

Constitutional Comparisons and Converging Histories: Historical Developments in Equal Educational Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South African Constitution

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I. Introduction: Convergence and Divergence in American and South African Histories: A Context for Current Discussions on Race

There are many historical similarities between the United States and South Africa. The countries' historical treatment of blacks, however, has diverged as well as converged over the past 150 years. For example, while both countries share a history of slavery, South Africa nominally freed its African slaves in 1834,¹ thirty-one years before the United States ratified the Thirteenth Amendment. Despite their disparate time frames for freeing black slaves, both countries' post-emancipation legal regimes were designed to maintain the subordinate status of blacks to whites, particularly with respect to labor relations. The black labor supply became a bedrock for each countries' continued economic development during the second half of the nineteenth century and the early twentieth century.

Between 1834 and the formation of the Republic of South Africa in 1910,² gold and diamond discoveries in South Africa necessitated cheap mining labor, and native Africans served this need.³ Similarly, immediate post-Civil War legislation in former slave-holding states sought to maintain an equilibrium in the African-American labor supply. The appearance of "black codes" in some former slave-holding states structured, secured, and directed the African-American labor force in order to maintain the plantation system.⁴

1. See LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 62-65 (1995).

2. See *infra* note 98.

3. See THOMPSON, *supra* note 1, at 112. The Masters and Servants Acts 1856-1910, criminalized breach of employment contracts. The Acts also regulated "desertion, drunkenness, negligence and strikes in the workplace." TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 1, Chap. 10, at 1 (1998). Although facially neutral, the Acts were applied discriminatorily to poorer, unskilled laborers, of whom the greatest percentage were African. See *id.* The Mines and Works Act No. 12 of 1911 required certificates of competency for particular skilled mining jobs and only allowed whites and coloureds to obtain them. See *id.* At this time, the South African labor force was divided "between white workers, with skilled or supervisory roles, opportunities for advancement, high wages, and relatively good living conditions, and black workers devoid of the means to exercise skilled or supervisory roles, poorly paid and subjected to harsh living conditions in all male compounds." THOMPSON, *supra* note 1, at 112.

4. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 199 (1988). The black codes of Mississippi were typical of these laws. In order to secure a sustained labor force for the agricultural economy, under Mississippi law, African-

Between 1910 and 1948, the pre-apartheid period in South African history commonly called the “era of segregation,” racially segregative laws regulated African ownership of land,⁵ labor relations,⁶ speech,⁷ voting rights,⁸ interpersonal relationships,⁹ and the African’s physical placement for living purposes.¹⁰ Correspondingly, the post-*Plessy v. Ferguson*¹¹ period in the United States—1896 to 1954—produced similar laws regulating various aspects of African-American life, including land ownership,¹² voting rights¹³ and marital relationships.¹⁴

The American and South African treatment of black citizens, however, seemed permanently to diverge in the post-World War II period. In the United States, the quest for desegregation in areas of

Americans were required to show proof that they had secured employment for the next year. *See id.* If a worker quit his job, he automatically lost his wages and the voluntary termination was criminally sanctionable. *See id.* Whites could not offer employment to African-Americans who were already under contract to another without criminal reprisal or fines. *See id.* African-Americans were not allowed to lease or rent accommodations in urban areas. This provision was intended to deliberately limit the employment opportunities of African-Americans to rural agrarian areas. *See id.*

5. The Black Lands Act No. 27 of 1913 allowed African ownership or lease of land only within reserved areas. *See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT*, Vol. 1, Chap. 13, at 2 (1998). The Black Laws Amendment Act No. 36 of 1937 forbade Africans from buying land in urban areas from anyone other than other Africans. *See id.*

6. The Industrial Conciliation Act No. 11 of 1924 reserved certain jobs for whites and forbade the establishment of African trade unions as well as African membership in any trade union.

7. The Riotous Assemblies Act of 1930 allowed the government to prohibit the “publication or dissemination of any documentary information . . . calculated to engender feelings of hostility between European inhabitants of the union . . . and other sections of . . . inhabitants.” *TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT*, Vol. 1, Chap. 13, at 3 (1998).

8. As of 1936, the only place in South Africa that recognized the black franchise was the Cape Province. With the enactment of the Representation of Blacks Act No. 12 of 1936, all blacks were removed from the Cape Province voting rolls and were replaced by four white senators who were the designated representatives for blacks. *See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT*, Vol.1, Chap. 13, at 3 (1998).

9. *See infra* note 19.

10. Pursuant to The Black Administration Act No. 38 of 1927, the Minister of Black Affairs was authorized to order Africans individually or as a group “to be moved from one place to another within the Republic of South Africa.” *TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT*, Vol. 1, Chap 13, at 3 (1998).

11. *See* discussion *infra* Section III.

12. *See Shelley v. Kramer*, 334 U.S. 1, 19-20 (1948) (striking down as unconstitutional the long established practice of racially restrictive covenants in housing accommodations).

13. *See infra* note 49.

14. *See infra* note 47.

black and white life became a “cold war imperative.”¹⁵ One example occurred in 1954, when the United States Supreme Court held that separate schools for black and white children were inherently unequal.¹⁶ The judicial pronouncement would create—in theory—the groundwork to conclusively resolve the social, political, and economic problems that stemmed from slavery and the legacy of Jim Crow.¹⁷ In marked contrast, the rise of the South African National Party in 1948,¹⁸ the enactment of the Prohibition of Mixed Marriages Act of

15. Mary L. Dudziak, *Desegregation As A Cold War Imperative*, 41 STAN. L. REV. 61 (1988). The origin of the term “cold war” is uncertain. By some accounts, however, journalist Walter Lippman is credited with coining the term. See HUGH BROGAN, *THE PENGUIN HISTORY OF THE UNITED STATES OF AMERICA* 602 n.1 (1985). The term commonly describes the period between 1945 and 1991 when the United States and the Soviet Union were engaged in an ideological conflict concerning the countries’ political and economic philosophies respecting democracy and communism, and the resulting quest to ally non-aligned countries. See Daniel Deudney & G. John Ikenberry, *After the Long War*, 94 FOREIGN POL’Y 21 Mar. (1994); Loch K. Johnson, *Book Review* of Oleg Kalugien’s *The First Directorate: My 32 Years in Intelligence and Espionage Against the West and Robert Gates’ From the Shadows: The Ultimate Insider’s Story of Five Presidents and How They Won the Cold War*, 105 FOREIGN POL’Y 179 Dec. (1996). The ideological conflict was also marked by Winston Churchill in the metaphor characterizing the “iron curtain” that had descended across the European continent. See ROBERT R. JAMES, *WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897-1963*, vol. VII, at 7285-93 (1993). The death of Jim Crow, *de jure* discrimination and segregation became a compelling cause during the 1950s and 1960s, particularly in light of the fact that African-American soldiers had served the cause of democracy in preserving the free world by helping to topple the Nazi regime which had been premised on the racial, ethnic and religious superiority of whites. Nonetheless, they returned to an America where in many places, they were subject to laws which were based on the same concept of white supremacy. See generally A. RUSSELL BUCHANAN, *BLACK AMERICANS IN WORLD WAR II* (1975); NEIL A. WYNN, *THE AFRO-AMERICAN AND THE SECOND WORLD WAR* (1975); Michael J. Klarman, *Brown, Racial Change, And The Civil Rights Movement*, 80 VA. L. REV. 7 (1994). See also Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980). The Cold War also became a unifying point for the development of South African internal policy during the 1960s. During the 1960s, the National Party used the relationship between the African National Congress and the South African Communist Party, as well as the African National Congress’s subsequent relationship with China and Soviet bloc countries, to support a general proposition that an African liberation movement was by necessity communist-oriented. See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 2, at 7 (1998).

16. See the textual discussion of *Brown v. Board of Education* in Section V.

17. “Jim Crow” is the term used to describe racial classification laws which required separate facilities for blacks and whites in public accommodations, education, and various other services. See *infra* note 46.

18. The National Party came to power during the elections of 1948 and began to legislate what have been called the foundational pillars of Apartheid: the Population Registration Act, the Mix-Marriages Act and the Group Areas Act. See ROGER OMOND, *THE APARTHEID HANDBOOK* 16 (1985).

1949,¹⁹ the Population Registration Act of 1950,²⁰ the Group Areas Act of 1950,²¹ and the Reservation of Separate Amenities Act of 1953,²² represented a solidification and expansion of racist laws and policies in post-World War II South Africa.

Yet with the end of apartheid, the histories of the two nations appear once again to converge. The first non-racial democratic national elections in 1994 and the enactment of the new Republic of South Africa Constitution of 1996—guaranteeing the equality of all South African people irrespective of race—marked the end of the *de jure* regime of apartheid. The end of legal discrimination in South Africa, however, by no means resolves centuries of racial intolerance. Unfortunately, the same is true of post-*Brown* United States policy.

In an attempt, perhaps, to come to grips with the troubled aftermath of the histories of discrimination, citizens of both the United States and South Africa have recently called for frank and truthful discussions, as well as apologies for the past discriminatory treatment of blacks. The most recent point of convergence in American and South African histories involves two reports which have renewed discussions of race in both countries. In the wake of controversy regarding the propriety of a national apology for slavery,²³ the United States

19. See Prohibition of Mixed Marriage Act 55 of 1949, S. Afr. Stat. 614 (1949) (forbidding marriages between certain racial classifications). Later, the Population Registration Act specifically designated these racial classifications. In 1957, sexual intercourse between those classified under the Population Registration Act was made illegal.

20. See Population Registration Act 30 of 1950, S. Afr. Stat. 275, 279 (1950). The act required the racial classification of all South African People as white, coloured, or native (now black). See OMOND, *supra* note 18, at 24. Described as a cornerstone of the Apartheid system, the Act was repealed in 1991. See THOMPSON, *supra* note 1.

21. See Group Areas Act 36 of 1966, S. Afr. Stat. 141 (1966) (designating land areas that could be owned and occupied by particular racial classifications).

22. See Reservation of Separate Amenities Act 49 of 1953, S. Afr. Stat. 311 (1953). This act required separate public accommodations in public places for those racial classifications designated under the Population Registration Act. See *id.* The Act also foreclosed judicial review on the issue of inequities in accommodation. See *id.* Courts could not declare that the segregated black facility was invalid because it was substantially unequal to that provided for whites. OMOND, *supra* note 18, at 53-54 (1985).

23. President Clinton has been asked to agree to a congressional bill apologizing for the nation's history of slavery. In June of 1997, Representative Tony Hall introduced legislation in which Congress would offer an official apology for the government's role in enslaving Africans in America. The resolution stated: "[T]he Congress apologizes to African-Americans whose ancestors suffered as slaves under the Constitution and laws of the United States until 1865." 143 Cong. Rec. H3890-06 (1997). See also Katherine Rizzo, Gingrich Questions Value of Congressional Apology for Slavery, 'Will One More Child Read Because of It?', THE ORANGE COUNTY REGISTER, June 14, 1997, at A25. In 1997, President Clinton issued a national apology for the Tuskegee syphilis experiment—another government action premised upon the idea that African-Americans were inferior. See Government Apologies: 1997 Seemed Like the Year of Apologies, Transcript of Talk of the

President's Advisory Commission on Race issued a report suggesting that race continues to be an "American dilemma."²⁴ Similarly, in South Africa, the Truth and Reconciliation Commission issued its final report, which chronicled the viciousness of the legal regime of apartheid.²⁵ The reports have once again focused both nations' attention on critical truths regarding both countries' treatment of blacks.

The Republic of South Africa Constitution of 1996 charged the Truth and Reconciliation Commission with the task of "promoting national unity and reconciliation" by providing a forum for exploring apartheid atrocities, and for granting amnesty to those who fully confessed to their crimes.²⁶ In many ways, the Commission played the

Nation, Ray Suarez Host, January 20, 1998. From 1932 until 1972 U.S. Public Health Service doctors secretly withheld treatment from over four hundred African-American men in Tuskegee, Alabama in an experiment aimed at determining whether African-American men would react differently than whites to syphilis. See JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1981).

24. See generally GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944). See also ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992).

25. See text and notes *infra* Section VII.

26. The goal of national unity and reconciliation was embodied in the Interim Constitution, which was ratified on November 18, 1993. Constitution of the Republic of South Africa, Chapter 15, General and Transitional Provisions, Section 251:

This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for unbuntu, not for victimization.

The South African Constitution of 1996 states:

Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995)

The Constitution of the Republic of South Africa, 1996, Schedule 6, Transitional Arrangements, Section 22. The Promotion of National Unity and Reconciliation Act of 1995 established the authority and structure of the Truth and Reconciliation Commission. The Commission's objective was to "establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from March 1, 1960 to the cut-off date, including the antecedents, circumstances,

role of national confessor, forcing South Africans to recognize the horrific nature of apartheid. The Commission followed with an apology and a promise to no longer do wrong. Through this process of truth-telling, South Africa sought to heal the wounds of racial hatred.²⁷

Critics, however, attacked both the American call for a national apology and the work of the Truth and Reconciliation Commission as inappropriate means for reconciling their racially divisive pasts. Some, for instance, charged that the South African Truth and Reconciliation Commission was a political instrument whose true function was to “whitewash atrocities committed in the name of liberation and to demonize parties, organizations and individuals who opposed the African National Congress.”²⁸

factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings.” Promotion of National Unity and Reconciliation Act 34 of 1995. The Commission was entrusted with the power to “facilitate the granting of amnesty to persons who make full disclosure of all relevant facts relating to acts associated with a political objective and comply with the requirements of [the] Act.” SOUTH AFRICAN MINISTRY OF JUSTICE, *Truth and Reconciliation Commission, in JUSTICE IN TRANSITION* 12 (1995). The Act created three Committees to facilitate these goals: The Committee on Human Rights Violations, The Committee on Reparations and Rehabilitation and The Committee on Amnesty. *See id.* at 12-18. The Commission released its final report on October 29, 1998. *See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT.*

27. The reconciliation portion of the Truth and Reconciliation Commission’s job has been to identify persons to whom reparations are due. The National Unity and Reconciliation Act (The Act) established the Reparation and Rehabilitation Committee whose task is to provide reparations for those who suffered human rights violations under apartheid. *See* The National Unity and Reconciliation Act, Preamble and Section 4(f). Section 1(1)(xiv) of The Act identifies reparation as “any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition.” In conformance with the Act, the final report of the Truth and Reconciliation Commission proposed a five component reparation and rehabilitation policy consisting of: urgent interim reparation, individual reparation grants, symbolic reparation/legal and administrative measures, community rehabilitation programs, and institutional reform. *See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT*, Vol. 5, at 170-184 (1998). Funding for reparations will pose real problems. The final report of the Truth and Reconciliation Commission estimates that 22,000 victims will be entitled to reparations and the total cost of administering the reparations policy will be “R477,400,00 per annum or R2,864,400,000 over six years.” *Id.* at 185. Funding sources will include “allocations from the national fiscus, international and local donations and earned interest on the funds.” *Id.*

28. Paul Pereira, *The Road Ahead May Be Rocky Indeed*, AFRICA NEWS SERVICE, Apr. 30, 1997. The Truth and Reconciliation Commission reviewed allegations of violations of human rights committed by all perpetrators, irrespective of race. *TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT*, Vol. 1, Chap. 4 (1998). As an example, Winnie Madikizela Mandela, former wife of President Nelson Mandela, was found to have committed gross violations of human rights respecting her involvement with the Mandela United Football Club’s criminal activities which included “killing, torture,

Indeed, during the period of amnesty application, very few applications were received from high ranking apartheid-era officials.²⁹ Neither of the former apartheid-era Presidents³⁰ nor any of the living ex-Ministers of Defense³¹ filed amnesty applications.

assaults and arson in the community” towards individuals who opposed her policies. TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 5, Chap.1, at 23-24 (1998).

29. See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 5, at 188-89 (1998). See also Sunanda K. Datta-Ray, *Exorcising Years of Evil Can Trigger Which Hunts*, SINGAPORE STRAITS TIMES, May 18, 1997. The Truth and Reconciliation Commission's period of service was to end in March of 1998, however, its commission was extended to July 1998. As of the closing date for application, September 30, 1997, the Commission had received approximately 7000 applications for amnesty. See SOUTH AFRICAN MINISTRY OF JUSTICE, *Truth And Reconciliation Commission*, in JUSTICE IN TRANSITION 14-16 (1995).

30. Former Presidents P. W. Botha and F. W. DeKlerk did not file amnesty applications. The Truth and Reconciliation Commission determined that former President P. W. Botha was found to have “contributed to and facilitated a climate in which . . . gross violations of human rights could and did occur, as such [was] accountable for such violations.” TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 5, Chap. 6, at 14-15 (1998). In a Truth and Reconciliation Commission proceeding, Johan Coetzee, a former apartheid police chief, accused former President P. W. Botha of condoning and/or ordering acts of violence against apartheid era activists. See *South African Minister Accuses Former Police Boss of Torture*, AGENCE FRANCE-PRESSE, Oct. 10, 1997. Former President Botha was ordered to appear before the Truth and Reconciliation Commission on October 14, 1997 in order to give testimony. He declined to appear citing illness and poor health as his reasons for failure to appear. See Beatrice Khadige, *South African Truth Commission Beset by Delays*, AGENCE FRANCE-PRESSE, Oct. 1, 1997; Pat Reber, *South African Penal Subpoenas 20 Top Leaders; Deadline Passes For Amnesty Bids*, THE WASHINGTON POST, Oct. 1, 1997. On December 5, 1997 Mr. Botha was issued another notice to appear before the Commission. Once again he failed to appear. Criminal charges were subsequently brought against him. He was tried in a magistrate's court on June 1-5, 1998. Botha was found guilty of contempt and was fined R10,000 or twelve months incarceration, as well as twelve months incarceration which was suspended. TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 1, Chap. 7, at 12. (1998). Despite the fact that he has been accused of authorizing crimes against apartheid era activists, former President F. W. DeKlerk claims that apartheid-era governments never made any such authorizations. Committee Chairman Archbishop Desmond Tutu challenged this denial and in response to his challenge, the National Party threatened to withdraw its cooperation with the Commission. See Suzanne Daly, *South Africa's Truth Panel Accuses de Klerk of Lies And Cover-Up*, N.Y. TIMES, Jan. 18, 1997; Holger Jensen, *Apartheid Entraps All, Without Respect To Color, Party Or Rank*, THE SACRAMENTO BEE, Feb. 3, 1997, at B7; *Panel Apologizes To National Party*, THE NEWS & OBSERVER, Sept. 7, 1997; *Tutu's Apology To DeKlerk Read In Court*, CHICAGO TRIBUNE, Sept. 7, 1997, at 11; *National Party Withdraws Case Against Truth Commission*, AGENCE FRANCE-PRESSE, Sept. 22, 1997.

31. The Minister of Defense was the head of the South African Defense Force (SADF), the military wing of government created by the South Africa Defense Act of 1912. Section 2 of the act excluded non-whites and females from military service. The Truth and Reconciliation Commission found that the “dominant portion of gross human rights violations were committed by the former state [government under apartheid], through its security agencies,” one of which was the South African Defense Force. The SADF was found to have committed “gross violations of human rights on a massive scale.”

In the United States, the call for an apology for slavery has also been criticized as a hollow gesture.³² In order to achieve true racial reconciliation, the critics implore governments to take more concrete actions, such as fostering educational achievement.³³ Reports issued by two national commissions validate the critics' concerns. Both the Report of the President's Advisory Commission on Race and the Final Report of the Truth and Reconciliation Commission highlight the importance of equal educational opportunity in healing the wounds of racial division.

If equal education brings social justice and political empowerment, then the American experience in the forty-four years since *Brown v. Board of Education* warrants particular attention. Upon final analysis, *Brown* reflects the law's limited ability to erase all traces of racial prejudice. Like the South African Constitution of 1996, *Brown's* power lies in recognizing the importance of baseline *governmental* enforcement of fairness in educational opportunity. As the racial policies of the two nations once again converge, the educational experiences of both countries offer cautionary perspectives in fostering greater social, political, and economic equality.

