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Separate and Unequal: Promoting Racial Equity in Public Schools in the United States and South Africa

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SEPARATE AND UNEQUAL: PROMOTING RACIAL EQUITY IN PUBLIC SCHOOLS IN THE UNITED STATES AND SOUTH AFRICA

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If there is one thing that Brown teaches South Africa, it is that the struggle for equal educational opportunities will be a long one, and that successes as well as reversals are inevitable. If there is one thing that South Africa teaches the United States, it is that the passion and hope of ordinary people can inspire judicial activity and stir judicial conscience by relentlessly exposing the contradictions between law and reality.[1]

INTRODUCTION

On January 24, 2022, the Supreme Court of the United States announced that it will hear two cases, against Harvard College and the University of North Carolina, which "rais[e] serious doubts about the future of affirmative action in higher education."[2] The plaintiff in both cases, Students for Fair Admissions, Inc. ("SFFA"), is a non-profit organization devoted to eradicating affirmative action programs nationwide.[3] Described as the "culmination of a years-long strategy by conservative activists,"[4] these cases represent the first affirmative action challenges to be argued before the Court's new conservative majority, where they "pose the gravest threats yet" to over forty years of judicial

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[1] Jonathan D. Jansen, *The Ties That Bind: Race and Restitution in Education Law and Policy in South Africa and the United States of America*, 105 Y.B. OF THE NAT'L SOC'Y OF EDUC. 211, 226 (2006) (internal quotation marks and citations omitted).

[2] Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html.

[3] *About*, STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org/about/ [https://perma.cc/8YFE-FE7F] (last visited Mar. 22, 2022).

[4] Ian Millhiser, *The Supreme Court Will Hear Two Cases That Are Likely to End Affirmative Action*, VOX (Jan. 24, 2022 9:32 AM), https://www.vox.com/2022/1/24/22526151/supreme-court-affirmative-action-harvard [https://perma.cc/4DL4-JBTV].

precedent approving the use of race as a non-determinative factor in undergraduate admissions.[5]

The United States is divided over how and whether public schools may legally consider race when seeking equity in access to public education. Though the Supreme Court declared de jure racial segregation in public schools unconstitutional under the Equal Protection Clause of the Fourteenth Amendment in *Brown v. Board of Education*,[6] the United States' public school system today remains "largely separate and unequal."[7] Students of color "are more racially and socioeconomically isolated today than at any time since data have been available,"[8] and "nonwhite" school districts receive $23 billion less in funding than white school districts that serve the same number of students.[9] Racially-concentrated minority schools have lower levels of academic achievement, inferior resources, higher teacher turnover rates, and less rigorous curricular opportunities.[10] Moreover, racially isolated schools severely limit interaction between students from different backgrounds.[11]

In attempting to remedy these disparities—which stem from the United States' slow redress of slavery, segregation, and

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[5] Liptak & Hartocollis, *supra* note 2 (internal quotation marks omitted).

[6] De jure segregation is segregation that has been formally legalized, as opposed to de facto segregation, which is segregation that exists between people but is not legally sanctioned.

[7] Keith Meatto, *Still Separate, Still Unequal: Teaching About School Segregation and Educational Inequality*, N.Y. TIMES (May 2, 2019), https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html.

[8] Maria Brenes, *65 Years After Brown v. Board of Education, More Work Remains*, L.A. DAILY NEWS (May 17, 2019, 4:40 PM), https://www.dailynews.com/2019/05/17/65-years-after-brown-v-board-of-education-more-work-remains/ [https://perma.cc/6RXD-H75D]; *see* Alvin Chang, *The Data Proves That School Segregation Is Getting Worse*, VOX (Mar. 5, 2018, 1:50 PM), https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data [https://perma.cc/H9VQ-6FFT].

[9] *Nonwhite School District Get $23 Billion Less than White Districts Despite Serving the Same Number of Students*, EDBUILD, https://edbuild.org/content/23-billion [https://perma.cc/GJT9-UKRE] (last visited Mar. 22, 2022).

[10] U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf [https://perma.cc/TT8V-U96J] (formally rescinded by the U.S. Department of Education but remains available on the web for historical purposes only).

[11] *Id.* In *Grutter v. Bollinger* and *Fisher v. University of Texas at Austin*, the Supreme Court found the states' interests in promoting student body diversity to be compelling. 539 U.S. 306, 329–31 (2003); 570 U.S. 297, 308–09 (2013).

discrimination[12]—the United States has grappled with whether institutions should explicitly consider students' race in their integration and diversity policies.[13] In *Brown*, the Court analyzed racial discrimination and segregation's social effects on Black students and prohibited state practices that reinforced the inferiority of historically oppressed populations, thereby explicitly addressing remedy in relation to race.[14] In cases immediately subsequent to *Brown*, the Court upheld race-conscious desegregation efforts, remedies, and public school policies,[15] affirmatively embedding antisubordination principles into the law.[16]

During the 1970s, in response to rising social tension and backlash to racial integration, President Nixon appointed three new Justices to the Court who were critical of *Brown* and supportive of a color-blind constitution.[17] Through a series of reverse discrimination cases,[18] this new Court "used *Brown's*

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[12] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 395–96 (1978) (Marshall, J., concurring); *see id.* at 388–89 (explaining that the Declaration of Independence and U.S. Constitution are color-conscious and designed to protect white supremacy); *see generally* Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – A Constitutional Insult*, ECON. POL'Y INSTITUTE (Nov. 12, 2014), https://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/ [https://perma.cc/8VL2-Y7DF] (showing that school segregation is the result of a history of "state-sponsored residential segregation," and arguing that improving the academic performance of poor Black students requires not only ending school segregation, but also improving Black students' social and economic conditions).

[13] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1475 (2004).

[14] Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954). I use the term "Black" to "convey[ ] elements of shared history and identity" and to emphasize "the difference between a color and a culture." Nancy Coleman, *Why We're Capitalizing Black*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/2020/07/05/insider/capitalized-black.html. When referring to racial categories constructed by the South African apartheid-era regime, I use terms including "black," "white," "coloured," "Asian," and "non-white."

[15] *See Bakke*, 438 U.S. at 398–99 (Marshall, J., concurring) (citing Green v. Cty. Sch. Bd., 391 U.S. 430, 441 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); McDaniel v. Barresi, 402 U.S. 39, 41 (1971)).

[16] Siegel, *supra* note 13, at 1473 n.8 (internal citations omitted) (asserting that *Brown* was grounded in the antisubordination principle, which states that laws cannot propagate the subordinate status of a disadvantaged group, and not the anticlassification principle, which posits that *Brown* prohibits classification based on race generally).

[17] *Id.* at 1523–24.

[18] In reverse discrimination cases, plaintiffs argue that race-conscious measures intended to further the goals of the civil rights movement discriminate against white Americans, thus violating the Fourteenth Amendment. Nikole Hannah-Jones, *What*

formal equality principle to equate race-conscious government decisions that seek to develop an integrated society with the evils of de jure segregation,"[19] leading to a "reorientation of equal protection doctrine."[20] Under this reorientation, the Court shifted from prohibiting government consideration of race for the purpose of eradicating "invidious" discrimination to a blanket prohibition on race-based classification—a "color blind" approach—even when such classification intended to right history's wrongs.[21] When evaluating integration and diversity policies in these cases, the Court declined to consider the context faced by each school in question, leading some scholars to assert that the shift ultimately forbade government actors from remedying discrimination.[22] In fact, as of one of the Court's most recent rulings on the issue in *Parents Involved in Community Schools v. Seattle School District No. 1* (*PIICS*), four Justices, three of whom still sit on the Court today, advocated for this color-blind approach.[23] In effect, *PIICS*

Abigail Fisher's Affirmative Action Case Is Really About, PROPUBLICA (June 23, 2016, 12:28 PM), https://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r [https://perma.cc/V6X6-478G]. In *Milliken v. Bradley*, the Court held that voluntary integration remedies may only be implemented to rectify de jure discrimination, and not de facto segregation. 418 U.S. 717, 745 (1974). In *Bakke*, a divided Court held that a medical school could use race as a non-determinative factor in a holistic review of applicants but did not consider the school's history of racial subordination and underrepresentation. 438 U.S. 265, 305 (1978). In *Grutter v. Bollinger*, the Court upheld a law school's affirmative action policy, heralding the benefits of diversity. 539 U.S. 306, 316 (2003). However, it neither analyzed "past and continuing racial barriers" for students of color nor the benefits of racial diversity. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1625 (2003). For a description of the rationale behind the color-blind perspective, *see* Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378, 1382–85 (2004).

