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Perspectives on Brown: The South African Experience

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PERSPECTIVES ON *BROWN*: THE SOUTH AFRICAN EXPERIENCE

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It is no mistake that our Constitution uses the phrase "achievement of equality." The tremendous indignity and political oppression that characterized the years of apartheid was coupled with the systemic entrenchment of economic disadvantage for millions of South Africans. The vast majority of this country's wealth remained then and remains still, as a consequence of the entrenched disadvantage, in the hands of a minority . . . . The use of the phrase 'achievement of equality' therefore recognizes that the creation of democracy and equal treatment before the law are not enough to foster substantive equality.[1]

INTRODUCTION

When *Brown*[2] was decided in 1954, South Africa was in the throes of apartheid governance.[3] The white minority government was barely a decade old and very confident and secure about the validity — legally and morally — of its laws and policies. In short, the doctrine of racial supremacy was fairly well entrenched.[4] By the end of the 1950s, the majority black population had been disen-

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1. Minister of Finance & Anor v. Van Heerden, 2004 (3) AllSA 63 (CC) at paragraph 73 (Opinion of Mokgoro).

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

3. The Nationalist Party came to victory in South Africa in 1948 with a policy of commitment to racial segregation. Laws were enacted that expressly gave effect to the purposes of racial distinction, subordination and discrimination. For example, the Population Registration Act classified the population according to race and ancestry. The Group Areas Act was promulgated to segregate residential areas according to the various racial categories and the Prohibition on Mixed Marriages Act forbade the intermarriage between white and black South Africans. Apartheid (meaning separateness) was the official ideology of the government from 1948 until 1994 when South Africa held its first democratic elections. *See* INT'L DEF. AND AID FUND FOR SOUTHERN AFR., APARTHEID: THE FACTS (1983); *see also* NIFEL WORDEN, THE MAKING OF MODERN SOUTH AFRICA: CONQUEST, SEGREGATION AND APARTHEID (2000).

4. LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA (3d ed. 2001); *see also* ALISTER SPARKS, THE MIND OF SOUTH Africa (1990).

franchised and widespread public opposition to apartheid effectively stifled.[5] In sharp contrast to legal developments in the United States, where the possibilities of racial integration and racial equality were at least surfacing, South Africa was moving in a different direction. As one of South Africa's most prominent human rights lawyers has commented:

> While your lawyers were preparing *Brown v. Topeka*, we took the opposite direction. . . In 1953, the apartheid regime, which was in power from 1948 until 1994, implemented the Bantu Education Act, legislation denying African people in South Africa an education that would enable them to become more than hewers of wood and drawers of water.[6]

A decision like *Brown* in 1954 therefore appeared distant and almost irrelevant. But despite the grim political reality of South Africa in 1954, the symbolic meaning of *Brown* cannot be overstated. *Brown*'s significance, albeit symbolically for forty years, was tremendously important as South Africans in the 1990s began to embark on negotiations that would lead the country towards non-racialism and democracy.[7] The rhetorical power of *Brown*, seen by many as an unequivocal rejection of notions of racial superiority and racial inferiority, provided succor to those in South Africa who believed that a societal route towards racial equality was possible.[8]

This paper views the meaning of *Brown* as three-fold. First, *Brown* represented the repudiation of racial discrimination on legal or constitutional grounds. Second, it furnished a model of public interest lawyering for South Africans who wanted to challenge unjust laws in the courts.[9] Third, *Brown* reiterated the importance

5. JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978).

6. Alison Thompson & Elizabeth Omara-Otunnu, *Lawyers Reflect on "Ties that Bind," South Africa, U.S.*, ADVANCE ON THE WEB (May 6, 2002), *at* http://www.advance.uconn.edu/2002/020506/02050602.htm.

7. ALISTER SPARKS, TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFIRCA'S ROAD TO CHANGE (1995).

8. Thompson & Omara-Otunnu, *supra* note 6. "George Bizos, a leading human rights lawyer . . . said the United States had a significant influence on the struggle in his country: 'We as lawyers followed the example of many of your lawyers and what they were doing, especially in the 1950s.'"