This article offers a critique of the development of the constitutional concept of equality in both the United States and South Africa. Part I of this article is the introduction. Part II of this article examines the historical social constructions of race in America and South Africa. Parts III and IV chronicle the experiences of African-American children and black South African children under *Plessy v. Ferguson*³⁴ and apartheid, respectively. Part V discusses the constitutional mandate of equal educational opportunity, as well as the difficulty of recognizing and implementing this policy. Part VI discusses the place of affirmative action in achieving constitutional equality. In light of re-

TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 5, at 198. There are four living former Ministers of Defense: Generals Magnus Malan, 1976-1980, Viljoen, 1980-1985, Geldenhuys, 1985-1990, and Liebenberg, 1990-1993. None of them applied for amnesty. See Transcript of the Armed Forces Hearing, SADF, Before the Truth and Reconciliation Commission Testimony of General Meiring, October 8, 1997 <<http://www.truth.org.za>>.

32. This sentiment was expressed by former Speaker of the House of Representatives, Newt Gingrich who said: "[a]ny American, I hope feels badly about slavery. I also feel badly about genocide in Rwanda. We can go back and have all sorts of apologies. But will one more child read because of it?" Jill Zuckman, *Clinton Weighs Apology To Blacks for Slavery*, LOS ANGELES DAILY NEWS, June 17, 1997, at N1; Katherine Rizzo, *Gingrich Questions Value of Congressional Apology for Slavery: 'Will One More Child Read Because of It?'*, THE ORANGE COUNTY REGISTER, June 14, 1997, at A5.

33. See sources cited *supra* note 32.

34. 163 U.S. 537 (1896).

newed discussions of race in both countries, the conclusion reflects on the overwhelming task of erasing the present effects of past discriminatory laws.

II. The First Point of Convergence: Understanding the Social Construction of Race as the Basis for Racial Classification Laws

America and South Africa owe their respective histories of chattel slavery to the perverse notion that dark skin color indicates inferior human status.³⁵ European explorers crafted a social construction³⁶ of dark skin color, which they attributed to biological inferiority and the wrath of God.³⁷ Later social constructions of race masqueraded as science and further influenced the “social and political discourse” of both countries.³⁸ The social-Darwinism movement of the late nineteenth century espoused the notion that Darwinian concepts of the “survival of the fittest” and the “struggle for existence” could readily be transferred to the “life of man in society [suggesting] that nature would provide that the best competitors in a competitive situation would win, and that this process would lead to continuing improvement [of society].”³⁹

35. See Winthrop D. Jordan, *White Over Black: American Attitudes Toward The Negro 1550-1812*, 23-43, 216-18 (1968); H. EDWARD RANSFORD, *RACE AND CLASS IN AMERICAN SOCIETY: BLACK LATINO, ANGLO* 3-8 (1994); BASIL DAVIDSON, *THE AFRICAN SLAVE TRADE*, 23-27 (1961); KENNETH M. STAMP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 8-10 (1956); THOMPSON, *supra* note 1, at 42-58; ALLISON BLAKELY, *BLACKS IN THE DUTCH WORLD, THE EVOLUTION OF RACIAL IMAGERY IN A MODERN SOCIETY* 17-20 (1993).

36. See Ian F. Haney Lopez, *The Social Construction of Race*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 191-202 (Richard Delgado ed. 1995).

37. See Roger Sanjek, *The Enduring Inequalities of Race* in *RACE* 1-17 (Steven Gregory and Roger Sanjek eds. 1994); PETER KOLCHIN, *AMERICAN SLAVERY: 1619-1877* (1993); SAUL DUBOW, *SCIENTIFIC RACISM IN MODERN SOUTH AFRICA* 20-25 (1995); JORDAN, *supra* note 35, at 17-19; STEPHAN ELLMAN, *IN A TIME OF TROUBLE, LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* 189-190 (1992); RICHARD LYNNESS WATSON, *THE SLAVE QUESTION: LIBERTY AND PROPERTY IN SOUTH AFRICA* 130-31, 183-85; BLAKELY, *supra* note 35 at 202-03.

38. See DUBOW, *supra* note 37, at 128.

39. RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 6 (1944). See also DUBOW, *supra* note 37, at 9. Charles Darwin published *On the Origin of Species by Means of Natural Selection* in 1859. CHARLES DARWIN, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* (1859). Darwin theorized that animal species evolved through the process of natural selection. See *id.* They either survived or became extinct dependent on their respective abilities to successfully adapt to their surrounding environments. See *id.* Applying this theory to the structure of society, social-Darwinist theorists adapted the language of science respecting adaption, degeneration, hygienic, fit-

The eugenics movement of the early twentieth century expanded social-Darwinist theory, in that it purported to offer scientific proof that society in general could be improved by providing positive influences to “improve the inborn qualities of [certain] races.”⁴⁰ Since theories of the dysgenic function and effect of race mixing were part of the science of eugenics, eugenics ideology necessarily included a designation of races that were “unfit” and thus subject to social control. The prevention of racial mixing between white Nordics and Africans was therefore “necessary,” as the latter were members of the lowest order of man.⁴¹ The eugenics ideology provided a pseudo-scientific justification for segregation laws in the United States and South Africa.⁴² Post-Civil War and apartheid-era racial classification laws evidenced the conversion of the new scientific theory to an actual practice.

Post-Civil War laws regarding the status of African-Americans and apartheid-era laws regarding the status of black South Africans bear striking similarities. In the United States, this period was characterized by stringent racial legal classifications based on phenotypic appearance,⁴³ bloodline,⁴⁴ or ancestry.⁴⁵ In turn, classification schemes facilitated the administration of Jim Crow laws,⁴⁶ anti-miscegenation

ness, hybridisation, and stock in referring to social relationships between individuals and groups. See DUBOW, *supra* note 37, at 9.

40. Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981). The term “eugenics” was coined by Francis Galton, a cousin of Charles Darwin. See HOFSTADTER, *supra* note 39, at 161. The “science” of eugenics identified the “fit” with the upper classes and the “unfit” with the lower.” *Id.* at 163. See also Paul A. Lombardo, *Miscegenation, Eugenics and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 423 (1988). Eugenists targeted particular candidates for eradication: the “feebleminded; insane (including the psychopaths); criminalistic (including the delinquent and wayward); epileptic; inebriate (including drug-habitues); diseased (including the tuberculous, the syphilitic, the leprous, and others with chronic, infectious and legally segregable diseases); blind (including those with seriously impaired vision); deaf (including those with seriously impaired hearing); deformed (including the crippled); and dependent (including orphans, ne’er-do-wells, the homeless, tramps and paupers).” Cynkar, *supra*, at 1428.

41. See Rachel Silber, *Eugenics, Family & Immigration Law in The 1920’s*, 11 GEO. IMMIGR. L. J. 859, 862 (1997); DUBOW, *supra* note 37, at 132-41, 180-89. See also M. HALLER, *EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT* 139 (1963); Beverly Horsburgh, *Schrodinger’s Cat, Eugenics, and The Compulsory Sterilization of Welfare Mothers: Deconstructing An Old/New Rhetoric and Constructing the Reproductive Right To Natality For Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 538-43 (1996).

42. See generally HOFSTADTER, *supra* note 39 and DUBOW, *supra* note 37.

43. See *The Legal Definition of Race*, 3 RACE RELATIONS REPORTER 371 (1958).

44. See *id.*

45. See *id.*

46. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1957). “Jim Crow” is the term used to describe racial classification laws which required separate

laws,⁴⁷ racially restrictive housing covenants,⁴⁸ and African-American disfranchisement.⁴⁹ In both countries, courts, juries, and administrative agencies were often called to decide issues of appropriate classification.⁵⁰ In making factual determinations respecting race,⁵¹ factfinders considered evidence as to the person's reputation in the community,⁵² testimony from relatives,⁵³ and testimony from expert ethnologists.⁵⁴ The individual in question and his relatives might also have appeared for jury inspection.⁵⁵

South Africa's categorization schemes were even more complicated because apartheid mandated four national categories: white,⁵⁶

facilities for blacks and whites in public accommodations, education, and various other services. *See id.*

47. *See* ROBERT J. SICKELS, *RACE, MARRIAGE AND THE LAW* 64-67 (1972). Anti-miscegenation laws forbade racial intermarriage between whites and other racial groups. *See id.* These laws remained on the books in many states until the United States Supreme Court declared them unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967).

48. In *Shelley v. Kramer*, 334 U.S. 1, 12 (1948), the United States Supreme Court declared that racially restricted housing covenants were unconstitutional.

49. Although the Fifteenth Amendment to the United States Constitution became effective in 1870 and stated that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," the states often employed poll taxes, literacy tests, and grandfather clauses as means to disenfranchise African-American voters. NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 231-32 (Gerald D. Jaynes & Robin M. Williams eds. 1989). With the 1965 Voting Rights Act, Congress declared the use of the literacy test as a requirement to vote illegal. In *Harper v. Virginia Board of Election*, 383 U.S. 663 (1966), the poll tax was declared violative of equal protection and therefore unconstitutional.

50. *See An Appraisal of the Legal Tests Used to Determine Who is a Negro*, 34 CORNELL L. Q. 246, 251 (1948).

51. *See id.*

52. *Hopkins v. Bowers*, 16 S.E. 1 (1892); *Weaver v. State*, 22 Ala. App. 469 (1928); *Sunseri v. Cassagne*, 185 So. 1, 4-5 (1940). In *Rex v. Sanitzky and Another*, a South African court had to determine whether an individual was a "native" in order to determine whether a law which prohibited the purchase of liquor to a native was applicable. The court determined that the relevant inquiry was as to the individual's appearance, parentage and his associates. *SOUTH AFRICAN LAW REP.* 120 (Cape of Good Hope Provincial Division 1937). Also, in *Rex v. Conradie* a white man was convicted under the Immorality Act which criminalized sexual intercourse of a white man with a black woman. The court found that the woman was indeed black because she lived among blacks. *See SOUTH AFRICAN LAW REP.* 229 (Cape of Good Hope Provincial Division 1933).

53. *See Weaver*, 22 Ala. App. at 470.

54. *See Daniel v. Guy*, 23 Ark. 50, 52 (1861); *Daniel v. Guy*, 19 Ark. 121, 127 (1857); *Green v. City of New Orleans*, 88 So. 2d 76, 79 (1956).

55. *Weaver*, 22 Ala. App. at 470.

56. *See* S.D. Grivin, *Race 2nd Race Classification* in *RACE AND THE LAW IN SOUTH AFRICA* 7 (A. J. Rycroft, L. J. Boule, M. K. Robertson, P. R. Spiller eds. 1987). According to the Population Registration Act of 1950, a White person was someone "who in appearance obviously is a White person and who is not generally accepted as a coloured person; or . . . is generally accepted as a White person and is not in appearance obviously not a

coloured,⁵⁷ Asian/Indian,⁵⁸ and African.⁵⁹ Called the “cornerstone[s] of Apartheid,”⁶⁰ the Prohibition of Mixed Marriages Act,⁶¹ the Population Registration Act,⁶² the Group Areas Act,⁶³ and the Reservation of Separate Amenities Act⁶⁴ represented the core apartheid era segregative policies. The administration of these laws placed a significant amount of discretion in the hands of administrators. For example, in administering the Population Registration Act, factfinders could consider evidence of an individual’s descent, ancestry, lineage, reputation, habits, education, speech, deportment, and demeanor.⁶⁵ Fact finders also used the “comb test,” where a comb was passed through the examinee’s hair and if the examiner felt resistance in the comb’s passage, the person would likely be classified as coloured.⁶⁶ In

White person.” *Id.* Section 5(5)(a) of the Act gave presumptive status of White to an individual if “his natural parents have both been classified as white persons.” *Id.*

57. Section (5)(5)(b) of the Population Registration Act mandated a presumptive status of coloured to an individual if “either both his parents were classified coloured or where one of his natural parents has been classified white and the other coloured or black.” *Id.* The Act further required that a “[c]oloured person means a person who is not a White person or a Black.” *Id.*

58. *See* MURIEL HORRELL, *LAWS AFFECTING RACE RELATIONS IN SOUTH AFRICA, 1948-1976*, 169 (1978). Individuals of Chinese or Japanese ancestry were classified as “other Asiatics” (Asians) as were Indians under the Population Registration Act. *See id.* Asians were defined as members of the race “whose national home is in Asia, but does not include Cape Malays, Jews or Syrians.” HENRY JOHN MAY, *THE SOUTH AFRICAN CONSTITUTION* 304 (1955).

59. *See* Grivin, *supra* note 56, at 6. The Population Registration Act of 1950 required that a person “shall be classified as black if his natural parents have both been classified as blacks.” *Id.*

60. *See* THOMPSON, *supra* note 1.

61. Prohibition of Mixed Marriages Act 55 of 1949, S. Afr. Stat. 614 (1949).

62. Population Registration Act 30 of 1950, S. Afr. Stat. 275, 279 (1950). The Act required the racial classification of all South African People as white, coloured, or native (now black). *See* OMOND, *supra* note 18, at 24.

63. Group Areas Act 36 of 1966, S. Afr. Stat. 141 (1966). This act designated land areas that could be owned and occupied by particular racial classifications. *See id.*

64. *See* OMOND, *supra* note 18, at 53-54. This Act required separate public accommodations in public places for those racial classifications designated under the Population Registration Act. The Act also foreclosed judicial review on the issue of inequities in accommodation. *See id.* Courts could not declare that the segregated black facility was invalid because it was substantially unequal to that provided for whites. *See id.*

65. *See* Grivin, *supra* note 56, at 7. The Act contained a test of “general acceptance” for whites, a standard which necessarily affected all other groups. *See id.* One would be generally accepted under certain restricted conditions. *See id.* One must be accepted as white in “the area or place where the person concerned is ordinarily resident, where he is employed or carries on his business and where he mixes socially or shares in other activities with other members of the public.” *Id.* Additionally, “he must be generally accepted in his association with the members of his family and other people with whom he resides.” *Id.*

66. *See* OMOND, *supra* note 18, at 26.

Long Walk to Freedom, Nelson Mandela recalled representing an individual in a hearing before the Classification Board, the administrative agency charged with settling classification disputes:

I once handled a case of a Coloured man who was inadvertently classified as an African . . . On his behalf, I appealed to the Classification Board . . . I had formidable documentary evidence to establish my client's case and the prosecutor formally indicated that he would not oppose our appeal. But the magistrate seemed uninterested in both my evidence and the prosecutor's demurral. He stared at my client and gruffly asked him to turn around so that his back faced the bench. After scrutinizing my client's shoulders, which sloped down sharply, he nodded to the other officials and upheld the appeal. In the view of the white authorities those days, sloping shoulders were one stereotype of the Coloured physique. And so it came about that the course of this man's life was decided purely on a magistrate's opinion about the structure of his shoulders.⁶⁷

This example illustrates the arbitrary nature of racial classification laws. In both the United States and South Africa, racial classifications were legal tools used to direct the course and scope of the African and African-American's life from birth to death, based on the malleable factor of race. Racial classification laws established the categorical foundations upon which all social institutions in the two segregated societies rested.⁶⁸ The laws were the essential foundations upon which the schools of *Plessy v. Ferguson* and apartheid were built.

III. Separate and Unequal: The Education of African-American Children from 1896-1954

One can understand why state governments that sought to maintain the subordinated status of blacks would countenance inferior educations for them: education is a powerful tool with which individuals may achieve social, political and economic empowerment.⁶⁹ Prior to the period of "separate but equal" education, some states enacted

67. NELSON MANDELA, *LONG WALK TO FREEDOM* 132 (1995).

68. Racial classification laws in both countries served a common purpose – to maintain the inferior social, political and economic status of African-Americans and black South Africans as well as other South Africans of color. The label "white" thus became the focus of all that was valuable, all that the individual should quest for, all that the individual might attain. Moreover, the very presence of the racial classification law resulted in the internalization of a negative "social image" of those who were excluded from the preferred classification.

69. See ROBERT A. MARGO, *RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY* 45 (1990). In explaining the "disenfranchisement hypothesis" respecting the inability of blacks to gain access to the ballot in order to influence school appropriations between 1890 and 1910, Robert A. Margo wrote:

laws that entirely barred the education of African-Americans.⁷⁰ During the 18th and 19th centuries, for example, some states made it a crime to teach slaves to read.⁷¹ Thus, by 1860, prior to the Civil War, fewer than 7% of free black children were enrolled in school.⁷² During the immediate post-Civil War era, Congress established the Freedman's Bureau as an agency under the War Department.⁷³ The Bureau was given "control of all subjects relating to refugees and freedmen from the rebel states."⁷⁴ Oliver Otis Howard, the Bureau's first commissioner, sought to provide public education to African-Americans.⁷⁵ In this context, education was a means of accomplishing the broader goals of the Bureau, namely relief, employment and enfranchisement.⁷⁶ These efforts, however, were met with great public resistance and scarce resources.⁷⁷ Despite the problems encountered by the Bureau, reports from the years 1860 through 1870 record a 1.9% to 9.9% increase in the number of black children enrolled in school.⁷⁸ By 1880, black children enrolled in school climbed to just over 33%.⁷⁹

At the close of the nineteenth century, the United States Supreme Court decided *Plessy v. Ferguson*.⁸⁰ The decision had a profound impact on the character and availability of public school education for black children.⁸¹ *Plessy* embodied what is commonly

A well educated black populace was a threat to the social and economic order which placed blacks at the bottom, below poor whites. If blacks had access to good schools, the order might be disrupted. "We must have more money," shrieked a county superintendent in Georgia. "Something is necessarily obliged to be done or the whites will not keep up with the darkey." The Shreveport, Louisiana *Weekly Caucasian* stated that black illiteracy was a problem but (oddly) "education [was] the most dangerous remedy for the evil yet proposed. That education is a long stride toward social equality no sane man can doubt." *Id.*

70. See KENNETH MEIER, JOSEPH STEWART, JR., J. ROBERT ENGLAND, *RACE, CLASS AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION* 40 (1989).

71. MEIER, ET AL., *supra* note 70, at 40; Walter G. Stephan, *A Brief Historical Overview of School Desegregation* in *SCHOOL DESEGREGATION PAST, PRESENT, AND FUTURE* 5 (Walter G. Stephan and Joe R. Feagin eds. 1980); JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935* 1-5, 16-18 (1988); JORDAN, *supra* note 35, at 399.

72. See Stephan, *supra* note 71, at 5.

73. 13 Statutes at Large 507 (March 3, 1865).

74. 13 Statutes at Large 507 (March 3, 1865).

75. See KENNETH B. WHITE, *The Alabama Freedmen's Bureau And Black Education: The Myth Of Opportunity*, in *AFRICAN AMERICAN LIFE IN THE POST-EMANCIPATION SOUTH, 1861-1900* 392 (Donald G. Nieman Ed. 1994).

76. See *id.*

77. MEIER, ET. AL., *supra* note 70, at 41; WHITE, *supra* note 75, at 392-94; ANDERSON, *supra* note 71, at 9-10.

78. See MEIER, ET AL., *supra* note 70, at 41.

79. See *id.*

80. 163 U. S. 537 (1896).

81. See *id.*

known as the “separate but equal” doctrine. In ruling on the constitutionality of a Louisiana state law that required separate railway cars for blacks and whites, the Court determined that state laws requiring racially separate accommodations in public services presented no equal protection question.⁸² Interpreting the Equal Protection Clause of the newly adopted Fourteenth Amendment, the Court found that:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.⁸³

Citing *Roberts v. City of Boston*⁸⁴ as an example of state practices of racial segregation in public schools, the *Plessy* Court suggested that state governments could legitimately exercise their police power by separating public school children by race.⁸⁵ Though the *Plessy* Court recognized that racial separation might result in serious disadvantages for African-Americans,⁸⁶ the Justices nevertheless opined that:

[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each others' merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.⁸⁷

The Court's recognition of the social construct of race provides an indispensable context in which to evaluate United States racial seg-

82. See *Plessy*, 163 U. S. at 544.

83. *Id.*

84. 5 Cush. 198 (Mass. 1849) (holding that under state law, it was a valid exercise of state legislative power to provide for racially separate schools for children). The *Roberts* court enunciated a “separate but equal principle:”

[B]y the [C]onstitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.

