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I'M CONFUSED: HOW CAN THE FEDERAL GOVERNMENT PROMOTE DIVERSITY IN HIGHER EDUCATION YET CONTINUE TO STRENGTHEN HISTORICALLY BLACK COLLEGES?

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I. Introduction

Education remains the key to success in America,[1] and often is the most important public priority.[2] Although the Supreme Court does not consider education a fundamental right,[3] the Court recognizes the importance of equal *access* to education.[4] Fifty years have passed since *Brown v. Board of Education*,[5] yet substantial racial sorting persists in education at all levels.[6] At the K-12 level, white families—and even middle-class black families—flee to the suburbs when urban neighborhoods and schools reach their "tipping point,"[7] which occurs when the number of blacks in a setting

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1 Shaakirrah R. Sanders, *Twenty-Five Years of a Divided Court and Nation: "Conflicting" Views of Affirmative Action and Reverse Discrimination*, 26 U. ARK. LITTLE ROCK L. REV. 61, 109 (2003); Harold McDougall, *School Desegregation or Affirmative Action?* 44 WASHBURN L.J. 65, 65 (2004).

2 Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 857 (1996).

3 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."); Plyler v. Doe, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution.").

4 Brown v. Bd. of Educ., 347 U.S. 483 (1954). Matthew S. Lerner, Comment, *When Diversity Leads to Adversity: The Principles of Promoting Diversity in Educational Institutions, Premonitions of the* Taxman v. Board of Education *Settlement*, 47 BUFF. L. REV. 1035, 1066 (1999) (citation omitted) (Equal access to education is, among other things, "the key to good jobs, quality housing, political influence, economic parity and social stability.").

5 347 U.S. 483 (1954). In *Brown*, Plaintiffs were denied admission to the public schools of their communities based on laws that required or permitted segregation according to race. *Id.* at 488. The Supreme Court overruled *Plessy v. Ferguson* by holding that the "separate but equal" doctrine has no application in the field of education. The segregation of children in public schools based solely on their race violates the Equal Protection Clause. *Id.* at 494–95. Following this case, schools were required to become desegregated. *Id.* at 495.

6 *See* Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER RACE & JUST. 213, 221 (2003) ("The gap and its disproportionate impact on people of color and the poor are exacerbated by failing urban school systems that, even fifty years after *Brown v. Board of Education*, remain segregated by race and class as a result of *de facto* circumstances.") (citations omitted); J. Clay Smith, Jr. & Lisa C. Wilson, *Brown on White College Campuses: Forty Years of* Brown v. Board of Education, 36 WM. & MARY L. REV. 733, 737 (1995) ("In looking at the bare principle of integration, the ideals of *Brown*, which call for the elimination of statutory segregation, apparently have been met. However, when looking closely at what is occurring, and recurring, on historically white campuses, it appears that the vestiges of segregation continue.").

7 Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 629–30 (1983). Professor Paul Gewirtz's landmark article introduced the tipping point theory:

> Whites who object to integration in a city's public schools and who have the flexibility and the resources may decide to "flee" by sending their children to private schools or by choosing to live in another community....The degree to which white flight occurs in a school system depends upon the proportion of black enrollment in the schools as well as other variables. If the proportion of blacks in the schools is greater than some "tipping point," it is commonly believed that white flight significantly escalates, and the schools may become or remain identifiably black.... A tipping point and flight therefore put a

prompts whites to leave in order to find a more homogenous environment.[8] The inability of whites and blacks to live, worship, commute, shop, and learn together makes *de facto* segregation[9] a fundamental characteristic of American life.[10]

> limit on achievable integration . . . . The very transition from segregation to integration sets in motion a movement towards resegregation.

Id. Since all parents want the best for their kids, white parents "fight against any element that could be perceived as watering down the quality of their kids," and black middle-class parents "worr[y] that teachers have low expectations of their children." SHERYLL D. CASHIN, THE FAILURE OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 78 (2004) (citation omitted).

[8] *See* Parents Ass'n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574, 576–77 (2d Cir. 1979) (stating that promoting a more lasting integration is a sufficiently compelling purpose to justify as a matter of law excluding some minority students from schools of their choice under the obviously race-conscious Rate of Change Plan). The court recognized tipping points. *Id.* at 576. Some courts have allowed school districts to limit black enrollments in certain schools in order to prevent white flight. *Id.* at 580; Riddick v. Bd. of Norfolk, 784 F.2d 521, 528–29 (4th Cir. 1986) (finding that school board may legitimately consider white flight when formulating a plan to stabilize school integration), *cert. denied*, 479 U.S. 938 (1986). In discussing these cases, Professors Lively and Plass note that "[c]onsequently, black students could be denied admission to a particular school even though it would accept white students." Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1338 n.168 (1991) (discussing *Parents Ass'n of Andrew Jackson High Sch. v. Ambach* and *Riddick v. Bd. of Norfolk*). Tipping points are also observed in housing and employment choices. *See, e.g.*, Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1994 n.34 (2000) ("At the neighborhood level, although white attitudes toward integration have become more liberal over time, there is strong evidence that white demand for housing in a neighborhood is clearly affected, to some degree, by its racial composition, thereby limiting prospects for achieving stable racial integration.") (citation omitted); Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897, 924–25 (2002) (observing that neighborhood demographics remain stable below the tipping point, but an "orgy" of selling occurs when it is reached); Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 312 (2004) (discussing the "tipping point" in the employment context, particularly when a job associated with a particular minority group becomes less desirable for whites).

[9] *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205 (1973) (recognizing two forms of segregation in the discrimination context). *De jure* segregation is "a current condition of segregation resulting from intentional state action." *Id.*; Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (defining *de facto* segregation as a racial imbalance that arises through no discriminatory state action). "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation...is purpose or intent to segregate." *Keyes*, 413 U.S. at 208 (citation omitted). *See also* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (elucidating the factors which establish proof of discriminatory intent); Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977) (noting that *de jure* segregation violates the Equal Protection Clause of the Fourteenth Amendment, but *de facto* segregation does not). For a alternative viewpoint, see *Keyes*, 413 U.S. at 216 (Douglas, J., dissenting) ("I think it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies.").

[10] *See* Wade, *supra* note 6, at 223. Dinesh D'Souza has written about the harmful effects of the "strong and persistent residue" of *de facto* segregation on American society:

> Indeed even without the support of law, social pressures appear actively to promote racial and ethnic isolation in many areas, threatening to reverse the trend of the past several decades, to thwart the national aspiration for integration, and to revive such concepts as "separate but equal," which had justified legal segregation since the late 19th century.

The seeds of segregation planted during childhood blossom in college, where racial sorting has become entrenched.[11] Segregated fraternities, sororities, theme houses, cafeteria tables, library floors, and sporting events pervade many campuses[12]—even those that claim to be *diverse*.[13] Many Americans are not particularly troubled by on-campus segregation because "[it] is perpetuated by choice, not mandated by law."[14] The courts generally agree.[15]

Dinesh D'Souza, *The New Segregation on Campus*, 60 AM. SCHOLAR 17, 17 (1991).

[11] *See* Mel Elfin & Sarah Burke, *Rage on Campus*, U.S. NEWS & WORLD REPORT, Apr. 19, 1993, at 52 (quoting Syracuse University Vice-President, Robert Hill, as saying, "[w]e have a campus of 25,000 students; [and] there is no mixing across cultural and racial lines."); Steve Sailer, *Where the Races Relate*, NAT'L REV., Nov. 27, 1995, at 41 (stating that university administrators may exacerbate self-segregation through "mandatory ethnic studies, minority-only orientation weeks, single-race dormitories, and relentless emphasis on the oppression of minorities, colleges today focus incoming freshmen on what each student is and unalterably will be: Black or white, Hispanic or Asian.").

[12] *See, e.g.*, D'Souza, *supra* note 10, at 17 (describing self-segregation at UC Berkeley and other prestigious colleges). Author and columnist Clarence Page believes that students "segregate according to their interests. It just so happens it goes along racial lines." Clarence Page, *Race, Law & Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 585 (1996). *See also* Wendy Hernandez, Note, *The Constitutionality of Racially Restrictive Organizations within the University Setting*, 21 J.C. & U.L. 429, 431–32 (1994) ("Increasingly, a new type of racially defined student group...is emerging [on college campuses]. These organizations restrict their membership to students of certain racial backgrounds....Although their rights to exist have not yet been challenged in court, racially restrictive clubs raise legal concerns for the universities within which they operate.") (citations omitted); BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE: A PSYCHOLOGIST EXPLAINS THE DEVELOPMENT OF RACIAL IDENTITY 75–80 (1997) (describing the development of racial identity in a self-segregated environment on college campuses.); JOE R. FEAGIN ET AL., THE AGONY OF EDUCATION: BLACK STUDENTS AT WHITE COLLEGES AND UNIVERSITIES 71 (1996) (identifying black demands for separate dorms and support facilities at major universities as being comparable to earlier patterns of legal segregation). This self-segregation has led some commentators to "[blame] black students for being unwilling to melt into the melting pot...." *Id.* at 2 (citing ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 93 (1987). Professor Troy Duster responds to the critics of self-segregation:

> Wholesale condemnation of self-segregation is too simple and simple-minded . . . . What ultimately bothers today's critics most is not the racial or ethnic segregation of students' social lives, but the challenges that the growing numbers of [minority] students pose to the faculty once they find their ancestors' histories and contributions largely ignored in the classroom.

Troy Duster, *Understanding Self-Segregation on the Campus*, CHRON. OF HIGHER EDUC., Sept. 25, 1991, at B1.

[13] *See, e.g.*, Denise K. Manger, *Amid the Diversity Racial Isolation Remains at Berkeley*, CHRON. OF HIGHER EDUC., Nov. 14, 1990, at A37 (identifying UC Berkeley as a typically diverse school where students nonetheless self-segregate); *see* D'Souza, *supra* note 10, at 20–22 (stating the these campuses should be described as "pluralistic" rather than "integrated" or "diverse").

[14] Paul Taylor, *Think Tank Proposes Overhaul of Affirmative Action Policies*, NEWS & OBSERVER, Aug. 6, 1995, at A11.

[15] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22 (1971) ("We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, *not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds.*") (emphasis added); *cf.* McLaurin v. Oklahoma St. Regents, 339 U.S. 637, 641 (1950) ("There is a vast difference—a Constitutional difference—between restrictions imposed by the

University administrators nonetheless pursue *diversity* initiatives in order to combat campus self-segregation, to provide greater access and opportunity to black students, and to prepare white students for a working world with larger percentages of minorities.[16] In *Grutter v. Bollinger*,[17] the Supreme Court recognized that a university may have a compelling interest in attaining a diverse student body, because obtaining the educational benefits that come from diversity may—in the school's educational judgment—be essential to the university's educational mission.[18] Justice O'Connor emphasized that *Grutter* is wholly consistent with *Regents of the University of California v. Bakke*,[19] where Justice Powell found that a university's effort to obtain a diverse student body is constitutionally permissible within limits.[20] Thus a university's consideration of race as an admissions criterion can survive strict scrutiny.[21]

Even though the federal government seeks diversity in its own agencies[22] and service academies,[23] it also supports historically black

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state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar.").

[16] *See* Elfin & Burke, *supra* note 11, at 52 (observing that diversity has become a tangible asset for many PWIs, which tout diversity statistics in admissions brochures and other publications). Unfortunately, "those glowing photos in college promotional material showing blacks and whites strolling on peaceful fall afternoons present a distorted picture—particularly at the larger institutions." *Id.*; *see also* D'Souza, *supra* note 10, at 18 ("Moreover, university leaders are embarked on a conscious project to shape students into future leaders of an increasingly multicultural community.").

