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## Historically Black Colleges & Universities: A Model for American Education

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# HISTORICALLY BLACK COLLEGES & UNIVERSITIES: A MODEL FOR AMERICAN EDUCATION

*Jennifer M. Smith\* & Elliot O. Jackson\*\**

*“The whole world opened to me when I learned to read.”*

~ Mary McLeod Bethune

Hungry for freedom and knowledge, enslaved Blacks engaged in a massive general strike against slavery by transferring their labor from the Confederate planter to the Northern invader, and this decided the Civil War.<sup>1</sup> In 1865, the North conquered the South, and slavery

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\*\*\* Associated Press, *AP Changes Writing Style to Capitalize ‘B’ in Black When Referring to Race*, ADVANCE LOCAL, (June 19, 2020), <https://www.al.com/news/2020/06/ap-changes-writing-style-to-capitalize-b-in-black-when-referring-to-race.html> (following the formal style to capitalize “Black” for persons). The authors use “Black” and “African American” interchangeably and maintain “Colored” or “Negro” in original quoted material.

\*\*\*\* The authors write in generalities when referring to race, gender, and other topics but understand that there are often examples of individuals or situations where generalities do not apply. Also, the authors use the third person, even when referring to their own cultural group.

1. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 57, 61, 637 (1935) (“What the Negro did was wait, look and listen and try to see where his interest lay. . . . As soon, however, as it became clear that the Union armies would not or could not return fugitive slaves, and that the masters with all their fume and fury were uncertain in victory, the

slave entered upon a general strike against slavery by the same methods he had used during the period of the fugitive slave. He ran away to the first place of safety and offered his services to the Federal Army . . . this withdrawal and bestowal of his labor decided the war. . . . It was as Frederick Douglass said in Boston in 1865, that the Civil War was begun ‘in the interests of slavery on both sides. The South was fighting to take slavery out of the Union, and the North fighting to keep it in the Union; the South fighting to get it beyond the limits of the United States Constitution, and the North fighting for the old guarantees; – both despising the Negro, both insulting the Negro.’ . . . The eagerness to learn among American Negroes was exceptional in the case of a poor and recently emancipated folk.”); JOHN HOPE FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 108-09 (1961) (“It is difficult to exaggerate the eagerness of Negroes at the close of the war to secure an education. The several Negro conventions held in 1865 drew up resolutions requesting the states to provide educational facilities for Negroes. Most of the states turned a deaf ear. . . . The Negroes’ avid desire for learning combined with other factors after 1867 to produce a system of public education in the Southern states.”); see also Errol A. Henderson, *Slave Religion, Slave Hiring, and the Incipient Proletarianization of Enslaved Black Labor: Developing Du Bois’ Thesis on Black Participation in the Civil War as a Revolution*, 19 J. AFR. AM. STUD. 192, 193, 195 (2015), <https://www.jstor.org/stable/pdf/43525589.pdf> (“In *Black Reconstruction*, first published in 1935, Du Bois challenged the prevailing myth that black Americans had not fought for their liberation in the Civil War. He argued that during the Civil War, enslaved blacks prosecuted a ‘General Strike,’ which was the ‘stubborn mutiny of the Negro slave’ that furnished about 200,000 black ‘Federal soldiers whose evident ability to fight decided the war.’ . . . Although Du Bois’ thesis was largely rejected by scholars of his day, several prominent historians support it today.”); see also Lucien Holness, *United States Colored Troops*, THE ENCYC. GREATER PHILA., <https://philadelphiaencyclopedia.org/archive/united-states-colored-troops/> (last visited Nov. 18, 2020) (“During the American Civil War (1861-65), Philadelphians raised eleven regiments of the United States Colored Troops (USCT) . . . [that] provided much-needed manpower for federal forces in the final two years of the war. . . . On July 16, 1862, Congress passed the Second Militia Act, which allowed African Americans to be employed as soldiers. . . . Military service did not guarantee equal treatment for African Americans on the battlefield or at home. For example, African American soldiers received pay of only ten dollars per month, with three dollars deducted for clothing, while white privates received thirteen dollars per month plus a clothing allowance. Many black soldiers expressed their dissatisfaction by refusing to accept the reduced rate and went for more than a year without pay. Not until June 15, 1864—when many black regiments teetered on the brink of mutiny—did Congress pass legislation that equalized the pay of black and white soldiers and offered back pay to those who refused their pay or were underpaid.”); see also EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 401-03 (2014) (“[E]nslaved people had been knocking on the portal of freedom for decades, in any way possible. Now, in a single moment, the Emancipation Proclamation [1863] had unbarred the door. Next, African Americans would force it all the way open. . . . Since the beginning of war, free northern blacks had been pushing for enlistment. . . . Soon some enslaved men, drawn by word of mouth passed from one side of the battle lines to the other, were leaving slavery and enlisting immediately in the Union Army. . . . Over the next two years, almost 200,000 other African-American soldiers – many of them former slaves – did mighty things that defined the rest of their lives. . . . By 1864, once-enslaved people were marching through almost every southern state, not in tatters and chains, but [as members of USCT] bearing arms and wearing blue uniforms with the confidence of people who believed that the federal government would back their claims to rights. Their presence encouraged enslaved people to refuse to work for their owners, or to run to the woods.”); see, e.g., SUSIE K. TAYLOR, REMINISCENCES OF MY LIFE IN CAMP: AN AFRICAN AMERICAN WOMAN’S CIVIL WAR MEMOIR, Preface (1902) (“I have been asked many times by my friends, and also by members of the Grand Army of the Republic and Women’s Relief Corps, to write a book of my army life [as an Army Nurse who

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officially ended. Having been starved of the opportunity to learn to read or write, the recently emancipated Blacks were eager to learn.

Within a year after slavery ended, however, Florida and other Southern states enacted laws to ensure the continuation of the vestiges of slavery in the United States. The legacy of slavery and racism evolved into an equally insidious system by controlling opportunities available to Blacks. Although the South seemed to guide the construction of the development of this new system to control Blacks, the North was complicit as well. This legacy was particularly evident in education.

Even after slavery, white-dominated political bodies enacted laws to prevent or interfere with the opportunities for Blacks to obtain an education. White obstruction to Black education existed at all levels, including in higher education.

Driven to learn, newly freed Blacks, often with the help of others, founded their own higher educational institutions, which are now called historically Black colleges and universities. From their inception to the present, these schools have embraced educating all who knocked on their doors, including whites, without regard to race or color. This should be modeled in American education where race and color continue to slam doors to Black education.

*“Had it not been for the Negro school and college, the Negro would, to all intents and purposes, have been driven back to slavery.”*

~ W.E.B. Du Bois

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was denied a war pension], during the war of 1861-65, with the regiment of the 1st South Carolina Colored Troops, later called 33d United States Colored Infantry.”).

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The idea for higher education in Florida began in the 1820s. However, it was not until 1851 when the Florida Legislature established two state-supported academies for higher education for whites – East Florida Seminary (the predecessor to the University of Florida (UF)) opened in 1853, and West Florida Seminary (the predecessor to Florida State University (FSU)) opened in 1857.

In January 1866, the Florida Legislature enacted a statute creating a dual school system to keep whites separate from Blacks. In 1885, the Florida Legislature revised the Florida Constitution to specify that: “White and colored children shall not be taught in the same school, but impartial provision shall be made for both.”<sup>2</sup>

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2. *Mims v. Duval Cty. Sch. Bd.*, 329 F. Supp. 123, 125 (M.D. Fla. 1971) (quoting Florida Constitution of 1885, Article 12, Section 12, F.S.A.); *see also* Du Bois, *supra* note 1, at 638, 641, 665, 697 (1935) (“Public education for all at public expense, was, in the South, a Negro idea. . . . It was only the other part of the laboring class, the black folk, who connected knowledge with power; who believed that education was the stepping-stone to wealth and respect, and that wealth without education, was crippled. . . . From the beginning, most of the Southern states made the Negro schools just as bad as they dared to in the face of national public opinion, and every cent spent on them was taken from Negro rents and wages, and came back to the property-holders tenfold in increased opportunities for exploitation. . . . The school term [for Negroes] was made and kept short and in many cases there was deliberate effort, as expressed by one leading Southerner, Hoke Smith, when two Negro teachers applied for a school, to ‘take the less competent.’”); *see also* Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365, 374 (1969) (“Negro schools, to be operated at no expense to the state, were to be financed by levying a one dollar capitation tax on all Negro males between twenty-one and fifty-five. . . . The state did not open schools for Negroes though the capitation tax was collected.”); *see also* FRANKLIN, *supra* note 1, at 108 (“When Florida in 1866 made special provision for the education of Negroes by imposing a tax of \$1.00 on each Negro male between twenty-five and forty-five and 50 cents per month for each pupil, Negro parents seized the opportunity to send their children to school. Meanwhile, scores of thousands of Negroes were availing themselves of their only educational opportunity in the schools set up by the Freedman’s Bureau, religious societies, and philanthropic agencies.”); *see also* *National Register of Historic Places Continuation Sheet, Florida’s Historic Black Public Schools*, U.S. DEP’T. INTERIOR NAT’L PARK SERV. 1, 2 (2003), <https://npgallery.nps.gov/GetAsset/8b62a6bd-12df-4c32-9d05-7eb60c65ff91> (“Although African Americans achieved important educational infrastructure gains, Southern blacks sustained a high cost, accepting northern influence and philanthropy. Not the least of those included prejudiced benefactors and organizations, and an insidious form of double taxation implemented by white governing officials and school boards. The process consisted of collecting property taxes, the bulk of which were directed at constructing and funding white schools; by comparison, some black schools were built solely from private black or philanthropic contributions with little or no assistance from local school districts.”); *but see* WILLIAM P. VAUGHN, *SCHOOLS FOR ALL: THE BLACKS AND PUBLIC EDUCATION IN THE SOUTH, 1865-1877* 54 (1974) (“This [1866] law stimulated the establishment of about twenty-five black schools by 1866, schools that were soon united with the Freedmen’s Bureau system.”); *see infra* note 100 and accompanying text.

During the mid-1880s, Florida opened segregated teachers institutes and normal schools for Blacks and whites to learn to become teachers. The first ones for Blacks opened in 1884 and lasted for two-month terms for 1885 and 1886. In three years, the Black normal schools trained over 300 teachers. Florida had a need for a permanent state-supported normal college (teacher's college). It was not until April 1887 that the Florida Legislature took action to establish one state normal school. But with the newly enacted segregation legislation, Black leadership knew that such a school would exclude Black students. With some strategic maneuvering by Black leadership, there would be two permanent normal schools: one for white students and one for Black students – the State Normal School for Colored Students.

With fifteen students, a principal and an assistant instructor, the State Normal School for Colored Students (SNSCS) in Florida was established on October 3, 1887. SNSCS became possible after the Honorable Thomas Van Renssalaer Gibbs, a Black educator in Duval County and the son of Jonathan C. Gibbs, Florida's first Black Secretary of State and Superintendent of Education who effectively established the Florida public school system, was elected to the Florida Legislature in 1884. That same year, the State Conference of the Colored Men of Florida met in Gainesville to address local and national civil rights issues. John Willis Menard, the first African American to win election to the United States Congress, although denied his seat by the House because he was Black, was a prominent speaker at this mass conference of over 200 distinguished Black leaders of Florida. Menard initiated the idea of higher education for Blacks in Florida. His son-in-law, Thomas Gibbs, introduced and piloted legislation to establish a Black school in Jacksonville that was later moved to Tallahassee and a white normal school in Gainesville.

Gibbs and Thomas De Saille Tucker, a Black attorney who attended Oberlin College and obtained his law degree from Straight University in New Orleans, Louisiana in 1882, co-founded SNSCS. Tucker became its first president and Gibbs was the vice president. The institution was divided into a preparatory and normal school, and students were placed in a division based upon their test scores. The preparatory school included classes such as algebra, Latin, music, drawing and bookkeeping; the normal school offered more advanced courses, such as physiology, astronomy, rhetoric, general history, advanced mathematics, philosophy, and pedagogics. This advanced curriculum was a bit unusual for Black colleges in the late 1880s because many other Black colleges focused more on industrial and vocational training.

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White Floridians were displeased with the news of a state-sponsored higher educational institution for Blacks. Resentment over the social and political progress of Blacks during Reconstruction (1865-77) caused white-dominated state legislatures in the South to enact Jim Crow laws beginning in the late 19th century. Those laws spread across the South and many areas in the North to restrict, suppress and deny Black political rights and participation. Thus, in 1887, Gibbs' political career abruptly ended. Nonetheless, he continued as the normal school's vice president until his death in 1898. State officials forced Tucker's resignation in 1901.

In 1891, SNSCS received a \$7,500 grant under the Morrill Act of 1890. Thus, SNSCS became Florida's land-grant institution for Blacks. It was renamed the State Normal and Industrial College for Colored Students (SNIC).