Roberts v. City of Boston, 5 Cush. at 206.

85. See *Plessy*, 163 U. S. at 544.

86. See *id.* at 551.

87. See *id.* at 551-52.

regation in public schools between 1896 and 1954.⁸⁸ Having received the imprimatur of the United States Supreme Court, post-*Plessy* efforts to educate African-American children inevitably faced staunch resistance.⁸⁹ In order to limit and undermine the education of blacks, states segregated black children into chronically under funded and substandard schools. Indeed, state funding of public school education for black children was dramatically lower than that for white children.⁹⁰ A survey of some southern states in the early twentieth century found that the State of Alabama spent 36 dollars per year on each white student enrolled in public schools and only 10 dollars on each black student enrolled in public schools.⁹¹ The state of Arkansas had a school enrollment population that was 23% black and 77% white, yet black students only received 12% of public school funding.⁹² The reports from the states of Florida, Georgia, and Louisiana were similar, reflecting disparities in spending of 4 to 1 in favor of white children enrolled in public schools.⁹³ For 58 years, *Plessy* remained the constitutional standard for judging the legitimacy of state segregation policies in public schools. The Supreme Court clung to segregationist policy until the landmark case *Brown v. Board of Education*.⁹⁴

IV. Apartheid Education and the Black South African Child

Prior to the enactment of the South African Constitution of 1996, South African people of color faced even greater obstacles to integration than their American counterparts. First, South Africa did not have a constitutional equality provision. People of color, therefore, did not have the constitutional means to argue equal protection violations.⁹⁵ Second, South Africa did not have an equivalent to the United States' Supreme Court review of federal and state action, an

88. It is important to note that the decision in *Plessy* was not limited to transportation contexts. In other contexts, *Plessy* was used to justify racial separation in hotels, restaurants, hospitals, housing, and departments of the United States government. See STEPHAN, *supra* note 71, at 7-8.

89. See MEIER, ET AL., *supra* note 70, at 42.

90. See *id.*

91. See REMOVING A BADGE OF SLAVERY: THE RECORD OF BROWN V. BOARD OF EDUCATION xix (Mark Whitman ed. 1993).

92. See *id.*

93. See *id.*

94. 349 U.S. 294 (1955).

95. The Union Constitution of 1909 contained an equality provision guaranteeing only equality for the English and Dutch languages. It provided: "Both the English and Dutch languages be official languages of the union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges . . ." South Africa Act, 1909, Part VIII, Section 137. The first South African Bill of Rights including South Africans of

essential part of the United States' constitutional system.⁹⁶ Indeed, pursuant to the doctrine of parliamentary supremacy,⁹⁷ the role of the South African judiciary was limited to the enforcement of the legislative will.⁹⁸ Within this context, South Africa's *Plessy*-like "separate but equal" jurisprudence was not a matter of constitutional concern.

Minister of Posts and Telegraphs v. Rasool provides one example of the South African courts' treatment of "separate but equal cases."⁹⁹ In *Rasool*, the postmaster set up separate counters in post offices marked "European" and "non-European"—meaning "white" and "non-white," respectively.¹⁰⁰ The counters provided the same services for post office clients.¹⁰¹ The South African court determined racial classification to be a valid regulation. Stating that the separation of facilities was "sensible" and "[made] for the convenience of the public

color is contained in the South African Constitutional of 1996. See text and notes *infra* Section V.

96. See *Marbury v. Madison*, 5 U.S. 137 (1803); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

97. See CONSTITUTIONAL LAW OF SOUTH AFRICA at 2-2 and 2-3 (Chaskalson, et al., eds. 1996).

98. See L.J. BOULLE, CONSTITUTIONAL REFORM AND THE APARTHEID STATE: LEGITIMACY, CONSOCIATIONALISM AND CONTROL IN SOUTH AFRICA 75 (1984). The doctrine of parliamentary sovereignty is characterized by the "legal dependence of the judiciary on the legislature, and the absence of any substantive legislative testing-rights for the courts." *Id.* It had been an integral part of the structure of South Africa's constitution since the creation of the Union in 1909. In 1909, the colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony formed the Union of South Africa. South Africa Act, 1909. The first constitution of the Republic of South Africa of 1909 adopted the British tradition of parliamentary sovereignty. LAURENCE BOULLE, BEDE HARRIS, & CORA HOEXTER, CONSTITUTIONAL AND ADMINISTRATIVE LAW: BASIC PRINCIPLES 132-43 (1989). Pursuant to the South Africa Act, 1909, the Union of South Africa was created and the legislative powers of the Union were vested in the Parliament of the Union. South Africa Act, 1909, Part IV, Section 19. Parliament was given "full power to make laws for the peace, order, and good government of the Union." South Africa Act, 1909, Part IV, Section 59. Subsequent constitutions retained the concept of parliamentary supremacy. In 1961, the Republic of South Africa was formed and the new constitution stated: "no court of law shall be competent to enquire into or pronounce upon the validity of any Act passed by Parliament, other than an Act which repeals or amends or purports to repeal or amend the provisions of section one hundred and eight or one hundred and eighteen." Republic of South Africa Constitution Act, 1961. The 1983 Constitution retained this principle and stated: "no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament." Republic of South Africa Constitution Act of 1983, Section 34(3). Section 34(2)(a) of the same Constitution stated that the South African Supreme Court was "competent to inquire into and pronounce upon the question as to whether the provisions of [the] Act were complied with in connection with any law" enacted pursuant to it. Republic of South Africa Constitution Act of 1983, section 34(2)(a).

99. 1933 AD 167.

100. *Rasool*, 1933 AD at 171.

101. *Id.* at 172.

as a whole," the court held the discrimination was "equal" and therefore reasonable. Acting Chief Justice Stratford wrote:

[I]f the case decided that a by-law is invalid on the sole ground that it divides the community for the purpose of its operation into white and colored, I cannot agree with it, for such conclusion runs counter to accepted principle and good sense. A classification by a by-law, if it presumably is to serve a useful purpose, is not invalid on that ground alone whether the line of division be race, colour religion or any other. I would add merely the qualification that the division must not be absurd or obviously designed to serve no useful purpose, as for example a classification depending on the colour of one's hair.¹⁰²

Further, several cases subsequent to *Rasool* suggest that race-based, government discrimination in accommodations was also reasonable, as long as no "substantial inequality" existed.¹⁰³

Historically, educational policy in South Africa developed concomitantly with statutory laws requiring racial separation in all other areas of South African life. Unlike the pretenses of post-*Plessy* educational policy in the United States, where the Supreme Court made deceptive promises of "separate but equal" education, the South African judiciary never espoused "equal" educational opportunity for black children. The South African Native Affairs Commission Report of 1903-1905 proposed separate education as a means of protecting the integrity and quality of the life of Europeans.¹⁰⁴ During the early part of the twentieth century, educational policy in the South African provinces provided segregated compulsory and free education for white children, non-compulsory free education for African children, and free but not compulsory education for colored children.¹⁰⁵ This policy was maintained throughout the first two decades of the twentieth century.¹⁰⁶ During this period, the few African children who at-

102. *Id.* at 175.

103. *See* R. v. Abdurahman 1950 (3) SA 136 (A); R. v. Carelse 1943 CPD 242; Tayob v. Ermelo Local Road Transportation Board 1951 (4) SA 440 (A); R. v. Lusu 1953 (2) SA 484 (A). *See also*, DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* 63-70 (1991).

104. Michael Cross and Linda Chisholm, *The Roots of Segregated Schooling in Twentieth-Century South Africa*, in *PEDAGOGY OF DOMINATION* 47 (Mokubung Nkomo ed. 1990).

105. The First Education Ordinance of 1903 for the Transvaal and the Orange River colony created state-sponsored school system for white children. *See id.* at 48. Three other acts reflect a similar bias in favor of white children. The 1905 Cape School Board Act, the Smuts Education Act of 1907 in the Transvaal Province and the Hertzog's School Act of 1908 in the Orange Free State all required racial separation in schools, compulsory education for white children with no such provisions for African children. *See id.*

106. Michael Cross and Linda Chisholm, *supra* note 6, at 50.

tended school were enrolled in religiously affiliated, government subsidized institutions.¹⁰⁷ The pattern of segregation in government sponsored education continued from this period until the rise of the National Party in 1948.¹⁰⁸

Between 1927 and 1945, the under funding of education for blacks and coloureds, made it difficult for them to progress economically.¹⁰⁹ Most black and coloured children were unable to continue their education beyond elementary school.¹¹⁰ The lack of education resulted in the disqualification of blacks and coloureds from jobs which required educational attainment of a specific level.¹¹¹

After 1948, the advent of the national policy of apartheid brought a more formalized system of race-based education. By codifying the Bantu Education Act of 1953,¹¹² the South African Parliament malevolently aligned black education policy with apartheid doctrine. The Act vested control of education for Africans in the national government's Department of Native Affairs.¹¹³ During the floor debates for

107. *See id.* at 51. Statistical data from the Transvaal province from the period 1917 to 1927 reflected an increase in the number of African children attending school. However, the total percentage of African children in school was only approximately 16 percent. The available facilities could only accommodate fewer than 25 percent of the school-age African population. *See id.*

108. *See id.* at 50-53.

109. *See id.* at 51.

110. *See id.*

111. *See id.* at 50.

112. The word "Bantu" is a pejorative term when used to refer to black South Africans. This however, is the language used in the legal nomenclature during the period of 1953-1978. *See HORRELL, supra* note 58, at 295. *See* the Extension of University Education Act of 1959, the Coloured Persons Education Act of 1963, the Indian Education Act of 1965 and the National Education Act of 1967.

113. The Bantu Education Act of 1953, § 2(a). The Act created a division of Bantu Education within the Department of Native Affairs, headed by the Minister of Native Affairs. Bantu Education Act of 1953, §§ 3(1) and 3(2). All education which had previously been under the control of the various provinces of the Union was brought under the auspices of the Department of Native Affairs. Bantu Education Act of 1953, §§ (4) and (5). The Act gave full discretion to the Minister of Native Affairs, respecting whether or not to subsidize or assist in the maintenance of tribal schools called Bantu community schools. Bantu Education Act of 1953, § 6. The Minister could decide whether or not to suspend, reduce, or withdraw spending respecting education for Africans in Bantu community schools. Bantu Education Act of 1953, § 6. Under the Act, the Minister of Native Affairs had full administrative discretion respecting money appropriated by Parliament for government sponsored school for Africans. Bantu Education Act of 1953. The Act declared that it would be illegal for any school to educate African children, if it was not approved and registered by the Minister Native Affairs. Bantu Education Act of 1953, § 9. The Minister of Native Affairs, upon advice and consent of the Native Affairs Commission, had full administrative authority to refuse the registration of a school or cancel the registration of a school if it "[was] of the opinion that its establishment or continued existence [was] not in the interests of the Bantu people or any section of such people or is likely to

the Bantu Education Act, Dr. H. F. Verwoerd, as Minister of Native Affairs, clarified the legislative purpose of "separate and unequal" education for African children:

Native education should be controlled in such a way that it should be in accord with the policy of the state If the native in South Africa today in any kind of school in existence is being taught to expect that he will live his adult life under a policy of equal rights, he is making a big mistake There is no place for him in the European community above the level of certain forms of labour.¹¹⁴

After the promulgation of the Bantu Education Act, the Department of Native Affairs instituted policies to bring private mission-sponsored teacher education programs and schools into alignment with the national education policy for Africans.¹¹⁵ Government mandates concerning the maintenance and funding of black schools further encouraged the disparities in white and non-white education.¹¹⁶

be detrimental to the physical, mental or moral welfare of the pupils or students attending or likely to attend such school." Bantu Education Act of 1953, § 9(2). Violation of the registry requirement of the Act was punishable by fine or imprisonment. Bantu Education Act of 1953, § 9(3).

114. OMOND, *supra* note 18, at 80. Nor was this an isolated statement on Verwoerd's part. W. A. Maree succeeded Verwoerd as Minister of Native Affairs, and he reiterated the Verwoerd's position: "[T]he Bantu must be so educated that they do not want to become imitators [of the whites, but] that they will want to remain essentially Bantu." HORRELL, *supra* note 58, at 298 (1978).

115. Teacher training programs were to be conducted under the control of Department of Bantu Affairs training institutions. HORRELL, *supra* note 58, at 300. Religiously affiliated mission schools that received governmental aid were given three choices: maintain control of their schools without any governmental aid, maintain control of their schools with reduced subsidies for teacher salaries, or give control of the mission school to Bantu community schools as designated under the Bantu Education Act of 1953. *See id.* at 301.

116. In 1954, the South African Minister of Finance announced that Africans would be required to pay the cost of future school expansion through direct taxation. *See id.* at 306. Africans were also required to pay a portion of the costs for new schools. *See id.* School furniture was to be made in Bantu vocational schools and children were required clean the school buildings and grounds. *See id.* at 307. School readers were provided for primary school class but post primary school students had to buy their own books. Parents had to provide all other materials. *See id.* Governance of educational programs for coloured children was transferred to Department of Interior, Division of Coloured Affairs in 1950 and the Department of Coloured Affairs in 1958. *See id.* at 306. In contrast to school services for Africans, national educational policy for coloured children required no payment of fees at the primary, secondary, or high schools for the basic education. *See id.* at 329. After 1969, books and equipment were provided to coloured children without charge. *See id.* In 1969, compulsory education laws were instituted for coloured children. *See id.* at 330. The Indians Education Act of 1965 transferred the control of Indian education from the provinces to the national government. *See id.* at 339. National policy for Indian children was structured to achieve a gradual introduction of free and compulsory school education and Indian schools were sometimes granted funds for the purchase of materials. *See id.* at 341. The National Education Policy Act of 1967 directed that education for white children be

A collage of additional education acts resulted in four segregated school systems—one each for whites,¹¹⁷ indians¹¹⁸, coloureds¹¹⁹ and blacks.¹²⁰ Pursuant to this national policy, educational services for non-white South Africans reflected deliberate and continuing disparities in funding and facilities for African children. Educational statistics from the last thirteen years of apartheid reflected gross inequalities in per capita spending,¹²¹ pupil teacher ratios,¹²² teacher

rendered free of charge. *See id.* at 350. Education for a white child was to be of Christian character, imbuing the child with a strong sense of national identity. *See id.*

117. The National Education Policy Act No. 39 of 1967 charged the Ministry of National Education with the administration of pre-primary, primary, and secondary education for white children. W.A. JOUBERT, 8 *THE LAW OF SOUTH AFRICA* 172 (1979). The Act mandated compulsory primary and secondary school education for white children from the ages of seven through sixteen. *See id.* at 181-182, 189. The compulsory education was structured in four phases and had a nationally coordinated course of study. *See id.* Only white teachers could teach white children and teachers had to be registered with the South African Teachers Council for Whites. *See id.* at 191-192.

118. In 1965, The Indians Education Act, No. 61 placed the control of the education of Indian children with the Department of Indian Affairs. JOUBERT, *supra* note 117, at 212.

119. In 1963, The Coloured Persons Education Act placed the control of the education of Coloured children with the Department of Coloured Affairs. *See id.*

120. 1991 estimates in one report show that as much as 50% of the black population of South Africa was illiterate and almost half of the school-aged children did not attend school. William Maclean, *South Africa Says School Crisis Hinges on Political Change*, Reuters News Service, February 7, 1991. The problem of disparity in facilities compounded the problem of poor attendance of children. Poor attendance statistics for black children was the direct result of non-compulsory attendance for black children as well as the violence in the schools that had become the hallmark of the lives of black South African children. THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, *THE WAR AGAINST CHILDREN 6-7* (1986); Nomisa Gwalla-Ogisi, *Special Education in South Africa in PEDAGOGY OF DOMINATION*, *supra* note 6, at 279; LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 265 (1995). Even in 1991, when it was clear that the Apartheid era was in its waning period, anti-apartheid activists who sought to achieve better educational opportunities by claiming the use of vacant white schools for black children were met with opposition from police, police dogs, and shotguns. Reuters News Service, *South African Police Block Protest Against Segregated Education*; August 21, 1991; William Maclean, *Right Wing Minister Quits South African Cabinet*; Reuters News Service, July 29, 1991.

121. The following represents an estimate of per capita spending in education for given years: (The Rand (R) is the base unitary amount in South Africa).

Year	Per Capita Costs			
	Whites R	Indians R	Coloured R	Africans R
1953	127,84	40,43	40,43	17,08
1969-70	282,00	81,00	73,00	16,97
1975-76	644,00	189,53	139,62	41,80

HORRELL, *supra* note 58, at 312.

Expressed in a ratio expenditure the rand allocations were:

pay scales,¹²³ school facilities,¹²⁴ compulsory education requirements,¹²⁵ school attendance practices,¹²⁶ secondary school matriculation rates,¹²⁷ and university entrance examinations.¹²⁸

By depriving black African children of equal education, apartheid stripped black youth of childhood's protected social status.¹²⁹ South Africa's black children, many of whom protested educational inequali-

Year	Whites	Indians	Coloured	Africans
1953	7,48	2,37	2,37	1
1969-70	16,62	4,77	4,30	1
1975-76	15,41	4,53	3,34	1

See id.

122. In 1984 the pupil teacher ratios were reported as 18.9 to 1 for white children, 23 to 1 for Indian children, 26 to 1 for coloured children and 40.7 to 1 for African children.

123. Teacher pay scales were tiered and followed the same pattern of racial hierarchy as all other laws. Whites were paid the highest followed by Indians, coloureds and lastly Africans. *See OMAND, supra* note 18, at 87.

124. *See id.* at 90.

125. *See id.* at 89.

126. Hunger and poor nutrition were also reported factors affecting low attendance rates as well as high drop out rates of African children in South African Schools. GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 238 (1995).

127. OMAND, *supra* note 18, at 88-89.

128. OMAND, *supra* note 18, at 89.

129. The final report of the Truth And Reconciliation Commission recognized that one of the psychological effects suffered by the children of apartheid because of exposure to gross human rights violations was the "loss of those aspects of childhood that many people assume children should enjoy." TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 4, Chap 9, at 270. In this country, we have come to view "childhood" as a sacred period in the non-adult's life in which the child's life is "regulated by affection and education, not work or profit." VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD, THE CHANGING SOCIAL VALUE OF CHILDREN* 209 (1985). As a social construction, the definition of "childhood" is influenced by the intersecting perspectives of religion, culture and psychology. VAN BUEREN, *supra* note 98, at 33. Recognizing the special needs of children for security in home, family, education, safety and economic support, the preamble to the United Nations Declaration of the Rights of the Child of November 1959, declared that "the child by reason of his physical and mental immaturity, need[ed] special safeguards and care, including appropriate legal protection, before as well as after birth." *Id.* The Declaration also recognized that children were entitled to a free and compulsory education as well as protection from racial discrimination. *See THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE WAR AGAINST CHILDREN* 6 (1986). South Africa failed to ratify the Declaration until 1998. *See id.* *See also, VAN BUEREN, supra* note 98, at 13. The current United National Convention On the Rights of the Child mandated that State Parties "protect the child from all forms of physical or mental violence, injury or abuse." THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, Article 19, 1990. The Convention also mandated that state parties recognize the free and equal compulsory education rights of children. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, Article 28, 1990. According to the Truth And Reconciliation Commission Of South Africa Report, apartheid respected none of these rights of the child. TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 5, Chap 6, at 255.

ties by boycotting classes at the early age of five or six, were often at the forefront of the revolt against apartheid.¹³⁰ In 1986, the Lawyers Committee for Human Rights documented the consequences of black children's involvement in anti-apartheid movements.¹³¹ The Committee concluded that:

1. Children had been the special targets of violence and had been singled out for arrests;¹³²

2. Many children had been killed by supposedly non-lethal weapons, tear gas, rubber bullets, and buckshot in confrontations with police;¹³³

3. The South African Defense Force, which had been deployed to certain townships, was responsible for many abuses to children;¹³⁴

4. Very young children had been arrested and detained without parental involvement;¹³⁵

5. Many children died in detention.¹³⁶

The Committee's report is particularly disturbing in that many of the black children listed in the report were subjected to these and other violent confrontations *at their schools*. The final report of the Truth and Reconciliation Commission observed that the "greatest proportion of victims of gross violations of human rights were youth, many of them under eighteen."¹³⁷ The Commission concluded that "the policy of apartheid resulted in the delivery of inferior, inadequate education to black children and deprived them of the right to develop in mind and body. This deprivation [constituted] a violation of human rights."¹³⁸

As a result of disparate education and other human rights violations, black South African children of the apartheid era have been referred to as a "lost" generation.¹³⁹ The significant educational dep-

130. *Teaching Apartheid is Ending in South Africa*, Transcription #686-5, Cable News Network Inc., April 30, 1994.