[19] Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 93 (2004).

[20] *See* Siegel, *supra* note 13, at 1523.

[21] *Id.* at 1521–33; Michelman, *supra* note 18, at 1381, 1389; *see* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 10 (2019) ("The language of color blindness—like the language of 'not racist'—is a mask to hide racism. 'Our Constitution is color-blind,' U.S. Supreme Court Justice John Harlan proclaimed in his dissent to *Plessy v. Ferguson*, the case that legalized Jim Crow segregation in 1896. 'The white race deems itself to be the dominant race in this country,' Justice Harlan went on. 'I doubt not, it will continue to be for all time, if it remains true to its great heritage.' A color-blind Constitution for a White-supremacist America.").

[22] Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1412 (1990).

[23] In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court struck down voluntary integration initiatives implemented in Seattle, Washington and Louisville, Kentucky that considered race when assigning students to public elementary schools. 551 U.S. 701, 747–48 (2007) [hereinafter *PIICS*].

obstructs schools from implementing policies that might both survive judicial scrutiny and address deep inequities in access to quality education across racial lines.[24]

Similar to the United States, South Africa's history of institutionalized racism, white supremacy, and racial segregation remain entrenched in its education system: schools are sharply segregated and people of color disproportionately struggle to achieve access to quality education.[25] Much like the U.S. Supreme Court post–*Brown*, the South African Constitutional Court has confronted the issue of how and whether schools may constitutionally implement diversity-enhancing initiatives and policies to increase equitable access to quality education across racial lines.[26] Contrary to the United States' color-blind approach, the Constitutional Court has explicitly adopted a color-conscious approach rooted in reconciliation and redress.[27]

Louisville's history of de jure segregation was undisputed. *Id.* at 710. However, the Court ignored Seattle's history of housing patterns and legalized discrimination, holding de facto segregation is a social condition not remediable by schools. *Id.* at 761. Three of the Justices who advocated for color blindness in *PIICS* remain on the court: Justices Roberts, Thomas, and Alito. Three traditionally conservative Justices have since joined the court: Justices Gorsuch, Kavanaugh, and Coney Barrett. This means the Court is currently split 6-3 conservative-liberal with respect to racial issues.

[24] *Parents Involved in Community Schools v. Seattle School District No. 1*, BRENNAN CTR. JUST. (June 28, 2007), https://www.brennancenter.org/our-work/court-cases/parents-involved-community-schools-v-seattle-school-district-no-1 [https://perma.cc/3HYL-X82M]; *PIICS*, 551 U.S. at 858–63 (Breyer, J., dissenting). *But see* Halley Potter, *A Decade After* PIICS *Setback, Schools Still Find Ways to Integrate*, CENTURY FOUND (June 28, 2017), https://tcf.org/content/commentary/decade-pics-setback-schools-still-find-ways-integrate/?session=1 [https://perma.cc/B8NG-ENLC].

[25] *See* Gelyke Kanse v Chairperson of the Senate of the Univ. of Stellenbosch [2019] ZACC 38, ¶¶ 29–30.

[26] *See infra* Part 0. The Constitutional Court is South Africa's highest court ruling on constitutional and separation of power matters, similar to the U.S. Supreme Court. *Constitutional Court of South Africa*, NAT'L GOV'T OF S. AFR., https://nationalgovernment.co.za/units/view/63/constitutional-court-of-south-africa (last visited Dec. 14, 2020). It has "exclusive jurisdiction" over the constitutionality of legislative and administrative actions, including over the constitutionality of a parliamentary or provincial Bill or a Constitutional amendment. *Id.*

[27] Michelman, *supra* note 18, at 1396; *see* Pierre de Vos, *"Race" and the Constitution: A South African Perspective*, VERFASSUNGSBLOG (June 26, 2020), https://verfassungsblog.de/race-and-the-constitution-a-south-african-perspective/ [https://perma.cc/VY97-T7SS] ("South Africa's Constitutional Court has adopted another view on non-racialism which is also the dominant view in South African political discourse. In this view 'non-racialism' is an ideal, but one that can only be reached by accepting the reality that 'race' has a profound effect on how we view people, how the world is arranged, and what life-chances individuals enjoy.").

This Note argues that the Constitutional Court's color-conscious and context-specific approach more honestly confronts the lasting inequities and disadvantages that Black communities face as a result of historical oppression. Further, this approach more readily creates real opportunities for post–segregationist schools to become inclusive of Black learners than the Supreme Court's color-blind approach.[28] By permitting schools to affirmatively address race when evaluating educational disparities across racial-linguistic lines,[29] and considering the specific context of each school's program and the surrounding community's needs,[30] the Constitutional Court has empowered schools to flexibly and actively enhance equitable access to quality education for Black South Africans and non-Afrikaans speakers.[31] However, the Constitutional Court's prioritization of inclusion and integration by approving single- or dual-medium English programs has diminished Afrikaans instruction in public schools, thereby posing a constitutional dilemma over Afrikaans-speakers' ability to receive education in their language of choice.[32]

Part I of this Note provides a historical background of the South African apartheid system and its impact on public education, the transformative 1996 South African Constitution and South African Schools Act, and the evolution of language into a proxy for race in South African society. Part II examines recent Constitutional Court jurisprudence regarding newly implemented English-dominated language policies. Additionally, it analyzes the facts of *PIICS* through the lens of Constitutional Court jurisprudence, and argues that the Constitutional Court's color-conscious, context-specific approach empowers schools to increase

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[28] *See Univ. of Stellenbosch*, [2019] ZACC 38, ¶¶ 26–30, 36; AfriForum v University of the Free State, [2017] ZACC 48, ¶ 49.

[29] *AfriForum*, [2017] ZACC 48, ¶ 46.

[30] Head of Dep't: Mpumalanga Dep't of Educ. v Hoërskool Ermelo, [2009] ZACC 32, ¶¶ 52, 80.

[31] *Hoërskool Ermelo*, [2009] ZACC 32, ¶ 80; *Afriforum*, [2017] ZACC 48, ¶¶ 50–51, 59. Afrikaans is a Germanic language spoken throughout southern Africa. Hein Willemse, *More than an Oppressor's Language: Reclaiming the Hidden History of Afrikaans*, CONVERSATION (Apr. 27, 2017, 12:09 PM), https://theconversation.com/more-than-an-oppressors-language-reclaiming-the-hidden-history-of-afrikaans-71838 [https://perma.cc/EX42-9HSR]. The language, a blend of Dutch, Malay, Portuguese, Indonesian languages, Khokhoe, and San, developed as Dutch colonialist settlers interacted with and enslaved indigenous populations and other migrants throughout the Western Cape during the nineteenth century. *Id.* Afrikaans eventually became a tool of Black oppression during the white supremacist apartheid regime in the late twentieth century. *Id.*

[32] *See University of Stellenbosch*, [2019] ZACC 38, ¶ 38.

equitable access to education. Part III first evaluates the consequences of such a view by exploring the constitutional price of equality borne by South African Afrikaans speakers and impoverished students and then parallels that reality with the inaccessibility of quality education to students experiencing poverty in the United States.

