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Battle of the Lands: The Creation of Land Grant Institutions and HBCUs – Fostering a Still Separate and Still Unequal Higher Education System

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Battle of the Lands: The Creation of Land Grant Institutions and HBCUs – Fostering a *Still* Separate and Still Unequal Higher Education System

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Abstract

In HBCU culture, the Battle of the Bands is a competition between school marching bands to determine the "best of the best". It is a cultural celebration that symbolizes friendly competition and showcases students' pride in their school. Unfortunately, since their inception, Historically Black Colleges, and Universities ("HBCUs") have been battling for legitimacy in America's higher education system. From the beginning, HBCUs were often the only place African Americans could receive an education. Today, HBCUs are known for creating some of the most successful Black graduates and serve as a safe haven for Black students seeking an education in an environment with people who look like them. But public HBCUs from the beginning have been underfunded, intentionally shut down, and negatively affected by state and federal government legislation. This Note tracks the founding of HBCUs. Next, this Note argues that the original purpose of HBCUs was never to be equal to white institutions but to keep Black people out of state land-

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grant institutions that were founded to train poor whites to create a middle class of managers. Through evaluating the Supreme Court's education jurisprudence and legislative history, this Note concludes by suggesting new ways to ensure that all public HBCUs are properly funded to give the institutions a fighting chance in continuing to educate America's youth.

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I. *Introduction*

Imagine: the year is 1855 in a rural town in Maryland. You are born to a slave woman by the name of Maryam. You are her 8th child, but half of your siblings either died as infants from malnourishment or have subsequently been sold off to other plantations to pay the debts of your slaveholder. Your complexion

is lighter than your mom, your paternity marked as unknown, yet everyone on the plantation knows the truth. When you were first born you had a few weeks to spend time with your mother but shortly after she was forced to return to the field every day at sunrise and you were left with an older woman who was no longer able to labor.

Now, as the offspring of a slave woman your legal status in the United States was similar to that of a domestic animal. You were no different than the very chickens you chased around the plantation for fun as a young child.[1] As a child on a plantation you had to learn to not only obey your mother but also your owners and overseers.

At the age of 6 you received your first job, caring for the child of your overseer as their personal servant. A perk of your job was that you were around for everything he learned, including his daily tutoring sessions of reading and writing. From your observations, you were able to pick up on words and learned to read and write on your own. You keep your skills and knowledge secret because you know what happens to slaves who learn to read and write and the consequences you would face if anyone found out.[2]

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1. *See* M'Vaughters v. Elder, 4 S.C.L. (2 Brev.) 307, 314 (Const. Ct. S.C. 1809)

The answer to this objection is, that, by our law, the brood, or offspring, of tame and domestic animals, is similar to the civil law, which declares that the issue shall follow the' condition of the mother, or dam . . . . This law applies to the joung of slaves, because as-objects of property, they stand on the same footing as other animals, which are assets to be administered by the personal representative of the deceased owner.

2. *See* Janet Cornelius, *"We Slipped and Learned to Read:" Slave Accounts of the Literacy Process, 1830–1865*, 44 PHYLON 171, 174 (1983).

Slaves themselves believed they faced terrible punishments if whites dis- covered they could read and write. A common punishment for slaves who had attained more skills, according to [B]lacks who were slaves as children in South Carolina, Georgia, Texas, and Mississippi, was amputation, as described by Doc Daniel Dowdy, a slave in Madison County, Georgia: "The first time you was caught trying to read or write, you was whipped with a cow-hide, the next time with a cat-o-nine-tails and the third time they cut the first jint offen your forefinger." Another Georgia ex-slave carried the story horrifyingly further: "If they caught you trying to write they would cut your finger off and if they caught you again they would cut your head off.

Slavery was a dehumanizing and egregious institution in our nation that held African Americans in bondage for generations.[3] This bondage was not only physical but spiritual, emotional, and psychological. Chattel slavery in the United States was also rooted in racism and white supremacy with the goal of allowing slaveholders to maintain ultimate control.[4] One way that control was maintained was by forbidding the enslaved from learning to read and write. Many states passed anti-literacy laws that disallowed the teaching of the enslaved.[5] Despite the legal and social barriers, many people were still able to secretly learn the skills.[6] Enslaved persons took the risk to learned because even in a system of chattel slavery many saw the value of education and being able to think for oneself.

Education has been deeply embedded in the history of the United States. Founding Father Benjamin Franklin is known for

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3. *See* Glenn C. Loury, *An American Tragedy: The Legacy of Slavery Lingers in Our Cities' Ghettos,* BROOKINGS (Mar. 1, 1998) (exploring how the United States' struggle with racial equality is rooted in division that was established during slavery) [perma.cc/7GSV-X6AX]. Slavery is commonly known as the original sin. As a new democracy, the Civil War was the only way the country was able to get rid of the undemocratic institution. *Id.*

4. *See* Tom Gjelten, *White Supremacist Ideas Have Historical Roots in U.S. Christianity,* NPR (July 1, 2020, 1:38 PM) (showing how Christian theologians utilized the Bible to justify the enslavement of human beings and how both Christianity and white supremacy were commonly used and promoted together) [perma.cc/T86E-TZ32].

5. In North Carolina, if someone was found to have taught a slave to read or write or if someone were to give or sell a slave a book or any type of material, that action would result in the punishment of thirty-nine lashes or imprisonment if the person was a free Black person but only a 200 dollar fine for a white person. "[T]eaching slaves to read and write, tends to excite dissatisfaction in their minds, and to produce insurrection and rebellion." EXECUTIVE COMMITTEE OF THE AMERICAN ANTI-SLAVERY SOCIETY, SLAVERY AND THE INTERNATIONAL SLAVE TRADE IN THE UNITED STATES OF NORTH AMERICA 195 (1841). *See also* Samuel J. Smith, *Margaret Douglass: Literacy Education to Freed Blacks in Antebellum Virgini*a, 2 BOUND AWAY: LIBERTY J. HIST. 1, 2 (2018).

General Assembly of the Commonwealth of Virginia passed a series of anti-literacy laws. Of which, Chapter 198, Section 32, stated, "If a white person assemble with negros for the purpose of instructing them to read or write . . . . he shall be confined in jail not exceeding six months, and fined not exceeding one hundred dollars . . . "

6. *See* Cornelius, *supra* note 2, at 5 ("A reading and analysis of all the 3,428 responses by ex-slaves questioned by the Federal Writers Project interviewers as compiled in these volumes pinpointed just over 5 percent (179) who mentioned having learned to read and write as slaves.").

promoting education as an essential element in the development of a child and how its presence was instrumental in upholding democracy.[7] As the United States became more industrialized, higher education was painted as the key to the American Dream for everyday Americans.[8] Yet the very country that proports higher education as a "golden ticket" to prosperity is the same country where higher education was once only exclusively available to the wealthy elite.[9] Women, Jewish people, Irish Americans, Black and Brown people were intentionally barred from entering these spaces of higher education.[10] In 1862 with the passage of the first Morrill Act and the establishment of land grant institutions, higher education finally opened up to a boarder spectrum of American

7. *See* Jenifer L. Hochschild & Nathan Scovronick, *Democratic Education and the American Dream*, *in* REDISCOVERING THE DEMOCRATIC PURPOSES OF EDUCATION, 209, 209 (Lorraine McDonnell & Michael Timpane eds., 2000) (quoting Benjamin Franklin);

> Nothing can more effectually contribute to the Cultivation and Improvement of a Country, the Wisdom, Riches, and Strength, Virtue and Piety, the Welfare and Happiness of a People, than a proper Education of youth, by forming their Manners, imbuing their tender Minds with Principle of Rectitude and Morality, [and] instructing them in . . . . all useful Branches of liberal Arts and Science.

see also KEVIN SLACK, BENJAMIN FRANKLIN, NATURAL RIGHT, AND THE ART OF VIRTUE 143 (Boydell and Brewer eds., 2017) (arguing that Benjamin Franklin was a philosopher of natural right).

8. *See* Heather E. McGowan, *Can We Save The American Dream?* FORBES (Aug. 7, 2019, 5:58 P.M.) ("We have long taken this to mean that the American dream is doing better than one's parents. The American dream is securing a stable place in the middle class or higher. The American dream is home ownership or some other determinant of stability.") [perma.cc/QCY4-87TV].

9. *See* Annika Neklason, *Elite-College Admissions Were Built to Protect Privilege,* ATLANTIC (Mar. 18, 2019) (highlighting the change in higher education during the early 20th century and how these policies were still shaped to maintain the advantages of wealthy white students) [perma.cc/S9TF-2ND7]. The very first graduating class of Harvard college included no people of color or women only "young men of good hope" who received their degree in an order according to "the rank their families held in society." *Id.*

10. *See* Eduardo Bonilla-Silva & Crystal E. Peoples, *Historically White Colleges and Universities: The Unbearable Whiteness of (Most Colleges and Universitas in America)*, 66 AM. BEHAV. SCIENTIST 1490, 1491–92 ("The first five colleges . . . . were instruments of Christian expansionism, weapons for the conquest of indigenous peoples . . . . These colleges were only open to White students, many of whom brought their personal enslaved Blacks with them to tend to daily tasks.").

society.[11] These schools were intended to educate poor white workers to become a new middle class of managers.[12] After the Civil War, with slavery coming to an end, Historically Black Colleges and Universities (HBCUs) emerged to educate the newly freed slaves of America, forming a corresponding Black school for each white land grant institution.[13]

Now imagine the two children from earlier 11 years later. Because of the Morrill Act, the child of the poor white overseer gets to attend the University of Maryland and the former slave child attends Baltimore Normal School.[14] The poor white child is being educated at a school intended to train him to become a member of a newfound middle class while the former slave child only has remedial classes available to him at a school with a completely different purpose.

Today, HBCUs are responsible for developing a large percentage of Black students in America. Despite HBCUs being founded as normal schools with less resources and representing only 3 percent of all higher education institutions in the United States, HBCUs have educated 10 percent of all Black students in

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11. *See* Louis Ferleger & William Lazonick, *Higher Education for an Innovative Economy: Land-Grant Colleges and the Managerial Revolution in America,* 23 CAMBRIDGE UNIV. PRESS 116, 119 ("The decades leading up to the Morrill Act of 1862, proponents of higher education for farmers and artisans had always stressed the need for these 'industrious classes', as the embodiment of Jeffersonian democracy, to have educational institutions that would put them on a par with the 'learned classes' . . . .").

12. *See* Jenkins, *infra* note 169, at 64 (noting that white land-grant schools were meant to provide "collegiate level training" in "agricultural and mechanical arts").

13. *See A History of Historically Black Colleges and Universities,* HBCU FIRST ("After the Civil War (1861-1865), HBCUs emerged to provide Black Americans the most basic of human rights – access to a full education.") [perma.cc/C4RU-577A].

