers to equal enjoyment of the opportunities of the United States. Segregation was and remains one of those structural barriers. If we cannot eliminate it, we can work harder and smarter to counteract its independently insidious symptoms.

More than ever, there is an urgent need to connect disconnected children in a meaningful, permanent way to the "out there"—a term so many kids use to describe just about anyplace beyond their neighborhoods. Where might we look? Everywhere. What might we consider? Everything.

Here are just a few examples. Many mentoring programs in neighborhoods of concentrated disadvantage could more systematically focus not on homework or field trips but on lifetime commitments to open up vast and powerful social networks to children with limited contacts in the mainstream. Colleges and universities, especially those with strong education schools, could draw on their resources to achieve the same kind of connections for children, not for a few years, but from pre-school through early adulthood. Social science research has recently articulated the way summer exacerbates inequality between low-income and middle-class children.<sup>81</sup> A solution would do more than open the recreation center in a crime-challenged neighborhood. It would aim to provide children access to recreational and educational programs and to enriching, career-enhancing job experiences available to their more advantaged peers who live in less overwhelmed communities.

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80. Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?*, (Jan. 18, 2004), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/1b/b8/82.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/b8/82.pdf). See also, Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, (Aug. 8, 2002) available at <http://civilrightsprojectsucla.edu/research/deseg/reseg-schools02.p?>

81. See, e.g., Anne McGill-Franzen & Richard Allington, *Bridging the Summer Reading Gap*, INSTRUCTOR, (May–June 2003), available at [http://teacher.scholastic.com/products/instructor/summer\\_reading.htm](http://teacher.scholastic.com/products/instructor/summer_reading.htm). See also, EDWARD W. GORDON ET AL., *SUPPLEMENTARY EDUCATION: THE HIDDEN CURRICULUM OF HIGH ACADEMIC ACHIEVEMENT* (Roward and Littlefield 2005).

We have long known about the positive effects of preschool for low-income children.<sup>82</sup> We also know that such children make more gains in preschools that are socioeconomically diverse and not overwhelmed by challenges that concentrated poverty brings.<sup>83</sup> States and grantmakers could provide incentives for non-profits to develop programs in line with such research.

We increasingly talk about educational problems within schools as if there are not larger structural, social inequalities that create huge challenges for children, teachers, and other educators within schools. For example, Abigail and Stephan Thernstrom's influential and engaging book, *No Excuses*, argues that poverty, single-parenthood, health disparities in impoverished communities, and myriad other social inequities are mere "excuses" educators use to deflect blame for low achievement.<sup>84</sup> This notion, though it has been embraced by the Bush Administration, flies in the face of social science evidence, the experience of educators in public schools, and basic common sense.

A child with an incarcerated father, an overworked mother, living in a neighborhood where street violence is common and healthy food and outdoor recreation difficult to come by, is simply not in a position to rise to her full potential in the classroom or outside it. Some will rise above circumstance, yes. But that is not reason to then ignore circumstance. Thus, in addition to exploring remaining means for creating integrated schools, it is crucial that thinkers from diverse fields come together to study and put in place research-based, community generated solutions to those social problems and inequalities outside of school that affect a child's opportunity to excel within schools. This includes work in fields we might not usually associate with "education" but extends into housing, public health, and criminal justice.

For example, increasing numbers of children suffer from the instability and stress of having a parent either in jail or involved with the criminal justice system. An estimated 2.5 million minor children have a parent who is incarcerated.<sup>85</sup> About 7.3 million children—about 10% of all minor children in the United States—have a parent in prison, jail, on probation, or on pa-

82. See, e.g., National Scientific Council & Center on the Developing Child at Harvard University, *The Science of Early Childhood Development: Closing the Gap Between What We Know and What We Do* (Jan. 2007), available at <http://www.developingchild.net>.