[17] 539 U.S. 306 (2003). In *Grutter*, a law school applicant sued the law school, university regents, and university officials, claiming race discrimination in the law school's admission policy. *Id.* at 316–17. The trial court concluded that the policy was unlawful and granted an injunction. *Id.* at 321. Sitting en banc, the United States Court of Appeals for the Sixth Circuit reversed the judgment and vacated the injunction. *Id.* at 321–22. The Court found that the Equal Protection Clause did not prohibit this narrowly tailored use of race in admissions decisions to further the school's compelling interest in obtaining the educational benefits that flow from diversity. *Id.* at 325. The goal of attaining a "critical mass" of underrepresented minority students did not transform the program into a quota. *Id.* at 330. Because the law school engaged in a highly individualized, holistic review of each applicant, giving serious consideration to all the ways the applicant might contribute to a diverse educational environment, it ensured that all factors that could contribute to diversity were meaningfully considered alongside race. *Id.* at 337.

[18] *Id.* at 328 (citation omitted).

[19] 438 U.S. 265 (1978).

[20] *Bakke*, 438 U.S. at 311–12 (acknowledging the goal of a diverse student body as constitutionally permissible, but rejecting the notion that minorities should receive preferential admission in order to promote better health-care delivery to deprived citizens because "there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race.").

[21] *Id.*; *Grutter*, 539 U.S. at 326–27 ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.").

[22] *See* 5 C.F.R. pt. 720, App. (2005) (instructing the U.S. Office of Personnel Management to build a diverse federal workforce "from all segments of society").

[23] *See* Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al., as Amici Curiae in Support of Respondents at 29, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) (describing that military officers supporting the service academies took the opposing viewpoint). "There is presently no workable alternative to limited, race-conscious programs to increase the pool of qualified minority officer

colleges and universities (HBCUs)[24]—institutions which, as Ward Connerly explains, are *inherently* nondiverse:

> [R]acial diversity is an intrinsic good that should be promoted at every opportunity on every campus. This is the position of the federal government, after the Supreme Court ruled [in *Grutter*] that states have a compelling interest in fostering diversity. [Most college and university administrators and a sizeable number of Americans support this ideal]. But directly opposed to the diversity ideal are historically black colleges and universities (HBCUs), *[whose] entire reason for being is to not be diverse.* Yet Americans support HBCUs as well, [which is shown by the channeling of] federal funds to HBCUs every year. Here lies the dilemma.[25]

The maintenance of HBCUs frustrates any sincere efforts to diversify predominately white institutions (PWIs). This issue is timely for two reasons. First, America's movement toward a race-blind society makes any race-conscious governmental actions suspect in the eyes of the public[26] and

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candidates and establish diverse educational settings for officer candidates....[T]he armed services must have racially diverse officer candidates who also satisfy the rigorous academic, physical, and personal prerequisites for officer training and future leadership." *Id.* The United States filed briefs in support of the petitioners in *Grutter* and in *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down the "points" that the University of Michigan awarded for race in undergraduate admissions); In *Gratz*, the United States claimed that Michigan's admissions policy "[was] plainly unconstitutional under this Court's precedents. The University...failed to employ race-neutral alternatives that have proven effective in meeting the important and laudable goals of educational openness, accessibility, and diversity in other States, [and instead] resorted to impermissible racial quotas or their equivalent." Brief for the United States as Amicus Curiae Supporting Petitioners at 11, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516). *See also West Point, White House Go Opposite Ways on Diversity*, BOSTON GLOBE, Feb. 2, 2003, at A12 (noting that the Bush administration distinguished the Michigan and service academy admissions policies, and thus made no plans to change the latter).

[24] An HBCU is any "college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans." 20 U.S.C. § 1061(2) (2000). HBCUs are a subset of Minority-Serving Institutions (MSIs), which include Tribal Colleges, Hispanic-Serving Institutions, and Alaska Native/Native Hawaiian Institutions. Mainstream institutions which have low minority enrollments are called predominately white institutions (PWIs).

[25] Ward Connerly, *At Issue: Are Racially Identifiable Colleges and Universities Good for the Country?* 13 CQ RESEARCHER 1061, 1061 (2003) (emphasis added) (William H. Gray, III, presents an opposing viewpoint in the same article.)

[26] *See, e.g.*, Carol R. Goforth, *"What is She?" How Race Matters and Why It Shouldn't*, 46 DEPAUL L. REV. 1, 63–64 (1996) ("[T]he adoption of laws and rules which rely on race as a basis for differentiating between individuals also undermines the goal of a color-blind society. After all, how color blind can society be if the law persists in classifying individuals by race and by making decisions based on those classifications?"); L. Darrell Weeden, *Creating Race-Neutral Diversity in Federal Procurement in a Post-*Adarand *World*, 23 WHITTIER L. REV. 951, 962 (2002) ("American society today is not color blind. The federal government is an ideal candidate to serve as a role model for initiating a color-blind society by declaring that it will not classify American citizens based on race for any reason.").

the courts.[27] Second, in his majority opinion in *United States v. Fordice*,[28] Justice White intimated that racially identifiable schools may border on unconstitutionality.[29]

This Note examines the inherent conflict between the federal government's efforts to strengthen HBCUs yet promote diversity at PWIs. Part II describes how HBCUs emerged from a dual system of higher education, which was fueled by the Morrill Acts and several Supreme Court cases. Funding inequities and other discriminatory treatment have made many HBCUs into mediocre institutions which toil in perpetual financial crises. Part III begins by exploring the scope of federal HBCU support, including White House initiatives and the "HBCU Aid Act." This Part continues by examining *Fordice*'s unanswered question, and concludes by presenting several reasons why federal support of HBCUs should cease. This Note, in Part IV, presents a hypothesis for the government's promotion of two divergent initiatives. These hypotheses include white guilt and America's love affair with *de facto* segregation. This Note concludes in Part V by arguing that the federal government, if it is serious about investing in minority education, should bridge the gap at the K-12 level. However, if the

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[27] *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 521 (1989) ("'[O]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.'") (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896)) (Harlan, J., dissenting); Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) ("[A] free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly...all racial classifications, imposed by [a] governmental actor must be analyzed by a reviewing court under strict scrutiny.") (citing Gordon v. Hirabayashi, 320 U.S. 81, 100 (1943)) (internal quotation marks omitted).

[28] 505 U.S. 717 (1992). In *Fordice*, the Court considered what standards to apply in determining if the State of Mississippi had met its obligations under *Brown II* to put an end to *de jure* segregation in public universities. *Id.* at 721. The Court found that the fact that college attendance is a matter of student choice and not assignment does not mean that the simple presence of a race-neutral admissions policy is enough to cure the constitutional wrongs created by a dual system: a state must not only eliminate its segregative admissions policy, it must also eradicate any state actions that continue to foster segregation. *Id.* at 729. The Court held that unless a school can prove that such state actions have a sound educational justification, such policies violate the Equal Protection Clause and are therefore unconstitutional. *Id.* at 731.

[29] The constitutionality of state support of public HBCUs—which is inextricably linked with the states' burden to remove remnants of the *de jure* system of higher education—remains an open question on the Court. *Compare Fordice*, 505 U.S. at 743 ("That an institution is predominantly white or black does not in itself make out a constitutional violation. But surely the State may not leave in place policies rooted in its prior officially segregated system that serve to maintain the racial identifiably of its universities if those policies can practicably be eliminated without eroding sound educational policies.") *with Fordice*, 505 U.S. at 749 (Thomas, J., concurring) ("Although I agree that a State is not constitutionally *required* to maintain its historically black institutions as such...I do not understand our opinion to hold that a State is *forbidden* to do so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.") (emphasis in original) *and Fordice*, 505 U.S. at 760–61 (Scalia, J., concurring-in-part and dissenting-in-part) ("There is nothing unconstitutional about a 'black' school in the sense, not of a school that blacks *must* attend and that whites *cannot*, but of a school that, as a consequence of private choice in residence or in school selection, contains, and has long contained, a large black majority.") (emphasis in original).

government continues to tinker with America's "race problem" at the college level, it should not continue to shoehorn HBCUs into an integrative, diverse ideal when they do not fit.

II. Background

A. History and Mission

HBCUs have played an undeniably important role in the history of American higher education.[30] Since the founding of Cheyney State College in 1837, more than 100 private and public HBCUs were established between the last third of the nineteenth century and the first half of the twentieth.[31] These institutions have secured educational access for blacks who, throughout history, have faced discrimination, negative social stereotypes, and legal and institutional barriers to learning and knowledge.[32] Their dual mission is the same now as it was in the beginning: "[To prepare] students to pursue various careers and to function as effective, humane leaders and advocates for the great disadvantaged, disesteemed, and relatively powerless black masses."[33]

The demand for black colleges increased sharply after the Civil War because black teachers[34] were needed to educate the freedmen.[35] Two

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[30] Tilden J. LeMelle, *The HBCU: Yesterday, Today and Tomorrow*, 123 EDUC. 190, 190 (2002).

[31] The majority of HBCUs were established in the seventeen southern and border states. *See* Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 37–38 (1987) (explaining that although some blacks were able to break the "race barrier" and gain admission to white schools, "until the middle of the twentieth century higher education for the overwhelming majority of black students meant segregated education." Accordingly, [t]he creation of black colleges was prompted by the success of the earliest efforts to provide emancipated slaves with a basic education.").

[32] Walter R. Allen & Joseph O. Jewell, *A Backward Glance Forward: Past, Present, and Future Perspectives on Historically Black Colleges & Universities*, 25 REV. HIGHER EDUC. 241, 242 (2002).

[33] DANIEL C. THOMPSON, A BLACK ELITE: A PROFILE OF GRADUATES OF UNCF COLLEGES 5 (1986).

[34] The first HBCUs were normal schools. Professor Kujovich explains the contradictory motives for establishing black colleges:

> [T]he incessant demand of the black population for education and the need for teachers to satisfy that demand led some state legislatures to fund black normal schools shortly after the Civil War. In the context of a general hostility toward and fear of black education, state support for the training of black teachers was usually given, if at all, only as an unpleasant alternative to the intrusion of northern white teachers in black elementary schools. Fearful of the ideas of social equality promoted by missionary teachers and unwilling to "disgrace" themselves by instructing black students, many white southerners supported the move to train black teachers. Many blacks also favored staffing their schools with black teachers, but for very different reasons. The black teacher was a source of racial pride and status and ensured that black youths would not be instructed by teachers hostile to their education.

educational models emerged to train the ex-slaves: a liberal arts curriculum or vocational training. Institutions built and controlled by white missionaries adopted a liberal arts curriculum.[36] W.E.B. DuBois embraced this classical, intellectual model because "[t]he arts and literature were tools to be used by colored people to free themselves from an identity created for them by white people."[37] Other schools broke the liberal arts tradition and taught an industrial curriculum rooted in manual labor and self-help.[38] Booker T. Washington insisted that a vocational education would meet blacks' immediate survival needs and eventually win the respect of whites.[39] The classical/industrial divide split the black community and the HBCUs themselves into two separate camps,[40] because the *real* debate involved the relative merits of integration versus segregation.[41] The industrial model was accepted, encouraged, and widely adopted by Northern philanthropists and Southern state legislatures because it was "an effective compromise between

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Kujovich, *supra* note 31, at 39–40.

[35] Thompson, *supra* note 33, at 5. ("[A]t the close of the Civil War, between 90 and 95 percent of the approximately 4.5 million blacks in the United States were functionally illiterate, and there were only twenty-eight known black college graduates in the total population.")