131. *Id.*

132. THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, *THE WAR AGAINST CHILDREN* 6 (1986).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 5, Chap. 6, at 254 (1998). The Commission specifically found that schools became centers for the resistance to apartheid and subsequently the focus of police surveillance and police occupations of schools. *See id.* at 255.

138. *See id.* at 254.

139. William Maclean, *South Africa Says School Crisis Hinges on Political Change*, Reuters News Service, February 7, 1991; Marvin Dunn, *Message to Mandela: Save Your*

rivation of the apartheid era casts the backdrop for the current crisis in black South African education.¹⁴⁰

V. The Second Point of Convergence: The Constitutional Mandate of Equal Educational Opportunity

Brown v. Board of Education represented a significant jurisprudential departure from the Supreme Court's history of *de jure* racial segregation in public schools. *Brown*, the seminal decision in a consolidated group of South Carolina, Delaware, and Virginia cases,¹⁴¹ recognized the inherent disparities in "separate but equal" black education. By rejecting government justifications for separate education, the Supreme Court overruled *Plessy* and declared the "separate but equal"¹⁴² standard violated the equal protection clause of the United States Constitution.¹⁴³ Concluding that "separate but equal" had no place in public education, the Court determined that government-mandated separateness itself was constitutionally infirm¹⁴⁴ and de-

Children; After South Africa's Historic Election, The Country Must Turn Its Attention to Its Young, Orlando Sentinel, May 8, 1994 G1.

140. There are continuing effects of apartheid policies that a constitutional mandate will not instantly address. As a result of the significant disruptions in black South African children's educations, they have been disproportionately represented in the population of children categorized as specific-learning disabled and mentally retarded. Nomsa Gwalla-Ogisi, *supra* note 6, at 276 (Mokubung Nkomo ed. 1990). Figures project that in the year 2020, the proportions of blacks to whites represented in the population of specific learning-disabled will be 10 to 1; those with mental handicaps 10 to 1; those committed with severe emotional disturbance approximately 16 to 1. *Id.* at 275. In its final report, the Truth and Reconciliation Commission presented its conclusions respecting the psychological consequences of South African children's exposure to gross human rights violations, suggesting that such violations have resulted in children who display "post traumatic stress disorder, depression, substance abuse, and anti-social behavior." TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol 4., Chap. 9, at 11 (1998).

141. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). *Bolling v. Sharpe* was the companion case from the District of Columbia. In *Bolling*, the Court held that under the Fifth Amendment of the United States Constitution, the Due Process Clause would be interpreted to include an equality provision, thereby prohibiting the District of Columbia from requiring racial segregation in public schools. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

142. The "separate but equal doctrine" popularly characterizes the United States Supreme Court opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896). See *supra* Part III.

143. *Brown I*, 347 U.S. at 495.

144. See *infra* note 150-53 and accompanying text. The purpose of segregation in public school education in the United States was to limit and define black children as inferior "thus exclud[ing] them from full and equal participation in society." Charles Lawrence, "One More River To Cross" - *Recognizing The Real Injury in Brown: A Prerequisite to Shaping New Remedies*, in *SHADES OF BROWN* 50 (Derrick Bell ed.)(1980). "[B]lacks are injured by the existence of the system or institution segregation rather than by particular segregating acts. . . . [T]he institution of segregation is organic and self-perpetuating. Once

clared that “[s]eparate educational facilities [were] inherently unequal.”¹⁴⁵

The *Brown* Court recognized that providing public school education is one the most important functions served by state and local gov-

established it will not be eliminated by mere removal of public sanction but must be affirmatively destroyed.” *Id.* By the time the equal protection issue in public elementary and secondary education had reached the Court in *Brown*, the issue as to whether the true constitutional defect lay only in equality of expenditures respecting services and facilities had been narrowed so that the most logical conclusion of the Court would be that separate was not equal. The groundwork for the Court’s conclusion in *Brown* had been made in the higher education admissions cases. The Court decided *State of Missouri et rel. Gaines v. Canada* in 1938. *State of Missouri et rel. Gaines v. Canada*, 305 U.S. 337 (1938). In *Gaines*, the Court determined that the State of Missouri had to provide Lloyd Gaines a legal education within the state’s borders if it provided whites with legal education within the state, irrespective of the state’s argument that there was virtually no demand by blacks for legal education. *Id.* at 349-50. Additionally, the Court required that those facilities be “substantially equal.” *Id.* at 351. In *Sipuel v. Board of Regents of University of Oklahoma*, the state denied Ada Sipuel admission to the law school at the University of Oklahoma. *Sipuel v. Board of Regents of University of Oklahoma*, 199 Okla. 36 (1947). The Supreme Court of the State of Oklahoma had denied Sipuel’s action in mandamus seeking admission to the white state law school, finding that she had not requested an opportunity to study law at Langston University, a black college that did not have a law school. Therefore, the state argued that it could not be held liable for unlawful discrimination based on race. *Id.* at 39-40. The United States Supreme Court ordered Ada Sipuel’s admission “in conformity with the equal protection clause of the Fourteenth Amendment and [mandated that the state] provide it as soon as it [did] for applicants of any other group.” *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631 (1948). In 1947, G. W. McLaurin applied for and was denied admission to a University of Oklahoma graduate program in education. *See McLaurin v. Oklahoma State Regents for Higher Education*, 87 F. Supp. 526, 527 (Okla. 1948). Relying on the Court’s decisions in *Gaines* and *Sipuel*, the federal district court ordered McLaurin’s admission. *See id.* at 526. Upon admission, McLaurin was required to “sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.” *McLaurin v. Oklahoma State Regents For Higher Education*, 339 U.S. 637, 640 (1950). The Court found this treatment to be violative of equal protection because the “fourteenth Amendment precludes differences in treatment by the state based upon race.” *Id.* at 854. The Court decided *Sweatt v. Painter* on the same day as *McLaurin*. *Sweatt v. Painter*, 339 U.S. 629, 631 (1950). Hemann Marion Sweatt had been denied admission to the University of Texas Law School in 1946. *Id.* Notwithstanding the fact that by the time the case reached the United States Supreme Court, the State of Texas had opened a law school for Blacks at the Texas State University for Negroes, the Court determined that Hemann Sweatt must be admitted to the University of Texas Law School. *Id.* at 636. The Court made its decision without reaching the merits of the state’s argument that *Plessy* required affirmance of the state’s decision to exclude Sweatt, nor of Sweatt’s argument that *Plessy* must be overruled. The Court found substantial inequality in the new school for Blacks. *See id.* at 633-34, 635-36.

145. *See Brown I*, 347 U.S. at 495.

ernments,¹⁴⁶ and that in order to participate in society, one needs a good educational foundation.¹⁴⁷ In the words of the Court, education is “the very foundation of good citizenship” and promotes an “awakening [of] the child to cultural values, helping him to adjust normally to his environment.”¹⁴⁸ Thus, given a decision to provide public education, governments—whether federal or state—are constitutionally required to provide equal education, irrespective of race.¹⁴⁹ The *Brown* decision marks a decisive point in U.S. constitutional history, where “[t]he Negro could no longer be fastened with the status of official pariah” and where “[n]o longer could the white man look right through him” as if he were invisible.¹⁵⁰

Similarly, South Africa’s 1994 multi-racial elections and the new South African Constitution have cast off the official governmental stamp of black inferiority.¹⁵¹ The South African Constitution now provides that “[e]veryone is equal before the law and has the right to equal protection of the law.”¹⁵² Indeed, the new South African Constitution’s guarantee of equal educational opportunity carries symbolic weight as a statement of moral principle.¹⁵³ Ideology alone, however, has no transformative effect in the lives of children; government must effectively implement programs that bring about equal educational opportunity. Regarding the government implementation of

146. *See id.* at 493. The Court recognized the value placed on education by most of the states, as illustrated by the fact that most states required that children attend school for a significant portion of their childhood.

147. *See id.*

148. *Id.*

149. *See id.*

150. RICHARD KLUGER, *SIMPLE JUSTICE* 749 (1975). In *Dred Scott v. Sandford*, Chief Justice Taney remarked on the invisibility of the African-American to constitutional principles: “[Blacks] are not included and were not intended to be included under the word ‘citizens’ in the Constitution, and therefore claim none of the rights and privileges which that instrument provides for and secures to the citizens of the United States.” *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856). The Court stated that blacks had “been regarded as beings of an inferior order . . . and so far inferior, that they had not rights which the white man was bound to respect . . .” *Id.* at 407. *Brown* represents a fundamental departure from this view, because the government is now *required* to recognize rights of blacks as well as intervene, if only through the courts, in a process by which the public, both whites and blacks, are to be educated in order to understand the equality of all before the law.

151. The first non-racial elections in South Africa were held in April, 1994. ZIYAD MOTALA, *CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA* 245 (1994).

152. The Constitution of The Republic of South Africa, Act 108 of 1996, Chapter 1, § 9.

153. The 1996 Constitution guarantees the right to a basic education as well as a basic adult education in the official language of choice where practicable. The Constitution also guarantees the right to establish private educational institutions as long as the institutions do not discriminate on the basis of race. Republic of South Africa Constitution of 1996, Chapter 2, § 29.

racially neutral education policy, South Africa may learn from the United States' post-*Brown* policy. At a minimum, South Africa must implement the strong statements of educational equality embodied in the 1996 Constitution. Equally important, however, is support for the Constitution's equality provisions.

A. Implementing the Constitutional Mandate of Equal Educational Opportunity in the United States and South Africa: The Problem of White Resistance

Mindful of the possibility of white resistance to school integration, the *Brown II*¹⁵⁴ Court declared that federal courts must "abide by equitable principles and be cognizant of the public interest in the elimination of obstacles to desegregation in a systematic and effective manner."¹⁵⁵ The Court seemed to anticipate opposition to the *Brown* decision.¹⁵⁶ Although government actors must comply with judicial mandates when constitutional violations are determined, the *Brown II* Court only required school officials to make "a prompt and reasonable start toward full compliance" and to proceed "with all deliberate speed."¹⁵⁷ Some commentators have blamed the *Brown II* Court's imprecise remedy for the succeeding forty-five years of constitutional crisis in school desegregation.¹⁵⁸ *Brown II*'s imprecise remedy, accompanied by a non-specific deadline for implementation, gave

154. *Brown v. Board of Education*, 349 U.S. 294 (1955). The *Brown II* opinion follows the *Brown I* Court's request to the parties to present further argument respecting the questions of remedy and oversight responsibilities of the federal courts. See *Brown I*, *supra* note 141, at 495-96 (1954).

155. *Brown II*, 349 U.S. at 300.

156. The Court said that the "vitality of [the] constitutional principles cannot be allowed to yield simply because of disagreement with them." *Id.*

157. *Brown II*, 349 U.S. at 300-01. The "all deliberate speed" remedial time line in the post-*Brown* cases is distinguished from the approach in the higher education admissions cases. *Sipuel, Gaines, and McLaurin*, *supra* note 144. In *Sipuel, Gaines, and McLaurin*, the court declared that the plaintiff's rights were "present and personal" and ordered an immediate remedy for them. *Sipuel*, 199 Okla. at 351; *Gaines*, 305 U.S. at 635; *McLaurin*, 87 F. Supp. at 854.

158. Mark Tushnet, *Brown v. Board of Education and Its Legacy: A Tribute To Justice Thurgood Marshall*, 61 *FORDHAM L. REV.* 23 (1992); Jack Greenberg, 63 *UMKC L. REV.* 207 (1994); David Crump, *From Freeman to Brown and Back Again: Principle, Pragmatism, and Proximate Cause In the School Desegregation Decisions*, 68 *WASH. L. REV.* 753 (1993). Thurgood Marshall was quoted as saying that it might take "up to five years for segregation to be eradicated, but by the [time the] 100th Anniversary of the Emancipation Proclamation is observed in 1963, segregation in all its forms [will be] eliminated from the nation." MEIER, ET AL., *supra* note 70, at 45. Nonetheless, pervasive desegregation of public schools has continued to elude accomplishment. See text and notes *infra* section V-B.

Southern states—which were already primed to oppose the desegregation mandate—room to both delay and oppose the Court's will.¹⁵⁹

The Little Rock crisis illustrates the acute problem of white resistance to school desegregation. The day after the United States Supreme Court announced that separate public schools for blacks and white were inherently unequal, the school board in Little Rock, Arkansas created a desegregation plan that would gradually meet integration goals.¹⁶⁰ Governor Orval Faubus and the state legislature, however, renounced the school board's attempted *Brown* compliance. Governor Faubus openly stated he would ignore the Supreme Court's order. Following the Governor's lead, the legislature amended the state constitution, creating a specific legislative mandate to ignore the *Brown* decision.¹⁶¹ The legislature further aggravated racial tensions by amending the compulsory school attendance law, permitting children to forego attending racially mixed school.¹⁶² The leaders of Arkansas felt justified in countering the orders of the Supreme Court, stating that the *Brown* Court acted unconstitutionally. Specifically, Faubus and the legislature contended that the governance of schools was a matter of local concern, wholly within the realm of the state and wholly outside of federal control.¹⁶³

On September 2, 1957, Governor Faubus dispatched the Arkansas National Guard to Central High School in order to prevent eight African-American students from attending the all white high school.¹⁶⁴ The move attracted national attention, and ultimately President Dwight Eisenhower called federal troops and federalized state National Guardsmen to enforce Central High School's integration.¹⁶⁵

Despite Eisenhower's show of executive force, the constitutional challenge of the Little Rock Crisis was not judicially resolved until *Cooper v. Aaron*.¹⁶⁶ The *Cooper* decision reiterated the Supreme Court as the final interpreter and arbiter of constitutional norms:

159. Raymond T. Diamond, *Confrontation As Rejoinder To Compromise: Reflections on the Little Rock Desegregation Crisis*, 11 NAT'L BLACK L. J. 151 (1989); Carl Tobias, *Public School Desegregation in Virginia During the Post-Brown Decade*, 37 WM. & MARY L. REV. 1261 (1996); Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997).

160. See *Cooper v. Aaron*, 358 U.S. 1, 7-12 (1958).

161. See *id.*

162. See *id.*

163. See *id.* See also TONY FREYER, *THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION* 80-82 (1984).

164. See *Cooper v. Aaron*, 358 U.S. 1.

165. See *id.* See also FREYER, *supra* note 163, at 108.

166. 351 U.S. 1.

Article VI of the Constitution makes the Constitution the supreme law of the Land. In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as the fundamental and paramount law of the nation, declared in the notable case of *Marbury v. Madison*, that "It is emphatically the province and duty of the judicial department to say what the law is."

This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.

It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States

No state legislator or executive or judicial officer can war against the constitution without violating his undertaking to support it.¹⁶⁷

It was not until *Green v. County School Board of New Kent County Virginia*,¹⁶⁸ where the Supreme Court found local school boards and other state authorities were using the "all deliberate speed" language as an excuse to delay, that the Court mandated affirmative actions to dismantle segregated school systems.¹⁶⁹

The problem of white resistance in the United States mirrored the disparate educational system in South Africa. The South African problem was complicated, however, by a student's constitutional right to receive education in his official language of choice, where reason-

167. *Id.* at 18.

168. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

169. *Id.* The New Kent County school district in Virginia had been segregated under law. Under both statutory and constitutional provisions, racial segregation was required in public education. See VA. CONST., Art IX, Section 140 (1902); VA. CODE ANN. 22-221 (Michie 1950). The district continued operating segregated public school education after *Brown v. Board of Education* I and II and *Cooper v. Aaron*. See *Green*, 391 U. S. at 433-434. In response to a law suit attacking racially segregated public school education in the county, the school board enacted a "freedom of choice plan." *Id.* Under the county school plan, parents had to choose the school their child would attend. A failure to choose resulted in the child being assigned to the school they previously attended. The facts demonstrated that the "choice" resulted in schools separated by race. See *id.* at 434. The Court required that the school board: "establish that [a] proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation." *Id.* at 439. The school board was required to "fashion steps which promise[d] realistically to convert promptly to a system which examined whether the equality mandate required states to affirmatively act to dismantle prior dual systems of education without a 'white' school and a 'Negro' school, but just schools." *Id.* at 442.

ably practicable.¹⁷⁰ Since the Constitution recognizes eleven official languages, this provision, in conjunction with the equality provision, has been argued to support “autogenous education”—racially segregated education meant to preserve specific cultures.¹⁷¹ As early as 1991, prior to the release of Nelson Mandela and the first multi-racial elections, the Director-General of national education, Johan Garbers, argued that even after the end of apartheid, “[i]f parents want autogenous education, that must be possible.”¹⁷² Under this vision, the government would continue to fund racially segregated schools, but require at least seven years of free and compulsory education.¹⁷³ The autogenous education proposal was based essentially on concepts of freedom of association. If whites choose to maintain separate educational enclaves, they could do so with government approval.¹⁷⁴

Ultimately, however, the proponents of the new constitution rejected an educational system based on “separate and equal” schools. The desegregation of the Potgietersrus Primary School in the Transvaal Province provides a telling illustration of South Africa’s current policy approach. After moving to a formerly all white neighborhood in the town of Potgietersrus, Magiliweni Alson Matukane, a black South African educated at Vanderbilt University in Nashville, sought to enroll his children in the neighborhood primary school.¹⁷⁵ In scenes reminiscent of the Little Rock Crisis, white school officials refused to admit the black children, and white parents forcibly blocked

170. The Constitution of The Republic South Africa, 1996, Chapter 2, § 29 (2).

171. See Brendan Boyle, *South Africa Reviews Apartheid Education But White Schools Stay*, Reuter News Service, June 4, 1991. The Republic of South Africa Constitution of 1996, now recognizes Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu as official languages. Republic of South Africa Constitution of 1996 Chapter 1 § 6 (1). These languages are the mother tongues of various African peoples of South Africa. They enjoyed no official language status prior to 1996. Iain Currie, *Official Languages* in CONSTITUTIONAL LAW OF SOUTH AFRICA, *supra* note 97. Afrikaans and English are also recognized as official languages. Republic of South Africa Constitution of 1996, Chapter 1, § 6 (1). However, since the Republic of South Africa Constitution of 1909, both Afrikaans and English have been recognized as official languages. See South Africa Act, 1909, § 137. Afrikaans and English were the languages of the white minority establishment. The constitutional protection of Afrikaans and English supported discrimination in both education and employment against non-official languages, as well as the individuals who spoke them. The officially superior status of “white” languages also supported the racial supremacy regime of apartheid. See Currie, *supra* note 97.

