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Civil Rights Remedies in Higher Education: Jurisprudential Limitations and Lost Moments in Time

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I. Introduction

> "[S]chool authorities are clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. If school authorities fail in their affirmative obligations[,] . . . judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[1]

> "Can we say in 1969 that a State has no duty to disestablish a dual system of higher education based upon race? The three-judge court in a careful opinion seems to draw a line between elementary and secondary schools on one hand and colleges and universities on the other. The inference is that if this were an elementary school, the result would be different."[2]

A long line of scholarship evaluates the work of the United States Supreme Court in effecting social change. Much of this scholarship centers on the role of the Supreme Court in creating, defining, and shaping racial equality rights and remedies. In a series of legal battles in the first decades of the twentieth century, civil rights advocates engaged in a lengthy and deliberate strategy to break the back of legal apartheid in American education by challenging the constitutionality of state policies barring African Americans from matriculation in exclusively white public colleges and universities throughout

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1. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971) (citations and quotations omitted) (finding that school systems that are in full compliance with *Brown I* may have fluctuating demographic patterns, and district courts should not intervene unless those entities deliberately altered the demographic composition of schools) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)) [hereinafter *Brown I*].

2. *See* Ala. State Teachers Ass'n v. Ala. Pub. Sch. & Coll. Auth., 393 U.S. 400, 401 (1969) (Douglas, J., dissenting) (holding that this law is local as opposed to a state-wide law, thus "not requiring a three-judge court.").

southern and border states.[3] The strategy resulted in several Supreme Court opinions that articulate the early contours of a constitutional right to racial equality in educational opportunity.[4] The strategy then moved to litigating for equality in primary and secondary education.[5] Ultimately, in the 1954 *Brown I* decision, a unanimous Supreme Court declared that state-sanctioned racial segregation in education violated the Constitution.[6] The *Brown* Court clearly defined a constitutional right to desegregated education in the context of public elementary and secondary

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3. Alan Krueger et al., *Race, Income and College in 25 Years: The Continuing Legacy of Segregation and Discrimination* 8–9 (Princeton Univ. Educ. Research Section, Working Paper No. 9, 2004) https://www.princeton.edu/ceps/workingpapers/108krueger.pdf. "Southern and border states" refer to the seventeen states that maintained clear, state-sponsored systems of segregation in public higher education at the time: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

4. *See* Sweatt v. Painter, 339 U.S. 629, 635–36 (1950) (explaining that Texas offered substantially unequal educational opportunities to black law students compared to their white counterparts, and finding that Texas was constitutionally required to admit African American applicants to white law school); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 641 (1950) (describing that state imposed restrictions requiring an African American student to sit in a row specified for colored students, at segregated table in the library, and a special table in cafeteria deprived the student of his personal and present right to equal protection of the laws); Sipuel v. Bd. of Regents of Univ. of Okla. , 332 U.S. 632, 632–33 (1948) (requiring University of Oklahoma to compel admittance and enrollment in the law school to African American applicant); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938) (finding that "equal opportunity for legal training within the State was not furnished" and "that petitioner was entitled to be admitted to the law school of the State University."); Pearson v. Murray, 182 A. 590, 594 (Md. 1936) (showing first recognition by any court of the inequality of segregated higher education, the Maryland Court of Appeals ordered the University of Maryland to admit Donald G. Murray, a black applicant, to its law school).

5. *See generally* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983) (exploring the strategy leading up to *Brown v. Board of Education*); *see* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–50 (2d ed. 2004).

6. *See Brown I*, 347 U.S. at 495 (stating "[s]eparate educational facilities are inherently unequal[; t]herefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are . . . deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

schools.[7] One year later, the Supreme Court decided upon a remedial course to make this abstract duty a reality. In *Brown II*, the Supreme Court declared that public schools in the United States must desegregate with "all deliberate speed."[8] At this time, activists with limited resources turned their focus on enforcing the remedial decrees in the context of primary and secondary education, curbing their efforts in the context of higher education. This Essay offers a brief examination of the desegregation of American public higher education as an illustration of the critical importance of adjudicatory remedies in helping to effectuate social change.

The difficulty in implementing effective remedies, the seeming intractability of racial, spatial, and socioeconomic inequities, and the judicial retreat from civil rights injunctions as a method of relief in more recent decades has led to scholars questioning the efficacy of equitable decrees in remedying school segregation.[9] Yet, in *Brown*'s wake, subsequent court decisions demarcating the equitable requirements necessary to give meaning to the articulated constitutional right, coupled with legislative and administrative directives[10] fostered long-awaited,

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7. *See id.* at 492 (citing higher education cases as the foundation for its ruling).

8. *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) [hereinafter *Brown II*] (discussing a remedial scheme for segregated school systems).

9. *See generally* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2006); *see* GERALD N. ROSENBERG, *Constraints Conditions, and the Courts, in Part 1 Civil Rights*, *in* THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 72-106 (1991) (discussing the ineffectiveness of injunctions).

10. Title VI of the 1964 Civil Rights Act prohibits racial discrimination by any entity receiving federal funds. To facilitate enforcement, the United States Secretary of the Department of Health, Education, and Welfare (HEW) was allowed to deny federal funds to any educational institution engaging in racial segregation. HEW's Office for Civil Rights (OCR) was given the power to enforce Title VI. *See, e.g.*, Nondiscrimination in Federally-Assisted Programs of the Department of Health, Education and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964, 29 Fed. Reg. 16298, 16299–300 (Dec. 4, 1964) (amended by 32 Fed. Reg. 14556); Miscellaneous Amendments, 38 Fed. Reg. 17982 (July 5, 1973)*; see generally* Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence,* 10 BERKELEY J. AFR.-AM. L. & POL'Y 146 (2008) (examining the role of Title VI enforcement power on school desegregation).

significant advancements toward racial equality in educational opportunity.[11] Such changes were most evident in elementary and secondary schools. Due to a combination of factors, including the limited resources of desegregation advocates, the complex nature of higher education desegregation, and the unpredictability of Supreme Court case selection, primary and secondary education was the subject of all of the Supreme Court's equitable decrees in the wake of *Brown*.[12] In the years following the *Brown* ruling, the Supreme Court offered no equitable remedial structure specific to American higher education.[13] Eventually, some public colleges

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11. *See, e.g.*, AMY STUART WELLS ET AL., BOTH SIDES NOW: THE STORY OF SCHOOL DESEGREGATION'S GRADUATES (2008) (explaining that the most effective period of school desegregation took place between 1970 and 1990 when court ordered equitable remedies were at their strongest); *see also* JOHN R. LOGAN & DEIRDRE OAKLEY, LEWIS MUMFORD CTR. FOR COMPARATIVE URBAN AND REG'L RESEARCH, STATE UNIV. OF N.Y. AT ALBANY, THE CONTINUING LEGACY OF THE BROWN DECISION: COURT ACTION AND SCHOOL SEGREGATION, 1960–2000, at 2 (2004) (illustrating that through consent decrees, advocates have affected more than simply the racial composition of elementary and secondary school classrooms, us[ing] equitable decrees to address newer forms of racial inequality such as resource inequality, racial segregation in special education classes, and discipline referrals); Lia Epperson, *True Integration: Advancing* Brown*'s Goals in the Wake of* Grutter*,* 67 U. PITT. L. REV. 175, 197–200 (2005) (discussing the value of racially integrated schools).

12. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971) (granting district court ample freedom to fashion remedies to desegregate schools, including court-mandated busing, redrawing of attendance zone lines, and using mathematical ratios); Green v. Cty. Sch. Bd., 391 U.S. 430, 439–40 (1968) (exploring how freedom-of-choice plans placed an undue burden on black schoolchildren and were unacceptable when more expedient and effective methods of desegregation were available); *see also Green*, 391 U.S. at 435 (listing the factors to be considered in determining whether a public school has fulfilled its duty to desegregate, including student assignments, facilities, staff assignments, faculty assignments, extracurricular activities, and transportation); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 201–04 (1973) (recognizing Latinos' rights to desegregation and deciding that school districts have an affirmative duty to desegregate all city schools, even if school officials only instituted segregated schools in a portion of said district); Alexander v. Holmes Cty. Bd. of Educ., 396 U.S. 19, 20 (1969) ("The obligation of every school district is to terminate the dual systems at once and to operate now and hereafter only unitary schools.").

13. It is important to note, however, that the decisions never expressly limited the scope to elementary and secondary schools. Rather, they spoke of "public education." *See, e.g.*, *Green*, 391 U.S. at 436 ("[A] unitary, nonracial system of public education is the ultimate end to be brought about under Supreme Court decisions declaring unconstitutional segregated school systems")

and universities, understanding the importance of *Brown*, took voluntary steps to eliminate the vestiges of racial segregation and discrimination from their admissions processes. As a result of such voluntary actions, however, public universities faced defensive court battles by white plaintiffs who argued that race-conscious admissions policies violated the Fourteenth Amendment's Equal Protection Clause.[14] These battles gave rise to a distinct form of affirmative action jurisprudence, where courts examined the constitutionality of voluntarily adopted race-conscious policies designed to "further student body diversity" rather than as policies designed to remedy the present effects of past racial segregation and discrimination.[15] The remedial aspect of institutional restructuring in higher education was lost. This loss has resulted in higher education desegregation being defined in a context *outside* of the remedial dismantling of apartheid norms. In the absence of judicial oversight, foes of this dismantling have been able to capture the terminology and bend it to suit their purposes.