[36] Allen & Jewell, *supra* note 32, at 244.

[37] Michael K. Jordan, *Colored People and Affirmative Action: The Colored Man Standing by the Punch Bowl*, 5 N.Y. CITY L. REV. 175, 191 (2002) (citing MANNING MARABLE, BLACK LEADERSHIP, FOUR GREAT LEADERS AND THE STRUGGLE FOR CIVIL RIGHTS 35 (1998)). *See generally* W. E. B. DUBOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES (1903).

[38] Allen & Jewell, *supra* note 32, at 244.

[39] BOOKER T. WASHINGTON, UP FROM SLAVERY: AN AUTOBIOGRAPHY (1901); BOOKER T. WASHINGTON, THE STORY OF THE NEGRO: THE RISE FROM SLAVERY (1909).

[40] Allen & Jewell, *supra* note 32, at 245; CARY D. WINTZ, AFRICAN AMERICAN POLITICAL THOUGHT 1890–1930: WASHINGTON, DUBOIS, GARVEY, AND RANDOLPH (1996). This debate continues today; the political bases for black liberalism and conservatism are often traced to DuBois and Washington, respectively. *See, e.g.*, Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?* 18 HARV. BLACKLETTER L.J. 1, 29–31 (2002) ("In a period of increasing social and political conservatism, the debate between the African American neo-conservatives and critical race theorists was similar to that between the Dubois and Washington camps at the turn of the century."). However, Professor LeMelle believes that too much has been made of the controversy:

> The controversy over what should be taught at the HBCUs—the so-called "industrial" vs. "classical" education argument...was in fact a false debate . . . . [N]ot much was done to provide Blacks in the South with any kind of effective education—industrial or classical . . . . [The] advocates of [the] true "industrial" education were not prepared to spend more money on institutions for Blacks to enable them to graduate students who could compete effectively with Whites for the skilled jobs in the South. DuBois and Washington themselves eventually acknowledged the falsely dichotomous nature of the controversy.

LeMelle, *supra* note 30, at 191–92 (citation omitted). *See also* Stephen F. Smith, *The Truth About Clarence Thomas and the Need for New Black Leadership*, 12 REGENT U. L. REV. 513, 530 (1999–2000) (describing the DuBois-Washington debate as an example of "a healthy diversity of opinion within the black community").

[41] John A. Powell, *Injecting a Race Component into* Mount Laurel*-Style Litigation*, 27 SETON HALL L. REV. 1369, 1374 n.18 (1997).

maintaining [w]hite supremacy and satisfying [b]lack educational aspirations . . . ."[42] Thus, Southern whites used the industrial model as a formula to meet their affirmative duty to "educate" blacks while maintaining a caste system which kept blacks in their proper place.[43]

B. A Dual System of Higher Education

The Morrill Acts of the late nineteenth century paved the way for the creation of separate black and white land-grant institutions in the 17 Southern and Border states.[44] "Congress enacted the Morrill Act of 1862 [(First Morrill Act)[45]] to provide [higher] education for the common man."[46] States were given funds to establish public universities which taught the agricultural and mechanical arts with a general liberal arts education.[47] However, Professor Voth explains that Senator Justin Smith Morrill's goal was not to train future farmers, but to provide the common man with *access* to higher education:

> The Land-Grant mission and purpose was NOT primarily agricultural or even rural . . . [they] were an experiment in

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[42] Allen & Jewell, *supra* note 32, at 245. Liberal arts HBCUs had to adopt parts of the industrial curriculum in order to maintain financial support from Southern state legislatures, Northern individual and corporate philanthropists, and other agencies. *Id.* at 245–46.

[43] ALBERT L. SAMUELS, IS SEPARATE UNEQUAL? BLACK COLLEGES AND THE CHALLENGE TO DESEGREGATION 34 (2004).

[44] The "Southern and Border states" stretch from Pennsylvania and Ohio to Texas, and include the District of Columbia.

[45] First Morrill Act, Ch. 130, § 4, 12 Stat. 503, 504 (1862) (codified as amended at 7 U.S.C. §§ 301–305, 307, 308 (1994)).

[46] Stephanie Y. Brown, *Millennium Showdown for Public Interest Law and Non-White Access to Public Higher Education: Wolves Circling at the Henhouse Door*, 7 D.C. L. REV. 1, 7 n.30 (2003). *See* Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 40–41 (1987) ("Had it not been for the efforts of Vermont's Justin Morrill and others determined to make higher education more than the private reserve of the wealthy, the development of public higher education for the freedmen might have ceased with the creation of normal schools.").

[47] The First Morrill Act allowed states to use the revenue from the sale of public lands to endow and support land-grant institutions:

> Provided, [t]hat the moneys so invested or loaned shall constitute a perpetual fund, the capital of which shall remain forever undiminished...and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this subchapter, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes on the several pursuits and professions in life.
>
> Ch. 130, section 4 of the First Morrill Act.

> *democracy* . . . . Thus the Land-Grant colleges were not originally agricultural colleges, but people's colleges, though many of the people without access to college were engaged in agriculture. They were to make our democracy better by providing higher education to the sons and daughters of ordinary citizens.[48]

The federal government distributed Morrill funds hoping to foster educational opportunities for all students, *especially* newly freed blacks.[49] "Many blacks, however, could not take advantage of the public education because the First Morrill Act did not obligate states to create land-grant colleges for blacks and because many states forbade blacks from attending the white public institutions."[50]

Although some states created black land-grant institutions, most states ignored the issue until they were forced to act.[51] The Morrill Act of 1890 (Second Morrill Act)[52] guaranteed educational access to blacks, because states that used original Morrill funds to create all-white institutions had to either allow black students to enter these schools or build separate but equitable schools for blacks.[53] So as Professor Barbara Phillips Sullivan

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[48] Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies*, 25 U. MEM. L. REV. 1265, 1269–70 (1995) (emphasis added). After passage of the Act many land-grant institutions—including Cornell University, Michigan State University, and the University of Tennessee—erected "Morrill Halls" to honor the Senator.

[49] Anthony N. Luti, Comment, *When a Door Closes, a Window Opens: Do Today's Private Historically Black Colleges and Universities Run Afoul of Conventional Equal Protection Analysis?* 42 HOW. L.J. 469, 483 (1999) (emphasis added) (citation omitted).

[50] John A. Moore, Note, *Are State-Supported Historically Black Colleges and Universities Justifiable After Fordice? A Higher Education Dilemma*, 27 FLA. ST. U. L. REV. 547, 550 (2000).

[51] John A. Powell & Marguerite L. Spencer, *Remaking the Urban University for the Urban Student: Talking About Race*, 30 CONN. L. REV. 1247, 1260 (1998) ("Upon passage of the Morrill Act, several Southern states set aside part of their endowment for the establishment of 'Negro Land-Grant Colleges.'" When] a second Morrill Act was passed, the " [s]tates that had used original funds to educate only white students were forced to allow blacks to enroll or to open up separate, equitable institutions for them.").

[52] Second Morrill Act, Ch. 841, 26 Stat. 417 (1890) (codified as amended at 7 U.S.C. §§ 321–326, 328 (1994)).

[53] The Second Morrill Act made "separate but equal" a national policy:

> That no money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of this act if the funds received in such State or Territory be equitably divided as hereinafter set forth....[T]hereupon such institution for colored students shall be entitled to the benefits of this act and subject to its provisions, as much as it would have been if it had been included under the [First Morrill Act], and the fulfillment of the foregoing provisions shall be taken as a compliance with the provision in reference to separate colleges for white and colored students.

Id. States did not follow the "equitable" mandate: "[T]he major issue in virtually every higher education desegregation case is the recouping of land grant funds allocated to black colleges and misappropriated by

points out, "federal policy has promoted racially segregated state institutions of higher education."[54] Thus the Supreme Court's 1896 holding in *Plessy v. Ferguson*[55] simply affirmed a national policy which allowed states to allocate public benefits prejudicially, and upheld state autonomy in policymaking.[56] Twelve years later, in *Berea College v. Kentucky*, the Supreme Court held that a state court could require *private* colleges—even ones that were already integrated—to segregate students based on race.[57] Thus the Morrill Acts, *Plessy*, and *Berea College* allowed every southern and border state to create and maintain HBCUs that were substantially inferior to white land grant institutions.[58] The negative effects of the dual system have continued into the 21st century.

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their white counterparts." Wendy Brown-Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER RACE & JUST. 315, 323 n.36 (1999).

[54] Barbara Phillips Sullivan, *The Gift of* Hopwood*: Diversity and the Fife and Drum March Back to the Nineteenth Century*, 34 GA. L. REV. 291, 315 n.134 (1999). *See also* Drew S. Days, III, Brown *Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 63 (1992) (discussing federal legislation that promoted the development of segregated educational institutions).

[55] Plessy v. Ferguson, 163 U.S. 537 (1896). In *Plessy*, petitioner was an individual of mixed racial background. *Id.* at 538. He was charged with violating a Louisiana statute which required railway passengers of different race to travel in separate cars. *Id.* at 538–39. Petitioner argues that such segregation was prohibited by the Fourteenth Amendment. *Id.* at 543. The court reasoned that separate railway cars did not necessarily cause blacks to be labeled as inferior. *Id.* at 551. Consequently the separation of the races by statute was not in violation of the protections of the Fourteenth Amendment. *Id.* at 551–52.

[56] A'lelia R. Henry, *Perpetuating Inequality:* Plessy v. Ferguson *and the Dilemma of Black Access to Public and Higher Education*, 27 J.L. & EDUC. 47, 49 (1998) ("The profound importance of the *Plessy* decision to public and higher education stems, not only from its precedence which mandated the practice of separate-but-equal, but from the slack the case has given to the concept of equality under the veil of states rights. Plessy accepted a legal definition of race that was already being employed by states to allocate public and private benefits and privileges prejudicially, and it upheld state autonomy in policymaking.").

[57] Berea College v. Kentucky, 211 U.S. 45 (1908). In *Berea College*, petitioner was fined for violating a Kentucky statute which prohibited a school from accepting both black and white students. *Id.* at 46. This fine was affirmed by the Court of Appeals of the State of Kentucky. *Id.* The Supreme Court of the United States reasoned that when a State incorporates a college, or any other corporate group, a State, having power over its corporate creations, may withhold powers that could not typically be withheld from an individual, including the right to educate both black and white students. *Id.* at 54.

[58] *See id.* at 51–54 (discussing the historical legality of separate facilities). The *Plessy* Court expressly stated that the establishment of separate schools was a valid exercise of the state police power:

> Laws permitting, and even requiring, their separation, in places where [blacks and whites] are liable to be brought into contact [are] within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

Plessy, 163 U.S. at 544.

C. The Current Situation

The vestiges of the discriminatory dual system of higher education continue to haunt HBCUs. Substandard infrastructures and dilapidated facilities burden these institutions, which perpetually sit on the cusp of fiscal insolvency.[59] The total endowment of the more than one hundred HBCUs combined is less than one-tenth of the endowment held by Harvard University.[60] Alumni giving is low, at least in part, because HBCU graduates tend to accumulate less wealth than PWI graduates.[61] Public HBCUs, which cannot join the United Negro College Fund—the oldest and largest private benefactor of minority higher education[62]—are at the mercy of the federal and state governments for funding.[63] Nevertheless, *all* HBCUs must survive with less financial and other resources than PWIs, private or public.[64]

The close relationship between fiscal hardships and accreditation explains the closing of many HBCUs and the precarious existence of many others.[65] The states that maintained dual systems of higher education "continue to fund public black colleges at significantly lower rates than [PWIs]—with white schools sometimes receiving more than *twice* as much per student as black schools."[66] The consequences of the funding deficiencies—inadequate library holdings, obsolete technology, inadequate science laboratories, and an inability to attract and retain outstanding faculty—can damage institutional quality to the point where accreditation is

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[59] *See* CYNTHIA L. JACKSON & ELEANOR F. NUNN, HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: A REFERENCE HANDBOOK 58–60 (2003) (discussing the historical development and current financial state of HBCUs).