14. Bowie State University was originally founded as the Baltimore Normal School for Colored Teachers. The school was founded by the Baltimore Association for the Moral and Educational Improvement of the Colored People. After petitions from the Baltimore Normal School trustees the state legislature authorized the Board of Education to take over control of the school in 1908 and in 1963 the Legislature authorized the school to become Bowie State College. In 1988, Bowie State College became Bowie State University under President James Lyons. *Bowie State University History,* BOWIE STATE UNIV. [perma.cc/CWW5-LMN3].

the United States.[15] HBCUs enroll twice as many Pell-Grant eligible students as other non HBCU institutions, yet HBCU graduates are 51 percent more likely to move into a higher economic bracket than they were born into than graduates of non-HBCUs.[16] HBCUs also serve as a pipeline to professional schools looking for talented Black students, most notably by supplying the highest amount of Black applicants of any other type of University.[17] HBCUs are also responsible for 80 percent of all Black judges, 50 percent of all Black lawyers, 40 percent of all Black engineers, 40 percent of all Black US Congress members, and 12.5 percent of Black CEOs.[18] These colleges and universities are able to produce compelling results all while being historically underfunded, an action that still effects these institutions today.[19] Despite the impact that HBCUs have had on the Black community, the number of successful alumni the institutions create, and the level of economic mobility an HBCU education can wield, the legitimacy of HBCUs in the modern day higher education sphere continues to be questioned. Some scholars argue that HBCUs are not quality institutions and have failed to achieve the quality and reputation of their counterpart institutions.[20]

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15. *See* Frankki Bevins et al., *How HBCUs Can Accelerate Black Economic Mobility*, MCKINSEY INST. FOR BLACK ECON. MOBILITY (July 30, 2021) ("Historically Black colleges and universities are uniquely positioned to inspire and support Black Americans in five critical roles they play in the US economy.") [perma.cc/L67S-5PNY].

16. *Id.*

17. *Id.*

18. *Id*; *About HBCUs,* THURGOOD MARSHALL COLL. FUND [perma.cc/JC3N-NCN3].

19. *See* Sean B. Seymore, *I'm Confused: How Can The Federal Government Promote Diversity In Higher Education Yet Continue To Strengthen Historically Black Colleges?,* 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 287, 294 (2006) (arguing for the federal government to invest in minority education at the K-12 level as opposed to tinkering with America's race problem at the college level with funding HBCUs). "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." *Id.* at 299.

20. *See id.* at 301.

HBCUs have not achieved the academic quality and reputation of contemporary mainstream institutions. Graduation rates at most lower- tiered HBCUs are subpar, and in some cases abysmal. Even Morehouse, Spelman, and Howard graduate a lower percentage of students than their PWI counterparts. HBCU

It is no secret that these institutions are underfunded compared to their peer institutions, especially public HBCUs that rely on the federal government and the state for funding.[21] For decades, all HBCUs have struggled to survive off of less financial support than Predominantly White Institutions ("PWIs").[22] The reason HBCUs are faced with this lack of funding is because of the dual education system that was not only encouraged, but sanctioned, by the federal government, allowing states to get away with segregation for far too long.[23] From the creation of anti-literacy laws, HBCUs in the North founded by white missionaries to spread the Gospel, Southern states refusing to integrate, to federal and state governments continuing to control the funding of many HBCUs, it is clear that white control over Black literacy and development still lives today.[24]

This Note argues that the original purpose of HBCUs was never to be equal to white institutions but to keep Blacks out of state land-grant institutions that were founded to train poor whites to create a middle class of managers. *Brown v. Board of*

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proponents attribute the low graduation rates, at least in part, to the institutions' outreach to "at-risk" students who otherwise would not attend college. 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. 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. (emphasis in original).

21. *See id.* at 299 ("The states that maintained dual systems of higher education continue to fund public [B]lack colleges at significantly lower rates than [predominantly white institutions]–with white schools sometimes receiving more than *twice* as much per student as [B]lack schools.") (internal quotations omitted) (emphasis in original).

22. *Id.*

23. *See id.* at 296–98 (describing how the Morrill Acts of the 1800s paved the way for a segregated educational system).

24. *See* Rasmussen, *infra* note 30, at 201 (discussing a 1740 anti-literacy act and its impacts); Consecrated Ground: Churches and the Founding of America's Historically Black Colleges and Universities, NAT'L MUSEUM AFR. AM. HIST. & CULTURE (explaining the origins of religiously affiliated HBCUs in the North as a reaction to educational oppression in the South) [perma.cc/U2MF-SMG5]; Alexis Marshall, *HBCUs Have Been Underfunded by $12 Billion, Federal Officials Reveal*, NPR (Oct. 9, 2023, 5:06 A.M.) [perma.cc/JF7G-B772].

Education[25] was supposed to fix the problem of separate but equal, but it did not. The only way to fulfill *Brown's* promise is to properly fund HBCUs today. Part II gives a historical background on the founding of HBCUs and how their founding created a government sanctioned dual education system. Part III explores the historical patterns of unequal access to education in the United States from the Supreme Court's ruling in *Plessy v. Ferguson*[26] to key cases that desegregated K-12 and higher education in the United States. Part IV explores a recently settled lawsuit between the State of Maryland Higher Education Commission (MHEC) and the states four public HBCUs. Finally, Part V gives policy solutions for how the federal government can right past wrongs in HBCU funding and create a cohesive higher education system that allows for all students regardless of race or the institution they choose to attend, to have access to equal educational opportunity.

II. Background on Historically Black Colleges and Universities

A. The Legacy of Slavery in the United States

The history of slavery in the United States is undeniable. Many tactics were used by white Americans to keep African Americans enslaved and promote a mindset of inferiority,[27] but the denial of education and language was the most damaging. For example, following the Stono Rebellion in South Carolina,[28] many states adopted laws making it illegal to teach the enslaved to read or write.[29] In South Carolina, the passage of the Negro Act of 1740

25. 347 U.S. 483 (1954).

26. 163 U.S. 537 (1896).

27. *See The Practice of Slavery at Monticello*, MONTICELLO (explaining the use of whipping and flogging as a means of control over enslaved persons on the plantation) [perma.cc/J6UT-EB5A].

28. *See* William Stanley, Fear and Rebellion in South Carolina: The 1739 Stono Rebellion and Colonial Slave Society 32 (May 8, 2020) (Masters thesis, James Madison University) (JMU Scholarly Commons) ("Twenty miles outside of Charleston, a group of enslaved men broke into a storehouse, killed two attendants inside, and obtained guns and ammunition. They set out towards Florida, gaining followers from neighboring plantations as they marched southward.").

29. *See* Earnest N. Bracey, *The Significance of Historically Black Colleges and Universities (HBCUs) in the 21st Century: Will Such Institutions of Higher*

highlighted the colony's clear fear of the threat that slave literacy posed to the slave holding colony.[30] Anti-literacy laws were successful and had a lasting impact. Over 90 percent of all African Americans were illiterate at the start of the Civil War in 1861.[31] As a result, when HBCUs were eventually founded, the education offered to its students included limited college subjects and focused on remedial skills like reading and writing.[32] Despite a history of obstacles created to restrict access to higher education, African Americans found ways to prevail by attaining literacy and other forms of knowledge through their own devices, most notably the formation and continued success of HBCUs.[33]

Learning Survive?, 76 AM. J. ECONS. & SOCIO. 670, 671 (2017) ("[T]he laws never broke the spirt of resistance that enabled close to 10 percent of African Americans in the South to achieve literacy by 1865.").

30. *See* Birgit Brander Rasmussen, "*Attended with Great Inconveniences": Slave Literacy and the 1740 South Carolina Negro Act*, 125 MOD. LANGUAGE ASS'N. 201, 202 (2010) ("Influential thinkers in Europe and America saw literacy as a sign of cultural and racial superiority–one used to justify the treatment of [B]lack slaves."); *id*. at 201.

Whereas, the having of Slaves taught to write or suffering them to be employed in writing may be attended with great Inconveniences Be it therefore enacted by the authority aforesaid That all and every Person and Persons whatsoever who shall hereafter teach or cause any Slave or Slaves to be taught to write or shall use or employ any State as a Scribe in any manner of writing whatsoever hereafter taught to write every such Person and Persons shall for every such Offense forfeit the Sume of One hundred pounds, Current money. (quoting a South Carolina statute prohibiting slaves from learning to read and write).

31. *See* Travis J. Albritton, *Educating Our Own: The Historical Legacy of HBCUs and Their Relevance for Educating a New Generation of Leaders,* 44 URB. REV. 311, 313 (2012) (explaining the history of Black colleges and universities, how they were funded, examining their mission statement and their relevance in the twenty-first century).

32. *See id*. at 313 (discussing the enduring consequences of anti-literacy laws on the educational landscape for African Americans).

33. *See* Bracey, *supra* note 29, at 672 (stating the sets of obstacles created for African Americans including fiscal policies and the powerful interest of others to keep Black people from "obtaining the tools necessary to gain control of their lives"); *see also* Erica L. Green, *Why Students Are Choosing H.B.C.U.s: '4 Years Being Seen as Family',* N.Y. TIMES (June 17, 2022) (interviewing dozens of the nation's most sought after high achieving Black students about why they chose HBCUs for their college education as opposed to Ivy Leagues) [perma.cc/EUE8-SA7K].

B. The Founding of HBCUs

Historically Black Colleges and Universities exist today as a legacy of the past, showcasing that the United States was never truly a land of equal opportunity.[34] HBCUs have several origin stories including establishment by ex-slaves, affiliation with Christian denominations, or through land grant programs provided by the federal government.[35] The first Black colleges ever created in the United States were Cheyney State College and Lincoln College in Pennsylvania, followed by Wilberforce College in Ohio.[36] Over the latter half of the nineteenth century and into the early years of the twentieth century, nearly 100 public and private schools known today as HBCUs were established, most of which were concentrated in border and southern states.[37] HBCUs were founded for the principal mission of educating Black Americans and preparing students to "pursue various careers and to function as effective, humane leaders and advocates for the

34. There would be no need for the creation of colleges and universities specifically for African Americans if the United States was actually committed to equal opportunity since its inception. Bracey, *supra* note 29, at 671.

35. *See id.* (observing how HBCUs serve as reminders of historical inequalities in United States educational access).

36. *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 (1987) (arguing that Historically Black Colleges and Universities are the symptom, not the cause, of injustice and their existence highlights the failure to remedy the separate by equal doctrine established in *Plessy*). Cheyney University was founded on February 25, 1837, and was first named the African Institute, later renamed the Institute for Colored Youth. Cheyney was established through the donation of Richard Humphreys a Quaker philanthropist who gave $10,000 to create a school to educate Black people and prepare them as teachers. *The First of Its Kind,* CHEYNEY UNIV. PENN. [perma.cc/7675-4ALJ]. Lincoln University of Pennsylvania was originally established as the Ashmun Institute and received its charter from the Commonwealth of Pennsylvania on April 29, 1854. Today, Lincoln University is known as the nation's first degree-granting Historically Black College and University. *Our History,* LINCOLN UNIV. [perma.cc/DYB6-8FHX]. Wilberforce University was founded in 1856 by the Methodist Episcopal Church to provide Black people with a college education. In 1863, the African Methodist Episcopal Church gained ownership of the university under the direction of Daniel Payne and reopened the schools' doors. *Wilberforce University,* OHIO HIST. CONNECTION [perma.cc/LK8H-7SNY].