I. BACKGROUND

A. Apartheid and the Bantu Education Act (1948–1993)

From 1948 until the early 1990s, South Africa endured a period of institutionalized racism and segregation as a matter of government policy under the system of apartheid that was instituted by the Afrikaner National Party, a "fiercely" nationalistic political party that sought to secure white supremacy and establish a common Afrikaner culture.[33] Apartheid, meaning "apartness" in the Afrikaans language, constituted a series of laws that established a clear racial hierarchy,[34] separating white minority British and Dutch descendants who held the nation's

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[33] *See National Party*, S. AFR. HIST. ONLINE, https://www.sahistory.org.za/article/national-party-np [https://perma.cc/FJN5-TR3P] (last visited Mar. 22, 2022). Though racial discrimination began with Dutch settlement in the seventeenth century, Black oppression took root in South African society after British colonists discovered diamonds and gold on indigenous lands in the nineteenth century. LAURA EVANS, FORCED RELOCATION IN APARTHEID SOUTH AFRICA 19, https://www.hoddereducation.co.uk/media/Documents/Magazines/Sample%20Articles/November%202017/ModHisRev20_2_Nov2017_sample.pdf [https://perma.cc/H62V-VZRN]. When the Union of South Africa was established in 1910 with dominion status, meaning it remained part of the British empire but was no longer a colony, the South African Party, which promoted harmony between British descendants and Afrikaners, or those of Dutch descent, was elected into power. *National Party (NP)*, S. AFR. HIST. ONLINE, https://www.sahistory.org.za/article/national-party-np [https://perma.cc/GH37-HRCV] (last visited Mar. 22, 2022). The Afrikaner National Party (ANP), which advocated for South African nationalism and protection of a distinct Afrikaner culture, rose to power in response. *Id.* By 1948, there was nationwide frustration from the post–war economic downturn. *Id.* The ANP gained momentum as the party resisted South African support of Britain in the two World Wars and was ultimately elected to power in 1948. *Id.* Once elected, ANP dismantled all connections to Britain and established a white supremacist society that culminated in the apartheid system. *Id.* Because the Union Constitution of 1909, in place until the fall of apartheid, did not have a provision ensuring racial equality, "non-white" South Africans had no legal path to fight de jure inequality. Alfreda A. Sellers Diamond, *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*, 26 HASTINGS CONST. L.Q. 853, 869 (1999).

[34] *Apartheid*, HIST. (Mar. 3, 2020), https://www.history.com/topics/africa/apartheid [https://perma.cc/4PD7-6P5S].

political power from those of non-European heritage, or "non-whites."[35] To oppress "non-white" peoples, constituting the majority of the population, the government subdivided them into categories including "Asian," or those of Indian and Pakistani descent; "coloured," or those of mixed racial heritage;[36] and "Bantu," or Black individuals under the Population Registration Act of 1950.[37] These racial categories aligned linguistically: "whites" overwhelmingly spoke what they identified as "pure" or standardized Afrikaans, considered the "official language" of apartheid, or English;[38] "coloureds" and "Asians" often spoke what white Afrikaners termed "kitchen" Afrikaans; and "Bantus" spoke various African languages including, for example, isiXhosa and isiZulu.[39]

A series of laws sanctioning segregation and discrimination controlled every aspect of South African life.[40] Each person was

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[35] *See* Erin Blakemore, *The Harsh Reality of Life Under Apartheid in South Africa*, HIST. (May 9, 2019), https://www.history.com/news/apartheid-policies-photos-nelson-mandela [https://perma.cc/49M3-FY66].

[36] *Apartheid*, *supra* note 34; *see* Esterline Fortuin, Language Shifts From Afrikaans to English in "Coloured" Families in Port Elizabeth 8 (Dec. 2009) (M.A. thesis, Stellenbosch University) (held by Stellenbosch University, at https://core.ac.uk/download/pdf/37321003.pdf) (explaining that unlike in the United States, the term "coloured" refers to a "phenotypically varied social group of highly diverse cultural and geographical origins," and not Black people generally).

[37] *See* 1 TRUTH AND RECONCILIATION COMMISSION, THE TRC FINAL REPORT 30 (1998) (stating that The Population Registration Act of 1950 invented "bizarre" racial categories: " 'A White person is one who is in appearance obviously white—and not generally accepted as Coloured—or who is generally accepted as White—and is not obliviously Non-White, provided that a person shall not be classified as a White person if one of his natural parents has been classified as a Coloured person or a Bantu . . . A Bantu is a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa . . . a Coloured is a person who is not a White person or a Bantu.' ").

[38] Alex Rawlings, *Is Afrikaans in Danger of Dying Out?*, BBC (May 14, 2020), https://www.bbc.com/future/article/20200514-is-afrikaans-in-danger-of-dying-out [https://perma.cc/4T8J-Q25T]. A long standing conflict between English and Afrikaans speakers remains from tension that arose between British settlers and Dutch descendants in the early 1800s. Lilly Marjorie, *Language Policy and Oppression in South Africa*, CULTURAL SURVIVAL Q. MAG. (Mar. 1982) [hereinafter *Language Policy*], https://www.culturalsurvival.org/publications/cultural-survival-quarterly/languagepolicy-and-oppression-south-africa [https://perma.cc/7SP7-G82Q]. Both English and Afrikaans were official languages of apartheid, but Afrikaans was more widely used. *See* Michael Bishop, *The Challenge of Afrikaans Language Rights in South African Education*, *in* HUMAN RIGHTS AND EQUALITY IN EDUCATION 71, 74 (Sandra Fredman, et. al. eds., 2018).

[39] *See* Rawlings, *supra* note 38; *How to Teach Yourself Afrikaans—and Why It's Worth It*, ALL LANGUAGE RESOURCES, https://www.alllanguageresources.com/learn-afrikaans/ [https://perma.cc/C2PW-KUGM] (last visited Mar. 22, 2022).

[40] *See generally Apartheid Legislation 1850s-1970s*, S. AFR. HIST. ONLINE, https://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s

arbitrarily assigned a race from "on-the-spot visual judgments," urban areas were strictly segregated,[41] and all social contact between races, including intermarriage, was prohibited.[42] Over 3.5 million people were forcibly relocated to segregated townships and many "Bantus" were sent to "tribal homelands"—"remote and barren areas where poverty, malnutrition, and mortality" ran high.[43] Furthermore, "Bantus," who were never enfranchised, and "coloureds," who were banned from voting under apartheid, were provided "white" political representatives.[44]

Education policy, understood as the key to maintaining apartheid, was calculated to maintain white supremacy and racial segregation.[45] The Bantu Education Act of 1953 aligned education policy with apartheid ideology, affording "Bantus" with "an inferior education designed to stress tribal loyalty and the acceptance of a subservient position in South African society."[46] When "Bantu education" was introduced in 1953, Dr. H. F. Verwoerd, Minister of Native Affairs, clarified that:

> 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

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[https://perma.cc/NW8W-3UFT] (last visited Mar. 22,, 2022) (overview of apartheid legislation).

[41] GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES 201 (1999).

[42] TRUTH AND RECONCILIATION COMMISSION, *supra* note 37, at 29–31.

[43] EVANS, *supra* note 33, at 20; *Language Policy*, *supra* note 38.

[44] GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY 249, 279–80 (1981).

[45] Segregated education systems were designed to protect the "quality of the life of Europeans." Sellers Diamond, *supra* note 33, at 871. Because "Bantu" schools were intentionally underfunded and education for "Bantu" students was not compulsory, few "Bantu" and "coloured" children were educated beyond elementary school and subsequently faced challenges in finding employment. *Id.* at 871–72.

