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The Unfinished Business of Desegregation: Race Conscious College Admissions

Wendy B. Scott

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THE UNFINISHED BUSINESS OF DESEGREGATION: RACE CONSCIOUS COLLEGE ADMISSIONS

Wendy B. Scott*

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INTRODUCTION

In *Desegregation and the Law*,¹ Albert P. Blaustein and Charles Clyde Ferguson, Jr. provided doctrinal, jurisprudential, and historical context for then recently decided, and now seminal *Brown v. Board of Education of Topeka* opinion.² In what Blaustein and Ferguson called “[a] new constitutional standard,”³ the unanimous *Brown* opinion announced that “in the field of public education the doctrine of ‘separate but equal’ has no place,” and that “[s]eparate educational facilities are inherently unequal.”⁴ As predicted by Blaustein and Ferguson, more law was inevitable as new attempts were made both to enforce and circumvent the Supreme Court’s desegregation mandates. The authors opined that “the desegregation law of the future will be neither novel nor new; it will be an extension of the principles which have been already established.”⁵ Thus, the “new constitutional standard” of

* Professor, Elon University School of Law. The author thanks Jennifer A. Martinez, Elon University Law School Class of 2023 and Editor-in-Chief of *Elon Law Review*, for her service as Research Assistant; the organizers of the *Constitutional Issues Within Educational Spaces*; and the editors of the *William & Mary Bill of Rights Journal*.

¹ See generally ALBERT P. BLAUSTEIN & CHARLES CLYDE FERGUSON, JR., *DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES* (1957).

² *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

³ BLAUSTEIN & FERGUSON, *supra* note 1, at 134.

⁴ 347 U.S. at 495.

⁵ See BLAUSTEIN & FERGUSON, *supra* note 1, at xi–xii; see also Wendy B. Scott, *Desegregation Law and Jurisprudence*, 1 DUKE F. L. & SOC. CHANGE 1, 9–17 (2009).

equality⁶ announced in *Brown* has borne the weight of rationalizing the “desegregation law of the future”⁷—affirmative action and diversity. This means that the jurisprudence and history of school desegregation is inextricably linked to race-conscious admissions in higher education. This Article contends that the nexus between specific evidence of past discrimination against African Americans in K–12 and continuing discrimination in access to higher education justifies considering race in college admissions policies.⁸

Until the 6–3 decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,⁹ diversity constituted a compelling reason to consider race in higher education admission decisions under the Equal Protection and Due Process Clauses.¹⁰ After *Fair Admissions*, the future of diversity as a compelling interest is bleak.¹¹ On the other hand, the Court reaffirmed that considerations of race to remedy the proven effects of specific identified past discrimination,¹² remains

⁶ BLAUSTEIN & FERGUSON, *supra* note 1, at 134.

⁷ *See id.* at xi.

⁸ This Article, as does the Court, focuses on African American students, while recognizing and affirming that “[w]e are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions.” *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O’Connor, J., dissenting); *see also* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 292 (1978) (citing authority for the proposition that the Equal Protection Clause extends “to all ethnic groups seeking protection from official discrimination”). Moreover, the litigation history pre- and post-*Brown*, with rare exception, has focused on efforts to ensure equal educational opportunities for African Americans that lead to the broader concept of diversity. For a discussion of the adverse effect of racial discrimination and the positive effect of diversity and affirmative action on Latinx, Indigenous peoples, and Asian Americans, see *SFFA v. Harvard and SFFA v. University of South Carolina FAQ: The Supreme Court’s Affirmative Action Decision, Explained*, LEGAL DEFENSE FUND, <https://www.naacpldf.org/case-issue/sffa-v-harvard-faq/> [<https://perma.cc/4GNY-BRAT>] (last visited Dec. 4, 2023); U.S. DEP’T JUST., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT’S DECISION IN *STUDENTS FOR FAIR ADMISSIONS, INC. v. HARVARD COLLEGE AND UNIVERSITY OF NORTH CAROLINA* (2023); https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf [<https://perma.cc/BT5A-AUY9>].

⁹ *See* 600 U.S. 181 (2023).

¹⁰ *See* *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003); *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 314–15 (2013); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 381 (2016).

¹¹ *See* 600 U.S. at 230 (holding admissions programs based on achieving diversity cannot be reconciled with the Equal Protection Clause). According to Justice Thomas, *Grutter* has been overruled. *See id.* at 287 (Thomas, J., concurring). However, Chief Justice Roberts states, “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise.” *Id.* at 230 (majority opinion). Justice Sotomayor characterizes this statement by the majority as “simply mov[ing] the goalpost, upsetting settled expectations and throwing admissions programs nationwide into turmoil” without making “the extraordinary showing required by *stare decisis*.” *Id.* at 342 (Sotomayor, J., dissenting).

¹² *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (requiring

constitutionally permissible under the Equal Protection and Due Process Clauses.¹³ *Fair Admissions* complicates matters, however, by resting the decision on the principle of color blindness,¹⁴ even though educational institutions at all levels in America continue to grapple with racial homogeny and the effects of past discrimination.¹⁵ And while the late Thurgood Marshall, an author of the appellants' brief in *Brown* cited by Chief Justice Roberts, used the term "color blind,"¹⁶ he employed the term to defeat color blind constitutionalism in the service of white supremacy,¹⁷ not to foreclose the use of race to remedy discrimination against African Americans. Marshall's later writing explains the difference between his use of the idea of color-blindness from that of Chief Justice Roberts:

[T]he principle that the "Constitution is colorblind" appeared only in the opinion of the lone dissenter [in *Plessy v. Ferguson*]. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, *by law*, [a white] individual could be given "special" treatment based on the color of [their] skin. It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration

evidence of a demonstrated need to satisfy the constitutional standard of narrowly tailoring an action to remedy present effects of past race discrimination).

¹³ Roberts writes that other than diversity, "[O]ur precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *Fair Admissions*, 600 U.S. at 207 (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007)); *see also* *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (remedies permissible for racial discrimination traceable to segregation). Roberts continues, "The second [compelling interest] is avoiding imminent or serious risks to human safety in prisons, such as a race riot." *Fair Admissions*, 600 U.S. at 207.

¹⁴ The idea of color-blind constitutionalism comes from the dissenting opinion of Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 532, 559 (1896) (Harlan, J., dissenting).

¹⁵ *See* Ian Millhiser, *American Schools Are More Segregated Now than They Were in 1968, and the Supreme Court Doesn't Care*, THINKPROGRESS (Aug. 13, 2015, 12:00 PM), <https://thinkprogress.org/american-schools-are-more-segregated-now-than-they-were-in-1968-and-the-supreme-court-doesnt-care-cc7ab6651c/> [<https://perma.cc/2Z5J-B4D8>]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104737, K-12 EDUCATION: STUDENT POPULATION HAS SIGNIFICANTLY DIVERSIFIED, BUT MANY SCHOOLS REMAIN DIVIDED ALONG RACIAL, ETHNIC, AND ECONOMIC LINES 7–10 (2022); *see also* *Fair Admissions*, 600 U.S. at 317 (Kavanaugh, J., concurring) (acknowledging that "racial discrimination still occurs and the effects of past discrimination still persist").

¹⁶ Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Re-argument at 65, *Brown I*, 347 U.S. 483 (1954) (No. 51-00316), 1953 WL 48699, at *65 ("That the Constitution is color blind is our dedicated belief.").