9. George Cooper, *Public Interest Law – South African Style*, 11 COLUM. HUM. RTS. L. REV. 106 (1980).

of non-discriminatory education in a democracy. In this paper I examine the lessons of *Brown* for the South African struggle for racial equality, South Africa's constitutional transition and the significance of *Brown* in pursuing the right to education in South Africa. I conclude that although *Brown* was of tremendous symbolic value to South Africans, the South African constitutional framework, negotiated in the early 1990's, reflected global human rights developments more substantially than it did the American civil rights struggle.[10] This is demonstrated by the mandate of the South African Constitution to consider international law[11] and by the limited references to *Brown* by the Constitutional Court[12] in comparison to the court's citation of international legal materials.[13] *Brown's* waning substantive influence may also be attributed to the different path towards non-racialism taken by South Africans in contrast to the civil rights struggle in the United States.[14]

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10. Several reasons account for this, most notably the contested nature of the gains of the civil rights movement in the U.S. For a thorough exploration of these issues see, Michael Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279 (2005); *see also* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1976).

11. The South African Constitution requires a court to consider international law when interpreting the Constitution. S. AFR. CONST. § 39 (1) (b) (1996).

12. *See, e.g., In re* The School Education Bill of 1995, 1996 (4) BCLR 537 (CC); Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC); S. v. Jordan and Others 2002 (6) SA 642 (CC). It is worth noting that the Constitutional Court does not cite *Brown* in many cases involving education and in none of the racial equality cases.

13. *See, e.g.*, S. v. Makwanyane and Another CCT, 1995 (3) SA 94 (CC); S. v. Baloyi and Others 2000 (1) BCLR 86 (CC); Carmichele v. Minister of Safety and Security and Another, 2001 (4) SA 938 (CC); Government of RSA and Others v. Grootboom and Other, 2001 (1) SA 46 (CC); Minister of Health and Others v. Treatment Action Campaign and Other 2002 (5) SA 721 (CC).

14. For an interesting discussion on the divergences of strategy in the South African struggle for racial equality as compared to the American civil rights movement see Alan Wieder, *Nonracialism as an Educational and World View: Lessons from South African Teachers*, 90 CORNELL L. REV 505 (2005). On a visit to South Africa in January 2005, I raised with colleagues, during informal discussions, the question of *Brown* and its significance during the constitutional negotiations. The responses seemed to suggest that the American civil rights movement might have been a significant backdrop against which the constitutional negotiations occurred, but that neither *Brown* nor the civil rights movement featured at all. Indeed, none of the prominent accounts of the negotiations by the protagonists mention *Brown*. The accounts of Cyril Ramaphosa (chief negotiator for the African National Congress, the governing party post-1994) and Roelf Meyer (chief negotiator for the Nationalist Party, the party of apartheid) are outlined in

I. LESSONS FOR SOUTH AFRICA

In 1990, after the release of President Nelson Mandela from prison, and particularly in the years preceding the first democratic elections in 1994, South Africa could cast a fresh eye, not just on *Brown* and its progeny, but indeed the civil rights struggle of the United States.[15] By 1990, the possibilities generated by *Brown* and many of the impediments to *Brown* had been played out in this country. Despite *Brown's* outlawing of racial segregation, the tensions between *de facto* racial segregation and growing economic inequality reflect an incomplete social revolution.[16] Indeed, it has been noted that "*Brown* has gained in reputation as a measure of what law and society might be."[17]

Despite impressive civil rights gains, not just for African-Americans, but for other racial minorities and women as well, in some respects the struggle for racial equality in the United States served as a cautionary tale for South Africa. For even though the gains of the civil rights movement are apparent fifty years later, there still appears to be no national consensus about what a racially equitable society should look like, and more importantly, the path to be chosen.[18] Some scholars have argued, for example, that there are still too many Americans who appear not to be persuaded about the

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THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW (Penelope E. Andrews & Stephen Ellmann eds., 2001). However, Ms. Faranaaz Veriava, a lecturer in law at the University of the Witwatersrand in Johannesburg, stated that in the last few yeaers *Brown* has been referred to in "all the academic literature" that analyzes the education clause in the Constitution. What is most relied upon by these commentators is the section of the judgment discussing the value of education. (Private correspondence between the author and Ms. Veriava.)