In 1896, the United States Supreme Court decided *Plessy v. Ferguson*. In *Plessy*, the Court placed its imprimatur on this concept of "separate but equal" and, thus, established it as the law of the land. However, by then "the educational prospects of Florida's black children were firmly entrenched in a segregated system" with Black schools vastly inferior to white schools because the schools were separate but not equal.<sup>3</sup>

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3. *Florida's Historic Black Public Schools*, *supra* note 2, at 2 ("In 1868, black legislators supported the creation of the Department of Public Instruction and the position of state superintendent of public instruction. Teachers were hired, schools constructed, and some professional educators, such as Jonathan Gibbs, rose to important political and administrative positions. Yet, Florida's Department of Public Instruction, still a fledgling unit of government in the 1870s, yielded meager resources for the state's black children."); see David H. Jackson et al., *FAMU Way Hist. Survey for the City of Tallahassee*, *FAMU WAY HISTORICAL SURVEY* 19, 22 (2000), <https://talgov.com/Uploads/Public/Documents/projects/famuway/FamuWay-HistoricalSurvey.pdf> (discussing the historical establishment of FAMU as set forth within and stating: "After the *Plessy v. Ferguson* decision in 1896 established the legal principle of 'separate but equal,' Florida began to codify its segregation laws. African-Americans could not stay at 'white' hotels, were not to be treated at 'white' hospitals, were not to be buried in 'white' cemeteries, and could not attend 'white' schools, among other things. Although black and white lives were separate, they were not equal. The disparate funding of public education in the state is a case in point. In 1898, Florida spent more than double on white education. They paid \$5.92 per capita to educate each white child in the state, but only \$2.27 per black child . . . No equality or anything near parity existed in the funding of white and black schools. For example, Florida's white public schools received \$523,000 for school operations in 1900, whereas black schools received only \$114,000."); see *Plessy v. Ferguson*, 163 U.S. 537 (1896); see also *About FAMU*, FLA. AGRIC. & MECH. UNIV., <http://www.famu.edu/index.cfm?AboutFAMU&History> (last visited Nov. 18, 2020) (discussing the history of the establishment of FAMU as set forth within); see also WILLIAM A. DARITY & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 220 (2020) (stating that during the Jim Crow years with the dual system of schooling in Southern States, white students received on average three times more per-pupil expenditures than Black students, but seven times more in Mis-



In efforts to avoid allowing Black students to attend the white universities, Florida renamed SNIC and expanded opportunities there. By 1910, SNIC was renamed the Florida Agricultural and Mechanical College for Negroes (FAMC), which enrolled 317 students and awarded its first degrees. Notwithstanding its limited resources, by 1923, FAMC had become a four-year degree granting institution, but it was

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issippi, and in Alabama sometimes it was thirty-two cents per Black student versus fifteen dollars per white student, and that today “a thirteen percent gap remains”); *see also* ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 321 (2010) (“Florida school boards, each its own little fiefdom, had a habit of shutting down the colored schools weeks or months before the school year was supposed to end, blaming the closings on budding shortfalls that for some reason did not affect class time at the white schools.”); *see also* Leonard R. Lempel, *The Long Struggle for Quality Education for African Americans in East Florida*, 1 J. FLA. STUD. 1, 13 (2018), [http://www.journaloffloridastudies.org/files/vol0107/LEMPEL\\_Integration.pdf](http://www.journaloffloridastudies.org/files/vol0107/LEMPEL_Integration.pdf) (“The Supreme Court provided legitimacy to Jim Crow with its infamous *Plessy v. Ferguson* (1896) decision, which established the so-called ‘separate but equal’ doctrine—segregation was constitutional as long as equal facilities were provided for both races. However, under Florida’s dual system of education, schools for blacks were vastly inferior, and the racist beliefs of white educators ensured that these inequalities would be perpetuated.”); Office for Civil Rights, *infra* note 19 (“The addition of graduate programs, mostly at public HBCUs, reflected three Supreme Court decisions in which the “separate but equal” principle of *Plessy* was applied to graduate and professional education. The decisions stipulated: (1) a state must offer schooling for blacks as soon as it provided it for whites (*Sinuel v. Board of Regents of University of Oklahoma*, 1948); (2) black students must receive the same treatment as white students (*MacLaurin v. Oklahoma State Regents*, 1950); and (3) a state must provide facilities of comparable quality for black and white students (*Sweatt v. Painter*, 1950). Black students increasingly were admitted to traditionally white graduate and professional schools if their program of study was unavailable at HBCUs. In effect, desegregation in higher education began at the post-baccalaureate level.”); *see also* DU BOIS, *supra* note 1, at 720, 724-25; *see also infra* note 293 and accompanying text; *see also* Jonathan Clarkson Gibbs, DARTMOUTH EDUC., [https://www.dartmouth.edu/library/rauner/blackgreens/j\\_gibbs.html](https://www.dartmouth.edu/library/rauner/blackgreens/j_gibbs.html) (last updated Jan. 5, 2012) (“Jonathan Clarkson Gibbs, [Dartmouth] Class of 1852, was born the son of free parents in Philadelphia in 1821. Mr. Gibbs apprenticed in the carpenter trade until he went to Dartmouth College at age twenty-one. He was the third black to graduate from the College in 1852. Jonathan C. Gibbs studied for two years at the Princeton Theological Seminary after graduating from Dartmouth. Mr. Gibbs opened a private school for freedmen in North Carolina after which he went to Florida. He was elected to the Constitutional Convention of 1868 as one of eighteen black delegates. Mr. Gibbs was then appointed as Secretary of State and served until January of 1873. Later that same year, he was appointed Superintendent of Public Instruction where he served until his death. Mr. Gibbs was also instrumental in introducing the bill which established what is now known as Florida A&M University.”); PAUL ORTIZ, *EMANCIPATION BETRAYED* 11 (2005) (“After succeeding in the state’s 1868 Constitutional Convention in limiting the number of elective offices in Florida, [Governor] Reed wrote triumphantly to the conservative railroad magnate David Yulee, ‘Under our Constitution the Judiciary & State officers will be appointed & the apportionment will prevent a negro legislature.’ Republicans and Democrats would increasingly join hands across the political divide to dilute the effectiveness of the ballot in Florida.”); *see also* EDWARD BALL, *LIFE OF A KLANSMAN* 167-68 (2020) (discussing Louisiana’s constitutional convention composed of 94 white men, who met yielding Louisiana’s 1864 constitution that “contain[ed] a provision for both whites and blacks in a dual system of separate schools,” but with no mechanism to “fund the black schools, only the white”).

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prohibited from developing graduate and professional programs for nearly 25 years.

By 1944, FAMC had built forty-eight buildings, had owned nearly 400 acres of land, had enrolled over 800 students, and had employed over 100 staff members. FAMC was stable and growing under presidents whose terms often spanned over fifteen years. Enrollment swelled to more than 2,000 students by 1949. The success and changes in the post-World War II political climate wrought another evolution.

In April 1949, Virgil D. Hawkins, a Black man, applied for admission to the University of Florida College of Law (UF).<sup>4</sup> Although he possessed all the “scholastic, moral and other qualifications,” UF denied his admission “solely because of certain provisions of the Constitution and statutes of Florida prohibiting the admittance of any but white students to the University, including the Law College.”<sup>5</sup> The Supreme Court of Florida ruled that segregation was constitutional as long as the Florida Legislature created a course of study “substantially equal to those afforded all other students duly enrolled in the same or a like course of study at any tax-supported institutions of higher learning within the State wherein such course is offered.”<sup>6</sup> Rather than admit Mr. Hawkins to UF, the Florida Legislature established a division of law at FAMC in December 1949 to maintain segregation. In 1951, FAMC enrolled Black male students in its first law division, which was in Tallahassee along with the college. Confronted with continual demands to desegregate, in 1953, the state instead elevated FAMC to university status and renamed it as the Florida Agricultural and Mechanical University (FAMU), which offered graduate and professional programs, but none were equivalent to the programs at the white universities.

In 1954, the United States Supreme Court overturned *Plessy* in *Brown v. Bd. of Education I* (Brown), ruling that racial segregation in public schools was unconstitutional and then in *Brown v. Bd. of Education II* (1955), decreeing that desegregation could proceed “with all deliberate speed.” By then, Blacks had been educating themselves for nearly a century. And *Brown* did not change education in Florida and other states for decades. Also, by 1954, there were three public universities in Florida’s segregated higher education system: UF and FSU for whites and FAMU for Blacks. But, unlike UF and FSU, FAMU was chronically underfunded and under constant threat of closure by Flor-

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4. State *ex rel.* Hawkins v. Bd. of Control of Fla., 47 So. 2d 608, 609 (Fla. 1950).

5. *Id.* at 609.

6. *Id.* at 616.

ida officials in retaliation against African Americans' push for integration.<sup>7</sup>

Hawkins continued to fight for admission to UF's law school, even after a law division was established at FAMU. Florida officials at every level and in every branch of government continued to circumvent United States Supreme Court rulings that required his admission to UF. The retaliation against Hawkins for his lawsuit was impenetrable. Eventually, Hawkins withdrew his application to UF in exchange for other Blacks to have the opportunity to attend UF.

Even with inequitable resources, FAMU's law school was successful and reputable, but whites were concerned that its law students were becoming students of the Civil Rights Movement. Thus, in retaliation for their participation in the Civil Rights Movement, the Florida Legislature closed the law school in 1965. The state transferred FAMU's funds and books to a new, all-white law school, Florida State University College of Law, established in 1966.<sup>8</sup> FAMU's law division graduated its last students in 1968.

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7. Larry Johnson et al., *African Americans and the Struggle for Opportunity in Florida Public Higher Education, 1947-1977*, 47 EDUC. & PSYCH. STUD. FAC. PUB. 328, 329, 332-33 (2007); see also Angela Dorn, *On Being the First: An Interview with Bernice Gaines*, #BLACKHER (Jan. 4, 2018), <http://blackher.us/on-being-the-first-an-interview-with-bernice-gaines/> (interviewing the first Black woman to practice law in Florida: "I never thought of myself as a future woman lawyer or black woman lawyer. I knew that I had to support myself so my focus was on learning enough in school to competently practice law. . . . It's probably worth saying that there was some tension between the races when I was at FAMU. FAMU was located in Tallahassee and was the only law school in the state's capital. When the pro-segregation Florida state bar association met, they would meet at FAMU because they liked the layout of the law school. I remember hearing a number of speeches by the bar association that were offensive. One of the more offensive talks was by a white lawyer who gave a speech about the law and the future of 'the cracker crop,' meaning their white children. His speech was all about what white Floridians had to do to preserve the status quo for themselves and their kids. While I don't remember all of the details, I do recall that it was a pretty pointed discussion about the need to maintain white supremacy for their 'crop' in spite of the Brown [v. Board of Educ., 347 U.S. 483 (1954)] decision."); *Schools and Education During Reconstruction*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/reconstruction-schools-and-education-during-reconstruction/> (last visited Nov. 18, 2020) ("The Freedmen's Bureau puts money into creating schools. But most of the schools that spring up are actually created by blacks themselves. They pool their resources — which are very meager at this time — to hire a teacher, to find a building, to build a building, to use an abandoned building — to create schools. And at these schools, everybody is going. It's not just schoolchildren. Adults, elderly people are seeking education. This is one of the critical definitions of freedom for black people, is the ability to get an education.").

8. See Johnson et al., *supra* note 7, at 350 ("Florida officials who had argued for decades that separate was in fact equal suddenly discovered irreparable dilapidation and irredeemable inferiority in black facilities. Their solution was not to fix those facilities but to close them. Within four years, they closed all of the black junior colleges, the FAMU hospital, and the FAMU law school, claiming that desegregation required the elimination of the separate facilities. Blacks' argument that desegregation did not require the loss of black

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institutions had little effect, and in the end blacks had fewer educational and health care opportunities.”); see Bishop C. Holifield & Reginald J. Mitchell, FLORIDA A&M UNIVERSITY LAW SCHOOL NEED STATEMENT 1993 1 (Aug. 17, 1993) (unpublished manuscript) (on file with the FAMU Law Review) (noting the state of Florida also refused to allow white students to attend the law school and then cited “low enrollment” as a basis for the school’s closing – a decision that was made behind closed doors); see *About FAMU*, *supra* note 3; see David Damron, *A New Era at FAMU*, ORLANDO SENTINEL (Apr. 29, 2005), <https://www.orlandosentinel.com/news/os-xpm-2005-04-29-0504290306-story.html>; see Kathleen Haughney & Aaron Deslatte, *Scott, FAMU Rift Only the Latest Incident in Rocky 50-year Relationship*, SOUTH FLA. SUN-SENTINEL (Dec. 24, 2011), [http://articles.sun-sentinel.com/2011-12-24/news/fl-famu-history-filled-with-tension-20111224\\_1\\_famu-board-famu-president-james-ammons-rick-scott](http://articles.sun-sentinel.com/2011-12-24/news/fl-famu-history-filled-with-tension-20111224_1_famu-board-famu-president-james-ammons-rick-scott) (“In the 1960s, the Legislature’s Johns Committee investigated and harassed FAMU faculty and staff members for participating in the Tallahassee bus boycott. During the same decade, the Legislature stopped funding the university’s law school — and approved the opening of a law school at predominantly white Florida State University the following year.”); see LEEDELL W. NEYLAND, FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY: A CENTENNIAL HISTORY, 1887-1987, at 7-9, 14 (1987) (“Representative Gibbs, a black man from Duval County, was responsible for introducing and piloting through the House of Representatives the bill providing for the establishment of the State Normal College for Colored Students. . . . [In April 1887], Representative Gibbs, recognizing that under Florida’s newly enacted segregation laws, ‘a State Normal School’ would have meant the legal exclusion of black students, on the next day offered House Bill No. 101: ‘To be entitled an act to provide for the establishment of normal schools.’ While making explicit that one of the normal schools would be for blacks, he did not specify the location for the proposed black school. This bill was read and returned to the Committee on Education. Perhaps out of respect for Gibbs, Representative C. F. A. Bielby introduced House Bill No. 133: ‘To be entitled an act to establish and maintain a white normal school at Gainesville; also a colored normal school at Jacksonville.’ . . . With the enactment of Senate Bill No. 103, Florida’s first state-supported black college had been founded. Thus, on October 3, 1887, a principal, along with an assistant instructor, formally opened in Tallahassee the State Normal College for Colored Students, a small school which ultimately grew into the Florida Agricultural and Mechanical University. . . . and the State Normal College for white students at DeFuniak Springs opened Monday, October 3, 1887. The enrollments were as nearly equal as possible—the white school reporting sixteen pupils and the Negro school, fifteen.”); see IBRAM H. ROGERS, THE BLACK CAMPUS MOVEMENT: BLACK STUDENTS AND THE RACIAL RECONSTITUTION OF HIGHER EDUCATION, 1965-1972, at 16, 39 (2012) (noting that state officials forced Tucker’s removal from office as president, then “accommodating separatists and paternal conservatives” drove Nathan B. Young from presidency because he refused to focus the curriculum on “the subordinating agricultural and manual learning,” and that against the wishes of alumni and students, the trustees appointed W. H. A. Howard, who held no degree, because his “accommodating separatist ideology qualified him for the position,” but that the students protested and did not stop until J. R. E. Lee, a former Tuskegee instructor, replaced Howard in 1924); see also *History*, FLA. ST. UNIV., <https://www.fsu.edu/about/history.html> (last visited Nov. 18, 2020) (“Florida State University . . . had its beginnings as early as 1823 when the Territorial Legislature began to plan for a higher education system. . . . The first black student enrolled in 1962.”); see also LARRY O. RIVERS, FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY COLLEGE OF LAW (1949-2000) 25 (2000) (“Given inadequate levels of support, [FAMU Law] still achieved many and varied successes.”); see also *Viewbook*, FLA. AGRIC. & MECH. UNIV. 14, <https://law.famu.edu/wp-content/uploads/2018/08/Viewbook-Final.pdf> (last visited Nov. 18, 2020) (“Noteworthy graduates of the original law school include: Alcee Hastings, U.S. Congressman, class of 1963; Gwendolyn Sawyer Cherry, the first Black woman elected to the Florida Legislature, class of 1965; Jesse McCrary Jr., second Black Secretary of State in Florida after Jonathan Gibbs, class of 1965; and Arthenia Joyner, Florida State Senator, class of 1968.”).