[46] Timothy G. Reagan, *The Politics of Linguistic Apartheid*, 56 J. OF NEGRO EDUC. 299, 302 (1987). Similarly, education in the United States during the Jim Crow era was racially segregated, and white school boards deliberately underfunded and under resourced Black schools. ANDRE L. SMITH, THE AMERICAN UNTOUCHABLES 66 (2019). Indeed, Black American students were "taught from a minimal curriculum that reinforced agricultural skills and domestic work" and were discouraged if not prohibited from pursuing higher education. *Id.*

> him in the European community above the level of certain forms of labor. . .[47]

Where "white" public schools, known as "model-C schools," were "lavishly treated by the apartheid government," receiving significantly more funding and resources both from the State and "relatively affluent white communities," "Bantu" public schools were "deliberately" underfunded by the apartheid government and "supported by relatively deprived [B]lack communities."[48]

Higher education was also statutorily segregated, and "Bantu" higher education on homelands was "designed to contain the heightened aspirations of the most educated Blacks and arrest the development of an African urban middle class."[49] In comparison, universities exclusively offering Afrikaans instruction received significant funding and resources from the government, as they were closely tied to the National Party.[50] In fact, South African education officers in charge of these policies visited and studied Black education models implemented in southern United States public universities for guidance as to how to "inculcate African subservience to and acceptance of white authority."[51]

The Bantu education Act was met with immediate resistance, culminating in the Soweto Uprising of 1976. Anti-apartheid sentiment was brewing nationwide as "Bantus" faced increasingly bleak employment prospects and "Bantu" children were forced into overcrowded and underfunded schools.[52] In 1974, The Minister of

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[47] ROGER OMOND, THE APARTHEID HANDBOOK 90 (2d ed. 1986). *Cf.* SMITH, *supra* note 46, at 66 ("The only value to a white [American] landowner in educating black children lay in their ability to pick cotton or wash laundry.").

[48] Head of Dep't: Mpumalanga Dep't of Educ. v Hoërskool Ermelo, [2009] ZACC 32, ¶ 46; *see also* OMOND, *supra* note 47, at 86–87.

[49] John Davies, *The State and the South African University System Under Apartheid*, 32 COMP. EDUC. 319, 322 (1996). Asians and Coloureds were given their own campuses under the Extension of University Education Act of 1959, and Blacks were required to attend institutions on their ethnically segregated homelands so that Zulus attended classes with Zulus, Xhosas with Xhosas, etc. *Id.*; *see also* Joseph Lelyveld, *Apartheid Creates Riddles in Black Education*, N.Y. TIMES (Dec. 26, 1982), https://www.nytimes.com/1982/12/26/world/apartheid-creates-riddles-in-black-education.html.

[50] Davies, *supra* note 49, at 322–23.

[51] Jansen, *supra* note 1, at 212 (internal quotation marks omitted).

[52] *See* Timothy Reagan, *"People's Education" in South Africa Schooling for Liberation*, 24 J. OF THOUGHT 4, 9–10 (1989) (internal citations omitted) ("Among the most serious factors . . . were the on-going 'crisis of black schooling,' which was exacerbated by the increased number of secondary students entering an already overcrowded and underfunded educational system, the general downturn in the South African economy and resulting increase in the unemployment rate among black South

Bantu Education and Development required Afrikaans instruction in "Bantu" secondary schools even though "Bantu" students preferred to be taught in English, did not speak Afrikaans, and considered Afrikaans—the language in which they were "control[led], exploit[ed], and systematic[ally] humiliat[ed]"[53]— to be the "language of the oppressor."[54] On June 16, 1976, an estimated 20,000 people, mostly students, marched in protest of government-imposed Afrikaans education throughout the Black township of Soweto.[55] In response, police "shot and killed schoolchildren indiscriminately," triggering riots and violence.[56] Coverage of the uprising ignited demonstrations against "Bantu education" and apartheid in 160 Black townships across South Africa and elicited a firm international call for apartheid's end.[57]

B. The Transitional and Reconciliatory South African Constitution and the South African Schools Act (1996)

Years of organized internal violent and nonviolent protest, deteriorating "white" support, international economic pressure, a domestic economic downturn, and the termination of the Cold War brought an end to the apartheid system in the 1990s.[58] New South African leaders drafted and implemented a "transformational" constitution that sought to achieve "reconciliation" and create a "non-racial and non-sexist egalitarian society underpinned by human dignity," going "beyond mere formal equality and mere non-discrimination."[59] Thus, the South African Constitution of

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Africans, and the widespread sense of oppression; and resistance to apartheid in the black community."); PAM CHRISTIE, THE RIGHT TO LEARN: THE STRUGGLE FOR EDUCATION IN SOUTH AFRICA 53–55 (1991).

[53] Afriforum v Univ. of the Free State, [2017] ZACC 48, ¶ 5.

[54] Willemse, *supra* note 31.

[55] United Press International, *Soweto Uprising Recalled*, N.Y. TIMES (June 7, 1986), https://www.nytimes.com/1986/06/17/world/soweto-uprising-recalled.html.

[56] Spec. Rep. of the Spec. Comm. Against Apartheid on The Soweto Massacre and Its Aftermath, at 17, U.N. Doc. A/31/22/Add.1 (1976).

[57] United Press International, *supra* note 55, at 8; *see generally* S.C. Res. 392 (June 19, 1976).

[58] *The End of Apartheid*, U.S. DEP'T OF STATE ARCHIVE, https://2001-2009.state.gov/r/pa/ho/time/pcw/98678.htm [https://perma.cc/3CNG-YJQ4] (last visited Mar. 22, 2022); *see* Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 UNIV. PA. J. CONST. L. 205, 205–06 (1998).

[59] Minister of Fin. v Van Heerden, 2004 (11) BCLR 1125 (CC), ¶ 26; *see generally* Nicole Maylor & Roberta Spivak, *Truth and Reconciliation: The South African Model*, ONE EARTH FUTURE, https://oefresearch.org/think-peace/truth-and-reconciliation-south-african-model [https://perma.cc/XQD5-VWCN] (last visited Jan. 10, 2022). For

1996 (1996 Constitution) imposed an affirmative duty on the State to continuously and proactively confront racial inequity, requiring it to provide social and legal redress for its history of oppression against those historically considered to be "non-white."[60]

In comparison to the U.S. Constitution's Fourteenth Amendment, the South African Equality Clause, Section 9 of the Bill of Rights, is detailed and comprehensive.[61] It explicitly guarantees all persons equal protection before the law, prohibits both direct and indirect state discrimination on the basis of race,[62] and permits affirmative action programs "designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination."[63] In fact, the South African founding fathers actively considered U.S. Equal Protection Clause jurisprudence when drafting Section 9.[64] Wishing to avoid reverse discrimination claims like those being brought in the United States,[65] the drafters of the 1996 Constitution established affirmative action as "part of the notion of equality," permitting "group-based remedies" that could inadvertently disadvantage individuals in the move toward reconciliation.[66]

Moreover, the 1996 Constitution establishes the rights to (1) communicate in one's language of choice and (2) receive "immediately realisable" basic education as fundamental rights.[67]

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an overview of literature discussing the 1996 Constitution, *see* Francois Venter, *The Limits of Transformation in South Africa's Constitutional Democracy*, 34 S. AFR. J. HUM. RTS. 143, 144, 151 n.2 (2018).

[60] Adrien K. Wing, *The South African Constitution as a Role Model for the United States*, 24 HARV. BLACKLETTER L.J. 73, 74 (2008).

[61] *Id.* at 75.

[62] S. AFR. CONST., 1996 § 9(3). This prohibition was first invoked in relation to discrimination in public schools in 1997 by the South African Supreme Court in *Matukane v Laerskool Potgietersus*. [1997] JOL 102 (T), 7. There, the Court held that under the Interim Constitution of 1993, it was per se unfair discrimination and thus unconstitutional for a former model-C all white all-Afrikaans primary school to bar entry to Black students. *Id.* at 7.

[63] S. AFR. CONST., 1996 § 9(2).

[64] Wing, *supra* note 60, at 76; Jansen, *supra* note 1, at 226.

[65] *See* Penelope E. Andrews, *Perspectives on* Brown*: The South African Experience*, 49 N. Y. L. SCH. L. REV. 1155, 1159 (2005).

[66] Wing, *supra* note 60, at 76; *see* de Vos, *supra* note 27 ("Section 9(2) is based on the premise that the abolition of racial discrimination does not automatically lead to the eradication of racism and of racial discrimination by both the state and by private parties. (As the global protests under the banner of 'Black Lives Matter' illustrate, informal or private racism and racial discrimination against black people also persist across the globe, despite the absence of racially discriminating legislation or policies.)").

