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2013]

Martin Luther King, Jr. Lecture

THE UNFINISHED JOURNEY—EDUCATION, EQUALITY, AND MARTIN LUTHER KING, JR. REVISITED

TAUNYA LOVELL BANKS*

“[W]e must accept finite disappointment, but we must never lose . . . infinite hope.”¹

I. INTRODUCTION

MY life has been largely shaped by *Brown v. Board of Education*,² the seminal United States Supreme Court decision. I was born and educated in Washington, D.C., the nation’s capital, and by congressional mandate,³ my first five years of schooling were spent in a racially segregated public school.⁴ Despite my limited experience in integrated schools, the Washington, D.C. chapter of the National Association for the Advancement of Colored People (NAACP) sent me and Susann Harris, a white public high school student, to Montgomery, Alabama in December 1959 to participate in the fourth anniversary celebration of the Montgomery bus boycott.⁵ There I met and spoke with Dr. Martin Luther King, Jr. He was thirty years old and about to garner greater fame following his forthcoming move to Atlanta. I was a fourteen-year-old black public high school student.

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1. MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 91 (1963).

2. 347 U.S. 483 (1954).

3. The District of Columbia, a federal enclave, was governed by a Southern-dominated Congress. Into the mid-1950s there were segregated public schools, housing, and recreational facilities. Blacks also were excluded from public accommodations (hotels, restaurants, and theaters) that catered to whites. William B. Harvey & Adia M. Harvey, *A Bi-Generational Narrative on the Brown v. Board Decision*, 56 *NEGRO EDUC. REV.* 43, 45 (2005).

4. The case the nation remembers is *Brown v. Board of Education*, but that case, grounded in the Equal Protection Clause of the Fourteenth Amendment, only applied to the states. For Washington residents, *Bolling v. Sharpe*, the companion case to *Brown*, which was based on the Due Process Clause of the Fifth Amendment, governed. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

5. *Integration Workshop*, *WASH. AFRO-AMER.* (Dec. 8, 1959), <http://news.google.com/newspapers/p/afro?nid=BeIT3YV5QzEC&dat=19591208&printsec=frontpage&hl=en>.

Susann and I were sent to Montgomery at Dr. King's request to participate in an "integration workshop"⁶ to prepare black school children in that city for what Dr. King then believed was the *imminent* integration of the Alabama public schools. Neither the United States Supreme Court nor Dr. King foresaw the South's massive resistance to *Brown's* mandate.⁷ It took almost a decade after my visit for meaningful desegregation to occur in Montgomery.⁸ In the interim, the students I met during my trip continued to attend, and graduate from, segregated schools the Supreme Court had condemned as unequal.

Almost sixty years later, most commentators concede that the implementation of *Brown* was a failure.⁹ Over the years there has been retrenchment.¹⁰ Although today America's schools are no longer segregated by law, a substantial percentage of school children are consigned to racially isolated schools.¹¹ "Almost 40 percent of black and Hispanic students attend schools where more than 90 percent of students are nonwhite."¹² The grandchildren and *great-grandchildren* of *Brown's* children are still waiting for the *equal* education promised my generation. We as a nation seem unwilling, or unable, to fully commit to the principle of racially integrated, equally resourced public schools.¹³

6. *Id.*

7. By 1963 a wiser Dr. King had grown tired of the delay, placing some of the blame on the Supreme Court's "all deliberate speed language" in *Brown II*. See Wendy B. Scott, *Dr. King and Parents Involved: The Battle for Hearts and Minds*, 32 N.Y.U. REV. L. & SOC. CHANGE 543, 549 (2008). Two years later he opined that after *Brown* "[s]chool segregation did not abate[,] but increased," even in the North. *Id.* (first alteration in original) (citing MARTIN LUTHER KING, JR., *Next Stop: The North* (1965), reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 189 (James M. Washington, ed., 1991)).

8. See, e.g., *Cart v. Montgomery Cnty. Bd. of Educ.*, 289 F. Supp. 647 (M.D. Ala. 1968) (documenting continuing resistance to desegregation order).

9. Wendy B. Scott, *Desegregation Law and Jurisprudence*, 1 DUKE F. FOR L. & SOC. CHANGE 1, 3 (2009) (citing both progressive and conservative commentators).

10. Gary Orfield et al., *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, CIVIL RIGHTS PROJECT (Sept. 19, 2012), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students> (discussing segregation of Latinos in Western States); Genevieve Siegel-Hawley & Erica Frankenberg, *Southern Slippage: Growing School Segregation in the Most Desegregated Region of the Country*, CIVIL RIGHTS PROJECT (Sept. 19, 2012), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/southern-slippage-growing-school-segregation-in-the-most-desegregated-region-of-the-country>.