37. *See* Kujovich, *supra* note 36, at 37–38 (counting seventeen border and southern states where newly freed slaves primarily reside making up an overwhelming majority of America's Black population).

great disadvantaged, disesteemed, and relatively powerless [B]lack masses."[38]

Immediately following the Civil War, with the vast majority of newly freed slaves being illiterate, there was an urgent push to undertake the education of millions of freedmen.[39] Many religious sects, in collaboration with the Freedman's Bureau, founded in 1865 and the federal government worked to supervise the education of freed slaves.[40] With the increased number of Black students entering elementary schools, there was a clear need for more teachers.[41] In addition to educating more Black teachers, many religious sects also maintained and supported these newly established black colleges with the additional goal of teaching "men and women who would ultimately take responsibility for spreading the message of the gospel."[42] White missionaries strove to educate Black people to create a class of morally upright citizens who were capable of living in white society.[43] But even when white people took active steps towards educating the Black population, it was still under the guise of control and manipulation. While many newly freed Black people appreciated the work and support of white missionaries, their efforts were met with a sense of mistrust and a growing desire for Black people to be involved in the day to day operations of the schools.[44]

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38. *See* Seymore, *supra* note 19, at 294 (2006) (arguing for the federal government to invest in minority education at the K-12 level as opposed to tinkering with America's race problem at the college level with funding HBCUs).

39. *See* Kujovich, *supra* note 36, at 38 (examining the critical need for immediate educational initiatives to address the high literacy rates among the recently emancipated slaves).

40. *See id.* (noting the collective effort among various organizations and the federal government in addressing the need to provide education for newly emancipated slaves).

41. *See id.* at 39 ("As increasing numbers of [B]lacks poured into the elementary schools, the need for additional teachers became clear."). Although there was growing fear of educating Black people in the South, state support for training Black teachers was reluctantly given to stop the alternative of northern white teachers infatuating the south to teach in Black elementary schools. *Id.*

42. Albritton *supra* note 31, at 314.

43. *Id.*

44. *Id.* For example, in 1865 when Howard University, a historically Black college in Washington D.C., needed a new president there was intense discussion amongst the board's white and Black members on who the new president should

C. Battle of the Ideologies: W. E. B. Du Bois and Booker T. Washington

The conversation of how and why Historically Black Colleges and Universities were founded is incomplete without the acknowledgment of two distinct thinkers who greatly influenced the evolution of HBCUs: Booker T. Washington and W.E.B DuBois.[45] Booker T. Washington, who founded Tuskegee University,[46] promoted an education system rooted in practical skills, self-help and hard work.[47] Washington believed it was important for Black colleges to teach students skills that were beneficial in the workplace because he recognized that, as a group, Black people were only recently released from the bondage of slavery and had to rely on the skills they already had to survive.[48] Washington's approach was less threatening towards whites, who felt that "industrial education would help maintain the status quo among the races."[49]

W.E.B. Du Bois was a Harvard educated intellectual whose philosophy focused on offering students access to a broad liberal arts education, similar to the colleges and universities that served

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be. This debate "underscores the desire by many Blacks to assert more authority and control over their institutions." *Id.* at 315.

45. *Id.* at 316–20.

46. Tuskegee University was originally founded as the Tuskegee Normal School that opened on July 4, 1881. Booker T. Gardner, *The Educational Contributions of Booker T. Washington,* 44 J. NEGRO EDUC. 502, 507 (1975).

47. *See id.* at 509–10 ("Washington's educational philosophy was pragmatic in that it stresses the importance of relating education to life. The type of industrial and vocational programs was designed to improve the economic, social, and educational conditions of any group or race.").

48. *See* Booker T. Washington, *The Awakening of the Negro,* ATLANTIC, Sept. 1896.

Our greatest danger is that in the great leap from slavery to freedom we may overlook the fact that the masses of us are live by the productions of our hands and fail to keep in mind that we shall prosper in proportion as we learn to dignify and glorify common labour, and put brains and skill into the common occupations of life.

49. *See* Albritton, *supra* note 31, at 318 ("As long as Blacks were not educated at the same level as Whites or taught to expect that their education should afford them the same opportunities as Whites, many White philanthropists readily supported Washington's efforts at Tuskegee.").

white students.[50] Du Bois' take on the Talented Tenth[51] theory relied on the formal education of the elite Black upper class in order to prepare the group to guide the Black community into "a process of growth and self-determination."[52] While Du Bois recognized that industrial education was important, he believed a greater focus was needed on teaching a liberal arts education to build the next leaders of the Black race.[53] Despite their differences, both men shared a common desire to ensure that Black people received some form of education that they had been denied for centuries.[54]

D. A Dual Education System

Slavery was not the only hierarchy maintained before the Civil War. Prior to the Civil War, higher education in the United States was essentially privatized with "sectarian institutions serving the wealthy and professional classes . . .offering a classical curriculum

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50. *Id.* at 316.

51. *See* W.E.BURGHARDT DUBOIS, *The Talented Tenth*, *in* THE NEGRO PROBLEM A SERIES OF ARTICLES BY REPRESENTATIVE AMERICAN NEGROES OF TO-DAY 33, 33 (James Pott & Company, 1903);

Education must not simply teach work–it must teach Life. The Talented Tenth of the Negro race must be made leaders of thought and missionaries of culture among their people. No others can do this work and Negro colleges must train men for it. The Negro race, like all other races, is going to be saved by its exceptional men.

see also HENRY LOUIS GATES, JR. & CORNEL WEST, THE FUTURE OF THE RACE (Vintage Books 1st ed. 1997) (utilizing W.E.B Du Bois's idea of the Talented Tenth to discuss how to combat poverty within Black America today). The Talented Tenth was a term originally coined by white philanthropist Henry Lyman Morehouse seven years before Du Bois popularized it. Henry Louis Gates Jr., *Who Really Invented the 'Talented Tenth'?,* PBS [perma.cc/V6WF-JKGN].

52. Albritton, *supra* note 31, at 317.

53. *See* DUBOIS, *supra* note 51.

The Negro Race, like all races, is going to be saved by its exceptional men. The problem of education, then, among Negroes must first of all deal with the Talented Tenth; it is the problem of developing the best of this race that they may guide the mass away from the contamination and death of the worst, in their own and other races.

54. *See* Albritton, *supra* note 31, at 320 ("The two educational giants did share a goal of educating African Americans and uplifting their race.").

to train the children of the privileged for positions of leadership."[55] With the vision and direction of Vermont Senator Justin Smith Morrill, the Morrill Act of 1862 was passed by Congress to provide access to higher education to everyday Americans.[56] The Act authorized the use of funds raised from the sale of federally gifted land to be used by the states to establish or create public universities that included within their curriculum (among the classics) technical training like agricultural and mechanical arts.[57] Although the Morrill Act is known for establishing "agricultural and mechanical schools," Senator Morrill's initial goal was to simply create more institutions of higher education so that it was accessible to all people in America, not just the wealthy.[58]

Sadly, the first Morrill Act did not grant access to higher education to all people, mostly notably newly freed African Americans. Black students were denied access to land-grant universities funded by federal money, specifically in the Southern states.[59] Black students were not only denied from these

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55. Kujovich, *supra* note 36, at 42.

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

57. States were allowed to raise money through the sale of public land that was gifted by the federal government to in turn fund the "land-grant" schools. Seymore, *supra* note 19, at 296 n.47 (citing Ch. 130, section 4 of the First Morrill Act).

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 related to agriculture and the mechanical 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 purists and professions in life.

58. *Id.* at 296–97; *see also* Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies,* 25 U. MEM. L. REV. 1265, 1269–70 (1995) (Land-Grant colleges were not originally agricultural colleges but people's colleges . . .they were to make our democracy better by providing higher education to the sons and daughters of ordinary citizens).

59. *See* Bracey, *supra* note 29, at 673 ("Southern legislatures were willing to allow Black colleges and universities to be built to get millions of dollars in federal funds for the development of white land-grant universities, to limit African American education to vocational training, and to prevent African Americans from attending white land-grant colleges.").

institutions, but the states also failed to use the funding for Black institutions.[60] After the passage of the first Morrill Act only three southern states, Virginia, Mississippi, and South Carolina shared a portion of the federal land-grant endowment with colleges educating Black citizens.[61]

As a result, Congress looked for a new way to address the inequitable application of funding by passing the Second Morrill Act formally known as the Morrill Act of 1890.[62] The goal of the Second Morrill Act was to guarantee access to education for Black students by requiring states that formally used the first Morrill Act to fund/create all white institution to either allow Black students to attend or to use this Morrill Act funding to build equitable schools of higher education for Black students.[63] Even with the change, the new Morrill Act did not have the immediate

60. *See* Fredrick S. Humphries, *Land-Grant Institutions: Their Struggle for Survival and Equality,* 65 AGRICULTURAL HISTORY SOCIETY 3, 3–4 (1991) (arguing that Black people were originally left out of the original Morrill Grant funding).

61. Kujovich, *supra* note 36, at 42. The legislatures in both Mississippi and South Carolina in 1871 and 1872 were Black controlled. In Mississippi, the Black-controlled legislative body created Alcorn University to educate the state's Black students. Alcorn University received three fifths of the federal land-grant money, with the remainder of the money allocated to the flagship institution the University of Mississippi. In South Carolina, the Black-controlled legislature designated Claflin University, a private Black college as their land-grant institutions and the school received all of the federal funding. When white people regained control of the legislature, the land-grant funding was then split in half between Claflin and the newly formed Clemson Agricultural College for white students. U.S. DEP'T OF INTERIOR OFFICE OF EDUC., VOL. I, BULLETIN NO. 9, SURVEY OF LAND-GRANT COLLEGES AND UNIVERSITIES 574–75 (1930).

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

63. Seymore, *supra* note 19, at 297. The Act required:

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]herupon such institution for college 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.