However, in 2000, the Florida Legislature reconstituted FAMU's law school as a result of the unrelenting advocacy of then-president Dr. Frederick S. Humphries, who led the charge. The law school is "to be dedicated to providing opportunities for minorities to attain representation within the legal profession proportionate to their representation in the general population," without preferences in the admissions process based on race, sex, or national origin.<sup>9</sup>

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The creation of FAMU amid abject racism and FAMU's resulting success, are typical of the trajectory of historically Black colleges and universities. Historically Black colleges and universities have overcome numerous challenges that face a race of United States citizens legally denied opportunities to learn to read or write since Africans were brought by force to be enslaved in North America.

Launched with meager funding and resources, compared to those of white public and private colleges, in a country committed to inhibiting Blacks' access to education, Black colleges have outsized results in educating successful African American graduates. Even though these schools developed into bastions of academic achievement, they continually must conquer criticism that is unyielding and often unfair. Because of institutionalized racism, Black institutions have had to do more with less than predominately white institutions. Historically Black colleges and universities are not without their challenges, but the positive learning environments they create should be modeled in American education.

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9. See S.B. 68, 2000 Leg., Reg. Sess. (Fla. 2000), <https://www.flsenate.gov/Session/Bill/2000/68>; see *About FAMU*, *supra* note 3; see NEYLAND, *supra* note 8; see *College of Law History*, FLA. AGRIC. & MECH. UNIV., <https://law.famu.edu/about-us/college-of-law-history/> (last visited Nov. 18, 2020) (discussing the history of the establishment of FAMU Law); see generally Larry E. Rivers & Canter Brown, Jr., "A Monument to the Progress of the Race": *The Intellectual and Political Origins of the Florida Agricultural and Mechanical University, 1865-1887*, 85 FLA. HIST. Q. 1 (2006), [https://palmm.digital.flvc.org/islandora/object/ucf%3A25561/datastream/OBJ/view/The\\_Florida\\_historical\\_quarterly.pdf](https://palmm.digital.flvc.org/islandora/object/ucf%3A25561/datastream/OBJ/view/The_Florida_historical_quarterly.pdf); see also DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET 160-90* (2010) (discussing the rape of Betty Jean Owens (FAMU student) and the subsequent FAMU student-led protests, successfully desegregating theaters, department stores and local lunch counters as other Black college students did throughout the South); see also *FAMU Way*, *supra* note 3, at 27 (discussing the significant civil rights activism of FAMU students and faculty, the founding of FAMU, the senseless and brutal rape of Betty Jean Owens in 1959 by four white men, and the opening and closing of FAMU Hospital, and noting that by 1890, whites "had 'redeemed' the state and Florida's blacks were forced out of virtually all national, state, and county offices.").

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## INTRODUCTION

Race and racism have shaped American education.<sup>10</sup> Those factors continue to play chief roles in shaping American schools and in local, state, and federal involvement in education.<sup>11</sup> Having an education is paramount to one being able to participate fully and equally in public and private life in America. In *Brown*, Chief Justice Warren stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional

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10. See Gerald J. Pine & Asa G. Hilliard III, *Rx for Racism: Imperatives for America's Schools*, PHI DELTA KAPPAN 1, 1 (1990) ("Racism, prejudice, and discrimination are shamefully sabotaging our nation's efforts to provide a high-quality education for all children."); see Max J. Romano, *White Privilege in a White Coat: How Racism Shaped My Medical Education*, 16 ANNALS FAM. MED. 261, 262 (2018) (quoting Camara P. Jones, *Confronting Institutionalized Racism*, 50 PHYLON 7, 10 (2003)) ("Racism is a 'system of structuring opportunity and assigning value based on appearance that unfairly disadvantages some individuals and unfairly advantages other individuals.'"); see also Pedro Noguera, *Creating Schools Where Race Does Not Matter: The Role and Significance of Race in the Racial Achievement Gap*, 77 J. NEGRO EDUC. 90, 96-100 (2008) (examining two school districts - one predominantly white population and one with a diverse population - that attained different results in closing the racial achievement gap); see also Erwin Chemerinsky, *Ending the Dual System of American Public Education: The Urgent Need for Legislative Action*, 32 DEPAUL L. REV. 77, 81 (1982) ("Segregation is largely a product of government policies and practices throughout the course of American history," and a "complex set factors" have created this "racial isolation, including exclusionary zoning, restrictive covenants, discriminatory insurance and loan policies, location of public housing, and individual discriminatory practices of real estate brokers and property owners."); see also A. Moore, *10 Quotes That Perfectly Explain Racism to People Who Claim They're Colorblind*, ATLANTA BLACK STAR (July 20, 2014), <https://atlantablackstar.com/2014/07/20/10-quotes-perfectly-explain-racism-people-claim-theyre-colorblind/> ("The problem is that white people see racism as conscious hate, when racism is bigger than that. Racism is a complex system of social and political levers and pulleys set up generations ago to continue working on the behalf of whites at other people's expense, whether whites know/like it or not. Racism is an insidious cultural disease. It is so insidious that it doesn't care if you are a white person who likes Black people; it's still going to find a way to infect how you deal with people who don't look like you. Yes, racism looks like hate, but hate is just one manifestation. Privilege is another. Access is another. Ignorance is another. Apathy is another, and so on. So while I agree with people who say no one is born racist, it remains a powerful system that we're immediately born into. It's like being born into air: you take it in as soon as you breathe."); see generally IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (2019); see generally ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018).

11. See PAUL FINKELMAN, *ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1896-PRESENT, FROM THE AGE OF SEGREGATION TO THE TWENTY-FIRST CENTURY* 131 (2009).

training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>12</sup>

As education became a priority in the United States, it did not prioritize education for African Americans.

Before the Civil War, the opportunity for Blacks to receive any education was virtually nonexistent as education for the enslaved was seen as a threat to slavery.<sup>13</sup> Even after slavery was abolished, local, state, and federal governments still denied or severely limited the ability of Blacks to obtain an education because an educated Black person was still deemed a threat to the farcical belief in white superiority.<sup>14</sup>

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12. See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); see also Leila McNeill, *How a Psychologist's Work on Race Identity Helped Overturn School Segregation in 1950s America*, SMITHSONIAN (Oct. 26, 2017), <https://www.smithsonianmag.com/science-nature/psychologist-work-racial-identity-helped-overturn-school-segregation-180966934/> (“Mamie Phipps Clark [a Howard University graduate] came up with the oft-cited ‘doll test’ and provided expert testimony in *Brown v. Board of Education*”).

13. PAUL FINKELMAN, *SLAVERY & THE LAW* 6-12 (1997) (advancing the notion that unlike other countries’ slave systems, in the United States, slavery defined by race prevented and still prevents Blacks’ ability to enjoy full equality in America because the racial stigma of being identified by color never disappears).

14. FRANKLIN, *supra* note 1, at 52 (“The hostility to the education of Negroes was a part of the scheme to keep the whites superior. Within the first two years after the war Southerners themselves not only did little to educate the Negro but they also resisted the efforts of others. The opposition to the Freedmen’s Bureau was based, in part, on resentment against its education program. Other organizations and individuals interested in educating the Negro were vigorously opposed. White teachers from the North were ostracized and occasionally run out of the community. Negro schools were often burned or razed. In dozens of other ways Negroes were discouraged from seeking education.”); see W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 27 (1903) (“The opposition to Negro education in the South was at first bitter, and showed itself in ashes, insult, and blood; for the South believed an educated Negro to be a dangerous Negro. And the South was not wholly wrong; for education among all kinds of men always has had, and always will have, an element of danger and revolution, of dissatisfaction and discontent.”); see ROGERS, *supra* note 8, at 23 (“For many whites who did not attend college, and most did not, the presence of articulate, confident, polished black students oftentimes undermined their sense of superiority and thus their sense of self.”); see also Erin Blakemore, *How the GI Bill’s Promise Was Denied to a Million Black WWII Veterans*, HIST. (June 21, 2019), <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits> (explaining the fear of Black advancement with regards to the G.I. Bill); see also *FAMU Way*, *supra* note 3, at 4 (“Free blacks represented a threat to the planter class [Southern aristocracy] because they symbolized a contradiction of terms of the ideology that blacks were lazy and child-like who required whites to enslave them for their own good. Additionally, free blacks were viewed with disdain because white planters feared they would provoke insurrection and serve as models for enslaved blacks to emulate. Thus, legislators in Florida attempted to exclude free blacks from entering the state altogether.”); see also KERI L. MERRITT, *MASTERLESS MEN: POOR WHITES AND SLAVERY IN THE ANTEBELLUM SOUTH* 43 (2017) (finding that before emancipation for enslaved Blacks, poor whites were

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Thus, historically Black colleges and universities (HBCUs) emerged in the mid-1800s to provide higher education to Blacks who were unwelcome in predominately white institutions (PWIs).

To qualify as an HBCU and receive federal funding, an institution must have served a majority Black population prior to 1964.<sup>15</sup> Thus, once designated as an HBCU, the institution is always an HBCU, even if the HBCU now serves a majority white population.<sup>16</sup> Today, 101 accredited HBCUs exist with the first, Cheyney University of Pennsylvania, having been established in 1837, even before the Civil War, to educate Blacks.<sup>17</sup>

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the ones described as “lazy, dirty, ignorant, immoral, and often drunk”); *see also* NANCY ISENBERG, *WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA* 175 (2016) (“White supremacy, as a thesis, lacked any basis in science, while it wreaked more and more havoc upon a perverse, fear- and hate-based class system. Despite popular claims that the white race was destined for global dominance, it was, [Dr. W.E.B.] Du Bois assured, in decline. Among the ‘many signs of degeneracy’ was the overall reduction in birthrates. Thus any threat of white deterioration came ‘from within.’”); *but see* ANDREA FLYNN ET AL., *THE HIDDEN RULES OF RACE: BARRIERS TO AN INCLUSIVE ECONOMY* 20 (2020) (finding that during Reconstruction public school funding was equally distributed to Black and white children and as a result “[f]reed blacks organized to increase political participation and representation; black leaders used the Declaration of Independence to argue for full equality before the law for black suffrage. In the decades after the war, black leaders held political control at the local and state level, albeit briefly. Black elected representation in Congress in the late 1870s was among the highest it has been in American history.”).

15. *What is an HBCU?*, U.S. DEP’T OF EDUC., <https://sites.ed.gov/whhbcu/one-hundred-and-five-historically-black-colleges-and-universities/> (last visited Nov. 18, 2020) (“The Higher Education Act of 1965, as amended, defines an HBCU as: ‘. . .any historically black college or university that was established prior to 1964, whose principal mission was, and is, the education of black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary [of Education] to be a reliable authority as to the quality of training offered or is, according to such an agency or association, making reasonable progress toward accreditation.’”); *How Predominantly Black Institutions Help Low-Income, First-Generation African American Students Succeed*, HIGHER EDUC. TODAY (OCT. 16, 2017), <https://www.higheredtoday.org/2017/10/16/predominantly-black-institutions-low-income-first-generation-african-american-students-succeed/> (explaining the distinction between historically Black colleges and universities that came into being starting in 1837 and predominately Black institutions that emerged via the Predominately Black Institution Act of 2007, sponsored by United States Senator Barack Obama).

16. *See* Shereen M. Meraji & Gene Demby, *The Whitest Historically Black College in America*, NPR (Oct. 18, 2013, 3:08 AM), <https://www.npr.org/sections/codeswitch/2013/10/18/236345546/the-whitest-historically-black-college-in-america> (discussing Bluefield State College in West Virginia, which is a predominately white HBCU, and noting experiences of an incoming Black student, who wondered where all the Black people were in his first moments on campus); *see also* Marcus A. Chanay & Adriel A. Hilton, *The Perception of Diversity at HBCUs: Is It Real or Imaginable?*, DIVERSE ISSUES HIGHER EDUC. (Feb. 27, 2019), <https://diverseeducation.com/article/139851/> (discussing HBCUs with majority white populations today).

