

TO BE *BROWN* IN BRAZIL: EDUCATION AND SEGREGATION LATIN AMERICAN STYLE

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As a scholar who studies civil rights movements from a comparative perspective, the commemoration of the fiftieth anniversary of the *Brown v. Board of Education*¹ decision causes me to query the power of *Brown* as a symbol of equality outside of the United States. Because there is a larger community of African descendants living in Latin America and the Caribbean than there is in the United States, examining the role of *Brown* in Latin America and the Caribbean is particularly worthwhile. Furthermore, focusing on the Latin American and Caribbean contexts is also relevant due to the significant influence of the U.S. civil rights movement in inspiring Latin American social justice movements.

Yet, what immediately becomes apparent in examining the Latin American social movements' literature is the general absence of any mention of the *Brown* decision. This absence is particularly remarkable given the growing amount of data that such movements are disseminating about problems surrounding poorly funded segregated schools in the region. In order to be more concrete about this rhetorical phenomenon, I have chosen Brazil as a case example. I shall focus on Brazil because of its longstanding Black² social justice movement, the rich body of literature describing this movement, and the country's recent experience with affirmative action in higher education. I put forth the theory that while the U.S. civil rights movement has been a great inspiration to Afro-Brazilian activists and

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

2. In this article, I have capitalized the words Black and White when they refer to persons whose race is Black or White to denote the political meaning of race, or to represent the social significance of being White or Black as something more than just skin color. *Accord* Victor F. Caldwell, Book Note, 96 COLUM. L. REV. 1363, 1369 (1996) (reviewing *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Williams Crenshaw et al. eds., 1995)) (contrasting the Critical Race Theory historical view of race, which acknowledges past and continuing racial subordination, with the formal view of race, which treats race as a "neutral, apolitical description[], reflecting merely 'skin color' or region of ancestral origin").

Afro-Latino activists generally, residents of Brazil and Latin America still view the absence of explicit state-sanctioned barriers to educational access as evidence that segregation does not exist, which in turn undermines the rhetorical value of *Brown* for Latin American brown people, despite the existence of entrenched de facto segregation that determines the poor social conditions of the majority of Afro-Latinos. In Section I, I will detail the ways in which Brazil's educational system is racially segregated and discuss what this particularly means in the context of Latin American racial discourse. In Section II, I will then describe the current educational reforms in Brazil, and in particular the debate over affirmative action, as a vehicle for demonstrating how the Latin American racial discourse veils the existence of segregation and thus prevents the use of tools like *Brown* to combat the ill effects of segregation. Finally, in Section III, I conclude by proposing some suggested applications of *Brown* as an anti-caste precedent in the struggle for racial equality in Brazil.

I.

THE BRAZIL CASE EXAMPLE OF EDUCATIONAL SEGREGATION IN LATIN AMERICA

Brazilians and foreigners alike often have a conceptual difficulty with discerning Brazil's experience with racial segregation. It is the obfuscation of Brazilian racial discourse that makes it difficult to discern the import of Brazilian racial segregation. For instance, Brazil, like much of Latin America, has been historically credited with having flexibility in racial identification.³ Yet, a critical examination of the history and sociology of the Brazilian racial identification process demonstrates that it is neither fluid nor neutral. Instead, this claimed or imputed fluidity operates as a vehicle for the perpetuation of White supremacy that obviates the need for legal enforcement of racial segregation. An introduction to how race operates in Brazil is instructive.

A. *Race in Brazil*

Like the United States, Brazil is a racially diverse nation with a significant number of persons of African descent stemming from the country's history of slavery. Yet Brazil's involvement in the African slave trade was even longer and more intense than that of the United States,⁴ which accounts for the fact that, aside from Nigeria, Brazil is the nation with the largest number of people of African descent in the world.⁵ After emancipation, Brazil continued to be

3. See Peggy A. Lovell, *Race, Gender, and Development in Brazil*, 29 *LATIN AM. RES. REV.* 7, 10–11 (1994); EDWARD E. TELLES, *RACE IN ANOTHER AMERICA: THE SIGNIFICANCE OF SKIN COLOR IN BRAZIL 79–80* (2004).

4. See A.J.R. RUSSELL-WOOD, *THE BLACK MAN IN SLAVERY AND FREEDOM IN COLONIAL BRAZIL* (1982) (discussing Brazil's importation of a greater concentration of African slaves than United States and its being last nation in world to legally emancipate its slaves in 1888).

5. See Lovell, *supra* note 3, at 7.

a racially divided nation, but occasionally provided social mobility for a few light-skinned mixed-race individuals. Yet, this social mobility was directly tied to the racist nation-building concepts of “branqueamento” (whitening) and “mestiçagem” (racial mixing/miscegenation), which can best be described as campaigns to whiten the population through a combination of European immigration incentives and the encouraging of racial mixture to diminish over time the visible number of persons of African descent.⁶ Indeed, the social recognition of the racially mixed racial identity of “mulato/pardo” was a mechanism for buffering the numerical minority of White-identified elite Brazilians from the discontent of the persons of African descent’s vast majority.⁷ Greater social status and economic privilege were accorded based on one’s light skin color and approximation of a European phenotype, which simultaneously denigrated Blackness and encouraged individuals to disassociate from their African ancestry.⁸ As a result, Brazil was able to maintain a rigid racial hierarchy that served White supremacy in the midst of a demographic pattern where people of African descent approximated and sometimes even outnumbered the White elite.⁹ This is in marked contrast to the demographic pattern in the United States, where Blacks have always been a numerical minority and have thus been more vulnerable to the White majority’s enforcement of Jim Crow racial segregation after emancipation from slavery.¹⁰ In Brazil, with its more numerous population of people of African descent, the use of the “mulatto escape hatch” was such an effective tool of racial subordination, that Jim Crow legal segregation was never needed, and all racial justice movements were efficiently hindered.¹¹ But it was the absence of Jim Crow in Brazil that later enabled the nation to promote itself as a country in which racial mixture had created a racially harmonious society. In fact, until recently it has been a firmly entrenched notion that Brazil was a model of race relations that could be described as a “racial

6. TELLES, *supra* note 3, at 27–29; *see generally* Lourdes Martínez-Echazábal, *Mestizaje and the Discourse of National/Cultural Identity in Latin America, 1845–1959*, 25 *LATIN AM. PERSPECTIVES* 21 (1998).

7. *See* CARL N. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* 224–25 (1971) (describing the concept of a “mulatto escape hatch” that serves to maintain White privilege by “spread[ing] people of color through the society” and “literally blur[ring] and thereby soften[ing] the line between black and white”).

8. *See* TELLES, *supra* note 3, at 27 (noting that mulattos “were clearly perceived as distinct from pure-blood blacks and Indians, and there was often an optimistic sense that they were more like whites”). Persons with darker skin, especially the highly educated, sometimes employed the ambiguous racial identification term “moreno” to avoid the more stigmatized non-White categories such as Negro. *Id.* at 98, 105.

9. *Id.* at 28–31 (describing how the Brazilian elite historically promoted whitening, which “ranked individually worth or quality on the basis of race”).

10. *See* DEGLER, *supra* note 7, at 3–5.

11. Edward E. Telles, *Ethnic Boundaries and Political Mobilization among African Brazilians: Comparisons with the U.S. Case*, in *RACIAL POLITICS IN CONTEMPORARY BRAZIL* 82, 84 (Michael Hanchard ed., 1999).

democracy” characterized by racial fluidity in its racial classification practices.

Today, racial fluidity in Brazil is based upon the premise that racial classifications are determined more closely by how one phenotypically appears rather than strictly by one’s genetic history or ancestors.¹² For instance, before a racial designation of Black/“Negro” is deemed appropriate, custom dictates that an informal visual assessment of an individual’s hair texture, nose width, thickness of lips, and degree of dark pigmentation be taken for consistency with what are stereotypically viewed as characteristics of a Black person.¹³ Accordingly, individuals with identical racial heritage are often identified socially or informally by distinct racial designations based on their phenotype. For this reason, Brazilian and Latin American racial classification practices have been termed a “prejudice of mark,” in contrast to the “prejudice of origin” which has traditionally guided racial classification in the United States, with its focus on familial and ancestral origins as the determination of racial identification.¹⁴

To a certain extent, prejudice of mark practices also permit economic and social status to mediate the determination of racial classification. As a result, dark-skinned Afro-Brazilians with higher socioeconomic standing may be able to choose a racial classification invoking greater Whiteness than more impoverished individuals with the same skin color.¹⁵ The interplay between social class and racial classification is rooted in the “branqueamento” (and Latin American/Caribbean “blanqueamiento”) whitening ideal which continues to be central to Brazilian, Latin American and Caribbean race ideology.¹⁶ Branqueamento refers to both the aspiration and possibility of transforming one’s social status by approaching Whiteness.¹⁷ An individual can become socially lighter by marrying a lighter-skinned partner, or by becoming wealthy or famous. For instance, a popular legend that is consistently alleged is that the

12. ROBIN E. SHERIFF, *DREAMING EQUALITY: COLOR, RACE, AND RACISM IN URBAN BRAZIL* 29–32 (2001). See also MARVIN HARRIS, *PATTERNS OF RACE IN THE AMERICAS* 57 (1964).

13. HARRIS, *supra* note 12, at 57–58 (detailing anthropological accounting of at least forty different racial terms to identify people with some African ancestry depending on color and phenotype variations).

14. Oracy Nogueira, *Skin Color and Social Class*, in *PLANTATION SYSTEMS OF THE NEW WORLD* 164, 169 (Res. Inst. for the Study of Man & Pan Am. Union eds., 1959).

15. See Lovell, *supra* note 3, at 13.

16. See Edith Piza, *Branco No Brasil? Ninguém Sabe, Ninguém Viu . . .*, in *TIRANDO A MASCARA: ENSAIOS SOBRE O RACISMO NO BRASIL* 97, 103 (Antonio Sérgio Alfredo Guimarães & Lynn Huntley eds., 2000) (discussing the whitening ideal in Brazil). See also Arlene Torres & Norman E. Whitten, Jr., *To Forge the Future in the Fires of the Past: An Interpretive Essay on Racism, Domination, Resistance, and Liberation*, *General Introduction* to 2 *BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN* 3, 8–9 (Arlene Torres & Norman E. Whitten, Jr. eds., 1998) (In Latin America and the Caribbean, “‘Blanqueamiento’ refers to the processes of becoming increasingly acceptable to those classified and self-identified as ‘white.’ [It] is an ethnic movement—coterminous with socioeconomic advancement governed by the ideology of ‘development’ . . .”).

17. See Torres & Whitten, Jr., *supra* note 16, at 8–9.

dark-skinned soccer icon from Brazil, Pelé, successfully deployed the branqueamento ideology when he had his birth certificate amended to reflect a White racial classification after achieving world fame.¹⁸

In concert with the prejudice of mark and branqueamento approaches to racial identification, the Brazilian and Latin American/Caribbean race model advances the cultural practice known as “mestiçagem,” which asserts that race mixture has made racial identification a very indeterminate and unnecessary practice.¹⁹ In turn, racial mixture is rhetorically idealized and promoted as the national norm. But the national representation of racial mixture that is preferred is closer to White than to Black, and individuals are overtly discouraged from identifying along racial lines in order to maintain the national myth of racial democracy.²⁰

In a Latin American cultural context like that of Brazil, where national pride is taken in asserting that racism has never existed, the Black movement has contributed a great deal to the production of knowledge about the historical and contemporary existence of racial stratification. While Brazil had a period of racial mobilization in the 1930s when the first explicitly political Afro-Brazilian organization was formed (the Frente Negra Brasileira/FNB), it ended under pressure from the authoritarian regime that came to power in 1937.²¹ Thereafter, Afro-Brazilian intellectuals and artists asserted a racialized political critique of social inequality in the 1940s and 1950s, but were not part of any broad-based social movement.²² In the 1970s, Afro-Brazilian youth groups became inspired by the export of U.S. Black culture and its civil rights movement,²³ and in 1978 the modern Afro-Brazilian racial justice movement was inaugurated with the founding of the “Movimento Negro Unificado/MNU” (Unified Black Movement).²⁴ With the growth of the Black social movement, social scientists

18. Interview with Anani Dzidzienyo, Professor of Afro-Brazilian Studies, Brown University, Africana Studies Department and Portuguese & Brazilian Studies Department (Feb. 20, 2002) (explaining that Brazilians so frequently set forth Pelé as the proof that “money whitens,” that it is also thought that Pelé altered his official racial classification on his identity documents).

19. See Torres & Whitten, Jr., *supra* note 16, at 7–8.

20. See Rebecca Reichmann, *Introduction, in RACE IN CONTEMPORARY BRAZIL: FROM INDIFFERENCE TO INEQUALITY* 1, 1–7 (Rebecca Reichmann ed., 1999) (describing the Brazilian racial democracy myth that denies the existence of racism and stifles racial debates and mobilization).