11. See, e.g., Orfield et al., *supra* note 10; Siegel-Hawley & Frankenberg, *supra* note 10.

12. ARY SPATIG-AMERIKANER, CTR. FOR AM. PROGRESS, UNEQUAL EDUCATION: FEDERAL LOOPHOLE ENABLES LOWER SPENDING ON STUDENTS OF COLOR 1 (2012), available at www.americanprogress.org/wp-content/uploads/2012/08/UnequalEducation.pdf

13. At least one commentator might disagree. Legal scholar Brandon Paradise argues that despite America's difficulty in achieving "cross-racial mutual understanding and empathy," that Americans are "more culturally prepared than

An educated society is important to the survival of a democracy. A good education feeds the soul and is necessary for America's children to thrive. As the Court in *Brown* remarked: “[i]n 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.”¹⁴

The America of the twenty-first century is dramatically different from the America that existed when *Brown* was decided, thus what constitutes a first class education today is slightly different. Today's education must prepare America's youth for the challenges they will face in the future. They must be prepared to engage the world on a firm foundation with empathy for, and understanding of, others. As I will explain, racial integration alone is insufficient—schools must receive adequate financial resources and be even more diverse socio-economically to adequately prepare America's youth for the diverse world in which they will live and work. This point is explained in the next section of this Essay.

II. EDUCATION AS A ROUTE TO EQUALITY

Access to quality primary and secondary education is a continuing concern of Americans. Even though the United States Supreme Court does not consider education a fundamental right, every state constitution mandates, encourages, or at least authorizes a free public education.¹⁵ While education remains a hallmark of first class American citizenship, there is no agreement about what constitutes a *quality* education.

As early as the mid-nineteenth century, some black Americans saw racially integrated schools as a measure of educational equality. In 1849, while the vast majority of black Americans remained enslaved, denied access to literacy, often by law,¹⁶ free black Bostonians sued to integrate that city's public schools.¹⁷ Raising many of the same arguments as the petitioners in *Brown*, these black Boston parents saw integration as a way to

ever to successfully pursue the diversity ideal of integration.” Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 418–419 (2012).

14. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

15. Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J.L. & EDUC. 1, 9–10 (2011).

16. It also is important to note that enslaved blacks were often prohibited by law from learning to read. See JANET DUTSMAN CORNELIUS, *WHEN I CAN READ MY TITLE CLEAR: LITERACY, SLAVERY AND RELIGION IN THE ANTEBELLUM SOUTH* 32–33 (1991) (describing state laws banning Black literacy during pre-Civil War period).

17. *Roberts v. City of Boston*, 59 Mass. (5 Cush) 198 (1849). Although the lawsuit was unsuccessful and later used against black litigants by the United States Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Boston Public Schools were desegregated shortly after the *Roberts* decision. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 90 (2004).

improve the *quality* of education their children received.¹⁸ They claimed that the white Boston schools were better resourced.¹⁹

In 1950, Thurgood Marshall, then General Counsel of the NAACP, decided, over the objections of some members of his legal team, to argue directly that racial segregation in public schools violates the Equal Protection Clause, rather than focus on equalizing per pupil expenditures and teachers' salaries.²⁰ After *Brown*, efforts to equalize all-black schools stopped as the focus became desegregation of public schools.²¹

Brown became a symbol of racial integration, not an equally resourced education. Educational equality was presumed if schools were integrated. Schools in jurisdictions where *de jure* segregation was mandated were considered integrated if segregated systems were dismantled. But desegregation of *de jure* racially segregated schools did not automatically result in integrated schools due to residential racial segregation patterns.²² Desegregated school systems were deemed in compliance even if most schools remained predominantly one race and resources remained unequal.²³ Resources often were unequal even in predominately white schools located in less affluent areas because property taxes were the primary means states used to finance public schools. This point is explored in the next section of this Essay.

A. School Funding

The Supreme Court, when asked in 1973 to address inequality in local school funding that disproportionately impacted poor, and predominantly

18. BELL, *supra* note 17, at 88.

19. *Id.*

20. For a discussion, see Taunya Lovell Banks, *Brown at 50: Reconstructing Brown's Promise*, 44 WASHBURN L.J. 31, 37, 39–40 (2004); Louis Menand, *Civil Actions Brown v. Board of Education and the Limits of Law*, NEW YORKER, Feb. 12, 2001, at 94.