Ch. 841, 26 Stat. 417 (190).

impact that the legislatures hoped for, with only six states creating new institutions for its Black students, and others either funding already established private Black colleges or designating existing normal schools as their second Morrill Act land grant institution.[64] The Morrill Act of 1890 had "the paradoxical consequence of contributing to the segregation of educational institutions" in America.[65] Congress gave money to state legislatures who were able to control how that money was distributed within their territory, ultimately giving them the weapon to restrict the financing of higher education for Black Americans.[66]

By giving states the opportunity to either create Black colleges or underfund them, the federal government in essence created the doctrine of sperate but equal six years before it was firmly established in *Plessy v. Ferguson*.[67]

In 1896 the Supreme Court decided *Plessy v. Ferguson*.[68] The petitioner brought the case before the high court to dispute a state statue requiring that all railway companies carrying passengers must provide separate accommodations for Black and White riders.[69] In addition to arguing that the Louisiana statute was

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64. Kujovich, *supra* note 36, at 43. In Tennessee, the legislature allotted Morrill funds to a private Black college and later placed said college under state control. "The states that named established state-supported Negro colleges as their designees were Missouri (1886), Arkansas (1872), Alabama (1875), Kentucky (1887), Louisiana (1880), and Florida (1887)." John E. Sullivan, A Historical Investigation of the Negro Land-Grant Colleges from 1890 to 1964 (1969) (Ed.D. dissertation, Loyola University Chicago) (Loyola eCommons).

65. *See* Bracey, *supra* note 29, at 673 (arguing that since the white controlled legislatures were able to control the money coming in from the federal government, these same legislatures specifically in the south who were not supportive of the reconstruction amendments could blindly restrict the financing of higher education for African Americans).

66. *See id.* at 674.

Public HBCUs remained disproportionately underfunded . . . . White land-grant institutions were still receiving state appropriations at a rate of 26 times more than Black colleges . . . . The per pupil state expenditure rate for African Americans equaled about one-fourth the rate for whites.

67. *See* Kujovich, *supra* note 36, at 43 ("To implement this requirement of nondiscriminatory admission, however, Congress firmly established, six years before the Supreme Court's decision in Plessy v. Ferguson the federal government's support for the doctrine of separate but equal . . . .").

68. 163 U.S. 537 (1896).

69. *See id.* at 540 ("This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for

unconstitutional, the petitioner also argued that the statute promoted separation between Black and White people both physically and socially, "stamp[ing] the colored race with a badge of inferiority."[70] The court rejected this notion, stating "any feelings of inferiority would not be 'by reason of anything found in act, but solely because the colored race chooses to put that construction upon it.'"[71] Ultimately the court ruled that separating people by race was not "inherently stigmatizing" and the state was not violating the Equal Protection Clause of the Fourteenth Amendment by promoting a separate but equal policy. This holding officially cemented the doctrine in American jurisprudence.[72]

With the *Plessy* decision, states used the separate but equal doctrine to not only continue to keep Black students out of Predominately White Institutions ("PWIs") but to also continue to underfund the state sanctioned "Black schools" under guise of race neutral policies. State legislatures had the power to closely monitor the curriculum of Black colleges keeping them colleges only by name.[73]

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separate railway carriages for the white and colored races."). The petitioner was a man of mixed race. He sat in a vacant seat in a section that was designated for white people and when he was ordered to move by the conductor, petitioner refused to comply and was forcibly ejected from the train by law enforcement. *Id.* at 541–42.

70. *See id.* at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.").

71. *See* Mark Strasser, Plessy, Brown *and HBCUs: On the Imposition of Stigma and the Court's Mechanical Equal Protection Jurisprudence,* 40 WASHBURN L. J. 48, 49 (2000) (comparing *Plessy v. Ferguson* with *Brown v. Board of Education* and discussing the implications of the Court's current equal protection jurisprudence for HBCUs) (quoting *Plessy*, 163 U.S. at 551).

72. *See id.* ("Thus, the Plessy Court denied that the separation of the races was inherently stigmatizing and also denied that a state was violating the Equal Protection Clause of the Fourteenth Amendment by virtue of its employing an express racial classification.").

73. Because white people determined the curriculum at all state-funded colleges, many of the Black schools offered mostly precollegiate courses or vocational and industrial education. The large secondary departments made it hard for any Black school to be recognized as a full-fledged degree granting college by federal or state agencies because funding was not going towards the collegiate departments. Good faith white philanthropists who donated money to build institutions of higher education in the South were also equally at fault. With white people in charge of the hiring of teachers, "qualified college graduates were

III. Historical Patterns of Unequal Access to Education

For decades the United States operated under a dual education system where HBCUs received unequal funding and access to prepare their students. In the 1930s, several lawsuits were filed in southern states to challenge the separate but equal doctrine in higher education "in attempts to break the 'glass ceiling' imposed on Black education for the past 70 to 75 years."[74] Some of these lawsuits were successful, resulting in a small number of Black students gaining access to some professional schools, but widespread desegregation did not manifest until 1954.[75] With the Supreme Court decision in *Brown v. Board of Education of Topeka Kansas*, the Court effectively reversed its decision in *Plessy*. In *Brown*, the plaintiffs argued that segregated schools for students were not equal and that the concept of separate but equal would never end in equal educational opportunities.[76] Plaintiffs stated that because of this, Black students were deprived of Equal Protection under the law.[77] The Court held that the separate but equal doctrine had no place in public education and that separate facilities will always be inherently unequal.[78] The decision completely rejected the *Plessy* assertion that segregation did not create a sense of inferiority in

often passed over for those with an inadequate education." *See* Joseph O. Jewell & Walter R. Allen, *Historically Black Colleges, in* EDUCATION AND SOCIOLOGY: AN ENCYCLOPEDIA 361 (David Levinson et al. eds., 2000) (detailing the development of HBCUs and the future for Black higher education).

74. *See* Walter R. Allen & Joseph O. Jewell, *A Backward Glance Forward: Past, Present, and Future Perspectives on Historically Black Colleges and Universities*, 25 REV. HIGHER EDUC. 241, 248 (2022) (examining the past, present, and future of HBCUs in higher education and their ability to continue to educate Black students).

75. *See generally* Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337 (1938); McLaurin v. Okla. State Regents Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

76. *See* Brown v. Bd. Educ., 347 U.S. 483, 488 (1954) (addressing five consolidated cases from the states of Kansas, South Carolina, Virginia, and Delaware where public schools were segregated for Black and white children).

77. *See id.* at 488 ("The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws.").

78. *Id.* at 495.

Black people.[79] The decision as a whole was a response to the deplorable conditions that African American children were educated in and was primarily about the segregation of elementary and secondary schools.[80]

In retrospect, many argue that while *Brown* had great historical significance in the history of the United States, the decision was legally weak and lacked enforceability. Throughout the South, many school districts "resisted the Supreme Court's mandate for integrated education with legal maneuvers and outright defiance."[81] Additionally, white parents fled urban cities

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79. *See* Cheryl I. Harris, *Whiteness as Property,* 106 HARV. L. REV. 1709, 1750 (1993) ("*Brown I* held that, parity of resources aside, the evil of state-mandated segregation was the conveyance of a sense of unworthiness and inferiority."). The court also rejected the property rights of white people when it officially refused to sanction inequality, "[i]t did not accept the premise that neutral principles guaranteed that white preferences should remain undisturbed." *Id.*

80. *See* M. Christopher Brown II et al., *The Black College and the Quest for Educational Opportunity,* 36 URB. EDUC. 553, 564 (2001) (highlighting a historical and contemporary view of HBCUs in the United States focusing on the institutions' cultural edification and social uplift); *see also* William B. Harvey et al., *The Impact of the* Brown v. Board of Education *Decision on Postsecondary Participation of African Americans,* 73 J. NEGRO EDUC. 328, 328 (2004) ("Many Americans, especially those of African descent, thought that a new era was dawning when on May 17, 1954 the United States Supreme Court issued a unanimous decision declaring that racial segregation in the nation's [K-12] public schools was unconstitutional.").

81. *See* Allen & Jewell, *supra* note 74, at 248 (explaining how many believed that the Brown decision signaled an end to Blacks' struggle for equal educational opportunity when in reality it only heightened the struggle). Virginia Senator Harry F. Byrd immediately criticized the Brown decision, arguing that it was a blow to the rights of the states. He worked actively to convince other politicians to resist the Brown decision and embrace the idea of interposition, "in which a state had the right to interpose its sovereignty between its citizens and the federal government." *See* Haylee Orlowski, *Grayscale Thoughts: Reactions to* Brown v. Board of Education, 8 JAMES MADISON UNDERGRADUATE RSCH. J. 63, 69 (2021) (surveying the spectrum of reactions to the *Brown* decision).

> The unanimous decision of the Supreme Court to abolish segregation in public education is not only surprising but will bring implications and dangers of the greatest consequence. It is the most serious blow that has yet been struck against the rights of the states in a matter vitally affecting their authority and welfare. The Supreme Court reversed its previous decision directing 'separate but equal' facilities for the education of both races.

Statement from Harry F. Byrd, U.S. Senator, May 17, 1954) (on file with Small Special Collections, University of Virginia). Southern states also found "legal" and race neutral ways to keep school segregated. For example, informal systems were set up with a placement assessment. Children were assigned to schools on an

in large numbers and chose to settle in the suburbs or enroll their students in private and parochial schools to avoid having their children attend schools with Black students.[82]

The problem was that, while the decision was well intentioned, the court did not specifically state what it meant by discrimination based on race, it only outlawed it.[83] As a result, the states were left with unchecked autonomy to interpret and apply the law on their own, leading to slow desegregation.[84] *Brown* was not only weak in terms of enforcement, it was also weak in dismantling a legacy of inequality and white supremacy. While the Court in *Brown* took a stance by recognizing that separate but equal as a doctrine did create a sense of inferiority for Black students, it did not define what equality looks like or detail the parameters of what that equality would mean for the desegregation of schools.[85] Some Black scholars also questioned

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"objective" basis like ability or school enrollment capacity. Mark V. Tushnet, *Some Legacies of* Brown v. Board of Education*,* 90 VA. L. REV. 1693, 1706 n.47 (2004).

82. Allen & Jewell, *supra* note 74, at 248. This process is collegially known as "white flight" and encompasses both white parents sending their students to private schools as opposed to public schools and leaving their school district all together. Christine H. Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Planes?,* 12 J. L. STUD. 69, 81 (1983). Ironically, in some school districts, school boards attempted to use the fear of white flight as a reason to justify their choice to ignore court-ordered segregation. The Supreme Court ultimately held, however, that the fear of white flight could not justify a lack of desegregation after the *Brown* decision. *See* United States v. Scotland Neck City Bd. Educ., 407 U.S. 484, 490–91 (1972) ("But while [white flight's impact on the school system] may be cause for deep concern to the respondents, it cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system.").

83. *See* Brown, *supra* note 80, at 565 ("Although the law was well intentioned, it was difficult to enforce because 'the law did not identify what was meant by discrimination based on race or national origin—it just outlawed it. The meaning of discrimination, desegregation, and compliance were not even explored in the legislative evolution of Title VI.") (quoting M. CHRISTOPHER BROWN, THE QUEST TO DEFINE COLLEGIATE DESEGREGATION: BLACK COLLEGES, TITLE VI COMPLIANCE, AND POST-ADAMS LITIGATION 8 (1999)).