[60] *See The News Hour with Jim Lehrer: Saving Black Colleges* (PBS television broadcast, Feb. 25, 2004) [hereinafter *Saving Black Colleges*], http:///www.pbs.org/newshour/bb/education/jan-june04/college_02-25.html# (examining the financial crises at HBCUs); Kenneth Jost, *Black Colleges: The Issues*, 13 CQ RESEARCHER 1047, 1047 (2003) (noting that regardless of the advantages or disadvantages of an HBCU education, poor enrollments and financial crises have pleases HBCUs in peril).

[61] Sean Paige, *Campus Contrasts in Black and White*, INSIGHT ON THE NEWS, Aug. 30, 1999, at 16 (discussing the burdens facing HBCUs and their efforts to attract talented black students).

[62] Many benefactors falsely assume that donations to the UNCF support all HBCUs. *See* Niara Sudarkasa, *All 117 Black Colleges and Universities Require Dramatic New Levels of Philanthropic Support*, CHRON. OF HIGHER EDUC., Mar. 28, 1990, at B1 (explaining the distinction between UNCF and non-UNCF HBCUs).

[63] Paige, *supra* note 61, at 16.

[64] Jost, *supra* note 60, at 1047. These infrastructural and financial disparities between HBCUs and PWIs can be traced back to racial injustice. *See* Paige, *supra* note 61, at 16 ("[B]ecause of the systematic denial of opportunity to their graduates, as a result of discrimination, [HBCU] graduates tend not to have accumulated the kind of wealth that other college graduates have."); Bob Clement, *Education: Where the Stakes Are As High As Children Can Dream*, 17 ST. LOUIS U. PUB. L. REV. 55, 68–69 (1997) (discussing infrastructural disparities).

[65] JACKSON & NUNN, *supra* note 59, at 59.

[66] Jost, *supra* note 60, at 1047 (emphasis added).

lost.[67] When this happens, federal aid[68] and private funding[69] cease, and institutional death is imminent.[70]

HBCUs often lose the battle with PWIs for the best and brightest black students and faculty.[71] This "brain drain" started in the wake of *Brown*, as desegregation allowed blacks to enter PWIs where academic quality was better and possibly "better prepare[d] blacks for life in the wider, whiter world."[72] Since choice is now available, "choosing to attend an HBCU is a declarative, and somewhat political decision based on value-based aspirations and expectations about oneself and on one's value-based perceptions of the institution."[73] Thus the choice between an HBCU and a PWI can be a formidable decision for black high school students, especially those who come from integrated, middle-class backgrounds.[74] Although the three high-profile, top-tier[75] schools of the black elite—Morehouse, Spelman, and Howard[76]—can always compete with PWIs for top black students, the fate of the lower-tiered HBCUs remains uncertain.[77]

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[67] JACKSON & NUNN, *supra* note 59, at 59.

[68] *See generally* Title IV of the Higher Education Act of 1965 (codified as amended at 20 U.S.C. §§ 1070–1099 (2000) and 42 U.S.C. §§ 2751–2757 (West. Supp. 2005)).

[69] The UNCF, for example, provides operating support and technology enhancement services for its 38 *accredited* HBCU member institutions and scholarships to students at over 1000 *accredited* institutions.

[70] At least ten HBCUs have closed since 1976, including Bishop College (Tex.), Mississippi Industrial College (Miss.), Daniel Payne College (Ala.), Lomax-Hannon Junior College (Ala.), Natchez Junior College (Miss.), Prentiss Institute (Miss.), and Mary Holmes College (Miss.). JACKSON & NUNN, *supra* note 59, at 59; Jost, *supra* note 60, at 1047; Joshua Karlin-Resnik, *Historically Black Barber-Scotia College Loses Accreditation*, CHRON. OF HIGHER EDUC., July 9, 2004, at A27; Audrey Williams June, *Southern Association Strips Two Black Colleges of Accreditation*, CHRON. OF HIGHER EDUC., Jan. 3, 2003, at A34; Audrey Williams June, *Endangered Institutions: Morris Brown's Plight Reflects the Financial Troubles of Small, Poorly Financed Black Colleges*, CHRON. OF HIGHER EDUC., Jan. 17, 2003, at A24.

[71] *See Saving Black Colleges*, *supra* note 60 (describing the impact of recruiting efforts of the country's most prestigious universities on the college choice of the "best and brightest black students").

[72] Paige, *supra* note 61, at 16.

[73] Aaron M. Browner & Annemarie Ketterhagen, *Is There an Inherent Mismatch Between How Black and White Students Expect to Succeed in College and What Their Colleges Expect from Them?* 60 J. SOC. ISSUES 95, 97 (2004) (citation omitted).

[74] *See* LAWRENCE OTIS GRAHAM, OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS 63–82 (1999) (explaining the complexities of the HBCU/PWI decision).

[75] *Id.* A tier system exists among HBCUs that is akin to the tier system for mainstream institutions. Lawrence Otis Graham explains parallels the elite black institutions with elite Ivy League schools: "Just as the Roosevelts and the Kennedys had Harvard and the Buckleys and the Basses had Yale, old families among the black elite have selected certain colleges for their children and their descendants." *Id.* at 66.

[76] *Id.* "Only a few [HBCUs] play a role in the upper-class black resume. The three most prestigious in this group are Howard University in Washington and Spelman College and Morehouse College in Atlanta." *Id.*

[77] *See id.* at 81–82 (discussing the lack of interest by upper-class blacks in the lower HBCUs). The high profile, top-tier HBCUs have received criticism in the black community for "turn[ing] away from their traditional constituency to attract the children of African-American elites through increased emphasis on high standardized test scores, exclusive honors programs, and high national rankings."

HBCUs have not achieved the academic quality and reputation of contemporary mainstream institutions.[78] Graduation rates at most lower-tiered HBCUs are sub par,[79] and in some cases abysmal.[80] Even Morehouse, Spelman, and Howard graduate a lower percentage of students than their PWI counterparts.[81] HBCU proponents attribute the low graduation rates, at least in part, to the institutions' outreach to "at-risk" students who otherwise would not attend college.[82] The burden of repairing deficiencies in public school education leads HBCUs to dedicate greater resources to remedial instruction, which in turn drains resources from college-level instruction and hampers their quest to become strong academic institutions.[83] Professor Gerald Foster, a critic of HBCUs, claims that at the middle and bottom-tiered HBCUs, "[t]here is an ethos of academic and administrative mediocrity that maintains and sustains an inefficient status quo of fifty years ago that *drives away* young, energetic faculty who are ostracized rather than embraced."[84]

Walter R. Allen & Joseph O. Jewell, *A Backward Glance Forward: Past, Present, and Future Perspectives on Historically Black Colleges & Universities*, 25 REV. HIGHER EDUC. 241, 254 (2002).

[78] This is—at least in part—a vestige of the dual system. In their formative years many black colleges were not really *colleges*; they had to devote their resources to teaching primary subjects because state support for blacks at the K-12 level was minimal or nonexistent. *See* ALBERT L. SAMUELS, IS SEPARATE UNEQUAL? BLACK COLLEGES AND THE CHALLENGE TO DESEGREGATION 32 (2004). Some states even demoted black colleges to non-degree granting institutes, thereby abolishing black higher education altogether. Professor A'lelia Robinson Henry explains the demotion that occurred in Virginia *after* the Morrill Acts:

> In 1902, the Virginia General Assembly passed a law that transformed Virginia Collegiate and Normal Institute (VCNI), a public college established for black Virginians in 1883, into a secondary agricultural training school by rescinding its power to offer the baccalaureate degree and renaming it Virginia Normal and Industrial Institute (VNII). African Americans were removed from VNII's governing board, thereby denying them a role in the making of policy affecting this school. This law effectively denied black Virginians access to all public higher education offered in the state for twenty-one years.

A'lelia R. Henry, *Perpetuating Inequality:* Plessy v. Ferguson *and the Dilemma of Black Access to Public and Higher Education*, 27 J.L. & EDUC. 47, 52 (1998) (citation omitted).

[79] *See* Theodore Cross, *The Persisting Racial Gap in College Student Graduation Rates*, 45 J. BLACKS IN HIGHER EDUC. 6 (2004) (presenting tabulated graduation data for black students at HBCUs and PWIs for 2003).

[80] *Id.* For example, the University of the District of Columbia reported a 5% graduation rate. *Id.*

[81] *See id.* (listing the graduation rates of premiere universities).

[82] *See* Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?* 43 EMORY L.J. 1, 13–20 (1994) (describing minority unequal access to education).

[83] Allen & Jewell, *supra* note 77, at 254 (citation omitted). *See also* Brown-Scott, *supra* note 82, at 13–18 (describing the background of students attending HBCUs). HBCUs also teach a relatively high percentage of economically disadvantaged students. *Id.*

[84] Kenneth Jost, *Black Colleges: The Issues*, 13 CQ RESEARCHER 1047, 1050 (2003) (emphasis added). Professor Foster has written two books which address the academic mediocrity of HBCUs. *See generally* GERALD A. FOSTER, IS THERE A CONSPIRACY TO KEEP BLACK COLLEGES OPEN (2001) ("At some point black colleges must relinquish the crutch of slavery and its harmful effects on black people and learn to embrace a standard of academic excellence that transcends race. If there is one basic criticism of far too many black colleges it is that their admission decisions are driven by the need for tuition and

The fiscal disparities, accreditation hurdles, academic struggles, and America's present interest in diversity have led supporters and critics of HBCUs to examine the future of these institutions. Some critics view HBCUs as obsolete vestiges of the past. Fervent supporters argue that the disappearance of HBCUs not only will cause "at-risk" black youth to "slip through the cracks," but may also have an detrimental impact on the black community.[85] Both sides, however, recognize the substantial contributions that HBCUs have made in the preparation of black professionals, as Professor David Jackson describes:

> Although HBCUs are relatively small institutions, have few resources and serve a high number of disadvantaged students, they have performed remarkably throughout their existence. By the early 1990s they had educated almost 40% of America's black college graduates. In addition, 80% of black federal judges, 85% of all black doctors, 75% of all black Ph.D.s., 50% of black engineers, and 46% of all black business professionals received their undergraduate training at HBCUs. Moreover, historically black health-profession schools have trained an estimated 40% of black physicians, 75% of black veterinarians, 50% of black pharmacists, and 40% of the nation's black dentists.[86]

In spite of these impressive statistics, the federal government's historical role in creating these institutions, and the belief that HBCUs "provide employment, role models, a learning environment free of racism,

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federal aid rather than seeking high-quality students who are ready to engage in serious study."); GERALD A. FOSTER, ARE BLACK COLLEGES NEEDED? AN AT-RISK/PRESCRIPTIVE GUIDE (1996).