¹⁷ *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1768 (1993).

to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.¹⁸

Race conscious admissions policies in higher education advance the same goal: To prevent the privilege afforded by whiteness and legacy from blocking the equal treatment of Black applicants.¹⁹ Why are such policies still needed? In the words of Justice Marshall:

[I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.²⁰

Marshall goes on to provide the factual and historical evidence to support his conclusion, stating that “it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. . . . Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.”²¹

In line with Justice Marshall and others,²² Justice Sotomayor rebuked the holding in *Fair Admissions*, writing, “the Court cements a superficial rule of color-blindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.”²³ Justice Ketanji Brown Jackson expressly rejected the notion of a color-blind Constitution as well, stating, “With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces ‘colorblindness for all’ by legal fiat. But deeming race irrelevant in law does not make it so in life.”²⁴

¹⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1978) (Marshall, J., concurring). The late Justice Thurgood Marshall provided the factual and historical evidence to support his conclusion, stating that “it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. . . . Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.” *Id.* at 398.

¹⁹ *See Harris*, *supra* note 17, at 1773.

²⁰ *Bakke*, 438 U.S. at 387.

²¹ *Id.* at 398.

²² Chief Justice Burger also questioned the extension of color-blind constitutionalism in remedying race discrimination. *See Fullilove v. Klutznick*, 448 U.S. 448, 482 (1980) (“As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly ‘color-blind’ fashion.”).

²³ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 318 (Sotomayor, J., dissenting).

²⁴ *Id.* at 407 (Jackson, J., dissenting).

The majority in *Fair Admissions* also failed to acknowledge the nexus between K–12 desegregation and its progeny, affirmative action and diversity, declaring “by legal fiat” and with finality that the consideration of race in college admissions is unconstitutional.²⁵ This rejection of race conscious admissions practices under the Equal Protection Clause of the Fourteenth Amendment by the Court requires a revisit to desegregation jurisprudence and practice to demonstrate why the considerations of race in higher education admissions fulfills the desegregation mandate. Given its rich history and contributions to the formation of equality norms and affirmative action, desegregation jurisprudence and practice provide a foundation for the premise that the use of race in college admissions constitutes a compelling state interest, supported by specific evidence of discrimination, that moves us closer to the democratization of education²⁶ and racial equality under the Fourteenth Amendment’s Equal Protection and Due Process Clauses.

Part I summarizes the jurisprudence of desegregation law in K–12 and higher education. The jurisprudence supports the rationale proffered in Part II for a compelling governmental interest—undergirded by evidence of the present effects of past discrimination in K–12 education traceable to *de jure* segregation—for considering race as a factor in college admissions.

²⁵ *Id.* at 230 (majority opinion); *id.* at 407 (Jackson, J., dissenting).

²⁶ While the democratization of education as a public good is not the focus of this Article, the author contends that achieving racial equality in education is essential for maintaining a strong democratic society. The Court in *Brown I* recognized the role of education in advancing our democracy and resisting autocratic leanings. The *Brown* Court characterized education as “the very foundation of good citizenship” and “a right which must be made available to all on equal terms.” 347 U.S. 483, 493 (1954). Scholars in various disciplines agree. See NAT’L EDUC. ASS’N & LAW FIRM ANTIRACISM ALL., THE VERY FOUNDATION OF GOOD CITIZENSHIP: THE LEGAL AND PEDAGOGICAL CASE FOR CULTURALLY RESPONSIVE AND RACIALLY INCLUSIVE PUBLIC EDUCATION FOR ALL STUDENTS 6–13 (2022), <https://www.nea.org/sites/default/files/2022-09/lfaa-nea-white-paper.pdf> [<https://perma.cc/WVR3-D96B>]. The Supreme Court has yet to recognize the right to education as fundamental. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19, 31, 35 (1972). But several state constitutions do recognize the right to education as fundamental. In the collection of essays, *A Federal Right to Education: Fundamental Questions for Our Democracy*, authors trace the history of arguments in support of a federal constitutional right to education going back to the premise announced in the early days of the Republic. See Martha Minow, “*The Whole People Must Take Upon Themselves the Education of the Whole People*,” Foreword to A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY, at vii (Kimberly Jenkins Robinson ed., 2019) (noting that education in a constitutional democracy is crucial to the “preparation for the responsibilities and opportunities of self-governance”). The authors agree that “a just society demands equal access to a high-quality education” because education is “the bedrock of a just society founded on democratic idea. Without this foundation, we forge a path towards our own failure.” Kimberly Jenkins Robinson, *An American Dream Deferred: A Federal Right to Education, Conclusion to A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 327, 334–35 (Kimberly Jenkins Robinson ed., 2019) (synthesizing the themes of the essays).

I. DESEGREGATION JURISPRUDENCE

A. Primary and Secondary Education

Desegregation jurisprudence in K–12 litigation is characterized by cycles²⁷: from declaring segregation based on race unconstitutional, to requiring desegregation to achieve integration, to retrenchment from integration, to resegregation, and to the path back to integration.²⁸

No clear statement came from the Supreme Court that *Brown* created a constitutional mandate for integration. After declaring segregation in public schools “inherently unequal” under the Fourteenth Amendment’s Equal Protection Clause,²⁹ the Supreme Court expected local school systems to “transition to a system of public education freed of racial discrimination . . . with all deliberate speed”³⁰ but on no established timetable. The Court’s pronouncements were met with resistance from school boards and local communities.³¹ Declarations were made that the adoption of anti-discrimination policies satisfied the constitutional principles of *Brown I* and the enforcement mandate of *Brown II*. For instance, in *Briggs v. Elliott*, the South Carolina case consolidated into *Brown I*, the District Court, on remand, concluded that *Brown I* did not require the states to mix children of different races.³² “The Constitution . . . does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action The Fourteenth Amendment is . . . not a limitation upon the freedom of individuals.”³³ Thus, there was no “deliberate speed,”³⁴ but judicial and political inaction.

Between 1955 and 1968, there was virtually no local or national effort to equate desegregation with integration as the means to end segregation or discrimination. Instead, the “freedom of choice” doctrine, wherein parents could choose whether to send their children to racially identifiable Black or white schools, justified maintaining

²⁷ Scott, *supra* note 5, at 1.

²⁸ See generally *Brown I*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 440 (1968); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Missouri v. Jenkins*, 551 U.S. 70 (1995); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

²⁹ *Brown I*, 347 U.S. at 495.

³⁰ *Brown II*, 349 U.S. at 299–301 (meaning “systematic and effective” removal of obstacles to non-discrimination “as soon as practicable”).

³¹ See, e.g., Leslie T. Fenwick, *The Ugly Backlash to Brown v. Board of Ed That No One Talks About*, POLITICO (May 17, 2022, 2:13 PM), <https://www.politico.com/news/magazine/2022/05/17/brown-board-education-downside-00032799> [<https://perma.cc/T7BW-YXTK>] (refusing to move Black teachers and principals to white schools).

³² See 132 F. Supp. 776, 777 (E.D.S.C. 1955).

³³ *Id.*

³⁴ *Brown II*, 349 U.S. at 299–301.

the status quo of segregated schools.³⁵ The failure of race neutral and color-blind policies, exemplified by the “freedom of choice” doctrine, to uproot racism and segregation ultimately required the Supreme Court to mandate integration.