84. *See id* (acknowledging the historical significance the *Brown* decision while showing that the decision did not have an immediate impact on segregation in education).

85. *See* Harris, *supra* note 79, at 1750.

To its credit, the Court not only rejected the property right of whites in officially sanctioned inequality, but also refused to protect the old property interest in whiteness by not accepting the argument that the rights of whites to disassociate is a valid counterweight to the rights of Blacks to be free of subordination imposed

whether integration itself was a proper remedy to solve the Equal Protection issue of Black children.[86] For example, Robert L. Carter argues that while many try to fashion *Brown* on the theory that equal education and integrated education are the same thing, at the core of the Equal protection is *only* equal educational opportunity.[87] In Brown, the fight for equal educational opportunity not only emphasized the idea that segregated schools were inherently unequal but also established the inherent assumption that Black schools themselves were inferior to white schools.[88] Therefore, the remedy for segregation usually involved

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by segregation. It did not accept the premise that neutral principles guaranteed that white preferences should remain undisturbed.

86. *See* CHARLES OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION 135–36 (1st ed. 2004) (reflecting on the legal landscape before, during, and after the *Brown* decision); *see also* Robert L. Carter, *A Reassessment of Brown v. Board, in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 20, 27 (Derrick Bell ed., 1980) (arguing that the only way to ensure equal educational opportunity for Black students is to make sure that quality education is delivered to Black schools, not just integration).

87. *See* Carter, *supra* note 86, at 27.

> While we fashioned *Brown* on the theory that equal education and integrated education were one and the same, the goal was not integration but equal educational opportunity. Similarly, although the Supreme Court in 1954 believed that educational equality mandated integration, *Brown* requires equal educational opportunity. If that can be achieved without integration, *Brown* has been satisfied.

88. *See id.* (emphasizing the goal of *Brown* as that of equality not integration and leading to the underlying premise that black and white schools were not equal thus mandating integration); *see also* Derrick Bell, *A Model Alternative Desegregation Plan, in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 125, 125 (Derrick Bell ed., 1980) (detailing alternative strategies that can be used in promoting equal educational opportunity for Black students including listening to input from the Black community, created a desegregation plan committee, and creating a judicial approval process for).

> It is the conventional wisdom in this country that any public school whose student population is all or mainly [B]lack is presumptively a poor school. In such a school, according to the general understanding, learning takes second place to discipline, and teaching techniques are subordinated to rules designed to promote safety and order. Academic performance is low, and absenteeism is high. Fighting and stealing are supposedly valued by students more than reading and writing, and teachers deserve, and often receive, "combat pay" merely for showing up and surviving, whether or not their students learn anything. The belief that this model of the all-[B]lack school was the result of racial segregation motivated the litigation that led to *Brown* . . . . the hope that integration was the antidote for bad [B]lack schools fired the zeal of those committed to implementing *Brown*

bussing Black students to the more desirable white schools.[89] Many scholars questioned whether this was the best way to address the issue of equal educational opportunity and considered other alternatives.[90]

The *Brown* decision was also difficult to apply to higher education. In *Florida ex rel. Hawkins v. Board of Control of Florida*, although the *Brown* decision was cited as binding and the court in *Hawkins* required per curium that the Black student be admitted to the Florida graduate school in question, there was still "very little attention paid to the dismantling of dual postsecondary systems in the 19 Southern and border states."[91] This was an attempt to apply the decision to postsecondary institutions in order to open the doors of colleges and universities to Black Americans, but the passage of Title VI of the Civil Rights Act of 1964 created a better legal argument for dismantling the dual higher education

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though racial balance remedies designed to eliminate every predominantly [B]lack school.

Id.

89. *See* Stacy Hawkins, *Reverse Integration: Centering HBCUs in the Fight for Educational Equality,* 24 U. PA. J. L. & SOC. CHANGE 351, 360 (2021) (arguing that Historically Black Colleges and Universities are an underutilized resource in the fight for educational equality).

90. *See id.* at 360–61 (highlighting scholars who questioned the push for school integration over the bolstering of Black institutions); *see also* OGLETREE, *supra* note 86, at 135–36.

Why were the [B]lack children being forced to go to white schools, without anyone's raising the question of more resources for [B]lack schools? . . . Did anyone ask whether the [B]lack parents were getting the best for their children by sending them into white schools and neighborhoods where the chance to study and learn, given the intense racial hostility was marginal at best? What message were we sending to our children, having them leave their neighborhood schools and sending them to white, presumably better, schools? We didn't ask these questions then, to our regret, and perhaps to the harm of our children.

91. 350 U.S. 413, 413 (1956) (denying cert.). The court went on to apply *Brown*:

The judgment is vacated, and the case is remanded on the authority of the Segregation Cases decided May 17, 1954, Brown v. Board of Education, 347 U.S. 483. As this case involves the admission of a Negro to a graduate professional school, there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates.

Id. See M. Christopher Brown II, *Collegiate Desegregation and the Public Black College: A New Policy Mandate,* 72 J. HIGHER EDUC. 46, 49 (2001) (contextualizing collegiate desegregation in the United States starting with the creation of the dual higher education system with the Morrill Acts and ending with *Fordice*).

system.[92] Title VI allowed federal funds to only be awarded to desegregated schools and colleges and also allowed the federal government to bring lawsuits against schools on behalf of Black plaintiffs.[93] Social justice organizations like the National Association for the Advancement of Colored People Legal Defense Fund attempted to promote a more widespread enforcement of the desegregation of higher education after the passage of Title VI, specifically by initiating a class action lawsuit against the U.S. Department of Education that proved unsuccessful.[94]

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92. *See* Brown, *supra* note 80, at 564 ("The thrust to dismantle dual systems of higher education was not widely supported or promoted until the passage of Title VI of the Civil Rights Act of 1964."). Title VI required states to end their dual systems of higher education, but even with the force of law collegiate desegregation according to *Brown* was still contingent on higher education to "(a) re-designate the missions and institutional statements of those institutions designed to deliver inferior service, (b) redefine the financial formula whereby institutions are funded, (c) reassess the standard of intuitional admission, and (d) reinterpret the possibility of incongruent collegiate populations." *Id.* at 565.

93. *See* Brown, *supra* note 91, at 49 ("Title VI of this act specifically restricted the awarding of federal funds to segregated schools and colleges.").

94. *See id.* ("In an attempt to establish a more focused and purposeful enforcement of statewide higher education desegregation, the National Association for the Advancement of Colored People Legal Defense Fund filed a class action suit against the U.S. Department of Education regarding the federal enforcement of Title VI."). The case that the NAACP brought against the U.S Department of Education is formally known as Adams v. Richardson. 351 F. Supp. 636, 642 (D.D.C. 1972) ("Compliance by school districts and other educational agencies under final order of a federal court for the desegregation of the school or school system operated by such agency is, by virtue of § 2000d-5, to be deemed compliance with the provisions of Title VI."). However, the suit did not lead to the desegregation of public colleges and universities. After the District Court granted plaintiffs' motion for declaratory and injunctive relief the defendants appealed the decision. In 1973, the U.S. Court of Appeals for the District of Columbia affirmed the district court's opinion. In 1975 the plaintiffs filed a motion for further relief which was granted. The Women's Equity Action League (WEAL) filed a motion to intervene that was later denied by in 1976 the decision was reversed by the Court of Appeals and WEAL was allowed to intervene. In 1987 the defendant's motion to dismiss was granted, plaintiffs appealed and the D.C Circuit held that the plaintiffs could not gain any relief sought and affirmed the district court's dismal in 1990. *Case: Adams v. Richardson,* C.R. LITIG. CLEARINGHOUSE (last updated Feb. 4, 2023) (detailing the history of *Adams v. Richardson*) [perma.cc/559D-CL5V].

A. United States v. Fordice

United States v. Fordice was one of the desegregation cases that was influential in dismantling the historically segregated higher education system.[95] *Fordice* was the first time since the *Brown* decision that the Supreme Court handed down a legal standard "for evaluating whether a state had addressed its affirmative duty to dismantle prior de jure segregated systems of higher education."[96] The case was brought by private petitioners who argued that Mississippi's maintenance of a racially segregated postsecondary education system violated their Fourteenth Amendment rights and Title VI of the Civil Rights Act of 1964.[97] Petitioners at the lower court cited the presence of only one race at each Mississippi college or university, differences in funding between the schools, lack of staff and resources at the Black colleges, and program duplication as evidence that the dual higher education system Mississippi maintained violated the Equal Protection Clause.[98] The primary goal of the litigation was to secure equitable funding for the states three HBCUs, but after five weeks of testimony the district court judge ruled that the state had done enough to dismantle segregation in its institutions of higher education.[99] The Fifth Circuit upheld the lower court's ruling

95. *See* Brown, *supra* note 91, at 50 ("The United States v. Fordice (1992) stands as the judicial guidepost for desegregation in those states that historically operated racially segregated dual systems of higher education").

96. *Id.*

97. *See* United States v. Fordice, 505 U.S. 717, 723–24 (1992) (arguing that the school system must take the necessary steps to ensure that a student's choice to attend as specific school in Mississippi is truly free and not a result of the remnants of a former de jure segregated system).

98. *See* Edward Taylor & Steven Olswang, *Peril or Promise: The Effect of Desegregation Litigation on Historically Black Colleges,* 23 W. J. BLACK STUD., 73, 77 (1999) (exploring the effects of certain desegregation litigation on Historically Black Colleges and highlights the unsolved tensions the process has created in contemporary higher education); *see also* Brown, *supra* note 91, at 50 (explaining that by maintaining disparities between the PWIs and HBCUs of the state of Mississippi, the institutions became "vestiges of de jure segregation").

99. *See* Taylor & Olswang, *supra* note 98, at 77 (explaining the court's opinion that Mississippi did act to segregate their educational systems with "all deliberate speed" despite arguments otherwise).

arguing that Mississippi fulfilled its obligation to desegregate when it implemented race-neutral policies.[100]

The Supreme Court disagreed and declared that the state had not desegregated its dual system.[101] First, the Court ruled that the lower court applied the incorrect legal standard and failed to make inquiries into whether Mississippi's race neutral policies were animated by a discriminatory purpose.[102] The Court concluded that the states maintenance of eight public universities was "wasteful and irrational."[103] By highlighting four issues present in the university system as clear remnants of de jure segregation, the *Fordice* decision made it clear that the state of Mississippi needed to take additional steps outside of their current race neutral policies to eradicate the effects of a prior discriminatory system.[104]

While the *Fordice* decision criticized the state of Mississippi for its inability to eradicate de jure segregation after *Brown*, the decision also raised potential concerns about the role and future of public Black colleges and universities. For example, after the Supreme Court's decision in *Fordice,* the Mississippi College Board voted to close one historically Black college, and merged another

100. *See id.* (citing *Bazemore v. Friday* where some segregated institutions are legal where they result from voluntary choice).