While adjudicatory remedies are not the sole solution, courts play a powerful role in creating the equitable remedies that give meaning to constitutional rights.[16] Indeed, some scholars have

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(emphasis added); *Brown I*, 347 U.S. 483, 495 (1954) ("The doctrine of 'separate but equal' has no place in the field of public education.").

14. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277–78 (1978) ("[Bakke] alleged that the Medical School's special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment.").

15. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (noting that "[a]ttaining a diverse student body is at the heart of the Law School's proper institutional mission[,]" and that student body diversity is a compelling state interest that can justify using race in university admissions); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (ruling that the policy of automatically granting large numbers of "points" to every underrepresented minority applicant was not narrowly tailored to state's compelling interest in attaining diversity); *Bakke*, 438 U.S. at 312–14 ("[T]he attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education[;] . . . however, ethnic diversity is only one element in a range of factors which a university may properly consider in attaining the goal of a heterogeneous student body.").

16. In previous work, I have examined both the historic significance and future possibilities of non-adjudicatory measures—such as administrative and regulatory equality directives—in effecting change. *See* Lia Epperson, *Legislating Inclusion*, 6 HARV. L. & POL'Y REV. 91, 91 (2012) (situating recent jurisprudence on the Constitution's commitment to ending racial segregation in

written extensively on the role of adjudicatory remedies shaping the right itself.[17] In the context of American public elementary and secondary schools, equitable decrees helped shape the trajectory of equality.[18] It may be nearly impossible to detail the precise ways in which such court-based racial remedies fostered change apart from the legislative enactments and administrative directives that came in *Brown*'s wake.[19] It is clear, moreover, that social movements and the role of the United States in the global push for democracy—through so-called "domino-effect"[20] policies—during the Cold War had a significant impact on the

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public education in the framework of congressional power to enact enforcement legislation); Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities*, 7 STAN. J. C.R. & C.L. 213, 216 (2011) (arguing that "[t]here is a unique opportunity to bridge the divide between constitutional ideals and practice in the realm of racial equality in education."); *see generally* Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. OF AFR.-AM. L. & POL'Y 146 (2008) (arguing that the Department of Education's Office for Civil Rights plays an extremely important role in addressing persistent racial isolation and inequality in educational opportunity).

17. *See* Daryl Levinson, *Rights Essentialism and Remedial Equilibration,* 99 COLUM. L. REV. 857, 858 (1999) (positing that the scope of a right is determined by the scope of the available remedy); *see also* RICHARD A. POSNER, OVERCOMING LAW 235 (1995) ("Everyone professionally involved with law knows that, as Holmes put it, judges legislate 'interstitially,' which is to say they make law, only more cautiously, more slowly, and in more principled, less partisan, fashion than legislators.").

18. *See, e.g.*, Kristin A. Ballenger, Honors Thesis, *The Grave Disparities in Modern Education, Segregation, and School Budgeting: A Comparison Between* Brown v. Board of Education *and* San Antonio Independent School District v. Rodriguez, U. of Tenn. Honors Thesis Projects 1, 26 (2014), http://trace.tennessee.edu/utk_chanhonoproj/1686/ (last visited Apr. 26, 2017) (noting that the resurgence of present day segregation in public schools ensued after courts concluded that desegregation efforts could be eliminated) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

19. *See infra* Part III (discussing public higher education and the Supreme Court's reluctance to articulate equitable remedies for higher education segregation).

20. The impact of post-*Brown* legislative and administrative initiatives may be similar to Dwight Eisenhower's "Domino theory." *See* Peter T. Leeson & Andrea M. Dean, *The Democratic Domino Theory: An Empirical Investigation*, 53 AM. J. POL'Y SCI. 533, 533 (2009) ("You have a row of dominoes set up, you knock over the first one, and what will happen to the last one is the certainty that it will go over very quickly. So you could have a beginning of a disintegration that would have the most profound influences.").

resulting change.[21] Yet, adjudicatory remedies held a unique space in providing a forceful mandate for the destabilization of existing apartheid norms.[22] The pronouncements in the jurisprudential progeny of *Brown II* gave meaning to the constitutional remedy first detailed in that case. The destabilization of the deeply entrenched racial segregation and discrimination in public elementary and secondary schools brought by such adjudicatory remedies provided a fertile ground for the implementation of administrative directives and other non-adjudicatory equality measures.[23] Thus, the critical importance of equitable remedies in this context is the space that court ordered remedies created for many innovative avenues for change.

In the context of public higher education, however, no such adjudicatory remedies came from the Supreme Court until nearly forty years after *Brown*. Until that time, state systems of higher education had no judicial mandate to affirmatively eliminate the vestiges of a century-old segregated system in the way that primary education did. This absence of equitable remedies ordered by the Supreme Court meant that state systems of higher education could maintain racially unequal systems for decades after *Brown*. Similarly, without court-based remedies to destabilize the status quo, there wasn't the requisite space for the non-adjudicatory remedies[24] that proved essential to the

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21. *See infra* Part III (describing how social movements and related geopolitical activity helped foster an environment conducive to effectuating the court-ordered remedies and spurring change).

22. *See generally* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996) (examining existing apartheid norms).

23. *See* Milliken v. Bradley, 433 U.S. 267, 287–88 (1977) (upholding remedial education programs combatting school segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (permitting federal courts to order busing, student ratios, and attendance zones to desegregate schools); United States v. Bd. of Educ., 395 U.S. 225, 235–37 (1969) (upholding mathematical ratios to desegregate faculty and staff). *But see* Milliken v. Bradley, 418 U.S. 717, 737–48 (1974) (invalidating desegregation injunction as overly broad, as it affected non-party, suburban school districts).

24. *See infra* Part II.C (describing the relationship between social movements and adjudicatory remedies).

furtherance of public elementary and secondary school desegregation.[25]

The struggle to desegregate public higher education shows how valuable opportunities for social change may be lost when the court fails to connect a constitutional remedy to the articulated right. As Owen Fiss expressed, "[r]ights and remedies are but two phases of a single social process—of trying to give meaning to our public values. Rights operate in the realm of abstraction, remedies in the world of practical reality."[26] In the absence of any judicially articulated remedy, public colleges and universities did not properly give meaning to the right to racial equality articulated in *Brown*.

This essay examines some of the collective forces that have hindered the articulation and enforcement of equitable remedies in the realm of public higher education. Part II of this essay examines the jurisprudential road to defining the constitutional right to desegregated education, as well as the remedy to make that right a practical reality.[27] Part III highlights the most critical issues hindering effective constitutional injunctions to remedy American public higher education.[28] These include those factors that distinguish higher education from elementary and secondary schools, the unique development of the public system of historically black colleges and universities (HBCUs) in the United States as a tool to entrench segregation, and the lack of adjudicatory and administrative remedies articulated for higher education in the wake of the *Brown* decision.[29] This section also highlights Maryland's public university system as a concrete

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25. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1022–25 (2004) (arguing that judicial remedies flowing from public law cases such as school desegregation litigation provided rights to destabilize racially segregated public schools that previously failed to provide constitutionally required equality and have resisted political change).

26. *See* Owen M. Fiss, *Foreword: The Forms of Justice,* 93 HARV. L. REV. 1, 52 (1979) (discussing why judges are charged with crafting remedies).

27. *See infra* Part II (describing the litigation strategies and court decisions that paved the way for a constitutional right to desegregated education).

28. *See infra* Part III (explaining possible reasons for lack of satisfactory remedies).

29. *See infra* Part III (noting the historical contexts, and the consequences, of different situational factors that have prevented adequate remedies).

example of some of the aforementioned issues.[30] Finally, Part IV outlines some of the normative implications of this history of ineffective injunctive relief and potential for extrajudicial enforcement and directives.[31]

II. The Antecedents and Progeny of Brown*: Identifying the Constitutional Right and Remedy in Educational Equality Cases*

> "It is emphatically the province and the duty of the judicial department to say what the law is."[32]

A. Racial Equality in Higher Education Cases: Identifying a Constitutional Right

The litigation strategy employed to dismantle pervasive racial discrimination and segregation in the United States has at its roots civil rights leaders' efforts to extirpate segregation in public higher education.[33] Since their inception and well into the 1960s, public colleges and universities in the United States closed their doors to black applicants. Prior to the end of the Civil War, the majority of blacks in the United States lived as slaves in the Southern states, where they were prohibited by law or social custom from learning to read or write.[34] At the end of the nineteenth century, federal funding[35] spurred the creation of a two-tiered system of public universities. Southern and border states created historically black colleges and universities, for a

30. *See id.*. (proving the issues that inhibit sufficient remedies, through a case study on Maryland's public university system).

31. *See infra* Part IV (noting the overall effect of remedies in aiding social reform).

32. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (establishing the foundational principle of "judicial review.").

33. *See* MCNEIL, *supra* note 5, at 133–35 (describing the beginnings of the process that was used to break down racial segregation in schools).

34. *The Slave Experience: Education, Arts, & Culture, Historical Overview,* PBS, http://www.pbs.org/wnet/slavery/experience/education/history2.html (last visited Apr. 26, 2017).

35. *See* 7 U.S.C. §§ 321–29 (2012) (requiring payments to endow and maintain "colleges for the benefit of agriculture and the mechanic arts" and allowing colleges to establish separate schools for "white" and "colored" students, as long as the schools received equal funding).

host of reasons, though all aimed at ensuring blacks did not gain access to traditionally white institutions.[36] At the time, the black colleges and universities were limited to vocational training, leaving blacks without any avenues for liberal arts education or graduate training.[37] The Supreme Court's 1896 decision in *Plessy v. Ferguson*[38] upholding racial segregation further entrenched this two-tier system.