[67] S. AFR. CONST., 1996, §§ 29(1), 30; Governing Body of the Juma Musjid Primary Sch. v Essay N.O. [2011] ZACC 13, ¶ 37. For an examination of the 1996 Constitution's

In addition to instituting eleven national languages, including Afrikaans, English, isiXhosa, and isiZulu in Section 6,[68] the Constitution guarantees all people "the right to receive education in the official language or languages of their choice in public educational institutions," taking into consideration "equity," "practicability," and "the need to redress the results of past racially discriminatory laws and practices" in Section 29(2).[69]

The purpose of this right is two-fold: First, it seeks to improve accessibility of education in one's mother-tongue, as mother-tongue education has proven to be more effective than education in a second language.[70] Second, it serves to "protect and promote linguistic communities," thus preserving cultural-linguistic ties.[71] This particular constitutional provision created a fork in the road for South African constitutional interpretation. On one hand, a color-blind reading of the Clause allows for "autogenous education" that would permit racially-segregated schooling when such schooling uniquely provides education in one's language of choice, thereby preserving associated cultures.[72] On the other, a color-conscious reading of the Clause considers Section 29(2) in concert with the Equality Clause and its underlying intentions of reconciliation and redress, thus combining a focus on protecting one's right to learn in her chosen language with the prohibition on discrimination and segregation.[73]

The fundamental right to education receives force and structure from the "comprehensive and nationally applicable" federal South African Schools Act of 1996 (Schools Act).[74] In addition to implementing a uniform system for the "organisation, governing and funding of schools," the Schools Act establishes a system of grassroots democratic school governance by creating school "governing bodies" composed of the school principal and

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educational provisions, *see generally* Rassie Malherbe, *Equal Educational Opportunities in South Africa: The Constitutional Framework*, 2004 J. S. AFR. L. 427 (2004).

[68] S. AFR. CONST., 1996, § 6(1) ("The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.").

[69] S. AFR. CONST., 1996, § 29(2).

[70] Bishop, *supra* note 38, at 82.

[71] *Id.*

[72] Sellers Diamond, *supra* note 33, at 883.

[73] *See id.* at 883–85.

[74] P.J. Visser, *Educational Rights in South Africa*, 1 INT'L J. EDUC. L. & POL'Y 206, 207 (2005).

elected parents, teachers, staff members, and students.[75] Significantly, these governing bodies may establish the school's language policy "[s]ubject to the Constitution," so long the policy is not racially dIscriminatory.[76]

C. Language as a Proxy for Race

Despite the Constitution and nation's post–apartheid focus on transformation, racial divides still permeate South African society,[77] and those divides align linguistically.[78] As of 2018, 60% of white people, 77% of coloured people, 1.3% of Asian people, and .9% of Black people speak Afrikaans inside the home,[79] whereas 36% of white people, 20% of coloured people, 92% of Asian people, and 1.6% of Black people speak English inside the home.[80] IsiXhosa, isiZulu, Sepedi, Sesotho, and Setswana are spoken by the majority of the Black population, but by less than 1% of the white, Asian, and coloured populations.[81] Though English is rarely the mother-tongue of Black South Africans, they gravitate toward learning and working in English as they believe it to be a "neutral alternative" to Afrikaans and its lingering apartheid legacy, in addition to a stepping stone to socioeconomic mobility in an increasingly globalized world.[82] Indeed, because English is South Africa's "most commonly spoken language used officially and in

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[75] S. Afr. Schools Act 84 of 1996 Preamble, §§ 16–24 [hereinafter *Schools Act*] (emphasis omitted); Izak J. Oosthuizen & Johann L. Beckmann, *A History of Educational Law in South Africa: An Introductory Treatment*, 3 AUSTL. & N.Z. J. L. & EDUC. 61, 70 (1998).

[76] *Schools Act*, *supra* note 75, § 6.

[77] *See* Peter S. Goodman, *End of Apartheid in South Africa? Not in Economic Terms*, N.Y. TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/business/south-africa-economy-apartheid.html.

[78] *Race, Ethnicity and Language in South Africa*, WORLD ELECTIONS, https://welections.wordpress.com/guide-to-the-2014-south-african-election/race-ethnicity-and-language-in-south-africa/ [https://perma.cc/4XGQ-KESQ] (last visited Sept. 27, 2020).

[79] STAT. S. AFR., GENERAL HOUSEHOLD SURVEY 8–9, tbl. 3.1 (2018), http://www.statssa.gov.za/publications/P0318/P03182018.pdf [https://perma.cc/X4VK-3PVW]. In contrast, 37 percent of white people, 69 percent of coloured people, 1.5 percent of Asian people, and 1 percent of Black people speak Afrikaans outside of their homes. *Id.* 61 percent of white people, 96 percent of Asian people, and 28 percent of coloured people, and 8.6 percent of Black people speak English outside the home. *Id.*

[80] *Id.*

[81] *Id.*

[82] Rosemary Salomone, *Court Moves Beyond the Past in Favouring English*, UNIV. WORLD NEWS (Oct. 19, 2019) [hereinafter *Court Favours English*], https://www.universityworldnews.com/post.php?story=20191017160303180 [https://perma.cc/PX49-ESME].

business,"[83] "many [Black] parents go to great lengths seeking English as the sole medium of instruction" for their children.[84] This trend persists despite studies that consistently prove that mother-tongue early childhood education is the most effective form of education.[85]

This racial-linguistic divide has posed challenges to intregrating the public school system. Until recently, many former model-C primary and high schools and formerly all-Afrikaans universities exclusively offered instruction in Afrikaans.[86] These single-medium schools typically serve a predominantly white community, and have more funding, lower student-teacher ratios, and better facilities than nearby English schools serving Black students.[87] Single-medium Afrikaans policies effectively bar entry to Black students wishing to be taught in English or an indigenous language, thereby serving as "an inadvertent tool for racial discrimination," perpetuating segregation in the public school system and transforming language into a proxy for race.[88]

D. Addressing Racial-Linguistic Inequity in Public Schools

The government has tried to rectify this issue at both lower and higher education levels. To increase Black student's accessibility to quality education, the South African government pressured single-medium Afrikaans language schools to implement dual- or parallel-medium English and Afrikaans programs.[89] Universities followed suit and began changing their

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[83] *Afrikaans Scrapped at South Africa's University of Pretoria*, BBC (Jan. 25, 2019), https://www.bbc.com/news/worldafrica47001468#:~:text=A%20top%20South%20African%20university,it%20%22truly%20South%20African%22.

[84] Rinelle Evans & Allie Cleghorn, *Parental Perceptions: A Case Study of School Choice Amidst Language Waves*, 34 S. AFR. J. EDUC. 1, 2 (2014).

[85] Steven Gordon & Jacqueline Harvey, *South Africans Prefer Their Children to Be Taught in English*, QUARTZ AFR. (Oct. 2, 2019), https://qz.com/africa/1720174/south-africans-prefer-their-children-to-be-taught-in-english/ [https://perma.cc/7S5W-VHHT].

[86] *See* Jansen, *supra* note 1, at 220–21; Aileen Manten et al., *An Investigation into the Early Literacy Skills of English Second Language Learners in South Africa*, 45 AUSTRALASIAN J. EARLY CHILDHOOD 142, 143–44 (2020).

[87] Bishop, *supra* note 38, at 71–75.

[88] AfriForum v Univ. of the Free State [2017] ZACC 48, ¶ 71; Jansen, *supra* note 1, at 221.