172. Boyle, *supra* note 170.

173. See *id.*

174. When asked whether the state should fund a whites-only school in the remote Orania settlement being set up by ultra-rightists, who specifically barred entrance to any black person, Director-General Garbers said that this would be permissible. See *id.*

175. See *Let Black In, Judge Tells School: South Africa Orders Admissions of 3 Students In Rural Community*, THE DALLAS MORNING NEWS, February 17, 1996, 9A.

their entrance to the school house door.¹⁷⁶ Other white parents refused to send their children to the school at all.¹⁷⁷ Matukane and other parents sought declaratory relief from the Transvaal Provincial Division of the Supreme Court, citing racial discrimination in violation of South Africa's constitutional provision requiring equal education.¹⁷⁸ The Court rejected the school's claims that the school could not feasibly admit additional students because the admission rolls were full.¹⁷⁹ The Court also rejected the school's legal position that the school was reserved for white children because the school was an exclusive Christian Afrikaan institution.¹⁸⁰ The Court determined that since the plaintiffs had established a prima facie case of racial discrimination, the burden of proof shifted to the respondent school to disprove discrimination.¹⁸¹ The school failed to meet the burden¹⁸²

176. See Bob Drogin, *School Ordered to Admit Blacks: South African Case Compared to '57 Arkansas Desegregation*, HOUSTON CHRONICLE, February 17, 1996, at 22; *South African Judge Orders White School to Integrate: Government Hails Ruling as Watershed in Desegregation*, THE BALTIMORE SUN, February 22, 1996, at A13; *Afrikaners Try to Halt Integration of School; White Boycott Highlights Divisions in South Africa*, ST. LOUIS POST-DISPATCH, February 23, 1996, at 3A; *Boycott, Anger as Blacks Enter South African White School*, THE EDMONTON JOURNAL, February 23, 1996, at A7; *Blacks Attend Former Whites-Only School*, THE DES MOINES REGISTER, February 23, 1996, at 4; Donna Bryson, *School Forced to Integrate*, THE CINCINNATI ENQUIRER, February 23, 1996, at A8.

177. Bob Drogin, *16 Blacks Break Color Barrier at South African School*, LOS ANGELES TIMES, February 23, 1996, at 12.

178. See *Matukane and Others v. Laerskool Potgietersrus*, [1996] 1 All SA 468 (T).

179. See *id.*

180. Afrikaans and English are the primary languages of approximately 60 percent and 40 percent respectively of white South Africans. THOMPSON, *supra* note 1, at 243.

181. The Constitution of the Republic of South Africa, Chapter 1, §9 states in pertinent part:

(3) The state may not *unfairly* discriminate directly . . . against anyone [because of] race

(4) Discrimination [because of race] is unfair unless it is established that the discrimination is fair.

The Potgietersrus Elementary School provided classes for both Afrikaans-speaking children and English-speaking children. The Matukane children were English-speaking children. See *Matukane*, *supra* note 178, at 469 (T). The Court accepted as evidence of discrimination the following facts: 1) no black or coloured students had ever been admitted to the school in spite of a large number of applications. 2) Afrikaans-speaking classrooms normally accommodated as many as twenty-eight children, however, at the time of the Matukane children's application for admission, the English-speaking classrooms were only accommodating twenty-two children. Despite this apparent room for additional English-speaking children, the Potgietersrus Elementary School administration declared that the classrooms were full. 3) The school administration's offer of the argument that the Afrikaans culture would be destroyed by the floodgate of English-speaking applicants would have yielded an Afrikaans-English-speaking children ratio of only 6:1 if all of the English speaking children on the wait-list were admitted. 4) The waiting list only contained names of white-Afrikaans speaking children. There were no names of black children who had

and the Court ruled denial of admission to the school contravened the mandate of non-discrimination in education.¹⁸³

In the *Matukane and Others* case, the court specifically addressed the school's arguments that the Constitution allowed for separate and autogenous education based on ethnic, cultural, or language differences. The school argued that both the constitutional language guaranteeing instruction in the language of choice¹⁸⁴ and the relevant international law¹⁸⁵ — which protects minority rights — supported the school's decision to exclude Matukane's children.¹⁸⁶ According to the Court, however, the clear language of the Constitution forbids *state sanctioned* discrimination based on race. The constitutional language regarding language choice, in contrast, only permits minorities to establish *private* educational institutions in order to insure the preservation of distinctive cultural and language values.¹⁸⁷ The Constitution in no way allowed for the exclusion of students based on their primary language.¹⁸⁸

The South African Supreme Court's firm pronouncement once again brings United States and South African educational policy into alignment. The judiciaries of both countries have recognized the path to peace, civility, and racial harmony cannot lie in legal and social regimes of separateness. Without strong judicial pronouncements in support of a constitutional regime of equality, a foundation for equal education opportunities cannot be created. Contrary to the words of *Plessy v. Ferguson*, law can be a powerful tool towards the abolition of racial distinctions and the moral, political, and legal authority of a constitution can seek to place people upon the same plane.¹⁸⁹ Like

applied for admission, which suggested that none of them had been seriously considered for admission. *See id.*

182. *See id.* at 468 (T).

183. *See id.*; Bob Drogin, *Court Orders Afrikaner School to Admit Blacks*, *AUSTIN AMERICAN-STATESMAN*, February 17, 1996, at A2; The plaintiffs did not pursue the action in the Constitutional Court. *South African School Ends Segregation Battle*, *NEW YORK TIMES ABSTRACTS*, February 27, 1996, at A1.

184. *See Matukane and Others, supra* note 178 (citing the Constitution of the Republic of South Africa, Chapter 1, § 29 (2)).

185. *See id.* at 476.

186. *See id.* South African Constitution, § 39, entitled *Interpretation of Bill of Rights*, mandates the interpreting courts, tribunals or fora to consider international law.

187. Constitution of the Republic of South Africa, Chap. 1, §§ 29 (2) and 29(3).

188. *Id.*

189. The Court in *Plessy v. Ferguson* stated:

Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences. . . . If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be

Cooper v. Aaron, however, *Matukane and Others* suggest that strong judicial pronouncements are only one facet of the formula for effective post-*Brown I* and post-apartheid achievement of equal educational opportunity. There are lessons for South Africa in the forty-five years of *Brown I* progeny. The aftermath of *Brown* illustrates the law's limited ability to achieve pervasive, widespread, and permanent improvements in the lives of black children, even through constitutional vehicles such as equal educational opportunity.¹⁹⁰

B. Achieving Educational Equality for Black Children: Is It Better to Focus on Desegregation for Its Own Sake or Educational Policy Initiatives?

Critics of the *Brown I* progeny have charged that it breeds "racial body counts" instead of educational opportunity.¹⁹¹ Post-*Brown* cases have by some accounts resulted in "counting the distribution of children by race throughout a school system, rather than . . . evaluating the skills, services, and training that schools provided to black children."¹⁹² In the quest to implement the *Brown I* mandate of equal educational opportunity, school districts have experimented with a variety of methods, including school bussing plans,¹⁹³ geographic zoning plans,¹⁹⁴ intra-district transfer plans,¹⁹⁵ curriculum enhancement

inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

163 U.S. at 551-52.

190. Scholars have provided extensive commentary on the limits of the law in effective social change through school desegregation. See David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring About Social Change?*, 12 J. L. & POL. 63 (1995); GERALD N. ROSENBERG, *THE HOLLOW HOPE, CAN THE COURTS BRING ABOUT SOCIAL CHANGE* 39-42, 49-54 (1991). DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 107-13 (1987); ARYEH NEIER, *ONLY JUDGMENT, THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 11-14 (1982).

191. STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* 303 (1995).

192. *Id.* at 316. Halpern compares the educational rights litigation under Title VI with the constitutional litigation in post-*Brown I* cases. Without questioning the ultimate value of either, he criticizes both by positing that there are limits to the effectiveness of the law to achieve successful integration without "well conceived well-financed social policies intelligently constructed to ameliorate [the] complex problem [of racially based denials of equal educational opportunity]" *Id.* at 321.

193. Desegregation plans which involve "bussing" are reported to be responsible for significant "white flight" from public schools. Christine H. Rossell, *Symposium: Brown v. Board of Education after Forty Years: Confronting the Promise: The Convergence of Black and White Attitudes on School Desegregation, Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV. 613, 638-39 (1995).

194. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

plans,¹⁹⁶ in-service training and testing,¹⁹⁷ as well as counseling and career guidance plans.¹⁹⁸ The various strategies approved by courts for achieving equal educational opportunity demonstrate the complexity of the economic and political facets of achieving the equal educational opportunity mandate once de jure discrimination has been abandoned.¹⁹⁹ These plans have become the misanthropic proxy for *Brown I's* command of equal educational opportunity. Moreover, desegregation strategies reflect the difficulty that the courts have had in reconciling the *Brown I* mandate with two underlying *Brown I* themes. The first theme is that of *Brown I's* exposition of race as a social problem while the second is *Brown I's* reflection of race as the experience of "racism" for people of color. Both themes are echoed in the continuing criticisms of desegregation strategies.

The efficacy of school desegregation or integration as the primary method through which black children might achieve equal education opportunity was challenged quite early in the post-*Brown* period. The Equal Education Opportunity Survey of 1966, for instance, found that although school facilities for black and white children had been greatly "equalized," student performance had not shown any remarkable improvement.²⁰⁰ Contemporary critics cite similar statistics in arguing that desegregation efforts are inapposite to the achievement of quality education.²⁰¹ Amidst these criticisms, some have explained the performance gap between black and white children by pointing to "second generation" discrimination which has resegregated black children *within* the desegregated school system. This intra-school segregation is a product of academic grouping,²⁰² ability grouping,²⁰³

195. *See id.*

196. *See* Milliken v. Bradley II, 433 U.S. 267, 275 (1977).

197. *See id.* at 275-76.

198. *See id.* at 276.

199. *See* HALPERN, *supra* note 191, at 304 (1995).

200. James Coleman, *Equality of Educational Opportunity Survey*. It was Coleman's conclusion that school input did not account for differences in family background and peer influences. *But see* Ronald R. Edmonds, *Effective Education for Minority Pupils, Brown Confounded or Confirmed*, SHADES OF BROWN 110 (Derrick Bell ed., 1980), in which the writer suggests that a school's response to differentials in family backgrounds is in fact highly determinant of a child's performance in school.

201. *See* the concurring opinion of Justice Thomas in *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995).

202. *See* MEIER ET AL., *supra* note 70 at 21-23; Derrick Bell, *Brown v. Board of Education and The Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 530-531 (1980); Janet Eyler, et al., *Resegregation: Segregation Within Desegregated Schools*, THE CONSEQUENCE OF SCHOOL DESEGREGATION 128 (Christine H. Rossell and Willis D. Hawley eds., 1983).

203. *See* MEIER ET AL., *supra* note 70, at 21-23; BELL, *supra* note 202, at 530-31; EYLER, *supra* note 202, at 128-29.

curriculum tracking,²⁰⁴ the disproportionate loss of black faculty and administrators,²⁰⁵ and the disproportionate representation of black children in suspension and expulsion statistics.²⁰⁶

Today the educational debate concerning the desegregation of public schools as the means of equal educational opportunities for children of color has yielded to a new outcry. The new focus of educational debate has centered on the lack of "quality" education in public schools which has created a state of crisis for *all* children.²⁰⁷ Partly

204. See MEIER ET AL., *supra* note 70; BELL, *supra* note 202; EYLER, *supra* note 202.

205. During the first phase of integration after the *Brown* decision, black schools were often closed, black principals were demoted to the teaching ranks and many black teachers were dismissed. In 1955, the year following the Court's opinion in *Brown*, in some Southern states, as many as 6,000 black teachers and principals were dismissed. Others, in the supervisory ranks, were not allowed to supervise white teachers in the schools that had recently been integrated. As an example of the local community losses suffered as a result of school integration, a Race Relations Information Center study reported that during the years of 1967 through 1970, the number of black principals in North Carolina dropped from 620 to 170, in Alabama from 250 to 40 and the loss in Mississippi was even greater. These statistics reflect a characteristic of the implementation of school integration policy since *Brown*, policies which demonstrate that the costs and the burdens of desegregation are often disproportionately borne by African-American communities. These statistics are characterized as losses because these black teachers and principals were part of the immediate local community. They knew their students as neighbors and their students' parents as friends. EMERGE, May 1994 at 38.

206. See BELL, *supra* note 202, at 530-31.

207. NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A Nation at Risk: The Imperative For Educational Reform*, April 1983. The Commission concluded that the country was at risk because of falling standardized test scores, large numbers of functionally illiterate teenagers and adults and increasing numbers of remedial math courses offered in schools. *Id.* The Commission recommended changes in the content of high school education mandating concentration in core academic subjects; increasing the standards of performance of high school and colleges curricula; that children spend time in school each day and each year; that teacher preparation programs increase their standards of performance, and that states enhance the attractiveness of the teaching profession; that local school agencies implement accountability and fiscal responsibility reforms into their systems of education. *Id.* Bastian, Fruchter, Gittel, Greer, and Haskins refer to this movement as the "myth of the economic imperative," specifically, that falling school performance is the major component in falling economic performance. CHOOSING EQUALITY at 49-50. "Get tough on education" responses are valuable, then, because they will be responsible for increases in the economic productivity and competitiveness of the country. Ann Bastian, Norm Fruchter, Marilyn Gittel, Colin Greer, And Kenneth Haskins, CHOOSING EQUALITY: THE CASE FOR DEMOCRATIC SCHOOLING 49-50 (1985). See also Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 1997, at 359, 393-98; Gary Orfield, *A Closer Look at Desegregation Efforts to Integrate Public Schools Need Another Push*, CHRISTIAN SCIENCE MONITOR, May 16, 1994, at 19; Ron Hutcheson, *Clinton Calls For School Upgrade: The President Seeks National Testing Standards and a Dramatic Increase in Federal Aid to Education*, THE FORT WORTH-STAR-TELEGRAM, February 5, 1997, at 1; John F. Harris, *On Education Front, A Bipartisan Lesson*, THE WASHINGTON POST, at A12; *Mr. Clinton's School Crusade*, AMERICA PRESS INC., March 8, 1997, at 3.

responsible for the new focus is a conservative influence in public school education, that has redirected, refocused, and polarized the concept of equality of education towards the need for normalization, standardization and uniformity.²⁰⁸ Indeed, some new current educational policies may represent a "crisis of inequality"²⁰⁹ in that they seem antithetical to the ideal of equality of educational opportunity.²¹⁰ The new flashpoint in educational debate is "school choice."²¹¹ The value of voucher schools,²¹² charter schools,²¹³ privatization,²¹⁴ home schooling,²¹⁵ and national education standards²¹⁶ lead the discussion.

208. *See id.* at 21.

209. *Id.* at 26.

210. Marguerite Ross Barnett, *Education Policy Trends in a Neoconservatism Era*, BLACK EDUCATION 36-46 (Willy Demarcelle Smith & Eva Wells Chunn eds., 1989). "Educational equity concerns have changed in light of '[t]he contraction of the public sphere and the definition of what constitutes the legitimate public interest.' This change is evidenced in the 'push to abolish the federal Department of Education and [the channeling] of money to the states in block grants, thereby removing education concerns from the federal sphere.'" Alfreda Sellers Diamond, *Becoming Black in America: A Book Review Essay of Life on the Color Line By Gregory Howard Williams*, 67 MISS. L.J. 6, n.94 (1997), citing Barnett, *supra*.

211. The "choice" in school choice is both practical and conceptual. "School choice" educational models seek to give parents the widest latitude of discretion, some with public monetary support, in which they decide the most appropriate educational setting for their child. *See* Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. & POL'Y REV. 1 (1992).

212. Educational vouchers allow parents to receive a stipend from the state government with which the parent may pay for private school tuition. However, First Amendment anti-establishment clause issues are raised by vouchers if they are used to pay for parochial school or other religious school education. Carol Ziegler & Nancy M. Lederman, *School Vouchers: Are Urban Students Surrendering Rights For Choice?*, 19 FORDHAM URB. L.J. 813 (1992); Peter J. Weishaar, *School Choice Vouchers and The Establishment Clause*, 58 ALB. L. REV. 543 (1994); Eric Nasstrom, Note, *School Vouchers in Minnesota: Confronting the Walls Separating Church and State*, 22 WM. MITCHELL L. REV. 1065 (1996); Jo Ann Bodemer, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid From the Lemon Test*, 70 ST. JOHN'S L. REV. 273 (1996); Harlan A. Loeb & Debbie N. Kaminer, *God, Money, And Schools: Voucher Programs Impugn The Separation of Church and State*, 30 J. MARSHALL L. REV. 1 (1996); Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359 (1997).

213. Charter schools are public schools that are operated by non-public school entities: they may be funded with public money and/or independent source money and they experiment with different and unique teaching styles. *See generally*, Robin D. Barnes, *Black America and School Choice: Chartering a New Course*, 106 YALE L.J. 2375 (1997).

214. The privatization of public school education occurs when state and local governments essentially fund private school educations through vouchers and other compensation devices. They may serve as a threat to the viability of the public schools as a place where the virtues of civic republicanism can be nurtured. *See* Molly Townes O'Brien, *Private School Tuition Vouchers And the Realities of Racial Politics*, 64 TENN. L. REV. 359, 365-72, 398-406 (1997).

Supposedly, through voucher schools, charter schools, and privatization, the element of competition will be introduced into education, thereby forcing public schools to compete by offering a quality educational product or lose the public resource support.²¹⁷ Others view the move toward voucher schools, charter schools, and privatization as disguised methods to resegregate America's schools along both race and class lines.²¹⁸ African-American voices appear on both sides of

215. The home-schooling movement has been growing within the last ten years in the United States. All fifty states now have legislation which permits children to be educated at home. Well over one million children are currently educated in their homes, with parents citing religion, concern for quality of public school education, concern for the content of education, as well as concern for the social climate at schools, among other reasons for rejecting public or parochial school educations for their children. See Alma C. Henderson, *The Home Schooling Movement: Parents Take Control of Educating Their Children*, 1991 ANN. SURV. AM. L. 985 (1992); David S. Adams, *Home Schooling in Kansas: Friend or Foe*, 63 MAR. J. KAN. B. A. 30 (1994); Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913 (1996); Note, *Home Schooling in Michigan: Is There A Fundamental Right To Reach Your Children At Home?*, 71 U. DET. MERCY L. REV. 1053 (1994); Donald D. Dorman, Note, *Michigan's Teacher Certification Requirement As Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REFORM 733 (1990); ERIC Digest of NOLA KORTNER AIEX, HOME SCHOOLING AND SOCIALIZATION OF CHILDREN <http://www.ed.gov/databases/ERIC_Digests/ed372460.html>.

216. President Clinton has called for national standards in education as a solution to the crisis in American public school education. See Goals 2000: Educate America Act, Pub. L. No. 103-227 (1994). Congress set specific national goals respecting "school readiness, school completion, student achievement and citizenship, teacher education and professional development, mathematics and science, adult literacy and lifelong learning, safe disciplined, and alcohol and drug free schools and parental participation." 20 U.S.C.A. § 5812 (1999). Under the reform plan, state educational agencies may apply for allotments with which they will coordinate state plans for improving elementary and secondary education with the national education goals. See 20 U.S.C.A. §§ 5884, 5885, 5886 (1999). See also Hutcheson, *supra* note 207, *Clinton Calls For School Upgrade*, at 1; Harris, *On Education Front*, at A12; Mr. Clinton's School Crusade, *supra* note 207 at 3.

217. JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* (1990).

218. In response to conservative predictions that the school choice movement is the next civil rights movement, American Federation of Teachers President Sandra Feldman said: "A civil right is the right to equal access to universal common schooling, with high standards, good teachers, decent classrooms and buildings – not a voucher that gives opportunity to a few and leaves the rest in schools that have been drained of resources." Richard Whitmire, *AFT Leader Feldman Doubts School Choice Next Civil Rights Movement*, GANNETT NEWS SERVICE, July 15, 1998. See also James S. Liebman, *Voice, Not Choice, Book Review of Politics, Markets, and America's Schools*, 101 YALE L.J. 259, 284-85 (1991); Angela Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 255, 277-78 (1995); Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375 (1997); Sharon Keller, *Issues in School Choice: Something to Lose: The Black Community's Hard Choices About Educational Choice*, 24 J. LEGIS. 67, 95 (1998). But see Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533 (1995).

the school choice debate. Several recent polls indicate strong support for school vouchers among African-Americans.²¹⁹ Other African-American opponents of school choice initiatives, however, view some choice proposals as a significant threat to equal educational opportunity for African-American children.²²⁰ Congress and the Clinton Administration have been at odds on the school choice issue. Federal legislation concerning school choice has been passed.²²¹ The Clinton administration has entered the school choice debate advocating the merits of charter schools and national education standards as means of improving educational opportunity for all children.²²² President

219. The Joint Center for Political and Economic Studies (The Joint Center) was created in 1970 by African-American intellectuals, professionals and elected officials primarily to provide assistance to black candidates who were seeking elected office. Since its inception it has also sought to "inform[] and illuminate[] the nation's major public policy debates through research analysis, and information dissemination in order to: improve the socioeconomic status of black Americans [as well as to] expand their effective participation in the political and public policy arenas . . ." Eddie N. Williams, visited <http://www.jointcenter.org/ann_pt.htm> (October 27, 1999). In a recent poll conducted by The Joint Center, of African-Americans surveyed, 57.3 percent supported school vouchers. A 1998 survey by the same group, however, demonstrated a decline in support for school vouchers among African-Americans to 48.1 percent. THE JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, 1998 NATIONAL OPINION POLL: EDUCATION 4 (1998). THE JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, 1997 NATIONAL OPINION POLL: CHILDREN'S ISSUES (1997). A poll conducted by The National Leadership Network of Conservative African-Americans also endorsed educational vouchers as a means of assuring equal educational opportunities for African-American children. THE NATIONAL LEADERSHIP NETWORK OF CONSERVATIVE AFRICAN AMERICANS INTRODUCTION TO PROJECT 21'S THIRD ANNUAL REPORT ON THE STATE OF BLACK AMERICA, BLACK AMERICA 1996: A TIME FOR RENEWAL. Another recent poll asked the following question: "[w]hether the respondent would favor giving a parent a voucher that could be used at any private or church-related school?" Half of the respondents were asked the question in a context wherein the government would pay for all of the tuition and half of the respondents were asked the question in a context wherein the government would pay for a portion of the tuition. Forty-seven percent of all respondents favored the voucher and 48 percent opposed vouchers. Fifty-seven percent of African-Americans responding preferred the "all tuition voucher." See THIRTY-FIRST ANNUAL PHI DELTA KAPPA/GALLUP POLL OF THE PUBLIC'S ATTITUDES TOWARD THE PUBLIC SCHOOLS.

220. NAACP President, Kweisi Mfume, opposed voucher plans because they threaten to drain the public fisc. His concern is that: "[t]here is an infinite amount of need and many school kids would be left behind." Webster Brooks, *Issuing A School Choice Challenge to the NAACP*, HEADWAY, October 31, 1998, vol. 10, n.8 at 37. The Milwaukee branch President of the NAACP was quoted as saying: "although some recent polls have indicated many African-Americans support school choice, we feel that the issue has been presented in such a way as to obscure the impact of charter schools on African-American children." NEW CRISIS (NAACP), December 1, 1998, vol. 105, Issue 6, at 44.

221. See *infra* note 250.

222. See The Charter School Expansion Act of 1999, Pub. L. No. 105-278. See also Presidential Proclamation No. 7118, *America Goes Back to School* wherein President Clinton advocated strengthening support for charter schools as a means of improving educational opportunity. 63 Fed. Reg. 49,261 (1998), available in 1998 WL 611648. National

Clinton, however, has decidedly opposed private school vouchers as means achieving equal educational opportunity.²²³

Amidst the current conflagration of policy debates on the appropriate means of accomplishing equal educational opportunity, the Supreme Court has continued to narrow the scope of remedies federal courts may use to accomplish *Brown's* equal education goal.²²⁴ As

standards purportedly will improve the quality of public education for children in low-performing schools by focusing less on purely local standards which may hinder the acquisition of uniform equal educational results and focusing more on a core set of expectations for quality educational accomplishments for all children. *See infra* note 242. National education standards, however, complicate the school choice controversy by introducing questions respecting the appropriate spheres of autonomy between state and national governments. *See also* Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 62 *FORDHAM L. REV.* 345 (1994); Ron Hutcherson, *Clinton Calls For School Upgrade*, at 1; *On Education Front*, at A12; *Mr. Clinton's School Crusade*, *supra* note 207, at 3.

223. President Clinton vetoed the District of Columbia Student Opportunity Scholarship Act. *See* District of Columbia Student Opportunity Scholarship Act of 1998, S. 1592, 105th Cong., 2nd Session. The Act would have provided vouchers in the form of tuition subsidies for children in the Washington D.C. public schools. *Id.* President Clinton stated that: "[w]e must strengthen our public schools, not abandon them Although I appreciate the interest of the Congress in the educational needs of the children in our nation's capital, this bill is fundamentally misguided and a disservice to these children." ASSOCIATED PRESS, ARIZONA REPUBLIC, *Clinton Vetoes Vouchers For D. C.*, May 21, 1998, at A2. The President also vetoed The Education Savings and School Excellence Act. The Act would have provided a tax credit to parents whose children attended private schools. The Education Savings and School Excellence Act of 1998, S. 1502, 105th Cong., January 27, 1998. The President stated that the measure was inappropriate because it would use money to give a tax break to those with money while doing "virtually nothing for average families." Sonya Ross, *Clinton Vetoes School Voucher Bill*, ASSOCIATED PRESS, July 21, 1998. *See also* the statement of Secretary of the U. S. Department of Education, Richard W. Riley wherein he notes the strong support of the Clinton administration for charter schools but denounces educational vouchers. Secretary Riley states that vouchers do "not improve public education in a meaningful way. [Factors relating to] the performance, capacity, costs, character, and accountability of private schools-suggests that the supporters of vouchers have not really thought through the real implications of their proposals Voucher proposals can only distract the American people from the hard work of real education reform, drain critically needed funds from our public schools, and undermine support for public education." Statement of Richard W. Riley, Secretary, U. S. Department of Education, *Fixing Our Schools From the Bottom Up: State, Local and Private Reform Initiatives*, available in 1999 WL 27594696.

224. In *Brown II*, the Supreme Court placed the primary responsibility for monitoring local school districts efforts towards "good faith implementation of the governing constitutional principles" with the lower federal courts. 349 U.S. at 299. The lower federal courts were given this responsibility because of "their proximity to local conditions and the possible need for further hearings." *Id.* The governing principle of *Brown I* required that schools which had maintained dual systems of education under law, cease the unconstitutional behavior and formulate a remedy for the constitutional violation. The remedy defined in *Brown II* was desegregation. Consequently, federal courts in their oversight capacity had the power to decree whether a school system was still "separate and unequal" or "unitary and equal." *See generally* *Brown II*, 349 U.S. at 299-300. In the cases of *Milli-*

more school districts are being released from federal court oversight, *Brown's* mandate of equal education remains unrealized.²²⁵ Statistics reveal continued racial disparity in educational opportunity and pinpoint ongoing differentials in educational outcomes and achievements.²²⁶

ken v. Bradley I and *Milliken v. Bradley II*, the Court narrowed the scope of the permissible remedies that could be used in dismantling dual systems of education by requiring a tailored fit between the remedy chosen for dismantling a dual school system and the school districts targeted for implementation. *Milliken v. Bradley*, 418 U.S. 717 (1974); *Milliken v. Bradley*, 433 U.S. 267 (1977). The *Milliken I* court held that the scope of the desegregation remedy is determined by the nature and extent of the constitutional violation of the school district. *Milliken I*, 418 U.S. at 744. Therefore, the remedy must apply only to a geographical area targeted as having engaged in unconstitutional behavior. *See id.* at 745. The Court has also clearly found that the constitutional command to desegregate schools does not mean that every school in every community must reflect the racial composition of the school system, and that one race schools are not necessarily a mark of a dual system. *See Swann*, 402 U.S. 1 (1971). In *Freeman v. Pitts*, the Court conditionally released a local school district from federal court oversight through an incremental approach, even though the school had not fully complied with desegregation orders. *Freeman v. Pitts*, 503 U.S. 467, 490-91 (1992). The Court found that the Board of Education in *Freeman* had achieved "maximum practical desegregation." *Id.* at 494. The Court attributed any vestigial imbalances in racial composition in the schools to private choice as opposed to intentional state discriminatory action based on race. *Id.* at 495-96. In *Missouri v. Jenkins*, the Supreme Court again narrowed the ability of the lower federal courts to fashion remedies. The school district in question had a significant number of all-black schools and in order to decrease the number of racially identifiable schools, the District Court fashioned a desegregation remedy which sought to attract non-minority students who lived outside the school district. *Missouri v. Jenkins*, 515 U.S. 70, 83-101. The order requiring salary increases for staffing within a school district was beyond the *Milliken I* remedial authority of the court. *See id.*

225. *See infra* notes 253, 255.

226. Black children begin elementary school with less preschool education than white children. *See* U.S. DEPARTMENT OF EDUCATION, OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, *The Educational Progress of Black Students, Findings From the Condition of Education 1994*, p. 2, May 1995. Rates of enrollment for black and white children in preschool have increased since the 1970s, however, the rate of increase has been slower for black children. *Id.* Statistics from 1991 show 31 percent of black three and four year-olds enrolled, compared to 40 percent white three and four year olds. *Id.* Statistically significant differences in academic performance of African-American children and white children are apparent as early as fourth grade and continue through high school. *Id.* at 3. Educational assessments of thirteen year olds have shown that black boys and girls are "more likely than white children to be below the modal grade for their age. While most 13 year-olds are in the eighth grade, 49 percent of black males at this age were in a lower grade compared with 32 percent of white males." *Id.* at 5. According to the President's Advisory Board on Race: "students of color often trail white students in test scores, high school graduation rates, and college graduation rates." *Id.* For example, although there is evidence of recent improvements in test scores for students of color, the National Assessment of Educational Progress average scaled-reading proficiency scores for 17 year-old Black and Hispanic students in 1996 were less than the average scores for 13 year-old white (265 versus 267 out of possible 500, respectively; the average scores for white 17 year-olds was 294). REPORT OF THE ADVISORY BOARD FOR THE PRESIDENT'S INITIATIVE ON

Recent Supreme Court cases reiterate the inadequacies of post-*Brown* desegregation policy. In *Missouri v. Jenkins*, Justice Thomas in concurrence commented on post-*Brown* desegregation policy and alluded to his disappointment in recent educational outcomes for African-American children.²²⁷ Justice Thomas' concurrence critiques U.S. desegregation policy since 1954. Thomas first addresses the *Brown* Court's decision to value social science data that suggested racial separation in and of itself caused black children to feel inferior.²²⁸ Justice Thomas wrote:

Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior education resources—making blacks 'feel' superior to whites sent to lesser schools—would violate the Fourteenth amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed. Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences. Regardless of the relative quality of the schools,

RACE, *One America in the 21st Century: Forging A New Future, The Presidents' Initiative on Race*, at 15-32, September, 1998.

227. 515 U.S. 70, 118 (1995) (Thomas, J., concurring).

228. In footnote 11 to *Brown I*, Chief Justice Warren cites a number of social science articles that suggested that racial separation in schools was psychologically damaging to black children. *Brown I* at 494-95. Notably, Chief Justice Warren cited the work of Kenneth Clark. Kenneth Clark and Mamie P. Clark conducted a "doll study" in which they asked young black children a number of questions respecting choices between black, brown and white dolls. Their findings were reported in social science journals. See Kenneth A. Clark & Mamie P. Clark, *The Development of Consciousness of Self and the Emergence of Racial Identification in Negro Preschool Children*, 10 J. SOC. PSYCHOL. 591-99 (1939); Kenneth A. Clark & Mamie P. Clark, *Racial Identification and Preferences In Negro Children*, READINGS IN SOCIAL PSYCHOLOGY, 602-611 (Theodore M. Newcomb and Eugene L. Hartley eds., 1947); A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 8-10 (1996); DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 99-101 (1995); Skelly Wright, *Public School Desegregation, Legal Remedies for De Factor Segregation*, THE EVOLVING CONSTITUTION, ESSAYS ON THE BILL OF RIGHTS AND THE U.S. SUPREME COURT 44, 48-49 (Norman Dorsen, ed. 1987); Charles Lawrence, "One More River to Cross" – Recognizing the Real Injury in *Brown*: A Prerequisite to Shaping New Remedies, SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 49, 50-54 (Derrick Bell ed. 1980); Sara Lawrence Lightfoot, *Families as Educators: The Forgotten People of Brown*, in *id.* at 3, 5-8.

segregation violated the Constitution because the State classified students based on their race²²⁹

Critics suggest the social science data was both faulty and disparaging to African-Americans.²³⁰ Although the Court accounted for the effects of segregation on the African-American child's psyche, it failed to recognize the existence of two stakeholders in the dismantling of dual systems of education. African-Americans and other people of color were stakeholders in the desegregation enterprise because they stood to gain access to equal educational opportunities. On the other hand, whites were stakeholders in the desegregation enterprise because the dismantling of racially segregated schools offered them a vantage point from which they might understand the "pathological implications of . . . racism itself."²³¹

Justice Thomas also found fault with the *Brown* Court's policy of placing black children in physical proximity to white children without seeking to improve actual educational outcomes for black children. Justice Thomas commented on the unsound educational policy²³² that emanated for post-*Brown* implementation strategies:

229. *Missouri*, 515 U.S. at 121.

230. Social scientists do not share uniform views on this topic. Naim Ak'bar has suggested that the court misused the Clark social science data. He states:

At no point does the [Court] identify the reality that in maintaining a system of segregation, not only are African-Americans hurt by thwarted opportunity and abuse, but Caucasian children are raised as delusional racists. . . . If you assume that only African-Americans are being benefitted by such a system, then implicit in such a conclusion is a perpetuation of precisely that system that you allegedly are seeking to correct. It is not surprising that the drop-outs, push-outs, suspensions, achievement levels, and overall academic performance of African-American children probably is much worse than it was in 1954 in the overtly segregated school system.

Na'im Akbar, *Our Destiny: Authors of a Scientific Revolution*, in *BLACK CHILDREN: SOCIAL, EDUCATIONAL AND PARENTAL ENVIRONMENTS* 17, 25 (Harriette Pipes McAdoo & John Lewis McAdoo eds., 1985). Social scientists have questioned the validity of studies which suggest segregated education results in the black child's poor self-concept and poor self-esteem. See Algea O. Harrison, *The Black Family's Socializing Environment*, in *id.* at 174, 175-79; Nancy H. St. John, *The Effects on School Desegregation on Children: A New Look at the Research Evidence*, *RACE AND SCHOOLING IN THE CITY* 84, 90-92 (Adam Yarmolinsky, et al. eds., 1981).

231. See Akbar, in McAdoo, *supra* note 230, at 25.

232. Derrick Bell offers the following perspective: "Effective schools for blacks must be a primary goal rather than a secondary result of integration." It may be better to "focus on obtaining real educational effectiveness which may entail the improvement of presently desegregated schools as well as the creation of preservation of model black school." See BELL, *supra* note 202, at 532. Interpreting educational significance of one-race schools and its correlation to achievement is difficult. The Presidents Advisory Board on Race found in a recent study that: "34 percent of black students and 35 percent of Hispanic students attend schools with more than 90 percent minority enrollment. Most dramatically, 88 percent of those schools with greater than 90 percent minority enrollment are predominately

Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment

“Racial isolation” itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based on a theory of black inferiority.²³³

Although Justice Thomas’ *Jenkins* concurrence did not specifically address the disparate education of poor children of color,²³⁴ the discrepancies in white and black education further question the effectiveness of *Brown*’s implementation. Relevant to the disparate education discussion is the disagreement among policymakers about the

poor. These rates of segregation are worse than the rates of segregation from more than 15 years ago for blacks and 25 years ago for Hispanics.” REPORT OF THE PRESIDENT’S ADVISORY BOARD ON RACE, *One America in the 21st Century: Forging A New Future*, note 93 (1998).

233. 515 U.S. at 121-22 (Thomas, J., concurring).

234. In *Milliken v. Bradley I*, the Court spoke to the local nature of public school educational policy making: “No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern.” *Milliken v. Bradley I*, 418 U.S. 717, 741-42 (1974). The Court has also espoused the belief that local control over school presents opportunities for “participation in decision making that determines . . . how local tax dollars will be spent. [It also] affords some opportunity for experimentation, innovation, and a healthy competition for education excellence.” *San Antonio v. Rodriguez*, 411 U.S. 1, 50 (1973). Derrick Bell, however, has commented that local autonomy might be inimical to the interests of African-American children: “local control . . . may result in the maintenance of a status quo that will preserve superior educational opportunities and facilities for whites at the expense of blacks.” See BELL, *supra* note 202, at 526-27. Also, with respect to the issue of local control, it may be “implausible to assume that school boards guilty of substantial violations in the past will take the interests of black school children to heart.” *The Supreme Court, 1978*, 93 HARV. L. REV. 60, 130 (1979). Availability of monetary resources is an important factor in providing quality education to children. Significant differentials exist from school district to school district in funding for instructional services support services and capital outlay expenditures in low wealth (median family income is less than \$20,000) and high wealth (median family income of \$35,000 or more) school districts. U. S. DEPARTMENT OF EDUCATION, OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, *The Social Context of Education*, at 26 (July, 1997). 1992-1993 statistics show that by comparison, low wealth districts spent less on each student than did high wealth districts and in the area of capital outlay, low wealth districts spent 31 percent less than did high wealth districts. See *id.*

correlation between educational spending and achievement.²³⁵ Most education policymakers and scholars believe that disparities in educational equity and funding have had a significant effect on educational outcomes.²³⁶ Disparities in educational funding occur when the funding sources are local property tax assessments.²³⁷ More affluent districts yield a high tax base from which schools can be funded while less affluent districts yield a lower tax base from which schools can be funded.²³⁸ Although most states will give some kind of supplementary funding to local school districts, the United States Supreme Court has not required the states to equalize funding across districts.²³⁹

235. Michael Rebell identifies "four myths" which hinder resolutions to spending inequities between school districts: "[that] there is no substantial relationship between educational funding and the quality of education; education is not a 'fundamental interest'; local control of education justifies the perpetuation of fiscal inequities; and the extra cost burden of social services in cities with large minority populations is insignificant." Michael Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 695 (1995). He argues that debunking these myths requires a realization that a true equal educational opportunity requires fiscal equity. *Id.* at 699-705, 714. Additionally, although "fiscal resources are limited," re-prioritizing national fiscal decision making might redistribute limited resources. *Id.* at 715-16. Rebell also suggests that although redistribution of wealth resources between districts may not be possible, myth debunking at least requires that we understand that the presence of comparatively wealthy and poor school districts in the same systems means that we may actually want to maintain elitist education systems. *Id.* at 715-16. Rebell says that perceptions of fiscal abuse must be corrected in order to begin solving the problem of fiscal inequity in school funding. *Id.* at 717. Finally, he suggests that another area of failing respecting school funding issues lies in the fact that judges perceive that the issue is one for legislatures and not the judiciary. *See id.* at 718. *See also* Michael Heise, *Equal Educational Opportunity Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 564-66 (1998); Michael Heise, *State Constitution, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995).

236. *See infra* note 279.

237. *See* Norman C. Thomas, *Equalizing Education Opportunity Through School Finance*, 48 U. CIN. L. REV. 255 (1979).