101. *See id.* (noting that the history of segregation and policies enacted to maintain segregation within the institutions necessarily negated arguments that Mississippi had done enough to dismantle segregation where those policies were not reformed).

102. *See Fordice*, 505 U.S. at 731–32.

> 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.

103. *See id.* at 741 ("The existence of eight instead of some lesser number was undoubtedly occasioned by state laws forbidding the mingling of the races.").

104. Brown, *supra* note 91, at 51. The four issues the court recognized were (1) admission policies that still existed in the system that were originally adopted for the purpose of keeping African American students out of the historically white institutions, for example the ACT score threshold requirements, (2) the maintenance of eight public universities creating a significant financial burden on the state, (3) duplication of programs and curriculums at HBCUs and PWIs that are geographically close (specifically at the graduate level), and (4) the label of flagship or comprehensive for the white institutions compared to regional for the Black schools. *Id.*

HBCU with a white college, leaving only one HBCU in the state while all five white institutions remained intact.[105] The court also rejected petitioners ask to upgrade HBCUs to create publicly financed, exclusively Black spaces to empower Blacks Americans' private choice in schools."[106] Professor Alex Johnson argues that the Court's refusal to require equal funding for HBCUs at the state level will kill the institutions and "effectively eliminate public financial support."[107] The *Fordice* decision not only gave states the ammunition to close HBCUs in their quest for "compliance," but also declared that the "mere existence of predominately [B]lack and white institutional enrollments represent[ed] a remnant of de jure segregation."[108] The Court established that states must take reasonable steps toward eliminating policies and practices that can be traced to the prior system that promoted segregation based on race; and that prior system includes the creation of Black colleges and universities to exclude Black students from attending school with white students.[109]

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105. Taylor & Olswang, *supra* note 98, at 77. Before the *Fordice* decision there were eight public universities in the state of Mississippi: (1) University of Mississippi (1848); (2) Alcorn State University (1871); (3) Mississippi State University (1880); (4) Mississippi University for Women (1885); (5) University of Southern Mississippi (1912); (6) Delta State University (1925): (7) Jackson State University (1940): (8) Mississippi Valley State University (1950). United States v. Fordice, 505 U.S. 717, 721–22 (1992). Mississippi Valley State University was closed, Alcorn State was absorbed by Delta State University, and Jackson State University remained open as the sole public HBCU in the state. *See also* Frank Adams Jr., *Why* Brown v. Board of Education *and Affirmative Action Can Save Historically Black Colleges and Universities,* 47 ALA. L. REV. 481, 483 (1996) ("Despite the view of Justice Thomas and many others relative to the present-day value of HBCUs, the current state of the law threatens the continuing existence of these institutions in prior de jure racially segregated states.").

106. *See* Seymore, *supra* note 19, at 306 (evaluating the effect of the Fordice decision on HBCUs).

107. *See id.* at 308 (adding that "Judge Constance Baker Motley, a civil rights pioneer . . . takes the other extreme: Public HBCUs should be closed or merged with PWIs because it would be "utterly confusing" to allow otherwise").

108. *See* Brown, *supra* note 91, at 53 (contextualizing the ruling as the first time since *Brown v. Board* that the Supreme Court evaluated de jure segregation); *see also* Adams, *supra* note 105, at 486 ("The Fordice decision jeopardizes the future of public HBCUs in at least two ways: first, by seemingly requiring racial balance in higher education institutions, and second, by suggesting that public funding of HBCUs may be unconstitutional.").

109. Brown, *supra* note 91, at 53.

However, HBCUs and their creation, albeit a result of de jure segregation, has over time developed a deeper mission for educating and uplifting Black students.[110] Under the *Brown* analysis, the Supreme Court was attempting to protect Black students from hastily created institutions like those struck down in *Sweatt* and *McLaurin*.[111] HBCUs possess the intangible qualities necessary for equal educational opportunity that the "makeshift" law school for negroes struck down in *Sweatt*, or the internal caste system created for Black students at the graduate school for the University of Oklahoma in *McLaurin* lacked.[112] Since their inception over a century ago, HBCUs have been considered the cornerstone of the African American intellectual experience, especially during times where Black students could not earn a

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There remains considerable ambiguity regarding what is legally required and what is educationally appropriate in order to eliminate the remaining vestiges of the dual system. It is this ambiguity that prevents many states from establishing and attaining achievable compliance goals. Even now, the "lower courts in Mississippi, Louisiana, Alabama, and Tennessee are currently wrestling with the Fordice decision and the application of the sound educational policy standard.

Id. *See also* Adams, *supra* note 105, at 487–88 ("Thus, as it stands, a prior de jure state's continued maintenance of public HBCUs that remain predominantly African-American is apparently illegal unless the court accepts a constitutional theory under which those institutions may continue to survive.").

110. *See* Liann Herder, *Keeping HBCUs Accountable to Their Mission, Students, and Communities* DIVERSE ISSUES HIGHER EDUC. (Apr. 19, 2022) ("As institutions created to uplift Black people, accountability for Historically Black Colleges and Universities (HBCUs) is more complicated than simply enrolling and graduating students.") [perma.cc/ND78-54S9].

111. *See* Adams, *supra* note 105, at 495 (arguing that the preservation of public HBCUs is doctrinally consistent with *Brown*); *see also* Sweatt v. Painter, 339 U.S. 629, 633–34 (1950) ("Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State . . . . the University of Texas Law School is superior."); *see also* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950) ("We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws.").

112. *See* Adams, *supra* note 105, at 495 ("They possess those qualities which *Sweatt* and *McLaurin* deemed as indicia of greatness in institutions, including, inter alia: (1) reputation in the community, (2) faculty committed to the nurturing and development of eager minds, as well as (3) experienced administrators and influential alumni.").

college, graduate, or professional education anywhere else.[113] Additionally, HBCUs were nothing like the racially segregated K-12 schools that were struck down in *Brown*.[114] In *Brown*, the Court recognized social science arguments and evidence that separate, and by nature unequal, facilities created a psychological stigma for Black students that resulted in "a diminished self-perception, thus hindering the learning process."[115] Conversely, HBCUs have a rich legacy of excellence, known for creating an environment that not only educates Black students but nurtures them.[116] Justice Thomas in his *Fordice* concurrence further articulates the commitment to excellence that HBCUs possess and that the institutions have traditions and a sense of culture that is invaluable to the African American community.[117] This shows that there is sound educational justification for the existence of HBCUs and under the analysis of the Court in *Brown*, a state can maintain its HBCUs even though it is still required to dismantle the prior racially segregated university system under *Fordice*.[118]

Ultimately, the *Fordice* decision is correct that seemingly race-neutral policies, like minimum cutoff scores on national standardized entrance exams, are not enough to redress the

113. *See id.* ("They possess those qualities which Sweatt and McLaurin deemed as indicia of greatness in institutions, including, inter alia: (1) reputation in the community, (2) faculty committed to the nurturing and development of eager minds, as well as (3) experienced administrators and influential alumni.")

114. *See id.* at 497 (contrasting racially segregated primary and secondary schools which imposed "a stigma on their students" with HBCUs which "help meliorate the self-perception of students" based on the schools' "rich legacy and commitment to excellence").

115. *Id.*

116. *See id.* (describing HBCUs as "creating an environment which nurtures the learning process").

117. *See* United States v. Fordice, 505 U.S. 717, 748 (1992) (Thomas, J., concurring) (noting that HBCUs have more than doubled in population since their founding and allowed for traditions and distinct leadership opportunities that continue to benefit African Americans); *see also* Adams, *supra* note 105, at 495–96 (explaining that Justice Thomas viewed HBCUs as "symbols of excellence in the African American community").

118. *See* Adams, *supra* note 105, at 497 ("Under the reasoning adopted by the Court in *Brown*, a prior de jure state may continue to maintain its public HBCUs if it chooses to do so, even though it is under an affirmative duty to dismantle its prior racially segregated university system.").

continuing vestiges of de jure segregation.[119] These states before and since *Fordice* have not been required to address other problems that originated from de jure segregation, like program duplication at HBCUs and PWIs or the states' continued inequality in their funding formulas for the two types of schools.[120] If these issues as opposed to implementing "race neutral" policies were addressed effectively perhaps HBCUs would currently be better off.

IV. The "Costly" Result of Government Action: Current Lawsuits Against State Government

With a history of dual higher education systems across the country and the Supreme Court's refusal to formally recognize the need to upgrade and further support HBCUs in *Fordice*, the treatment of HBCUs throughout the century has continued to be suspect.[121] Presently, HBCUs continue to be severely underfunded compared to their historically white peer institutions, creating a financial strain on HBCUs, especially those that are publicly funded.[122] In an effort to fight back, many HBCUs across the country have filed lawsuits against states for years of intentional underfunding and program duplication.[123]

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119. Brown, *supra* note 91, at 52.

120. *Id.*

121. *See* J. Clay Smith Jr. & Erroll D. Brown, *Overview of Supreme Court Opinion in United States v. Fordice,* 147 SELECTED SPEECHES 1, 9 n.3 (1992).

The Court rejected any proposal by private petitioners that it mandate the upgrading of the HBCUS, stating that such a mandate would make the schools "publicly financed [B]lack enclaves. However, the Court recognized the possibility of increased funding for the HBCUS as part of the State's obligation to achieve full dismantlement of the state's segregated past.

122. *See* Susan Adams & Hank Tucker, *How America Cheated Its Black Colleges,* FORBES (Feb. 1, 2022, 1:00 PM) ("Compared to their predominately white counterparts, the nation's Black land-grant universities have been underfunded by at least $12.8 billion over the last three decades. Many are in dire financial straits–and living under a cloud of violence.") [perma.cc/CVF2-DG23].

123. *See* Justin Gamble & Nicquel Terry Ellis, *Florida A&M University Students Sue State Alleging Historically Black College is Underfunded,* CNN (Sept. 28, 2022, 3:25 PM) (reporting the filing of a federal lawsuit by six Florida A&M students against the Board of Governors alleging that four HBCUs within the state have been underfunded for decades in violation of Title VI and the 14th Amendment) [perma.cc/C393-NTJW]; *see also* Elizabeth Shwe, *Maryland Settles*

A. Maryland

The State of Maryland is known for many things, for example being the home of the first Black Supreme Court Justice Thurgood Marshall.[124] During the Civil War, Maryland was a border state and although the state was a member of the Union, Maryland's history of slavery and segregation is equally as troubling as some of the southern states that seceded. Currently, Maryland is the only state where all HBCUs are publicly funded.[125] While all four of the HBCUs were not always public throughout Maryland history, their contemporary identity as public institutions make the state of Maryland an interesting case study to evaluate recent developments in public HBCU funding. [126]

In the state of Maryland, the Maryland Charter for Higher Education is the governing document for higher education policy in the state that "assess[es] the adequacy of operating and capital funding for public higher education."[127] Maryland currently has four public HBCUs: Morgan State University, Coppin State University, Bowie State University and University of Maryland Eastern Shore ("UMES").[128] In 1969, the Office of Civil Rights

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HBCU Federal Lawsuit for $577 Million, MD. MATTERS (Apr. 28, 2021) ("After years of legal wrangling, Maryland reached a $577 million settlement to end a 15-year-old federal lawsuit that accused the state of providing inequitable resources to its four historically Black colleges and universities.") [perma.cc/2U4S-VZCJ].