21. See Luiz Claudio Barcelos, *Struggling in Paradise: Racial Mobilization and the Contemporary Black Movement in Brazil, in RACE IN CONTEMPORARY BRAZIL: FROM INDIFFERENCE TO INEQUALITY* 155, 158 (Rebecca Reichmann ed., 1999).

22. *Id.* at 158–59 (describing the efforts of the “Teatro Experimental Negro” (Experimental Black Theater) in the 1940s and 1950s).

23. Barcelos, *supra* note 21, at 160. See also João Jorge Santos Rodrigues, *Olodum and the Black Struggle in Brazil, in BLACK BRAZIL: CULTURE, IDENTITY, AND SOCIAL MOBILIZATION* 43, 48–49 (Larry Crook & Randal Johnson eds., 1999) [hereinafter BLACK BRAZIL] (observing the influence of North American Black movements on the Afro-Brazilian cultural and political organization Olodum).

24. Barcelos, *supra* note 21, at 160.

have begun to document the existing racial disparities in Brazil including those in the educational context, as detailed below.²⁵

B. *Race and Education in Brazil*

Examining Brazilian racial disparity in the educational context reveals startling patterns. A study holding per capita family income constant showed that (1) non-Whites have a lower rate of schooling than Whites, (2) non-White students have a higher likelihood of falling behind in school than White students, and (3) non-White students attend schools that are apt to offer fewer classroom hours than schools attended by White students.²⁶ Students of African descent achieve educational levels consistently inferior to those achieved by Whites from the same socioeconomic level, and African-descended students' returns to education are disproportionately lower.²⁷ The cumulative effects of these educational racial disparities are reflected in illiteracy rates for non-Whites, which were double the rates for Whites in 1980, and also in Whites' seven-fold greater likelihood of completing college than non-Whites.²⁸

This statistical racial disparity in levels of education is paralleled by the racial segregation of Brazil's educational system, in which students of African descent are relegated to underfinanced public schools for primary and secondary education, while economically privileged White children attend private schools.²⁹ This schooling disparity results in a racially segregated public university setting as well because the public primary and secondary schools fail

25. See Maria Aparecida (Cidinha) da Silva, *Formação de Educadores/as Para O Combate Ao Racismo: Mais Uma Tarefa Essencial*, in RACISMO E ANTI-RACISMO NA EDUCAÇÃO: REPENSANDO NOSSA ESCOLA 65, 65 (Eliane Cavalleiro, ed. 2001) [hereinafter RACISMO E ANTI-RACISMO NA EDUCAÇÃO] (noting that the subject of education has been the primary focus of the Black Brazilian Movement's theoretical production).

26. Nelson do Valle Silva & Carlos A. Hasenbalg, *Race and Educational Opportunity in Brazil*, in RACE IN CONTEMPORARY BRAZIL: FROM INDIFFERENCE TO INEQUALITY 53, 54 (Rebecca Reichmann ed., 1999) (citing to research conducted by the Carlos Chagas Foundation in São Paulo, Brazil).

27. *Id.* at 54 (citing ESTRUTURA SOCIAL, MOBILIDADE E RAÇA (C. Hasenbalg & N.V. Silva eds., 1988)).

28. *Id.* at 54–55.

29. See Abdias do Nascimento & Elisa Larkin Nascimento, *Dance of Deception: A Reading of Race Relations in Brazil*, in BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA, AND THE UNITED STATES 105, 116 (Charles V. Hamilton et al. eds., 2001) [hereinafter BEYOND RACISM]. See also LAURENCE WOLFF & CLAUDIO DE MOURA CASTRO, INTER-AMERICAN DEVELOPMENT BANK, SECONDARY EDUCATION IN LATIN AMERICA AND THE CARIBBEAN: THE CHALLENGE OF GROWTH AND REFORM 10 (2000) (describing the class divide between public and private school settings in Latin America and the Caribbean); Michael Smith, *Educational Reform in Latin America: Facing a Crisis*, INT'L DEV. RES. CTR. REP. (Feb. 19, 1999), at http://web.idrc.ca/en/ev-5552-201-1-DO_TOPIC.html (quoting Argentinean Senator José Octavio Bordón, "Most of the best schools in the region are private and many of them are on par with the best schools world-wide," but more than eighty percent of students are forced to attend underfunded public schools, a difference that "reinforces inequality, poverty, and poor economic performance").

to prepare their students for the public university entrance examination.³⁰ In contrast, the White children whose parents are better able to pay the fees for the racially exclusive private primary and secondary schools are then better trained for the public university entrance examination. This all results in having the free, elite, and well-funded public universities of Brazil disproportionately attended by White students. This pattern of racial segregation is replicated throughout much of Latin America and the Caribbean.³¹

C. *Explaining Brazilian Segregation*

Why does this educational racial segregation exist if there was never explicit state-sponsored Jim Crow segregation in Brazil or anywhere else in Latin America? Certainly, the convergence of African/indigenous ancestry and poverty is a factor that supports de facto segregation. But, there is evidence that social class is not the only factor contributing to the racial segmentation of the educational system. Brazilian studies have shown that differential access to school for Whites and persons of African descent persists even after controlling for socioeconomic status. Furthermore, as family income decreases, the differential disadvantage in access to schooling between students of European and African ancestry increases.³² Despite expectations to the contrary, economic development has not improved racial disparities in the educational system.³³ Thus, it seems that being poor in Latin America is not the same experience for people of African descent as it is for Whites.

Although to a lesser extent than that in the United States, Latin American residential patterns are segregated,³⁴ thereby facilitating continued school

30. Nascimento & Nascimento, *supra* note 29, at 117.

31. See ORLANDO ALBORNOZ, EDUCATION AND SOCIETY IN LATIN AMERICA 6 (1993) ("Although no generalization can be made about the behaviour [sic] of all educational systems in Latin America some tendencies can be observed. . . . In mixed societies, from the ethnic point of view the 'white' schools do better than those for children of mixed or 'pure' ethnic origins."). Access to universities is restricted by race. *Id.* at 141 ("No 'cholo'—a native Peruvian—would be found in any of the elite universities in Lima, and no 'negro' would be found in the same type of university in Caracas."). Even the selection of faculty members is stratified. *Id.* at 26. See also ALLISON L.C. DE CERRENO & CASSANDRA A. PYLE, EDUCATIONAL REFORM IN LATIN AMERICA ¶7 (Council on Foreign Relations, Working Paper, 1996), available at <http://www.ciaonet.org/wps/cea01/> (summarizing a finding of the Latin America Program of the Council on Foreign Relations that "[i]nequality along the lines of class, gender, and ethnicity exists in many education systems" in the region today); Pablo Gentili, Educación y Ciudadanía: Un Desafío para América Latina, in SEMINARIO INT'L PIIIE (2003), at http://www.piie.cl/seminario/textos/ponencia_gentili.pdf (seminar paper later published as book chapter in PROGRAMA INTERDISCIPLINARIO DE INVESTIGACIONES EN EDUCACIÓN (PIIE), REFORMA EDUCATIVA Y OBJETIVOS FUNDAMENTALES TRANSVERSALES (Jenny Assael et al. eds., 2003) (describing great levels of discrimination, segregation, and educational exclusion in Latin American countries).

32. Silva & Hasenbalg, *supra* note 26, at 58.

33. See Diana DeG. Brown, *Power, Invention, and the Politics of Race: Umbanda Past and Future*, in BLACK BRAZIL, *supra* note 23, at 213, 213–14 (explaining that racial discrimination has worsened despite the expectation that it would diminish with economic development).

34. See, e.g., Edward Telles, *Residential Segregation by Skin Color in Brazil*, 57 AM. SOC.

segregation. In fact, Afro-Brazilian public figures describe the de facto racial segregation of Brazil as being of comparable severity to that of apartheid South Africa:³⁵

Racial hierarchy and segregation are etched indelibly in contrasting landscapes of luxury and privation. African Brazilians in disproportionate numbers live in urban shantytowns called *favelas*, *mocambos*, or *palafitas*. To visit Rio de Janeiro's Central Station is to witness dangerously dilapidated trains taking hours to transport mostly black workers from the huge metropolitan area called the Baixada Fluminense to their jobs in the capital city, a scene that recalls black South Africans' commute from segregated townships. The racial contrast between a public school in the Baixada—or in poor suburbs or *favelas* almost anywhere in Brazil—and a university in a rich area like Rio de Janeiro's Zona Sul suggests the difference between a township school and a university in South Africa.³⁶

Moreover, those Afro-Brazilians who do manage to integrate themselves into a residential area often experience a high degree of social isolation and ostracism.³⁷ Even the mythical notion of a racially integrated annual Carnival celebration has been debunked by one Brazilian race relations scholar, who observes:

All join together in the world's greatest carnival—everyone participates, “each in his or her place.” There is no social interaction among the groups, and ropes mark the physical limits of each. In view of blacks' affirmation in carnival, the middle and upper classes, self-identified as whites, react by establishing rigid criteria of social and racial discrimination for participation in their own organizations.³⁸

REV. 186 (1992) (analyzing causes of pervasive residential segregation in metropolitan areas); CRISTINA TORRES PARODI, EQUIDAD EN SALUD: UNA MIRADA DESDE LA PERSPECTIVA DE LA ETNICIDAD 14 (2001), at http://ciss.insp.mx/migracion/site_library/raza17.doc (describing spatial segregation in Latin America); Fernando Urrea Giraldo & Hector Fabio Ramirez Echeverry, Cambios en el Mercado de Trabajo de Cali (Colombia), Reestructuración Económica y Social del Empleo de la Población Negra en la Década del 90: Un Análisis de Segregación Socio-Racial a Partir de las Transformaciones Más Recientes del Mercado de Trabajo, Presentation before the Third Latin American Congress on the Sociology of Work, Buenos Aires, Argentina 1 (May, 2000), at <http://www.alast.org/PDF/Marshall2/MT-Urrea.PDF> (noting the racial segregation that exists in Latin America).

35. Nascimento & Nascimento, *supra* note 29, at 108. See also Antônio Pitanga, *Where Are the Blacks?*, in BLACK BRAZIL, *supra* note 23, at 31, 31–32 (describing two Brazils—one in the hotels, exclusively White, and another in the streets and *favelas*).

36. Nascimento & Nascimento, *supra* note 29, at 108.

37. See FRANCE WINDDANCE TWINE, RACISM IN A RACIAL DEMOCRACY: THE MAINTENANCE OF WHITE SUPREMACY IN BRAZIL 26 (1998).

38. Jeferson Bacelar, *Black in Salvador: Racial Paths*, in BLACK BRAZIL, *supra* note 23, at 85, 99.

More importantly, government officials devote public funds to maintaining the excellence of the racially exclusive university settings while simultaneously abdicating any responsibility toward providing a quality education in the public primary and secondary schools attended by people of African descent. This abdication of responsibility occurs despite the fact that the Brazilian Constitution declares that education is a right for all, declares that it is the duty of the state to provide free education, and establishes a fixed percentage of tax revenues from federal, state, and municipal sources to be allocated to the educational system.³⁹

The racialized significance of this seemingly benign neglect is amplified by the racialized treatment of students in the public schools. For example, social scientists have documented that the majority of Brazilian teachers view Afro-Brazilian students as lacking the potential to learn.⁴⁰ As one such teacher states, "They can't learn, they're not disciplined, they're lazy and they give up too soon. All they want is soccer and samba. *It's in the blood.*"⁴¹ Racialized attitudes are also manifested in the textbooks children are assigned, in which Black people are consistently depicted as animal-like, as socially subordinate, and in other stereotyped manners.⁴² When Black children are targeted with racist behavior by classmates who have internalized the societal bias against those with dark skin, school authorities condone the behavior by characterizing it as harmless teasing and joking.⁴³ These racialized attitudes may in turn help explain the reasons for the neglect⁴⁴ of public education by Latin American governments,⁴⁵

39. See CONSTITUIÇÃO FEDERAL [C.F.] art. 206, 208, 212, translated in Keith S. Rosenn, *Federative Republic of BRAZIL—Booklet 1*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2001). See also CONSTITUCIÓN ARGENTINA art. 5, art. 75 para. 17, 19; REPÚBLICA DE BOLIVIA CONSTITUCIÓN POLÍTICA DEL ESTADO art. 177, para. I–III, art. 180; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 10, 11; CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 44, 64, 67–69; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA art. 79; CUBA (Constitution) art. 39, para. B; CONSTITUCIÓN POLÍTICA DE ECUADOR art. 23, para. 20, art. 49, 53, 63; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 8, para. 16; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE EL SALVADOR art. 35, 53, 56, 58; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 71, 73, 74; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 2, para. B, § II, art. 3, para. IV, V, art. 4; CONSTITUCIÓN DE NICARAGUA art. 105, 119, 121, 125; CONSTITUCIÓN POLÍTICA DE PANAMÁ art. 52, 87, 90, 91, 96, 104; CONSTITUCIÓN DE LA REPÚBLICA DE PARAGUAY art. 73, 74, 76, 77; CONSTITUCIÓN POLÍTICA DEL PERÚ art. 13, 16, 17; CONSTITUCIÓN DE LA REPÚBLICA ORIENTAL DEL URUGUAY art. 68, 70–71; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA pmb., art. 102, 103, 121.