238. *See id.*

239. *See id.* and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55 (1973). More recent litigation has sought to redress inter-district educational inequity in state court litigation with varying degrees of success. Under Connecticut state constitutional law, for example, the "state has an affirmative obligation to monitor and to equalize educational opportunity." *Sheff v. O'Neill*, 678 A.2d 1267, 1281 (Conn. 1996). When challenged, the "state must demonstrate that it has substantially equalized school funding and resources." *Id.* *See also* *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977). In *Horton*, disparities in funding resulted in numerous rich property based tax districts and several poor ones. Citing the state constitution's mandate of equal educational opportunity, the court determined that the funding formula dependent "primarily on local property base without regard to the disparity in the financial ability of the towns to finance and with no significant equalizing state support . . . did not meet the state's duty to provide equal educational opportunity." *Horton* at 374. *See also* Rebell, *supra* note 235, at 692; Heise, *supra* note

The United States Supreme Court has held that states are only required to provide basic or minimum education for children, regardless of whether educational funding is dependent on the property tax base and results in economically disparate school districts.²⁴⁰ The Court held that disparate funding sources, despite their disparate effect on children of color and their education, does not violate equal protection.²⁴¹ The Court's stance on funding disparities has created a problem in solving educational equity issues by leaving the resolution of the problem to state and local legislators. Equity in funding issues has become a part of the educational "social context" for many children of color.²⁴² Effective educational policy for African-American children and other children of color must consider *all the factors* which influence the availability of equality of educational opportunity—in-

235, at 1152, 1163-69; John Dayton, *When all Else Has Failed: Resolving the School Funding Problem*, B.Y.U. EDUC. & L. J. 1, 2 (1995).

240. *San Antonio v. Rodriguez*, 411 U.S. 55. In the state of Texas, school districts supplemented the state funding source of education by assessing ad valorem property taxes. The system resulted in disparate educational spending across school districts. *See id.* at 54-55.

241. *See id.* at 55.

242. The social context of education refers to the "combination of out-of-school factors . . . which center on family characteristics, such as poverty and parents' education" which in turn influence school performance. U.S. DEPARTMENT OF EDUCATION, OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, *The Social Context of Education*, at 1 (July, 1997). The overriding social factor negatively correlated with poor educational performance is poverty. *See id.* In 1995 both Hispanic and black children were more than two times as likely to live in poverty when compared to white children. *See id.* at 8. Statistical differences exist respecting educational performance in low and high poverty schools. "Low poverty" schools are those in which "5 percent or fewer of the students are eligible to receive free or reduced-price lunches" whereas "high poverty" are described as those in which "more than 40 percent of students are eligible to receive free or reduced price lunches." *Id.* at 15. Statistics show that "27 percent of white students were in schools with a high poverty rate compared to 65 percent of black and Hispanic students, 37 percent of Asian/Pacific islander students, and 57 percent of American Indian/Alaskan Native students." *Id.* at 15-16. Research has shown that high poverty schools report more student discipline problems, higher student absenteeism and tardiness, and increased lack of parental involvement. *See id.* at 16-21. Higher school drop out rates are also correlated to income and race factors; statistics demonstrate that Hispanic and African-American children have greater dropout rates than white children (9, 6, and 4.1 percent for each group respectively). U.S. DEPARTMENT OF EDUCATION, OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, *Dropout Rates in the United States, 1996*, at 5 (December 1997). Additionally, children ages 15-24 who dropped out of school in the year preceding October 1996, whose families' incomes rank in the bottom 20 percent of incomes, had a school drop out rate of 4.5 to 11 times that for students whose family incomes ranked in the top 20 percent of family incomes. *See id.* at iii, 8.

cluding the child's "race and ethnicity, [possible] limited English proficiency, family income, parental education, and family structure".²⁴³

In the same vein, a focus on the social context of black South African education, both past and present, is central to the implementation of post-apartheid South African educational policy. In attempting to implement equal education policy, South African educational policymakers have considered the efforts in post-*Brown* United States education policy.²⁴⁴ Despite the study of United States implementation, desegregation and integration are not considered the foundation for equal educational opportunity.²⁴⁵ South African policy initiatives focus more on the substance of the black South African children's educational experience rather than on where—or in whose proximity—the education will occur.²⁴⁶ This approach is evident in the South African Schools Act of 1996 and the National Education Policy Act of 1996 and Curriculum 2005, which provide the framework for constitutionally mandated equal education.

The South African School Act of 1996 provides for a "uniform system for the organization, governance and funding of schools."²⁴⁷ The bill mandates compulsory attendance for all children from age seven through fifteen and admission to public school without respect to race.²⁴⁸ In addition to this legislation, the National Education Policy Act No. 697 of April 1996 (The Act) assigns the Minister of Educa-

243. U.S. DEPARTMENT OF EDUCATION, OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, *The Social Context of Education*, at 2 (July 1997).

244. *See supra* note 75.

245. Some who have commented on current South African educational policy initiatives have suggested that more focus should be placed on early childhood development and adult basic education and training. *See* REPORT ON POVERTY AND INEQUALITY IN SOUTH AFRICA, PREPARED TO THE OFFICE OF THE EXECUTIVE DEPUTY PRESIDENT AND THE INTER-MINISTERIAL COMMITTEE FOR POVERTY AND INEQUALITY, at 15 (May 13, 1998). However, the implementation of the national education policy is the responsibility of the provincial governments who carry 85 percent of the education budget. *See id.* Seventy-five percent of this money is spent on primary school education. *See id.* As a result, early childhood education and adult basic education and training are largely underfunded. *See id.*

246. *See* Ross R. Kriel, *Education*, in *THE CONSTITUTIONAL LAW OF SOUTH AFRICA* 38-7, 38-8 (Chaskalson, Kentridge, Klaaren, Marcus, Spitz & Woolman eds., 1996).

247. The South African School Acts of 1996. Kriel suggests that: "One way of enforcing integration, and overcoming the results of segregated areas, involves busing children from one area to a school in another area In South Africa it is possible that state-funded transportation will be provided to make underutilized resources situated in formerly 'white suburbs' available to students from under-resourced areas. But this is not necessarily the same as the American 'busing' remedy. Its primary objective may be to utilize inaccessible and under-used educational resources rather than to desegregate public education as it was in America." *Id.*

248. *See* S. Afr. Schools Act of 1996, Chapter 2, §§ (3)(1) & (5).

tion the job of determining national education policy. The Act requires that all school policy conform to the "advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 3 of the Constitution, and in terms of international conventions ratified by Parliament," particularly the rights to "be protected against unfair discrimination" and the right of "every person to basic education and equal access to education institutions."²⁴⁹ Further guiding South African educational policy, the national Department of Education's *Curriculum 2005* initiative²⁵⁰ encompasses a new curriculum framework which focuses on "outcomes based learning" as opposed to the "inputs of traditional curriculum driven education and training."²⁵¹

Implemented within the continuing effects of apartheid's poverty and inequality, the new education policies cannot alone guarantee that South African people of color will be able to take advantage of constitutional guarantees of formal equality.²⁵² Reports from 1997 in-

249. The National Education Policy Act No. 697 of April 1996 § 4(a)(i) & (ii). The Act allows the Minister to initiate policy regarding student teacher ratio, compulsory school education, admission requirements, and other factors relation to organization, management and governance of the national education system. *See id.* at §§ 4(b), (e), (h), (i). The Act provides for a National Department of Education which is charged with the responsible administration of National Educational Policy at the provincial level through a cooperative relationship between the Council of Education Ministers as well as the Heads of Education Department Committee. *See id.* at §§ 9, 10.

250. *See generally* DEPARTMENT OF EDUCATION, CURRICULUM 2005, LIFELONG LEARNING FOR THE 21ST CENTURY, A USER'S GUIDE 18 (1997).

251. *Id.* at 17. The Department of Education has determined that an outcomes-based education and training system requires a shift from focusing on teacher input (instructional offerings of syllabuses expressed in term of content) to focusing on the outcomes of the learning process. Outcomes-based learning focuses on the achievement in terms of clearly defined outcomes, rather than teacher input in terms of syllabus content. *Id.* at 18. The 1996 Constitution also guarantees the right to adult education. *See S. Afr. Const. of 1996* § 29(1)(a). This guarantee suggests that the drafters recognized that apartheid era educational deprivation would have a continuing effect on the adult population of color. *See supra* note 250, at 10-12. Accordingly, The Minister of Education has stated that Curriculum 2005 must contain an adult basic education and training component and that the initiative will focus on "particular target groups which have historically missed out on education and training." *Id.*

252. *See generally* REPORT ON POVERTY AND INEQUALITY IN SOUTH AFRICA, PREPARED TO THE OFFICE OF THE EXECUTIVE DEPUTY PRESIDENT AND THE INTER-MINISTERIAL COMMITTEE FOR POVERTY AND INEQUALITY (May 13, 1998). The report characterizes poverty as "the inability of individuals, households or communities to command sufficient resources to satisfy a socially acceptable minimum standard of living." *Id.* at 3. South Africans who are poor suffer from "alienation from the community, food insecurity, crowded homes, usage or unsafe and inefficient forms of energy, lack of jobs that are adequately paid and/or secure, and fragmentation of the family." *Id.* The same South Africans characterize wealth as "good housing, the use of gas or electricity, and ownership of a major durable good such as a television set or fridge." *Id.*

dicating the severity of apartheid's legacy on the education of African children, particularly in the geographic areas previously designated as "homelands."²⁵³ The Northern Province, Eastern Cape and Kwa Zulu-Natal provinces housed most of the apartheid homelands' departments of education.²⁵⁴ As late as 1997, approximately one-half of the 1.9 million students in the Northern Province had no water facilities within walking distance of their schools; 79% of the schools had no toilets; 80% of the schools had no telephones; and approximately 41% of homeland schools needed major repairs.²⁵⁵ Further, pupil-teacher ratios were reported at 51:1 in the Eastern Cape, 44:1 in the Northern Province, and 41:1 in Mpumalanga Province.²⁵⁶ By contrast, the statistics in the Western Cape Province, a predominantly white province, reflected that approximately 90 percent of schools had telephones, fewer than 1% of schools were in need of repair, and pupil teacher ratios were approximately 25 to 1.²⁵⁷

Assessment of school progress toward achieving increased graduation rates and admissions to institutions of higher education also present significant equal educational opportunity questions for education policymakers. The apartheid era "senior certificate examination," also called the "matric examination," was the measure of success in secondary school performance. By passing the examination, students earned a high school diploma and fulfilled an entrance requirement to college or university education.²⁵⁸ Unfortunately, until a new national qualification framework is designed by the Department of Education, the senior certificate examination will be maintained as both a secondary school completion examination, as well as a college entrance exam.²⁵⁹ Statistics illustrate the disparate effects of the unequal education. In March 1995, eight of ten white

253. Pursuant to statutory law, the apartheid homelands were established as reserved areas for black occupancy. See The Bantu Land and Trust Act of 1936, The Bantu Laws Amendment Act, No. 7 of 1973. See also LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 191-93 (1995).

254. See *From Policy to Implementation: Ongoing Challenges and Constraints*, University of Witwatersrand Education Policy Unit; Quarterly Review of Education and Training in South Africa Vol. 5, No. 1, at 4 (September 22, 1997).

255. *Id.*

256. *Id.*

257. *Id.*

258. See S. Afr. Universities Act of 1955. See also W.A. JOUBERT, THE LAW OF SOUTH AFRICA 236-38.

259. DEPARTMENT OF EDUCATION WHITE PAPER 3, A PROGRAMME FOR THE TRANSFORMATION OF HIGHER EDUCATION 17 (July 24, 1997).

children reached the “matric year,”²⁶⁰ whereas only two of ten African children attained the same goal.²⁶¹ By documenting the deficiencies of black children in passing basic examinations, the post-apartheid senior certificate pass scores reiterate the continuing inequalities in South African education.²⁶²

VI. The Third Point of Convergence: Affirmative Action As A Constitutional Necessity or An Unconstitutional Deprivation of Equal Protection

The United States Supreme Court recognized early in the post-*Brown* period that governments would have to act affirmatively to dismantle dual systems of education.²⁶³ To this end, both federal and state governments employed the now maligned “affirmative action”

260. The matric year is the last year of secondary school for South African children. See generally *Matric Results, Between Vision and Practice: Policy Processes and Implementation*, University of Witwatersrand Education Policy Unit; Quarterly Review of Education and Training in South Africa, Vol 3, No. 3, March 15, 1996.

261. See *id.*

262. In 1994, Senior Certificate examination results reflected a matric passage rate of 43.8 percent for Africans; 84.3 percent for coloureds; 88.9 percent for Asians and 92 percent for whites. Provincial senior certificate rates for 1994 reflect 33.42 percent passage in Mpumalanga province and 38 percent passage in the Northern province for passage for former Department of Education and Training schools. Philippa Garson & Vusi Mona, *We're Still A Long Way From Equal Education*, DAILY GUARDIAN AND MAIL, Jan. 5, 1996. In Mpumalanga province, however, the passage rate for the former Transvaal Education Department (whites) was 97.5 percent; former House of Delegates (Indian) schools was 95.67 percent and former House of Representatives (coloured) was 89.34 percent. See *id.* 1995, 1996 and 1997 statistics for the matric examination were not available by race. See *id.* The provincial passage scores for those years were reported as: Western Cape at 84.27, 80.4, and 77 percent; Casual-Natal 76.64, 63, and 54 percent; Northern Cape at 74.83, 72.9 and 63.7 percent; North West province at 66.6, 69, and 53 percent; Gauteng province at 63.5, 57, and 51 percent; Free State at 50.9, 51.1, and 42.3 percent; Eastern Cape at 48.16, 42, and 46 percent; Mpumalanga at 42.28, 50, and 54 percent, and the Northern province at 38.64, 36, and 31 percent. See *Between Vision and Practice: Policy Processes and Implementation*, *supra* note 260; and Matric Result 1997, Independent Online, INDEPENDENT NEWSPAPERS 1997.

263. See *Green v. New Kent County School Board*, 391 U.S. 430 (1968). Even though the United States Supreme Court declared that the segregated education provided to children in Virginia pursuant to state constitutional and statutory law was unconstitutional in Virginia's consolidated case in *Brown v. Board of Education*, the school board in New Kent County continued to maintain a segregated school system through 1965. See *id.* at 433. Plaintiffs in *Green* filed suit challenging this continued practice in 1965. *Id.* at 432. Subsequently, the New Kent county school board offered children a freedom of choice plan as a veiled measure to desegregate schools. See *id.* at 433-34. Noting that the County's first steps toward desegregation “did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a ‘prompt and reasonable start,’ the United States Supreme Court found the freedom of choice plan unconstitutional.” *Id.* The Court found that the county was operating a segregated system of education and imposed

model as a remedy for correcting the present effects of past discrimination.²⁶⁴ The affirmative action model allowed either a government or a private actor to benefit an individual of a particular racial group which has been excluded or under-represented in the past.²⁶⁵ Fortunately, for South African people of color, affirmative action has been adopted as a principle which is in concert with the constitutional principle of equality.²⁶⁶ The Constitutional Court's interpretation of the equality provision of the South African Constitution is instructive for the United States. Unfortunately, for people of color in the United States, affirmative action programs have been attacked as "reverse discrimination." Affirmative action programs in higher education²⁶⁷ and in employment²⁶⁸ have fallen to constitutional challenges as being

an affirmative duty on the school board to "come forward with a plan that promise[d] realistically to work now." *Id.* at 439.

264. Exec. Order No. 10,925, 26 Fed. Reg. 2977 (1961)(requiring federal contractors to consider minorities in awarding contracts); Exec. Order No. 11,246, 3 C.F.R. 339 (1964), amended in 42 U.S.C. § 2000(e) (1988)(requiring contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin").

265. See generally Leland Ware, *Tales From The Crypt: Does Strict Scrutiny Sound the Death Knell For Affirmative Action in Higher Education*, 23 J.C. & U.L. 43 (1996); Jamie B. Raskin, *Affirmative Action and Racial Reaction*, 38 How. L.J. 521 (1995); Ivan E. Bodensteiner, *Affirmative Action: The Need for Leadership*, 39 How. L.J. 757 (1996); Frank Adams, Jr., *Why Brown v. Board of Education and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 ALA. L. REV. 481 (year?); Thomas Glenn Martin, Jr., Comment, *UCLA School of Law Admissions in The Aftermath of The U. C. Resolution to Eliminate Affirmative Action: An Admissions Policy Survey and Proposal*, 18 CHICANO-LATINO L. REV. 150 (1996).

266. See S. Afr. Const. of 1996, Chapter 2, § 9(2). See also the discussion of *Motala and Another v. University of Natal*, *infra* notes 278-82 and accompanying text.

267. In *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the Court declared a program designed to increase the number of students of color in the entering medical school class unconstitutional. The United States Supreme Court held that while the goal of diversity in the student body could be a compelling state interest, and race could be a "plus factor" in the admissions process, the particular admissions program in question, was not narrowly tailored towards achieving the goal of diversity. *Bakke*, 438 U.S. at 271-72. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996), an affirmative action admissions program at the University of Texas Law School was held unconstitutional by the Fifth Circuit. Disregarding Justice Powell's opinion in *Bakke*, the *Hopwood* Court held that race could not be used as a plus factor in the admissions process and that achievement of diversity within the law school student body was not a compelling state interest. *Id.*

268. In *City of Richmond v. Croson*, 488 U.S. 469 (1989), the Court held that a minority set-aside program was unconstitutional. The City of Richmond, Virginia, had created a set-aside program wherein thirty percent of construction contracts would be preserved for minority contractors. *Id.* The set-aside program was an effort by the city to act affirmatively to remedy present effects of past discrimination in the construction industry. *Id.* The Court held that unlike Congress, the City could not redress generalized effects of past discrimination. See *id.* at 490. Absent a demonstration that the City itself had engaged in

violative of Fourteenth Amendment rights of equal protection under the law.²⁶⁹ It is difficult to see how a post-apartheid South Africa could effectively implement the constitutional mandate of equality of educational opportunity,²⁷⁰ the right to choose one's trade, occupation or profession freely,²⁷¹ the restitution of property taken because of racially discriminatory laws or practices,²⁷² or the right to have access to adequate housing²⁷³ without using affirmative action. Indeed, African education was — until only a few years ago — consciously structured to lead to failure. It seems, therefore, that an equal opportunity provision without an affirmative action component would “translate into constructive exclusion for groups that have suffered previous discrimination.”²⁷⁴ A mere statement of structural equality in a constitutional text without the support of affirmative means for their

racial discrimination in the construction industry, the City had gone beyond its constitutional authority and had violated the equal protection rights of contractors who were not minorities. *Id.* at 469-471. In *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), the Court held that all racial classifications, whether enacted by federal or state governments must be subjected to strict scrutiny. *Adarand Constructors* at 235-37. Therefore, in order for an affirmative action program to survive equal protection attack, it must be narrowly tailored towards the accomplishment of a compelling state interest. *See id.*

269. The State of California adopted the California Civil Rights Initiative on November 5, 1996. The initiative, popularly known as Proposition 209, provided:

The state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. Cal. Const. art. 1, § 31(a).

The ballot initiative passed by a vote of 55 percent to 46 percent. *See Coalition For Economic Equity v. Wilson*, 122 F. 3d 692, 697 (9th Cir. 1997). Proposition 209's constitutionality was subsequently challenged and upheld in *Coalition for Economic Equity v. Wilson*, 110 F. 3d 1431 (9th Cir. 1997), *reh'g denied en banc*, 1997; application for stay presented to Justice O'Connor and by her referred to the Court, *denied* September 4, 1997; *cert. denied* at 118 U.S. 397 (1997). A similar ballot initiative was defeated in Houston, Texas on November 4, 1997. *See Jerome Karabee, A Win For Affirmative Action*, SAN FRANCISCO CHRON., November 18, 1997, at A21. Washington state's anti-affirmative action Initiative 200 was passed by a vote of 58% in November, 1998. *State of Washington Bans Affirmative Action*, THE GRAND RAPIDS PRESS, November 4, 1998, at A5; Thomas Bray, *Perspective: Is Initiative 200 Headed for Michigan*, THE DETROIT NEWS, November 15, 1998, at B11; Charlie James, *For African Americans, Washington's Approval of 1-200 Means Hang On*, Sally Hemings, *Here We Go Once Again*, SEATTLE POST-INTELLIGENCER, November 6, 1998, at A17; Kim Murphy, *Decision 98/The Final Count, Preferences, Laws Against Pot Lose Out In Some*, LOS ANGELES TIMES, November 5, 1998, at S1. Similar ballot initiatives have been proposed in Florida, Colorado and Oregon. R. A. Dyer, *Race Preference Foes Across U. S. Face Uphill Fight*, HOUSTON CHRONICLE, November 9, 1997, at 1.