Thus, the litigators dedicated to dismantling this system of racial inequality, one that had been sewn into the fabric of American institutions, mounted a well-structured attack.[39] The litigation strategy, developed with an understanding of limited legal resources, the location of willing plaintiffs, and the local and national social and political milieu, began by filing suits against segregated higher education, and then moved to suits for equalization of teacher salaries and finally against primary and secondary education.[40] The NAACP, which developed the litigation strategy and argued all cases before the Supreme Court, chose to begin the attack with segregated higher education largely because plaintiffs were more readily available.[41] Thousands of blacks graduated from black four-year colleges,

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36. *See* Lynch v. State, No. 08-S-450-NE, 2011 U.S. Dist. LEXIS 155012, at *8 (N.D. Ala. Nov. 7, 2011) ("Strict white control was the hallmark of black higher education in the state until the 1970's.").; Sean B. Seymore, Note, *I'm Confused: How Can the Federal Government Promote Diversity in Higher Education Yet Continue to Strengthen Historically Black Colleges?*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 287, 294–98 (2006) (detailing the history of HBCUs and examining the government's seemingly contradictory position of supporting integration in higher education while promoting the maintenance of HBCUs).

37. *See* UNITED STATES OFFICE OF EDUCATION, NATIONAL SURVEY OF THE HIGHER EDUCATION OF NEGROES, VOL. II: GENERAL STUDIES OF COLLEGES FOR NEGROES 14–15 (1942) (showing that by 1940, only two of the approximately thirty black public colleges in the Southern and border states included a professional school when, at the time, there were more than 100 professional programs offered at white public colleges in these states).

38. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (repudiating the principal purpose of the Fourteenth Amendment, and creating the legal doctrine of "separate but equal," which allowed states to *require* and enforce racial segregation and discrimination).

39. *See* MCNEIL, *supra* note 5, at 133–40 (discussing the landscape prior to *Brown*).

40. *Id.*

41. *See id.* at 137–39 (explaining the reasons why the NAACP chose to begin the battle of desegregation with higher education).

many of whom sought graduate education. College-educated blacks seeking graduate degrees were readily available, and given the level of racial hostility at the time, poking the figurative beast was simply more suitable for adult plaintiffs. A plaintiff in an elementary or secondary school lawsuit may risk parental unemployment and the child's safety. Finally, advocates could espouse a clear legal theory in graduate school desegregation cases; there were very few graduate and professional schools available to blacks at the time, so advocating for admission to white institutions became the only option.[42]

In a series of decisions beginning in the 1930s, the Supreme Court began to articulate the contours of a constitutional right to equality in cases requiring the admission of black applicants to previously segregated state universities. These decisions focused on the inherent unconstitutionality of the substantive racial inequality in public higher education. Beginning in 1938, the Supreme Court first recognized the inequality of segregation in public higher education as a constitutional violation.[43] In a number of subsequent rulings, the courts fleshed out the substantive right to equality in the realm of public higher education. These decisions included striking down the use of state funds as a means to send black applicants to private graduate schools outside state borders rather than to educate them in public white institutions within their state.[44] It additionally included requirements to admit black applicants to traditionally

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42. In 1943, Florida, Georgia, Louisiana, Mississippi, and South Carolina had no professional schools for African Americans.

43. *See* Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337, 352 (1938) (explaining that a state could not pay for black students to attend graduate school out of state—they had to build a new graduate school for black students or integrate the existing white graduate schools); *see also* Pearson v. Murray, 182 A. 590, 594 (Md. 1936) (ordering, for the first time by any court of law recognizing inequality of segregated higher education, that the University of Maryland admit Donald G. Murray to its law school); *Pearson*, 182 A. at 593 (explaining that after *Pearson*, Maryland did not appeal the ruling to the United States Supreme Court, so it did not result in nationally binding precedent).

44. *See Pearson*, 182 A. at 594 ("[T]he state has undertaken the function of education in the law, but has omitted students of one race . . . solely because of their color. If those students are to be offered equal treatment in the performance of the function, they must, at present, be admitted to the one school provided.").

white public universities[45] and forbade states from circumscribing their presence and movements in classrooms or campus buildings.[46]

In the case that sounded the death knell for racial segregation in higher education, the Supreme Court required Texas to admit an African American applicant to the state law school rather than a hastily-constructed school exclusively for blacks.[47] In *Sweatt v. Painter,* the Supreme Court offered the most coherent and detailed explanation of a constitutional right to a racially desegregated, equal education: [48]

> It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State, is no answer. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.[49]

Without exclusively overturning the existing constitutional doctrine of "separate but equal" espoused in *Plessy v. Ferguson*[50], the Supreme Court nonetheless developed and articulated a constitutional vision that all but ensured the Supreme Court

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45. *See* Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 632, 633 (1948) (requiring the University of Oklahoma to admit and enroll a black applicant in the law school).

46. *See* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950) (explaining that "the conditions under which this appellant is required to receive his education deprived him of his personal and present right to the equal protection of the laws.").

47. *See* Sweatt v. Painter, 339 U.S. 629, 634 (1950) (finding that educational opportunities offered white and black law students by the state of Texas were not substantially equal, and that the equal protection clause of the 14th Amendment required that relator be admitted to the University of Texas Law School).

48. *See id.* at 635–36 (explaining that legal education equivalent to that offered by the State to students of other races is a full constitutional right).

49. *Id.* at 634–35 (citations omitted) (internal quotation marks omitted).

50. *See* Plessy v. Ferguson, 163 U.S. 537, 563 (1896) (finding that segregation is not unconstitutional if the segregated groups are treated equally).

would reach the conclusion it famously reached in *Brown v. Board of Education*[51] four years later.

Brown represented the culmination of a lengthy litigation strategy to dismantle racial apartheid in American public education.[52] By 1950, advocates had amassed enough legal victories and experience in litigating complex constitutional cases to shift strategies, graduating to attacking racial segregation in education squarely, forcefully, and in multiple jurisdictions.[53] It was at this time that the strategy shifted to litigating primary and secondary education cases.[54] Thus, unlike prior Supreme Court education decisions, the *Brown* case consolidated four cases dealing exclusively with elementary and secondary public schools.[55] In striking down state-sponsored racial segregation in these schools, the Supreme Court declared that "education is perhaps the most important function of state and local governments."[56] Because of this, the Supreme Court held, "where the state has undertaken to provide [education, it] is a right which must be made available to all on equal terms."[57] In overturning *Plessy*, the Supreme Court held that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal," and amount to a deprivation of equal protection of the laws guaranteed by the Constitution.[58]

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51. *See Brown I*, 347 U.S. 483, 491–96 (1954) (declaring racial segregation in public schools unconstitutional).

52. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 133–39 (1975) (discussing how quantitative evidence provided proof that the theory behind separate but equal was a fiction). *See generally* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 58–61, 85–87, 111–15 (1994).

53. *See* TUSHNET, *supra* note 5, at 135–37 (providing an overview of how litigators attacked segregation directly).

54. *Id.*

55. *See Brown I*, 347 U.S. at 486 (explaining that the four consolidated cases come from Kansas, South Carolina, Virginia, and Delaware).

56. *Id.* at 493.

57. *Id.*

58. *Id.* at 495.

B. Identifying a Constitutional Remedy: Brown II *and its Progeny*

Because of the complexities inherent in crafting a remedy to attain the constitutional right articulated in *Brown*, the Supreme Court left formulating the decrees for later.[59] In *Brown II*, the Supreme Court offered its first, timid articulation of a remedy to restore equality in public education.[60] In that decision, the Supreme Court underscored the "practical flexibility,"[61] the "facility for adjusting and reconciling public and private needs," and consideration of administrative and local problems that are inherent in exercising equity power to remedy this constitutional violation.[62] While many bemoaned the somewhat contradictory tone of the opinion that called for an end to racial segregation with "all deliberate speed," the decision nonetheless laid the foundation for courts to begin the long, arduous process of crafting equitable remedies.[63]

In several cases over the next fifteen years, the Supreme Court articulated with more force and clarity the contours of the constitutional remedy for racially segregated education.[64] As a result of several factors, including the limited resources of

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59. *See id*. (subordinating the issue of appropriate relief to the issue of whether segregation was constitutional in public schools on re-argument because the decisions in this class action suit had wide applicability, the local conditions were varied, making the cases highly complex).

60. *See Brown II*, 349 U.S. 294, 299 (1955) (explaining that the court realizes that the time required to implement the changes in schools will vary by district and additional time may be given).

61. *See id.* at 300 (recognizing that different remedies may be required for each particular case and granting the lower courts authority to decide as they see fit).

62. *See id.* at 300–01 (considering some of the potential administrative conflicts that the implementation of desegregation could create within local governments and recognizing that courts may be required to grant extra time to violators to solve them).

63. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 112 (1987) (indicating that the ambiguous definition of "all deliberate speed" led to, in the author's opinion, a ten-year delay in implementation of desegregation).

64. *See* Griffin v. Cty. Sch. Bd., 377 U.S. 218, 233 (1964) (requiring the "supervisors" to levy taxes in order to adequately fund the county public schools); Green v. Cty. Sch. Bd., 391 U.S. 430, 439 (1968) (requiring the "school board . . . to come forward with a plan that promises realistically to work, and promises realistically to work now.").

advocates and the reluctance of the Supreme Court to wrestle with lower court decisions regarding higher education desegregation, each of these opinions offered guidelines in the context of primary and secondary education yet remained silent on how to remedy the issue of segregation in public higher education. When state governments attempted to defy the Supreme Court's order to desegregate—on the grounds that such desegregation would cause too much public unrest—the Supreme Court firmly stated:

> State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.[65]

The Supreme Court reiterated that "[t]he principles announced [in Brown] . . . are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth."[66] Later, in cases like Green v. County School Board,[67] the Supreme Court held that simply removing the explicit barriers to matriculation at white elementary and secondary schools and adopting a "freedom of choice" plan for student enrollment was unsatisfactory.[68] Such a remedy both placed an undue burden on black schoolchildren and was less expedient or effective than alternate methods of desegregation.[69] The Supreme Court called for a clear elimination of segregated public schools, requiring "every school district . . . to terminate the dual systems at once and to operate now and hereafter only

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65. Cooper v. Aaron, 358 U.S. 1, 19 (1958) (emphasis added).