[85] HBCUs, like mainstream colleges and universities, serve their local communities. HBCUs often go a step farther and serve the black community on a larger scale. *See, e.g.*, Arinola O. Adebayo et al., *Historically Black Colleges and Universities (HBCUs) as Agents of Change for the Development of Minority Businesses*, 32 J. BLACK STUDIES 166 (2001)(discussing the impact of HBCUs on black-owned businesses); Paulette V. Walker, *Black Colleges Help Revive Struggling Neighborhoods; Federal Program Supports Efforts to Improve Housing and to Create Good Jobs*, CHRON. OF HIGHER EDUC., June 13, 1997, at 22 (analyzing the increasing cooperation between HBCUs and disadvantaged communities in their areas); *Historically Black Medical Schools: Providing Critical Health Care, Training, and Research*, EBONY, Sept. 2003, at 88 (discussing the importance of historically black medical schools to health issues faced primarily by minorities and in black communities); *Tuskegee Helps State's Needy*, JET, June 2, 2003, at 23 (listing the grants received by Tuskegee University to provide health services to the poor in Alabama). In medicine, there is a need for medical professionals who can appreciate how cultural and social factors of blacks contribute to the diseases that significantly affects the race, like HIV/AIDS, sickle-cell anemia, and diabetes. *See* CYNTHIA L. JACKSON & ELEANOR F. NUNN, HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: A REFERENCE HANDBOOK 46 (2003).

[86] David H. Jackson, Jr., *Attracting and Retaining African American Faculty at HBCUs*, 123 EDUCATION 181, 182 (2002) (citations omitted). The Association of Minority Health Professions Schools (AMHPS) member schools, which includes historically black schools of medicine (4), dentistry (2), pharmacy (5) and veterinary medicine (1), teach and train 50% of black medical doctors, 50% of black dentists, 50% of black pharmacists, and 75% of black veterinarians in the nation. Minority Health Foundation, http://www.minorityhealth.org (last visited Jan. 21, 2006).

opportunities for the development of self-esteem and racial pride, and other intangible qualities 'which are incapable of objective measurement but which make for greatness' in an educational institution,"[87] the question remains: Should the *government* continue to support HBCUs in light of its own pursuit of diversity and the nation's movement toward a color-blind society?[88]

III. Federal Support of HBCUs: A Discrimination "Remedy" Which Frustrates Diversity

A. The Scope of Federal Involvement

Even if federal support of HBCUs remains constitutional,[89] the federal government should not support two mutually exclusive initiatives. Ward Connerly, Chairman of the American Civil Rights Institute, argues that "[i]t is hypocritical to support the public funding of HBCUs and then turn around and criticize a 'lack of diversity' at other public colleges and universities, since HBCUs, by their very nature, draw away many black students who would otherwise attend racially mixed schools and affect their 'diversity.'"[90] Federal support of these competing initiatives confuses state governments and the academy.[91]

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[87] Brown-Scott, *supra* note 82, at 11–12 (1994) (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)).

[88] Are HBCUs "merely a vestige of a discriminatory system that inhibits current efforts to integrate schools?" *See* Jerlando F. L. Jackson et al., Fordice *as a Window of Opportunity: The Case for Maintaining Historically Black Colleges and Universities (HBCUs) as Predominately Black Institutions*, 161 EDUC. LAW REP. 1, 15 (2002) (arguing that they are not).

[89] "In a constitutional age when colorblind rhetoric is freely bandied about in United States Supreme Court opinions and would seem to trump and such claim to a legally defined status of 'historically black,' how can 'historically black' be anything more than a constitutional oxymoron?" Alfreda A. Sellers-Diamond, *Serving the Educational Interests of African-American Students at* Brown *Plus Fifty: The Historically Black College or University and Affirmative Action Programs*, 78 TUL. L. REV. 1877, 1883 (2004). *See supra* note 30 and accompanying text (stating that HBCUs have historically played an important role).

[90] Ward Connerly, *At Issue: Are Racially Identifiable Colleges and Universities Good for the Country?* 13 CQ RESEARCHER 1061, 1061 (2003).

[91] As Professor Leland Ware states:

> State governments, university administrators and other educational policy makers are understandably confused by the conflicting signals they are receiving from the courts and from federal agencies. On the one hand, courts order them to eliminate all vestiges of discrimination. On the other, supporters of black colleges demand the preservation and enhancement of black schools. It is, of course, difficult to raise minority enrollments at white colleges when a substantial number of minority candidates [elect] to attend black colleges.

Leland Ware, *Issues in Education Law and Policy: The Most Visible Vestige: Black Colleges after* Fordice, 35 B.C. L. REV. 633, 677 (1994).

1. Empowerment from the White House

The Executive Branch and Congress both aim to strengthen HBCUs. They hope that HBCU initiatives and legislation will (1) allow America to develop its full human potential; (2) improve equal opportunity in higher education; (3) strengthen HBCUs so that they can provide high-quality education; and (4) allow HBCUs "to participate in and benefit from Federal programs, *as do other colleges and universities*."[92]

In 1981, President Ronald Reagan established the White House Initiative on Historically Black Colleges and Universities in order to empower these institutions to "overcome the effects of discriminatory treatment."[93] President George H. W. Bush established the President's Board of Advisors on Historically Black Colleges and Universities,[94] which instructed the President and the Secretary of Education on how to increase both HBCU participation in federal programs and the role of the private sectors in strengthening HBCUs.[95] President Clinton appointed a senior executive in each federal agency to implement the Order.[96] President George W. Bush transferred the Initiative to the Department of Education[97] and proclaimed the week of September 28, 2001, as "National Historically Black Colleges and Universities Week."[98]

The Bush administration's effort to strengthen HBCUs is hard to reconcile with its *amici* supporting the petitioners in *Grutter* and *Gratz*.[99] Professor Alfreda Sellers Diamond questions the President's agenda:

> The significance of President Bush's support for [HBCUs] becomes questionable, however, when one considers this support alongside his attack against the University of Michigan Law School diversity admission[s] policy. The official position of the White House respecting the University of Michigan affirmative action programs was that diversity was an "important and entirely

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92 Exec. Order No. 13,256, 3 C.F.R. 13256 (2003) (emphasis added).

93 Exec. Order No. 12,320, 3 C.F.R. 176 (1982). Note that President George W. Bush's Executive Order, which supersedes similar Orders made by his predecessors, omits the phrase "and to overcome the effects of discriminatory treatment." *Compare* Exec. Order No. 13,256, 3 C.F.R. 13256 (2003) *with* Exec. Order No. 12,320, 3 C.F.R. 176 (1982).

94 Exec. Order No. 12,677, 3 C.F.R. 222 (1990).

95 *Id.* at 222–23.

96 Exec. Order No. 12,876, 3 C.F.R. 671, 672 § 5 (1994).

97 Exec. Order No. 13,256, 3 C.F.R. 200, 200 § 1 (2003) ("There is established, in the Office of the Secretary of Education, a Presidential advisory committee entitled the 'President's Board of Advisors on Historically Black Colleges and Universities.").

98 Proclamation No. 7472, 3 C.F.R. 274 (2002).

99 *See supra* note 23 and accompanying text (opposing awarding "points" for race in a school's admissions process).

> legitimate government objective" that could be "achieved through race neutral means" . . . [Both] programs were "quotas" and "impose[d] unfair and unnecessary burdens on innocent third parties." *One wonders if the support for these historically black institutions accompanies an agenda to destroy affirmative action programs and redirect African-American students to "their" institutions.*[100]

Although many black persons will always view the Bush administration with suspicion, the President's efforts to strengthen HBCUs garners him and the GOP much-needed support from the black community.

2. The "HBCU Aid Act"

Congress passed the "Strengthening Historically Black Colleges and Universities" Act as Title III of the Higher Education Act.[101] Congress justifies Title III because it has found that the present condition of HBCUs arose in part from discriminatory federal and state allocations of land and resources under the Morrill Acts, and discrimination in the award of federal grants, contracts, resources, and other programs which benefit higher education.[102] Congress concluded that this discriminatory action requires a remedy which provides money to strengthen the physical plants, financial management, academic resources, and endowments of HBCUs in order to ensure that they continue to fulfill the Federal mission of the equality of educational opportunity.[103] Even if this legislative set-aside—which attempts to remedy past discrimination by encouraging racial discrimination—does not itself raise a constitutional question,[104] Justice

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[100] Sellers-Diamond, *supra* note 89, at 1885 n.29 (emphasis added) (citations omitted).

[101] Congress included Title III, Part B in the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965). Title III, Part B is codified as amended at 20 U.S.C. §§ 1060–1063c (1992).

[102] 20 U.S.C. § 1060(2) (2000).

[103] 20 U.S.C. § 1060(3) (2000).

[104] *See* Anthony N. Luti, Comment, *When a Door Closes, a Window Opens: Do Today's Private Historically Black Colleges and Universities Run Afoul of Conventional Equal Protection Analysis?* 42 HOW. L.J. 469, 484–85 n.95 (1999) (citation omitted). Anthony N. Luti, a practicing attorney who holds three degrees from HBCUs, recognizes the problem with Congress's stated purpose for Title III, which he calls the "HBCU Aid Act":

> Although Congress is vested with broad powers under the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, Congress may no longer utilize permanent discriminatory programs to remedy past wrongs....Assume, arguendo, that one deems a federal financial program assisting colleges and universities whose primary mission is the education of one particular race as discriminatory, on the theory that the program encourages discrimination on the basis of race. By creating a financial assistance program to strengthen HBCUs in order to compensate for past discriminatory practices, Congress may be regarded as attempting to utilize a discriminatory program to remedy a

Scalia commented in *Fordice* that the Congress, by passing Title III, "seems out of step with the drum that the Court beats today."[105]

3. *Fordice: Savior or Death Knell?*

In *United States v. Fordice*, the Supreme Court held that Mississippi had not met its affirmative obligation under *Brown* to dismantle its prior *de jure* system of "separate but equal" education at the university level.[106] The private petitioners and the United States, who intervened in the suit,[107] alleged that the underfunding of public HBCUs was itself a remnant of the *de jure* system.[108] They argued that equitable funding could remedy the discrimination.[109] Justice White intimated that maintenance of a PWI-HBCU dual system could violate the Constitution without sound educational justification:

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.[110]

Justice White also rejected any request by the petitioners to upgrade the HBCUs "*solely* so that they may be publicly financed, exclusively black enclaves by private choice," because the state "provides these facilities for *all* its citizens[,] and it has not met its burden under *Brown* to take affirmative

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> past discriminatory wrong. Under these circumstances, this action would be constitutionally impermissible . . . .

Id. *See also* Fullilove v. Klutznick, 448 U.S. 448, 480 (holding that congressional programs which attempt to remedy the present effects of past discrimination must be narrowly tailored). "[E]ven if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental purpose." *Fullilove*, 448 U.S. at 498 (Powell, J., concurring) (citation omitted), *quoted in Grutter*, 539 U.S. at 378–79 (Rehnquist, J., concurring).

[105] United States v. Fordice, 505 U.S. 717, 761 (1992) (Scalia, J., concurring-in-part and dissenting-in-part).

[106] *Id.* at 743.

[107] *Id.* at 723–24.

[108] *Id.* at 25.

[109] *Id.* at 725, 743.

[110] *Fordice*, 505 U.S. at 731–32 (citation omitted).

steps to dismantle its prior *de jure* system when it perpetuates a separate, but 'more equal' one."[111]

The unanswered question left by the *Fordice* Court can be viewed several ways.[112] Justice Thomas, whom many criticize for his jurisprudence on racial issues,[113] offered some support for HBCUs, observing that the Court "do[es] not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges as such."[114] Other members of the black community are much less optimistic.

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[111] *Id.* at 743 (emphasis in original).