17. *The First HBCU*, CHEYNEY UNIV., <https://cheyney.edu/who-we-are/the-first-hbcu/> (last visited Nov. 18, 2020); *About HBCUs*, T. MARSHALL COLL. FUND, <http://tmcf.org/about->



HBCUs emerged as a result of segregation, but they have not engaged in segregation.<sup>18</sup> On the contrary, from their inception, HBCUs educated Black, white (often the poorer ones), Native American, and Asian students; were often created and led by both Blacks and whites; and were “more racially desegregated, with respect to their . . . staff, than predominately white institutions (PWIs).”<sup>19</sup> Although

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us/our-schools/hbcus (last visited Nov. 18, 2020) (“There are 101 Historically Black Colleges and Universities (HBCUs) across the nation and nine percent of all African American college students attend HBCUs. All HBCUs play a critical role in the American system of higher education. For most of America’s history, African Americans seeking a college education could only get it from an HBCU.”); *HBCUs Make America Strong: The Positive Economic Impact of Historically Black Colleges and Universities*, UNCF, [https://cdn.uncf.org/wp-content/uploads/HBCU\\_Consumer\\_Brochure\\_FINAL\\_APPROVED.pdf?\\_ga=2.168590753.1498063267.1595348314-32347031.1595348314](https://cdn.uncf.org/wp-content/uploads/HBCU_Consumer_Brochure_FINAL_APPROVED.pdf?_ga=2.168590753.1498063267.1595348314-32347031.1595348314) (last visited Nov. 18, 2020) (“Today, there are 101 accredited HBCUs, public and private, concentrated in 19 states, the District of Columbia and the U.S. Virgin Islands. They enroll almost 300,000 students, approximately 80 percent of whom are African American, and 70 percent are from low-income families.”); see *HBCU Listing*, THE HUNDRED-SEVEN, <http://thehundred-seven.org/hbculist.html> (last visited Nov. 18, 2020) (listing 107 HBCUs, including those closed or unaccredited).

18. Marybeth Gasman, *Comprehensive Funding Approaches for Historically Black Colleges and Universities*, 1, 4 (2010), [https://repository.upenn.edu/cgi/viewcontent.cgi?article=1400&context=gse\\_pubs](https://repository.upenn.edu/cgi/viewcontent.cgi?article=1400&context=gse_pubs) (noting that “HBCUs have never excluded students based on race. . . .”); see Larry O. Rivers, *HBCUs: Segregated, But Not Segregating*, DIVERSE ISSUES EDUC. (Mar. 5, 2009), <https://diverseeducation.com/article/12348/>; see ROGERS, *supra* note 8, at 20, 24 (“Several HBCUs hired black presidents and professors, often pressured by revolting nationalists and white separatists who demanded the removal of whites from black institutions. . . . Refusing to desegregate, state legislatures and philanthropists appropriated funds to found new HBCUs, beefed up existing ones, and established graduate and professional programs at HBCUs over the next few decades.”).

19. Office for Civil Rights, *Historically Black Colleges and Universities and Higher Education Desegregation*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/hq9511.html> (last updated Jan. 10, 2020); see also Lisa V. Sparks, *Native American Education at Hampton University Not Always a Flattering Legacy*, DAILY PRESS (Dec. 29, 2019, 9:02 AM), <https://www.daily-press.com/news/education/dp-nw-fzx19-hampton-university-native-american-education-20191229-yvznpvxin5gxjdj6b2hmlbtlwa-story.html> (highlighting that Hampton Institute was one of the few colleges willing to educate Native Americans and allowed them to maintain “many of their cultural attributes” while other university programs were “designed to ‘Americanize’ the new students, teaching them Christianity and trades, and assimilate and strip them of their culture and way of life.”); see also CYNTHIA L. JACKSON & ELEANOR F. NUNN, *HISTORICALLY BLACK COLLEGES AND UNIVERSITIES, A REFERENCE GUIDE*, 107 (2003) (“HBCUs have always been affirmative action organizations. Their doors have always been open to all.”); see also MERRITT, *supra* note 14, at 143 (“To protect and preserve slavery, [wealthy white slaveholders] understood that preventing education among poor whites helped stifle the spread of abolitionist ideas. Illiterate or semiliterate, the white masses remained largely uniformed and politically apathetic.”); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 25 (2012) (“Deliberately and strategically, the planter class extended special privileges to poor whites in an effort to drive a wedge between them and black slaves.”); see generally BELINDA HURMENCE, *MY FOLKS DON’T WANT ME TO TALK ABOUT SLAVERY: PERSONAL ACCOUNTS OF SLAVERY IN NORTH CAROLINA* 11 (1984) (discussing a slave narrative of Elias Thomas: “We thought well of the poor white neighbors. . . [Master] hired both men and women of the poor

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HBCUs emerged principally to educate Black students, the schools have always enrolled whites and students of other races, nationalities, cultures and ethnicities, and even have employed many non-Blacks as professors, and the diversity is ever-increasing.<sup>20</sup> In 2018, non-Black students comprised twenty-four percent of enrollment at HBCUs, compared to fifteen percent in 1976,<sup>21</sup> and that population includes white, Hispanic, Asian, Pacific Islander, and Native American.<sup>22</sup>

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white class to work on the plantation. We all worked together.”); Du Bois, *supra* note 1, at 700 (noting that poor whites were “given public deference and titles of courtesy because they were white” and that the planter and poor white united under the doctrine of racial separation, which drove a wedge between the white and black workers).

20. Monica Anderson, *A Look at Historically Black Colleges and Universities as Howard Turns 150*, PEW RES. CTR. (Feb. 28, 2017), <https://www.pewresearch.org/fact-tank/2017/02/28/a-look-at-historically-black-colleges-and-universities-as-howard-turns-150/>; see also Deja Dennis, *What Does Diversity Look Like at HBCUs?*, NATION (June 7, 2018), <https://www.thenation.com/article/archive/diversity-look-like-hbcus/> (noting that “the white presence at HBCUs shouldn’t be a surprise because these institutions always accepted students of every race”); see also *Ten Little Known Black History Facts*, PBS, <http://www.pbs.org/black-culture/explore/10-black-history-little-known-facts/> (last visited Nov. 18, 2020) (“In the 1930s when Jewish academics from Germany and Austria were dismissed from their teaching positions, many came to the United States looking for jobs. Due to the Depression, xenophobia and rising anti-Semitism, many found it difficult to find work, but more than 50 found positions at HBCUs in the segregated South. . . . By the time Jewish professors arrived, the number of HBCUs had grown to 78. At a time when both Jews and African Americans were persecuted, Jewish professors in the Black colleges found the environment comfortable and accepting, often creating special programs to provide opportunities to engage Blacks and whites in meaningful conversation, often for the first time.”); see, e.g., BLACK AMERICAN COLLEGES & UNIVERSITIES 529 (Levirn Hill, ed. 1994) [hereinafter Hill] (“From its inception, Lincoln [University] has attracted an interracial and international enrollment. The university graduated its first class of four black men and two white men in 1868. In 1873, 10 students from Liberia came to study at Lincoln, making the university one of the first, if not the first, U.S. institutions of higher education to accept African students.”); see, e.g., Harold R. Washington, *History and Role of Black Law Schools*, 5 N.C. CENT. L. REV. 158, 162 (1974) (“[Straight] Law School operated on an interracial basis until 1886 when Tulane University opened its law school. Ironically, Tulane refused to admit Blacks to any of its schools pursuant to state law. The Straight Law School was closed in 1887 without explanation, although conjecture on the point need not be strained.”); see, e.g., Greg Robinson, *Stepping Over the Color Line: Nikkei at Historically Black Colleges and Universities*, DISCOVER NIKKEI (Sept. 30, 2019), <http://www.discovernikkei.org/en/journal/2019/9/30/hbcu/> (discussing the inviting educational environments for Japanese and Japanese American students at HBCUs in the late 1800s through the mid-1960s).

21. *Historically Black Colleges and Universities [HBCUs]*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=667> (last visited on Nov. 18, 2020) (“Of the 101 HBCUs, 51 were public institutions and 50 were private nonprofit institutions.”).

22. Anderson, *supra* note 20 (“In 2015, 17% of HBCU students were white, Hispanic, Asian, Pacific Islander, or Native American, compared to 13% in 1980.”); see also Lorenzo L. Esters & Terrell L. Strayhorn, *Demystifying the Contributions of Public Land-Grant Historically Black Colleges and Universities: Voices of HBCU President*, 64 NEGRO EDUC. REV. 119, 122 (2013) (“Students of various ethnic and racial groups (e.g., Whites, Hispanics, and Asians) are attending HBCUs. In addition, with the influx of students from African and Caribbean nations, HBCUs are experiencing even greater ‘within race diversity.’”); see also

Although linked by shared experiences of racism, Black people are not a monolithic group. There is great diversity among melanated people – Black people – in important identities such as cultures, ethnicities, ideologies, and ancestral nationalities.<sup>23</sup> Thus, unlike PWIs, which – with few exceptions – prohibited Black students, diversity at HBCUs has always existed and been welcomed. From their founding, HBCUs created and exemplified the model of diversity and inclusion before that model was ever an institutional goal or aspiration in America and the world.

According to the Department of Education, HBCUs are a “vital resource in the nation’s educational system” and have “played an historical role in enhancing equal educational opportunity for all students.”<sup>24</sup> Of course, considering the underfunding of HBCUs, the educational opportunities were never equal and still are not. Nevertheless, HBCUs have been transformative for their students.

Studies have compared HBCU students to their counterparts at PWIs. [They] found that Black students attending PWIs have more negative experiences, suffer higher attrition rates, and lower academic success than their counterparts. Further, they argue that in contrast, these students at HBCUs experience better psychological adjustment and self image than those who attend PWIs. Blacks at

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COLLEGE SCHOLARSHIPS.ORG, *The White Man’s Guide to Getting a Minority Scholarship*, <http://www.collegescholarships.org/scholarships/white-scholarship-guide.htm> (last visited Nov. 18, 2020) (discussing the white man’s guide to getting a minority scholarship at HBCUs [but failing to acknowledge that many of the first graduates of HBCUs were white students]); see, e.g., *Straight University Law Department 1874-1876*, *infra* note 104 and accompanying text.

23. See Rashawn Ray, *Black Americans Are Not a Monolithic Group So Stop Treating Us Like One*, THE GUARDIAN (Feb. 14, 2020, 6:33 PM), <https://www.theguardian.com/commentisfree/2020/feb/14/black-americans-are-not-a-monolithic-group-so-stop-treating-us-like-one> (“First, black Americans comprise many ethnicities and ancestral nationalities. Immigrants represent roughly 10% of black people in the US and a substantial percentage of Latinos identify as black. Second, geography matters. Similar to the end of slavery and Jim Crow, black people are concentrated most in the south, mid-Atlantic and select cities such as Chicago, Detroit and New York City.

Third, gender is different for blacks than the general population. There are nearly 5% more black women relative to black men, while women outnumber men by about 1.6% generally. Fourth, education matters and intersects with gender. About 25% of black women who are 25 years of age or older have a graduate or bachelor’s degree (compared with only 18% of black men). There are important educational differences among cities as well. While over 30% of black Americans in some cities have a bachelor’s degree or higher (Washington DC, Austin, Raleigh, Durham and San Francisco), other cities have black populations where less than 20% are college-educated (Milwaukee, Cleveland, Las Vegas, Charleston, St. Louis and Detroit). . . . But, if you are going to view blacks as a monolith, then deal with the Goliath that links us – structural racism.”); see ROGERS, *supra* note 8, at 85.

24. Office for Civil Rights, *supra* note 19.

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HBCUs also have higher aspirations; many go on to attain doctoral degrees.<sup>25</sup>

A recent study found that Black graduates of HBCUs are more likely to flourish in purpose and financial well-being than Blacks who did not attend HBCUs.<sup>26</sup> The study also found that Blacks at HBCUs are more than twice as likely as Blacks at non-HBCUs to have experienced “a professor who cared about them as a person, a professor who made them excited about learning and a mentor who encouraged them to pursue their goals and dreams.”<sup>27</sup>

Although HBCUs comprise only three percent of America’s colleges and universities and enroll only ten percent of Black students, twenty to twenty-five percent of bachelor degrees earned by Black students are earned at HBCUs.<sup>28</sup> As for careers, nearly 40 percent all Black congressional representatives, 12.5 percent of Black chief executive officers (CEOs), 40 percent of all Black engineers, 50 percent of Black teachers, 50 percent of Black professors at non-HBCUs, 50 percent of Black lawyers, 70 percent of Black veterinarians, 75 percent of Black military officers, 80 percent of Black judges, and up to 85 percent of Black medical doctors and dentists are graduates of HBCUs.<sup>29</sup> Addi-

25. See Esters & Strayhorn, *supra* note 22, at 121-22; see also David Wilson, *HBCU Attributes Encourage High Achievement*, BALT. SUN (June 5, 2019, 6:00 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0606-morgan-achievement-20190604-story.html> (discussing the success of students at one of the nation’s top HBCUs).

26. See GALLUP, INC., *Gallup-USA Funds Minority College Graduates Report 1*, 6 (2015), <https://www.gallup.com/services/186359/gallup-usa-funds-minority-college-graduates-report-pdf.aspx>.

27. *Id.* at 7, 18, 22 (noting also that HBCUs support their students in a manner that is not comparable or as evident at non-HBCUs).