[89] Bishop, *supra* note 38, at 75–77. Students at dual-medium schools are instructed in two different languages whereas learners in a parallel-medium school learn in only one language, though the school offers more than one medium of instruction. Nikki Stein, *Language in Schools*, *in* BASIC EDUCATION RIGHTS

language policies as well.[90] However, the initial iterations of these programs have had mixed effects, "exposing identity-based fractures" both within and without the student body.[91]

For example, the University of the Free State (UFS)—a historically all Afrikaans institution—adopted a parallel-medium language policy in 1993 that offered separate instruction in English and Afrikaans.[92] But because the majority of white and coloured students learned in Afrikaans and the majority of Black students in English, segregation along racial lines inflamed racial tensions.[93] In 2016, Black students led protests against the de facto segregation resulting from UFS' policy, reminiscent of the 1976 Soweto uprising.[94] In response, UFS adopted a new policy in 2017 establishing English as the only medium of instruction, though it made some accommodations for Afrikaans, Sesotho, and isiZulu speakers.[95] AfriForum, an organization seeking to preserve Afrikaner identity and culture, challenged the policy and argued that the plan violated Afrikaans-speaking students' constitutional right to receive education in their language of choice.[96]

Similarly, the University of Stellenbosch—a traditionally all-Afrikaans, all-white university which was closely affiliated with the apartheid regime—established a parallel-medium language policy that retained Afrikaans as the primary language of instruction, but provided for interpretation in English through translation devices.[97] Over time, students protested the dominance of Afrikaans instruction, claiming that the policy

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HANDBOOK—EDUCATION RIGHTS IN SOUTH AFRICA 204, 208 (Farnaaz Veriava, et al., eds., 2017).

[90] *See* Sharon Dell, *University Language Policy Exposes Societal Fractures*, UNIV. WORLD NEWS (Feb. 8, 2019), https://www.universityworldnews.com/post.php?story=20190201152805780 [https://perma.cc/FE4M-NC93].

[91] *Id.*

[92] *AfriForum,* [2017] ZACC 48, ¶ 15.

[93] *Id.* ¶¶ 15–18.

[94] Rosemary Salomone, *Court Ruling Misses the Mark on Language Rights*, UNIV. WORLD NEWS (Jan. 19, 2018) [hereinafter *Court Misses the Mark*], https://www.universityworldnews.com/post.php?story=20180117110720340 [https://perma.cc/VR3P-F6FH].

[95] *AfriForum,* [2017] ZACC 48, ¶¶ 18–20.

[96] *Id.* ¶¶ 21, 37–38.

[97] *Gelyke Kanse v Chairperson of the Senate of the Univ. of Stellenbosch* [2019] ZACC 38, ¶ 3; *See* Contraband Cape Town, *Luister*, YOUTUBE (Aug. 20, 2015) at 12:40, https://www.youtube.com/watch?v=sF3rTBQTQk4&t=1115s&ab_channel=ContrabandCapeTown (describing the challenges of receiving lecture through translation devices).

marginalized and stigmatized Black students.[98] This movement, commonly referred to as "#OpenStellenbosch," was led by working class and poor Black students who called for English as the primary medium of instruction.[99] In response, the University established a working group that formulated the 2016 language policy, under which the school would offer parallel classes in English and Afrikaans "where reasonably practicable and pedagogically sound."[100] When parallel instruction was not practicable, classes would be taught in English with accommodations made for Afrikaans speakers.[101]

Gelyke Kanse, a voluntary association, challenged the policy in court alongside six white and "brown" Afrikaans speaking students,[102] arguing that the policy violated the students' constitutional right to be educated in the language of their choice.[103] It also argued that the State was obligated under Section 6(4) to treat all official languages "equitably."[104]

This South African conflict mirrors the American debate over race in public school equity policies. The notion of eradicating an educational system that excludes historically oppressed peoples—a Black South African majority and a Black American minority—is at odds with treating all people, including the historically privileged white Afrikaner South African minority and white American majority, in exactly the same way.[105] The South African Constitutional Court reconciled these two perspectives in ruling on the constitutionality of these school language policies that seek

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[98] *See Court Favours English*, *supra* note 82.

[99] *Id.* (explaining that though English was not necessarily their mother tongue, Black students felt it offered them social and economic mobility, and was a "neutral alternative" to the oppressive legacy of Afrikaans).

[100] *Univ. of Stellenbosch*, [2019] ZACC 38, ¶ 4.

[101] *Id.* ¶¶ 4–5.

[102] *See id.* ¶1 n.1 (stating that defendants used the term "brown" for persons sometimes referred to as "coloured").

[103] *Id.* ¶ 8.

[104] *Id.* ¶ 7–8, 46.

[105] *Compare* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978) (Brennan, J., concurring) ("[C]laims that the law must be 'colorblind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality."), *with Univ. of Stellenbosch*, [2019] ZACC 38, ¶ 64 (Froneman, J. concurring) ("South Africa's history and current inequality entail that the white Afrikaans-speaking minority, because of its historically and currently privileged position, cannot exact the same treatment as historically disadvantaged minorities."). *See* Michelman, *supra* note 18, at 1397 ("[C]orrelation of class and race status to political majority/minority status is the opposite in South Africa to what it historically has been understood to be, and what our constitutional culture still conceives it to be, in the United States.").

to accommodate students in languages other than Afrikaans. In doing so, it has prioritized equity for all races over color-blind equal treatment under the law.

II. THE FIGHT FOR EQUITABLE ACCESS TO EDUCATION AT THE SOUTH AFRICAN CONSTITUTIONAL COURT

A. Setting the Stage: The Ermelo Case (2009)

The Constitutional Court first laid out a framework for balancing the individual right to receive education in one's chosen language with the legal right of a public school to determine its language of instruction in *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* (*Ermelo*). In this case, the Court had to decide whether a government official could force an all-Afrikaans school with an "enviable academic record" and significant capacity for additional students to admit and provide parallel-medium instruction to Black students wishing to learn in English when all other schools had reached capacity.[106]

The school argued that the Schools Act empowered its governing body to formulate the language policy.[107] Though the Court agreed, it asserted that schools have a "positive dut[y]" to increase access to education in Black learners' language of choice under Section 29(2).[108] After overtly acknowledging the "deep social disparities[,] and resultant social inequity" that lingers in South African schools post–apartheid,[109] the Court: (1) required schools to mitigate any disparate impact their policy would have on Black students and consider the needs of the surrounding community; (2) demanded that schools flexibly and proactively accommodate those needs; and (3) evaluated the school's individual right to determine its language policy as within, rather than divorced from, the broader "ethos" of reconciliation.[110] Thus, unlike the U.S. Supreme Court's current color-blind approach, but similar to the analysis in *Brown*, the Constitutional Court addressed remedy in relation to racial disparity and created an enduring framework for antisubordination.

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[106] Head of Dep't: Mpumalanga Dep't of Educ. v Hoërskool Ermelo, [2009] ZACC 32, ¶¶ 6, 11, 16–18, 27–28, 38.

[107] *Id.* ¶¶ 23, 27.

[108] *Id.* ¶ 77.

[109] *Id.* ¶¶ 45–46.

[110] *Id.* ¶ 59.

Because schools are "entrusted with a public resource," school administrations must, under *Ermelo*, be conscious of how students' ethnicity or race shapes their accessibility to quality education and account for "the interests of the broader community."[111] By meticulously analyzing racial disparities embedded in the Ermelo school system as a consequence of apartheid, the Court engaged in "a context-sensitive" evaluation that prioritized "whether the state has taken reasonable and positive measures" to promote equitable education for all students.[112] This standard aligns with Supreme Court Justice O'Connor's emphasis in *Grutter* that "[c]ontext matters" when analyzing the role of race in school policies.[113] Additionally, it requires schools to be alert and adaptive to their students' evolving social needs.[114]

Rather than pursuing a color-blind approach by upholding the school's statutory right to decide its language policy, allowing for "autogenous education,"[115] the *Ermelo* Court subordinated the school's individual right to the "ethos" of reconciliation, mandating that the right to determine language policy fits within the "broader constitutional scheme to make education progressively available and accessible to everyone."[116] This approach, as subsequent litigation revealed, empowers schools to remedy racially inequitable education.