40. Elisa Larkin Nascimento, *It's in the Blood: Notes on Race Attitudes in Brazil from a Different Perspective*, in BEYOND RACISM, *supra* note 29, at 509, 518.

41. *Id.* (emphasis added). See also Cesar Rossato & Verônica Gesser, *A Experiencia da Branquitude Diante de Conflitos Racias: Estudos de Realidades Brasileiras e Estadunidenses*, in RACISMO E ANTI-RACISMO NA EDUCAÇÃO, *supra* note 25, at 11, 19 (detailing how Brazilian school teachers' assessments of student potential and performance are directly influenced by race).

42. *Id.* at 519.

43. *Id.*

44. See DAVID N. PLANK, THE MEANS OF OUR SALVATION: PUBLIC EDUCATION IN BRAZIL, 1930–1995 6 (1996) (describing the failure of Latin American governments, including Brazil, to act to improve and expand basic education systems).

45. See Ruth Sautu, *Poverty, Psychology, and Dropouts*, in SCHOOLING FOR SUCCESS:

and may also help explain why Latin American educational specialists observe that in Brazil, the “benefits of ‘universally’ designed programs to improve educational outcomes do not reach the poor adequately.”⁴⁶

Yet, children of African descent encounter in Brazil not only an environment inhospitable for learning, but also a racialized access to schooling.⁴⁷ For instance, even though it is compulsory for children aged seven to fourteen to attend school,⁴⁸ it is common for Brazilian families who informally adopt children of color, to prevent them from attending primary school,⁴⁹ and for school officials not to enforce the compulsory nature of education.⁵⁰ In this practice of “*criação*” (which I translate as “informal paperless adoption”), upper- and middle-class Brazilian families take in Afro-Brazilian girls and care for them in an unstated exchange for their unpaid labor. As one such woman explains,

I needed an extra maid. I asked Jose Costa . . . to find me a young girl from the rural area near Alianca. And so he drove to the villa during his lunch hour and he knocked on the door of a woman to whom he had been referred. . . . I have not made her into a slave the way some of the wealthy treat their foster children or the way our grandmothers and great grandmothers treated their adoptive children. . . . My own mother kept a black girl as a kind of slave, and when my mother died, I inherited her as a middle-aged woman, a childlike adult who had never married and didn’t know anything other than taking care of my mother. . . . I kept her until she died.⁵¹

The unpaid workload of cleaning, cooking, and caring for children that the adoptive families impose upon their Afro-Brazilian charges does not permit

PREVENTING REPETITION AND DROPOUT IN LATIN AMERICAN PRIMARY SCHOOLS 23, 27 (Laura Randall & Joan B. Anderson eds., 1999) (“Social class, ethnicity, national origin, and gender are dealt with as sociocultural categories frequently associated with low learning achievement and in many cases with so-called disruptive behavior. When children’s school failure is explained almost exclusively by family and neighborhood characteristics, social responsibility is implicitly transferred from the school context and society to individuals. This may be an expression of the prejudice and discrimination deeply rooted in Latin American tradition.”). See also PLANK, *supra* note 44, at 14–15 (“The idea that a skilled labor force might represent an asset in an increasingly competitive international economy has yet to make much headway against long-established assumptions about the ‘educability’ and appropriate economic roles of black and poor Brazilians.”).

46. WOLFF & DE MOURA CASTRO, *supra* note 29, at 45 annex. 1.

47. *Brazil’s Unfinished Battle for Racial Democracy*, THE ECONOMIST, Apr. 22, 2000, at 31 (“Access to education is still the greatest obstacle to the advancement of black Brazilians.”).

48. See Silva & Hasenbalg, *supra* note 26, at 55.

49. TWINE, *supra* note 37, at 37.

50. See PLANK, *supra* note 44, at 6 (“official estimates suggest that as many as five million children in the ages of compulsory attendance (7 to 14) were not in school in 1989”). Cf. Abraham Lama, *Market Reforms Come at a Cost to Education*, INTER PRESS SERVICE, Oct. 9, 1997, at 1 (observing that although primary education is mandatory in Peru, no authority forces the return of those children who drop out).

51. TWINE, *supra* note 37, at 35 (quoting Nancy Scheper-Hughes) (alteration in original).

them to attend school. When one such girl was asked whether she had chosen to stop attending primary school she responded,

No. I left because I was obliged to leave, understand? I had to work. I used to have to cook [for my adoptive family]. And this didn't leave me the time to go to school and to do the same things [as my adoptive sister].⁵²

Those Afro-Brazilian children who are able to attend primary school then find themselves disproportionately affected by forced grade repetition in Latin America, where approximately forty percent of primary school students are forced to repeat at least one grade.⁵³ This grade repetition practice contributes to higher dropout rates among older Afro-Brazilian children who feel disempowered by the classroom and who are pulled strongly by the need to contribute to the family income by performing unskilled labor, such as "cutting sugar cane, working harvests or mines, or selling candy at traffic signals."⁵⁴ The practice is maintained despite numerous studies showing that mandatory retention rarely works.⁵⁵ Furthermore, the Afro-Brazilian students who do manage to stay in school often encounter a substandard quality of instruction.⁵⁶ For example, in the rural Northeast where the majority of residents are Afro-Brazilian, less than half of the primary school teachers have themselves

52. *Id.* at 43.

53. See WOLFF & DE MOURA CASTRO, *supra* note 29, at 6. Because Afro-Brazilians predominate in public schools, they are disproportionately affected by the public school practice of grade repetition. See also DE CERRENO & PYLE, *supra* note 31, at 3 ("High rates of repetition generally stem from lack of attendance and the tradition of holding a youngster back a full grade even if only one class was failed. More worrisome and more detrimental to an educational system as a whole are bureaucratic incentives for having children repeat grades—some budgets are determined by enrollment numbers so schools try to keep children as long as possible.")

54. Nascimento & Nascimento, *supra* note 29, at 115.

55. See PLANK, *supra* note 44, 87–88 (noting how in Brazil the problem with grade repetition is universally acknowledged); Paulo Renato Souza, *Primary Education in Brazil: Changes and Prospects*, in *SCHOOLING FOR SUCCESS: PREVENTING REPETITION AND DROPOUT IN LATIN AMERICAN PRIMARY SCHOOLS* 75, 80 (Laura Randall & Joan B. Anderson eds., 1999) (describing the ways in which grade repetition causes grave problems for Brazilian children); Donna Barnes, *Causes of Dropping Out from the Perspective of Education Theory*, in *SCHOOLING FOR SUCCESS: PREVENTING REPETITION AND DROPOUT IN LATIN AMERICAN PRIMARY SCHOOLS* 14, 19 (Laura Randall & Joan B. Anderson eds., 1999) ("Years of research in this area of inquiry indicate almost uniformly that the choice to retain a student in the same grade for an extra year is not a helpful long-term strategy to encourage children to learn more or stay in school. In most Latin American countries, students take examinations in order to enter the next grade. It is not uncommon for children to have been retained three times before they are in sixth grade."); Michael Winerip, *Principal Sees Mistake in Plan to Hold Back 3rd Graders*, N.Y. TIMES, Feb. 4, 2004, at B9 (citing expert Dr. Ernest House's opinion that "most studies indicate [that mandatory retention] rarely works").

56. See LINDA LARACH, WORLD BANK, HUMAN DEVELOPMENT NETWORK SECONDARY EDUCATION SERIES BRAZIL: SECONDARY EDUCATION PROFILE: A SUMMARY OF "SECONDARY EDUCATION: TIME TO MOVE FORWARD" 7 (2001), at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2002/09/07/000094946_02082104033872/Rendered/PDF/multi0page.pdf.

completed primary schooling.⁵⁷ Yet, despite these patterns of racial disparity in education, few Brazilian commentators attribute the disparities to the influence of racial segregation.

II.

THE IMPACT OF THE BRAZILIAN DISCOURSE ON RACE ON EDUCATIONAL REFORM

Because Brazilian race ideology equates segregation with the state-imposed contexts of the United States and South Africa, the problems of the Brazilian educational system are not perceived to emanate from the problem of de facto segregation that exists in Brazil.⁵⁸ The discursive invisibility of segregation in Brazil is particularly curious given the nation's historical experience with segregation in even public spaces.⁵⁹ While never codified as law, public segregation in Brazil has nevertheless been virulent. For instance, in the 1940s Afro-Brazilians were not allowed to enter public parks in São Paulo.⁶⁰ In Campinas, "Whites only" signs were used in movie theaters and other public places.⁶¹ Similarly, residents of Vasalia, a small town in Rio de Janeiro's northwestern interior, recall "Jim Crow-like segregation of the main street, stores, public sidewalks, social clubs, dances, and beauty contests that was a fact of life as recently as 1985."⁶² Yet, as one sociologist has explained, the absence of legally imposed state barriers in Brazil similar to those previously existing in the United States encourages the Brazilian myth of racial democracy and a willful amnesia with respect to the history of racial segregation.⁶³ When Brazilians are questioned about the existence of racism in the educational system, they emphasize the absence of state-sanctioned barriers to access as an indicator of the absence of discrimination, but rarely consider informal and de facto forms of racial exclusion.⁶⁴ Accordingly, the few attempts to reform the educational system to better serve students of color have not overtly employed the *Brown* racial integration ideal.

57. See PLANK, *supra* note 44, at 7.

58. See Elisa Larkin Nascimento, *Aspects of Afro-Brazilian Experience*, 11 J. OF BL. STUD. 195, 202 (1980) ("In the Latin racial ideology, racism is identified with racial violence and institutional segregation, again ignoring its broader ideological fundaments. . . . Latins identify only de jure segregation with racism, and thus claim that it only exists in South Africa and the United States."). See also PLANK, *supra* note 44, at 178 ("Race and gender inequalities have until quite recently been virtually invisible in debates over educational policy. With respect to race, for example, the conventional wisdom among policy elites in Brazil asserts that the low social status of blacks is primarily attributable to the fact that they (along with most white Brazilians) are poor, and poorly educated, rather than to discrimination based on race.").

59. TWINE, *supra* note 37, at 120.

60. Nascimento, *supra* note 40, at 205.

61. See Nascimento, *supra* note 58, at 206.

62. TWINE, *supra* note 37, at 120.

63. *Id.* at 121-22.

64. *Id.* at 59.

A. Educational Reforms

The existing educational reforms in Brazil vary in their approach to addressing the needs of underserved populations. One reform that has been modestly instituted in Brazil in an attempt to curb child labor is the provision of state aid to poor rural families for keeping children in the classroom.⁶⁵ There are also a small number of alternative schools employing a comprehensive approach to the needs of underprivileged children.⁶⁶ These schools are entire complexes and include medical and dental services, libraries, sports facilities, and a cafeteria.⁶⁷ Additionally, grade repetition is not practiced in these schools, as qualitative forms of assessment are substituted for yearly examinations.⁶⁸

Afro-Brazilian groups have themselves entered the education reform movement by creating community-based alternative schools in which Black culture and history are valorized.⁶⁹ But, because the community schools received virtually no public funding and were operated exclusively by poor communities, they initially extended only through the fourth grade.⁷⁰ The Black Movement also successfully lobbied for legislation that requires schools to teach Afro-Brazilian history,⁷¹ and has developed race relations training programs for school teachers.⁷² The Black Movement has also attempted to improve the educational opportunities of students of color by developing what they call "University Admissions Preparation Courses for Blacks and Poor People."⁷³ In addition to better preparing the students for the public university entrance examination, the organizers have negotiated some tuition grants for their students to attend the private universities.⁷⁴ Because these programs have made only modest inroads into the racially exclusive domain of higher education, affirmative action programs have also been lobbied for, as discussed below.⁷⁵

65. See Celia W. Dugger, *To Help Poor Be Pupils, Not Wage Earners, Brazil Pays Parents*, N.Y. TIMES, Jan. 3, 2004, at A6 (describing the "Family Grant" government program that provides small monthly cash payments to families on the condition that their young children attend school).

66. See Moacir Gadotti, *Contemporary Brazilian Education: Challenges of Basic Education*, in LATIN AMERICAN EDUCATION: COMPARATIVE PERSPECTIVES 123, 137 (Carlos Alberto Torres & Adriana Puiggrós eds., 1997) (discussing "Integrated Centers for Children Support").