Affirmative judicial action to end the continued operation of racially separate school systems rested on the extension of broad judicial authority to mandate remedies for the enforcement of *Brown*. In *Green v. County School Board of New Kent*,³⁶ the Supreme Court held that school boards 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.”³⁷ In *Swann v. Charlotte-Mecklenburg Board of Education*,³⁸ the Court set forth the prototype desegregation plan against which lower courts could measure the success of school boards in achieving unitary status and end racial discrimination.³⁹ As a result of the Court’s aggressive, albeit delayed, intervention, the number of racially integrated schools increased. Almost two hundred local school districts across the country were subject to either voluntary or court-ordered desegregation plans.⁴⁰ States outside of the South came under scrutiny by the Court as well and were ordered to desegregate.⁴¹

Schools in the South achieved relatively high levels of integration under Supreme Court mandates and civil rights regulations.⁴² Then came judicial retrenchment.⁴³ This period of judicial retrenchment began in 1974, and impeded the fragile

³⁵ See generally Richard W. Brown, *Freedom of Choice in the South: A Constitutional Perspective*, 28 LA. L. REV. 455 (1968).

³⁶ 391 U.S. 430, 440 (1968) (holding that freedom of choice plans alone are insufficient for school desegregation efforts); see also *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969) (restating the basic obligation to stop dilatory tactics and immediately implement plan to end racially identifiable schools within a dual system).

³⁷ *Green*, 391 U.S. at 437–38.

³⁸ 402 U.S. 1 (1971).

³⁹ See *id.* at 21–30.

⁴⁰ Halley Potter & Michelle Burris, *Here Is What School Integration in America Looks Like Today*, THE CENTURY FOUND. (Dec. 2, 2020), <https://tcf.org/content/report/school-integration-america-looks-like-today/> [<https://perma.cc/E7NA-55LE>].

⁴¹ See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 213–14 (1973) (extending the holdings of *Brown I* and *II*, and *Green* to segregated school systems even if they did not operate under state mandated segregation laws).

⁴² See Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, C.R. PROJECT, HARV. UNIV. (July 2001), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-of-resegregation/orfield-schools-more-separate-2001.pdf> [<https://perma.cc/NP76-S266>] (tracking the progress made in integrating public school system and the effect of retrenchment of judicial interventions).

⁴³ Cf. *The Civil Rights Cases*, 109 U.S. 3, 25–26 (1883) (regarding swift retrenchment from congressional efforts to legislate against racial discrimination under the Fourteenth Amendment following slavery).

progress towards integration. The apathy of President Nixon's administration toward integration manifested itself in its four Supreme Court Justice appointees, who significantly limited the Court's ability to integrate schools.⁴⁴ Judicial support for court-supervised integration plans quickly waned as the Rehnquist Court favored state over federal or judicial control.⁴⁵

In 1974, the Court decided *Milliken v. Bradley*.⁴⁶ *Milliken* involved the attempt of the Detroit City School Board to comply with a court-created desegregation order.⁴⁷ The school board faced a dilemma, however, because the majority of the school population was Black.⁴⁸ Thus, the Detroit school board proposed to incorporate the surrounding, virtually all-white, suburban school districts into its plan.⁴⁹ The central issue was whether a remedy to desegregate the Detroit city schools that extended the desegregation plan to include suburban school districts was in the scope of the district court's equitable powers.⁵⁰ In a 5–4 split decision, the Court found that the lower federal court had exceeded its constitutional authority by evaluating schools that had not been found in violation of the Constitution.⁵¹

⁴⁴ See Millhisser, *supra* note 15.

⁴⁵ See Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 1–2 (2004) (discussing that the Rehnquist Court limited federal power in favor of state power); Cass R. Sunstein, *The Rehnquist Revolution*, NEW REPUBLIC (Dec. 27, 2004), <https://newrepublic.com/article/64247/the-rehnquist-revolution> [<https://perma.cc/5GNC-7Y8F>] (describing the Rehnquist Court's goal to "strike down affirmative action programs . . . and stop the use of the equal protection clause to assist members of disadvantaged groups").

⁴⁶ 418 U.S. 717 (1974).

⁴⁷ Parents of students in Detroit schools and the Detroit branch of the NAACP brought a class action against the Detroit Board of Education, the Michigan State Board of Education, and various other state and local officials, alleging that the public school system was racially segregated because of official policies and state action. *Id.* at 721–22. The plaintiffs sought implementation of a plan to eliminate segregation and establish a unitary status school system. *Id.* at 722–23. At the time, most of the school-age population in Detroit was Black, while the majority of students in the surrounding suburban districts were white. *Id.* at 724–25.

⁴⁸ *Id.* at 726.

⁴⁹ After a lengthy trial, the district court concluded that the city and state had created and perpetuated school segregation. *Id.* at 724–25. The court ordered the board to submit a Detroit-only desegregation plan, as well as desegregation plans encompassing the three-county metropolitan area. *Id.* at 729–30. The school districts in these three counties were not parties to the action, and there was no claim that they had committed constitutional violations. *Id.* The court concluded that school district lines are designed for political convenience and may not be used to deny constitutional rights. *Id.* at 732–33. The court of appeals, affirming in part, held that the record supported the district court's finding as to the constitutional violations committed by city and state officials; that the district court was authorized and required to take effective measures to desegregate the school system; and that a metropolitan area plan embracing outlying districts was the only feasible solution within the district court's equity powers. *Id.* at 732–35.

⁵⁰ See *id.* at 721–22.

⁵¹ *Id.* at 744–45.

The Justices focused on the relationship between the remedy sought and the constitutional violations; the extension of the remedies to include suburban districts that had not been found in violation of *Brown*; the role of courts in developing desegregation remedies; and whether actions of local government should be considered those of the state.⁵² The Court characterized substantial local control of public education in this country as a deeply rooted tradition.⁵³ Therefore, the majority concluded that a federal court may not impose a multidistrict, area-wide remedy for single-district violations of the judicial mandates to integrate public schools in Detroit when there were no findings that the surrounding school districts had also operated dual school systems or committed intentional acts that advanced segregation within those districts.⁵⁴ Further, the Court made no finding that the school district boundary lines were established with the purpose of fostering racial segregation but did find that there was no meaningful opportunity for the neighboring school districts to present evidence or be heard.⁵⁵

After *Milliken*, the Supreme Court became even more deferential to local control,⁵⁶ even though local control without judicial supervision had historically stagnated desegregation. In the 1991 and 1992 terms, the Court relaxed the showing required from school districts to prove that they no longer maintained dual systems.⁵⁷ In *Board of Education v. Dowell*, Chief Justice Rehnquist wrote, “the important values of local control of public school systems” dominated over the need for racial integration.⁵⁸ Even if resegregation was the consequence of returning control to local authorities, the Court would consider the district “unitary” as long as there was no evidence of intent to resegregate.⁵⁹ The majority in *Dowell* held that schools under desegregation orders should be judged by their good faith effort to desegregate and that desegregation orders “are not intended to operate in perpetuity.”⁶⁰ Justice Thurgood Marshall dissented, predicting that the decision would lead to resegregation,⁶¹ which the Court would address sixteen years later in *Parents Involved in Community Schools v. Seattle School District No. 1*.⁶² Justice Marshall

⁵² *Id.* at 741, 743–45, 750–51.

⁵³ *Id.* at 741.

⁵⁴ *Id.* at 752.

⁵⁵ *Id.* at 721–22, 752.

⁵⁶ *But see* *Missouri v. Jenkins*, 515 U.S. 70 (1995) (rejecting a voluntary multi- and cross-district desegregation plan that urban and suburban schools agreed to under desegregation consent decree).

⁵⁷ *See* *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 245, 249 (1991) (holding that good faith is enough even if schools within the unitary system are still racially identifiable); *see also* *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (determining that partial compliance with court-ordered desegregation was enough to lift the order).

⁵⁸ 498 U.S. at 248.

⁵⁹ *Id.* at 248–49; *see Freeman*, 503 U.S. at 496.

⁶⁰ 498 U.S. at 248–49.

⁶¹ *See id.* at 266 n.10 (Marshall, J., dissenting).