15. Commencing in 1990, a significant number of American and other foreign lawyers traveled to South Africa to consult with public interest lawyers there about America's attempts at racial integration. *See, e.g.*, UNIV. OF THE W. CAPE & AFR. NAT'L CONG., AFFIRMATIVE ACTION IN A NEW SOUTH AFRICA: THE APARTHEID LEGACY AND COMPARATIVE INTERNATIONAL EXPERIENCE (1992); *see also* THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE (Sandy Liebenberg ed., 1995).

16. *See* CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004).

17. Derrick Bell, *The Real Lessons of a 'Magnificent Mirage'*, THE CHRONICLE REVIEW, THE CHRONICLE OF HIGHER EDUCATION, Apr. 2, 2004, at B10.

18. For a thoughtful exploration of the difficulties of race-based determinations for benign purposes, see Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimnation Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004). *See also* Linda Greene, *Race in the Twenty-First Century: Equality Through Law?, in* CRITICAL

benefits of a society in which notions of racial superiority and inferiority have been discarded.[19]

South Africans also witnessed in the decades since *Brown* how increasingly the struggle for racial equality has been hijacked at both the philosophical/rhetorical level and the practical one.[20] Indeed, it is arguable that the very notion of equality has been stripped of its intended purpose (redress for past injustice)[21] and distorted to pursue aims which do not necessarily comport with those of the earlier architects of the civil rights movement here.[22] This is most pronounced in the struggle around affirmative action where in the final analysis, a divided Supreme Court has allowed diversity to remain as the central rationale for the continuance of affirmative action programs.[23]

Indeed, a skeptical South African public witnessed the rather rancorous battle around affirmative action in the United States and competing claims of "victimhood" that sometimes formed the subtext of the conflict.[24] These unresolved tensions no doubt influenced the decision to include affirmative action in the South African Constitution and shield it from constitutional challenge.[25] Modeling the provision for affirmative action on that contained in

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RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 292 (Kimberle Crenshaw et al. eds. 1995).

19. ELLIOT COSE, THE RAGE OF A PRIVILEGED CLASS (1995); *see also* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

20. *See* Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001).

21. *See* Taunya Banks, Brown *at 50: Reconstructing* Brown*'s Promise*, 44 WASHBURN L.J. 31 (2005). In her article Professor Banks points out that education was used as a vehicle to attack racial segregation laws. Civil rights lawyers also used *Brown* to strike down other segregation laws.

22. *Id. See also* Neil Gotanda, *A Critique of "Our Constitution is Colour Blind,"* *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257.

23. Grutter v. Bollinger, 539 U.S. 306 (2003).

24. *See generally* THE AFFIRMATIVE ACTION DEBATE (George E. Curry ed. 1996); *see also* STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES (1996).

25. In *Minister of Finance & Anor v. Van Heerden*, 2004 (3) AllSA 63 (CC), the Constitutional Court upheld section 9 (1) of the Bill of Rights (the affirmative action provision). The case involved a challenge to employer contributions to a pension fund that attempted to equalize the pensions of senior members of parliament (mostly White) and their junior counterparts (mostly Black). The parity provisions were instituted to deal with the legacy of apartheid, in which most Black parliamentarians would inevita-

both the International Convention on the Elimination of All Forms of Racial Discrimination[26] and the Convention on the Elimination of All Forms of Discrimination Against Women,[27] the Bill of Rights provides that: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."[28]

II. THE SOUTH AFRICAN CONSTITUTION AND EQUALITY

The South African Constitution centers equality as the primary principle and states that, "everyone is equal before the law and has the right to equal protection and benefit of the law."[29] The Bill of Rights outlaws both direct and indirect discrimination on several grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[30] This section

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bly end up as junior members of Parliament (since under apartheid they were denied the right to vote and subsequent participation in government).

26. G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N.Doc.A/6014 (1966) (entered into force Jan. 4, 1969). In Part 1, Art. 4, the Convention provides that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

27. G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981). Article 4 (1) provides that:

> Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

28. S. AFR. CONST. §2.

29. *Id.* § 9(1).