67. *Id.*

68. *Id.*

69. See Adjoa Florência Jones de Almeida, *Unveiling the Mirror: Afro-Brazilian Identity and the Emergence of a Community School Movement*, 47 COMP. EDUC. REV. 41 (2003) (examining community-based schools in the Brazilian city of Salvador and their attempts to address questions of racial identity).

70. *Id.* at 43–44.

71. Decreto No. 10.639, de 9 de janeiro de 2003, D.O. de 10.01.03.

72. See da Silva, *supra* note 25, at 69–75.

73. See Renato Emerson dos Santos, *Racialidade e Novas Formas de Ação Social: O Pré-Vesibular Para Negros e Carentes*, in AÇÕES AFIRMATIVAS: POLÍTICAS PÚBLICAS CONTRA AS DESIGUALDADES RACIAIS 127, 130 (Renato Emerson dos Santos & Fatima Lobato eds., 2003).

74. See Nascimento & Nascimento, *supra* note 29, at 130.

75. See *infra* Section II.B.

Despite the lack of dramatic change in access to quality education in Brazil thus far, future reform efforts can benefit from the existence of a central, educational policy maker in the office of the Ministry of Education. Through the Ministry of Education, the federal government in Brazil is responsible for education nationwide.⁷⁶ While the Brazilian Constitution divides funding responsibilities across the federal, state, and municipal levels, the federal government influences education at all levels through its allocation of funding from the federal budget.⁷⁷ This is in marked contrast to the nationally decentralized system of educational regulation in the United States that retards attempts to institute nationwide reforms.

Another useful point of distinction from the United States that enhances Brazil's ability to institute educational reforms is Brazil's intellectual history of viewing education as a mechanism to help the oppressed.⁷⁸ Paulo Freire, an educator who passed away in 1997, was well-known throughout Latin America and the world for his development of a "pedagogy of the oppressed."⁷⁹ The pedagogy of the oppressed is a popular education model that "arose from a political and social analysis of the living conditions of the poor and their outstanding problems (such as unemployment, malnourishment, poor health), and attempted to engage the poor in individual and collective awareness of those conditions."⁸⁰ The key features of the model stress work in groups for the purpose of instilling pride and self-confidence in those psychologically harmed by class, race, or gender oppression, while imparting substantive knowledge and skills through a curriculum based on the actual experiences of the students.⁸¹ Its

76. Tarcísio G. Della Senta, *The Structure of Educational Knowledge in Brazil*, in PERSPECTIVES ON BRAZILIAN EDUCATION 55, 57-58 (Inst. of Educ., Univ. of London, 1987).

77. *Id.* at 57. The Brazilian Constitution mandates that at least eighteen percent of federal tax revenues and at least twenty-five percent of state and other tax revenues be applied towards the maintenance and development of education. C.F. art. 212, § 4°.

78. While it is certainly true that the United States has its own intellectual history of viewing public education as what Horace Mann termed "a great equalizer" that would enable the poor to access greater opportunities, it departs from Freire's pedagogy of the oppressed in a number of ways. See LAWRENCE A. CREMIN, *THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN* 8 (1957) (describing the origins of Horace Mann's Common School Movement and the establishment of the first public normal schools in the United States); see also W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: 1860-1880*, 638-42 (Atheneum Books 1992) (1935) (observing that the first mass movement for state-financed public education in the South came from African-Americans seeking to improve the social mobility of each individual Black). Rather than the U.S. focus on how public education can enable each individual to access greater opportunities, the Brazilian pedagogy of the oppressed considers broad structural barriers to group-based socioeconomic equality and brings them to bear in the construction of the curriculum. See *infra* notes 79-93 and accompanying text.

79. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos, trans., Continuum Pub. Corp. 1982) (1970). See also LITERACY AND REVOLUTION, *THE PEDAGOGY OF PAULO FREIRE* (Robert Mackie ed., 1981).

80. MARIA DEL PILAR O'CADIZ, PIA LINDQUIST WONG & CARLOS ALBERTO TORRES, *EDUCATION AND DEMOCRACY: PAULO FREIRE, SOCIAL MOVEMENTS, AND EDUCATIONAL REFORM IN SÃO PAULO* 21 (1998).

81. *Id.* at 21, 46.

concrete goals include addressing the way in which institutionalized racism and other factors impair equality of access and retention.⁸²

Freire had the opportunity to put his pedagogy into action as the Secretary of Education for São Paulo from 1989 through 1991.⁸³ One reform he instituted, in keeping with his theory, was the use of professional development workshops to educate teachers about social, as well as pedagogical, issues.⁸⁴ One such workshop had as its objectives “(1) demystify[ing] the traditional vision of slavery and abolition; (2) review[ing] the history of race related institutions and laws; [and] (3) demonstrat[ing] the different forms of racial violence that exist in the world, comparing Brazil, the United States, and South Africa,” and included instructions about how to discuss race relations in the classroom.⁸⁵ This instructional reform was instituted simultaneously with the use of social promotion from one grade to the next, except in cases where students were considered by an evaluation team to be too ill-prepared to move forward.⁸⁶ Along with these curriculum reforms, the repair, the maintenance, and the construction of new school buildings were high priorities.⁸⁷ As a result of the Freire reforms, the São Paulo student retention rate rose for grades one through eight, educational enrollment kept up with population growth, and many new students were enrolled.⁸⁸ While the social promotion policy was not retained after Friere’s term ended,⁸⁹ a number of schools continue to employ elements of the Freire model.⁹⁰

The objectives of the Worker’s Party (“PT” or “Partido dos Trabalhadores”) that is currently in power in Brazil reflect the educational reforms that Freire instituted.⁹¹ President Luiz Inácio “Lula” da Silva has dedicated his presidency to focusing on conditions of the poor and those subordinated by race.⁹² Evidence of the racial justice component of Lula’s priorities include his appointment of longtime activist Matilde Ribeiro as the first ever Minister for the Promotion of Racial Equality.⁹³ Accordingly, racial justice activists now have an opportunity to build upon the interest in Freire’s pedagogy of the oppressed and the federal government’s interest in racial justice to remedy the caste-based structure of education. As discussed below, *Brown* could be one

82. *See id.* at 49.

83. *See id.* at 45.

84. *See id.* at 52.

85. *Id.* at 97–98.

86. *Id.* at 100.

87. *See, e.g., id.* at 141 (describing government plans to construct up to 122 schools in a poor region on the periphery of São Paulo).

88. *Id.* at 234–35.

89. *Id.* at 100.

90. *Id.* at 248–49.

91. *Id.* at 23.

92. *See TELLES, supra* note 3, at 73.

93. *Id.* at 73–74. Lula also appointed other blacks and mixed-race Brazilians to high positions in government. *Id.*

tool of many for doing so in the context of Brazil's current debate about affirmative action.

B. *Brazil's Affirmative Action Litigation*

Brazil began instituting affirmative action policies in 2001, when the Minister of Agriculture issued an executive order mandating that twenty percent of his staff be Black, that twenty percent of the staff of firms contracting with the agency be of Afro-descent, and that another twenty percent of each firm's staff be women.⁹⁴ Thereafter, the Federal Supreme Court and all other cabinet agencies instituted affirmative action policies as well.⁹⁵ The Senate's establishment of quotas at public universities proved to be controversial, however.⁹⁶ Lawsuits challenging the educational affirmative action policies soon followed.⁹⁷

Before examining the details of those legal challenges, it is important to note that unlike in the United States, where many private colleges are considered more prestigious than all but a few state universities, Brazil's public institutions of higher learning are held in greater esteem than their private counterparts.⁹⁸ The tuition-free public colleges and the private colleges each administer their own admissions test called the "vestibular."⁹⁹ University admission is based solely upon the entrance examination.¹⁰⁰ Because there is great competition for a very limited number of spaces, some students, usually those with greater financial resources, pay for a year-long enrollment in test preparatory courses called "cursinhos."¹⁰¹ The university entrance examinations aim to test substantive knowledge from all earlier years of study, but are known to test on subjects not taught in the public primary and secondary schools.¹⁰² As a result, the elite public universities are attended disproportionately by White Brazilians whose parents paid for their superior private primary and secondary school educations.¹⁰³ The majority of Afro-Brazilians, of limited means and excluded from the free elite public universities, are relegated to paying for private school

94. See Seth Racusen, *Making the "Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 CONN. L. REV. 787, 811-12 (2004) (providing a detailed account of the development of affirmative action in Brazil).

95. *Id.* at 812-13.

96. See *id.* at 813 (describing opposition to affirmative action policy in public higher education in the state of Rio de Janeiro).

97. See *id.* at 815 (describing how over three hundred applicants to just the two state universities in Rio de Janeiro alone brought challenges to the affirmative action policies).

98. TELLES, *supra* note 3, at 124, 159.

99. *Id.* at 159; ZAKIYA CARR JOHNSON, INTERNATIONAL HUMAN RIGHTS LAW GROUP, OVERVIEW OF VESTIBULAR: THE BRAZILIAN COLLEGE ENTRANCE EXAMS (May 2003) at 2-3.

100. TELLES, *supra* note 3, at 159.

101. CARR JOHNSON, *supra* note 99, at 2-3.

102. *Id.* at 3.

103. TELLES, *supra* note 3, at 124.

tuition or not continuing their education at all.¹⁰⁴ The politics of these demographic patterns in university admissions is what prompted the movement for affirmative action policies in university admissions.¹⁰⁵

In December 2000 and September 2001, Rio de Janeiro was the first state in Brazil to enact a set of laws establishing that fifty percent of state university entrance admissions would be reserved for public high school graduates (most of whom are of Afro-Brazilian descent).¹⁰⁶ Thereafter, the law was modified to establish an outright quota of forty percent for top scoring “Black/negra” or “brown/parda” students and a ten percent quota for students with disabilities.¹⁰⁷ The affirmative action policy was initially challenged before the Supreme Federal Court of Brazil by a state legislator and an association of private schools (CONFENEN) as a violation of the Brazilian constitutional provision for proportionality in the exercise of legislative discretion (“razãoabilidade”).¹⁰⁸ This lawsuit was ruled moot when the state legislature revised the policy in September 2003, to establish the more limited quotas of twenty percent for self-declared “Blacks/negras,” twenty percent for public school students, and five percent for other disabled students and indigenous Brazilians in total.¹⁰⁹ In addition, all students admitted under the new policy had to meet financial eligibility requirements.¹¹⁰ This revised affirmative action policy was then challenged in court once again and is still pending and awaiting briefs from the parties.¹¹¹

There is much to be learned about Afro-Brazilian perspectives on

104. *Id.* See also Antonio Sérgio Alfredo Guimarães, *Ações Afirmativas Para a População Negra Nas Universidades Brasileiras*, in *AÇÕES AFIRMATIVAS: POLITICAS PUBLICAS CONTRA AS DESIGUALDADES RACIAS* 75, 76–77 (Renato Emerson dos Santos & Fatima Lobato eds., 2003) (charting the disparate university enrollment and university exam passage rates of Brazilians by skin color).

105. TELLES, *supra* note 3, at 59. “[M]uch of the attention in developing affirmative action thus far has focused on admission to the university, which is highly appropriate since unequal access to university education has become the major impediment to racial equality in Brazil.” *Id.* at 253.

106. Public Law 3524/2000, State of Rio de Janeiro, available at http://www.alerj.rj.gov/top_leis_ordinairas.htm; Public Law 3524/2000, State of Rio de Janeiro, available at http://www.alerj.rj.gov/top_leis_ordinairas.htm. Thereafter, the Brazilian states of Bahia and then Mato Grosso do Sul also instituted affirmative action policies for their public university admissions. Racusen, *supra* note 94, at 817 n.132. This article focuses on the Rio de Janeiro affirmative action policies because they have been the target of the most contentious litigation.

107. Public Law 3708/2001, State of Rio de Janeiro, available at http://www.alerj.rj.gov/top_leis_ordinairas.htm; Public Law 3524/2000, State of Rio de Janeiro, available at http://www.alerj.rj.gov/top_leis_ordinairas.htm.