66. *Id.* at 20.

67. *See Green*, 391 U.S. at 441–42 (declaring that schools have a burden to create a desegregation plan that works quickly).

68. *Id.*

69. *See id.* ("[T]he plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board.").

unitary schools."[70] Providing not only a mandate but also a road map to public schools, the Supreme Court outlined a number of factors to consider in determining whether a public school has fulfilled its constitutional duty to desegregate.[71] Public school districts across the nation utilized these "*Green* factors" in remedying their segregated school systems.[72]

Three years later, the Supreme Court further issued a decree to eliminate all vestiges of segregation "root and branch" from public schools.[73] In *Swann v. Charlotte Mecklenburg Board of Education*, the Supreme Court granted district courts ample freedom to fashion wide-ranging remedies that included court-mandated busing, redrawing of attendance zone lines, and using mathematical ratios to desegregate students.[74] The Supreme Court explicitly extended these remedies in recognizing Latinos' right to desegregation in 1973.[75] While the Supreme Court refused to extend the reach of desegregation remedies beyond the borders where state-sponsored segregation took place,[76] it nonetheless continued to show a breadth in the range of equitable remedies that could be ordered, including the use of remedial

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70. Alexander v. Holmes Cty. Bd. of Educ., 396 U.S. 19, 19 (1969).

71. *See* Green v. Cty. Sch. Bd., 391 U.S. 430, 435–37 (1968) (describing what factors district courts should consider when evaluating a school's desegregation plan).

72. *See* Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL. ANALYSIS & MGMT. 876, 876 (2012) (indicating that the case "ultimately led to substantial decreases in school segregation throughout the South.").

73. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (explaining that district courts have broad power when constructing remedies to desegregate schools).

74. *See id.* at 17 (indicating that "[a]s with any equity case, the nature of the violation determines the scope of the remedy [, and i]n default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.").

75. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 197–98 (1973) (explaining that Hispanic students face the same discrimination as black students and may also be treated as an identifiable class under the Fourteenth Amendment).

76. *See* Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (ruling that a district court generally may not redraw the boundaries of an integrated school district to desegregate another school district).

education programs, curricular reform, and teacher training.[77] All of these equitable decrees set forth by the Supreme Court provided a necessary foundation for the destabilization of an apartheid system in public schools.[78]

C. The Complementary Relationship Between Social Movements and Administrative and Adjudicatory Remedies

In addition to the essential role the aforementioned judicial mandate and road map played in the desegregation of public elementary and secondary schools in the wake of *Brown,* social movements and ensuing geopolitical activity helped foster an environment conducive to effectuating the court-ordered remedies and spurring change. Such change occurred in large measure as a result of tremendous public forces for desegregation at the time of the ruling.[79] In addition to the public outrage over acts of racial violence,[80] the United States played a global role in advocating for a strong democracy. The maintenance of an apartheid system

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77. *See* Milliken v. Bradley, 433 U.S. 267, 272–74, 288 (1977) (explaining that a district court may order remedial education programs to children who have suffered from discrimination, and these programs may include service training for educators and revised testing).

78. *See, e.g.*, Sabel & Simon, *supra* note 25, at 1022–25 (describing the tools required in order to supervise institutional restructuring effectively).

79. *See, e.g.*, TUSHNET, *supra* note 5, at 123 ("If the United States is to stand before the world as an exemplar of equality of rights . . . [i]t seems to us that the language of the Fourteenth Amendment must be tortured out of common meaning to make segregation practices in education anything except unconstitutional" (quoting *Equal Rights in Education*, N.Y. TIMES (Jan. 15, 1948) at 22L)).

80. *See, e.g.*, Jay Stewart, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century,* 34 WM. MITCHELL L. REV. 773, 973–74 (2008) ("It took a hardened heart not to be offended by nonviolent protesters being slammed against walls from the force of fire hoses, set upon with police dogs and clubbed by baton-wielding cops, all under the direction of Birmingham [Alabama]'s overtly racist police chief, T. Eugene 'Bull' Connor."). *See also* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 646 (1995) ("Massive non-violent civil disobedience was met with equally intense violent police action . . . . black children kneeling in prayer or singing spirituals as they walked down sidewalks were attacked by vicious police dogs and rolled down the streets by fire department water cannons.").

domestically while advocating for equality abroad made the United States the subject of international derision.[81] In these school desegregation cases, the United States Department of Justice filed *amicus* briefs highlighting the importance of foreign policy to the issue of racial inequality in the nation: "[It] is in the context of a world in which freedom and equality must become living realities, if the democratic way of life is to survive, that the issues of these cases should be viewed."[82] In a brief filed to the Supreme Court in *Brown*, the Department of Justice focused even more forcefully on the relationship between the "world struggle between freedom and tyranny" and the problem of "racial discrimination."[83]

In addition to the social and geopolitical climate fostering the destabilization of existing norms of racial inequality, subsequent legislative and executive directives helped to spur real social reform in public education. In 1964, Congress passed the Civil Rights Act, which prohibited racial discrimination by any entity receiving federal funds.[84] This provided a strong mechanism for forcing public elementary and secondary schools to make real the right articulated in *Brown I* and the remedy outlined in

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81. *See* MARY L. DUDZIAK, COLD WAR AND CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 79–83 (2000) (explaining that some United States politicians believed segregation harmed the United States' foreign policy relations during the Cold War era); Mary L. Dudziak, *Desegregation as Cold War Imperative*, 41 STAN. L. REV. 61, 62–66 (1988) (describing how the international community scrutinized American politicians and leaders who advocated for democracy in a postwar world while dealing with racial segregation at home).

82. *See* Dudziak, *Desegregation as Cold War Imperative*, *supra* note 81, at 109 (referring to how the Department of Justice's articulated its stance against school segregation in amicus briefs before the Supreme Court).

83. *See* Brown v. Bd. of Educ., 1954 & 1955*, in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 121 (Philip B. Kurland & Gerhard Casper eds., 1975) ("The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with the other countries.").

84. *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.); *see also* 42 U.S.C. § 2000d (2016) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

Brown II.[85] Ultimately, the Office for Civil Rights of the Department of Health, Education, and Welfare, and later the newly-formed Department of Education, had real sway in shaping the scope and meaning of school desegregation.[86] Using its enforcement power, the Office for Civil Rights produced guidelines detailing the requirements for desegregating public school districts.[87]

As a result of these collective forces, public elementary and secondary schools became less segregated. The percentage of black students in majority white schools in the South rose from 2 to 33 percent between 1964 and 1970.[88] By the late 1980s, 44 percent of black students attended majority white schools.[89]

While political forces and administrative remedies undoubtedly played a critical role in pressuring Supreme Court movement toward outlining a constitutional right to public education at all levels in the United States, it is only in the field of elementary and secondary education that the Supreme Court articulated a constitutional remedy in the form of equitable decrees to effectuate Brown I & II.[90] By offering a judicial mandate for change, the Supreme Court actively upset existing norms to such an extent that the abstract right could become

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85. *See Brown I*, 347 U.S. 483, 495 (1954) (finding that the "separate but equal" doctrine has no place in public education, and that segregation is a violation of the Equal Protection Clause of the Fourteenth Amendment); *Brown II*, 349 U.S. 294, 301 (1955) (deciding that local school boards and local courts were responsible for implementing desegregation "with all deliberate speed.").

86. *See generally* Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146 (2008) (focusing on the interaction between the federal and executive branches of government concerning school integration after the end of school segregation).

87. *See* 34 C.F.R. § 100.8(a) (2015) (allowing for enforcement through termination of federal assistance proceedings carried out by the Department of Justice or State or local courts).

88. *See* GARY ORFIELD & CHUNGMEI LEE, HARV. C. R. PROJECT, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 13 (2006) (analyzing how school segregation still exists today).

89. *Id.*

90. *See Brown I*, 347 U.S. at 493 (finding that "segregation of children in public schools solely on the basis of race . . . deprives [the children of the minority group] of equal educational opportunities" and violates the Fourteenth Amendment); *Brown II*, 349 U.S. at 301 (requiring that desegregation be carried out quickly and enforced by local and district courts).

more of a practical reality. In the absence of such destabilization for higher education, public colleges and universities remained segregated for many decades to come.[91] By the time the Supreme Court offered a remedy nearly forty years after the *Brown* ruling, the judicial, social, and political momentum for wide-ranging equitable remedies had passed.

III. The Case of Public Higher Education: Where did the Court Go?

Many advocates and scholars see structural reform as an imperfect, unwieldy tool to effect change. Indeed, in the context of school desegregation, implementing successful remedies confounded jurists and advocates due to deeply entrenched residential segregation, intractable economic inequality, and pervasive racial hostility.[92] Nonetheless, remedies articulated by the highest Court offer a powerful foundation from which to begin the process of change. The role of equitable remedies in giving meaning to the constitutional right to racial equality in education is to eliminate the very conditions that create and maintain systems of inequality.[93] Structural reform litigation offsets the "negatives" of its unwieldiness with the "positives" of creating an environment for long-term change.