[112] Professors and practicing attorneys have written numerous law review articles which claim that HBCUs can survive because of—or in spite of—*Fordice*. *See, e.g.*, Frank Adams, Jr., *Why* Brown v. Board of Education *and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 ALA. L. REV. 481 (1996) (positing two Constitutional theories under which prior de jure states may legally maintain public HBCUs, even after *Fordice*); L. Darnell Weeden, *Statutory and Equal Protection Remedies to Save Historically Black Colleges from the Effects of Invidious Desegregation*, 18 T. MARSHALL L. REV. 41 (1992) (suggesting that the Supreme Court's decision in *Fordice* misapplied previous jurisprudence by conflating racial inferiority with racial imbalance).

[113] *See, e.g.*, Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43, 52 (1997) ("Justice Thomas was afforded almost universal acclaim by political commentators for articulating [his] concern about the survival of [HBCUs].") (citation omitted); Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 114 (2005) ("Justice Clarence Thomas is well-known for his opposition to affirmative action, [which is] contrary to the views of most Blacks, but mostly because he is a black man who is viewed as turning his back on a policy that helped him advance to his current standing.") (citation omitted); Michael DeHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes—A Study in Social and Racial Alienation from African-Americans*, 48 ST. LOUIS U. L.J. 327, 327–28 (2004) ("Clarence Thomas continues to be a thorn in the side of many African-Americans and the storm has not subsided....[He] writes opinions and casts votes on the Court that continue to bother, frustrate, annoy, and exasperate many African-Americans....Clarence Thomas is deeply alienated from most African-Americans."). Justice Thomas's jurisprudence has intrigued the academy. *See, e.g.*, Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323, 335–39 (2004) (attempting to reconcile Justice Thomas's "black nationalist" impulses in *Fordice* with his "individualist" impulses in *Adarand* and *Jenkins*).

[114] 505 U.S. at 748 (Thomas, J., concurring). *See also* Missouri v. Jenkins, 515 U.S. 70 (1995) (Thomas, J., concurring) (attempting to dispel any notion that black schools are inherently inferior or unconstitutional). In *Missouri v. Jenkins*, a school desegregation case decided three years after *Fordice*, Justice Thomas wrote a concurrence which attempted to dispel any notion that black schools are inherently inferior or unconstitutional:

> The mere fact that a school is black does not mean that it is the product of a constitutional violation. A racial imbalance does not itself establish a violation of the Constitution.
>
> ....
>
> [N]eutral policies, such as local school assignments, do not offend the Constitution when individual private choices concerning work or residence produce schools with high black populations. The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race....[T]here is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment. Indeed, it may very well be that what has been true for historically black colleges is true for black middle and high schools.

Id. at 115, 121–22 (1995) (citations omitted).

Professor Alex Johnson believes that the *Fordice* Court's refusal to mandate equal funding for HBCUs has sounded their death knell "by allowing for a remedy that will effectively eliminate public financial support for [these] colleges."[115] Judge Constance Baker Motley,[116] a civil rights pioneer who worked as a law clerk for Thurgood Marshall and wrote briefs for *Brown* while with the NAACP's Legal Defense and Educational Fund,[117] takes the other extreme: Public HBCUs should be closed or merged with PWIs because it would be "utterly confusing" to allow otherwise.[118]

B. Why Federal Support of HBCUs Should Cease

HBCUs are inherently nondiverse.[119] In her book *Diversifying Historically Black Colleges and Universities: A New Higher Education Paradigm*, Serbrenia Sims concedes that HBCU diversity is "one of higher education's unspoken dilemmas."[120] Many persons recognize the need to confront the dilemma, but few have moved forward to tackle this delicate topic.[121] While the federal government, industry, and the professional world *demand* that PWIs become diverse, this mandate does not extend to HBCUs.

To the extent that diversity remains a nonpriority at HBCUs, the federal government should cease support. HBCUs view diversity with pause. Before *Brown*, HBCUs were segregated by *law*; now the racial exclusivity has become a source of pride which HBCU supporters do not

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[115] Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1468 (1993). Professor Johnson argues that *Fordice* and *Brown* were wrongly decided because the Supreme Court has adopted a particular view of integration:

> Being able to choose whether or when to integrate depends upon the freedom to choose a predominantly or historically black college or a predominantly white college. The ideal integrated society can only be achieved through a transitional stage in which racial differences are truly respected, a stage which requires the public maintenance of and support for predominantly black colleges.

Id. at 1401.

[116] Judge Motley, appointed to the U.S. District Court for the Southern District of New York in 1966, was the first black woman appointed to the federal judiciary. She became Chief Judge On June 1, 1982, and assumed senior status on Oct. 1, 1986.

[117] *See* CONSTANCE BAKER MOTLEY: EQUAL JUSTICE UNDER THE LAW: AN AUTOBIOGRAPHY 210, 212–12 (1998) (offering tips for HBCUs to achieve diversity).

[118] *Id.* at 240, *quoted in* John A. Moore, *Are State-Supported Historically Black Colleges and Universities Justifiable After Fordice?—A Higher Education Dilemma*, 27 FLA. ST. U. L. REV. 547, 556–57 (2000).

[119] *See supra* note 26 and accompanying text ("But directly opposed to the diversity ideal are historically black colleges and universities (HBCUs), [whose] entire reason for being is to not be diverse.").

[120] SERBERNIA J. SIMS, DIVERSIFYING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: A NEW HIGHER EDUCATION PARADIGM 1 (1994).

[121] *See id.* ("Many recognize the need, but few espouse the reality of implementing a program for diversity and multiculturalism.").

want to relinquish. On remand, the *Fordice* trial judge ordered the State of Mississippi to upgrade the public HBCUs and to establish endowments "to provide funds for continuing educational enhancement and racial diversity, including recruitment of white students and scholarships for white applicants" at the state's two largest HBCUs.[122] Many HBCU proponents criticize *any* increased white presence at these institutions[123] because they fear that integration will destroy HBCU uniqueness.[124] HBCUs may not have a choice because Justice White's mandate in *Fordice* was clear.[125] Thus, integration may be the key to HBCU survival.[126]

While PWIs are forced to recruit and retain black professors,[127] HBCUs aggressively limit the number of white professors at their institutions because they supposedly thwart the unique mission of the HBCU. Some critics of HBCUs consider this overt behavior racist.[128] Several HBCUs have lost racial discrimination suits brought by injured white faculty.[129] The

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[122] Ayers v. Fordice, 879 F.Supp. 1419, 1494-96 (N.D. Miss. 1995). *See* Dannye Holley & L. Darnell Weeden, *United States v. Fordice: The Mississippi Aftermath*, 31 NEW ENG. L. REV. 769 (1997) (discussing *Fordice* generally).

[123] *See, e.g.*, Ronald Roach, *Blues for Blacks at Bluefield State: African Americans Awkwardly Strive to Regain a Presence at the Nation's Whitest HBCU*, BLACK ISSUES IN HIGHER EDUC., June 11, 1998, at 14–18 (discussing the transformation of an all-black residential college into a predominantly white commuter school).

[124] Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43, 53 (1997).

[125] *See supra* notes 106–11 and accompanying text (discussing the *Fordice* case).

[126] Dr. Julius Chambers, the Chancellor of North Carolina Central University, stated this conclusion in an interview:

> [T]he integration of HBCUs is not only a question of fairness, but also a critical survival tactic. HBCUs [must] prepare for a more diverse student body because it's in their long-term best interest . . . . [More] of the best Black students are attending White colleges. Any Black public college that wants to keep its doors open will have to be both good enough and welcoming enough to attract all types of students. We can keep our great tradition and position of being a haven for students who need nurturing, but we had better realize that more and more of those students won't be Black, and that we will have to reach out to everybody.

Paul Ruffins, *In a Society that is Increasingly Diverse, What's an HBCU to Do?* BLACK ISSUES IN HIGHER EDUC., Jan. 7, 1999, at 22.

[127] *See, e.g.*, Norris v. State Council of Higher Educ., 327 F.Supp. 1368, 1380 (E.D.Va. 1971) ("Qualified black professors are greatly in demand by predominantly white colleges in order to comply with various aspects of federal law, grants, and decisions."), *aff'd mem.* Bd. of Visitors of the Coll. of Wm. & Mary v. Norris, 404 U.S. 907 (1971).

[128] *See* Denise K. Magner, *White Professors Accuse Some Black Colleges of Racism: Charges are Strongly Denied*, CHRON. OF HIGHER EDUC., Oct. 13, 1993, at A20 (providing examples of white faculty members who have accused administrators of black institutions of racism).

[129] *See, e.g.*, Bachman v. Bd. of Trs. of the Univ. of D.C., 777 F. Supp. 990 (D.D.C. 1991) (finding that white professor was denied tenure because of his race), *aff'd*, 90 F.3d 591 (App. D.C. 1996); Lincoln v. Bd. of Regents of the Univ. Sys. of Ga., 697 F.2d 928 (11th Cir. 1983) (finding that white professor was forced to leave black college for racial motives), *cert. denied*, 464 U.S. 826 (1983); Fisher v. Dillard Univ., 499 F. Supp. 525 (E.D.La. 1980) (finding white professor's denial of salary increase and termination racially discriminatory); Harrington v. Harris, 118 F.3d 359 (5th Cir. 1997) (finding racial

notion that black students need black faculty mentors to serve as role models has some merit, but *all* students benefit from a diverse faculty. White students at PWIs need black faculty—from academic departments other than African-American Studies—because black professors show white students that black persons can teach, publish, conduct research, and do more than play sports and sell drugs. Similarly, black students—especially those that attend HBCUs—need white faculty so that these students can see that there are well-intentioned white persons in America who are not racist.[130]

The federal government should not—as a matter of policy—support *any* educational institution that seeks to retain remnants of a "separate but equal" regime. More than one commentator has recognized the paradox of the arguments made in favor of black colleges: The proponents of these schools want to maintain a system reminiscent of *Plessy* and repugnant to *Brown*.[131] HBCU supporters argue that mere *de facto* segregation does not constitute a continuing harm.[132] Thus, they agree with Justice Thomas's claim that "[r]acial isolation itself is not a harm; only state-enforced segregation is."[133] Others sharply disagree.[134] As a prudential matter, the

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discrimination in merit pay increases for three white faculty at a public HBCU law school), *cert. denied*, 522 U.S. 1016 (1997).

[130] Barbara K. Townsend, *Integrating Nonminority Instructors into the Minority Environment*, 112 NEW DIR. FOR COMM. COLL. 85 (2003); AFFIRMED ACTION: ESSAYS ON THE ACADEMIC & SOCIAL LIVES OF WHITE FACULTY MEMBERS AT HISTORICALLY BLACK COLLEGES & UNIVERSITIES (L. Foster et al. eds., 1999). A substantial number of white faculty teach at minority-serving community colleges located in urban centers.

[131] "The irony of the arguments made in favor of Black colleges is that they seem in some ways to be the same claims that were made by defenders of segregation when *Brown* was argued." Jerlando F. L. Jackson et al., Fordice *as a Window of Opportunity: The Case for Maintaining Historically Black Colleges and Universities (HBCUs) as Predominately Black Institutions*, 161 EDUC. LAW REP. 1, 14 (2002) (citation omitted). These arguments "could be construed as accepting the *Plessy* rationale that 'separate but equal' schools for Black students are as good as receiving an education in an integrated school." *Id.*; *see* Leland Ware, *Issues in Education Law and Policy: The Most Visible Vestige: Black Colleges after* Fordice, 35 B.C. L. REV. 633, 675–76 (1994) (recognizing the paradox).

[132] *See* Missouri v. Jenkins, 515 U.S. 70, 122 (1995) (Thomas, J., concurring) (citing United States v. Fordice, 505 U.S. 717, 748 (1992)) (noting that state-supported segregation, not segregation itself, is harmful).