108. See Racusen, *supra* note 94, at 816.

109. See Public Law 4151/2003, State of Rio de Janeiro, available at <http://www.alerj.rj.gov.br/processo2.htm>.

110. Racusen, *supra* note 94, at 816–17.

111. Supremo Tribunal Federal, Detalhes Da Ação Direta de Inconstitucionalidade, available at <http://gemini.stf.gov.br/cgi-bin/nph-brs?d=ADIN&s1=3197&u=http://www.stf.gov.br/Proc> (Supreme Federal Court summary of procedural posture of case indicating its pending status).

affirmative action, even from just the initial court challenge that was later ruled moot. Despite the fact that some of the student activists who initially led the movement for affirmative action within the university-entrance context were inspired by U.S. Black struggles for equality,¹¹² the discourse within the Brazilian movement has thus far refrained from overtly depicting the source of the problem as racial segregation. Specifically, the absence of a racial segregation narrative is notable in the legal brief filed jointly by eight Afro-Brazilian organizations in April 2003 defending the use of affirmative action at the University of the State of Rio de Janeiro and the State University of North Fluminense in Rio de Janeiro.¹¹³ Instead, the brief focuses on the existence of societal racial disparities that justify the use of affirmative action to remedy educational inequality.¹¹⁴

Absent from the brief is an analysis of the way in which the racial segmentation of the students between public and private primary and secondary schools assures the racial exclusivity of the university setting.¹¹⁵ Missing also is a description of how the state is implicated in its allocation of funds to benefit the universities while abdicating any responsibility to the primary and secondary schools that students of color attend. Indeed, the term “segregation” is used only to describe how Brazil’s ranking on the United Nations Human Development Index plummets lower than that of South Africa when calculated based on the living conditions of Afro-descendants, but does not when based on the living conditions of the White population.¹¹⁶ This ranking is viewed as particularly shameful because it means that Brazil is comparable to a country “just recently out of a segregationist regime.”¹¹⁷ And while the brief discusses the *Bakke*¹¹⁸ case, U.S. concepts like disparate treatment theory, disparate impact theory, and diversity, and provides extensive quotation from U.S. scholars like Ronald Dworkin and Peter Singer, it does not discuss the relevance of the *Brown* case in the Brazilian context.¹¹⁹

112. See TWINE, *supra* note 37, at 1–2 (describing leader of University of São Paulo campus movement for affirmative action as being “inspired to fight for racial diversity after spending a year in the United States on a Fulbright Fellowship”).

113. Brief for Amicus Curiae Institutos de Pesquisas e Estudos Afro-Brasileiros, et al. v. Governador do Estado do Rio de Janeiro, Ação Direta de Inconstitucionalidade No. 2858-8/600-RJ, Supremo Tribunal Federal (2003), available at <http://www.adami.adv.br/uerj.asp>.

114. *Id.*

115. See generally Gadotti, *supra* note 66, at 145 (referring to government’s lack of commitment to “basic quality education for all” as a cause of “Brazil’s social apartheid”).

116. Brief for Amicus Curiae, *supra* note 113, at para. 67.15.

117. *Id.*

118. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

119. Because Brazil is a civil code jurisdiction that incorporates a framework for *stare decisis*, the affirmative action litigators were not precluded from discussing case law and in fact often included a discussion of U.S. affirmative action precedent. See [I Brazil] THOMAS H. REYNOLDS & ARTURO A. FLORES, *FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD* 6 (1989 & 8/2004 Release) (“Case law plays a much greater role in the evolutionary process of legal development in Brazil than elsewhere in the civil

In short, this brief, the most significant legal statement from leading Afro-Brazilian public interest organizations about the exclusion of Afro-Brazilians from higher education, does not view *Brown* as a useful reference. While *Brown* does have a strong symbolic value in Brazil and the rest of Latin America,¹²⁰ it speaks only to segregation, and in turn segregation is understood solely as explicit de jure segregation.¹²¹ Thus, for Brazilians, the symbolic value of *Brown* is one of demarcating the racial problems of the U.S. educational system as distinctive from those of Latin America and the Caribbean.

The United States itself has had much to do with exporting the notion that *Brown* stands for much less than it was meant to, and that the concept of de jure segregation is much narrower than the original decision intended.¹²² The irony of course is that many regions in the United States now find themselves in much the same racial predicament as Latin America and the Caribbean, in which racial segmentation is largely structured around the divide between public and private schools.¹²³ The complex impact of *Brown* in Latin America speaks to the

law world.”). Furthermore, the Brazilian “Lei de Boa Razão” (Law of Good Sense) encourages “judges and lawyers to look to common sense, custom, comparative legislation and the spirit of the law as the basis for decision.” *Id.*

120. See Mônica Sifuentes, *O Direito a Educação e a Exclusão Social*, available at <http://www.redebrasil.inf.br/Oartigos/educacao.htm> (last visited April 12, 2005) (Brasilia, Brazil Federal Judge praising *Brown* for consecrating the humanitarian importance of racially integrated education for a democratic society).

121. See Sheriff, *supra* note 12, at 188 (describing how Black Movement activists in Brazil felt unable to organize around the issue of legal segregation because it was understood solely as de jure segregation).

122. Cf. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 1-3* (1993) (describing the way in which the word “segregation” was purposefully avoided in the public discourse during the 1970s and 1980s in order to cast the continued racial disparities in society as natural). Yet, many U.S. de jure segregation cases were litigated in the North where de facto segregation was presumed to be the more prevalent problem, but these courts noted that state inaction in the face of continuing de facto segregation was actionable as de jure segregation. See discussion *infra* note 189 and accompanying text. Furthermore, from its inception, the *Brown* case symbolized more than the notion that legally mandated segregated schooling was impermissible. See *infra* notes 174-89 and accompanying text.

123. See SEAN F. REARDON & JOHN T. YUN, *THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, PRIVATE SCHOOL RACIAL ENROLLMENTS AND SEGREGATION 3* (2002), available at http://www.civilrightsproject.harvard.edu/Research/deseg/Private_Schools.pdf (demonstrating with empirical data that in both the South and West where White students make up a much smaller share of the population than elsewhere and where Black-White public school segregation is the lowest in the country, private schools are much more segregated than their public school counterparts, and that in the rest of the country private school segregation is much greater in large metropolitan areas and rural areas). The large school districts with the highest White private school enrollment rates are generally the large urban districts of the Northeast and Midwest, in which there are large proportions of Black students in the school district population. *Id.* at 6-7. Indeed, the empirical data also demonstrates that since the *Brown* decision “some whites have used private schools to avoid enrolling their children in integrated schools.” *Id.* at 19. In the South, the White private school enrollment has been significant enough to propel the rapid process of resegregating the public schools. *Id.* at 27. Throughout the rest of the country, the racial disparities in private school enrollments (with Whites disproportionately enrolling their children in

current complexities of making the racial equality aspirations of *Brown* a reality in the United States—ostensibly free of de jure segregation, but stuck in the mire of racial hierarchy. This leads to the essential question of whether there is a way in which *Brown* might be applied to the Latin American context and thus to the evolving United States context. The question of whether *Brown* can be helpful in Latin America or the contemporary U.S. context is critical given that in the country in which *Brown* was decided, legal actors seemingly view the precedent with growing irrelevance.¹²⁴ In fact, in the Supreme Court's recent analysis in *Grutter* of affirmative action's constitutionality, the Court did not deploy the precedent except in summary fashion.¹²⁵ Alarmingly, *Brown* was cited more frequently by the *Grutter* and *Gratz* jurists opposing affirmative action, describing continued affirmative action as resulting in minority student "tribalism."¹²⁶ Similarly, *Brown*'s integration ideal is viewed as irrelevant and at times even misplaced to some U.S. Black scholars.¹²⁷ Yet, it is Latin

private schools) suggest that there is "white flight" from minority schoolchildren in public schools with White enrollment in private schools. See Robert W. Fairlie & Alexandra M. Resch, *Is There "White Flight" into Private Schools? Evidence From the National Educational Longitudinal Survey (2000)*, available at http://www.jcpr.org/wpfiles/Fairlie_Resch.pdf. These racial disparities in enrollment and their effects on the racial balance of public schools is particularly disturbing in light of the fact that private school enrollments are on the rise. REARDON & YUN, *supra* note 123, at 3. Yet, it should also be noted that racial segregation within the U.S. public school context continues to be a growing problem. See Gary Orfield, *Toward an Integrated Future: New Directions for Courts, Educators, Civil Rights Groups, Policymakers, and Scholars*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 331, 336–40 (Gary Orfield & Susan E. Eaton eds., 1996) [hereinafter *DISMANTLING DESEGREGATION*].

124. See, e.g., CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* 311 (2004) (observing that after the *Brown* cases, "[s]ubsequent courts do not even seem to recognize integration as an imperative").

125. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting *Brown* for the premise that "education . . . is the very foundation of good citizenship").

126. See *id.* at 349 (Scalia, J., dissenting).

127. See Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 516 (1976) ("The time has come for civil rights lawyers to end their single-minded commitment to racial balance, a goal which, standing alone, is increasingly inaccessible and all too often educationally impotent."); John O. Calmore, *Random Notes of an Integration Warrior*, 81 *MINN. L. REV.* 1441, 1444 (1997) ("[W]hen I find myself in poor black neighborhoods or public schools, I think integration is simply irrelevant."); John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 *N.C. L. REV.* 1487 (1992–93) (questioning integration as a form of assimilation because it "is predicated on white dominance and virtual assimilation by blacks as preconditions to whites accepting blacks into their communities"); Joe F. Feagin, *School Desegregation: A Political-Economic Perspective*, in *SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE* 25, 49 (Walter G. Stephan & Joe R. Feagin eds., 1980) (quoting Robert Allen's suggestion that racial integration is "a liberal reform version of cultural chauvenism [sic], for it still assumed that integration of nonwhites would not challenge the foundations of American society," ROBERT L. ALLEN, *RELUCTANT REFORMERS* (1974)); Ray C. Rist, *On the Future of School Desegregation: A New American Dilemma?*, in *SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE* 117, 127 (Walter G. Stephan & Joe R. Feagin eds., 1980) (observing a "growing ambivalence of the Black community to pursuing school desegregation").

But as some scholars are quick to note, full integration was never fully implemented before critics quickly labeled it as a failure. See, e.g., Orfield, *DISMANTLING DESEGREGATION supra* note

health, nourishment, *education*, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, *discrimination*, exploitation, violence, cruelty and oppression.”¹³⁹ In short, because Brazil has a rich constitutional framework regarding the right to quality education, it may have a greater potential for expanding the utility of *Brown* than does the contemporary United States, whose jurisprudence is locked into the construct of de jure segregation and state action.¹⁴⁰ Similarly, because many other Latin American countries’ constitutions also contain this right to education, they may also have this enhanced mechanism for addressing the government neglect of the public primary and secondary schools¹⁴¹ that children of African descent are relegated to throughout Latin America and the Caribbean.¹⁴²

The argument under the constitutional right to education also holds greater promise than an argument under the constitution’s equality provision because the Brazilian constitution’s equality provision characterizes the practice of racism as a non-bailable crime.¹⁴³ The Brazilian constitution’s penal code approach to racial inequality, with its focus on an individual perpetrator of a biased act, inhibits a structural discrimination claim like one concerned with patterns of racial segregation in public education.¹⁴⁴

Yet, there are those who might question the viability of a lawsuit based on the Brazilian constitutional right to education as being in conflict with Brazil’s civil law traditions. Brazil is a civil law country; its legal system and legal culture are greatly influenced by Roman law, and thus heavily codified with all federal laws applying uniformly in the twenty-six states and in the Federal District.¹⁴⁵ In addition, like other civil law countries, Brazil’s legal community has a history of “[v]iewing law as a science and legal education as a means of

139. C.F. art. 206 & 227 (emphasis added) (*as translated at www.georgetown.edu/pdba/Constitutions/Brazil/*).

140. *But see* Kagan, *supra* note 130 (describing major campaigns for educational reform based upon state constitutional rights to “adequate” education).

141. *See* O’CADIZ, WONG & TORRES, *supra* note 80, at 16 (stating that “the past two decades have witnessed a decline in quantity and quality of schooling in [Latin America]”).

142. *See* Donald R. Winkler, *Investigaciones Sobre Etnicidad, Raza, Género y Educación en las Américas*, in *ETNICIDAD, RAZA, GÉNERO Y EDUCACIÓN EN AMÉRICA LATINA* 1, 22 (Donald R. Winkler & Santiago Cueto eds., 2004) (observing that children of African descent in Latin America attend schools with fewer resources than other students).

143. C.F. art. 5, cl. XLII.

144. In addition to the practice of racism being defined as a non-bailable crime (C.F. art. 5, cl. XLII), other legal provisions that maintain the focus on individual perpetrators rather than systemic patterns of discrimination are: C.F. art. 140 (penal code provision making it a crime to malign someone’s honor using racial insults), C.F. art. 159 (permitting monetary compensation to be collected from a person who has committed a race crime or caused other harm), Public Law 1390/1951 (persons who restrict entry and access to public places because of race prejudice can be subject to one year of imprisonment), and Public Law 7716/1989 (making race discrimination a felony punishable by two to five years of imprisonment).