124. *See* Tanika White, *Thurgood Marshall, Civil Rights Lawyer,* BALT. SUN (Feb. 26, 2007, 3:00 AM) (highlighting the life of Thurgood Marshall and his contributions to the State of Maryland and the legal profession) [perma.cc/9GQT-UHY2].

125. *See* Felecia Commodore & Nadrea R. Njoku, *Outpacing Expectations: Battling the Misconceptions of Regional Public Historically Black Colleges and Universities,* 2020 NEW DIRECTIONS FOR HIGHER EDUC., 99, 106 (2020) (identifying Maryland as a unique state for HBCUs; both private and public HBCUs exist in Alabama, Mississippi, and North Carolina, all of the HBCUs in Maryland are regional public universities).

126. *See, e.g., Our History,* MORGAN STATE UNIV. (detailing the history of Morgan State University) [perma.cc/JP-J8-JBR8]. Morgan State University was founded in 1867 as the Centenary Biblical Institute founded originally to train young men for the ministry. Morgan remained private until 1939 when the state of Maryland purchased the school after learning from a study that it needed to provide more opportunities for its Black citizens. *Id.*

127. MD. CODE ANN., EDUC. § 10-207.

128. *See* John-John William IV, *A Product of Jim Crow, Maryland's Historically Black Colleges Beckon to Students of Color Today as a 'Safe Space' in*

("OCR") at the Department of Education formally notified Maryland that it was "one of ten states operating a racially-segregated system of education in violation of Title VI of the Civil Rights Act."[129] Maryland submitted a "State Plan" for desegregation to the Office of Civil Rights that later required revisions and was resubmitted in 1970.[130] The state of Maryland went through another series of desegregation plans that OCR still found was not in compliance with Title VI in 1973.[131] In 1974, Maryland submitted another plan that was successfully accepted by OCR in June.[132] However, shortly after, OCR found that Maryland failed to execute its plan "promptly and vigorously" and the office threaten to initiate enforcement proceedings if remedial actions were not taken.[133] In fear of losing federal funding, the state of Maryland quickly began desegregating its higher education system in only one way; allowing Black students to attend the states traditionally white institutions.[134]

In 2000, Maryland entered into a Partnership Agreement with OCR that set commitments the state and OCR believed would result in full compliance under federal law, Title VI, and the standards set forth in *Fordice*.[135] Under this agreement, the state of Maryland agreed to avoid unnecessary program duplication at

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a Racially Tense Nation, BALT. SUN (Apr. 26, 2021) (highlighting many students' choice to attend one of Maryland's four HBCUs because of their desire to feel safe) [perma.cc/452A-JQAY].

129. *See* Coal. for Equity & Excellence Md. Higher Educ. v. Md. Higher Educ. Comm'n, 977 F. Supp. 2d 507, 516 (D. Md. 2013) (explaining the OCR initial notification of noncompliance to the State of Maryland and their first plans submitted to the Department for desegregation).

130. *Id.*

131. *Id.* OCR informed Maryland that it was still not in compliance with Title VI and gave the states the deadline of June 1973 for a new plan. Maryland submitted a new plan in February 1974 and then amended said plan in May 1974. "The plan called for MCHE, which had no formal enforcement authority to review mission designations or academic programs, to implement the plan." *Id.*

132. *Id.*

133. *See id.* ("[U]nless remedial actions were taken, enforcement proceedings would be initiated.").

134. *See id.* at 517. The push for desegregation was only in the state white institutions. The opposite effect took place at the states HBCUs. In the mid 1970s white students attending the states HBCUs was at its highest and for the most part declined thereafter. *Id.* at 516.

135. *Id.* at 518.

the flagship institutions, expand the mission and program uniqueness at HBCUs, and enhance the states' HBCUs by assessing and incorporating capital enhancement funding proposals into their budgets.[136] In *Coalition for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n*, the Plaintiffs filed a civil suit against the state of Maryland for failing to meet "its commitment to effectively and aggressively enforce relevant desegregation."[137] The coalition sought to prevent the state from continuing to maintain its dual higher education system and to take steps towards making HBCUs "attractive to and provide a quality education [for students] regardless of race" or the school they attend.[138] In *Coalition for Equity & Excellence*, the court applied the three-step analysis to determine whether a state has discharged its duty to dismantle former systems of de jure segregation.[139] The plaintiff first must show that a particular policy currently present in the higher education system is traceable to a past segregative purpose.[140] Next, if the plaintiff can show that the policy is a product of de jure segregation, the burden shifts to the state to show that it has dismantled its prior de jure segregated system.[141] Finally, if the state is unable to show that the traceable policies do not have "segregative effects," it must show that the policies had sound educational justification and cannot be practicably eliminated.[142]

In *Coalition*, Plaintiffs' expert Dr. Clifton Conrad defined unnecessary program duplication as "instances where two or more institutions offer the same nonessential or noncore program."[143] Relying on Dr. Conrad's analysis the court found that 60% of the noncore programs statewide at Maryland's HBCUs were unnecessarily duplicated compared to only 18% of Maryland's PWIs.[144] The duplication that Dr. Conrad found was, according to

136. *Id.*
137. *Id.* at 519.
138. *Id.* (internal quotations omitted).
139. *Id.* at 523.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 535 (quoting United States v. Fordice, 505 U.S. 717, 738 (1992)).
144. *Id.* at 536.

the court, a direct result of the state's failure to address a de jure era policy of program duplication.[145] For example, in the 1960s and 70s, Maryland's HBCUs began to offer high demand and unique programs that attracted white students.[146] Instead of continuing this development, the state of Maryland made investments to open Towson University and University of Maryland Baltimore County ("UMBC") to undermine "preliminary gains in desegregation."[147]

In terms of higher education funding, Maryland has evolved from a rote funding formula (using factors like attendance, program offerings, research, and size of the facilities to determine funding) to its current system of comparing Maryland schools to peer institutions as a funding benchmark.[148] To date, Maryland institutions are compared to peer institutions that are similar in nature, and the peer institutions' funding is used as only a benchmark for the funding of the Maryland school.[149] The funding process as it stands starts with a budget request from the institution that is submitted to the State Department of Budget and Management and the Maryland Higher Education Commission and ends with collaboration between the Governor,

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Today, Maryland's TWIs have a total of 296 unique, non-core programs, for an average of 42 programs per institution . . . . On the other hand, Maryland's HBIs only have 44 unique programs, in total, for an average of only 11 per institution. Duplication also varies somewhat depending on degree level: for example, the TWIs have six times as many unique masters programs as the HBIs, but over thirteen times as many unique doctoral programs, in part because of UMCP's central role as Maryland's flagship research university. More importantly, Maryland's HBIs offer only 11 non-duplicated, high-demand, noncore programs, compared with 122 such programs at TWIs, for an average of 17 per TWI and only 3 per HBI.

Id.

145. *See id.* (asserting that program duplication was a part of Maryland's prior segregated system. Originally HBCUs and PWIs were located geographically close to one another in order to create separate streams of education, one for Maryland's Black population and the other for its white population).

146. *Id.* at 537.

147. *Id.* at 537–38.

148. *See id.* at 530 (detailing the background of the former and current funding systems with the goal to "attain national eminence for its system of higher education").

149. *See id.* (comparing institutions by utilizing the Carnegie Foundation for the Advancement of Teaching classification to identify peer institutions as a benchmark).

the General Assembly, and respective state agencies to determine the final budget for each school.[150]

Ultimately, the court found that although Maryland HBCUs may be at a competitive disadvantage with the states' PWIs because of past discriminatory treatment, the Coalition did not show that Maryland's current funding practices are traceable to the states de jure era.[151] The court argued that the current funding formula is significantly different from any of Maryland's prior funding policies. [152] The court also ruled that the state failed to prove that the current program duplication that exists within Maryland's higher education system does not have segregative effects.[153] The court further ruled that the state also failed to show a sound educational justification that prevented the elimination of the duplication. [154] In the end, the court strongly suggested the parties enter into a mediation process to create a suitable plan to address the problems identified.[155]

Fifteen years after the commencement of the civil lawsuit the Coalition for Equity and Excellence in Maryland Higher Education settled with the State of Maryland for $577 million dollars in supplemental funding for all four of the states HBCUs to be paid over 10 years.[156] The legislation approving the 10-year allocation and creation of a program evaluation unit and an HBCU Reserve

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150. *Id.* at 531–32.

151. *Id.* at 532.

152. *See id.* at 533 (finding that the funding formula is "neither based in nor derived" from the *de jure* era, and that the formula is not traceable to prior era funding practices or policies).

153. *See id.* at 523–24 (emphasizing that the segregative effects are the result of unnecessary program duplication).

154. *Id.* at 524.

155. *Id.* at 544.

156. *See* Ian Weiner, *After 15-Year Battle, Four Maryland HBCU's to Receive $577 Million in Additional Funding in Victory for Education Equality,* LAWS.' COMM. FOR C.R. UNDER L. (Mar. 24, 2021) [perma.cc/HR6F-ZLUN].

The $577 million will be used to bolster academic programs at the four Maryland HBCU's that will make them more appealing and unique to prospective students. In addition, Maryland will be prohibited from using this funding as an excuse to limit, reduce, or otherwise negatively affect the HBCU's budget in the future.

Fund was ultimately passed by the state General Assembly.[157] The Maryland Higher Education Commission will be required to establish a program evaluation unit to evaluate new programs and make substantial modifications to existing programs in order to mitigate unnecessary program duplication.[158] Each fiscal year, the state is required to include a proportional amount of the settlement fund to each HBCU with the unused funds being redistributed to the HBCU Reserve Fund.[159]

V. Policy Solutions

A. Nationwide Study

With lawsuits in states like Maryland and bipartisan state-level legislation investigating the disenfranchisement of HBCUs in higher education, it is clear that the problem of HBCU funding and program duplication is not going away.[160] The federal government had an active hand in allowing the creation of this dual education system.[161] As a result, the federal government should conduct a nationwide study into specifically how land grant HBCUs that were created to match its "peer," white land grant institution were undermined or underfunded.[162] This study would

157. MD. GEN. ASSEMBLY DEP'T LEGIS. SERVS., FISCAL AND POLICY NOTE, HOUSE BILL 1, 1 (2021).

158. *Id.* at 2.

159. *See id.* at 2–3 (requiring a distribution to be included in the state operating budget each year until 2032 for schools such as Bowie State University, Coppin State University, Morgan State University, and the University of Maryland Eastern Shore).