28. Brian Bridges, *African Americans and College Education by the Numbers*, UNCF, <https://uncf.org/the-latest/african-americans-and-college-education-by-the-numbers#:~:text=HBCUs%20make%20up%20only%20three,times%2C%20the%20numbers%20are%20discouraging> (last visited Nov. 18, 2020); Kathryn Hoffman et al., *Status and Trends in the Education of Blacks* 104 (2003), <https://nces.ed.gov/pubs2003/2003034.pdf>.

29. Kyra M. Robinson, *Rise, Shine: Bragging Rights and Best-Kept Secrets of HBCU*, LINKEDIN (May 19, 2018), <https://www.linkedin.com/pulse/rise-shine-bragging-rights-best-kept-secrets-hbcus-robinson-m-s->; *HBCU Facts You Should Know*, CORE PLAN. GRP. FOR OHBCUD, <https://www.cpgghbcu.org/> (last visited Nov. 18, 2020); *About HBCUs*, *supra* note 17; Office for Civil Rights, *supra* note 19 (“More than 80 percent of all black Americans who received degrees in medicine and dentistry were trained at the two traditionally black institutions of medicine and dentistry—Howard University and Meharry Medical College. (Today, these institutions still account for 19.7 percent of degrees awarded in medicine and dentistry to black students.) HBCUs have provided undergraduate training for three fourths of all black persons holding a doctorate degree; three fourths of all black officers in the armed forces; and four fifths of all black federal judges. HBCUs are leading institutions in awarding baccalaureate degrees to black students in the life sciences, physical sciences mathematics, and engineering. HBCUs continue to rank high in terms of the proportion of graduates who pursue and complete graduate and professional training.”).

tionally, unlike Black students' experiences at PWIs, white students were often satisfied with their experiences at HBCUs, gained an appreciation for Black peers/classmates, and enjoyed amicable relationships with both Black and white faculty at HBCUs.<sup>30</sup>

Notwithstanding the widespread, positive impact of HBCUs, HBCUs and other educational institutions for Blacks have always been underfunded as compared to education for whites. Thus, for African Americans, integration in education was not about blending the races but about the unequal funding allocated to Black institutions. That is, Blacks thought integration would provide access to equal resources for Black students.

In 1935, Dr. W.E.B. Du Bois, a Fisk University and Harvard-trained *cum laude* scholar and a founder of the National Association for the Advancement of Colored People (NAACP), originally opposed the establishment of Black schools, but later posited that "the Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools."<sup>31</sup> In 1955, a year after the *Brown* ruling, Zora Neale Hurston, an activist and widely acclaimed author, wrote to the *Orlando Sentinel* opining:

If there are not adequate Negro schools in Florida, and there is some residual, some inherent and unchangeable quality in white schools, impossible to duplicate anywhere else, then I am the first to insist that Negro children of Florida be allowed to share this boon. But if there are adequate Negro schools and prepared instruc-

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30. JULIAN B. ROEBUCK & KOMANDURI S. MURTY, HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: THEIR PLACE IN AMERICAN HIGHER EDUCATION 203 (1993); *see also* Dennis, *supra* note 20 (discussing white students' positive experiences at HBCUs and quoting a white student at Prairie View A&M University in Texas: "HBCUs have an opportunity to educate white students about the beauty of black culture, debunk stereotypes, and build bridges.").

31. W. E. B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935) <http://nationalhumanitiescenter.org/tserve/freedom/1917beyond/essays/does-the-negro-need-seperate-schools.pdf>. ("It is saying in plain English: that a separate Negro school, where children are treated like human beings, trained by teachers of their own race, who know what it means to be black in the year of salvation 1935, is infinitely better than making our boys and girls doormats to be spit and trampled upon and lied to by ignorant social climbers, whose sole claim to superiority is ability to kick 'niggers' when they are down. I say, too, that certain studies and discipline necessary to Negroes can seldom be found in white schools."); *see also* 3 EBONY PICTORIAL HISTORY OF BLACK AMERICA, EBONY, 135 (1971) ("If the curriculum was racist, if many teachers were racist, if, in short, schools were faithful reflections of a chronically racist society, then perhaps genuine school integration could not be attained – at least not in the immediate future.").

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tors and instructions, then there is nothing different except the presence of white people.<sup>32</sup>

In 1976, Derrick Bell, activist, lawyer, and law professor, posited that the United States Supreme Court would have served Blacks better by enforcing the “equal” portion of the 1896 *Plessy* “separate but equal” ruling that allowed for segregation in public facilities, including schools.<sup>33</sup> Desegregation did have a positive effect on Black and white children, but many Blacks concluded that integration was not the panacea that Blacks thought it would be.

For decades, studies, articles, and outcomes have highlighted the inequities in education for Blacks and whites. For instance, in 1982, Erwin Chemerinsky, lawyer, law professor, and law dean, criticized inequality in education. He stated that a dual system of education based on race must end and stated that segregation may be tolerable if schools were otherwise equal, but they are not, resulting in white students outperforming Black students.<sup>34</sup>

Dr. Du Bois also accurately predicted that the South would not comply with the *Brown* ruling for years, “long enough to ruin the education of millions of black and white children.”<sup>35</sup> The *Brown*

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32. Letter from Zora Neale Hurston to Editor, Orlando Sentinel (Aug. 11, 1955) <https://teachingamericanhistory.org/library/document/letter-to-the-orlando-sentinel/>.

33. Lisa Trei, *Black Children May Have Been Better Off without Brown v. Board*, *Bell Says*, STAN. REP. (Apr. 21, 2004), <https://news.stanford.edu/news/2004/april21/brownbell-421.html> (referring to Bell’s book, *SILENT COVENANTS* (2004) that presented an imaginary court opinion upholding the “separate but equal” doctrine).

34. See Chemerinsky, *supra* note 10, at 84 (“For example, the Clayton School District, a predominately white suburb of St. Louis, spends \$3,441 per student on education, while St. Louis, a school system that is over 70% black, spends \$1,863 per student. Overall, on the average, 15% to 20% more is spent on each white student’s education than on each black student’s.” (footnotes omitted)); see also Keith Meatto, *Still Separate, Still Unequal: Teaching about School Segregation and Educational Inequality*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html> (“Racial segregation in public education has been illegal for 65 years in the United States. Yet American public schools remain largely separate and unequal — with profound consequences for students, especially students of color.”); see generally FLYNN ET AL., *supra* note 14.

35. Trei, *supra* note 33 (quoting W.E.B. Du Bois’ celebration speech regarding the 1954 *Brown* decision); see also Elise C. Boddie & Dennis D. Parker, *Linda Brown and the Unfinished Work of School Integration*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/opinion/linda-brown-school-integration.html> (“At the height of school desegregation, from 1964 through the 1980s, high school graduation rates for black students improved significantly. So did standardized test scores. Desegregation led to higher income, more years of education and better health outcomes for blacks, and integration also reduced racial prejudice among whites, according to studies by the economist Rucker Johnson. Numerous studies show that being around people who are different improves cognitive skills, like critical thinking and problem-solving.”); see also FLYNN ET AL., *supra* note 14, at 99 (“[A]ttending a racially balanced school has lasting positive effects on economic and so-

desegregation ruling eventually brought funding, opportunities, and experiences, which had a positive impact on Black children's education. A recent study showed:

In the aftermath of *Brown*, it took considerable time before schools were substantially desegregated, but by the 1970s and 1980s there was noticeable desegregation of schools, which is also the time when the black-white test score gap closes. After 1980, the rate of desegregation slows to a near stop, and so does the closing of the black-white gap.<sup>36</sup>

"Undoing the racism that muffles achievement requires teaching the scions of privilege who will likely end up running systems that fail students of color."<sup>37</sup> Thus, Black and brown school administrators and teachers are critical. In addition, a recent study showed that all students "have more favorable perception[s] . . ." of teachers of color, in particular, Black and Latino teachers.<sup>38</sup>

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cial well-being for black and nonblack students alike."); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 196-97* (2017) ("As for children, segregation is not healthy for either whites or African Americans. In segregated schools, neither can gain experience navigating the diverse environments in which, as adults, they will have to make their way. . . . High average achievement is almost impossible to realize in a low-income, segregated school, embedded in a segregated neighborhood. . . . The false sense of superiority that segregation fosters in whites contributes to their rejection of policies to integrate American society. The lower achievement of African American children that results from life in a segregated neighborhood adds another impediment to those children's ability to merge into middle-class workplaces. In these ways, segregation perpetuates itself, and its continued existence makes it ever harder to reverse.").

36. E. Hanushek et al., *The Unwavering SES Achievement Gap: Trends in U.S. Student Performance*, 18 (Nat'l Bureau of Econ. Res., Working Paper No. 25648, 2019), [https://pdfs.semanticscholar.org/8e25/8b8c11088e3307301f44e8662065f4a43fe5.pdf?\\_ga=2.215127124.291196238.1587141404-1812609927.1587141404](https://pdfs.semanticscholar.org/8e25/8b8c11088e3307301f44e8662065f4a43fe5.pdf?_ga=2.215127124.291196238.1587141404-1812609927.1587141404).

37. See Andre Perry, *We Need More Black and Brown Teachers but Not for the Reasons You Think*, HECHINGER REP. (May 3, 2016), <https://hechingerreport.org/need-black-brown-teachers-not-reasons-think/>.

38. Hua-Yu S. Cherng & Peter F. Halpin, *The Importance of Minority Teachers: Student Perceptions of Minority Versus White Teachers*, 45 EDUC. RES. 407, 411 (2016) (finding "[1] consistent evidence that students have more positive ratings of Latino and Black teachers than White teachers after controlling for student demographic and academic characteristics, other teacher characteristics, work conditions, and teacher efficacy; [2] evidence that perceptions of minority students depend on the race/ethnicity of their teacher: Black students have particularly favorable perceptions of Black teachers, but the same is not true for Latino students and Latino teachers; [3] Asian American students also have particularly favorable perceptions of Black teachers; and [4] all student groups have more positive ratings of minority teachers, including White students and Asian American students, suggests that minority teachers can translate their experiences and identities to form rapport with students that do not share the same race or ethnicity.").

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The unequal distribution of money and resources negatively impacted the education of Black students and still does today.<sup>39</sup> In America, “predominantly white school districts get \$23 billion more than their nonwhite peers, despite serving a similar number of children.”<sup>40</sup> A recent educational report affirms:

But a single fact is clear – financially, it is far better in the United States to have the luck and lot to attend a school district that is predominantly white than one that enrolls a concentration of children of color. That is the inherent shame of the system we’ve built and one we haven’t gone far enough to fix.<sup>41</sup>

Clearly, white-dominated legislatures were adamant that schools be separate but not adamant that school funding be equal. The single factor of funding is critical at every level of education – unequal funding based on race has hindered Blacks’ access to education, even though the law required impartial provision. This is American education past and present.

HBCUs are “[n]oted for their contributions in educating ‘black, low-income and educationally disadvantaged Americans.’”<sup>42</sup> HBCUs successfully pour into America’s most underprivileged students even

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39. See *The Persistence of Racial Segregation in American Schools*, FACING HIST. AND OURSELVES, <https://www.facinghistory.org/educator-resources/current-events/persistence-racial-segregation-american-schools> (last visited Nov. 18, 2020); see Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> (“Even so, educational experiences for minority students have continued to be substantially separate and unequal. Two-thirds of minority students still attend schools that are predominately minority, most of them located in central cities and funded well below those in neighboring suburban districts.”); see also *Poverty in America Continues to Affect People of Colour Most*, THE ECONOMIST, <https://www.economist.com/special-report/2019/09/26/poverty-in-america-continues-to-affect-people-of-colour-most> (last visited Nov. 18, 2020) (“Across America, black people remain disproportionately poor. More than 20% live in poverty, twice the rate of whites.”); see also ROGERS, *supra* note 8, at 24 (noting that in 1939 Congress had the Office of Education study Black higher education, and the agency reported back in the 1942 “National Survey of the Higher Education of Negroes” that “black K-12 students were allocated one-third the amount of funding that white students received and that the school years of African Americans tended to be one to three months shorter, resulting in many students being poorly prepared for college”); see generally Chemerinsky, *supra* note 10, at 80-84.

40. *\$23 Billion*, EDBUILD, 1, 4 (Feb. 2019), <https://edbuild.org/content/23-billion/full-report.pdf>; see also Chemerinsky, *supra* note 10, at 78 (“It is beyond doubt that American public schools are separate and unequal.”).

41. *\$23 Billion*, *supra* note 40, at 4; see also Du Bois, *supra* note 31, at 335 (“A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad.”).