⁶² *See* 551 U.S. 701, 711 (2007).

also rightly presaged that the re-emergence of racially separated schools would limit educational opportunities for Black children if school boards were no longer under legal compulsion to maintain desegregated school systems.⁶³ In the meantime, Black Americans began to question the efficacy of school integration.⁶⁴

The Supreme Court last spoke on the issue of K–12 school desegregation over sixteen years ago in *Parents Involved*.⁶⁵ The plurality opinion authored by Chief Justice Roberts would not extend the diversity rationale offered by local school boards to justify using race as part of the school assignment formula.⁶⁶ But a majority of the Justices concluded that avoiding resegregation or racially isolated schools constitutes a compelling state interest.⁶⁷ Moreover, the Roberts opinion acknowledged that when a constitutional violation can be traced to intentional segregation, the use of race constitutes a compelling state interest.⁶⁸

B. Higher Education

Before *Brown*, courts addressed the issue of segregated education at the higher education level.⁶⁹ Several states attempted to satisfy the separate-but-equal doctrine of *Plessy* by providing scholarships for Black Americans to attend out-of-state graduate schools.⁷⁰ In *Pearson v. Murray*, Donald Murray challenged Maryland's practice of providing scholarships for Black Americans to attend out-of-state law schools.⁷¹ The court found that the practice constituted a denial of equal protection and ordered Murray admitted to the University of Maryland Law School.⁷²

⁶³ Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 268 (1991) (Marshall, J., dissenting) (warning that removing the decree increases the risk of “not delivering a full remedy to the Afro-American children in the school system”).

⁶⁴ For example, Black parents joined the local school board to end court-ordered desegregation in DeKalb County, Georgia. *Freeman*, 503 U.S. at 484. The most cited critique came from the late Professor Bell who litigated school desegregation cases prior to entering the legal academy. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 516 (1976); see also Larry Tye, *U.S. Sounds Retreat in School Integration: America's Schools in New Segregation*, BOS. GLOBE (Jan. 5, 1992) (questioning the benefit to Black children of attending integrated schools); David Treadwell, *Seeking a New Road to Equality*, L.A. TIMES (July 7, 1992) (positing that busing exacted “too great a price” on Black children).

⁶⁵ See generally 551 U.S. 701 (2007).

⁶⁶ *Id.* at 830.

⁶⁷ Justice Kennedy joined Breyer and other dissenting justices to make a majority on the issue. See *id.* at 865 (Breyer, J., dissenting).

⁶⁸ *Id.* at 825.

⁶⁹ See, e.g., Wendy B. Scott, *McKissick v. Carmichael Revisited: Legal Education in North Carolina Through the Lens of Desegregation Jurisprudence*, 34 N.C. CENT. L. REV. 38, 55–57 (2011).

⁷⁰ *Id.* at 52–53.

⁷¹ 182 A. 590, 590–91 (Md. 1936); see Scott, *supra* note 69, at 53.

⁷² *Pearson*, 182 A. at 594.

In *Missouri ex rel. Gaines v. Canada*, the Supreme Court held that denying Gaines admission to the University of Missouri Law School violated the Equal Protection Clause and ordered Gaines admitted to the law school.⁷³ But in dicta, *Gaines* suggested that states could satisfy the Equal Protection mandate by creating separate-but-equal graduate programs within the state for Black Americans.⁷⁴ In response, several states established separate law schools for Black citizens.⁷⁵ North Carolina was one of those states.⁷⁶ In 1939, the state legislature opened a law school at what was then the North Carolina College for Negroes and continued to deny admission to the North Carolina University School of Law.⁷⁷ Oklahoma was another state that established a separate law school for Black students after the Supreme Court ordered the admission of Ida Sipuel Fisher into the University of Oklahoma Law School.⁷⁸ In response, Oklahoma created the Langston Law School.⁷⁹ Fisher refused to attend, but the Court affirmed the right of the state to establish a separate law school and deny Fisher admission to the University of Oklahoma.⁸⁰

In 1950, the Court decided two companion cases on racial segregation in higher education.⁸¹ Heman Marion Sweatt sought a writ of mandamus to compel various Texas state officials to admit him to the University of Texas Law School.⁸² The Court acknowledged that intangible qualities in higher education that “are incapable of objective measurement but which make for greatness,” such as reputation, influential alumni, and standing in the community could not be replicated overnight in a segregated school system.⁸³ The Supreme Court ordered Sweatt’s admission to

⁷³ 305 U.S. 337, 352 (1938).

⁷⁴ *Id.* at 345–46, 352 (“We are of the opinion that . . . petitioner was entitled to be admitted . . . in the absence of other and proper provision for his legal training within the State.”).

⁷⁵ See Heather Joinville, “Choose Your Goal, and Success is Yours. . . . Follow It, Even Though You May Never Reach It.”: Lloyd Gaines and the Case Against the University of Missouri, READ EX BLOG (Mar. 18, 2022), <https://www.readex.com/blog/choose-your-goal-and-success-yours-follow-it-even-though-you-may-never-reach-it-lloyd-gaines> [<https://perma.cc/WTT9-DFQZ>].

⁷⁶ See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South in the Decade After Brown*, 89 NW. L. REV. 92, 101 (1994).

⁷⁷ See *id.*; *The University of North Carolina School of Law: A Sesquicentennial History*, 73 N.C. L. REV. 563, 594 (1995).

⁷⁸ See *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631, 632–33 (1948) (per curiam).

⁷⁹ *Photo Essay: Ada Lois Sipuel Fisher*, OKLA. UNIV. COLL. L., <https://law.ou.edu/alumni/photo-essay-ada-lois-sipuel-fisher> [<https://perma.cc/MLB2-X29A>] (last visited Dec. 4, 2023).

⁸⁰ See *Fisher v. Hurst*, 333 U.S. 147, 150 (1948) (per curiam).

⁸¹ See generally *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950).

⁸² See *Sweatt*, 339 U.S. at 631; see, e.g., *McLaurin*, 339 U.S. at 638–40 (challenging the required isolation of McLaurin from white students while attending the university’s graduate program).

⁸³ *Sweatt*, 339 U.S. at 634. Following the decision, Texas created the Texas Southern

the University of Texas but declined to overrule *Plessy*.⁸⁴ However, these cases, from *Murray* to *Sweatt*, laid the groundwork for the Court to do so in *Brown* and establish the link between desegregation theory and practice in higher education, primary education, and secondary education.

The Supreme Court would revisit the “all deliberate speed” remedial issue of desegregation in higher education in 1992 in *United States v. Fordice*.⁸⁵ In *Ayers v. Allain*, the Fifth Circuit Court of Appeals affirmed a trial court ruling that Mississippi had abolished *de jure* segregation and implemented race-neutral policies for operating its system of higher education.⁸⁶ The Fifth Circuit also affirmed the finding that although the formerly *de jure* segregated Black institutions provide a more limited range of educational options than do predominantly white institutions, this limitation alone did not deny equal protection to plaintiffs.⁸⁷ The two lower courts concluded that any remaining racial identifiability could not be attributed to state action or policy.⁸⁸ Instead, they attributed the continued segregation to private conduct: the exercise of individual free choice.⁸⁹ The Supreme Court vacated the Fifth Circuit Court of Appeals decision that approved the continued existence of racially segregated systems of higher education.⁹⁰ The Court held that the lower courts had failed to apply the correct standard in ruling that Mississippi had brought itself into compliance with the Equal Protection Clause.⁹¹ The Court agreed that, “[t]he proper inquiry is whether ‘policies traceable to the *de jure* system are still in force and have discriminatory effects.’”⁹²

Part II makes the case that the lower enrollment of post-secondary school African American students in colleges and universities compared with white students is “traceable” to the continuing effects of *de jure* segregation that persist in K–12. This traceability justifies college admissions policies that take race into account as a remedial requirement of *Brown* and its progeny.