21. Banks, *supra* note 20, at 42–43.

22. Some schools, especially in urban areas where residential segregation was prevalent, were *de facto* segregated by race and often class. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 191 (1973) (describing system of *de facto* segregation implemented in Denver public school system); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971) (noting “familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change”). In the South where residential segregation was not as prevalent during the *Brown* era, most whites fled the public schools for all-white private academies. BELL, *supra* note 17, at 109–12.

23. A classic example was the desegregation of the public schools in my hometown, Washington, D.C., detailed in a federal district court class action, *Hobson v. Hansen*, where lawyers for the named plaintiff, black civil rights activist Julius Hobson, argued successfully that poor children and most black students were denied an equal educational opportunity as a result of discriminatory practices by the local school board, including less experienced teachers and fewer resources and tracking programs. *Hobson v. Hansen*, 269 F. Supp. 401, 491 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

Mexican-American children, refused. Instead, it held in *San Antonio Independent School District v. Rodriguez*²⁴ that public education is not a fundamental right,²⁵ effectively permitting educational inequality to continue. This decision seemed almost inevitable as it became clear that racial integration would be limited in scope. Disparities in educational resources persisted.

The Court's decision in *San Antonio Independent School District*, however, triggered a wave of "fiscal equality" litigation in state courts premised on state constitutional provisions.²⁶ This litigation raised more questions like what "equalizing funding" actually entails. The success of the fiscal equality cases was limited and depended on the wording of each state's constitutional text. Most state constitutions require only minimum support for public education.²⁷ Six others mandate higher levels of quality,²⁸ but only four state constitutions characterize education as the highest or one of the most important duties of the state.²⁹ Some state courts, narrowly reading these provisions, refused to find constitutional violations.³⁰ Thus it is not surprising that state courts have been inconsistent in interpreting educational guarantees to require an equally resourced education.

State legislatures, in response to this litigation, looked for resources, in addition to property taxes, to address glaring expenditure disparities in

24. 411 U.S. 1 (1973).

25. *Id.* Although states can fund public schools unequally without violating the federal constitution, the Supreme Court has held that children cannot be denied access to public education provided to others by the state. *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964) (describing children in closed school district where other districts in state were open); *see also Plyler v. Doe*, 457 U.S. 202 (1982) (involving undocumented children).

26. For a discussion of this point, see Scott *supra* note 7, at 556–57; *see generally*, ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS* (2009) (arguing for performance based measures of achievement); *see also* Jeanne M. Powers, *High-Stakes Accountability and Equity: Using Evidence from California's Public Schools Accountability Act to Address the Issues in "Williams v. State of California"*, 41 AM. EDUC. RES. J. 763 (2004) (arguing for more equal distribution of education funding by linking lack of school resources with lower student achievement test scores).

27. William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19, 19 (1993). Eighteen state constitutions simply provide for a baseline level of "general" or "liberal" public schools. Twenty-two state constitution's education clauses require minimum standards for public school. Jon Mills & Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools*, 52 FLA. L. REV. 329, 344 (2000).

28. Thro, *supra* note 27, at 24.

29. *Id.* at 25.

30. *See, e.g.*, *Idaho Schs. for Equal Educ. Opportunity v. State*, 976 P.2d 913 (Idaho 1998) (upholding dismissal of adequacy claim under constitutional education clause); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994) (dismissing equity challenge based on state education provision and state equal protection); *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994) (upholding system under education provisions of state constitution).

school funding, including gaming revenue as well as retail and individual income taxes. According to legal scholar Mildred Robinson, while these new funding resources “provided increased funding for public education . . . [they also resulted in] unanticipated funding instability as state economies expand and contract in sync with the national economy.”³¹ She attributes the reduction in state support for public education to these changes in funding sources.³² Thus adequate funding of public education remains an issue today.

Fiscal litigation for educational equality in state courts is fraught with other problems. One of the more difficult issues is judicial deference to state legislatures. Only twenty state courts have found legislatively crafted public school system financing incompatible with state constitutional provisions.³³ In other cases, state courts are hesitant to implement equal education requirements because of a lack of “judicially . . . manageable standards.”³⁴ The primary focus in these battles is over resources and the money to pay for them. But equalizing funding for education alone is not enough for a quality public school education.

A recent report on education by the Council on Foreign Relations notes “that while the United States invests more in K-12 public education than many . . . developed countries, its students are ill prepared to compete with their global peers.”³⁵ As the report notes, financial resources alone do not guarantee quality outcomes.³⁶ I contend that the classroom environment is an important factor.