145. *See* Keith S. Rosenn, *Brazil*, in *LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA* 188, 190 (Herbert M. Kritzer ed., 2002).

dogmatically imparting the true meaning of legal rules," rather than as a means to effectuate social change.¹⁴⁶ Indeed as one Brazilian legal scholar notes, "Civil law systems present substantial obstacles to the legal protection of group rights. . . . includ[ing] the tradition of judicial conservatism, a deeply ingrained individualistic philosophy, the 'scientific' and legalistic approach to law, and the judicial tendency to revere the status quo."¹⁴⁷

At the same time, Brazilian law does contain a number of features that permit a more entrepreneurial approach to litigation than in other civil law jurisdictions.¹⁴⁸ To begin with, "[c]ase law plays a much greater role in the evolutionary process of legal development in Brazil than elsewhere in the civil law world" with the use of a quasi-precedential device called the "súmula."¹⁴⁹ The súmula consists of a set of rules of law that have become firmly established by decisions of the Supreme Federal Tribunal.¹⁵⁰ A more overt mechanism for instituting flexibility into the interpretation of Brazilian laws is the colonial Portuguese concept of the law of good sense ("Lei da Boa Razão").¹⁵¹ It is a principle that "encourage[s] judges and lawyers to look to common sense, custom, comparative legislation and the spirit of the law as the basis for decision," thereby increasing the doctrinal freedom and legal discretion of the judiciary.¹⁵²

Moreover, the 1988 Constitution also instituted a number of measures that directly encourage a social justice approach to litigating.¹⁵³ The 1988 Constitution was drafted after the end of Brazil's twenty-one years of military rule and during a time in which "the belief in the transformative power of law was at its height and the Brazilian government played a central role in ordering economic and social development."¹⁵⁴ For instance, the Constitution established a novel procedural device called a mandate of injunction ("mandado de injunção") in its delineation of fundamental rights and guarantees.¹⁵⁵ It has no relation to the U.S. concept of injunctions, but rather it is designed to empower individuals seeking a remedy for the violation of constitutional rights

146. Keith S. Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. INT'L. L. J. 1, 24 (1984).

147. Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 402 (2003).

148. See *infra* notes 149–165.

149. REYNOLDS & FLORES, *supra* note 119, at I Brazil 6.

150. Rosenn, *supra* note 146, at 34 n.108 ("[The Súmula's] provisions are summarily cited to dispose of those issues in future litigation. The Súmula can be overruled or modified, but only by an absolute majority of the full tribunal."). The Súmula has been in effect since 1964. *Id.*

151. REYNOLDS & FLORES, *supra* note 119, at I Brazil 3–5.

152. REYNOLDS & FLORES, *supra* note 119, at I Brazil 6. See generally Orlando Gomes, *Historical and Sociological Roots of the Brazilian Civil Code*, 1 INTER-AM. L. REV. 331 (1959).

153. See Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 BERKELEY J. INT'L L. 230, 234, 247 (1999).

154. *Id.* at 247.

155. C.F. art. 5, cl. LXXI.

America's simultaneous similarity to and distinctiveness from the United States' legal structures and racial history that may provide greater potential for deploying *Brown* effectively in Brazil, and in turn reinvigorating its application in the United States.¹²⁸

III.

SUGGESTED APPLICATIONS OF *BROWN* IN BRAZIL

A. *The Legal Context for Applying Brown*

While the United States' state action doctrine has limited any legal intervention into racial segregation to situations where the segregation is de jure, Latin American race activists have access to another means of legal intervention. The alternative basis for addressing racial segregation in the public education system is the constitutional guarantee of government-provided education found in Brazil's constitution and in most other Latin American constitutions.¹²⁹ A natural consequence of this federal constitutional right, one that does not exist in the United States,¹³⁰ should be the notion that an impoverished education is a denial of education. The language of the Brazilian Constitution that suggests such an interpretation is in Article 205, which states, "Education, which is the

123, at 335 ("For a generation, our schools have been left halfway through a revolution that is now threatening to unravel. There has been almost no work on moving from desegregation to genuine integration, moving from the awkward but necessary remedy of busing to the ultimate goal of integrated communities with schools the [sic] produce clear gains for minority students."). Indeed, as Charles Ogletree, Jr. has noted, "[T]he important goal of full equality in education following slavery and Jim Crow segregation was compromised from the beginning." OGLETREE, JR., *supra* note 124, at xv.; SHERYLL CASHIN, *THE FAILURES OF INTEGRATION* 41–43 (2004) (detailing the limited existence of integrated communities in the United States).

128. This is a centrally important goal in the United States, where over the years the anti-caste principle view of *Brown* has been obfuscated. See Orfield, *supra* note 123, at 345 ("As we face resegregation and inequality, it is urgent to seek policies that lead back toward the vision of *Brown*."); John A. Powell & Marguerite L. Spencer, *Brown Is Not Brown and Educational Reform Is Not Reform if Integration Is Not a Goal*, 28 N.Y.U. REV. OF L. & SOC. CHANGE 343, 343 (2003) ("Without a more complete and honest 'interrogation of matters of race and equality' *Brown* will not be *Brown*, and educational reform will not be reform."); Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education is More Than Just a Tort*, 96 NW. U. L. REV. 99, 99–104 (2001) (detailing the ways in which the U.S. Supreme Court has narrowed the distributive justice vision of *Brown*).

129. See sources cited *supra* note 39 (listing Latin American constitutional provisions granting right to education).

130. Even though the U.S. Supreme Court held that education is not a fundamental right, the "right to education" does exist in many state constitutions in the United States. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); Denise C. Morgan, *What is Left to Argue in Desegregation Law? The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER L.J. 99 (1991) (listing all the state constitutions with a right to education provision). But litigation to force state governments to provide an adequate education pursuant to the state constitutions has had mixed results. See Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2242 (2003) (observing that "[a] litigation strategy [based on state education clauses] has proven difficult").

right of all and duty of the State and family, shall be promoted and encouraged with societal collaboration, *seeking the full development of the individual, preparation for the exercise of citizenship and qualification for work.*"¹³¹ Nearly four million Brazilian children aged seven to fourteen, for whom education is compulsory, receive no formal schooling, and many of those who do enroll in school eventually drop out due to the precarious physical condition of the schools, limited teacher preparation, and the poor quality of the education provided.¹³² One can logically equate this government neglect to a denial of the constitutional right to education, inasmuch as the children are not provided "*the full development of the individual*" nor "*preparation for the exercise of citizenship and qualification for work,*"¹³³ as mandated in Article 205 of the Constitution, and are not provided with the "guarantee of standards of quality" as required by Article 206 of the Constitution. The Brazilian government's longstanding diversion of funds to the racially exclusive university setting and subsidization of private and religious primary and secondary schooling of the elite¹³⁴ speak to government involvement in the racial segmentation that exists¹³⁵ despite the constitutional mandate to give priority to providing compulsory education when distributing public funds.¹³⁶ Government actors look particularly complicit in the racial segmentation of the educational system when one considers that the state governments are responsible for controlling the expansion of private schools at the secondary level.¹³⁷ Indeed, one commentator attributes the impoverished status of the educational system disproportionately serving children of African descent in part to Brazil's prolonged existence as a "slaveocratic" regime.¹³⁸ The commentator argues that the educational system could be understood as violating Article 206 of the Brazilian Constitution—which mandates "equal conditions of access and permanence in school"—along with Article 227, which defines one of the family's, society's, and State's duties as "ensuring children and adolescents, with absolute priority, the right to life,

131. C.F. art. 205 (emphasis added).

132. O'CADIZ, WONG & TORRES, *supra* note 80, at 7.

133. C.F. art. 205 (emphasis added).

134. See Danielle Cireno Fernandes, Educational Stratification, Race and Socioeconomic Development in Brazil 3, 64 (1999) (unpublished Ph.D. dissertation, Univ. of Wisconsin-Madison) (on file with UMI Dissertation Services); cf. Della Senta, *supra* note 76, at 57–58 (observing that "it is not surprising to find some institutions of higher education receiving funds from State budgets, and competing for financial support with primary and secondary schools").

135. O'CADIZ, WONG & TORRES, *supra* note 80, at 20.

136. C.F. art. 212 ("In distribution of public funds, priority shall be assured to meeting the needs of compulsory education pursuant to the national education plan."). The pragmatic concern about how a litigator would be able to gather the relevant financial data in order to mount a case of discriminatory government financing priorities could perhaps be addressed by the constitutional right to obtain data from public agencies that is in the collective interest. C.F. art. 5, cl. XXXIII ("[A]ll persons are entitled to receive from public agencies information . . . of collective or general interest.").

137. Della Senta, *supra* note 76, at 58.

138. O'CADIZ, WONG & TORRES, *supra* note 80, at 7.

for which no regulatory provisions have yet been legislated.¹⁵⁶ When constitutional provisions that are not self-executing lack regulations, making “the exercise of constitutional rights and liberties and the prerogatives inherent in nationality, sovereignty and citizenship” infeasible, a mandate of injunction can be issued by the court to enforce the constitutional law at issue.¹⁵⁷ This may be especially helpful for social justice lawsuits such as the educational financing disparity lawsuit I have proposed herein.¹⁵⁸ And, while opponents may attempt to characterize the constitutional right to education as merely aspirational, with such non-self-executing legislation,¹⁵⁹ the mandate of injunction can be requested as a measure to make the right to education more than symbolic and ambitious. Similarly, the 1988 Constitution also confers original jurisdiction on Brazil’s highest court, the Supreme Federal Tribunal, to issue a declaration of unconstitutionality for the government not taking action whenever the court determines there is a “lack of measures to make a constitutional rule effective.”¹⁶⁰ The court must then notify the appropriate branch of government to adopt the necessary measures.¹⁶¹ If the offender is an administrative agency, the court may direct that the needed measures be adopted within thirty days.¹⁶² If the offender is the legislature, the court can only issue a warning about noncompliance with a constitutional duty—it cannot force the legislature to act.¹⁶³

In addition, the 1988 Constitution provided greater enforcement potential for the pre-existing right of the 1934 Constitution of any citizen to commence a class action suit seeking to annul state actions that are “injurious to the public patrimony” or to “administrative morality,” by relieving plaintiffs of the burden of paying costs and defendant’s attorney’s fees, as long as they sue in good faith.¹⁶⁴ Similarly, a class action may be also be brought for violation of diffuse

156. See Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution*, 7 SW. J. L. & TRADE AM. 291, 296–97 (2000).

157. C.F. art. 5, § LXXI. *But see*, Rosenn, *supra* note 156, at 296–97 (noting that “the mandate of injunction has been ineffective,” in large part because the constitutional provision was “poorly drafted”).

158. See *supra* notes 127–140 and *infra* note 188, and accompanying text.

159. See Claudia Fonseca, *Inequality Near and Far: Adoption As Seen from the Brazilian Favelas*, 36 LAW & SOC’Y REV. 397, 414 (2002) (observing that “in Brazil legislators have consciously espoused the idea of ‘symbolic legislation’—laws that, by providing a sort of blueprint for the ideal society, point out the direction social change will hopefully take”). See also Rosenn, *supra* note 156, at 292–93 (“Brazil’s constitution is also *dirigiste*, setting out ambitious goals and programs for reforming society with virtually nothing excluded from its global scope. Many of its provisions, however, are not self-executing. They either require complementary legislation to fill in certain missing elements, or they are programmatic, mandating directives for substantive legislation and regulations. Brazil’s fractionalized Congress, however, has left many constitutional provisions without the necessary implementing or complementary legislation.”) (footnote omitted).

160. C.F. art. 103, § 2.

161. *Id.*

162. *Id.*

163. CF art. 103, § 3. See also Rosenn *supra* note 156, at 308.

164. C.F. art. 5, cl. LXXIII; Gidi, *supra* note 147, at n.26.

and collective rights.¹⁶⁵ But, the “public civic action” can only be commenced by an association whose mission is the protection of the diffuse interests, the Public Ministry, or other government and quasi-government entities.¹⁶⁶

Thus, despite the traditional civil law objection to the assertion of group rights as being in conflict with the framework of Napoleonic codes,¹⁶⁷ Brazilian litigators have breathed life into these procedural rights with many lawsuits against the government for improper administration of public monies.¹⁶⁸ Indeed, a number of lawsuits that have taken very aggressive stands against the government have not only withstood potential court dismissals as inappropriate uses of the civil law, but have yielded successes for the plaintiffs.¹⁶⁹ One legal scholar suggests that at least some of this success might be attributed to the progressive “alternative law” movement’s influence on contemporary Brazilian judges.¹⁷⁰ The alternative law movement was a judicial philosophy that emerged as Brazil ended its military rule in 1985, “encourag[ing] judges to wield their authority to protect the more vulnerable sectors of Brazilian society” and to thereby engage in “[s]ocially oriented judicial activism.”¹⁷¹ As articulated by the Brazilian Association of Judges for Democracy (known as the “movement of alternative judges”), alternative law “advocated interpreting laws to serve the interests of oppressed classes” by considering the social and historical context in which judges apply the law.¹⁷² Some adherents even favored the more forceful perspective that “judicial power ought to be rallied to the service of the poor masses in their struggles.”¹⁷³ Accordingly, Brazil’s unique history as a civil law jurisdiction may ideally situate it as not only amenable to entrepreneurial approaches to litigation, but at a jurisprudential moment for being open-minded to social justice litigation. In such a context, the broader vision of *Brown* as an anti-caste precedent may have greater utility than formerly thought.