42. *Public Policy Priorities for the Trump Administration and the 115th Congress*, UNCF 14 (2017), [https://www.uncf.org/wp-content/uploads/PDFs/2017\\_UNCF\\_PublicPolicyPriorities\\_for\\_the\\_115th\\_Congress\\_Final\\_7.12.17.pdf](https://www.uncf.org/wp-content/uploads/PDFs/2017_UNCF_PublicPolicyPriorities_for_the_115th_Congress_Final_7.12.17.pdf).



with exiguous budgets. The sustainability of HBCUs evinces that those schools are not inherently unequal or inferior as they are often unfairly labeled, but that unequal funding based on race remains an issue for HBCUs. In 1935, Dr. Du Bois stated:

Howard, Fisk, and Atlanta are naturally unable to do the type and grade of graduate work which is done at Columbia, Chicago, and Harvard; but why attribute this to a defect in the Negro race, and not to the fact that the large white colleges have from one hundred to one thousand times the funds for equipment and research that Negro colleges can command?<sup>43</sup>

HBCUs have led with a model of inclusion and rejected the possibility of becoming institutions of segregation, so as not to mimic the discriminatory PWIs, which refused to admit Black students solely due to their race, or that permitted Black students' admission but then treated them with disdain and hostility. HBCUs created educational environments that foster and promote learning conducive for all students. If HBCUs received funding commensurate with PWIs, HBCUs would be leading the charge as the American educational model for all students.<sup>44</sup>

This article posits that HBCUs should be studied as a model for the American educational system. Part I explores the historical foundation and underfunding of HBCUs, including how and why they emerged. Part II examines the impactful HBCU model and why after over a century and a half HBCUs still matter. Part III discusses the efforts that undermine HBCUs, funding inequities, and why the inequities must be remedied. The article closes by discussing the current

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43. Du Bois, *supra* note 31, at 332; Sam McKenzie Jr., *Segregation Isn't the Problem in Schools; It's Inequality*, MEDIUM (May 5, 2019), <https://medium.com/age-of-awareness/segregation-isnt-the-problem-in-schools-it-s-inequality-d9480b258db1> ("But the existence of Historically Black Colleges and Universities proves segregated schools aren't inherently unequal or inferior. The issue is funding. The issue is being racist and stingy."); Johnson et al., *supra* note 7; see also *supra* note 8 and accompanying text; ROEBUCK & MURTY, *supra* note 30, at 30 ("Unlike private HBCUs, however, the public HBCUs were dependent on white state governments for support. . . . Complete control was in the hands of stingy and discriminating state governments."); W.E.B. Du Bois, *A Negro Student at Harvard at the End of the 19th Century*, 1 MASS. REV. 3 (1960), 439, 440, <https://www.jstor.org/stable/25086526?seq=1> ("I did not find better teachers at Harvard, but teachers better known, who had had wider facilities for gaining knowledge and lived in a broader atmosphere for approaching truth.").

44. See GALLUP, INC., *supra* note 26, at 24 (finding that notwithstanding struggles of HBCUs in some areas, "their overall success in providing black graduates with a better college experience than they would get at non-HBCUs needs to be examined more closely – and potentially modeled – at other institutions"); see, e.g., EBONY, *supra* note 31, at 139 ("In 1970, black colleges, which granted nearly 80 percent of the degrees earned by blacks, were largely impoverished since they did not receive their share of either state or federal aid. The total federal financial aid to higher education in 1969 was more than \$4 billion. Of this, only \$119 million, or 3.5 percent, went to predominately black colleges.").

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renaissance that HBCUs are experiencing because of the HBCU model, traversing through racial injustices against African Americans that ultimately affect HBCUs, and concluding that the HBCU model should be emulated as a model for American education.

## I. A HISTORICAL PERSPECTIVE: PAST TO PRESENT

For wealthy, white men, higher education began in 1636 with the establishment of Harvard College in Cambridge, Massachusetts. For others, however, higher education began nearly two centuries later with significantly more opportunities for whites than Blacks.<sup>45</sup>

After Harvard was established, other states followed and established colleges. “Human slavery was the precondition for the rise of higher education in America.”<sup>46</sup> Colleges, such as Princeton, Dartmouth, Yale, William and Mary, Brown, Columbia, Rutgers, and the University of Pennsylvania, all founded before the American Revolution, owned dozens of enslaved Blacks.<sup>47</sup> As one historian stated:

In the decades before the American Revolution, merchants and planters became not just the benefactors of colonial society but its new masters. Slaveholders became college presidents. The wealth

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45. Jone J. Lewis, *A Brief History of Women in Higher Education*, THOUGHTCO, <https://www.thoughtco.com/history-women-higher-ed-4129738> (last updated Mar. 25, 2019) (“In 1742, the Bethlehem Female Seminary [a school of secondary/higher level] was established in Germantown, Pennsylvania, becoming the first institute of higher education for [white] women in the United States.”); *but see* Linda Eisenmann, *The Impact of Historical Expectations on Women’s Higher Education*, F. ON PUB. POL’Y 1, 4 n.5 (2006), <https://files.eric.ed.gov/fulltext/EJ1099152.pdf> (“Many U.S. institutions have claimed to be the ‘the first’ college for women because their origins as academies or seminaries predated Oberlin College [coeducational from its founding in 1833]. However, because of the vast differences in educational quality and curricula among such early institutions, as well as the fluid definition of ‘college’ before the mid-1800s, historians have generally agreed that Oberlin was the first to admit women to an actual college.”); *see also* *Oberlin History*, *infra* note 66 and accompanying text; Ethan Roy & James E. Ford, *Deep Rooted: A Brief History of Race and Education in North Carolina*, EDUC. NC (Aug. 11, 2019), <https://www.ednc.org/deep-rooted-a-brief-history-of-race-and-education-in-north-carolina/> (“According to historian Harry Watson, in order to ease class tension among whites, reformers pushed for universal white education in the South to rid the white poor of their ‘blackness,’ or ignorance. . . . White education in the state slowly began to improve. In 1825, the North Carolina legislature created a state literacy fund and later offered matching grants to passed taxes to support primary schools. Furthermore, North Carolina became the first state to offer publicly funded universal white education.”).

46. CRAIG S. WILDER, *EBONY AND IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA’S UNIVERSITIES* 114 (2013).

47. HENRY N. DREWRY & HUMPHREY DOERMANN, *STAND AND PROSPER, PRIVATE BLACK COLLEGES AND THEIR STUDENTS* 32 (2001); *see, e.g.*, WILDER, *supra* note 46, at 136 (noting the College of William and Mary owned dozens of enslaved persons).

of the traders determined the locations and decided the fates of colonial schools. Profits from the sale and purchase of human beings paid for campuses and swelled college trusts. And the politics of the campus conformed to the presence and demands of slave-holding students as colleges aggressively cultivated a social environment attractive to the sons of wealthy families.<sup>48</sup>

Colleges were built and financed by the very people who were refused admission solely *because* of their skin color – Blacks. More egregiously, during “the first half of the 19th century, male students studying at Southern universities regularly mistreated, beat and raped the enslaved men, women and children who catered to their everyday needs,” and “[t]he brutal behavior was ignored or accepted by professors, administrators and local authorities.”<sup>49</sup>

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48. WILDER, *supra* note 46, at 77.

49. Hannah Natanson, *Two Centuries Ago, University of Virginia Students Beat and Raped Enslaved Servants, Historians Say*, WASH. POST (Oct. 6, 2019, 7:00 AM), <https://www.washingtonpost.com/history/2019/10/06/two-centuries-ago-university-virginia-students-beat-raped-enslaved-servants-historians-say/>; see also Marcus L. Martin et al., *President's Commission on Slavery and the University*, UNIV. OF VA. 1, 23-24 (2018), [https://vpdiversity.virginia.edu/sites/vpdiversity.virginia.edu/files/PCSU%20Report%20FINAL\\_July%202018.pdf](https://vpdiversity.virginia.edu/sites/vpdiversity.virginia.edu/files/PCSU%20Report%20FINAL_July%202018.pdf) (reporting findings of multi-year research and finding that “[s]lavery, in every way imaginable, was central to the project of designing, funding, building, and maintaining the [University of Virginia]” and that the commission’s work is not done until it encourages “other institutions to engage in similar processes and confront their own difficult pasts” and begins “reconciliation or repair”); see also Thomas A. Foster, *The Sexual Abuse of Black Men Under American Slavery*, 20 J. HIST. SEXUALITY 445, 448-50, 453 (2011), <http://www.jstor.org/stable/41305880> (“Although scholars have acknowledged the sexual assault of enslaved women, none to my knowledge have highlighted the sexual abuse of enslaved men. . . . The rape of slave men has also gone unacknowledged because of the current and historical tendency to define rape along gendered lines, making both victims and perpetrators reluctant to discuss male rape. The sexual assault of men dangerously points out cracks in the marble base of patriarchy that asserts men as penetrators in opposition to the penetrable, whether homosexuals, children, or adult women. . . . The sexual exploitation of enslaved black men took place within a cultural context that fixated on black male bodies with both desire and horror. Sexual assault took a wide variety of forms, but the common factor in all was the legal ownership that enabled control of the enslaved body. . . . Colonial accounts abound with recorded instances of masters and others commenting not only on the nudity of slaves but on their bodies with a certain fascination. . . . Numerous abolitionist images also fixate on the black male body as perfection, highlighting muscular bodies and, in almost pornographic detail, exposed buttocks, enduring unjust abuse and degradation. William Benemann and others maintain that the image of whipping exposed male flesh carried a homoerotic charge - one that mirrored the nearly obscene fixation on whipping nude enslaved women, as has been suggested by scholars such as Colette Colligan. . . . *Incidents in the Life of a Slave Girl*, published in 1861 by abolitionist and escaped slave Harriet Jacobs (under the pseudonym Linda Brent), also included mention of male slave owners sexually abusing male slaves. Jacobs alluded to this abuse in the context of the rape of slave women and girls, lamenting that ‘no pen can give adequate description to the all-pervading corruption produced by slavery.’”); see also FAR MORE TERRIBLE FOR WOMEN 16-17 (Patrick Mingos, ed. 2006) [hereinafter Mingos] (“Marse Jim [slave owner] called me and Sam ter him and ordered Sam to pull off his shirt – that was all the McClain

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To be fair, although the South did not admit Black students to its schools, educational institutions in the North were not much different. If Black students were permitted to enroll, Northern schools were often very hostile places for Black students. In 1935, Dr. Du Bois penned:

[R]ace prejudice in the United States today is such that most Negroes cannot receive proper education in white institutions . . . many public school systems in the North where Negroes are admitted and tolerated but they are not educated; they are crucified . . . certain Northern universities where Negro students . . . cannot get fair recognition, either in classroom or on the campus, in dining hall or student activities, or in human common courtesy . . . at Harvard, Yale, and Columbia, Negroes are admitted but not welcomed; while in other institutions like Princeton they cannot even enroll.<sup>50</sup>

Over two centuries after Harvard was established, the United States abolished slavery in 1865, but there were no provisions in place to educate, house or feed the mass of newly freed Blacks. Thomas Hall, a former enslaved African born in 1856, expressed his experience with freedom after the Civil War:

Lincoln got the praise for freeing us, but did he do it? He give us freedom without giving us any chance to live ourselves, and we still

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niggers wore – and he said to me, ‘Nor, do you think you can stand this big nigger?’ He had that old bullwhip flung across his shoulder, and Lawd, that man could hit so hard! So I just said, ‘Yessir, I guess so,’ and tried to hide my face so I couldn’t see Sam’s nakedness, but he made me look at him anyhow. Well, he told us we must get busy and do it in his presence, and we had to do it. After that, we were considered man and wife.”)

50. Du Bois, *supra* note 31, at 328-29; *see also* EDWARD BALL, *SLAVES IN THE FAMILY* 283 (1998) (noting that in the late 1800s, Harvard University admitted black men who earned bachelor’s degrees “but required them to enter the university as third-year undergraduates”); *see, e.g.*, Calvin Pearson, *Irving Linwood Peddrew III of Hampton Was First African American to Attend Virginia Tech*, *DAILY PRESS* (Feb. 25, 2020, 7:00 AM), [https://www.dailypress.com/history/vp-nw-hampton-roads-black-history-irving-linwood-peddrew-022520-20200225-tlibm2boqnc6biagjcwg2rqqwi-story.html?fbclid=IWAR19c\\_CoLExqRq9AxLZkqjK\\_I5VBWsN6hvWP\\_95j5fvB\\_pGv258L6VJmpg](https://www.dailypress.com/history/vp-nw-hampton-roads-black-history-irving-linwood-peddrew-022520-20200225-tlibm2boqnc6biagjcwg2rqqwi-story.html?fbclid=IWAR19c_CoLExqRq9AxLZkqjK_I5VBWsN6hvWP_95j5fvB_pGv258L6VJmpg) (reporting about Irving Linwood Peddrew III, who was the first Black student to attend Virginia Tech . . . “At Virginia Tech he majored in electrical engineering and was a member of the Virginia Tech Corps of Cadets. Among 3,322 students, he was not permitted to live on campus or eat in the cafeteria. He eventually left the school before graduating.”); *see, e.g.*, SHIRLEY GRAHAM & GEORGE D. LIPSCOMB, *DR. GEORGE WASHINGTON CARVER 101-04* (1967) (noting that Highland University in Kansas offered George Washington Carver an academic scholarship in the late 1880s, but when he showed up and the college officials realized he was a Negro, he was not admitted even though the college president marveled that George’s high school record from Minneapolis High School was “one of the best in the state”); *see, e.g.*, Rachel B. Doyle, *Meet the Black Architect Who Designed Duke University 37 Years Before He Could Have Attended It*, *CURBED* (Dec. 6, 2017, 5:21 PM), <https://www.curbed.com/2017/12/6/16743328/julian-abele-black-architect-of-duke-university?fbclid=IWAR3crzTGUqabmXKT8UDBOV2q7RP5xRjiquGe65neRN7cqqp8Z56xtzKmbJc> (reporting Julian F. Abele “designed Duke University 37 years before he could attend it” because of segregation).

had to depend on the Southern white man for work, food, and clothing, and he held us, through our necessity and want, in a state of servitude but little better than slavery.<sup>51</sup>

Because the legal institution of slavery ended when Union Army (North) conquered the Confederacy (South), there is a misperception that slavery only existed in the South. Harriet and Dred Scott, the petitioners in the famous Supreme Court decision *Scott v. Sanford*,<sup>52</sup> were enslaved by United States military officers on a military base, in what is now Minnesota, despite the slavery prohibitions in the North-