In addition to the positive duty of public schools to increase accessibility of education to Black learners, Section 29(2) implicitly imposes a "negative duty" on the state not to "diminish the right" of a learner to be taught in her chosen language "without appropriate justification."[117] While parallel-medium programs do not clearly reduce access to Afrikaans learning, Afrikaans speakers "fear . . . that dual- and parallel-medium schools will gradually result in the complete loss of Afrikaans as a language of learning," raising important constitutional questions about balancing individual rights with the goal of equality.[118]

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[111] *Id.* ¶ 80.
[112] *Id.* ¶ 52.
[113] Grutter v. Bollinger, 539 U.S. 306, 327 (2003).
[114] *See Hoërskool Ermelo*, [2009] ZACC 32, ¶¶ 98–102.
[115] *See supra* note 72 and accompanying text.
[116] *Hoërskool Ermelo*, [2009] ZACC 32, ¶¶ 59, 61.
[117] *Id.* ¶ 52.
[118] Bishop, *supra* note 38, at 86. However, "[t]he truth of this claim . . . is unclear. Afrikaans is the third most spoken language in the country, the second most

B. Challenging University Language Policies: The Cases of University of the Free State and The University of Stellenbosch (2017 – 2019)

The tension between Section 29(2)'s imposition of positive and negative duties on the State erupted in the challenges to newly implemented English-dominated language policies in *Afriforum v The University of the Free State* (*Afriforum*), and *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* (*Stellenbosch*), previously introduced in Section II.[119]

The Constitutional Court in *Afriforum*, in a 7-3 decision,[120] upheld the University's new English-dominated policy.[121] Through a context-specific analysis, the Court lauded the University's focus on racial equity and integration in light of the post–apartheid inequality faced by Black students in public schools nationwide.[122] Additionally, the Court deferred to the University's decision to change the language policy, accepting its findings that Afrikaans instruction had become "an instrument of racial or cultural division and discrimination," and that "many Afrikaner students prefer English" as sufficient justification for the change, thus empowering the University to be flexible and proactive in remedying racial and cultural division.[123]

The *Afriforum* opinion enhanced equity for all students and remedied segregation. However, its ruling that "equity" and "the need to redress the results of past racially discriminatory laws and practices" must guide, if not determine, the "practicability" of implementing language policies,[124] effectively allowed schools "the option to abandon parallel medium."[125] By neither considering whether this policy would deprive Afrikaans speakers of their Section 29(2) constitutional rights nor whether UFS's policy met its constitutional obligation to promote all eleven national languages,[126] the decision risked rendering Section 29(2)

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prominent language for business, and the only language other than English widely used in higher education." *Id.*

[119] Though this Note focuses on these two cases, similar challenges have arisen in response to new English-dominated language policies at the University of Pretoria and University of South Africa. *See* Dell, *supra* note 90.

[120] The Court was split along racial lines: justices in the majority were Black and dissenting justices were white. *Court Misses the Mark*, *supra* note 94.

[121] Afriforum v Univ. of the Free State [2017] ZACC 48, ¶ 79.

[122] *See id.* ¶¶ 17, 48–52, 55–62.

[123] *Id.* ¶¶ 50, 55, 76.

[124] *Id.* ¶¶ 52–53, 69.

[125] Bishop, *supra* note 38, at 88.

[126] *Court Misses the Mark*, *supra* note 94.

"meaningless in many contexts."[127] In *Stellenbosch*, the Constitutional Court tempered the *Afriforum* decision by balancing the transformational understanding of Section 29(2) rights with the deprivation of Afrikaans learners' constitutional rights.[128] Here, the Court adopted a forward-looking tone as it emphasized the importance of fostering multilingualism as a whole.[129] Once again, the Court took a color-conscious, context-specific approach, upholding Stellenbosch's new policy because instruction under the previous policy was significantly less accessible to Black learners than to white learners.[130]

Based on a detailed evaluation of the number of students capable of learning in English and Afrikaans, the cost of a parallel-medium program, marginalization experienced by non-Afrikaans speaking students, and "the erection along racial lines of a barrier to full access to Stellenbosch's learning," the Court found that the University had sufficient justification for implementing the 2016 policy.[131] This context-specific decision empowered the University to honestly evaluate the exclusionary impacts its policies have on Black learners, and proactively implement more equitable policies—little by little undoing a history of white supremacy.[132] Furthermore, the Court explicitly acknowledged that racism's and segregation's lasting effects impact Black and white people differently, echoing Supreme Court Justice Blackmun's assertion in *Bakke* that "[t]o treat some persons equally, we must treat them differently."[133] Therefore, the Constitutional Court enabled schools to connect policy to social reality and commit to eradicating systemic racial discrimination on their campuses.[134] Moreover, the majority opinion and concurring opinions reckon with the global hegemony of the English language, diminished constitutional rights of Afrikaans speakers, and current inequities facing

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[127] Bishop, *supra* note 38, at 88.

[128] *See* Gelyke Kanse v Chairperson of the Senate of the Univ. of Stellenbosch [2019] ZACC 38, ¶ 41.

[129] *See id.* ¶ 48.

[130] *See id.* ¶¶ 27–28.

[131] *Id.* ¶¶ 17, 26–29, 31–33, 42–45.

[132] *Court Favours English*, *supra* note 82.

[133] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 406 (1978) (Blackman, J., concurring).

[134] *Univ. of Stellenbosch*, [2019] ZACC 38, ¶ 36 ("The University's determinative motivation for introducing the 2016 language policy was to facilitate equitable access to its campus and to its teaching and learning opportunities by black students who are not conversant in Afrikaans.").

students.[135] The Court also left open the possibility of reassessing the 2016 policy if evidence that Afrikaans becomes sufficiently "sidelin[ed]" arises.[136] Thus, the jurisprudence surrounding South African school policies sought to address disparate social realities and redress historical oppression. This approach more honestly confronts past wrongs and enhances accessibility to quality education than does the U.S. Supreme Court's approach, which divorces application of the law from social realities.

C. PIICS *Through the Eyes of the Constitutional Court*

The Constitutional Court's color-conscious, context-specific approach in evaluating schools' diversity-enhancing policies starkly contrasts the U.S. Supreme Court's color-blind method. Where the Constitutional Court's approach is rooted in antisubordination principles, the U.S. anticlassification approach actively elevates flat equal treatment under the law over redress for historical wrongs, thereby obstructing schools from becoming inclusive of historically oppressed minority learners.[137]

For example, in *PIICS* the Supreme Court ruled that a Seattle School District's voluntary integration program, which used race as a "tiebreaker" when determining admission to maintain student body diversity in the Districts' highest quality schools, was unconstitutional under the Equal Protection Clause.[138] However, were the South African Constitutional Court presented with the facts of *PIICS*, which are similar to the facts of *Ermelo*, it would have arrived at the opposite result: one which prioritized inclusive education and redress for discrimination and encouraged the District to proactively address systemic inequity.

The Constitutional Court would have likely upheld the Seattle School District's desegregation policy. Because school diversity policies must be evaluated within the boarder "ethos" of

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[135] Chief Justice Mogoeng called on the private sector to preserve Afrikaans. *Id.* ¶ 62 (Mogoeng, C.J., concurring). Justice Froneman's opinion, written in both English and Afrikaans, acknowledges that while this decision seeks to increase equitable access to education, the poorest Afrikaans speakers remain largely unacknowledged by the majority opinion and the 2016 policy. *Id.* ¶¶ 76–80. Justice Froneman also points to evidence indicating that mother-tongue education is the most effective. *Id.* ¶¶ 81–86.

[136] *Court Favours English*, *supra* note 82.

[137] *See supra* note 24 and accompanying text.

[138] *PIICS*, 551 U.S. 701, 734, 748 (2007).

reconciliation for historical oppression,[139] the Constitutional Court would first analyze the facts of *PIICS* with an eye toward achieving equity for all students rather than equal treatment of each individual applicant.[140] Doing so, as acknowledged by the Court in *Stellenbosch*, demands an affirmatively color-conscious approach operating with the awareness that historically privileged white communities "cannot exact the same treatment as historically disadvantaged minorities"—an honest confrontation with the disadvantages communities of color continue to face.[141] This strategy aligns closely with Justice Brennan's assertion in *Bakke* that "we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and their fellow citizens."[142]

Moreover, the Constitutional Court, recognizing that "a school cannot be seen as a static and insular entity," requires public schools to consider both how the surrounding community's history affects its accessibility and demographic makeup, and how they serve the surrounding community's present-day needs.[143] The Supreme Court in *PIICS*, by focusing exclusively on equal treatment of applicants to the District's most popular schools rather than evaluating the District's segregation as a symptom of communitywide or nationwide historical oppression of minorities, divorced individual student rights from the history and needs of the community.[144] Conversely, Constitutional Court precedent would require an analysis of how Seattle and the United States' formalized history of discrimination and segregation generated segregation in Seattle schools.[145] Finding a clear link between the two, the Court would assert that the District's "group-based remedy" had "appropriate justification."[146]

Adhering to its context-specific analyses in *Afriforum* and *Stellenbosch*, the Constitutional Court would also contextualize

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[139] Head of Dep't: Mpumalanga Dep't of Educ. v Hoërskool Ermelo, [2009] ZACC 32, ¶ 59.