The destabilization brought by adjudicatory enforcement helped create the fertile ground for ensuing administrative directives and regulatory enforcement that gave meaning to

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91. *See* Knight v. Alabama, 476 F.3d 1219, 1220 (11th Cir. 2007) ("[M]any of the State's policies governing higher education tended to perpetuate its formerly *de jure* segregated university system."); Peter Applebome, *College Segregation Persists, Study Says*, N.Y. TIMES (May 18, 1995), http://www.nytimes.com/1995/05/18/us/college-segregation-persists-study-says.html (last visited Apr. 26, 2017) (noting that more than eighty percent of students at most flagship universities in the South were white in 1995) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

92. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 122 (1995) (finding that school districts are only required to restrict *de jure* segregation, and have no obligation to provide salary increases or remedial education in order to combat *de facto* segregation).

93. *See* Fiss, *supra* note 26, at 32 (providing a critique on structural reform).

Brown's call for equality in educational opportunity.[94] The Supreme Court's failure to articulate such a remedy in public higher education may occur for a host of complex reasons, including the structure of higher education and its governance, the unique role of historically black colleges, and changes to Supreme Court composition in the years following *Brown*.[95]

A. Distinguishing Public Higher Education

Even in the instances where higher education desegregation cases entered the courts in *Brown*'s wake,[96] there are a number of factors that may have contributed to the Supreme Court's reluctance to articulate equitable remedies for higher education segregation. The context of American higher education differs significantly from public elementary and secondary schools in a number of ways. For instance, while the United States has provided free, compulsory elementary and secondary education since the early nineteenth century,[97] American public colleges

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94. *Brown I*, 347 U.S. 483, 495 (1954).

95. *Id.*

96. *See, e.g.*, Geier v. Univ. of Tenn., 597 F.2d 1056, 1065 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979) (finding that Tennessee had a duty to do more than have an open admissions policy for its public universities because *Brown I* and *Brown II* apply to public higher education as well as primary and secondary education); Norris v. State Council of Higher Educ., 327 F. Supp. 1368, 1369 (E.D. Va. 1971) (indicating that "Bland [a two-year institution and agency of the state], cannot impede another agency of the state, Virginia State, in its efforts to fully integrate it student body[;]. . . [t]herefore, . . .we will enjoin Bland and its parent, William and Mary [a four-year institution], from escalating Bland into a four-year college"), *aff'd sub nom*. Bd. of Visitors of the Coll. of William & Mary v. Norris, 404 U.S. 907 (1971); Ala. State Teachers Ass'n v. Ala. Pub. Sch. & Coll. Auth., 289 F. Supp. 784, 787–88 (M.D. Ala. 1968) (declining to exercise equitable power to impose a desegregation remedy in the case of dual system of higher education, stating, "[w]e too are reluctant at this time to go much beyond preventing discriminatory admissions"), *aff'd per curiam*, 393 U.S. 400 (1969). *But see* Frasier v. Bd. of Transp., 134 F. Supp. 589, 592 (M.D. N.C. 1955) (confirming that *Brown I* applied to higher education), *aff'd*, 350 U.S. 979 (1956).

97. *See* Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1918 (1996) ("Massachusetts passed the nation's first compulsory attendance law in 1852. By the early twentieth century, every state in the nation required school attendance.").

and universities are neither free nor compulsory.[98] Rather, even public universities have competitive admissions processes and come at a cost.[99] In addition, public elementary and secondary schools are thought to be more fungible. While many would contest the notion that all public elementary and secondary schools are equal, the *Brown* Court acknowledged as much in its opinion.[100] Colleges and universities vary more in terms of prestige and quality. Further, while advocates focused their litigation efforts outside of higher education, lower courts questioned the practicality of heavy adjudicative involvement in educational policy for colleges and universities when courts were already so heavily involved in the governance of elementary and secondary schools.[101] Thus, the Supreme Court declined to enter the thicket—even when given the opportunity—due to conflicting lower court decisions.[102] Without a mandate from the high Court, lower courts struggled for a clearly defined adjudicatory remedy.

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98. *See* U.S. COMM'N ON CIV. RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION, xii (1960) ("Public education beyond high school . . . is offered by every State, and its importance to the Nation's welfare and security is being recognized more and more, still it is neither provided for all nor compelled of any.").

99. *See* John W. Schoen, *Why does a college degree cost so much?*, CNBC, http://www.cnbc.com/2015/06/16/why-college-costs-are-so-high-and-rising.html (last visited Mar. 19, 2017) (explaining the cost of both private and public universities today and tracking the increase in cost through history) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

100. *Brown I*, 347 U.S. 483, 492 (1954).

101. *See, e.g.*, Lorne Fienberg, United States v. Fordice *and the Desegregation of Public Higher Education: Groping for Root and Branch*, 34 B.C. L. REV. 803, 850 (1993) (arguing that historically black colleges should not be merged with white universities or closed because they serve the important purpose of creating "greater access and enhanced educational opportunities for black students.").

102. *Compare* Norris v. State Council of Higher Educ., 327 F. Supp. 1368, 1373 (E.D. Va. 1971) (explaining that Green v. Cty. Sch. Bd., 391 U.S. 430 (1968) "defined a constitutional duty owed as well to college students") *aff'd sub nom*. Bd. of Visitors of the Coll. of William & Mary v. Norris, 404 U.S. 907 (1971), *with* Ala. State Teachers Ass'n v. Ala. Pub. Sch. & Coll. Auth., 289 F. Supp. 784, 787–88 (M.D. Ala. 1968) (declining to exercise equitable power to impose a desegregation remedy in the case of dual system of higher education), *aff'd per curiam*, 393 U.S. 400 (1969).

B. Role of HBCUs

For decades, many traditionally white public colleges and universities struggled to fulfill the constitutional duty set forth in *Brown II*. A number of institutions persistently closed their doors to African American applicants after the decision.[103] In addition to the well-established white institutions, remedial jurisprudence regarding public higher education would have to contend with the dilemma of how to resolve the fate of those historically black public colleges that held an incongruous position in American history. For nearly a century, historically black colleges and universities were largely the only institutions of higher learning open to blacks in the United States.[104] As such, historically black institutions have served a critical role in educating African American students during segregation and beyond.[105] These

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103. *See generally* ROBERT A. PRATT, WE SHALL NOT BE MOVED: THE DESEGREGATION OF THE UNIVERSITY OF GEORGIA (2002) (recalling the life of Horace Ward, an African American student who was instrumental in the desegregation of the University of Georgia); *see* Thomas D. Russell, *"Keep Negroes Out of Most Classes Where There Are a Large Number of Girls": The Unseen Power of the Ku Klux Klan and Standardized Testing at the University of Texas, 1899–1999*, 52 S. TEX. L. REV. 1, 35 (2010) (detailing the battle for desegregation at the University of Texas). Some public institutions did take early steps to eliminate segregation. In 1951, for instance, the University of Louisville admitted black students to all of its programs, simultaneously closing the branch of the university that had previously operated for black students. *See* Jack Greenberg, *Racial Integration of Teachers—A Growing Problem*, 20 J. NEGRO EDUC. 285, 294 (1951) ("In 1950, the Kentucky General Assembly amended the State's Day law, which requires segregation in education, by permitting boards of trustees of institutions of higher learning to open their classes to Negroes. . . . The University of Louisville greeted the law by voting to abolish segregation . . . .").

104. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., HISTORICALLY BLACK COLLEGES AND UNIVERSITIES AND HIGHER EDUCATION DESEGREGATION 1 (Mar. 1991), https://www2.ed.gov/about/offices/list/ocr/docs/hq9511.html (last visited Apr. 26, 2017) ("[P]ublic support for higher education for black students was [governed by the] Second Morrill Act . . . [which] required states with racially segregated public higher education systems to provide a land-grant institution for black students whenever a [one] was established and restricted for white students") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

105. *See* United States v. Fordice, 505 U.S. 717, 748 (1992) (Thomas, J., concurring) (finding that historically black colleges have not only survived, but have flourished and "expanded as opportunities for blacks to enter historically white institutions have expanded.").

institutions have their own traditions and alumni base. Perpetuating racial segregation and white supremacy, however, were also motivating factors for the construction and minimal maintenance of black public colleges and universities.[106]

Once *Brown II* outlawed state mandated apartheid, states were required to do something to address the long-standing racial segregation and inequality that existed in systems of higher education.[107] Unfortunately, there was no clear path as to what that something should entail.[108] One alternative remedy involved the transformation of HBCUs via increased funding and enhanced programmatic options, thus increasing their desirability as alternatives to traditionally white institutions for students of all races.[109] An alternate remedy was to dismantle black public colleges, as they were deemed tools of racial segregation.[110] Without hope for a true and immediate destabilization of the existing apartheid structure, however, many African Americans pushed back against the elimination of existing institutions.[111] Even in more recent years, efforts to close

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106. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 104, at 1 (noting that HBCUs were created "to serve the educational needs of black Americans . . . [who] were generally denied admission to traditionally white institutions.").104

107. *See Brown II*, 349 U.S. 294, 300 (1955) (concluding that racial discrimination in public educational institutions is unconstitutional and directing the lower courts to implement conforming measures and revise local law).

108. *See id.* at 301 (providing ways that local courts may revise their public-school admission policies and state law, but failing to specify or mandate these revisions).