Scholars who write about education usually discuss school financing separately from the issue of school populations isolated by race, class, or both, not fully acknowledging the interconnectedness of these factors. As one commentator points out, “the fiscal . . . equity litigation . . . did not seek to directly challenge schools’ status as racially separate.”³⁷ Further, economic diversity in and of itself was not seen as a positive factor in the classroom. When, for example, the Charlotte Mecklenburg School District instituted a policy of economic diversity in the classroom, their goal was a neutral way to achieve racial integration.³⁸ Conflating race and

31. Mildred W. Robinson, *Funding K-12 Public Education* (unpublished manuscript) (on file with author).

32. *Id.*

33. Mills & McLendon, *supra* note 27, at 402–09.

34. *Id.* at 357.

35. *U.S. Education Reform and National Security*, COUNS. ON FOREIGN REL., <http://www.cfr.org/united-states/us-education-reform-national-security/p27618> (last visited Mar. 19, 2013) (discussing Task Force report on U.S. Education Reform and National Security).

36. *Id.* at 68.

37. Scott, *supra* note 7, at 557.

38. R Kenneth Godwin et al., *Sinking Swann: Public School Choice and the Resegregation of Charlotte’s Public Schools*, 23 *REV. OF POL’Y RES.* 983 (2006) (analyzing practical effects of race-neutral diversification policy of Charlotte–Mecklenburg schools post-2002).

class, the district assumed that most black children come from improvised homes and, by implication, white children did not.

B. *An Integrated Classroom*

While some school districts saw financial equality as a measure of *educational* equality, others continued to stress racial integration, concerned about racially isolated school populations. A few scholars argue that racial integration is more important in the primary and secondary grades than at the college level.³⁹ The school board in Topeka, Kansas, understood this reality. Prior to *Brown*, Kansas permitted, but did not mandate, school districts to operate racially segregated schools.⁴⁰ Topeka chose to operate segregated primary schools, but the high school was integrated.⁴¹ Legal scholar Brandon Paradise argues that because children become aware of race at an early age, they must have positive experiences and interactions with other racial and ethnic groups early in their education to counteract damaging stereotypes that persist in American society.⁴²

There is, however, no consensus on the Supreme Court about whether *Brown* mandates desegregation of contemporary racially isolated school populations because *Brown* only dealt with *de jure* segregation.⁴³ Rather, in 2007 a narrowly divided Court in *Parents Involved in Community Schools v. Seattle School District No. 1*⁴⁴ announced that a *voluntary* effort to

39. See, e.g., Paradise, *supra* note 13, at 418.

40. *Brown v. Bd. of Ed.*, 98 F. Supp. 797, 797 (D. Kan. 1951), *rev'd*, 349 U.S. 294 (1955).

41. *Brown v. Bd. of Ed.*, 671 F. Supp. 1290, 1293 (D. Kan. 1987), *rev'd*, 892 F.2d 851 (10th Cir. 1989), *vacated*, 503 U.S. 978 (1992).

42. In a footnote Paradise cites these sources in support of his claim that children become aware of race at an early age. Gary Orfield, Erica Frankenberg & Liliana M. Garces, *Statement of American Social Scientists of Research on School Desegregation to the U.S. Supreme Court in "Parents v. Seattle School District" and "Meredith v. Jefferson County"*, 40 URB. REV. 96, 103, 112 (2008) (summarizing empirical research on effect of school integration on racial attitudes and concluding school integration promotes cross-racial understanding); see also Brief Amicus Curiae of the Nat'l Educ. Ass'n et al. in Support of Respondents at 17, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927085, at *17 (noting "contact that occurs during key periods of personal development—most importantly during a child's formative years—and that frequently recurs, is far more effective at promoting tolerance and cross-racial understanding than intermittent contact among persons whose social beliefs and identities are fully formed. . . . Once the destructive 'habit' of 'racial stereotyping' is learned, it is difficult to break, making it 'more difficult to teach racial tolerance to college-age students' than to public elementary/secondary school students" (quoting *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 356 (D. Mass. 2003))). This describes the testimony of social psychologist Dr. John Dovidio on early childhood interracial interaction and racial stereotyping. See generally Heidi McGlothlin, Melanie Killen & Christina Edmonds, *European-American Children's Intergroup Attitudes About Peer Relationships*, 23 BRIT. J. DEV. PSYCHOL. 227, 243–47 (2005).

43. Scott, *supra* note 9, at 3.

44. 551 U.S. 701 (2007).

maintain racially integrated public schools is not a sufficiently compelling state interest under the Constitution.⁴⁵ Strikingly, the plurality opinion “turned the focus of [its] analysis away from whether segregated schools still harmed students of color ‘because of race’ [saying] [i]nstead . . . that . . . voluntary efforts to desegregate harmed white students ‘because of race.’”⁴⁶ This statement suggests that white children derive no value from attending racially and ethnically diverse primary and secondary schools.