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51. HURMENCE, *supra* note 19, at 52 (reporting a slave narrative told in 1937); *see also Segregation in the United States*, HIST. (Nov. 28, 2018), <https://www.history.com/topics/black-history/segregation-united-states> (“After the United States abolished slavery, black Americans continued to be marginalized through enforced segregated and diminished access to facilities, housing, education—and opportunities.”); *see also FAMU Way*, *supra* note 3, at 6 (“African Americans reacted differently to the end of the Civil War and freedom’s arrival. Some immediately left the plantations and began to look for loved ones, while others left the region to completely disassociate themselves from the site of their previous oppression. And yet, the majority stayed on their plantation because they simply did not have any place to go despite the racist sentiments most white Floridians harbored against them.”); *see also MERRITT*, *supra* note 14, at 326, 337 (stating “[w]ith the emancipation of African Americans, poor whites were finally brought into the system of white privilege, albeit at the bottom . . . they gained certain legal, political, and social advantages solely based on race” and finding that “the Homestead Act of 1862, along with the Southern Homestead Act of 1866, allowed tens of thousands of poor whites finally to join the ranks of landholders.”); *see also ISENBERG*, *supra* note 14, at 312-13 (“The Civil War was a struggle to shore up both a racial *and* a class hierarchy. The Confederacy was afraid that poor whites would be drawn in by Union appeals and would vote to end slavery – because slavery was principally a reflection of the wealthy planters’ self-interest. Today as well we have a large unbalanced electorate that is regularly convinced to vote against its collective self-interest.”); *see also FLYNN ET AL.*, *supra* note 14, at 21 (“Newly freed slaves were threatened, assaulted, and killed for attempting to leave plantations, disputing contracts, attempting to buy or rent land, resisting whippings, and not working as their employers desired.”); *see also* Nina Martyris, *Frederick Douglass on How Slave Owners Used Food as a Weapon of Control*, NPR (Feb. 10, 2017, 11:42 AM), [https://www.npr.org/sections/thesalt/2017/02/10/514385071/frederick-douglass-on-how-slave-owners-used-food-as-a-weapon-of-control?fbclid=IWAR2XDxrODqIueQF7sbv9Zjc8bwq43dDC\\_A0ck8WTuXkzM06BUtS6BU\\_XKc](https://www.npr.org/sections/thesalt/2017/02/10/514385071/frederick-douglass-on-how-slave-owners-used-food-as-a-weapon-of-control?fbclid=IWAR2XDxrODqIueQF7sbv9Zjc8bwq43dDC_A0ck8WTuXkzM06BUtS6BU_XKc) (“But if [food] deprivation was one form of control, a far more insidious and malicious one was the annual Christmas holidays, where gluttony and binge drinking was almost mandatory. During those six days, the enslaved could do what they chose, and while a few spent time with distant family or hunting or working on their homes, most were happy to engage in playing sports, ‘fiddling, dancing, and drinking whiskey; and this latter mode of spending the time was by far the most agreeable to the feelings of our masters. . . . It was deemed a disgrace not to get drunk at Christmas.’ To encourage whiskey benders, the ‘masters’ took bets to see who could drink the most whiskey, thus ‘getting whole multitudes to drink to excess.’”).

52. *Scott v. Sandford*, 60 U.S. 393, 426 (1857) (holding that any descendants of Africans – whether enslaved or free – could not be citizens of the United States and finding that “[t]he Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require”).

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west Ordinance of 1787 and the Missouri Compromise of 1820.<sup>53</sup> Thus, slavery was not just limited to plantation owners or the South.

Having been denied the opportunity for over 245 years during slavery to learn to spell, read, or write, formal education was the utmost priority for previously enslaved Africans.<sup>54</sup> The Federal Government intervened for a while. In the aftermath of the Civil War, Congress established the Freedmen's Bureau, in 1865, to help former enslaved Blacks and poor whites in the South with obtaining food, health, housing, legal aid, and education.

The Freedman's [*sic*] Bureau sent agents into southern counties to mediate between land-owning, cash-poor planters and the formerly enslaved. African Americans wanted, above all, to avoid anything like the pushing-system [ways that enslavers forced them to work faster] or the whipping-machine: no more driver's lash, no weighing-up and recording, nothing that resembled that. They wanted mothers to have a chance to care for their babies and tend their gardens. They wanted men to be able to plow without other men in riding behind them with guns on their hips. They wanted children to go to school instead of doing field work all year. And African Americans throughout the South usually wanted their own land, on which they could grow subsistence crops and live as what, in another country, we would call independent peasant farmers. The freedpeople's dream of land went largely unfulfilled.<sup>55</sup>

53. See Annette Atkins, *Dred and Harriet Scott in Minnesota*, MNOPEdia (Oct. 13, 2014), <https://www.mnopedia.org/event/dred-and-harriet-scott-minnesota> ("Both the Northwest Ordinance (1787) and the Missouri Compromise (1820) prohibited slavery in the area, but slavery existed there even so."); see also HENRY LOUIS GATES, JR., *100 AMAZING FACTS ABOUT THE NEGRO 60-64* (2017) (reporting that a small number of Black people owned slaves from at least 1654 through to the Civil war, mainly for personal or humanitarian reasons (buying a family member) but sometimes "to improve their economic status"); see also ISENBERG, *supra* note 14, at 153.

54. Ronald E. Butchart, *Freedmen's Education During Reconstruction*, GA. ENCYC. (Sept. 3, 2002), <https://www.georgiaencyclopedia.org/articles/history-archaeology/freedmens-education-during-reconstruction>; see also WILLIAM H. WATKINS, *THE WHITE ARCHITECTS OF BLACK EDUCATION, IDEOLOGY AND POWER IN AMERICA, 1865-1954*, at 181 (2001).

55. BAPTIST, *supra* note 1, at 407; see also DU BOIS, *supra* note 1, at 641, 648, 658 ("White laborers did not demand education, and saw no need for it, save in exceptional cases. . . . For some years after 1865, the education of the Negro was well-nigh monopolized by the Freedmen's Bureau, and the missions sustained by the Northern churches and organizations allied with them. . . . Under the Freedmen's Bureau, Negroes built schoolhouses and sometimes furnished as much as 33% of the cost of instruction. The civil government did little toward the encouragement of Negro education."); WATKINS, *supra* note 54, at 46; see also ISENBERG, *supra* note 14, at 178; see also HURMENCE, *supra* note 19, at 22-23 ("There were very few poor white folks who could read and write" – "only about half, or less than half, could read and write then."); see also Tonya Mosley, *'Slavery Doesn't End, It Just Evolves': Lawyer Portrayed in 'Just Mercy' Wants Film to Inspire Change*, WBUR (Jan. 10, 2020), [https://www.wbur.org/hereandnow/2020/01/10/just-mercy-bryan-stevenson?fbclid=IWAR1AHSKr4-7y83KxoV-gjkoJYmvX\\_YNAN0U2\\_zUwWFYQGw4gIbVpJoTPfII](https://www.wbur.org/hereandnow/2020/01/10/just-mercy-bryan-stevenson?fbclid=IWAR1AHSKr4-7y83KxoV-gjkoJYmvX_YNAN0U2_zUwWFYQGw4gIbVpJoTPfII) (quoting

It was presumed the Freedmen's Bureau would intervene when possible to prevent the harsh treatment of Blacks under the Black Codes that preceded Jim Crow laws.<sup>56</sup>

Between the establishment of Harvard and the ending of slavery, the Federal Government began enacting federal education laws. These laws included the Land Ordinance of 1785, the Northwest Ordinance of 1787, and the Morrill Act of 1862. When slavery ended, the Federal Government enacted the Freedmen's Bureau Bills of 1865 and 1866, the Hatch Act of 1887, and the Morrill Act of 1890. Overwhelmingly, these laws benefitted whites more than Blacks.

### A. Pre-World War II Federal Enactments

#### 1. The Land Ordinance of 1785 and the Northwest Ordinance of 1787

After the American Revolutionary War ended, the country endured significant changes, including in education. The Land Ordinance of 1785 and the Northwest Ordinance of 1787 (together "Northwest Ordinances") were enacted as the founding documents of public education.<sup>57</sup> They became a part of the framework for the American public school system.

The Land Ordinance of 1785 only incidentally mentioned education. However, a minor provision, which committed, "the lot No. 16, of every township, for the maintenance of public schools, within the said township," influenced the far-reaching practice that public land be dedicated to education.<sup>58</sup> This clause explained the manner in which settlers should support public education.<sup>59</sup>

The Northwest Ordinance of 1787, Article III, declared, "[r]eligion, morality, and knowledge being necessary to good govern-

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Bryan Stevenson, Esq., founder of the Equal Justice Initiative, saying that "slavery doesn't end, it just evolves").

56. See Richardson, *supra* note 2, at 375-76; see also MERRITT, *supra* note 14, at 329 (noting the powerlessness of the Freedmen's Bureau); see generally ALEXANDER, *supra* note 19 (arguing that mass incarceration is the new Jim Crow).

57. See Carl F. Kaestle, *Public Education in the Old Northwest: "Necessary to Good Government and the Happiness of Mankind,"* 84 IND. MAG. HIST. 60, 60 (1988) ("The Northwest ordinances have long been regarded as the founding documents of public education in the Old Northwest. Two clauses account for this reputation, one in the 1785 ordinance and the other in the 1787 ordinance. The first specified the ways in which the settlers should support education, and the second defined the purposes of education in a republic.").

58. See HOWARD C. TAYLOR, THE EDUCATIONAL SIGNIFICANCE OF THE EARLY FEDERAL LAND ORDINANCES 9-10 (1922).

59. See Kaestle, *supra* note 57, at 60.

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ment and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>60</sup> This clause explained the purposes of education in the new territory and reinforced the commitment to public education.<sup>61</sup> These ordinances predated the signing of the United States Constitution.

Two years later, George Washington became the first president of the United States. He advocated for a federally funded, national university, but Congress did not support the idea.<sup>62</sup> Despite that, various public universities emerged pursuant to, and as a result of, the Northwest Ordinance.<sup>63</sup>

Nearly forty years after Congress enacted the Northwest Ordinance of 1787, the first Black students graduated from American colleges: Alexander Lucius Twilight (Middlebury College, 1823), Edward A. Jones (Amherst College, 1826), John B. Russwurm (Bowdoin College, 1826), Edward A. Mitchell (Dartmouth College, 1828), and

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60. *Transcript of Northwest Ordinance of 1787*, OUR DOCUMENTS <https://www.ourdocuments.gov/doc.php?flash=false&doc=8&page=transcript> (last visited Nov. 18, 2020); see also Angelica Cervantes et al., *Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later* 5, 5 (2005), <https://eric.ed.gov/?id=ed542500> (“As part of that act, it was required that each territory set aside two townships of land to fund the establishment of institutions of higher education.”); see also *History and Traditions*, OHIO UNIV., <https://www.ohio.edu/student-affairs/students/history-traditions> (last visited Nov. 18, 2020) (“In 1786, 11 men gathered at the Bunch of Grapes Tavern in Boston to propose development of the area north of the Ohio River and west of the Allegheny Mountains known then as the Ohio Country. Led by Manasseh Cutler and Rufus Putnam, the Ohio Company petitioned Congress to take action on the proposed settlement. The eventual outcome was the enactment of the Northwest Ordinance of 1787, which provided for settlement and government of the territory and stated that ‘. . . schools and the means of education shall forever be encouraged.’ In 1803, Ohio became a state and on February 18, 1804, the Ohio General Assembly passed an act establishing ‘The Ohio University.’ The University opened in 1808 with one building, three students, and one professor, Jacob Lindley.”); see also ROGER L. WILLIAMS, *THE ORIGINS OF FEDERAL SUPPORT FOR HIGHER EDUCATION: GEORGE W. ATHERTON AND THE LAND-GRANT COLLEGE MOVEMENT* 35 (1991).

61. See Kaestle, *supra* note 57, at 60, 63.

62. See Cervantes et al., *supra* note 60, at 5 (“The early leaders of the United States did not succeed in realizing all of their ambitions for a federal role in higher education. George Washington, as the first President of the United States, repeatedly endorsed the founding of a national university funded directly from the federal purse. He personally set aside funds to found such a university, but was unable to convince Congress to allocate federal money for the project. The idea was revived, and again rejected, several times in the 19th century.”); see also MERRITT, *supra* note 14, at 152-53 (finding that wealthy whites pushed against funding a universal education system for poor whites so that they could remain illiterate, and thus, the slaveholders could maintain a slave system, which system was against the economic interest of poor whites).

63. See Cervantes et al., *supra* note 60, at 5 (discussing how Ohio University, founded in 1808, and Miami University, founded in 1809, were the first two public universities established under the Northwest Ordinance).



John Newton Templeton (Ohio University, 1828).<sup>64</sup> All of these men made significant inroads in emancipation and education for the advancement of Black people through public office, education, and other areas. Nevertheless, “[h]aving before them striking examples of highly educated colored men who could find no employment in the United States, the free Negroes began to realize that their preparation was not going hand in hand with their opportunities.”<sup>65</sup>

Oberlin College was co-educational from its founding in 1833 and opened its doors to Black students in 1835.<sup>66</sup> In 1850, Lucy Sessions graduated from Oberlin, thereby becoming the first Black woman to earn a degree from an American College; in 1862, Mary Jane Patterson followed.<sup>67</sup> Both became educators for Black students.