109. *See* Scott Jaschik, *Defining Desegregation*, INSIDE HIGHER ED (Oct. 22, 2012), https://www.insidehighered.com/news/2012/10/22/federal-judge-gets-ready-decide-suit-supporters-marylands-historically-black (last visited Apr. 26, 2017) (citing the stark difference between the amount of state funds allocated to historically white public universities and those allocated to historically black public universities) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

110. *See, e.g.*, JEFFREY A. RAFFEL, HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE 263 (1998) ("There is some fear that [*Fordice*] imperils [HBCUs] . . . If the Court applied the same standard to higher-education desegregation that it applied to elementary . . . education . . . HBCUs would be viewed as vestiges of a dual system and would . . . be eliminated.").

111. *See* Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal*, 72 MINN. L. REV. 29, 33 (1987)

HBCUs have met with criticism that such a remedy may impose significant educational and social costs on African American communities.[112]

While constitutional doctrine required an end to state mandated apartheid in public education, colleges and universities lacked any judicial roadmap as to how to implement a remedial structure.[113] As such, historically black colleges and universities remained in a "twilight zone."[114] Compared to traditionally white institutions, these colleges and universities suffered from substandard facilities, unequal state funding, paltry endowments, and no blueprint for fostering racially integrated student bodies.[115] Without the force of a clearly outlined adjudicatory remedy, states operated without any clarity as to

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(discussing how proponents of black colleges contend that historically black colleges provide opportunities to preserve black traditions, culture, and other educational options).

112. *See, e.g.*, Charise Frazier, *Lawmakers Vote to Shutter SC State University to Manage Deficit***,** NBC NEWS (Feb. 13 2015, 5:18 PM), http://www.nbcnews.com/news/nbcblk/lawmakers-vote-shutter-sc-state-university-manage-deficit-n305396 (last visited Apr. 26, 2017) (discussing how the legislature voted to close South Carolina's "only public historically black college") (on file with the Washington and Lee Journal of Civil Rights and Social Justice). In addition,

> The Congressional Black Caucus, . . . outraged that some members of the South Carolina legislature have an interest in closing the [HBCU], calling this 'overreaching and overreacting . . . .' Chairman G. K. Butterfield, (D-NC) continued, 'There are many remedies available to the state's government without using the nuclear option of closing the institution.'

Id.

113. *See* Walter Recharde Allen & Joseph O. Jewell, *A Backward Glance Forward: Past, Present and Future Perspectives on Historically Black Colleges and Universities,* 25 THE REV. OF HIGHER EDUC. 241, 250–51 (2002) (discussing the lack of judicial guidance in implementing segregation practices in colleges and universities after *Brown*).

114. *See* John K. Pierre & Charity R. Welch, *Why Historically Black Colleges and Universities are Needed in the 21st Century*, 1 J. RACE, GENDER, & POVERTY 101, 111 (2010) ("While legal barriers to equality have been eliminated, socio-economic barriers to equality still exist. Disparities are present in educational opportunities, educational attainment, and access to health care for racial minorities.").

115. *See* Kujovich, *supra* note 111, at 44–112 (addressing issues including inequality of funding, programs of instruction, the consequences of separation, and segregation of the curriculum).

how to dismantle segregated systems of higher education and foster equality in educational opportunity.[116]

C. Judicial Retreat from Racial Remedies

While the Supreme Court remained silent on remedial structures for higher education desegregation, it began to eschew adjudicatory remedies for discrimination generally and for the type of sweeping racial remedies outlined in *Brown II* and its early progeny.[117] Changes in Supreme Court composition and in social and political climate meant a swift end to the most opportune time for creative use of the Supreme Court's equitable powers in the area of educational equality.[118] As early as 1973, reshaped by four new Justices, the Supreme Court substantially limited the judicial remedies available to low-income and minority students in disadvantaged schools in *San Antonio v. Rodriguez*.[119] In *Rodriguez*, the Supreme Court held that the United States Constitution creates no fundamental right to education, nor is wealth a protected class; consequently, there is no constitutional violation for a state's provision of inequitable educational resources.[120] One year later, the Supreme Court rejected metropolitan desegregation, the only available route to successfully desegregate the racially segregated schools in the urban core of Detroit, Michigan.[121] In the limited avenues that

116. *See id.* at 113 (describing the inequalities between historically black and white universities in addition to the difficulties and delay states had in instituting any graduate instruction in black public colleges).

117. *See id.* at 32 (suggesting that the course of desegregation in public colleges has been delegated to the lower federal courts after *Brown II*).

118. *See id.* at 31 ("The current racial identifiability of black public colleges suggests that the disestablishment remedy has not been carried out and that the constitutional violation therefore persists in public higher education.").

119. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 39 (1973) (finding that there is no Constitutional fundamental right to education).

120. *See id.* at 30–39 (exploring whether the right to education is implicitly guaranteed by the Constitution and determining that education issues should fall under the purview of the benefits provided by the States rather than under Federal or Constitutional protection).

121. *See* Milliken v. Bradley, 418 U.S. 717, 741 (1974) (concluding that local control over school operations and local autonomy over school transportation issues are essential to maintaining community support for the public schools and educational process).

remain, the Supreme Court has used doctrines such as remedies and federalism to curb their accessibility.[122] In a series of opinions in the 1990s, a conservative Court led by Chief Justice Rehnquist issued a trilogy of opinions that severely curtailed the circumstances, means, and duration of school desegregation remedies.[123] Understanding the persistence of racial injustice but exhibiting exhaustion with continued remedial decrees, the Supreme Court provided states with multiple avenues for relief from injunctions, even when some vestiges of desegregation remained, and even in cases where it was clear resegregation would occur.[124]

In the context of higher education, the Supreme Court appeared poised to tolerate only minimal state efforts toward the broad concept of racial diversity rather than the more structured, vigorous racial remedies set forth in earlier opinions addressing public elementary and secondary education.[125] Thus, institutions

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122. *See* Missouri v. Jenkins, 515 U.S. 70, 99 (1995) ("[L]ocal autonomy of school districts is a vital national tradition, . . . and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution.").

123. *See id*. at 138 (Thomas, J., concurring) (arguing that "federal courts should [not use] racial equality as a pretext for solving social problems that do not violate the Constitution."); *see also* Freeman v. Pitts, 503 U.S. 467, 491 (1992) ("[T]he court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations."); Bd. of Educ. v. Dowell, 498 U.S. 237, 238 (1991) (concluding that "the legal justification for displacement of local authority in [desegregation attempts] is a violation of the Constitution.").

124. *See, e.g.*, *Dowell*, 498 U.S. at 248–51 (calling for the District Court to review every facet of school operation to determine whether *de jure* segregation had ended); *see also Pitts,* 503 U.S. at 490–91 ("While retaining jurisdiction, . . . the court may determine that it will not order further remedies in areas where the school district is in compliance with the decree."); *Jenkins*, 515 U.S. at 97–98, 100–02 (arguing the importance of allowing local districts to retain autonomy over their schools and concluding that directing districts on exactly how to achieve of "desegregative attractiveness" is beyond the discretion of the District Court).

125. *Compare* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 318–20 (1978) (stating that a state may constitutionally consider race as a factor in its university admissions to promote educational diversity, but only if considered alongside other factors and on a case-by-case basis), *with Brown II*, 349 U.S. 294, 301 (1955) (demanding that all U.S. schools must desegregate with all deliberate speed), *and* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29–32 (1971) (noting that busing is an appropriate remedy for righting racial imbalance in schools).

of higher education tried to proactively address continuing inequality through measures that became known as "affirmative action."[126] In 1978, the Supreme Court invalidated the admission plan of the University of California-Davis Medical School, which reserved 16 of 100 places in each entering class for racial minorities.[127] In doing so, however, the divided Supreme Court did allow for the limited use of race as a positive factor in admissions.[128] The Supreme Court cautiously embraced a new constitutional framework for sustaining race-conscious measures that state universities *voluntarily* adopted to foster integration in education.[129] This framework, while permitting some race-conscious policies, operates explicitly outside of the remedial context and arguably rests on a very different constitutional foundation.[130] Instead of a constitutional interest developed with an understanding of the persistent vestiges of racial segregation that was baked into the founding of the nation, affirmative action jurisprudence allows for the use of race in a historical vacuum.[131] Without connecting such policies to their original purpose—remedying pervasive racial discrimination and segregation in higher education—it is easier for opponents of such policies to challenge them and to redefine the terms of the debate.[132] While

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126. *See Bakke*, 438 U.S. at 343 app. ("In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.").

127. *See id.* at 275 (explaining the process of the admission committee when reviewing minority applicants).

128. *See id.* at 320 ("[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.").

129. *See id.* at 312 ("The freedom of a university to make its own judgments as to education includes the selection of its student body.").

130. *See id.* at 368 ("Congress was empowered under that provision to accord preferential treatment to victims of past discrimination . . . and we see no reason to conclude that the States cannot voluntarily accomplish . . . what Congress . . . validly may authorize or compel either the States or private persons to do.").

131. *See* Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 67 U. PITT. L. REV. 175, 177 (2005) (explaining the "flaws in the contemporary strategy and remedies used to address the violation of rights that the Court acknowledged in *Brown*.").