University, Law School for African Americans. See *History*, TEX. S. UNIV., <https://www.tsu.edu/about/history/> [<https://perma.cc/TV4U-AF8Z>] (last visited Dec. 4, 2023).

⁸⁴ *Sweatt*, 339 U.S. at 636.

⁸⁵ 505 U.S. 717, 721 (1992). For a detailed discussion of *Fordice*, see Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State’s Affirmative Duty to Provide Equal Educational Opportunity*, 60 TENN. L. REV. 63, 65, 73, 128–29 (1992).

⁸⁶ *Ayers v. Allain (Ayers III)*, 914 F.2d 676, 692 (5th Cir. 1990) (en banc), *rev’d*, *Ayers v. Allain (Ayers II)*, 893 F.2d 732 (5th Cir. 1990), *vacated sub nom.* *United States v. Fordice*, 505 U.S. 717 (1992).

⁸⁷ *Id.*

⁸⁸ See *id.* at 678, 688; *Ayers v. Allain (Ayers I)*, 674 F. Supp. 1523, 1558 (N.D. Miss. 1987), *aff’d en banc*, 914 F.2d 676 (5th Cir. 1990), *vacated sub nom.* *United States v. Fordice*, 505 U.S. 717 (1992).

⁸⁹ See *Ayers III*, 914 F.2d at 694 (Higginbotham, J., concurring); *Ayers I*, 674 F. Supp. at 1558.

⁹⁰ See *Fordice*, 505 U.S. at 743 (O’Connor, J., concurring).

⁹¹ *Id.*

⁹² W.R. Brown, *supra* note 85, at 65 n.2.

II. THE NEXUS BETWEEN CONTINUING K–12 DESEGREGATION AND RACE AS A FACTOR IN COLLEGE ADMISSIONS

A. *The Nexus*

In her dissenting opinion in *Fair Admissions*, Justice Sotomayor recognized the nexus between the nation’s history of structural racism, the *Brown* school desegregation mandate, and the consideration of race in higher education admissions.⁹³ She recognized that “the Court extended *Brown*’s transformative legacy to the context of higher education,”⁹⁴ and concluded that “*Bakke*, *Grutter*, and *Fisher* are an extension of *Brown*’s legacy.”⁹⁵ This nexus allowed colleges and universities “to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity.”⁹⁶ And while diversity jurisprudence is considered a legacy of *Brown*, the concept of diversity has no strong anchor in the effects of past discrimination. Therefore, remedial action to address the present effects of documented historic racial discrimination is a compelling governmental interest more grounded in the constitutional standard announced in *Brown* in the context of education⁹⁷ and economic empowerment.⁹⁸

Remedying the present effects of past racial discrimination through affirmative action can satisfy strict scrutiny when there is evidence to show particularized harm beyond societal discrimination. Section II.B provides the type of evidence that begins to establish a nexus between segregation in K–12 systems in several states, including North Carolina, and limited access for African Americans to higher education to provide justification for the consideration of race in admissions. The data in this Article is not intended to be exhaustive but to suggest that the mandate of *Croson* for particularized harm to justify remedial actions can be satisfied.⁹⁹

B. *The Evidence*

American public school systems that produce most African American college-age students, remain underfunded and segregated by race.¹⁰⁰ Therefore, the pipeline

⁹³ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 336–37 (2023) (Sotomayor, J., dissenting).

⁹⁴ *Id.* at 318.

⁹⁵ *Id.* at 332.

⁹⁶ *Id.* at 318.

⁹⁷ See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (eliminating the vestiges of past discrimination).

⁹⁸ *Fullilove v. Klutznick*, 448 U.S. 448, 455–56 (1980) (recognizing the role of the judiciary to remedy past racial and ethnic discrimination).

⁹⁹ For example, there were 178 open federal desegregation cases reported as of 2016. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-345, K–12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION (May 17, 2016), <https://www.gao.gov/products/gao-16-345> [<https://perma.cc/9L7F-ZRQC>].

¹⁰⁰ See generally *id.*; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 15 (conducting the

to college includes a considerable number of minority applicants who have experienced the present effects of *de jure* segregation.¹⁰¹

At the height of desegregation enforcement efforts, approximately 750 school districts were known to be under desegregation orders, which were eventually fortified with the strength of the federal government's purse strings attached.¹⁰² Desegregation orders eventually bore fruit, but this compliance with *Brown I* did not come quickly or easily, especially in the Southern states.¹⁰³ While *Brown II* required school systems to desegregate, the mechanism by which disenfranchised Black families could hold segregated schools accountable was to file a lawsuit—a task made more daunting by Jim Crow-era laws and the ever-present intimidation of the Ku Klux Klan.¹⁰⁴ Indeed, the first lawsuit challenging Mississippi's segregated public schools was not filed until 1963—nine years after *Brown II*.¹⁰⁵

Judges and attorneys who sought to enforce desegregation orders also endured significant resistance and violence.¹⁰⁶ Judge Frank Minis Johnson, Jr., a District Court judge for the Middle District of Alabama, was subject to death threats, cross burnings, and a firebomb for his rulings upholding the civil rights of Black Americans and *Brown II*'s order.¹⁰⁷ Judge John Minor Wisdom, a staunch opponent of segregation on the Fifth Circuit Court of Appeals stood firm in his judicial duty to enforce *Brown II*. He “wrote the majority opinion in *United States v. Jefferson County*, the case that, as he recalled, ‘really started affirmative action.’”¹⁰⁸

study because: “GAO previously reported that students who are poor, Black, and Hispanic generally attend schools with fewer resources and worse outcomes.”).

¹⁰¹ See, e.g., Ivy Morgan & Ary Amerikaner, *Funding Gaps 2018: An Analysis of School Funding Equity Across the U.S. and Within Each State*, EDUC. TR. (Feb. 27, 2018), <https://edtrust.org/resource/funding-gaps-2018/> [<https://perma.cc/UN9C-H6JU>]; Bruce D. Baker & Sean P. Corcoran, *The Stealth Inequities of School Funding: How State and Local School Finance Systems Perpetuate Inequitable Student Spending*, CTR. FOR AM. PROGRESS (Sept. 19, 2012), <https://www.americanprogress.org/article/the-stealth-inequities-of-school-funding/> [<https://perma.cc/8YS3-2V5K>].

¹⁰² See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15, at 7–10; see also Nikole Hannah-Jones, *Lack of Order: The Erosion of a Once-Great Force for Integration*, PROPUBLICA (May 1, 2014, 1:11 PM), <https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration> [<https://perma.cc/8YS3-2V5K>] (reporting that nearly 90% of Black children attend desegregated schools by the early 1970s).

¹⁰³ For example, five years after *Brown II*'s mandate, less than 1% of Nashville's Black students attended integrated schools. See Millhisier, *supra* note 15 (highlighting that only 12 out of 12,000 Black students attended integrated schools).

¹⁰⁴ *Id.*

¹⁰⁵ See *id.*

¹⁰⁶ See, e.g., JACK GREENBERG, *CRUSADERS IN THE COURTS* 97 (1994) (describing a “motorized mob” pursuing Black lawyers and reporters after a trial in Florida); KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF CIVIL RIGHTS LAWYERS* 129 (2012) (noting that Black civil rights lawyers walked “a fine line” to avoid violence from local officials in cases involving race).