B. *The Potential Rhetorical Power of Brown in Brazil*

When *Brown* is looked to as a precedent decrying the existence of caste and any government facilitation of the maintenance of caste structures, it has a greater transformative potential than when it is looked to solely as the

165. Rosenn, *supra* note 156, at 299.

166. See Rosenn, *supra* note 156, at 299.

167. Gidi, *supra* note 147, at 344–45.

168. *Id.* at 330–31.

169. See Ballard, *supra* note 153, at 230–32, 253, 255 (describing lawsuits in 1997 against President Cardoso’s efforts to sell off forty-five percent of the government’s interest in its largest iron ore exporter, a legal action in 1998 to block government sale of the national telephone company, a judicial order prohibiting the Brazilian Central Bank from implementing a financial reorganization program, and the imprisonment of the president of the Brazilian Social Security Service in 1992 for refusing to comply with a court-ordered increase in retiree pensions).

170. *Id.* at 256.

171. *Id.* at 239.

172. *Id.* at 244.

173. *Id.* at 245.

outlawing of de jure segregation in public education. Legal scholar Charles L. Black, Jr. early on articulated a broad anti-caste understanding of *Brown*.¹⁷⁴ Specifically, he interpreted *Brown* as stating an anti-caste principle from the Fourteenth Amendment's "broad principle of practical equality" because "any device that in fact relegates the Negro race to a position of inferiority" is inconsistent with legal equality.¹⁷⁵ Since then, Charles Lawrence has further elaborated upon *Brown*'s anti-caste principle by specifying three underlying characteristics of segregation:¹⁷⁶ (1) "segregation's *only* purpose is to label or define [B]lacks as inferior and thus exclude them from full and equal participation in society;" (2) "[B]lacks are injured by the existence of the *system* or *institution* of segregation rather than by particular segregating acts;" and (3) "the institution of segregation is *organic* and *self-perpetuating*"—"[o]nce established it will not be eliminated by mere removal of public sanction but must be affirmatively destroyed."¹⁷⁷

Indeed, Lawrence presents these three characteristics as a contrast to the mistaken assumption that segregation is simply about physically separating the races.¹⁷⁸ Given these true purposes of segregation, Lawrence notes that the distinction between the concepts of de jure and de facto segregation are immaterial because any facilitation of racial segregation sets in motion a self-perpetuating tool of caste subordination.¹⁷⁹ Segregation is a caste-creating principle because of its message suggesting that the socially excluded are inferior.¹⁸⁰ This message is conveyed to all of society regardless of whether the government is facially involved through the imposition of Jim Crow laws.¹⁸¹ In fact, the Black psychologist whose work informed the *Brown* decision, Dr. Kenneth Clark, was very clear in noting that "the fact that the segregation is or is

174. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

175. *Id.* at 429–30.

176. Charles R. Lawrence, "One More River to Cross"—Recognizing the Real Injury in *Brown*: A Prerequisite to Shaping New Remedies, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 48, 50 (Derrick Bell ed., 1980). See also ROBERT J. COTTRILL, RAYMOND T. DIAMOND, AND LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 241 (2003) ("*Brown*'s importance lay in setting the nation's law on the path of rejecting the kind of racial exclusion that had made African Americans a people apart since before the nation's founding. . . . *Brown* began the process of withdrawing the law's sanction from the system of caste and castelike distinctions that had been a part of American life from the beginning.").

177. *Id.*

178. *Id.* at 50–51 ("That the purpose of the institution of segregation has always been to stigmatize and subordinate rather than to simply separate is perhaps best demonstrated by the fact that whites in the antebellum South had no aversion to commingling with blacks so long as the institution of slavery made their superior status clear. It was only with the demise of slavery that segregation became necessary.").

179. *Id.* at 56.

180. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439–40 (1990).

181. *Id.* at 53.

not sanctioned by the law has no impact on the detrimental effect that segregation has on minority children."¹⁸² Lawrence explains that *Brown* can be read more broadly to articulate a principle of equal citizenship that is the foundation for all anti-discrimination law because "it requires the affirmative disestablishment of societal practices that treat people as members of an inferior or dependent caste, as unworthy to participate in the larger community."¹⁸³ It is this broader understanding of the *Brown* case, supported in early court decisions,¹⁸⁴ which may make it useful to Latin American racial justice movements generally and also specifically in Brazil.¹⁸⁵

The primary value of *Brown* as an anti-caste principle in Brazil is the assistance it could lend to denaturalizing the view of racial hierarchy as inevitable. Linda Greene observes that because racial segregation in the United States is of such long stature and continues to exist, North American culture is "confident that caste reflects true merit, not undeserved oppressions."¹⁸⁶ Similarly, in Brazil and the rest of Latin America and the Caribbean, racial hierarchy is viewed as a natural consequence of both the "bad culture" imbued in people of African descent and their coincidental lives of poverty.¹⁸⁷ If the anti-caste understanding of *Brown* were used as a vehicle for revealing the ways in which racial disparity and hierarchy arise from segregation and other tools of social exclusion, then it might help to debunk the notion that racial hierarchy is accidental and beyond the purview of the law to address.

182. KENNETH B. CLARK, PREJUDICE AND YOUR CHILD 85 (1955). The psychological effects of segregation that Dr. Clark observed were the development of feelings of inferiority, awareness of rejection, poor social adjustment, introversion, and emotional instability. *Id.* at 62.

183. Lawrence III, *supra* note 180, at 439.

184. See *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968) (ordering a school district to take affirmative duty to eliminate the segregation still existing after instituting a race neutral "freedom of choice" plan that allowed each pupil to choose which public school he or she would attend, but which was ineffective at integrating a school system that had previously been ruled by longstanding state-imposed segregation). See also E.H. Schopler, *De Facto Segregation of Races in Public Schools*, 11 A.L.R. 3d 780 (listing state court cases in which a cause of action for relief from de facto segregation was permitted).

185. I view the anti-caste principle in *Brown* as its original meaning, before courts began to narrow its implementation and social conservatives held it captive to their own narrower perspective of the case's meaning. See Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 390 (2000) ("[T]he narrow, modern interpretation of *Brown* is a direct by-product of its conservative canonization."). See also RICHARD KLUGER, *SIMPLE JUSTICE* 749 (1976) ("Every colored American knew that *Brown* did not mean he would be invited to lunch with the Rotary the following week. It meant something more basic and more important. It meant that black rights had suddenly been redefined; black bodies had suddenly been reborn under a new law. Blacks' value as human beings had been changed overnight by the declaration of the nation's highest court. At a stroke, the Justices had severed the remaining cords of *de facto* slavery. The Negro could no longer be fastened with the status of official pariah.").

186. Linda Greene, *Jim Crowism in the Twenty-First Century*, 27 CAP. U. L. REV. 43, 58 (1998).

187. Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1160 (2002).

Of course the *Brown* case would not be deployed in Latin America for the purpose of seeking such desegregation orders as existed in the United States. This is because the Latin American racial segregation problem is not primarily within the public schools, but instead between public and private schools, as well as between public elementary and secondary education and the public university setting. Indeed one possible solution is to reallocate government funding from the university settings to the Black elementary and high schools in order to create a kind of magnet for voluntary integration. *Brown* would then be helpful perhaps to launch the struggle against the caste system that segregation imposes. Thus, my proposal for Afro-Brazilian activists is to use *Brown* as a rhetorical tool for framing the problem as one of segregation, thereby revealing the state's complicity in maintaining the segregation of its schooling by its financing priorities. The goal would be to pressure the government to seek greater financing for public elementary and secondary schools and/or to shift its financing from the university setting to the primary and secondary settings.

Why might this be an attractive proposal despite its utopian aspirations? Because it provides a way to address the disparity of fiscal priorities with a legal cause of action rather than merely a political one. Given the fact that the executive branch of the Brazilian federal government has been a proponent of addressing racial disparities in Brazil and at the forefront of supporting affirmative action, this proposal may provide it with the political tool it needs to marshal for a fiscal overhaul.¹⁸⁸ University officials resistant to redeploying funds could be obligated to devote pro bono hours to the primary and secondary school levels as a way to maximize resources all the way around.

Furthermore, the anti-caste principle of *Brown* could also be useful in the ongoing litigation surrounding affirmative action in higher education. It would further justify government action to institute affirmative action programs as a remedy for the racially exclusive public university settings created by racially-biased government education funding policies. One may find support for such an expansive application of *Brown* from U.S. court decisions finding impermissible de jure segregation in contexts where facially race-neutral government policy or state inaction maintains de facto racial segregation.¹⁸⁹

188. See Mala Htun, *From "Racial Democracy" to Affirmative Action: Changing State Policy on Race in Brazil*, 39 *LATIN AM. RES. REV.* 60, 62, 80 (2004) (detailing the initiatives various government officials, particularly President Cardoso, took in supporting affirmative action in Brazil). See also Andrew Hay, *Brazil's Poor To Get Private University Quotas*, *REUTERS NEWS*, Jan. 13, 2005 (describing a new Brazilian law that President Luiz Inacio Lula da Silva created to allow private universities to receive tax breaks if they voluntarily set admission quotas at twenty percent for poor Afro-Brazilian and indigenous students).

189. See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) (finding de jure segregation for purposes of validating judicial authority to impose a busing desegregation plan in the context of a school district that was not affirmatively segregating students but had yet to proactively remove the vestiges of its former dual system and its race neutral assignment of students to the school nearest their home would not effectively dismantle the segregation); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973) (articulating the premise that de jure

The advantage of using *Brown* to assist the efforts of educational reform rather than simply lobbying for color-blind equal financing is that, as examples in the United States have shown, equal funding does not necessarily equalize opportunity.¹⁹⁰ Severing race from class in the analysis and consideration of

segregation can exist in a jurisdiction that never had a history of legislatively mandated public school segregation, if there was otherwise an intentional state action—but there is prima facie evidence of such intent throughout the school system, if actual intent is demonstrated for one portion of the school system). “The Court’s decision today, while adhering to the *de jure/de facto* distinction, will require the application of the *Green/Swann* doctrine of ‘affirmative duty’ to the Denver School Board despite the absence of any history of state-mandated school segregation.” *Keyes*, 413 U.S. at 224 (Powell, J., concurring in part and dissenting in part). See also *Milliken v. Bradley*, 418 U.S. 717, 761 (1974) (Douglas, J., dissenting) (“[T]here is so far as the school cases go no constitutional difference between *de facto* and *de jure* segregation. Each school board performs state action for Fourteenth Amendment purposes when it draws the lines that confine it to a given area, when it builds schools at particular sites, or when it allocates students.”); *Sheff v. O’Neill*, 678 A.2d 1267, 1280 (Conn. 1996) (“The fact that the legislature did not affirmatively create or intend to create the conditions that have led to the racial and ethnic isolation in the Hartford public school system does not, in and of itself, relieve the defendants of their affirmative obligation to provide the plaintiffs with a more effective remedy for their [state] constitutional grievances.”); *Sch. Comm. v. Bd. of Educ.*, 319 N.E.2d 427 (Mass. 1974) (holding that when a school board takes voluntary action to eliminate segregation, subsequent action that would cause a return to segregation constitutes state action). See also Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 108 (1967) (advocating position that “equal protection of the laws is denied by the state whenever the legal regime of the state, which numbers amongst its ordinary police powers the power to protect the Negro against discrimination based on his race, elects not to do so”); David Chang, *The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process*, 63 B.U. L. REV. 1, 52 n.159 (1983) (arguing that state action doctrine is not solely about determining the intent of state policy but that the government also has “an obligation . . . that will be breached if education fails to benefit disadvantaged minority students as much as their white counterparts”); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555, 594–95 (1994) (observing that Mexican-American school desegregation litigation led to some decisions holding that a school district’s employment of “a ‘neighborhood school’ concept in the context of a pattern of Mexican-American residential segregation” constituted sufficient state action to support a finding of unconstitutional segregation).