132. *See* Nikole Hannah-Jones, *What Abigail Fisher's Affirmative Action Case Was Really About*, PROPUBLICA (June 23, 2016),

ostensibly challenging "affirmative action," today's litigation challenges are part of a broader attack on the Fourteenth Amendment's Equal Protection Clause.[133] While the measure was drafted during Reconstruction to ensure the rights of African Americans, the question has become whether this clause of the U.S. Constitution now prohibits any use of race to help overcome the country's "legacy of racism."[134]

As a result of shifts in the Supreme Court composition and social and political climate, the Supreme Court disfavors court-based remedies altogether, favoring only limited, forward-looking "diversity" rationales.[135] Even the limited use of race in college admissions "who point to the educational benefits that flow from student body diversity,"[136] such as increased cross racial understanding and democratic involvement, is now in jeopardy.[137] This "jurisprudence of fragmentation"[138] operates on two tracks, a

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https://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r (last visited Apr. 26, 2017) ("Nearly 60 years after that Supreme Court victory [in *Brown*], which changed the nation, conservatives freely admit they have stolen that page from the NAACP's legal playbook as they attempt to roll back many of the civil rights group's landmark triumphs") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

133. *See id.* ("At issue is whether the Constitution's equal protection clause, drafted by Congress during Reconstruction to ensure the rights of black Americans, also prohibits the use of race to help them overcome the nation's legacy of racism.").

134. *See id.* (deciding whether the Equal Protection Clause can be implemented to prevent race being used as a factor in government programs).

135. *See* Grutter v. Bollinger, 539 U.S. 306, 325, 328 (2003) (concluding that institutions of higher education could establish affirmative action admissions programs to further the institution's important interest in cultivating a diverse student body); Gratz v. Bollinger, 539 U.S. 244, 258–59 (2003) (establishing that the University of Michigan's undergrad affirmative action policy with predetermined point allocations was unconstitutional).

136. *See Grutter*, 539 U.S. at 330 (describing petitioner's claim that increasing student body diversity is a compelling interest).

137. *See id.* ("As the District Court emphasized, the Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'").

138. *See* Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321, 1322 (2008) (describing three different ways in which *Gutter v. Bollinger* played a part in undoing voluntary desegregation).

"remedial" track and a "diversity" track.[139] Each track arguably emanates from the same constitutional right identified in *Brown II* and its antecedents, but offers completely disparate theories of jurisprudence.[140] For decades now, the Supreme Court has disfavored a "remedial justification" for race conscious policies, which previously served as the foundation for equitable remedies in higher education desegregation.[141]

D. A Court Articulated Remedy for Higher Education Segregation: Fordice

In 1992, nearly forty years after *Brown II*, the Supreme Court ruled on equitable remedies for the desegregation of public higher education for the first time.[142] The *United States v. Fordice*[143] decision brought to a close a seventeen-year legal battle, including more than a decade of court-supervised negotiations, a five-week trial in the lower court, more than 50,000 pages of evidence,[144] and two rulings by the United States Court of Appeals for the Fifth Circuit.[145] While the Supreme

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139. *See id.* at 1321–22 (explaining how the courts have taken a race conscious approach to undo past discrimination while the courts have also recognized the diversity rational to learn from individual's various backgrounds).

140. *See id.* at 1321 (discussing how *Brown* "endors[ed] a normative ideal of colorblindness, while others insisted that Brown recognized that race-consciousness was necessary to undo longstanding patters of segregation, subordination, and stratification.").

141. *See id.* at 1366 ("Culture-race becomes an insupportable justification because the Court fears that quota systems will intensify racial divisions rather than create a space for the development of racial identities.").

142. *See* United States v. Fordice, 505 U.S. 717, 743 (1992) (establishing that universities in Mississippi had not properly integrated).

143. *Id.*

144. *See id.* at 725 ("At trial's end, based on the testimony of 71 witnesses and 56,700 pages of exhibits, the District Court entered extensive findings of fact.").

145. *See* Ayers v. Allain, 674 F. Supp. 1523, 1560 (N.D. Miss. 1987) (establishing that state officials are meeting their duty to disestablish the segregated system in higher education); Ayers v. Allain, 893 F.2d 732, 756 (5th Cir. 1990) (finding that state officials failed to uphold their duty and, in turn, are guilty of maintaining a racially dual system in higher education); Ayers v. Allain, 914 F.2d 676, 692 (5th Cir. 1990) (en banc) (concluding that state

Court outlined the broad remedial requirements of the Fourteenth Amendment's Equal Protection Clause, the *Fordice* ruling left the specifics of a constitutionally sound equitable remedy to the lower courts.[146] Of particular note, it set forth a significantly less robust mandate than that which guided elementary and secondary school segregation for the prior four decades.[147] In addition, it did so in a dramatically different political, social, and judicial climate than the post-*Brown* 1960s that gave birth to strong civil rights legislation and jurisprudence that spoke forcefully of the affirmative duty to eradicate racially segregated public education.[148]

In today's "post-racial" America, we had an African American president and a populace who feels more exhaustion than outrage when confronted with persistent racial inequality and segregation.[149] Courts disfavor race-based remedies for existing racial inequality in a host of areas, including education, employment, and housing.[150] In the context of higher education,

officials failed to try and dismantle the segregated system in higher education by not implementing new policies).

146. *See Fordice*, 505 U.S. at 743 ("Whether such an increase in funding is necessary to achieve a full dismantlement under the standards we have outlined, however, is a different question, and one that must be addressed on remand.").

147. *See* Chaka M. Patterson, *Desegregation as a Two-Way Street: The Aftermath of* United States v. Fordice, 42 CLEV. ST. L. REV. 377, 391–92 (1994) ("The differences between the remedies available to elementary and secondary institutions as compared to institutions of higher education are indeed significant.").

148. *See* United States v. Fordice, 505 U.S. 717, 743 (1992) (concluding that the state must dismantle the prior dual system according to their affirmative duty under the Constitution and Title VI).

149. *See, e.g.*, JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 316 (2005) (quoting Professor Roger Wilkins and explaining that many Americans feel "moral exhaustion" regarding racial integration efforts).

150. *See* Ricci v. DeStefano, 557 U.S. 557, 593 (2009) (discussing how a city violated Title VII of the Civil Rights Act of 1964 by refusing to promote non-black firefighters after they passed a promotion test); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237–38 (1995) (explaining that courts use the strict scrutiny standard when evaluating affirmative action cases involving federal agency contracting); *cf.* Grutter v. Bollinger, 539 U.S. 306, 335–36 (2003) (finding that seeking a "critical mass" of minority students is acceptable, while setting a "quota" for minority students is not). *But see* Adam Weiss, Grutter*, Community, and Democracy: The Case for Race-Conscious Remedies in Residential Segregation Suits*, 107 COLUM. L. REV. 1195, 1196

adjudicatory enforcement and social policy favor more "universal" courses of action with only limited consideration of race to further "student body diversity," rather than for the purpose of remedying present effects of past discrimination.[151] Courts are loathe to take notice of the need for remedies for long-standing segregative and discriminatory policies.[152] Instead, courts have more often absolved states of any responsibility or requirement in favor of allowing measures fostering diversity.[153] The result is that even in the limited instances in which race conscious state policies in education have withstood constitutional scrutiny, it is for the justification of furthering student body diversity, rather than remedying discrimination.[154] In addition, it is in the context of voluntary efforts by state institutions, rather than adjudicatory enforcement.[155]

(2007) (arguing that it is consistent with the Equal protection clause that judges may tailor race-conscious solutions to foster racial integration).

151. *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 493–94 (1989) (articulating that the standard of strict scrutiny applies to race-conscious policies regardless of whether the policy is designed to discriminate or to provide a benefit); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) ("The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education.").

152. *See Croson*, 488 U.S. at 507 (holding that thirty percent quota allowed by the plan was not "narrowly tailored to any goal, except perhaps outright racial balancing."); *see also* Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.").

153. *See* Darren Lenard Hutchinson, *Majority Politics and Race Based Remedies*, 50 HOW. L.J. 827, 829 (2007) (discussing how courts have allowed states to remedy some of their own discrimination issues).

154. *See Bakke*, 438 U.S. at 312 (stating that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.").

155. *See id*. at 336 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (discussing the Congressional intent to encourage voluntary compliance).

E. Impact on Administrative Remedies

Without the power of court ordered remedies to mandate the desegregation of traditionally white institutions (TWI) or the HBCUs, public higher education in the United States remained deeply segregated.[156] Lower courts adjudicated claims of racial segregation and inequality in higher education without guidance from the Supreme Court and reached conflicting, muddled results.[157]

Even in ideal conditions, the difficulties inherent in structural reform litigation merit a corresponding consideration of legislative and executive avenues for change. Through subsequent federal political activity, administrative remedies can help fill adjudicatory voids, or further the aims of existing adjudicatory remedies, as was the case with elementary and secondary school desegregation.[158] Lacking the destabilizing effect of a judicially articulated remedy in higher education, however, administrative remedies operated at a sluggish pace.[159] No administrative guidelines for the desegregation of public higher education existed for more than twenty years after the

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156. *See* Walter Recharde Allen & Joseph O. Jewell, *A Backward Glance Forward: Past, Present and Future Perspectives on Historically Black Colleges and Universities,* 25 THE REV. OF HIGHER EDUC. 241, 250–51 (2002) (discussing the inequalities in higher education after *Brown*).

157. *See* Lia B. Epperson, *Resisting Retreat: The Struggle for Equality in Educational Opportunity in the Post-*Brown *Era,* 66 UNIV. PITT. L. REV. 131, 133–34 (explaining the difficulties associated with enforcing desegregation in education).

158. *See* Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence,* 10 BERKELEY J. OF AFR.-AM. L. & POL'Y 146, 147 (2008) (discussing the executive and judicial interaction concerning the scope of school integration); *see also* Lia Epperson, *Legislating Inclusion,* 6 HARV. L. & POL'Y REV. 91, 92–93 (2012) (examining congressional enforcement of racial equality in education); *see generally* Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities,* 7 STAN. J. C.R. & C.L. 213 (2011) (discussing the efficacy of administrative directives and regulatory enforcement over traditional adjudicatory remedies for fulfilling constitutional equality imperatives).