¹⁰⁷ See Hannah-Jones, *supra* note 102.

¹⁰⁸ Jack Bass, *John Minor Wisdom, Appeals Court Judge Who Helped to End Segregation*,

By 1964, less than 2% of Black students in the South attended an integrated school.¹⁰⁹ In 1964, President Johnson signed the Civil Rights Act of 1964, which contained two provisions that gave teeth to desegregation orders.¹¹⁰ First, it allowed Attorneys General at the state level to initiate lawsuits against school systems that had not complied with *Brown II*, thus relieving private citizens of the burden of holding these systems accountable.¹¹¹ Second, it authorized the federal government to withhold federal funds from non-compliant school systems.¹¹² *Brown II* desegregation orders, despite the resistance fueled by racial animus, could now fulfill their promise.¹¹³

By the 1970s, nearly 90% of all Black students in the South attended desegregated schools, compared to 1% in 1963.¹¹⁴ These efforts had a profoundly positive effect on the academic success for Black students, most notably in the Southern United States.¹¹⁵ High school graduation rates for Black students in desegregated school increased 15% compared to rates before 1950.¹¹⁶ Similarly, Black students that attended desegregated schools were also more likely to attend some college.¹¹⁷ These effects persisted into the workplace, as twelve years of integrated schooling correlated to a 30% increase in annual salaries for Black students.¹¹⁸

Since the 1980s, though, efforts to enforce desegregation of our nation's public schools have stalled. Under President Reagan's administration, federal financial support for enforcement of desegregation orders was significantly cut.¹¹⁹ William Bradford Reynolds, the head of the Civil Rights Division of the Department of Justice stated that it would no longer "compel children who do not want to choose to have an integrated education to have one."¹²⁰ What remains in the absence of federal enforcement is the unfulfilled promise of *Brown*.¹²¹

Executive and judicial lethargy surrounding desegregation, combined with "freedom of choice" doctrines, has triggered (or at least allowed) resegregation.

Dies at 93, N.Y. TIMES (May 16, 1999), <https://www.nytimes.com/1999/05/16/us/john-minor-wisdom-appeals-court-judge-who-helped-to-end-segregation-dies.html> [<https://perma.cc/SW7W-JV22>].

¹⁰⁹ See Millhisser, *supra* note 15.

¹¹⁰ See Civil Rights Act of 1964, 42 U.S.C. §§ 2000c to 2000d-4.

¹¹¹ See *id.* at § 2000c-6.

¹¹² See *id.* at § 2000d-1; Hannah-Jones, *supra* note 102.

¹¹³ See Hannah-Jones, *supra* note 102.

¹¹⁴ *Id.*

¹¹⁵ See Garrett Anstreicher et al., *The Long Run Impacts of Court-Ordered Desegregation* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29926), https://www.nber.org/system/files/working_papers/w29926/w29926.pdf [<https://perma.cc/736Y-3A8H>].

¹¹⁶ *Id.* at 23.

¹¹⁷ *Id.* at 17.

¹¹⁸ *Id.*

¹¹⁹ See Hannah-Jones, *supra* note 102.

¹²⁰ *Id.*

¹²¹ See *id.*

Since 1988, the percentage of Black students attending majority white schools has declined dramatically.¹²² In addition, the percentage of white students attending public schools in the United States has dropped significantly since 2010.¹²³ Not surprisingly, private school students in the United States are disproportionately white, a product of avoidance of integrated schools in the 1950s and 1960s.¹²⁴ Forty-three percent of American private school students attended “virtually all-white” schools, defined as schools where over 90% of students are white.¹²⁵ This association does not stop at private schools. Almost 80% of white public-school students attend a school where they are the majority population.¹²⁶

C. Getting Particular

In *Fair Admissions*, Justice Sotomayor pointed to the “deeply entrenched” racial inequality in North Carolina’s K–12 education,¹²⁷ a state whose higher education system was subject to scrutiny by the Court. Over 99% of Black students in North Carolina remained in segregated schools in 1960.¹²⁸ When the school district in Pitt County, North Carolina adopted a new zoning plan that reassigned some white students to predominately Black schools in 2005, white parents reacted by removing their children from the school district.¹²⁹ A 2009 settlement agreement seemingly resolved the issue, allowing the zoning plan to move forward but “reiterating the district’s continued desegregation obligations under earlier orders” from 1965.¹³⁰

¹²² See Millhisser, *supra* note 15.

¹²³ See *Racial/Ethnic Enrollment in Public Schools*, NAT’L CTR. FOR EDUC. STATS. (May 2023), <https://nces.ed.gov/programs/coe/indicator/cge/racial-ethnic-enrollment> [https://perma.cc/R84H-NXPM].

¹²⁴ See Emma Brown, *The Overwhelming Whiteness of U.S. Private Schools*, in *Six Maps and Charts*, WASH. POST (Mar. 29, 2016, 7:00 AM), <https://www.washingtonpost.com/news/education/wp/2016/03/29/the-overwhelming-whiteness-of-u-s-private-schools-in-six-maps-and-charts/> [https://perma.cc/J9RZ-D4VC]; James S. Murphy, *The Real College Admissions Scandal*, SLATE (June 14, 2021, 11:44 AM), <https://slate.com/news-and-politics/2021/06/private-schools-competitive-college-advantage-problems.html> [https://perma.cc/ZVA9-E54V].

¹²⁵ See E. Brown, *supra* note 124.

¹²⁶ Katherine Schaeffer, *U.S. Public School Students Often Go to Schools Where at Least Half of Their Peers Are the Same Race or Ethnicity*, PEW RSCH. CTR. (Dec. 15, 2021), <https://www.pewresearch.org/short-reads/2021/12/15/u-s-public-school-students-often-go-to-schools-where-at-least-half-of-their-peers-are-the-same-race-or-ethnicity/> [https://perma.cc/HH8Z-XLEW].

¹²⁷ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 336 (2023) (Sotomayor, J., dissenting) (citing to 2020 and 2022 opinions in the ongoing litigation of *Hoke County Board of Education v. State*).

¹²⁸ See *id.* (highlighting that only 40 out of 300,000 Black students attended integrated schools).

¹²⁹ See *id.*

¹³⁰ See Sharon McCloskey, *In a Split Decision, Fourth Circuit Releases Pitt County*

However, a 2011 zoning plan from Pitt County reversed course and actually increased segregation in some majority Black schools.¹³¹ After a series of legal battles, the desegregation order for Pitt County was lifted by a 2–1 decision from the Fourth Circuit Court of Appeals in 2015.¹³² While Justice Diaz, writing for the majority, emphasized the importance of local control over school districts and the administratively inactive status of the order for over thirty-five years,¹³³ Justice Wynn dissented, stating:

[I]n 2013, the Board did not dispute that it had yet to obtain unitary status and thus had a duty to eliminate the vestiges of past discrimination and demonstrate good faith compliance with prior desegregation orders. Our words, it would appear, have fallen upon deaf ears Our consideration of this case does not occur in a vacuum. The rapid rate of de facto resegregation in our public school system in recent decades is well-documented Today the majority upholds the Board’s promulgation of a student assignment plan that, Appellants argue, furthers this trend.¹³⁴

In Yancey County, North Carolina, a desegregation order from 1960 remained in force until at least 2014.¹³⁵

Similarly, St. Martin Parish in Louisiana remained under a desegregation order until 2010.¹³⁶ In that case, the order was deemed fulfilled as a function of time, a judicial determination often asserted to “clean[] up” rosters of old desegregation cases.¹³⁷ The desegregation order for the Gadsen, Alabama school system was lifted in 2000, despite the fact that the district operated a “90-percent [B]lack high school,

Schools from Desegregation Orders, NC NEWSLINE (June 4, 2015, 12:01 PM), <https://ncnewsline.com/2015/06/04/in-a-split-decision-fourth-circuit-releases-pitt-county-schools-from-desegregation-orders/> [https://perma.cc/3RVP-CTR7].