83. Janet H. Bagby, Loretta C. Rudd & Majka Woods, *The Effects of Socioeconomic Diversity on the Language, Cognitive and Social-Emotional Development of Children from Low-Income Backgrounds*, 175 EARLY CHILD DEVELOPMENT AND CARE 5, 395–405 (2005).

84. ABIGAIL THERNSTROM & STEPHAN THERNSTROM, *NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING* (Simon & Schuster 2004).

85. NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* (The New Press 2005). See also Christopher J. Mumola, *Incarcerated Parents and Their Children*, Bureau of Justice Statistics Special Report 1.1 (2000), available at <http://www.ojp.gov/bjs/pub/pdf/iptc.pdf>.

role.<sup>86</sup> According to experts, the effects of incarceration on children are numerous and cannot help but negatively affect a child's school performance. In early childhood, a child may have impaired social development, be unable to form bonds with others, and have acute reactions to stress, much like that of a trauma victim. By seven to ten years old, a child may have a very poor self-concept, and by early adolescence, a child may reject limits on his behavior and continue having more severe so-called trauma-reactive behaviors, such as depression, aggression, concentration and attention problems, and withdrawal.<sup>87</sup> By late adolescence, that child will be at great risk for incarceration himself.<sup>88</sup>

Thus, initiatives to ease the transition of ex-prisoners who are returning to their communities by strengthening connections to family should be seen not only as helping the returning ex-prisoner. It is a way to aid communities in which they live. It is an education policy, as such programs will surely benefit the children whom the prisoner has left behind. Societal solutions, designed to improve educational opportunity and enhance life chances, cannot then simply dump more responsibility on already overwhelmed public schools. That said, the experience of schoolteachers, administrators, counselors, parents, and children within public schools certainly should inform such programs and policies.

#### IV. FOLLOWING THE DISSENTER'S LEAD AND REMEMBERING THE PAST TO INFORM THE PRESENT-DAY STRUGGLE

*Parents Involved* makes it even more urgent to articulate both the intellectual and moral underpinnings of civil rights policies and legal efforts that seek to connect children who are not connected to the mainstream. This requires that we continuously acknowledge the vast, interlocking structural barriers to equal opportunity that are defining, though often invisible features of our nation. This includes appreciation for the huge role that discrimination and government policy has played in creating segregated neighborhoods of concentrated disadvantage. It includes, too, an understanding of the economic changes and policies that helped fuel crime, violence, and disillusionment in urban neighborhoods. It concerns itself with the physical and mental health problems such environments engender. These combined factors impede a child's ability to reach her full potential in school and even to imagine and participate in the world beyond.

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86. *Id.*

87. *Id.* at 4.

88. Charlene Wear Simmons, *Children of Incarcerated Parents*, 7 CAL. RESEARCH BUREAU NO. 2, 1, 9 (Mar. 2000), available at <http://www.library.ca.gov/crb/00/notes/V7N2.pdf>. See also BERNSTEIN, *supra* note 85.

Most significantly, civil rights solutions express hope for an egalitarian, tolerant, and cohesive democratic society. Creating diverse learning environments and reducing segregation and its harmful effects remain vitally important elements in achieving that collective aspiration. In seeking justification for retrograde policies and court rulings, conservatives may find it easy to wrap up in our flag or quote selectively from the Bible. Yet they will find nothing in the intent of *Brown v. Board of Education* to serve their purposes.

We face an uphill climb after *Parents Involved*. But long-time civil rights advocates know that this has nearly always been the case. Remember that the path toward *Brown v. Board of Education* was long and full of obstacles, too. Much of the legal groundwork for *Brown* was laid beginning in the 1930s by the too-often overlooked legal theorist, scholar, and litigator, Charles Hamilton Houston, for whom the Houston Institute for Race and Justice at Harvard Law School is named.

As vice-dean at Howard University Law School, Charles Hamilton Houston shaped an unapologetic social justice mission for the school. Houston brought in the nation's best black legal scholars, who, at the time, probably would have been denied professorships at white universities. With his students by his side, Houston had argued seminal segregation cases in graduate school admissions and employment, which were crucial preludes to *Brown*. Under Houston's direction, civil rights law was essentially invented at Harvard Law School. Houston's most famous student and mentee, Thurgood Marshall, graduated in 1933.