[133] *Id.*

[134] Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and* Brown v. Board of Education, 20 HASTINGS CONST. L.Q. 725, 726 (1993). Professor Cummings' criticism of efforts to sustain all-male black schools provides an example:

> The proponents of the [all-male black schools] are referred to in this article as the "New Separatists," the post-modern anti-integrationists, who as the result of disillusionment with the promises of a truly interracial society, have sought to find solutions through the established constitutional order that legitimize separate educational institutions based on race and gender. They differ from the "Old Separatists" by their commitment to constitutional means to achieve the changes they consider essential for the survival of young black males. By working within the system, they affirm the American constitutional tradition while challenging the current application of its recognized doctrines. Yet while their commitment to the constitutional process and their sincerity are to be applauded, their conclusions must be eschewed. Specifically, even if racial

government should not support racial sorting in *any* form, even if it can construct a way to do so legally.[135]

Looking forward, maybe the federal government should reconsider *all* of its race-based initiatives in higher education. Although the Supreme Court's holdings in *Bakke*, *Gratz*, *Grutter*, and *Fordice* suggest that diversity initiatives are more constitutionally sound than government support of public HBCUs, this does not mean that the *government* needs to be the instrument which promotes diversity. For an educational interest to be sufficiently compelling to justify race-conscious government action, the purported educational benefits must outweigh the various costs to the institution and to the wider society.[136] In the wake of *Grutter*, *Gratz*, and current threatened legal challenges, many colleges and at least one federal agency[137] have

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> segregation of blacks is voluntary, as it is in [all-male black schools], it is still harmful. The "sanction of the law" standard of *Brown* can be eliminated with its holding still intact.

Id. Professor Murray Dry suggests that the *Brown* Court's "emphasis on equal educational opportunity and its implicit endorsement of the view that racial separation is harmful to the minority even without the sanction of law, allowing one to argue that the constitutional mandate must be integrated public schools." Murray Dry, Brown v. Board of Education *at Forty: Where Are We? Where Do We Go From Here?* 1 RACE & ETHNIC ANC. L. DIG. 8, 11 (1995), *quoted in* Mark Strasser, Plessy, Brown *and HBCUs: On the Imposition of Stigma and the Court's Mechanical Equal Protection Jurisprudence*, 40 WASHBURN L.J. 48, 56 n.62 (2000).

[135] *See* Brief of Amicus Curiae Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners at 29, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) & Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) (suggesting that deeming diversity as a compelling interest might require states to ban HBCUs or exclude them from federal funding).

[136] Brief of Amici Curiae Center for Equal Opportunity, the Independent Women's Forum, and the American Civil Rights Institute in Support of Petitioners at 12, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241). The potential costs of using race-conscious measures are great:

> It is personally unfair and sets a disturbing legal, political, and moral precedent to allow racial discrimination; it creates resentment; it stigmatizes the so-called beneficiaries in the eyes of their classmates, teachers, and themselves; it fosters a victim mindset, removes the incentive for academic excellence, and encourages separatism; it compromises the academic mission of the university and lowers the overall academic quality of the student body; it creates pressure to discriminate in grading and graduation; it breeds hypocrisy within the school; it encourages a scofflaw attitude among college officials; it mismatches students and institutions, guaranteeing failure for many of the former; it papers over the real social problem of why so many African Americans and Hispanics are academically uncompetitive; and it gets state actors involved in unsavory activities like deciding which racial and ethnic minorities will be favored and which ones not, and how much blood is needed to establish authentic group membership.

Id. at 12–13 (citations omitted).

[137] The National Science Foundation has eliminated the NSF Minority Graduate Research Fellowship Program. In 1997 a white graduate student at Clemson University sued the NSF for not allowing him to compete for one of the minority awards. As a result of a settlement, the NSF redesigned its graduate research fellowship to make financial rewards to institutions rather than individuals. The National Institutes of Health (NIH) and the U.S. Department of Agriculture (USDA) have settled similar lawsuits, which required them to remove racial criteria from the challenged programs. *See* Anne Springer, American Association of University Professors, *Update on Affirmative Action in Higher*

eliminated their race-based diversity grants because it is "harder to justify programs that separate student communities instead of building them into an interactive whole."[138]

IV. Why the Federal Government Promotes Two Divergent Initiatives: A Hypothesis

A. Legacy

HBCU supporters ask critics to look at outcomes. HBCU alumni include Dr. Martin Luther King, Justice Thurgood Marshall, former Virginia Governor Douglas Wilder, Pulitzer Prize-winning author Toni Morrison, and Oprah Winfrey.[139] Statistically, most black federal judges, doctors, veterinarians, and Ph.D. recipients attended HBCUs, as well as nearly half of America's black engineers, business professionals, pharmacists, and dentists.[140] Therefore HBCU supporters could strongly argue that withdrawing federal support of HBCU would tarnish the legacy of the prestigious alumni and cripple the intellectual pipeline of black America.

B. White Guilt

1. Is America Confused?

The dilemma exists in part because America still has not come to terms with race. The same person who claims to embrace diversity will live in a suburb that is consciously all-white. A young professional couple who criticize school choice will send their own kids to a private school. A hiring manager who is "committed to diversity" will live, worship, dine, golf, and befriend persons who are exclusively white. Thus diversity may have fallen victim to the NIMBY syndrome.[141] Arguably many white persons will buy

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Education: A Current Legal Overview, http://www.aaup.org/Issues/AffirmativeAction/aalegal.htm (Jan. 2005) (exploring the ongoing controversy surrounding legal and political challenges to affirmative action).

[138] Peter Schmidt, *Not Just for Minority Students Anymore: Fearing Charges of Discrimination, Colleges Open Minority Scholarships and Programs to Students of All Races*, CHRON. OF HIGHER EDUC., Mar. 19, 2004, at A17 (quoting Richard H. Brodhead, the Dean of Yale College, in the wake of *Grutter* and *Gratz).*

[139] S. David Friedman, Note, *College Desegregation: Toward Abandoning the Integrative Ideal to Save Publicly Funded Black Institutions of Higher Education*, 11 N.Y.L. SCH. J. HUM. RTS. 339, 377 n.249 (1994) (citation omitted).

[140] See *supra* note 86 and accompanying text.

[141] The environmental justice and land use communities frequently discuss the "Not In My Backyard" (NIMBY) syndrome. *See, e.g.*, Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not In My Backyard" Syndrome*, 43 SYRACUSE L. REV. 945 (1992) (addressing the issues of NIMBY victims with specific reference to the effects of project opposition on

into the diversity ideal as long as its impact remains distant. Professor Shelby Steele ties this fear and self-preoccupation to white guilt:

> [T]his fear for the self does not only inspire selfishness; it also becomes a pressure to escape the guilt-inducing situation. When selfishness and escapism are at work, we are no longer interested in the source of our guilt and, therefore, no longer concerned with an authentic redemption from it....
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> [Guilt can be] a very dangerous [motive] because of its tendency to draw us into self-preoccupation and escapism.... [M]any of our social policies related to race have been shaped by the fearful underside of guilt.[142]

This fear and self-preoccupation converts any genuine concern for blacks into a need for quick redemption.[143] Blacks become victims, and black entitlements provide redemption.[144] The unfortunate irony is that blacks are now viewed as "different, special," or "less than" whites,[145] which was the mindset that spawned the guilt in the first place!

2. *Redemption and Black Entitlement*

"In the 1960s the need for white redemption from racial guilt became the most powerful, yet unspoken, element in America's social-policy-making process."[146] White guilt "springs from a knowledge of ill-gotten advantage" which "constitutes a continuing racial vulnerability—an openness to racial culpability—that is a thread in white life."[147] White guilt—at least in part—underlies laws and policies like affirmative action, racial preferences, black entitlements, diversity initiatives, and the "HBCU Aid Act."

Professor Steele believes that white guilt is most evident on college campuses.[148] Many black students cry "racism," but that is not the real

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racial minorities); Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495 (1994) (same). The NIMBY syndrome refers to an organized effort of opposition by local citizens to a civic project that, although needed by the larger community, is often considered to be unsightly or likely to lead to depreciated property values. Margulies, *supra*; Gerrard, *supra*.

[142] Shelby Steele, *White Guilt*, 59 AM. SCHOLAR 497, 502 (1990).

[143] *See id.* (stating that fear for the self initiates a desire to escape from a guilt-inducing situation and the appearance of redemption provides the means for that escape).

[144] *Id.*

[145] *Id.* at 503.

[146] *Id.* at 498.

[147] Shelby Steele, *supra* note 142, at 499; *see also* Walter E. Williams, *White Guilt, Black Exploitation*, HUM. EVENTS, June 16, 2003, at 24 ("Guilt is one of the worse human motivations. It promotes self-serving actions, while ignoring or discounting the efforts of those actions on the object of the guilt.").

[148] Steele, *supra* note 142, at 503–05.

problem: These students have developed a "grievance identity."[149] University administrators eagerly give black students whatever they want; including separate dorms, black cultural centers, and all-black graduation ceremonies.[150] Black students "are taught that extra entitlements are their *due* and that the greatest power of all is the power that comes to them as *victims*."[151] Colleges will even replace a liberal arts curriculum with a "multicultural approach" which will build the "self-esteem" of minorities.[152] Therefore many PWIs will allow black students to create their own insular world within the larger university.[153]

The HBCU is the ultimate embodiment of the "nation within a nation" concept, and has also become the extreme expression of white guilt in the higher education context. HBCUs are seemingly immune from critical review from outside of the black community because any unacceptable action by a white person will be deemed racist.[154] Lawmakers and politicians know this too; any inclination to reduce or eliminate HBCU funding may result in irreparable harm or political suicide. HBCU proponents know the power of white guilt; thus, they will wield the *race card*[155] when necessary.

C. "Those Qualities Which Are Incapable of Objective Measurement"[156]

HBCU proponents contend that black colleges fulfill a mission that PWIs and other American institutions are unwilling or unable to perform. Professor Kenneth Tollett claims that HBCUs serve seven functions.[157] The

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[149] Shelby Steele, *Rise of "The New Segregation,"* USA TODAY (Magazine), Mar. 1993, at 53–55.

[150] *Id.* at 55.

[151] *Id.* (emphasis added).

[152] *Id.*

[153] "One representative study at the University of Michigan indicated that 70% of the school's black undergraduates never have had a white acquaintance. Yet, across the nation, colleges and universities like Michigan readily and even eagerly continue to encourage more segregation by granting the demands of every vocal grievance identity." *Id.*

[154] *See, e.g.*, Scott Jaschik, *President of Black-College Lobbying Group Stirs Furor With Claim ACE Is Racist*, CHRON. OF HIGHER EDUC., Jan. 8, 1992, at A1 (examining a letter sent from an HBCU lobbying group accusing the American Council of Education (ACE) of racism and claiming that the ACE president was hostile to HBCUs).

[155] *See, e.g.*, Ellis Cose, *12 Things You Must Know to Survive and Thrive in America*, NEWSWEEK, Jan. 28, 2002, at 52 ("Given such psychologically complex phenomena as racial guilt and racial pain, you are not likely to find much empathy or understanding when you bring racial complaints to whites," but "there is a time when playing the race card makes perfectly good sense.").

[156] Sweatt v. Painter, 339 U.S. 629, 634 (1950), *quoted in* Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 153 (1987) ("Understanding the ambiguous legacy of the black public college requires a look beyond the tangible and quantifiable characteristics of the institution to 'those qualities which are incapable of objective measurement.'").