30. *Id.* § 9(3).

also recognizes the interconnectedness of various forms of discrimination by proscribing discrimination on one or more grounds.[31]

The section on equality also sets out a two-part test for discrimination by stating that "[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."[32] Once an individual or group of individuals falling within the outlawed grounds of discrimination allege discrimination, there is a presumption that the discrimination is unfair and the burden therefore shifts to the discriminator to demonstrate that the discrimination is not unfair. A fairly novel inclusion in the Bill of Rights is the recognition of human dignity.[33]

The listing of socio-economic rights in the South African Constitution is extensive. Included are environmental rights; the rights of access to land, housing, health care services, food, water and social security rights. Also included are rights to education and children's socio-economic rights.[34] These rights are not available on demand. What is required is that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.[35]

In comparing South African and American constitutionalism, there are two points worth noting: The first is the extensive listing of rights in the South African Constitution, including both the range of civil and political rights, as well as social, economic and cultural rights. The U.S. Constitution is a much more abbreviated document, excluding social, economic and cultural rights. The sec-

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31. *Id. See also* § 9(4). For a discussion of the impact of race and gender on South African women, see Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307 (1998).

32. *Id.* § 9(5).

33. *Id.* § 10. This section states very clearly that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."

34. S. AFR. CONST. §§ 24-29.

35. *Id. See, e.g.*, §25(5) (Property) ("The state must take reasonable legislative and other measures, within its available resources which enable citizens to gain access to land on an equitable basis."); § 26(2) (Housing) ("The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of this right."); § 27(2) (Health care, food, water and social security) ("The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of each of these rights."); and § 29(1)(b) (Education) ("Everyone has the right to further education, which the state, through reasonable measures, must make progressive, available and accessible.")

ond point worth noting is the explicit promise of transformation made in the South African Constitution, suggesting a total reconstruction of the society. The Preamble to the Constitution sets out in comprehensive terms the goals of the new non-racial democracy, including the task of healing "the divisions of the past" and establishing "a society based on democratic values, social justice and fundamental human rights".[36] In addition, the Constitution is designed to "improve the quality of life of all citizens and free the potential of each person."[37] The South African Constitution therefore is designed to ensure that the status quo, racist and inequitable, is fundamentally restructured.[38] In so doing, its egalitarian commitments arguably outstrip the possibilities raised by *Brown,* and indeed the Constitution of the United States.

III. THE SOCIETY IN TRANSITION — TOWARDS EQUALITY

As mentioned earlier in this essay, *Brown's* legacy, and its official death knell for the policy of racial segregation, was of enormous symbolic importance to those who opposed apartheid in South Africa.[39] The legal universe of non-discrimination and equality spawned by *Brown,* and thereafter the burgeoning of international human rights principles, most importantly the Convention to Eliminate Racial Discrimination ("CERD") was of great importance. It has been argued that *Brown* and American civil rights laws had an enormous impact on the development of international human rights principles regarding racial discrimination, and in particularly CERD.[40] CERD created the framework within which the South African architects of the new non-racial legal order could shape an in-

36. S. AFR. CONST. pmbl.

37. *Id.*

38. For a thoughtful assessment of the transformative possibilities of the South African Constitution see Karl E. Klare, *Legal Culture and Transformative Constitutionalism,* 14 S. AFR. J. HUM. RTS. 146 (1998).

39. Parallels have sometimes been drawn between apartheid in South Africa and Jim Crow in the United States. *See* GEORGE M. FREDERICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY OF AMERICAN AND SOUTH AFRICAN HISTORY (1981); *see also* BLACK AND WHITE IN SOUTHERN STATES: A STUDY OF THE RACE PROBLEM IN THE UNITED STATES FROM A SOUTH AFRICAN POINT OF VIEW (Maurice S. Evans ed., 2001).

40. J. Richard Goldstone & Brian Ray, *The International Legacy of* Brown v. Board of Education, 35 MCGEORGE L. REV. 105, 106 (2004).

digenous view of equality to comport with South Africa's peculiar legacy of racial subordination, dispossession and discrimination.[41]

But what was this equality to look like? The South African Constitutional Court in several judgments has outlined a version of equality that eschews a merely formalistic one to that embracing a substantive equality.[42] The Court has restated its vision of substantive equality in a series of cases. In the latest decision which validated the affirmative action provision in the Bill of Rights,[43] the Court stated:

> As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.[44]

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41. CERD provides a comprehensive definition of racial discrimination, much of which became incorporated into the South African Bill of Rights. The definition in Part 1, Article 1 of the South African Constitution provides that:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res, 2106 A(XX), 660 U.N.T.S. 195 (1969), Dec. 21, 1965, *available at* www.unhchr.ch.