¹³¹ *See id.*

¹³² *See id.*; *Everett v. Pitt Cnty. Bd. of Educ.*, 788 F.3d 132 (4th Cir. 2015).

¹³³ *See Everett*, 788 F.3d at 140, 149.

¹³⁴ *Id.* at 150–51 (Wynn, J., dissenting).

¹³⁵ *See Hannah-Jones*, *supra* note 102.

¹³⁶ *Id.* Other school districts in Louisiana remained under court supervised desegregation orders after 2010. *See, e.g.*, Noel Brinkerhoff & Danny Biederman, *48 Years After It Was Supposed to Desegregate, Louisiana School District Is Given 3 More Years of Federal Supervision*, ALLGOV (May 29, 2015), <http://www.allgov.com/news/controversies/48-years-after-it-was-supposed-to-desegregate-louisiana-school-district-is-given-3-more-years-of-federal-supervision-150529?news=856599> [https://perma.cc/6DR3-3SBC]; *Separate and Unequal: School Segregation in Louisiana 65 Years After Brown v. Board*, LA. BUDGET PROJECT (May 17, 2019), <https://www.labudget.org/2019/05/separate-and-unequal-school-segregation-in-louisiana-65-years-after-brown-v-board/> [https://perma.cc/7GS6-MVKJ] (reporting that 23 out of 69 school districts under desegregation orders in 2018).

¹³⁷ *Id.*

hadn't adopted any specific policies to address segregation, and had refused to consider removing the name of Ku Klux Klan founder Nathan Bedford Forrest from one of its schools."¹³⁸ Here, U.S. District Court Judge William Acker declined to order the school district to comply more completely with the desegregation order, as it would "only invite another dispute," and race relations in Gadsden were more progressive than those in Northern Ireland or Kosovo.¹³⁹

The worst offender in terms of non-compliance, or outright defiance, of desegregation orders is the State of Mississippi,¹⁴⁰ which has the highest percentage of Black public school students of any state and where 87% of white school-age children attend private schools.¹⁴¹ As of June 2023, Mississippi had thirty-two outstanding desegregation orders for school districts.¹⁴² One such order, for Cleveland, Mississippi, was issued in 1965, yet the racial composition of the town's schools remains largely frozen in time.¹⁴³ In 2015, 359 of the 360 (99.7%) students at Cleveland's East Side High School were Black, similar to its makeup in 1972.¹⁴⁴ An investigator hired by the Department of Justice reported in 2009 that, compared to its majority-white schools, Cleveland, Mississippi's majority Black schools were inferior in both curriculum and facilities.¹⁴⁵ Eventually, District Court Judge Deborah Brown approved a settlement to begin the consolidation of the racially identifiable district schools.¹⁴⁶

D. The Present Effects of Past Discrimination

The American public school systems that produce the majority of African American college-age students, remain largely underfunded and segregated by

¹³⁸ *Id.*

¹³⁹ *Id.* The Eleventh Circuit overruled Judge Acker's decision, and a 2005 settlement agreement resulted in the eventual termination of the order. *Id.*

¹⁴⁰ See Dennis J. Mitchell, *Education in Mississippi: A Brief History from 1820 to the Creation of the State's First Statewide Public Education System*, 36 MISS. COLL. L. REV. 289, 297–98 (2018) (chronicling the rise and fall of public education for whites and Black people after the Civil War).

¹⁴¹ See E. Brown, *supra* note 124 (reporting the school-age population in Mississippi as 51% white and 48% Black in 2012).

¹⁴² Michael Goldberg, *32 Mississippi School Districts Still Under Federal Desegregation Orders*, APNEWS (June 1, 2023, 6:51 PM), <https://apnews.com/article/mississippi-civil-rights-violations-desegregation-federal-ef52788ed24dc0965b4bc788b4dcd546> [<https://perma.cc/R6ZD-3NVV>].

¹⁴³ See *Cowan v. Bolivar Cnty. Bd. of Educ.*, 186 F. Supp. 3d 564 (N.D. Miss. 2016).

¹⁴⁴ Sharon Lerner, *A School District That Was Never Desegregated*, THE ATLANTIC (Feb. 5, 2015), <https://www.theatlantic.com/education/archive/2015/02/a-school-district-that-was-never-desegregated/385184/> [<https://perma.cc/SC8H-P45U>].

¹⁴⁵ See *id.*

¹⁴⁶ Press Release, Cleveland School District to Open Consolidated Middle and High Schools by August 2017 (Mar. 13, 2017), <https://www.justice.gov/opa/pr/court-approves-desegregation-plan-cleveland-mississippi-schools> [<https://perma.cc/DUW5-GY6W>].

race.¹⁴⁷ Therefore, the pipeline to college includes a significant number of minority applicants who have experienced the present effects of *de jure* segregation.¹⁴⁸

Despite the Supreme Court's mandate for lower federal courts to require desegregation "with all deliberate speed,"¹⁴⁹ integration remains largely elusive in the current American public school system.¹⁵⁰ In 2020, researchers examined the integration efforts of 907 American public school districts and found that almost 80% (722) of those districts were "subject to a desegregation order or voluntary agreement with a federal or state court or agency."¹⁵¹ Dormant desegregation orders have allowed segregated school systems to persist for decades, and unfortunately, even the resurrection of these orders has not yielded action.¹⁵²

Racially motivated community development, school districting, and funding mechanisms tied to property values have resulted in students of color having a vastly different academic experience than their age-matched white peers. Public high schools offer vastly different levels of resources and opportunities for its students, and over three times as many Black students live in poverty and attend "high poverty" schools compared to white peers.¹⁵³ Black students were significantly more likely to rely on internet access from their mobile device rather than a household internet service, a significant barrier in today's highly technological environment.¹⁵⁴ Compared to Black students, white students are almost twice as likely to live in a household where at least one guardian has a bachelor's degree.¹⁵⁵ Moreover, documented racial segregation in K–12 adversely impacts college readiness among Black high school students by limiting access to required courses and other academic offerings.¹⁵⁶ And

¹⁴⁷ See generally *id.*; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15 (conducting the study because: "GAO previously reported that students who are poor, Black, and Hispanic generally attend schools with fewer resources and worse outcomes.").

¹⁴⁸ See, e.g., Morgan & Amerikaner, *supra* note 101; Baker & Corcoran, *supra* note 101.

¹⁴⁹ *Brown II*, 349 U.S. 294, 301 (1955).

¹⁵⁰ See Schaeffer, *supra* note 126 (finding that 79% of white students, 56% of Hispanic students, and 42% of Black students go to schools where half or more of their peers were the same race as them).

¹⁵¹ Potter & Burris, *supra* note 40.

¹⁵² *Educational Opportunities Cases*, U.S. DEP'T OF JUST. C.R. DIV., <https://www.justice.gov/crt/educational-opportunities-cases> [<https://perma.cc/7NZF-BNHU>] (last visited Dec. 4, 2023) (listing partially "unitary" school districts under desegregation orders).

¹⁵³ *Black Students in the Condition of Education 2020*, NAT'L SCH. BDS. ASS'N (June 23, 2020), <https://www.nsba.org/Perspectives/2020/black-students-condition-education> [<https://perma.cc/NKA7-5WB5>]; see also Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 WASH. U. J.L. & POL'Y 117, 151 (2012) (describing how the advent of charter schools exacerbates the concentration of minority students in high poverty, low performing schools, "returning us to the days of legal segregation").