160. Weiner, *supra* note 156; *see also* Susan Adams, *Tennessee Governor Requests $250 Million For State's Public HBCU,* FORBES (Feb. 2, 2022) ("The Republican governor of Tennessee, Bill Lee, proposed giving $250 million to the state's only public historically Black college, Tennessee State University (TSU). The money is needed to repair the 6,600 students' crumbling campus infrastructure, Lee said in his Monday night state of the state address.") [perma.cc/4WTT-XLYZ].

161. *See* Bracey, *supra* note 29, at 673 (describing how Congress adapted existing land grant education programs for the creation of Black colleges).

162. *See* Alberto Ortega & Omari H. Swinton, *Business Cycles and HBCU Appropriations,* 1 J. ECONS., RACE & POL'Y 176, 176 (2018) (conducting a study that found that HBCU funding is responsive to business cycles particularly economic downturns including the sample states of Kentucky, Maryland, North

investigate two things. First, it would look at how much funding HBCUs across the country lost and the status of program duplication compared to their white land grant institutions, similar to the findings of the Maryland lawsuit. Additionally, the study would investigate the current state of America's public HBCUs and the effect that lack of funding and program duplication has had on the schools. University of Pennsylvania's Center for Minority Serving Institutions conducted a study investigating the institutional capacity and state funding priorities of four states.[163] Through studying the public higher education systems of Alabama, Louisiana, Mississippi, and North Carolina, the study found broadly that state governments routinely prioritized its PWIs and flagship schools when making appropriations, and HBCUs within these states do not have "an adequate share in the distribution of advanced degrees."[164] This shows that a national study investigating the same objectives is feasible. A lawsuit like the one in Maryland is another helpful way to illuminate the issues of equitable educational opportunity in higher education, however, that suit took over ten years and resulted in a settlement.[165] Other HBCUs have followed Maryland's lead, filing lawsuits against their own state governments.[166] To avoid the oversaturation of state and federal courts with lawsuits fighting for equitable treatment of HBCUs, the federal government should investigate the level of damages HBCUs have experienced at the hands of state governments to allow for an efficient process to take place.

Carolina, Ohio, South Carolina, and Virginia). Within this study the authors examined the funding of public HBCUs over a 29-year period. *Id.* at 185.

163. *See* WILLIAM CASEY BOLAND & MARYBETH GASMAN, PENN CTR. FOR MINORITY SERVING INST., AMERICA'S PUBLIC HBCUS: A FOUR STATE COMPARISON OF INSTITUTIONAL CAPACITY AND STATE FUNDING PRIORITIES 1 (2014) (conducting the study for Alabama, Louisiana, Mississippi, and North Carolina).

164. *Id.*

165. *See* Weiner, *supra* note 156 (describing how the suit filed in 2006 was not settled until 2021).

166. *See* Hank Tucker, *Following a Forbes Investigation, Florida A&M Students Sue Florida Over $1.3 Billion In Underfunding*, FORBES (Sept. 22, 2022, 8:22 PM) ("Any state that is discriminating against historically Black colleges and universities by underfunding them should be on notice . . . . There should be no disparity, period, and we're going to help bridge that gap.") [perma.cc/5UGB-9WD5].

B. Permanent Federal Apportionment

Once the amount owed to HBCUs is determined from a national study, the federal government should handle the funding of land grant HBCUs. In 2022, several members of Congress sent a letter to states urging them to address gaps in their funding between HBCUs and white land grant institutions.[167] The letter expressed that equitable state funding is necessary for HBCUs to reach their full potential.[168] The sad reality is that state governments have participated in the underfunding practice since Congress passed the second Morrill Act in 1890.[169] Therefore, we cannot expect the states to properly fund HBCUs simply because Congress members ask. Direct action from the legislature and the executive is necessary to ensure equitable funding for HBCUs.

Recently, there have been attempts by the legislature and the executive branch to help with the funding for HBCUs. For example, in 2021, the IGNITE HBCU Excellence Act was introduced in the Senate by Senator Scott Coons proposing funding for the long-term improvement of HBCUs.[170] While the bill allowed for HBCUs to renovate existing buildings, build new instructional spaces, and improve the overall campus facilities the bill was never

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167. *See* Annie Ma, *States Urged to Address Funding Disparities for HBCUs,* AP NEWS (Feb. 24, 2022) ("Your state's commitment to matching funding for students . . . . at 1890 Land-Grant institutions will maximize our talent pipeline and positively impact the next generation of agricultural leaders . . . . give this worthy consideration when making funding decisions in your state budget.") [perma.cc/8JP2-8UKY].

168. *See id.* ("Your state's commitment to matching funding for students, faculty, and staff at 1890 Land-Grant intuitions will maximize our talent pipeline and positively impact the next generation of agricultural leaders . . . .").

169. *See* Robert L. Jenkins, *The Black Land-Grant Colleges in Their Formative Years, 1890–1920*, 65 AGRIC. HIST. SOC'Y 63, 64 (1991).

> The [Morrill funds] legislation was "both an injunction against discrimination and specification that 'separate but equal' satisfies the man- date." What was equitable was certainly not equal, however, and the various "equitable" formulas that were utilized to distribute funds in the states reflected the inequality of the races in the region. Genuine state interest was lacking in the colleges' development.

170. *See* Institutional Grants for New Infrastructure, Technology, and Education for HBCU Excellence Act, S. 1945, 117th Cong. (2021) (providing for the long-term improvement of Historically Black Colleges and Universities).

signed into law and died in committee.[171] Several successful bills passed in recent years in support of HBCUs. For example, in 2020, the HBCU PARTNERS Act was passed requiring agencies within the federal government to submit annual plans for strengthening the capacity of HBCUSs to participate in their federal program.[172] The law also establishes the President's Board of Advisors on HBCUs in the Department of Education or within the Executive Office of the President.[173] While these efforts are important and give HBCUs help and access to additional federal programs and funding, successful HBCU legislation has yet to address program duplication, the years of underfunding, and the boarder issue that had HBCUs had access to equitable funding in the past, they might have been further along today.

On the Executive side, the Biden-Harris administration has made significant investments into HBCUs in the last few years.[174] In the 2021 federal budget, over $500 million dollars of funding went directly to HBCUs through the Department of Education.[175] In the 2022 Budget request President Biden asked for over $2 billion dollars for HBCU–specific funding in the Higher Education Act.[176] Again, while the strives taken by the current administration are admirable, they are not permanent guarantees that public HBCUs can rely on.

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171. *See US S1945 IGNITE HBCU Excellence Act Institutional Grants for New Infrastructure, Technology, and Education for HBCU Excellence Act*, BILL TRACK 50 (indicating that the bill died on January 3, 2023) [perma.cc/2HXG-RXKN].

172. *See* HBCU Propelling Agency Relationships Towards a New Era of Results for Students Act of 2020, Pub. L. No. 116-270, 134 Stat. 3325 (requiring the annual plan to include a description of future actions, identification of the specific federal programs, and an outline of efforts to improve participation among HBCUs).

173. *Id.* § 5 (a)(1).

174. *See Fact Sheet: The Biden-Harris Administration's Historic Investments and Support for Historically Black Colleges and Universities,* WHITE HOUSE (Oct. 9, 2021) (detailing the investments that the White House has made in Historically Black Colleges and Universities) [perma.cc/5ASN-BY8U].

175. *See id.* (noting that the $500 million dollars was part of a $1 billion dollar effort to build capacity for serving students of color).

176. *See id.* ("Recognizing the historic underfunding of HBCUs and other institutions that serve large numbers of students of color, the President's plan also would invest $40 billion in upgrading research infrastructure, half which would be reserved for HBCUs, TCUs, and MSIs.")

One way to secure protection for HBCUs is a permanent Congressional budget line designed to airmark funds for all public HBCUs similar to Howard University's situation. Howard University is an HBCU located in Washington D.C. that has maintained a permanent appropriations line in the United States' congressional budget since 1879 – despite being classified as a private institution.[177] The school relied heavily on federal programs like the Freeman's Bureau for financial support and in 1873 when the country experienced a financial crisis these federal programs were discontinued, causing Howard University to experience financial hardship.[178] The first appropriation took place in 1879 in a nominal amount.[179] In 1926 Congress made Howard's appropriation line permanent. The committee argued that consistent aid to Howard was fully justified by the national importance of the Negro Problem.[180] The committee compared the government's obligation to Native Americans who received federal appropriations for the land that was taken from the group to the obligation the government has to the "Negro race" because of forced

177. *See* Autumn A. Arnett, *February 9: Howard University's Permanent Congressional Budget Line is Considered Reparations for the Atrocities Committed Against Blacks in the U.S.,* MEDIUM (Feb. 9, 2019) (explaining how Howard University gained a permanent budget line in the federal government's appropriations) [perma.cc/89KR-HAA3]; *see also Howard At A Glance,* HOW. UNIV. (describing Howard University as a historically Black college) [perma.cc/3SYA-R2YX].

178. *See* Walter Dyson, *A History of the Federal Appropriation of Howard University 1867-1926,* 8 HOW. UNIV. STUD. HIST. 1, 8–9 (1927) (highlighting how Howard University took several steps to financially save the school including, cutting department, reducing faculty salaries and evening operating without a president or a few years).

179. Arnett, *supra* note 177.

180. *See id.*

The Committee feels that Federal aid to Howard University is fully justified by the national importance of the Negro problem. For many years past it has been felt that the American people owed an obligation to the Indian, whom they disposed of his land, and annual appropriations of sizeable. Amounts have been passed by Congress in fulfillment of this obligation. The obligation in favor of the Negro race would seem to be even stronger than in the case of the Indian., The Negro was not robbed of his land as was the Indian, but he was seized by force and brought unwillingly to a strange country, where for generations he was the slave of the white man, and where, as a race, he has since been compelled to make out a meager and precarious existence.

chattel slavery.[181] The spirit of the legislation in 1926 for Howard University should be applied to all public HBCUs, even more so considering the initial purpose of HBCUs as normal schools. The more money HBCUs can receive, the closer the United States comes to establishing a more equitable higher education system.

VI. Conclusion

The current higher education system we have is not working to provide equitable education for all people. With the passage of the first and second Morrill Act, the federal government is responsible for creating a higher education system that allows for the unequal funding of HBCUs compared to their corresponding white land grant institutions. Instead of holding the states responsible, the government charged the states with fixing the problem and it is no surprise remnants of a de jure segregated system are still present today. In order to ensure that Black students have equal protection under the law if or when they choose to attend an HBCU, the federal government must take a more active role in supporting HBCUs. That role must go further than the currently implemented "federal support." In the United States, we have not come as far as we would like to think when it comes to equal and equitable access to educational opportunities. The only way to redress this lack of progress is by financially and physically building up HBCUs.*

181. *See id.* (explaining that the permanent funding for the university was designed as a reparation for slavery).