42. For example, in *Fraser v. Naude and Another*, 1998 (11) BCLR 1357 (CC), the court struck down a statute which disposed of a father's consent for adoption of a child born out of wedlock, while conversely requiring the consent of a father when the parents are married. Similarly, in *President of the Republic of South Africa v. Hugo*, 1997 (6) BCLR 708 (CC), the Court allowed a facially gender discriminatory presidential pardon to stand where mothers of minor children would benefit. In a controversial decision, the Court contextualized the role of mothers in child-bearing and child-rearing, and concluded that a presidential pardon which benefited mothers in prison did not violate the rights of fathers in similar situations.

43. Minister of Finance and Others v. Van Heerden, 2004 (11) BCLR 1125 (CC).

44. *Id.* ¶ 26. The Court continued, "This substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist." *Id.* ¶ 27.

In this respect one could argue that the Constitutional Court, compared to the United States Supreme Court, appreciates that substantive equality is the engine that moves a racist society towards one underpinned by non-racialism and democracy.[45]

Brown's legacy was important in another respect for South Africa. *Brown* catapulted the United States Supreme Court into a central role in shaping the path towards racial equality — the Court essentially usurped what had fundamentally been seen as a state prerogative.[46] For South Africans emerging from the excesses of the doctrine of parliamentary sovereignty, the Court as an arbiter of government policy and law was a refreshing alternative. Indeed during the days when apartheid's demise seemed far away, public interest lawyers in South Africa were clearly inspired by the path that public interest litigation had followed in this country.[47] These began in the various challenges to racial segregation pre-*Brown*, the victory in *Brown* itself, and then subsequent public interest pursuits by women, consumers, and other racial minorities.[48] South Africa's Constitutional Court and its role in enforcing the values and principles of the Constitution bear testimony to this.[49]

IV. *BROWN* AND THE RIGHT TO EDUCATION

Focusing specifically on education and *Brown*, the struggle in the United States was about equal access to education, and specifi-

45. Indeed, the drafters of the Bill of Rights were clear about the purpose of the Constitution, namely, to generate a transformative agenda with human rights at the center. Chapter One of the Constitution lists several values on which the new South African state is founded, including human dignity, the achievement of equality, and the advancement of human rights and freedoms, non-racialism and non-sexism. S. AFR. CONST. ch 1. § 1(a) & (b).

46. Goldstone & Ray, *supra* note 40, at 116. The authors opine that "Brown operates . . . as a paradigmatic example of the power of courts to . . . force social change.

47. *Id.*

48. For a thoughtful account of the ramifications of *Brown*, see ROBERT J. COTTROL ET. AL., BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION (2003).

49. In Chapter 8, Section 167(5), the South African Constitution provides that:

> The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

cally the right to an integrated education.[50] Other speakers in this symposium have explored *Brown*'s legacy, highlighting whether the goals of *Brown* have been attained.

The South African Constitution in effect captures the essence of *Brown*, but goes much further, providing a more comprehensive definition of the right to education. The Bill of Rights provides that "everyone has the right to a basic education, including adult basic education."[51] It also provides that "everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible."[52] Moreover, recognizing and catering to the multiplicity of languages spoken in the country, the Bill of Rights also provides the right for South Africans to "receive education in the official language or languages of their choices"[53] at state schools "where such education is reasonably practicable."[54]

The Bill of Rights further provides that in implementing this right, and making it accessible, the government "must consider all reasonable educational alternatives"[55] within considerations of "equity and practicability"[56] and "the need to redress the results of past racially discriminatory laws and practices."[57] The Bill of Rights also provides for those who wish to pursue the establishment and maintenance of private schools, on the condition that such educational institutions register with the government and "do not discriminate on the basis of race."[58] Moreover, these private educational institutions are required to "maintain standards that are not inferior to standards at comparable public educational institutions."[59]

This positive and negative component of the Bill of Rights was put to the test in a case involving the constitutionality of several

50. Banks, *supra* note 21. "Thus, it is unsurprising that 'equal education' in a post *Brown* world became synonymous with racially integrated schools." *Id.* at 40.