There was no widespread outcry when *Parent Involved* was decided. The begrudging acceptance of the case by the country suggests that public school integration has lost its symbolic power.⁴⁷ Yet four years earlier the same Court acknowledged in *Grutter v. Bollinger*⁴⁸ the importance of a racially diverse educational environment in *higher* education.⁴⁹ The connection between racial and class diversity as part of a *quality* public school education, and readiness for higher education, is underappreciated.

Students cannot compete on the college level without being adequately prepared during their K-12 years. The failure to close earlier gaps compelled reliance on increasingly vilified “affirmative action” efforts. Thus the Court in *Parents Involved*, without seeming conflict, can thwart

45. *See, e.g., id.*

46. MICA POLLOCK, *BECAUSE OF RACE: HOW AMERICANS DEBATE HARM AND OPPORTUNITY IN OUR SCHOOLS* 2 (2008).

47. There has been a flurry of criticism for the decision within the legal academy. *See, e.g.,* POLLOCK, *supra* note 46; Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937 (2008); Joseph O. Oluwole & Preston C. Green, *Grating Race-Conscious Student Assignment Plans in the Cauldron of Parents Involved v. Seattle School District*, 56 WAYNE L. REV. 1655 (2010); Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. MIAMI L. REV. 507 (2009); Taryn Williams, Note, *Outside the Lines: The Case for Socioeconomic Integration in Urban School Districts*, 2010 BYU EDUC. & L.J. 435 (2010).

48. 539 U.S. 306 (2003).

49. *Id.* at 331 (achieving “critical mass” of unrepresented minority students is compelling state interest if means used are narrowly tailored). Justice O’Connor stated:

Major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation’s leaders . . . the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. Thus, the Law School has a compelling interest in attaining a diverse student body.

Id. at 308. Justice O’Connor, writing for the majority, referred to Justice Powell’s statement in *Bakke* that the “‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation.” *Id.* at 307 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)). Justice Powell was himself quoting from an even earlier Court case. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (striking down loyalty oath required of state officials to screen for communist party members).

voluntary integration efforts in primary and secondary schools while simultaneously permitting such efforts by colleges and universities in *Grutter*.

The Council on Foreign Relations report on education also linked improving the quality of public education to national security.⁵⁰ The report's recommendations focused on developing a core curriculum, more performance based measures, and increased school choice for students. It did not, however, include racial and economic integration as a measure of quality education.

C. *The Connection Between Funding and the Integrated Classroom*

As mentioned previously, numerous studies show that public schools today are more segregated than ever along race and class lines.⁵¹ Predominantly one-race non-white schools also tend to be under resourced, especially in large urban areas where the school system has been abandoned by affluent and middle class families of *all races*.⁵² One of the reasons these families have abandoned urban schools is that parents, consciously or unconsciously, associate inferior education with racially and economically diverse student populations as well as lower property values. *Brown* may be partially at fault. I have always been troubled by the Court's statement in *Brown* that *de jure* segregated schools only harmed black children.⁵³ The Court in *Brown*, and more recently in *Parents Involved*, seems unwilling to concede that racial isolation of *any* race, especially during the early years of education, is harmful to the education of all American children because we live in a multi-racial democracy. The Court's statements suggest that the benefit of racially integrated schools operates one way, reinforcing notions of white superiority.

Similarly, children from poor or affluent families educated in economic isolation are equally harmed, but for different reasons. Children from less affluent families are most often confined to subpar public schools and may have their opportunities limited as a result, while children from more affluent families who are not exposed early on to children from diverse economic backgrounds may fail to develop empathy for economically-less-advantaged individuals. As a result, privileged children,

50. COUNCIL ON FOREIGN RELATIONS, *supra* note 35.

51. *See supra* notes 10–11.

52. *Defunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting).

53. *Brown*, 347 U.S. at 494. The Court cited the findings of another segregation case with approval stating:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.

Id.

who are more likely to become members of the leadership class, may be less likely to push for educational policies that advance the broad range of American families if educated in isolation.