[140] *See* Gelyke Kanse v Chairperson of the Senate of the Univ. of Stellenbosch [2019] ZACC 38, ¶ 41.

[141] *Id.* ¶ 64.

[142] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978) (Brennan, J., concurring).

[143] *Hoërskool Ermelo*, [2009] ZACC 32, ¶ 80.

[144] *PIICS*, 551 U.S. 701, 807–13, 833 (Breyer, J., dissenting).

[145] *Hoërskool Ermelo*, [2009] ZACC 32, ¶¶ 45–47.

[146] Afriforum v Univ. of the Free State [2017] ZACC 48, ¶ 50 (quoting *Hoërskool Ermelo*, [2009] ZACC 32, ¶ 52).

the policy's effects on students and on the school within Seattle's history and current needs.[147] Where the Supreme Court in *PIICS* explicitly ignored arguments over whether racial diversity had a beneficial impact on students, the Constitutional Court would give importance to any data indicating the policy's beneficial or detrimental effects.[148] Indeed, it would meticulously analyze whether the District's policy was diligently researched; consider whether the research presented included the experiences of students, teachers, and parents; and examine data confirming that the policy decreased segregation and reduced high concentrations of minority students in the District's least desirable schools—a goal of utmost importance to the Constitutional Court.[149] Finding that the policy did indeed reduce segregation, the Court would contextualize the analysis within Seattle's broader historical pattern of discrimination and segregation, and ultimately would defer to and uphold the District's decision to institute a color-conscious tiebreaker when determining admission to "oversubscribed school[s]."[150]

While the Supreme Court in *PIICS* bluntly precluded the District from remedying inequities caused by yesterday's wrongs and faced by people of color today, the Constitutional Court's color-conscious, context-specific approach would require honest confrontation with Seattle's past and history's lingering effects on the District in deciding to uphold the diversity policy. By accepting that segregated schools cannot and do not exist in a vacuum, the Constitutional Court would allow the Seattle School District to flexibly and actively increase inclusivity and equitable access to quality education.

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[147] *See id.* ¶¶ 4–5.

[148] *PIICS*, 551 U.S. at 726.

[149] *See* Gelyke Kanse v Chairperson of the Senate of the Univ. of Stellenbosch [2019] ZACC 38, ¶¶ 17, 26–29, 31–36, 42–45; *Afriforum* [2017] ZACC 48, ¶¶ 53, 56–58; *PIICS*, 551 U.S. at 812–13 (Breyer, J., dissenting).

[150] *PIICS*, 551 U.S. at 711.

III. WHO IS LEFT BEHIND?

Though the Constitutional Court's approach more readily provides schools with the opportunity to enhance racial equity than the Supreme Court's approach, the question remains whether the Afrikaans language, recognized as "one of the cultural treasures of South African national life," is being sidelined under current Constitutional Court precedent.[151] All South Africans, including Afrikaans speakers, have the right to receive education in their mother-tongue language.[152] Though the Court's decisions in *Afriforum* and *Stellenbosch* ensure that quality education is more accessible to Black students[153] and empower schools to equalize the historically elevated status of white Afrikaans speakers with historically disadvantaged linguistic minorities, the decisions come at a cost.[154] Even if most Afrikaans speakers can effectively learn in English, their right to receive education in their mother-tongue at the tertiary level is, at the very least, diminished.[155]

Moreover, these "equitable" policies impose a serious burden on students experiencing poverty. Native English speakers, who are primarily white and relatively wealthy, are "unscathed" by these opinions, and "those who can afford to attend private, independent English schools or previously privileged public schools" have the best chance of becoming "academically proficient in English."[156] It is coloured people, many of whose mother-tongue is Afrikaans, and Black people with African mother-tongue languages, who attend under-resourced schools in marginalized communities that suffer the most: "Not only do they receive inadequate mother-tongue education . . . but the education they receive in English is often of a poor quality."[157]

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[151] Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1955 [1996] ZACC 4, ¶ 49.

[152] *See Univ. of Stellenbosch*, [2019] ZACC 38, ¶ 24 n.35 (internal citation omitted).

[153] *Id.* ¶ 68 (Froneman, J., concurring) ("[T]he use of Afrikaans as a medium of instruction leads to the exclusion or stigmatisation of black students. Because most Afrikaans-speaking students are proficient in English, but black students are not co-equally proficient in Afrikaans, policies that favour English as a medium of instruction are judged normatively reasonable.").

[154] *Id.* ¶ 47.

[155] *Id.* ¶ 72 (Froneman, J. concurring).

[156] *Id.* ¶ 76.

[157] *Id.* ¶ 77–79.

This problem is paralleled in the United States. Recent studies show that the racial achievement gap in public education can be largely attributed to the concentration of minority students in less effective high-poverty high schools: there is a "very strong link between racial school segregation and academic achievement gaps" due in large part to "differences in exposure to poor schoolmates."[158] These statistics and disparities illustrate that a conversation about racial integration must be accompanied by a conversation regarding equitable funding of all public schools.[159]

CONCLUSION

No system is perfect, and inequalities that disparately disadvantage people of color remain entrenched in both South African and American school systems.[160] However, by requiring schools to actively assess accessibility to education across color lines, prioritize the redress of history's wrongs when generating policy, and consistently evaluate how that policy affects social reality, the South African Constitutional Court has empowered schools to enhance equity in public education in a way that the United States' color-blind approach precludes. In doing so,

> South African jurists treat South African whites as having it within themselves to find wholly curative satisfaction—as opposed to 'little comfort'—in the thought that the deprivations they suffer in consequence of race-conscious, transformation-minded measures are entailments of their own project of uplifting others—the project having become theirs by the virtue of its adoption by the political community in which they claim membership.[161]

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[158] SEAN F. REARDON, ET AL., IS SEPARATE STILL UNEQUAL? NEW EVIDENCE ON SCHOOL SEGREGATION AND RACIAL ACADEMIC ACHIEVEMENT GAPS 1, 6–10, 24, 33 (Stanford Ctr. for Educ. Pol'y Analysis, Working Paper No. 19-06, 2019).

[159] The South African Schools Act requires states to "fund *public schools* . . . on an equitable basis." South African Schools Act 84 of 1996 § 34(1) (emphasis in original). In *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court held that (1) education is not a fundamental right; (2) disparate funding sources for public schools that negatively impact minority students do not violate the Fourteenth Amendment; (3) states need only provide minimum education for children, regardless of economically disparate school districts. 411 U.S. 1, 35–37, 41 (1973).

[160] *See generally* AMNESTY INTERNATIONAL, BROKEN AND UNEQUAL: THE STATE OF EDUCATION IN SOUTH AFRICA (2020) (discussing that, despite real progress since the end of apartheid, education in South Africa remains harmed by inequalities).

[161] Michelman, *supra* note 18, at 1380; *see also* ZADIE SMITH, INTIMATIONS: SIX ESSAYS 80 (2020) ("[T]he truth is that not enough [white] carriers of this virus [of racial 'contempt'] have ever been willing to risk the potential loss of any aspect of their

To enhance access to quality education for students of all ethnicities and socio-economic status, the United States must first prioritize equitable education for all, elevating redress for the nation's history of race-based oppression over color-blind equal treatment under the law.

social capital to find out what kind of America might lie on the other side of segregation. They are very happy to 'blackout' their social media for a day, to read all-black books, and 'educate' themselves about black issues—as long as this education does not occur in the form of actual black children attending their actual schools.").