51. S. AFR. CONST. § 29(1)(A).

52. *Id.* § 29(1)(b).

53. *Id.* § 29(2).

54. *Id*

55. *Id*

56. *Id.*

57. S. AFR. CONST. § 29(2)

58. *Id.* § 29(3).

59. *Id.*

sections of a provincial bill.[60] One of the challenged sections was a prohibition on the testing for language competence as a criteria for admission to a public school.[61] Another dealt with the formulation of public school policy on religion that explicitly aimed to foster the development of a national democratic culture providing sufficient recognition of South Africa's diverse cultural and religious traditions.[62] Another part of the challenged bill related to the rights of students at public schools not to attend religious education classes and their right not to participate in religious practices at that school.[63]

This case was brought under South Africa's Interim Constitution.[64] The petitioners contended that the clauses violated Section 32(c) of the Interim Constitution which provided that everyone has the right "to establish, where practicable, educational institutions based on a common culture, language or religion, provided that

60. 1996 (4) BCLR (CC).

61. Section 19(1) of the Bill provided as follows:

(1) Language competence testing shall not be used as an admission requirement to a public school;

(2) Learners at public schools shall be encouraged to make use of the range of official languages;

(3) No learner at a public school or a private school which receives a subsidy . . . shall be punished for expressing himself or herself in a language which is not a language of learning of the school concerned.

Id. ¶ 3.

62. Section 21 (2) of the challenged Bill provides that:

The religious policy of a public school shall be developed within the framework of the following principles:

(a) The education process should aim at the development of a national, democratic culture of respect for our country's diverse cultural and religious traditions.

(b) Freedom of conscience and religion shall be respected at all public schools.

Id. ¶ 4.

63. Sections 22 (3) (a) (i) of the challenged Bill provides that:

Every learner at a public school, or at a private school which receives a subsidy . . . shall have the right not to sttend religious education classes at the school.

Id.

64. The constitution writing process in South Africa involved two stages: The first was the drafting of the Interim Constitution that laid out the structure of governance for the first five years of the new democratic government. The Interim Constitution outlined the process by which the Final Constitution was to be written. *See* Penelope Andrews & Stephen Ellmann, *Introduction: Towards Understanding South African Constitutionalism, supra* note 14, at 1.

there shall be no discrimination on the ground of race."[65] The petitioners interpreted Section 32(c) as imposing a positive obligation on the state to establish, where practicable, public schools based on a common culture, language or religion.

The Court held that a proper reading of Section 32(c) did not suggest a positive obligation on the state.[66] The language and purpose of the section did not support such an interpretation. In the Court's opinion, the section meant only that a person shall have the right, in association with others, to establish educational institutions based on a common culture, language or religion, where this is reasonably practicable, and provided there is no discrimination on the ground of race.[67] The Court claimed that the challenged section does not create an obligation on the state to establish such schools, but rather protects the right of the individual to do so. The disputed clauses of the Bill therefore did not conflict with Section 32(c). Citing *Brown*, the Court noted that:

> Afrikaans . . . like all languages, is not simply a means of communication and instruction, but a central element of community cohesion and identification for a distinct community in South Africa. We are accordingly dealing not merely with practical issues of pedagogy, but with intangible factors, that as was said in *Brown v. Board of Education of Topeka*, form an important part of the educational endeavor. In addition, what goes on in schools can have direct implications for the cultural personality and development of groups spreading far beyond the boundary fences of the schools themselves.[68]

The Court recognized the importance of identity and language, but these factors were to be considered a negative right against state intrusion, not a positive obligation on behalf of the state.

In 2000 the Constitutional Court had to consider another case dealing with religion, namely, the right of independent (religious) schools to impose corporal punishment when they deemed it appli-

65. Section 32 (c) of the Interim Constitution, Act 200 of 1993, is identical to Section 29 (3) of the final Constitution.

66. 1996 (4) BCLR (CC) ¶ 9.