If we are failing to provide all of America's children with quality primary education, it is unsurprising that there is a lack of racial and economic diversity in the nation's colleges and universities. Our failure to properly educate children at the primary and secondary level has given rise to a continuing battle in the United States Supreme Court about efforts to insure a more racially diverse college and professional school population. Ironically, the systematic assault on attempts to diversify America's college population became more public a year after the *San Antonio Independent School District* decision when Justice William Douglas, a progressive member of the Court, wrote a dissent in *Defunis v. Odegaard*⁵⁴ questioning the use of race in law school admissions decisions.⁵⁵ The rest of the Court in the *Defunis* case refused to rule on a challenge to the use of race in the college admissions process.⁵⁶

Douglas' dissent was seen by some as an invitation to challenge race-based affirmative action efforts by colleges and universities. Five years later a deeply fractured Court in *Regent of the University of California v. Bakke*⁵⁷ took on this question directly.⁵⁸ In a plurality opinion Justice William Powell approved the consideration of race as one of many factors, including class, in the admissions process to create a more diverse university student body.⁵⁹

Twenty-five years later when the Court in *Grutter* agreed to reconsider the *Bakke* decision, a bare majority rationalized that taking race into account in the law school admissions process at the University of Michigan was needed to "remedy" a lack of diversity among the leadership class in colleges and universities.⁶⁰ It was important, according to the Court, that America's future leaders had experiences interacting with members of other races and ethnicities.⁶¹ Nevertheless, Justice O'Connor, writing for the Court, warned that these meager efforts to compensate for a lack of racially diverse students in higher education populations must be temporary, lasting no more than twenty-five years.⁶²

54. 416 U.S. 312 (1974).

55. *Id.* at 320–21 (Douglas, J., dissenting).

56. *Id.* at 312–20 (majority opinion).

57. 438 U.S. 265 (1978).

58. *Id.*

59. *Id.* at 271–72.

60. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

61. *Id.* at 332.

62. *Id.* at 342. Justice O'Connor wrote:

[R]ace-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification

Ten years have passed since the *Grutter* decision. Modest efforts by Congress to improve public education, such as *No Child Left Behind*⁶³ that focuses on performance, and *Race to the Top*⁶⁴ that encourages use of charter schools and privatization, have been criticized as ineffective and addressing only parts of the problem.⁶⁵ Further, the Supreme Court, responding to public pressure, in a series of decisions has severely handicapped the ability of local schools boards to achieve or maintain desegregated schools.⁶⁶ We must accept that the Supreme Court, often touted for its bravery in issuing the *Brown* decision, in hindsight has been as much an obstacle to educational equality as it has been a proponent. As legal scholar Wendy B. Scott notes: “the Court has never fully embraced the idea that equality requires structural changes in public education to end the adverse effects of racial subordination.”⁶⁷

Last October the United States Supreme Court heard oral arguments in *Fisher v. University of Texas at Austin*⁶⁸ on the issue of whether the Equal Protection Clause of the Fourteenth Amendment permits a state university

for racial preferences would offend this fundamental equal protection principle.

.....

The requirement that all race-conscious admissions programs have a termination point “assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.” . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Id. at 342–43 (second alteration in original).

63. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

64. “Race to the Top” is a \$4.35 billion dollar program in which the Department of Education awards education grant funding to states that “creat[e] conditions for innovation and reform.” U.S. DEP’T OF EDUC., *RACE TO THE TOP: EXECUTIVE SUMMARY* (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

65. See, e.g., Charles R. Lawrence III, *Who Is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 *SUFFOLK U. L. REV.* 699 (2006); Michael Salerno, Note, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 *CARDOZO PUB. L. POL’Y & ETHICS J.* 509 (2007); Regina R. Umpstead, *The No Child Left Behind Act: Is it an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 *J.L. & EDUC.* 193 (2008).

66. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (noting school district not required to remedy racial isolation resulting from residential patterns); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (rejecting creation of special magnet schools to attract white suburban students whose parents fled urban school districts resulting in racially isolated non-white city schools); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976) (holding school district is not required to mitigate consequences of “normal pattern of human migration” resulting in racially isolated non-white schools); *Milliken v. Bradley*, 418 U.S. 717 (1974) (rejecting inter-district remedies to address changing racial demographics in urban school district resulting in over-abundance of racially isolated non-white schools); see also Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court’s Role*, 81 *N.C. L. REV.* 1597 (2003).

67. Scott, *supra* note 9, at 15–16.

68. No. 11-345 (U.S. argued Oct. 10, 2012).

to use race in making undergraduate admissions decisions.⁶⁹ Even if the *Grutter* decision withstands the attack in the *Fisher* case, unless more aggressive measures are taken to address the deficiencies of public education, we may have only fifteen years left before higher education, and a better life, maybe foreclosed for many Americans. Achieving educational equality, however, will not be easy.