190. Susan E. Eaton, Joseph Feldman & Edward Kirby, *Still Separate Still Unequal: The Limits of Milliken II’s Monetary Compensation to Segregated Schools*, in *DISMANTLING DESEGREGATION*, *supra* note 123, at 143, 145–46 (noting various limitations of equal financing approaches to ensuring quality education, including the fundamental weakness that “extra funding to segregated schools is not guaranteed to last”); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1347, 1350–52 (2004) (concluding that the old effort toward integration of equal financing has not worked. The redistribution of funding to lower-income districts does not equalize the level of education because these school districts have more expenses than do wealthier schools and as a result they spend more. These lower-income districts spend more money on special needs, bilingual education, students with untreated health problems, hunger, and security. These areas also have dilapidated overcrowded schools in need of expensive repairs.); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 432–33 (1999) (citing studies by Professors Douglas Reed in New Jersey and Kent Tedin in Texas showing that “white citizens in both states inaccurately perceived school finance reform as primarily benefiting blacks”). See also Denise C. Morgan, *The Less Polite Questions: Race, Place, Poverty and Public Education*, 1998 ANN. SURV. AM. L. 267 (1998) (discussing the ways in which the lack of adequate financial allocation to public schools serving students of color implicitly questions the ability of children of

policies to the persistent social exclusion of people of color inherently hampers the construction of an adequate policy solution.¹⁹¹ That is why it is necessary to analyze the public school context in Brazil as a problem of both race and class. Merely seeking additional funding and resources for public schools leaves unaddressed the ways in which racialized reasoning can continue to inform financing priorities and the resulting construction of racially exclusive institutions of higher learning. Engaging in a holistic race and class analysis can provide a more accurate picture of the social problem and hopefully lead to a more effective solution than one based solely in a race-neutral class analysis.

Assessing the impoverished education of Brazilian public school students, who are predominantly Black, as a form of segregation via racist financing priorities seeks not only to improve the schools for the benefit of students of African descent, but also to erode the notion that students of African ancestry do not deserve a quality education or to be better prepared for civic life. A class-based discourse alone cannot erode such pervasive and problematic assumptions about the capabilities and social roles of people of African descent. Even if additional funding were provided to the public schools, the absence of a race-based analysis would permit the continuing racial segregation between public and private schools to create a culture of racial hierarchy and subordination.¹⁹²

Engaging in a discourse about racial segregation also heightens the possibility that White parents will reconsider whether to place their children in private schools once the public schools actually do begin to offer quality education. I do not mean to suggest that the presence of White students is what creates the possibility for quality education. White students do not innately bring a racially superior attitude toward education, but those White students with economic resources do bring "opportunity networks" that students of African descent are otherwise foreclosed from regardless of their educational performance.¹⁹³ Bringing students of African descent into those opportunity networks not only benefits them but also broadens the perspectives of White students. In other words, when *Brown* stated that "[s]eparate

color to learn).

191. See Tanya K. Hernandez, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135, 1159–66 (2000); MASSEY & DENTON, *supra* note 122, at 84–88 (demonstrating with empirical data the extent to which class-based explanations of Black-White residential segregation are inadequate to assess the powerful influence of structural racial bias).

192. See Powell & Spencer, *supra* note 128, at 350 ("Because segregation creates a culture of racial hierarchy and subordination, true integration requires community-wide systemic efforts to dismantle this culture and create a more inclusive educational system and a more inclusive society—a society in which all individuals and groups have equal opportunities to fashion and participate in the democratic process.").

193. Orfield, *supra* note 123, at 344.

educational facilities are inherently unequal,”¹⁹⁴ it stated it with an appreciation for the impossibility of separately providing a quality education for students while an unequal society continues to characterize quality and merit as White only.¹⁹⁵

C. *Barriers to Brown in Brazil?*

Despite the *Brown* case having the potential to assist the racial justice movement in Brazil and elsewhere in Latin America, it may also undermine those very same efforts for a number of different reasons. For one, because there are segments of the Black movement in Brazil that are focused on developing community-based, alternative schools in which Black culture and history are valorized, some may be reluctant to pursue a strategic discourse on segregation that could in turn be used to challenge the Black schools they have created.¹⁹⁶ But the disinterest in *Brown* could extend beyond those involved in the Black culture schools.

This is because the Black movement in Brazil has since its inception been attacked by its opponents as being inappropriately influenced by ill-fitting U.S. notions of discrimination.¹⁹⁷ Despite the Black movement’s articulation of how the racial subordination in Brazil has long existed and is neither a foreign invention nor an imperialist import, claims of racial subordination in Brazil are still subject to accusations of inauthenticity and alarmism. Furthermore, the narrative of violence attached to *Brown*, by virtue of Jim Crow, lynching, resistance to civil rights protestors, and White opposition to busing, may divorce it too strongly in the minds of Brazilians fed on the notion that Brazilian race relations are cordial despite being hierarchical.¹⁹⁸ This perspective, of course, overlooks the Brazilian violence of racially biased policing, police brutality, and even death squads targeting primarily Black street children. Nevertheless, given the cultural belief in cordial race relations, the reference to *Brown* may be rejected as an ill-fitting foreign import, even by Brazilian decision makers otherwise concerned with the existence of racism in Brazil. Indeed, because the

194. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

195. See Orfield, *supra* note 123, at 361 (“There is nothing in the experience of the United States since *Plessy v. Ferguson* to suggest that racially separate schools will ever be equal so long as the rest of society is profoundly unequal.”).

196. See De Almeida, *supra* note 69, at 19 (equating the ruling in *Brown* with discrediting Black educational institutions).

197. See Edward E. Telles, *US Foundations and Racial Reasoning in Brazil*, 20 THEORY, CULTURE & SOCIETY 31, 31 (2003) (discussing and ultimately rejecting claim by two French scholars that “US foundations . . . inappropriately impos[e] their conceptions of race . . . by requiring grantees to implement US-style affirmative action, use dichotomous black/white categories and promote US-style black movements”).

198. See TWINE, *supra* note 37, at 7; see also Maria Ligia de Oliveira Barbosa, *Diferencias de Género y Color en las Escuelas de Brasil: Los Maestros y la Evaluación de los Alumnos*, in ETNICIDAD, RAZA, GÉNERO Y EDUCACIÓN EN AMÉRICA LATINA (Donald R. Winkler & Santiago Cueto eds., 2004).

longstanding, prevalent discourse of racial mixture in Brazil is seemingly distinct from the U.S. focus on racial separation embodied in the Jim Crow laws and the Rule of Hypo-Descent (also known as the “One Drop Rule”) which racially classified an individual as Black if they had even one known ancestor of African ancestry, *Brown’s* segregation discussion may seem particularly ill-suited to the Brazilian context in which racial categories are more fluidly assigned to allow for an escape from the racial category of Blackness.¹⁹⁹ In fact, because the concept of segregation has long been understood as being intimately tied to the Rule of Hypo-Descent for classifying who is Black and thus socially excludable, the absence of such a system of racial categorization in Brazil may make the concept of segregation particularly alien.²⁰⁰ Consequently, Black activists may be reluctant to take on this kind of baggage in defending the usage of *Brown*.

Finally, Brazilian activists may be intuitively disinclined to use *Brown* and its emphasis upon segregation as an analytical tool. With Brazil’s problematic history of touting the existence of its racial mixture as evidence of the absence of racial discrimination, Brazilian activists are particularly attuned to the ways in which facially diverse racial demography alone does not remedy inequality. In other words, “segregation” may not be viewed as analytically useful to the activists because they are cognizant of how the superficial appearance of racial integration may coexist with entrenched racial hierarchy. Even a struggle against the supremacist usage of segregation to subordinate might very well result in mere facial integration without the necessary substantive change and the reallocation of resources that must occur to divorce the notion of inferiority from Blackness.

Despite the possible problems with using a U.S. precedent like *Brown* in Brazil, it should be noted that the Black movement has already begun the work of justifying the use of borrowed concepts like affirmative action (which originated in India), despite the fact that affirmative action is simultaneously under attack in the United States.²⁰¹ Nor have the activists been dissuaded from advocating for affirmative action by the charge that affirmative action cannot be implemented in a racially mixed society where

199. See F. JAMES DAVIS, WHO IS BLACK? 5 (1991) (describing the traditional U.S. classification of individuals as Black based upon the existence of even a single ancestor with African ancestry, as the One Drop Rule and alternatively as the Rule of Hypo-Descent as it is used by anthropologists). See also Hernández, *supra* note 187, at 1123 (comparing and contrasting the Latin American “fluid” system of racial categorization with the “rigid” U.S. approach).

200. This of course ignores the historical truth that the use of the Rule of Hypo-Descent predates the U.S. imposition of Jim Crow laws and that racial commingling was common during slavery but came to be viewed as problematic when Whites became threatened by the notion of having to share power with Blacks post-emancipation. See Lawrence, *supra* note 176, at 50–51.

201. See AÇÕES AFIRMATIVAS: POLÍTICAS PÚBLICAS CONTRA AS DESIGUALDADES RACIAIS (Renato Emerson dos Santos & Fátima Lobato eds., 2003) (publishing collection of papers by various Brazilian and Afro-Brazilian scholars discussing the concept of affirmative action for Brazilian society); *CivilRights.org, Status Report on Affirmative Action* (Oct. 26, 2004), at http://www.civilrights.org/issues/affirmative/status_report.html (detailing the continued attacks on affirmative action in the United States).

identifying who is Black is not as presumably simple as it is in the United States. In a remarkable showing of public support for the campaign for affirmative action, former president José Sarney once stated, "Without access to education, blacks are condemned to segregation."²⁰² Accordingly, Afro-Brazilian activists may very well be open to considering the possible uses of *Brown* once the caste principle of *Brown* is highlighted and the discursive invisibility of segregation is addressed in Brazil.

IV. CONCLUSION

It is not my intention to in any way suggest that an educational reform movement cannot move forward in Brazil without a reference to *Brown*. Rather, I have explored the possible application of *Brown* in Brazil and Latin America for the purpose of developing theoretical frameworks for putting into legal practice the racial solidarity movement of peoples of African descent throughout the Diaspora.²⁰³ Certainly not every legal tool can or should be transplanted from one jurisdiction to another.²⁰⁴ Yet, this consideration of *Brown*'s possible global influence has revealed the way in which the subordination of people of African descent is pervasive across the Americas. More importantly, it has revealed the central use of racial segregation as a symbol of racial inferiority to legitimate racially exclusive spaces of privilege. While North and South America do not share the same historical use of Jim Crow laws,²⁰⁵ they do share a societal use of segregation for the promotion of supremacy. The segregation of education has been key to this agenda of privilege. Because they share the same battle against insidious systems of racial hierarchy, it is sensible for both Americas to look beyond the superficial differences of their legal histories and instead focus upon the commonality of the historical legacy of slavery and its outgrowth in the continuing societal efforts to maintain privilege as veiled by the discourse of merit, self-reliance, and culture. It is perhaps by

202. See Htun, *supra* note 188, at 70 (reprinting Sarney's statement as reported by Brazilian newspaper *Jornal da Tarde* published on Oct. 2, 2001).

203. See Tanya Kateri Hernández, *Comparative Judging of Civil Rights: A Transnational Critical Race Theory Approach*, 63 LA. L. REV. 875, 878–79 (2003) (describing the developing transnational collaboration between racial justice movements across the Americas).

204. Indeed, at least one close observer of Brazilian race relations has conjectured that the distinct economic and demographic patterns of Brazil, as compared with the United States, will make it unlikely that White Brazilians will be as willing to consider the redistributive justice demands of the Black Movement, as Whites in the United States were during the Civil Rights Movement. See GEORGE REID ANDREWS, *BLACKS AND WHITES IN SÃO PAULO, BRAZIL 1888–1988*, 240–41 (1991). *But see* Hernández, *supra* note 187, at 1164 (describing how Afro-Brazilians successfully influenced state officials to institute affirmative action policies by operating within international venues like the 2001 United Nations World Conference Against Racism).

205. See Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11 (2001) (contrasting the laws of race and slavery in Brazil and the United States).

the strategically combined efforts of peoples of African descent in the Americas that racial justice can be effectuated in the contemporary landscape of presumably color-blind lawmaking within the complex reality of racial disparity.²⁰⁶

206. The African diasporic approach to challenging racial injustice proposed herein may be an example of what Derrick Bell terms “forging fortuity” to effectuate lasting racial equality. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 190–91* (2004). One modest example of a current attempt at forging fortuity across the African Diaspora is the “Afro-Latino Resolution” that has been proposed in the United States Congress by African American congressman Charles Rangel. Karen Juanita Carrillo, *Black/Latino Caucus Pushing for “Afro-Latino Resolution,”* N.Y. AMSTERDAM NEWS (N.Y.), Feb. 5–11, 2004, at 7. The resolution would have the United States formally recognize that there are some 80 to 150 million people of African descent living in Latin America and the Caribbean and would acknowledge, in Rangel’s words, that Afro-Latinos are “our brothers and sisters through the slave trade and, like us, they are suffering from similar problems.” *Id.*