67. *Id.*

68. *Id.* ¶ 47 (citations omitted).

cable.[69] The central issue in the case was whether legislation prohibiting corporal punishment in all school interfered with the constitutional rights of parents of children in independent schools.[70] The argument was that, in accordance with their religious convictions, parents had delegated to teachers the right to apply corporal punishment as a method of discipline.[71]

The Minister of Education, in defending the statute, raised a contrary perspective: that indeed it was the infliction of corporal punishment that violated the constitutional rights of children to equality, human dignity and security of the person — all provided for in South Africa's Bill of Rights.[72] The Court had in a previous case strongly criticized the "culture of authority which legitimated the use of violence" and contradicted South Africa's constitutional principles.[73] The Minister argued in the alternative that if the prohibition in fact limited the religious rights of parents, such limits were constitutionally permissible.[74] A unanimous court held that

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69. 2000 (4) SA 757 (CC).

70. The challenged statute was the South African Schools Act 84 of 1996, in particular section 10 which provided that:

> (1) No person may administer corporal punishment at a school to a learner.
>
> (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

Id. ¶ 2.

71. *Id.* ¶ 5. Counsel for the parents cited several verses from the Bible which apparently required that they use "corporal correction". They contended that "corporal punishment is a vital aspect of Christian religion and that it is applied in the light of its biblical context using biblical guidelines which impose responsibility on parents for the training of their children". *Id.* ¶ 4.

72. Counsel for the Department of Education referred to the preamble to the National Educational Policy Act which declared that "to facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all people of South Africa and upholds their fundamental rights." *Id.* ¶ 9.

73. *Id.* ¶ 44. Citing an earlier judgment, the Court noted that:

> The deliberate infliction of pain with a cane on a tender part of the body as well as the institutionalized nature of the procedure involved an element of cruelty in the system that sanctioned it. The activity is planned beforehand, it is deliberate. Whether the person administering the strokes has a cruel streak or not is beside the point . . .. The juvenile is, indeed, treated as an object and not a human being.

2000 (4) SA 757 (CC) ¶ 44, *citing* 1995 (3) SA 632 (CC).

74. *Id.* ¶ 8. Section 36 of the Constitution provides as follows:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justi-

indeed there had been a limitation on the constitutional rights of the parents, but such limitation was justified.

The Court has not had occasion to consider the substance of the right to education. Most of the cases, excluding the one mentioned above, raised questions not central to the content of the right to education. For example, the Court has considered the constitutionality of disallowing non-South African citizens permanent employment in public schools[75] The Court has also considered the implications and validity of government spending in education.[76] The Court's analysis in other cases involving socio-economic rights suggests that the Court will interpret socio-economic claims, including the right to education, against the government on the basis of "reasonableness."[77]

The provision of the right to education in the Constitution is premised on the truism that education is fundamentally a precondition for the exercise of other rights. Moreover, the overarching principle of the Constitution, the right to equality, has to be contextualized in the social and historical context of South Africa and its legacy of dispossession, discrimination and subordination. It is no accident that the major protests against apartheid emerged from an unequivocal rejection by students of the grotesquely unequal system of education which typified the policies of the apartheid government.[78]

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fiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

a. the nature of the right;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the relation between the limitation and its purpose; and

e. less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

S. AFR. CONST § 36.

75. CCT2/97 (1997).

76. 2002 (3) SA 265 (CC).

77. *See, e.g.*, 2000 (11) BCLR 1169.

78. In June 1976, students in the black township of Soweto just outside of Johannesburg commenced a strike to protest the teaching of Afrikaans in schools – a compulsory requirement for matriculation. The rioting soon spread from Soweto to other towns on the Witwatersrand, Pretoria, to Durban and Cape Town, and developed into the largest outbreak of violence South Africa had experienced. The police used brutal

V. *BROWN* AND THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

In incorporating the right to education, the framers of the Constitution recognized the interconnectedness of education and other socio-economic rights, for example, housing or health. The framers also appreciated that ultimately the Bill of Rights was to be transformative at the core — and the incorporation of both the panoply of civil and political rights as well as social, economic and cultural rights gave effect to that transformative vision.[79] The Constitutional Court has generated an equality jurisprudence that comports with this vision, cognizant of the historical and contemporary context within which their judgments are situated.