270. *See* S. Afr. Const. of 1996, Chapter 2, § 29(1).

271. *See id.* Chapter 2, § 22.

272. *See id.* § 25(7).

273. *See id.* Chapter 2, § 26(1).

274. Ross R. Kriel, *Education*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 38-11 (1996).

accomplishment would only be a hollow right devoid of any real meaning.

The new Constitution is written in both broad and specific terms with respect to the implementation of equality under the law. Enforcement of the general equality mandate will actually require affirmative action, specifically race-conscious decision making, in order to assist Africans and other people of color in securing the equality rights given to them under the 1996 Constitution. In order to remedy present and ongoing effects of past discrimination the 1996 Constitution states:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance *persons*, or *categories of persons*, disadvantaged by unfair discrimination may be taken.²⁷⁵

The equal education provision has been interpreted to limit the equal access provision of the Constitution,²⁷⁶ thereby permitting affirmative action programs in higher education to withstand constitutional criticism. Indeed, in the case of *Motala and Another v. University of Natal*, the court found a medical school affirmative action program constitutional under these provisions.²⁷⁷

In *Motala and Another*, Indian parents of a minor sought injunctive relief from the Court in order to prevent their daughter's denial of to the medical school at the University of Natal.²⁷⁸ The University of Natal had adopted an affirmative action program in which it sought to increase the number of African students in its degree program.²⁷⁹ Although the plaintiff's daughter had been evaluated by different cri-

275. S. Afr. Const. of 1996, Chapter 2, § 9(2) (emphasis added).

276. *See id.* § 32(1)(a) provides that "everyone has the right of access to any information held by the state." *See also* Ross R. Kriel, *Education*, CONSTITUTIONAL LAW OF SOUTH AFRICA 38-11(1996).

277. 1995 (3) BCLR 374 (D), 1995 SACLX LEXIS 256.

278. *Motala and Another v. University of Natal*, 1995 (3) (BCLR) 374 (D), 1995 SACLX LEXIS 256.

279. The Dean of the Medical School for the University of Natal explained the affirmative action program:

The programme is an attempt to take into account the educational disadvantages to which certain students have been subjected in certain of the school education departments and is directed at determining the true potential of each aspirant student.

The faculty evaluates the performance at school of African students in a way which is different from that employed in relation to students schooled under other education departments.

The matriculation results of accepted African applicants will in almost all cases be lower than those of other applicants who are accepted, and indeed lower than those of other applicants who are not accepted.

teria from that applied to African students, the court did not find a violation of the right to further education guarantee nor to the guarantee of freedom from unfair discrimination.²⁸⁰ Though it recognized that Indians, too, have suffered racial discrimination during apartheid, the Court concluded that the experience of African students had been significantly worse.²⁸¹ Because the University of Natal's selection criteria sought to compensate for the differential harms suffered by Africans and other groups, it had not affected constitutionally unfair discrimination.²⁸²

Motala and Another suggests that the drafters of the 1996 Constitution realized that although *de jure* racial discrimination was abandoned, remnants of the past would nonetheless account for the current social, economic, and political status of those who were subjected to race-based discrimination. It was thus the intent of the drafters to require legislative and other actions to remedy harms of the past. As a constitutional concomitant to "full equality," affirmative action under the new South African Constitution cannot be characterized as "reverse discrimination." Rather the original intent of the framers was to establish equality to the fullest extent allowable under law, meaning that affirmative action could be utilized to meet equality ends. Without the availability of the affirmative action remedy, the Constitution would be a document of formal equality, without any substantive hope for a meaningful effect on the lives of black South Africans.²⁸³ Moreover, placing the affirmative action provision in the

By these means it is possible to identify a pool of African students who satisfy the university's requirements for admission to the medical faculty.

The principal difficulty then becomes a matter of comparing students who have been assessed on different bases, and it is almost impossible to do this. A policy decision has to be made.

It is safe for the respondent to assume that there is no question of the selection process being unfair for so long as the numbers chosen from a particular group, expressed as a percentage of the total admission, did not exceed the representation that cultural group has in society. There is no other way of overcoming the circumstance that it is almost impossible to compare potentials across the cultural groups emanating from the various educational systems.

Motala & Another at 5-6.

280. See S. Afr. Const. of 1996, §§ 29(1)(b) and 9(3).

281. See *Motala and Another* at 28.

282. See *id.* at 28-29. The court also rejected the claim that the admissions process was an unreasonable administrative procedure in that it relied on standard nine results as part of its selection criteria for members of the Indian community. See *id.* at 28.

283. See *Prinsloo v. Van der Linde* 1997 (3) SA 1012 (CC) at paragraph 20. See also Janet Kentridge, *Equality*, CONSTITUTIONAL LAW OF SOUTH AFRICA, 14-4 (Chaskalson, Kentridge, Klaaren, Marcus, Spitz & Woolman eds., 1996). Kentridge suggests that the equality provision of the 1996 constitution must be interpreted within the social context of its drafting:

Constitutional text suggests the drafters' understanding that the achievement of equality is not a short-term proposition nor is equality an achievement that can be readily met by simply removing invidiously discriminatory laws from the books. The equality envisioned by this Constitution, rather, is a long-term process that will be concluded only when individuals, groups, and institutions—the very fabric of which a society is constructed—no longer act upon premises of conscious or unconscious racism.²⁸⁴ To this end, the commitment to a just interpretation of constitutional provisions commemorates this original understanding.

VII. Conclusion: Continuing Discussions of Race in the United States and South Africa and the Education of Black Children

A recent Gallup poll suggested there is a significant differential in black and white perceptions regarding the condition of race relations in the United States. Of those surveyed, 54% of whites and 58% of blacks said that race will always be a problem in the United States.²⁸⁵ The same poll also found that 46% of blacks and 79% of whites believe that blacks have as good a chance as whites to get whatever job they choose; 79% of blacks and 93% of whites believe that blacks have as good a chance as whites to receive whatever education they choose; and 58% of blacks and 86% of whites believe that blacks have as good a chance as whites to receive whatever housing they choose.²⁸⁶ This poll also revealed that 53% of blacks and 22% of whites said that affirmative action programs should be increased; 29% of blacks and 29% of whites said that affirmative action programs should be the same; 12% of blacks and 37% of whites said that affirm-

[T]he value of the contextual approach is that it apprehends that formal equality of treatment may, in certain situation, reinforce rather than redress social disadvantage. Formal equality poses the question of whether individuals are to be similarly treated in broad and abstract terms. It focuses on fairly superficial indicia of individual similarity and thereby fails to recognize underlying patterns of group-based disadvantage which belie the appearance of equality. The existence of these deep-rooted, pervasive and self-perpetuating patterns of inequality, in other words structural inequality, means that actual social equality cannot be achieved by the application of apparently neutral standards to all."

Id.

284. See Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

285. See The Gallup Organization of Princeton, New Jersey, *The Gallup Poll Social Audit on Black/White Relations in the United States*, June 10, 1997.

286. See *id.*

ative action programs should be decreased.²⁸⁷ Additionally, of those surveyed, 59% of blacks and 34% of whites said that government should make every effort to improve the conditions of blacks and minorities, whereas, 30% of blacks and 59% of whites said that government should not make any special effort to improve the conditions of blacks.²⁸⁸ The poll is significant in that it may reflect differences in black and white perceptions to a basic underlying question: whether African-Americans perceive that they have achieved equality of opportunity in all facets of American life. It suggests that the Clinton Administration's attempt to create a national dialogue on race was timely and appropriate.

Following the recent calls for a presidential apology for slavery,²⁸⁹ President Clinton announced the creation of an advisory commission on race relations.²⁹⁰ The Commission was given the task of assessing the status of U.S. race relations and was instructed to open a "national conversation" on race.²⁹¹ Chaired by Professor John Hope Franklin, the Commission undertook a year long dialogue concerning the problem of race in the United States.²⁹² The Franklin Commission was appointed by a President who, like Eisenhower in the Little Rock Crisis, once again determined the need for national reflection on the problem of race in this country. In this respect, the Franklin Commission was a powerful reminder of the past presidential attempts to address the pressing needs of minority communities.²⁹³

In the summer of 1967, twenty-three predominantly African-American urban areas in the United States were the sites of violent

287. *See id.*

288. *See id.*

289. *See MYRDAL supra* note 24.

290. *See* DeWayne Wickham, *Clinton Needs To Lead On Race, Not Study It*, GANNETT NEWS SERVICE, June 9, 1997; Paul Barton, *Clinton Hopes To Bridge Racial, Ethnic Divisions That Torment Americans*, June 13, 1997; Katherine Rizzo, *Gingrich Questions Value of Congressional Apology For Slavery*, THE ORANGE COUNTY REGISTER, June 14, 1997, at A25; *Race According To Bill Clinton*, THE WASHINGTON TIMES, June 16, 1997, at A14; *Clinton Praised, Warned For Taking On Racism*, THE LAS VEGAS REVIEW-JOURNAL, June 15, 1997, at 2A; E. J. Dionne, *Race Panel Must Identify Its Mission*, THE STAR-LEDGER, August 15, 1997; *Chairman Pledges Sweeping Study of Race*, GREENSBORO NEWS & RECORD, September 12, 1997, at A6; John Yemma, *Assessing Integration In Hearts And Minds*, THE BOSTON GLOBE, September 17, 1997, at A18; Peter Baker, *Race Initiative Appears to Be Foundering*, THE WASHINGTON POST, October 5, 1997, at A06.

291. *See id.*

292. John Hope Franklin is a Professor of History Emeritus of the University of Chicago. He has written extensively on the topic of race and American history. HARRY A. PLOSKI & JAMES WILLIAMS, THE NEGRO ALMANAC 991 (1989).

293. Otto Kerner, a former Governor of the state of Illinois, chaired this commission. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, at vi (1968).

rioting.²⁹⁴ In an effort to understand the origins of the uprisings and prevent further outbreaks, President Johnson ordered that a commission be convened to study the problem.²⁹⁵ In its final report, the Kerner Commission issued an indictment on the status of race relations in the United States. In its findings, the Commission determined that the United States was “continuing to move toward two societies, one black one white—separate and unequal.”²⁹⁶ The Kerner Commission found that the country was continuing to develop along class-specific and race-specific lines.²⁹⁷ This finding was attributable to a continuing legacy of past discrimination, segregation and poverty which had created “ghettos”—enclaves of deprivation where the living environments were destructive to many ghetto inhabitants.²⁹⁸

Reports of the Kerner and Franklin commissions illustrate Gunnar Myrdal’s identification of the “American dilemma”²⁹⁹—the persistent problem of race in America. Now, in the United States, thirty years after the Kerner Commission and forty-five years after *Brown v.*

294. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 6 (1968). The Commission searched for causes to the uprisings in: Tampa, Florida; Cincinnati, Ohio; Dayton, Ohio; Atlanta Georgia; Bridgeton, New Jersey; Englewild, New Jersey; Jersey City, New Jersey; Newark, New Jersey; Patterson, New Jersey; Plainfield, New Jersey; New Brunswick, New Jersey; Cambridge, Maryland; Detroit, Michigan; Grand Rapids, Michigan; Houston, Texas; Jackson, Mississippi; Milwaukee, Wisconsin; Nashville, Tennessee; New Haven, Connecticut; Phoenix, Arizona; Rockford, Illinois; and Tucson, Arizona. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

295. See *id.* at v.

296. See *id.* at 1.

297. See *id.*

298. A COMMON DESTINY: BLACKS IN AMERICAN SOCIETY x-xi (Gerald D. Jaynes & Robin M. Williams eds. 1989). Many solutions were proposed by the Commission as remedies for the deteriorated state of race relations in the country. The Commission recommended national and state actions directed towards remedying problems of unemployment, developing and improving urban and rural poverty areas, aggressive action in desegregating public schools. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL RIGHTS at 410-56. “Welfare reform” was proposed with the eye towards improving the quality of assistance to those in need as opposed to reducing the availability of assistance. *Id.* at 457-66. Housing issues were targeted as a problem by the Commission. The Commission recommended national action towards the achievement of adequate housing for the poor. See *id.* at 467-82. The Commission specifically focused on the efficacy of *Brown v. Board of Education* as a mechanism through which might raise their social, political, and economic achievements. Concomitantly, however, the Commission recognized that left unchecked and unrepaired, the continuing existence of significant poverty and its secondary effects in the black inner city would limit a broader and more generalized effect of *Brown v. Board of Education*. *Id.* at 25-26.

299. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

Board of Education, African-American children are still disproportionately affected by problems associated with poverty and crime.³⁰⁰

The Franklin Commission focused on the possible similarities between American people irrespective of race,³⁰¹ the difficulties encountered in discussing the topic of race in America,³⁰² and the racial demographics in the context of problem solving and “bridging the gap” between American people who perceive others to be different because of race.³⁰³ The Commission concluded that “persistent barriers to . . . full inclusion in American society” exist in “education, employment, economic opportunity, criminal justice and health care.”³⁰⁴ Many of the same barriers had indeed been identified by the Kerner Commission thirty years earlier.³⁰⁵ Most relevant to this article, the Franklin Commission identified education as a critical issue warranting continued national discussion.³⁰⁶ In conclusion, the Franklin

300. The intersection of race and poverty has been identified as a statistical point of disproportionate representation of African-American children and other children of color. In 1996, “11 percent of whites, 14.5 percent of Asian Pacific Americans, 28 percent of blacks, 29 percent of Hispanics, and 51 percent of American Indians who live on reservations live in poverty.” REPORT OF THE ADVISORY BOARD FOR THE PRESIDENT’S INITIATIVE ON RACE, *One America in the 21st Century: Forging A New Future, The Presidents’ Initiative on Race* 64 (Sept. 1998). See also EMORY BURTON, *THE POVERTY DEBATE: POLITICS AND THE POOR IN AMERICA* 50-55 (1992); YOUNG BLACK AND MALE IN AMERICA: AN ENDANGERED SPECIES 132, 147 (Jewelle T. Gibbs et al. eds., 1988).

301. REPORT OF THE ADVISORY BOARD FOR THE PRESIDENT’S INITIATIVE ON RACE, *One America in the 21st Century: Forging A New Future, The Presidents’ Initiative on Race*, 15-32 (Sept. 1998).

302. See *id.* at 33-48.

303. The Advisory Committee offered specific recommendations targeting resolution of problems associated with civil rights enforcement, education and race, poverty and race, welfare reform and race, economic inequality and race, housing markets and race, stereotypes and race, crime, the administration of justice and race, health and race, and finally, immigration and race. *Id.* at 57-86.

304. *Id.* at 4.

305. See *supra* note 293, and accompanying text.

306. The Advisory Board’s major concern respecting education was that “educational opportunities and public resources [were] being restricted to those who live disproportionately in areas of concentrated poverty.” *Supra* note 301, at 59. The Advisory Board made seven specific recommendations calling for greater cooperation between federal and state governments in solving the problem in education which occurs as a result of the intersection of race and poverty: 1) Enhance early childhood learning; 2) Strengthen teacher preparation and equity; 3) Promote school construction; 4) Promote movement from K-12 to higher education; 5) Promote the benefits of diversity in K-12 and higher education; 6) Provide education and skills training to overcome increasing income inequality that negatively affects lower skilled and uneducated immigrants. See *id.* at 61-64. The Advisory Board identified the continuing debate on affirmative action as an area in which it recommended continuing dialogue. The Advisory Board said that “affirmative action will continue to serve as a proxy for the Nation’s continuing debate over equality and racial reconciliation.” See *id.* at 95. The position of the Advisory Board was that “affirmative

Commission identified the need for "racial reconciliation" in America.³⁰⁷

Approximately two months after the Franklin Commission report, the South African Truth and Reconciliation Commission issued a final report.³⁰⁸ Like the Franklin Commission, the Truth and Reconciliation Commission focused on the importance of education as an instrument for fostering racial reconciliation.³⁰⁹ Indeed, a core ideal of both *Brown* and post-apartheid policy focus on a concept of educational empowerment as a conduit to economic empowerment. Nevertheless, as we approach the new millenium, child poverty in the United States is increasing in both rate and magnitude.³¹⁰ The increase's most significant corollary is race.³¹¹ Also disturbing is the disproportionate presence of black children under surveillance by the

action continues to be a critical and necessary tool for overcoming past discrimination, delineating disparities in education, and moving us toward the goal of one America." *See id.* at 94. Resegregation of children of color to low ability special education classrooms and white children to gifted classrooms through tracking programs inside arguably integrated public school settings was also targeted by the Advisory Board as a issue which warrants further discussion and attention.

307. *Id.* at 101-105.

308. *See* text and notes *supra* Section I.

309. The Truth and Reconciliation Commission concluded that "reconciliation is a process vital and necessary for enduring peace and stability" in the country. TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 1 Chap. 10, at 1 (1998). With respect to preventing gross human rights violations as those fostered by apartheid, the Commission mandated that "urgent attention [be given] to the transformation of education" as the means for "[accelerating the closure] of the gap between the advantaged and the disadvantaged." *Id.* at 2.

310. Peter Cicchino, *The Problem Child: An Empirical Survey and Historical Analysis of Child Poverty in the United States*, 5 J.L. & POL'Y 5 (1996).

311. Four trends in child poverty have been identified. In *The Problem Child: An Empirical Survey and Historical Analysis of Child Poverty In The United States*, Peter Cicchino identifies the following as significant: The rate of child poverty is increasing along with its intensity. *Id.* at 19-21. Moreover, younger children tend to be disproportionately poor. *Id.* at 21. Lastly, the point at which race and poverty intersect is disproportionately inhabited by black and Hispanic children. *Id.* at 22. In 1994, a statistical data survey reported that of all children in the United States, 21.2 percent, roughly 14,610,000 children lived in poverty. Of the 21.1 percent impoverished, 43.3 percent of *all* black children were present, representing about 4,787,000 children; 41.1 percent of *all* Hispanic children were present, representing about 3,956,000 children, while 16.3 percent of all white children were present, representing about 8,826,000 children. *United States Department of Commerce, Statistical Abstract of the United States* at 472 (1996). These numbers represent an increase in poverty statistics for all groups since 1975. In 1975, children comprised 10.8 percent of the poverty statistics, roughly 10,882,000 children. During this same year, black and Hispanic children were disproportionately represented with black children comprising 41.4 percent of the child poverty statistics and Hispanics comprising 33.1 percent of the child poverty statistics. *Id.*

criminal justice system.³¹² These statistics suggest that the hope that *Brown* would solve the myriad of problems associated with *de jure* racial discrimination has not been realized.

Finally, the United States can offer its very lengthy post-*Brown* experience as a cautionary perspective respecting the power of law as well as its limits. As the social fabric of South Africa is being re-woven, South Africa should reflect on the irony suggested by the words of Thurgood Marshall in 1954 after the Court decided *Brown I*: it might take “*up to five years*” for segregation to be eradicated, but, “by the time the 100th Anniversary of the Emancipation Proclamation is observed in 1963, segregation in all its forms [will be] eliminated from the nation.”³¹³ It is now forty-five years since that statement and still in both countries, racial disparities represent a current whose origins can be found in the history of racial discrimination under American law. Although *de jure* discrimination is no longer present, discrimination’s lingering effects continue to persist. It is in this context that we find the call for apologies for slavery and racial discrimination in the United States, as well as the daunting project of a post-apartheid South Africa under a constitutional regime of equality.

312. Although black people comprise only 12 percent of the population, in 1992, black children comprised 27 percent of all juvenile arrests. JANICE JOSEPH, *BLACK YOUTHS, DELINQUENCY AND JUVENILE JUSTICE* 39 (1995), *citing* the Uniform Crime Reports.

313. *See* MEIER, *supra* note 202, at 45-46 (emphasis added).