During this period—the 1930s—the United States economy was failing. There existed no popular movement for the rights of blacks. There were no legal precedents to bolster Houston's social justice lawyering. Lawyers began conceiving of ways to rid the nation of Jim Crow at a time when civil rights did not live anywhere in the law, but only in the imagination of a handful of determined citizens.

Journalist Richard Kluger wrote in his book, *Simple Justice*, a masterful chronicle of the *Brown* case: "At a moment when . . . [African Americans], scarcely the beneficiary of America's bounty even in good times, were viewed as more expendable than ever, only a fool or a man of extraordinary determination would have undertaken the battle for racial justice. Charles Houston was no fool."<sup>89</sup> Kluger continues: "Charles Houston set out to teach young Negroes the difference between what the laws said and meant and how they were applied to black Americans. His avowed aim was to eliminate that difference."<sup>90</sup>

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89. KLUGER, *supra* note 28, at 126.

90. *Id.*

It may be that we have reached another low point in our civil rights history. It may be, too, that we need to take this opportunity to lay more groundwork, to fashion new legal theories and enact new kinds of solutions to the all too familiar problem of unequal opportunity. Those who are committed to providing equal life chances to children can no longer afford to work in separated, isolated spheres divided by categories such as "health," "housing," "education," or "environmental science." As Charles Hamilton Houston once said: "This fight for equality of educational opportunity [was] not an isolated struggle. All our struggles must tie in together and support one another . . . . We must remain on the alert and push the struggle farther with all our might."<sup>91</sup>

*Brown* was not a story of immediate, exultant victory. Little Rock demonstrated how very difficult it was to achieve even basic desegregation *after* a unanimous Supreme Court ruling. The reality is that America was largely intolerant of integration and made every effort to prevent it. Nonetheless, the public resistance to integration did not stop the lawyers from pushing for civil rights. The team of lawyers continued to be successful in the integration movement, including promoting desegregation not only in public education, but also in transportation, jobs, housing, and other areas.

Seventy years ago Charles Hamilton Houston viewed legalized segregation as a roadblock to full citizenship for African Americans. In the twenty-first century, legalized state-sponsored segregation is off the books. Thurgood Marshall is a national hero. The segregationist governor of Arkansas who resisted segregation probably would not survive in politics today. But huge inequalities and roadblocks still stand in the way. The nation's persistent racial inequalities, created in large part through racial discrimination, show up particularly clearly in schools and are a reflection of inequality in other sectors of society. Blazing new paths around the walls that divide and determine unequal destinies is a task in which each of us—urban, suburban, rural, black, Latino, Asian and white—must be engaged in this post-*Parents Involved* era.

In 2003, then-Supreme Court Justice Sandra Day O'Connor cast her vote in *Grutter v. Bollinger*<sup>92</sup> in favor of retaining some affirmative action policies at the higher education level. In her written opinion Justice O'Connor also stated her expectation that in twenty-five years, the use of racial preferences "will no longer be necessary."<sup>93</sup> This sunset provision could be viewed as an unreachable target given the vast divide between the haves and have nots. But Justice O'Connor's words could also be viewed as

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91. Charles Hamilton Houston, *Don't Shout Too Soon*, THE CRISIS MAGAZINE (Mar. 1936).

92. 539 U.S. 306 (2003).

93. *Id.* at 343.

a call to arms—a way of underscoring the urgent need to make measurable progress not just in education, but on all fronts. Let us use Justice O'Connor's words as a motivation, not to lament the considerable backward movement, but in Charles Hamilton Houston's words, to "push the struggle farther with all our might"<sup>94</sup> and work even smarter to ameliorate inequalities that hinder equal opportunity for children here in the richest country in the world.

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94. Houston, *supra* note 91.