¹⁵⁴ *Black Students in the Condition of Education 2020*, *supra* note 153.

¹⁵⁵ *Id.*

¹⁵⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-8, K–12 EDUCATION: PUBLIC HIGH SCHOOLS WITH MORE STUDENTS IN POVERTY AND SMALLER SCHOOLS PROVIDE FEWER

in her dissenting opinion in *Fair Admissions*, Justice Sotomayor showed that disproportionate discipline, limited early childhood education, the likelihood of being a first-generation student, and housing segregation provide evidence to support remedial interventions to remedy the present effects of past discrimination.¹⁵⁷

Segregated K–12 systems result in racial divisions in higher education. In 1986, over 99% of the white undergraduate students in Mississippi were enrolled in majority white institutions and over 71% of the Black students were enrolled in majority Black institutions.¹⁵⁸ In Louisiana, the enrollment at the predominantly Black colleges and universities ranged from 90% to 98% Black in 1987, while whites ranged from 60% to 95% of the student enrollment in predominantly white institutions.¹⁵⁹ Despite the slight increase in statewide Black enrollment, the predominantly white institutions had fewer Black students enrolled in 1987 than in 1981; the predominantly Black schools showed “only a negligible increase in white enrollment” during that same time period.¹⁶⁰

Given the provable connection between public high schools and the colleges that attract significant numbers of applicants from underrepresented populations,¹⁶¹ equitable representation on college campuses will not occur until the Court agrees

ACADEMIC OFFERINGS TO PREPARE FOR COLLEGE (Oct. 26, 2018), <https://www.gao.gov/products/gao-19-8> [<https://perma.cc/8YV3-YDCH>]. In recognition of the preparation gaps universities are intervening to address the performance gap. *See, e.g., UC System to Offer Online Classes to Low-Income High Schools*, INSIGHT INTO DIVERSITY (Sept. 27, 2023), <https://www.insightintodiversity.com/uc-system-to-offer-online-classes-to-low-income-high-schools/> [<https://perma.cc/7N6G-3MSS>].

¹⁵⁷ *See* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 335–36 (2023) (Sotomayor, J., dissenting).

¹⁵⁸ *See Ayers II*, 893 F.2d 732, 735 (5th Cir. 1990), *rev’d en banc*, 914 F.2d 676 (5th Cir. 1990), *aff’d*, *United States v. Fordice*, 505 U.S. 717 (1992).

¹⁵⁹ *United States v. Louisiana*, 692 F. Supp. 642, 645 (E.D. La. 1988).

¹⁶⁰ *See id.* at 645, 657–58 (finding that Louisiana is continuing to operate an unlawful dual system of public higher education in violation of Title VI). Judge Schwartz continued to work towards a resolution, calling the separate but equal system of higher education in Louisiana “an anachronism that our society no longer tolerates.” Frances Frank Marcus, *Desegregation Order in Louisiana Is Rejected*, N.Y. TIMES (Dec. 12, 1993), <https://www.nytimes.com/1993/12/12/us/desegregation-order-in-louisiana-is-rejected.html> [<https://perma.cc/6WSA-JV7F>] (noting the opposition of white and Black parties).

¹⁶¹ A recent study shows that the Court’s ruling in *Fair Admissions* affects a small number of colleges with selective admissions criteria. *See* Audrey Williams June & Jacquelyn Elias, *The Supreme Court’s Admissions Ruling Mainly Affects Selective Colleges. They’re a Tiny Slice of Higher Ed.*, CHRON. HIGHER EDUC. (June 30, 2023), <https://www.chronicle.com/article/the-supreme-courts-admissions-ruling-mainly-affects-selective-colleges-theyre-a-tiny-slice-of-higher-ed> [<https://perma.cc/6RYN-XC3Y>]. The study defines “selective colleges” as schools that admit less than 25% of applicants. Of the 3,160 two- and four-year colleges in the study only 68 (2%) are selective colleges. *Id.* Colleges that admit 25% or more enroll larger numbers of “underrepresented minorities” defined to include Black, Hispanic, Asian, Multiracial, American Indian, and Native Hawaiian/Pacific Islanders. *Id.*

that the particularized evidence of inequality in public school systems, traceable to the perpetuation of unconstitutional segregation, justifies race conscious college admission policies.

CONCLUSION

The strong provable nexus between the continued racial identifiability of K–12 school systems across the country and the corresponding absence of African Americans enrolled in institutions of higher education goes beyond societal discrimination. The evidence justifies the remedial use of race to remedy the effects of the past and present discrimination that has created the nexus. W.R. Brown admonished that, “[n]arrowing the scope of the Equal Protection Clause in school desegregation litigation, which has long held a unique place in constitutional jurisprudence and in the historical struggle to end invidious discrimination, would have a far-reaching impact.”¹⁶² *Fair Admissions* has embraced a narrow view that even Justice Scalia would question.¹⁶³ Rather than honoring the legacy of *Brown*, *Fair Admissions* harkens back to the idea in *Plessy* that racial equality can derive from inequality. Even the idea of color-blind constitutionalism was tainted by the ideology of racial supremacy.¹⁶⁴ The majority opinion in *Fair Admissions* carries this ideological taint.

¹⁶² W.R. Brown, *supra* note 85, at 70–71.

¹⁶³ Justice Scalia singled out school desegregation litigation as one of the few areas where race can be considered as a factor to “‘undo the effects of past discrimination’ . . . to eliminate [the state’s] own maintenance of a system of unlawful racial classifications.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring). He explained:

This [race neutral/race conscious] distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies. While there is no doubt that those cases have taken into account the continuing “effects” of previously mandated racial school assignment . . . we have concluded, in that context, that they perpetuate a “dual school system.” We have stressed each school district’s constitutional “duty to *dismantle* its dual system,” and have found that “[e]ach instance of a failure or refusal to fulfill this affirmative duty *continues the violation* of the Fourteenth Amendment.”

Id.

¹⁶⁴ In the same breath with which he pronounced, “[o]ur Constitution is color-blind,” Harlan wrote:

The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Plessy v. Ferguson, 163 U.S. 532, 559 (1896) (Harlan, J., dissenting).

As long as racial inequality exists in American public schools, we will never achieve racial equality in higher education being blind to color.

Moreover, the world is watching. A recent article reaffirms that:

More than 60 years after the *Brown vs. Board of Education* sentence, the topic of school segregation not only remains an important area of educational research but has gained momentum in recent decades. Globalization has undoubtedly impacted this renaissance in school segregation studies . . . [O]ur conclusion is that the available evidence provides solid grounds for considering school segregation by race, social class and ethnicity as a problem of enormous relevance, which should become a priority on educational policy agendas . . . [to create] a shared vision of educational policy radically oriented towards socio-educational equity.¹⁶⁵

American school systems should participate in the “renaissance” of concern for ensuring racial equality in education on the global stage. *Fair Admissions* left open the opportunity to do so by recognizing the nexus between K–12 desegregation cases, that remain live constitutional controversies, and the constitutionally permissible use of race in college admissions to finally completing the unfinished business of desegregation.

¹⁶⁵ Xavier Bonal & Cristian Bellei, *School Segregation in Times of Globalization: Research and Policy Challenges*, in EDUCATIONAL MARKETS AND SEGREGATION: GLOBAL TRENDS AND SINGULAR EXPERIENCES FROM BELGIUM AND CHILE 57, 59, 75 (Vincent Dupriez et al. eds., 2023).