According to education scholar Mica Pollock, instead of a public school system where there is “purposeful racial inequality . . . [T]oday’s racially unequal educational opportunity is a result of . . . the nation’s failure to actively desegregate, and of the intersections between opportunity denials in health and housing as well as education [and the] ordinary actions and inactions by well-intentioned people.”⁷⁰ A recent *New York Times* article illustrates one aspect of the problem Professor Pollock describes. A New York City public school with a racially and economically diverse student body remains internally segregated as a result of its “gifted and talented” program that disproportionately favors students from more affluent, mainly white, families who enter school with more resources and better pre-school training than their less affluent, mainly non-white, classmates.⁷¹

Persistent residential segregation along racial and class lines⁷² coupled with school assignments based primarily on geography,⁷³ and schools, even within the same school district, that are unequally resourced,

69. The exact issue as stated by the Court is whether this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, permit the University of Texas at Austin’s use of race in undergraduate admissions decisions. Transcript of Oral Argument at 3, *Fisher v. University of Texas at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012).

70. POLLOCK, *supra* note 46, at 11 (footnote omitted); *see also* Spatig-Amerikaner, *supra* note 12 (federal educational policy).

71. Al Baker, *Gifted, Talented and Separated*, N.Y. TIMES (Jan. 12, 2013), http://www.nytimes.com/2013/01/13/education/in-one-school-students-are-divided-by-gifted-label-and-race.html?pagewanted=all&_r=0.

72. *See generally* RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP (2004); Erica Frankenberg, *Metropolitan Schooling and Housing Integration*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 193 (2009) (arguing housing and education policy must work in tandem to stem persistent post-*Brown* segregation and live up to promise of *Brown* and Fair Housing Act); Ilyce Glink, *U.S. Housing Market Remains Deeply Segregated*, CBS NEWS (June 20, 2012), http://www.cbsnews.com/8301-505145_162-57443862/u.s-housing-market-remains-deeply-segregated/; Daniel T. Lichter et al., *National Estimates of Racial Segregation in Rural and Small-Town America*, 44 DEMOGRAPHY 563 (2007); Susan E. Mayer, *How Economic Segregation Affects Children’s Educational Attainment*, 81 SOC. FORCES 153 (2002) (arguing that increase in economic segregation does not change overall educational attainment but worsens inequality and reduces low-income children’s educational attainment).

73. John R. Logan, Elisabeta Minca & Senem Adar, *The Geography of Inequality: Why Separate Means Unequal in American Public Schools*, 85 SOC. OF EDUC. 287 (2012) (analyzing segregation based on school profiles and effect of segregation on school performance).

seem like intractable problems. Thus, achieving educational equality may seem like a pipe dream. But as Dr. King said: “there is a creative force in this universe . . . a power that is able to *make a way out of no way* and transform dark yesterdays into bright tomorrows.”⁷⁴ Thus the enormous task for the future is to develop multi-faceted strategies to insure quality education for all of America’s children.

III. ACHIEVING KING’S DREAM

As a first step it is time to abandon *Brown* as a fatally flawed symbol of educational equality, and replace it with a new symbol. Access to education that is unequally funded, and that occurs in racially and economically isolated schools, does not result in the kind of education twenty-first century children need to become productive adults. Thus a reconstituted right to education should consist of several components: equal resourcing and funding of schools along with racially and economically diverse classrooms, especially in large urban and suburban areas.

Rather than re-litigate *San Antonio Independent School District* and devote many resources to recognition of a federal right to education, we need to focus on litigation efforts in the states because their constitutions all recognize this right. Thus, state constitutional guarantees can be a vehicle to achieve a more comprehensive vision of quality public education. The parameters of this right can be worked out in the states, the unit of government with the primary responsibility for public education. This effort should begin in those states that are already trying to more broadly interpret their education guarantee because they may be more receptive to a reconstituted right to education.

But as my foregoing remarks indicate, the complexity of the problem I have identified involves more than legal barriers. Harvard Law School Dean Martha Minow writes: “[s]chooling accentuates potential tensions between . . . conceptions of equality that are focused on individual opportunity, inclusion, and commonality and . . . conceptions of equality that are focused . . . on group rights, group autonomy, and multiculturalism.”⁷⁵ Too often American families are concerned only with the quality of education *their* child receives, not with the quality of education available for all of America’s children.

Bottom line: there is a direct connection between effective K-12 education and the ability to compete academically in college. Improving primary and secondary education is especially important as the United States Supreme Court withdraws its approval of affirmative action programs. But efforts that focus on improving fiscal equality may undermine the ability to

74. Martin Luther King, Jr., *Make a Way Out of No Way*, Address to the Southern Christian Leadership Conference (Aug. 16, 1967), available at http://humankindmedia.typepad.com/my_weblog/2008/01/make-a-way-out.html.

75. MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* 171 (2010).

be attentive to integration, and vice versa. Even if schools become more racially and economically diverse, the educational outcomes will probably be different if the emphasis is on fiscal concerns over classroom demographics.