[157] *See* Kenneth S. Tollett, Sr., *The Fate of Minority-Based Institutions After* Fordice: *An Essay*, 13 REV. LITIG. 447, 475–84 (1994) (listing the seven functions of black colleges).

first four functions, which Tollett claims are unique to HBCUs, are that they provide black students with (1) admirable models for success; (2) an environment which is "psychologically and socially congenial"; (3) *an "enclave" for black students to transition from an isolated black world to white America*; and (4) protection against America's "declining interest in the education of blacks".[158] The three remaining functions, which are not unique to HBCUs, include providing (5) societal resources for black communities; (6) *a "wider freedom of choice for black and white students"*; and (7) preserving black culture.[159]

Even if some of Tollett's claims are legitimate,[160] the federal government should take little or no part in fulfilling them. In fact, two purported functions are wholly antithetical to the legacy of *Brown*.[161] The federal government should not support *any* program which further isolates and alienates black students from American society. Similarly, providing students with a "wider freedom of choice" is to create racially-identifiable enclaves for black and white students[162]—a goal that the *Fordice* Court explicitly rejected.[163]

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[158] *Id.* at 475–82 (emphasis added).

[159] *Id.* at 482–84 (emphasis added).

[160] For example, Professor Johnson argues that "coercive assimilation" into PWIs will harm black students:

> Finally, I question the notion that the remedy mandated by *Fordice*—essentially forcing African-Americans to attend predominantly white schools—is truly illustrative of any notion of integration. Fordice mandates coercive assimilation. Predominantly white colleges are not "neutral" environments in which African-Americans and whites can meet and learn as equals. Rather, such colleges are institutions that maintain and promote white norms. Such schools mask a white cultural perspective or norm that has the effect of stifling or eradicating the consciousness of African-American students. Thus, the continued maintenance and operation of predominantly or historically black colleges is unobjectionable and justifiable as an effective counterbalance to the maintenance of white culture through predominantly white colleges. Instead of eliminating or merging historically black colleges into white colleges through coercive assimilation, these schools should receive increased funding to attain the same level of excellence as their white counterparts.

Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1456 (1993).

[161] "[T]he proposed alternative of creating a separate but equal 'educational environment' for African-American students would amount to *de facto* segregation that runs contrary to the dictates of *Brown*." Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1028 n.7 (9th Cir. 1998).

[162] Tollett, *supra* note 157.

[163] United States v. Fordice, 505 U.S. 717, 749 (1992); *see also supra* notes 106–11 and accompanying text (discussing the *Fordice* opinion).

D. De Facto Segregation and "The Race Problem"

America's love affair with *de facto* segregation lies at the core of the HBCU dilemma and the larger "race problem."[164] High-achieving black high school students will forego a full scholarship to a top-tier PWI to attend a lower-ranked HBCU with no scholarship because the student presumes that the PWI is a bastion of racism.[165] To be sure, there are plenty of white college students who have not joined the diversity bandwagon.[166] These white students, who come from an insular world, can argue quite persuasively that a *diverse* campus does nothing to improve their *individual* college experience.[167]

Colleges that claim to be diverse may be able to tout high minority enrollment statistics, but campus self-segregation is reminiscent of the 1950s.[168] University administrators accommodate black students' demands for separate dorms, houses, and library floors because these *de facto* practices limit interracial conflicts.[169] A roommate fight over *MTV* or *BET*

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[164] *See generally* ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM (1990) (defining the race problem, providing a class-based analysis, and providing strategies for the transformation of black America).

[165] *See, e.g.*, Lino A. Graglia, Podberesky, Hopwood, *and* Adarand: *Implications for the Future of Race-Based Programs*, 16 N. ILL. U. L. REV. 287, 287–88 (1996) ("Judge Motz, at least as gullible as he was self-righteous, had no difficulty believing that the reason that there are not more black students at the University of Maryland is that it has a 'poor reputation' among blacks, and the reason so many black students drop out of law school is the existence of 'a hostile racial attitude on campus'—after all, how else could low black enrollment and retention be explained?"). Prospective black students are not the only persons who draw cursory conclusions about race at PWIs. Professor Graglia has criticized a federal district court judge for this behavior:

> [The judge], at least as gullible as he was self-righteous, had no difficulty believing that the reason that there are not more black students at the University of Maryland is that it has a "poor reputation" among blacks, and the reason so many black students drop out of law school is the existence of "a hostile racial attitude on campus"—after all, how else could low black enrollment and retention be explained?

Id.

[166] Extreme examples are those white students who engage in overt racist speech at PWIs. *See, e.g.*, Evan G. S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351 (1990) (describing that the social climate toward minority students at colleges and universities has become inhospitable because white students believe that minority students receive special treatment); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990) (examining racial harassment on college campuses).

[167] "Diversity, like most other things, means different things to different people....We care about diversity for many reasons, and we place different limits on how 'much' diversity we seek in different contexts." Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1106 n.7 (2005) (citation omitted). Whites and blacks conceive and quantify diversity differently. *Id.*

[168] *See supra* notes 12–16 and accompanying text (listing examples of student self-segregation).

[169] However, perceived "special treatment" can also elevate racial tension on campus. *See* Mel Elfin & Sarah Burke, *Rage on Campus*, U.S. NEWS & WORLD REPORT, Apr. 19, 1993, at 52–54

will not happen if black students and white students are not assigned to the same room.[170]

Simply stated, the federal government promotes two contradictory policies because America demands both. PWIs are ill-prepared to handle an influx of black students, and HBCUs certainly do not want to absorb more white students or white professors.[171] Diversity initiatives allow PWIs to assuage white guilt and to comply with federal law. Likewise, white students do not stand at the main gate of HBCUs crying, "Let me in!"[172] HBCUs play an important—albeit unrecognized—function in white America because they (1) assuage white guilt by (2) giving black persons what they want, which (3) redeems, and (4) limits black-white interaction.

Thus HBCUs allow America to cling to *de facto* segregation and its inescapable consequence: separate but equal education. As Damian Gosheff comments, "*Plessy v. Ferguson* is entrenched in American schools; whether via *de jure* discrimination, as in the pre-*Brown* years, or via *de facto* discrimination, as is the case today, *separate but equal is accepted and even endorsed.*"[173] Moreover, "[f]ederal judges adjudicating desegregation litigation have assumed that historically black colleges stand as obstacles to school desegregation."[174] Thus, efforts by the President and Congress to

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(discussing white students' resentment of what they see as unwarranted special treatment for black students).

[170] MTV was America's first music television network, and BET was America's first cable network dedicated to black programming. In the 1980s MTV aired mostly rock-and-roll music videos, whereas BET featured music videos with black artists. Now the MTV-BET divide is much less apparent, as airs numerous "black" programs and music videos which is due, at least in part, to the white suburban kids' affinity for "hip hop" and "gangsta rap." *See, e.g.*, Ronald D. Brown, *The Politics of "Mo' Money, Mo' Money" and the Strange Dialectic of Hip Hop*, 5 VAND. J. ENT. L. & PRAC. 59, 62 (observing how suburban white kids purchase millions of "gangsta rap" albums each year). In 2000, the founder of BET sold the network to Viacom, the owner of MTV, for $3 billion; *see* Richard Sandomir, *Founder of TV Network Becomes First Black Owner in Major Sports*, N.Y. TIMES, Dec. 19, 2002, at A1 (reporting that Robert Johnson sold BET to Viacom in 2000 for three billion dollars).

[171] *See supra* notes 127–30 and accompanying text (discussing challenges and benefits for HBCUs that employ white professors).

[172] There are a few notable exceptions. *See, e.g.*, Molly O'Brien, *Discriminatory Effects: Desegregation Litigation in Higher Education in Georgia*, 8 WM. & MARY BILL RTS. 1, 21–41 (1999) (discussing the era of the "white plaintiff" in Georgia HBCU desegregation litigation).

[173] Damian B. Gosheff, Comment, Brown's *Unfulfilled Promise: Education Finance Reform and the Separate But Equal Effect of State Education Clause Remedies—New York as a Model*, 35 U. TOL. L. REV. 889, 890 (2004) (emphasis added).

[174] Leland Ware, *Issues in Education Law and Policy: The Most Visible Vestige: Black Colleges after* Fordice, 35 B.C. L. REV. 633, 651 (1994). The *Fordice* cases addressed the dual HBCU-PWI system in Mississippi. HBCUs in other Southern states have also been embroiled in litigation. *See, e.g.*, Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) (suit seeking desegregation of Alabama colleges); United States v. Louisiana, 9 F.3d 1159 (5th Cir. 1993) (action alleging maintenance of dual college system based on race); Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986) (suit seeking to use racial quotas to eliminate effects of *de jure* segregation); Norris v. State Council of Higher Educ., 327 F. Supp. 1368 (E.D. Va. 1971) (alleging maintenance of a dual college system in Virginia), *aff'd mem. sub nom.* Bd. of Visitors of the Coll. of William & Mary v. Norris, 404 U.S. 907 (1971); Ala. Statute Teachers Ass'n v. Ala. Pub. Sch. and Coll. Auth., 289 F. Supp. 784 (M.D. Ala. 1968) (challenging the dual system in Alabama), *aff'd*

strengthen HBCUs frustrate diversity and likely hinder the judiciary's efforts to fulfill the *Brown* legacy.

V. Conclusion

HBCUs were created during America's shameful past, when separate but equal education was the law. Southern legislatures used Jim Crow laws and the Morrill Acts to forge a dual system of higher education, which made HBCUs an icon of *de jure* segregation. Although fifty years have elapsed since *Brown* and its progeny, vestiges of America's shameful past remain. Martin Luther King Jr.'s dream of white kids and black kids sitting side-by-side will not be reached because American society still sees a benefit in educating kids in segregated schools.

Since *Brown*, the federal government has sought redemption for the race problem that it helped create. Attempts to fix the race problem *at the college level* are too late. Professor Ware argues that governmental intervention should begin sooner:

> From a policy perspective, states would be better served by taking actions to increase the pool of minority college students. This could be accomplished by creating programs that would improve the preparation minority students receive in elementary and high schools. College is the continuation of a long-term educational process, where it is difficult to remedy problems that have developed at earlier stages. The focus should be on elementary and high schools in urban areas, where the vast majority of black students attend school, and where the quality of educational services is most lacking. The economic disparities between urban and suburban school districts are at the heart of the nation's failure to educate minority children.[175]

Thus, pouring money into HBCUs and promoting diversity initiatives are a scapegoat; this allows policymakers to obtain partial credit for a larger program that the government is afraid or unwilling to tackle. The inherent conflict between diversity initiatives and programs aimed at strengthening HBCUs ties into a larger tension within the black community—whether to

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per curiam, 393 U.S. 400 (1969); Sanders v. Ellington, 288 F. Supp. 937 (M.D. Tenn. 1968) (suit seeking desegregation of public colleges in Tennessee), *enforced sub nom.* Geier v. Dunn, 337 F. Supp. 573 (M.D. Tenn. 1972), *modified sub nom.* Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd sub nom.* Geier v. Univ. of Tenn., 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

[175] Ware, *supra* note 173, at 677.

move toward the *Brown* ideal of integration or to develop a uniquely black "nation within a nation."[176]

The federal government should move cautiously in trying to fix the race problem at the college level because race-conscious tinkering often creates more problems than it attempts to remedy. However, if the government truly supports *Brown* and its progeny, it should not try to shoehorn HBCUs into this educational vision if they do not fit.[177]

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[176] *See* Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1456–57 (1993) (discussing how the unique social history of African Americans has resulted in the emergence of an African American nation, creating tension in integration).

[177] *Cf.* Leocal v. Ashcroft, 543 U.S. 1, 13 (2004) ("But this fact does not warrant our shoehorning it into statutory sections where it does not fit.").