159. In 1973, a federal court set forth a roadmap for the desegregation of HBCUs, offering a hybrid of regulatory and judicial remedy. *See* Adams v. Richardson, 480 F. 2d 1159, 1161–62 (D.C. Cir. 1973) (requiring the federal government to enforce Title VI of the 1964 Civil Rights Act more aggressively).

Supreme Court's decision in *Brown*.[160] By the time the federal judiciary stepped in to call for more aggressive administrative enforcement, the "perfect storm" of judicial activism and social and political momentum that fostered significant change in elementary and secondary schools had largely dissolved.[161]

F. Example of Maryland

Public colleges and universities in the state of Maryland provide an interesting example of the difficulty in attaining a sound model for desegregation and educational equality in the absence of adjudicative remedies or a strong push for administrative enforcement. Even after the 1954 Supreme Court ruling that racially segregated education violated the Constitution, Maryland failed to adequately remedy the century long *de jure* system of racially segregated higher education.[162] Prior to 1954, the state forced black students to attend schools that lacked sufficient funding, facilities or programmatic opportunities when compared with TWIs in the state.[163] It was not until 2000 that Maryland entered into an agreement with the U.S. Department of Education's Office for Civil Rights to bring the state into compliance with constitutional and legislative requirements. In 2006, however, a group of prospective students, current students, and alumni of the state's four historically black colleges and universities brought a lawsuit alleging that the state

160. In the area of elementary and secondary school desegregation, OCR implemented regulations in 1967. *See* 45 C.F.R. §§ 80.1–80.13 (2017) (stating that "[t]he purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964" which attempts to end racial discrimination).

161. *See* Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities supra* note 158, at 219 (explaining that the Supreme Court declined to address racial issues in elementary and secondary schools, among other forums).

162. *See* Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, *supra* note 158, at 157 (explaining that the University of Maryland's campus "remained ninety-nine percent white in the late 1960s.").

163. *See* John K. Pierre, *History of De Jure Segregation in Public Higher Education in America and the State of Maryland Prior to 1954 and the Equalization Strategy*, 8 FLA. A & M UNIV. L. REV. 81, 88–89 (2012) (discussing the differences in educational facilities between African-Americans and whites in Maryland).

had failed to successfully dismantle the vestiges of racial segregation in the areas of funding, capital improvements, and program duplication.[164] After six years of litigation, the court heard arguments in October 2012 and has yet to issue a decision.

The state of Maryland's continued battle regarding the desegregation of public higher education illustrates how, in the absence of a mandate from the Supreme Court, the quest for an equitable remedy in higher education has been foiled by contested definitions of the very notion of desegregation. The Supreme Court squarely defined "desegregation" decades before in the realm of elementary and secondary education in cases like *Green*, holding that states had an "affirmative duty" to remove all vestiges of discrimination "root and branch,"[165] eschewing plans that simply removed explicit racial prohibitions as insufficient. There is no similar directive for colleges and universities. HBCUs contend that the state of Maryland never met its obligation to make the schools "comparable and competitive" with traditional white institutions.[166] Maryland's traditionally white institutions, like their counterparts in other southern states, received preferential treatment from the state for decades.[167] This resulted in persistent inequities in facilities, programmatic offerings, faculty, and scholarships for students.[168] HBCUs in the state have consistently called for increased funding for new programs and facilities that would attract students of all races.[169]

The state body governing higher education, however, argues that desegregation should be defined simply as providing

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164. *See generally* Coal. for Equity and Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n, No. CCB-06-2773, 2011 WL 2217481 (D. Md. June 6, 2011) (examining types of funding in the context of higher education.).

165. *See* Green v. Cty. Sch. Bd., 391 U.S. 430, 437–38 (1968) (describing how "[s]chool boards such as the respondent then operating state-compelled dual systems were clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated.").

166. *See* Jaschik, *supra* note 109 (discussing the arguments in support of funding new initiatives and facilities for historically black colleges) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

167. *See id.* (explaining that traditionally white institutions have also received preferential treatment regarding funding).

168. *Id.*

169. *Id.*

prospective students with the freedom to choose to attend any public college or university in the state and removing explicit racial barriers from admission.[170] By this definition, the state of Maryland has more than fulfilled its duty, as the vast majority of African American students in the state attend traditionally white institutions today.[171] However, this is a definition of a remedy that was squarely dismissed by the Supreme Court in earlier opinions regarding primary education.[172]

These contested definitions of desegregation flow from contested views of the role of history. A study of Maryland and the quest for desegregated higher education also provides a worthwhile illustration of the role of history, and the ways in which state governments used HBCUs as tools to enforce segregation.[173] From 1926 to 1936, HBCUs received roughly 25 percent of the funding that traditionally white institutions received.[174] Today, the state governing body has called such history immaterial to existing disparities in infrastructure.[175] Rather than vestiges of segregation, the state sees them as irrelevant since all students are now provided a choice of public colleges and universities. In other words, no student, regardless of race, need attend the financially crippled HBCUs.

Finally, the case of Maryland provides an interesting view into the role of research. In examining avenues for altering historical patterns of racially segregated college and university attendance, research findings suggested creating high demand,

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170. *Id.*

171. *See id.* (citing state's argument that in 2012, fifty-nine percent of African American students enrolled in public four year colleges or universities in Maryland attended institutions other than HBCUs, and going on to assert that this figure rises to eighty-one percent if including community colleges and private institutions).

172. *See* Green v. Cty. Sch. Bd., 391 U.S. 430, 441–42 (1968) (rejecting the New Kent School Board's "freedom of choice" plan as insufficient plan for remedying segregation).

173. Jaschik, *supra* note 109.

174. *See id.* (noting that one traditionally white institution in the state of Maryland received $742,000, while three HBCUs received a combined total of $774,000 over a span of 10 years between 1926 and 1936).

175. *See id.* ("The state argues that enrollment figures show that all Maryland colleges are open to students of all races, and says that the 'vast majority' of black students attend institutions other than historically black colleges.").

unique programs at HBCUs. The theory, adopted from school desegregation litigation strategy leading to *Brown*, is that "green follows white."[176] By enticing white enrollment to HBCUs, money would follow. The issue at stake in the current Maryland litigation centers largely on the allegation that the state is perpetuating segregation by "unnecessarily duplicating" scores of academic programs offered at HBCUs at traditionally white institutions.[177] In 2013, the case remains open.[178] The district court has yet to issue a remedial opinion to determine whether or what remedy may be available to fix the broken system.

IV. Conclusion

An examination of some of the challenges of seeking racial equality in higher education provides a striking refutation of the oft-cited argument that constitutional injunctions have been ineffective in spurring social change. On the contrary, equitable decrees in education cases have served a critical function in destabilizing apartheid norms.[179] Such adjudicatory remedies provided fertile ground to allow for the ensuing regulatory

176. *See, e.g.*, Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 WM. & MARY L. REV. 685, 692 (1995) (describing "green follows white" as a phrase commonly used in African American communities to describe the phenomenon of money and other resources being spent on other projects when an area's white population leaves and is replaced by a black population).

177. *See* Amended Complaint at ¶ 40, Coal. For Equity and Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n, (D. Md. Jun. 6, 2011) (No. 06CV02773) ("In 1965, however, rather than encourage integration at Morgan State, Maryland established University of Maryland Baltimore County (UMBC). UMBC was a complete duplication of Morgan State's entire institution, not just its programs.").

178. Coal. for Equity and Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n, No. CCB-06-2773, 2011 WL 2217481 (D. Md. June 6, 2011).

179. *See* Armstrong v. Bd. of Sch. Dirs., 616 F.2d 305, 318 (7th Cir. 1980) ("Indeed, it appears that school desegregation is one of the areas in which voluntary resolution is preferable to full litigation because the spirit of cooperation inherent in good faith settlement is essential to the true long-range success of any desegregation remedy"), *overruled by* Felzen v. Andreas, 134 F.3d 873 (1998); *see also* Kathleen Snyder Schoene, Note, *Voluntarily Unlocking the Schoolhouse Door: The Use of Class Action Consent Decrees in School Desegregation,* 59 WASH. U.L.Q. 1305, 1309 (1982) ("Voluntary resolution in school desegregation is preferable to full litigation because the cooperation inherent in a settlement ensures the long-range success of the desegregation plan.").

enforcement and administrative directives to take hold. Equitable decrees, complemented by other equality initiatives from federal political branches, produced significant social reform in primary education. For the years when the factors worked together, American public schools became more racially inclusive, and students garnered academic, social, and "democratic" benefits that have been well documented in social science research.[180]

As was the case in elementary and secondary education, courts could have used equitable power in more radical ways in higher education to undermine the existing structure of racial inequality.[181] Some options included requiring traditionally white institutions to merge with black institutions to achieve racial balancing, but placing the closure burden on the white institutions. By creatively assessing varied equitable remedies, the Supreme Court could come closer to fulfilling the equal protection requirement set forth in *Brown* in a manner that may benefit students of all races. In the absence of a constitutionally defined remedy for higher education, however, states failed to act to effectuate the constitutionally articulated right outlined in *Brown I*. This glaring absence of any Supreme Court decision outlining equitable remedies for the constitutional violation of racially segregated and discriminatory colleges and universities allowed for the existing inequality to continue unfettered for decades.

180. *See* Lia Epperson, *The Promise and Pitfalls of Empiricism in Educational Equality Jurisprudence*, 48 WAKE FOREST L. REV. 489, 513–515 (2013) (examining social science research data and other empirical evidence to advocate for the increased use of race-conscious policies to foster diversity and improved educational outcomes).

181. Sabel & Simon, *supra* note 25.