If one examines the decisions of the Court regarding the enforcement of socio-economic rights, these goals are evident. In two significant cases, involving the right to housing and the right to health, the Court has shown that these rights can bring meaningful relief to the poorest South Africans.[80]

In 2000, the Constitutional Court had to consider the right to housing as incorporated in Section 26 of the Bill of Rights.[81] The case concerned an application for temporary shelter brought by a group of people, including children, who were brutally evicted from private land on which they were squatting. The conditions under which the community lived were deplorable. They had access to one tap and no sanitation facilities. When the case was heard it was widely regarded as an international test case on the enforceability of social and economic rights.[82] The Court affirmed

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force to quell the riots and several students died in the protests. *See* ELSABE BRINK, SOWETO 16 JUNE 1976 (2001).

79. Klare, *supra* note 38, at 164.

80. *See* Albie Sachs, *Social and Economic Rights: Can They be Made Justiciable?* 53 SMU L. REV. 1381 (2000).

81. Section 26 provides as follows:

> (1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

S. AFR. CONST. § 26.

82. 2000 (11) BCLR 1169. *See* Craig Scott & Phillip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: a Comment on* Soobramoney*'s Legacy and* Grootboom*'s Promise,* 16 S. AFR. J. HUM. RTS. 206, 211-12 (2000).

that the government had a duty in terms of Section 26 of the Constitution (the right to adequate housing) to adopt reasonable policy, legislative, and budgetary measures to provide relief for people who have no access to land, have no roof over their heads, and are living in intolerable conditions. The judgment also dealt in detail with the implications of the children's socio-economic rights enshrined in Section 28 of the Bill of Rights.[83]

In *The Treatment Action* case[84] the appeal to the Constitutional Court was directed at reversing orders made in a high court against the government because of perceived shortcomings in its response to an aspect of the HIV/AIDS challenge. The court found that the government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically the finding was that the government had acted unreasonably in refusing to make an antiretroviral drug called nevirapine available in the public health sector where the attending doctor considered it medically indicated and not setting out a timeframe for a national program to prevent mother-to-child transmission of HIV. The Court exercised its authority under the Constitution to provide injunctive relief and ordered the government to do so, citing *Brown* as influential authority.[85]

The socio-economic rights cases that have been heard by the Constitutional Court indicate that the Court has struck an appropriate balance between its role as the final arbiter of the rights in the Constitution and the role of the legislature in making resource allocation decisions, cognizant of available resources.

CONCLUSION

Brown appeared to signal to all sectors of American society that the commitment to racial equality was worth pursuing. Rhetorically it centered civil rights discourse; indeed the case came to be the most consequential civil rights decision of the twentieth century.

83. Section 28 of the Constitution provides as follows:

28 (1) Every child has the right -

c. to basic nutrition, shelter, basic health care services and social services

S. Afr. Const. § 28.

84. 2002 (5) SA 721 (CC).

85. *Id.* at 107.

Fifty years later the promises of *Brown* and its inability to meet those promises continue to be debated.[86]

South Africa's vehicle to racial equality, arguably more expansive, appears more strident and unequivocal. This may be because South Africa always had what may have been lacking in the United States in 1954: a majority of the population, historically disempowered and subordinated, clearly committed to the goal of racial equality. Although racial minorities, and specifically African-Americans, spearheaded the move towards racial equality, there was not a national consensus about the eradication of racial discrimination even though that goal became official federal policy. South Africa also had the benefit of four decades of global human rights activism, with extraordinarily huge numbers of human rights activists committed to the eradication of racism and apartheid. Indeed, the demise of apartheid vindicated forty years of global human rights activism.[87]

In short, *Brown* was decided amidst American reluctance and international ambivalence about the immorality of racism. This was not the case in South Africa in 1994. The new non-racial constitution emerged in an environment shorn of national reluctance and international ambivalence about the need to eradicate racism in all its manifestations.

86. *See, e.g.*, GREGORY S. JACOBS, GETTING AROUND *BROWN*: DESEGREGATION, DEVELOPMENT, AND THE COLUMBUS PUBLIC SCHOOLS (1998). *See also* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001). Steve Kahanovitz, a lawyer at the Legal Resources Center (LRC), a public interest law firm in Capetown, noted that Geoff Budlender, a colleague at the LRC (counsel in both the Grootboom and TAC cases) relied heavily on *Brown* when arguing for particular rememdies. (Private communication between the author and Mr. Kahanovitz.)

87. *See* Louis B. Sohn, RIGHTS IN CONFLICT: THE UNITED NATIONS & SOUTH AFRICA (1994).