As our experience with *Brown* has taught us, law is an imperfect vehicle for bringing about massive social change. In 1963, Dr. King, in his often quoted *Letter from a Birmingham Jail*, wrote about the “interrelatedness of all communities and states.”⁷⁶ The same year he wrote in his book *Strength to Love* that: “True integration will be achieved by true neighbors who are willingly obedient to unenforceable obligations.”⁷⁷ I contend that we as Americans have an *unenforceable obligation* to provide quality education for all of our children and not handicap some children so that others can become more competitive. We must do this by *public will*, not solely through law.

As I said earlier, our efforts to bring about educational equality should be multi-directional, and lawyers have a role to play. As part of this battle some lawyers and academics must recommit to convincing state courts to define more broadly their guarantees of a free public education. We must convince state courts that education is a fundamental right. Others must work with state legislatures to get them to commit, in words and funds, to the achievement of a twenty-first century notion of educational equality. More importantly, we *all* must work to get Americans throughout the nation to recommit to a strong public education system throughout the country.

IV. CONCLUSION

In less than a decade the man I met in Montgomery, Alabama had evolved into an internationally-recognized human rights advocate. He spoke out against the war in Vietnam, engendering criticism from both his supporters and detractors.⁷⁸ Dr. King also was an early critic of apartheid in South Africa.⁷⁹ At the time of his death in the spring of 1968 he was organizing a Poor People’s Campaign—a mass protest for economic as well as civil rights.⁸⁰ Thus, at the end of his life Dr. King recognized the interconnectedness of various forms of subordination and oppression that included, but were not necessarily defined by, race.

In 1994 I celebrated the King Holiday in Honolulu, Hawaii, and witnessed the first celebration I thought truly represented Dr. King’s dream. This celebration bore little resemblance to the token ceremonies I wit-

76. Martin Luther King, Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

77. MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 38 (1963).

78. MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* xiv (Beacon Press 2010) (1967).

79. *Id.* at 183.

80. *Id.* at xx.

nessed on the mainland. Those ceremonies treat the King birthday as a “black” holiday. In Honolulu the audience was large, and given that state’s multi-racial and multi-ethnic composition, diverse. There was singing by a black church choral group from the military base, music by the Royal Hawaiian Band and dancing by elderly Japanese-American women. Various groups representing other components of the Island’s community also participated. The Honolulu celebration seemed to capture Dr. King’s thoughts that “[a]n individual has not started living until he can rise above the narrow confines of his individualistic concerns to the broader concerns of all humanity.”⁸¹ This is why we must strive for equally resourced, racially and economically diverse public schools classrooms throughout America.

We are naïve, however, if we believe that achieving educational equality is a simple task capable of easy fixes. Looking backward it becomes apparent that, like governance in general, with public education “[t]here is no equilibrium. [Rather, t]here’s just a process of critique and mobilization and activism that dynamically inches you toward something better.”⁸²

In 1964, when he received the Nobel Peace Prize, Dr. King remarked that the honor was “a commission to go out and work even harder for the things in which we believe.”⁸³ So, I urge each of you to consider your law degree a commission to go out and make educational equality and social justice a part of your life’s work. America needs *many* good leaders to survive this century as a true multi-racial democracy. Remember in the words of the hit song, *The Greatest Love of All*, popularized by Whitney Houston that: “children are our future. *Teach them well* and let them lead the way.”⁸⁴

81. This sermon/speech was delivered several times with only minor changes: Martin Luther King, Jr., Remaining Awake Through a Great Revolution, Address at Morehouse College Commencement (June 2, 1959), *available at* http://mlk-kpp01.stanford.edu/index.php/home/article/remaining_away_2_june_1959/; Oberlin College (Aug. 1, 1965), *available at* <http://www.thekingcenter.org/archive/document/remaining-awake-through-great-revolution-1>; The National Cathedral, Washington, D.C. (Mar. 31, 1968), *available at* http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/remaining_away_through_a_great_revolution/.

82. Mary Carole McCauley, *Meritocracy Is Ruining, Says Pundit Chris Hayes*, BALT. SUN (Jan. 7, 2013), http://articles.baltimoresun.com/2013-01-07/entertainment/bs-ae-book-hayes-20130107_1_meritocracy-equality-payroll-tax/2 (interview with Chris Hayes, editor-at-large of *The Nation* and MSNBC host of *Up With Chris Hayes*).

83. CORETTA SCOTT KING, *THE WORDS OF MARTIN LUTHER KING, JR.* 12 (2001).

84. WHITNEY HOUSTON, *THE GREATEST LOVE OF ALL* (Arista Records 1986).