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64. *Key Events in Black Higher Education*, J. BLACKS HIGHER EDUC., <https://www.jbhe.com/chronology/> (last visited Nov. 18, 2020); Henry R. Burke, *John Newton Templeton – First African-American Graduate of Ohio University*, HAMPTON UNIV. (1999), <http://lestweforget.hamptonu.edu/page.cfm?uuiid=9FEC4DF3-B710-52F7-18FFD0C8B2E59FE6>; *but see* CARTER G. WOODSON, *THE EDUCATION OF THE NEGRO PRIOR TO 1861: A HISTORY OF THE EDUCATION OF THE COLORED PEOPLE OF THE UNITED STATES FROM THE BEGINNING OF SLAVERY TO THE CIVIL WAR* 265 (2004) (“No Negro had graduated from a college before 1828, when John B. Russwurm, a classmate of Hon. John P. Hale, received his degree from Bowdoin.”)

65. WOODSON, *supra* note 64 at 283; *see, e.g.*, Edward Alexander Bouchet Biography, BIOGRAPHY (Apr. 2, 2014), <https://www.biography.com/scientist/edward-alexander-bouchet> (reporting that Edward Alexander Bouchet was the first Black to earn a doctorate degree in the United States, which degree was in physics, and “[d]espite his impressive achievement, Bouchet could not land a college professorship due to his race.”).

66. *Oberlin History*, OBERLIN C. & CONSERVATORY, <https://www.oberlin.edu/about-oberlin/oberlin-history> (last visited Nov. 18, 2020) (“The college and community thrived on progressive causes and social justice. Among Oberlin’s earliest graduates were women and black people. While Oberlin was coeducational from its founding in 1833, the college regularly admitted black students beginning in 1835, after trustee and abolitionist, the Rev. John Keep, cast the deciding vote to allow them entry. Women were not admitted to the baccalaureate program, which granted bachelor’s degrees, until 1837. Prior to that, they received diplomas from what was called the Ladies Course. The college admitted its first group of women in 1837.”); *see also* ELIZABETH D. TAYLOR, *THE ORIGINAL BLACK ELITE* 385 (2018) (noting how many Northern universities “became increasingly hostile to blacks,” including Harvard, Cornell and Oberlin, which “transitioned from welcoming to intolerant”); *see also* Cally L. Waite, *The Segregation of Black Students at Oberlin College after Reconstruction*, 41 HIST. EDUC. Q. 344, 344 (2001), <https://www.jstor.org/stable/369200?seq=1> (“[D]uring the early nineteenth century there were no Black colleges for students to attend. Although Bowdoin College boasted the first Black graduate in 1827, few other colleges before the Civil War opened their doors to Black students. Therefore, the opportunity that Oberlin offered to Black students was extraordinarily important. The decision to admit Black students to the college, and offer them the same access to the college curriculum as their white classmates, challenged the commonly perceived notion of Blacks as childlike, inferior, and incapable of learning.”).

67. *Lucy Sessions*, OHIO HIST. CENT., [http://ohiohistorycentral.org/w/Lucy\\_Sessions](http://ohiohistorycentral.org/w/Lucy_Sessions) (last visited Nov. 18, 2020) (“Lucy Sessions was the first African-American woman to receive a college degree. Little is known about her early life. Her mother, who also was named Lucy Sessions, lived for a time in Boston, Massachusetts, where she was active in encouraging

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Obtaining an education was critical for Black people because they wanted to help their race and develop their communities. Initially PWIs were the only higher education institutions offering the necessary curriculum in some disciplines. For example, in 1864, Rebecca Lee Crumpler became the first Black female physician in the United States when she graduated from New England Female Medical College. She desired to become a doctor to treat Blacks who did not have access to

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men and women of all races to leave churches that condoned slavery. By the mid 1840s, the Sessions family had relocated to Toledo, Ohio. Lucy Sessions was denied admittance to all schools in the area. Thanks to her mother's firm belief that her daughter should have an education, Lucy Sessions enrolled at Oberlin College. Located in Oberlin, Ohio, the college was the first institution of higher education to admit women in the United States. Sessions was too young to enroll, but college officials made an exception, especially after Sessions proved her ability in the classroom. She graduated with a college degree in 1850."); Lewis, *supra* note 45 ("[In 1850], Lucy Sessions made history when she graduated with a literary degree from Oberlin College in Ohio. She became the First African-American female college graduate. . . . After Sessions earned her history-making degree from Oberlin, Mary Jane Patterson, in 1862, became the first African-American woman to earn a bachelor's degree."); Carla Garner, *Lucy Stanton Day Sessions (1831-1910)*, BLACKPAST (Nov. 8, 2010), <https://www.blackpast.org/african-american-history/sessions-lucy-stanton-day-1831-1910/> ("Educator and abolitionist Lucy Stanton Day Sessions is believed to be the first African American woman to graduate from college, completing a Ladies Literary Course from Oberlin College in 1850. For over a century the Ohio college has recognized its early Literary Course program as equivalent to a degreed program even though it did not award graduates with a bachelor's degree. In 1862 Oberlin College formally awarded the first bachelor's degree to an African American woman when Mary Jane Patterson graduated with a B.A. . . . Upon graduation in 1850, Sessions moved to Columbus, Ohio to become principal of a school but two years later returned to Cleveland when she married Oberlin classmate William Howard Day, a librarian who edited an abolitionist newspaper, the *Alienated American*. In 1854, she became the first African American to have a fictional story published when she wrote a short story on slavery for her husband's newspaper."); *but see Oberlin History, supra* note 66 (finding that Mary Jane Patterson earned a BA degree in education from Oberlin in 1862, and, thus, was the first Black woman to earn a degree from an American college.); *see also Frances Jackson Coppin – From Slavery to Trailblazer*, OBERLIN HERITAGE CTR. (Dec. 17, 2015, 1:41 PM), <https://www.oberlinheritagecenter.org/blog/2015/12/frances-jackson-coppin-from-slavery-to-trailblazer/> ("In 1865, Fanny Jackson [who at 13 years old had been bought out of slavery by her aunt] graduated from Oberlin College with a bachelor's degree. Interestingly, she was not now the first black woman to do so. Mary Jane Patterson had attained that honor at Oberlin in 1862 (and perhaps was the first black woman in the country to earn that degree). Both women would now be offered teaching positions at the Institute for Colored Youth in Pennsylvania [Cheyney University], but ironically Jackson would be appointed Principal of the Female Department, while Patterson would become her assistant.").

proper healthcare.<sup>68</sup> The first historically Black medical school, Howard University College of Medicine, did not open until 1868.<sup>69</sup>

Racism remained a significant barrier to the advancement of Blacks in education in the North and the South.<sup>70</sup> Compared with educational opportunities available for Blacks in the North, the opportunity for Blacks to learn in the South was virtually non-existent. The Southern education environment was particularly cruel. States continued to pass laws aimed to prevent the education of Blacks, free or enslaved. For instance, in 1832, an Alabama state law read: “Any person or persons who shall attempt to teach any *free* person of color or slave to spell, read, or write, shall upon conviction thereof by indictment, be fixed in a sum not less than \$250, nor more than \$500.”<sup>71</sup>

The first HBCU emerged before the Civil War to counterbalance the government’s practice of limiting or denying the education of

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68. Kristina Fiore, *First Black Woman Doctor in U.S. Lies in Unmarked Grave*, MEDPAGE TODAY (Feb. 20, 2020), [https://www.medpagetoday.com/special-reports/exclusives/84987?fbclid=IWAR3tp53CAv441KPZOXLWlb\\_2jYMWEM39drpIdBZqPC4j\\_mhVs3XS\\_sXd2Jw](https://www.medpagetoday.com/special-reports/exclusives/84987?fbclid=IWAR3tp53CAv441KPZOXLWlb_2jYMWEM39drpIdBZqPC4j_mhVs3XS_sXd2Jw); see also Jennifer M. Smith, *The Color of Pain: Blacks and the U.S. Health Care System—Can the Affordable Care Act Help to Heal a History of Injustice? Part I*, 72 NLG REV. 238 (2015), <https://www.nlg.org/nlg-review/article/the-color-of-pain-blacks-and-the-u-s-health-care-system-can-the-affordable-care-act-help-to-heal-a-history-of-injustice-part-i> [hereinafter *Smith, Pt. I*]; see also Jennifer Smith, *The Color of Pain: Blacks and the U.S. Health Care System—Can the Affordable Care Act Help to Heal a History of Injustice? Part II*, 73 NLG REV. 1 (2016), <https://www.nlg.org/the-color-of-pain-blacks-and-the-u-s-health-care-system-can-the-affordable-care-act-help-to-heal-a-history-of-injustice-part-ii/> (discussing the historical context of blacks in America’s health care system) [hereinafter *Smith, Pt. II*]; see also Leila McNeill, *The Woman Who Challenged the Idea that Black Communities Were Destined for Disease*, SMITHSONIAN MAG. (June 5, 2018), <https://www.smithsonianmag.com/science-nature/woman-challenged-idea-black-communities-destined-disease-180969218/> (“[Rebecca J. Cole who excelled at the Institute for Colored Youth (later became Cheyney University) and received her high school diploma there] graduated in 1867 [from Women’s Medical College of Pennsylvania], becoming the first black woman to graduate from the college [then only an undergraduate degree was needed to become a physician] and the second black woman physician in the U.S.”).

69. Howard Markel, *Celebrating Rebecca Lee Crumpler, First African-American Woman Physician*, PBS (Mar. 9, 2016, 11:07 AM), <https://www.pbs.org/newshour/health/celebrating-rebecca-lee-crumpler-first-african-american-physician>; see also BALL, *supra* note 3, at 165-66 (noting that in the late 1840s, a prosperous Black man, Louis Charles Roudanez, traveled to Paris to earn a medical degree then returned to open a medical office that served both Blacks and whites).

70. See Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RES. L. REV. 373, 373 (2004), <https://scholarlycommons.law.case.edu/caselrev/vol55/iss2/5> (“The commonly told history of antebellum race relations in the midwest, especially in Ohio, is one of a bleak and dismal landscape, with discrimination everywhere.”).

71. HENRY BARNARD & MOSES B. GOODWIN, HISTORY OF SCHOOLS FOR THE COLORED POPULATION (Arno Press ed., 1969) (emphasis added); see also DREWRY & DOERMANN, *supra* note 47, at 155 (reporting that many states passed laws making it illegal to teach Blacks to read or write).

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Blacks, most of whom were still enslaved.<sup>72</sup> Founded in 1837 as the African Institute, and after going through a series of name changes, Cheyney University of Pennsylvania was the first institution of higher learning for Blacks.<sup>73</sup> It became a part of the Pennsylvania state system in 1983.<sup>74</sup> Originally, the school taught basic subjects before it became a degree-granting institution in 1932 when it awarded its first baccalaureate degree.<sup>75</sup> Richard Humphreys, a Quaker philanthropist, bequeathed \$10,000, one-tenth of his estate, “to design and establish a school to educate people of African descent and prepare them as teachers.”<sup>76</sup>

After the founding of Cheyney University, other HBCUs were established to educate Blacks but also welcomed others to attend.<sup>77</sup> Established in 1854, Lincoln University of Pennsylvania (established as Ashmun Institute) became the first “degree-granting” HBCU, awarding baccalaureate degrees in 1868 to six men – four Black and two white.<sup>78</sup> In 1856, Wilberforce University in Ohio, the nation’s oldest, private HBCU was founded as Wilberforce University of the Methodist Episcopal Church, named to honor the 18th-century abolitionist, Wil-

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72. See CHARLENE HOFFMAN ET AL., *HISTORICALLY BLACK COLLEGES AND UNIVERSITIES, 1976 TO 1994*, at 2 (1996), <https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=96902>.

73. See *The First HBCU*, *supra* note 17.

74. *Id.*

75. Vanessa L. Patterson, *Cheyney University of Pennsylvania*, BLACKPAST (July 6, 2010), <https://www.blackpast.org/african-american-history/cheyney-university-pennsylvania-1837/> (“Originally located in Philadelphia, the school taught basic subjects such as reading, writing and math as well as mechanics and agriculture. Humphreys envisioned the institute training the teachers who would then instruct far more young women and men.”); see DREWRY & DOERMANN, *supra* note 47, at 33; see also *2019-2020 Undergraduate Academic Catalog*, CHEYNEY UNIV. 11, <https://cheyney.edu/wp-content/uploads/2019/10/2019-2020-UG-Catalog-.pdf> (last visited Nov. 18, 2020).

76. See *The First HBCU*, *supra* note 17.

77. See *History*, HAMPTON UNIV., <http://www.hamptonu.edu/about/history.cfm> (last visited Nov. 18, 2020) (discussed further in Part II of this article); see also JACKSON & NUNN, *supra* note 19; ANDERSON, *supra* note 20; *About*, LINCOLN UNIV., *infra* note 78; CREOLEGEN, *infra* note 104; see generally Walter R. Allen et al., *Historically Black Colleges and Universities: Honoring the Past, Engaging the Present, Touching the Future*, 76 J. NEGRO EDUC. 263, 264 (2007).

78. *About*, LINCOLN UNIV., <https://www.lincoln.edu/about/history> (last visited Nov. 18, 2020) (“On April 4, 1866, the institution was re-named LINCOLN UNIVERSITY in honor of President Abraham Lincoln. At that time, [John Miller Dickey, founder] then proposed to expand the college into a full-fledged university and to enroll students of ‘every clime and complexion.’ Law, medical, pedagogical and theological schools were planned in addition to the College of Liberal Arts. White students were encouraged to enroll and two graduated in the first baccalaureate class of six men in 1868. . . . During [its] first 100 years, Lincoln graduated approximately 20 percent of the African American physicians and more than 10 percent of the African American attorneys in the nation.”); see also DREWRY & DOERMANN, *supra* note 47, at 33.

liam Wilberforce, and the University played a key role in the Underground Railroad Movement.<sup>79</sup> There is no record of any Black institutions awarding baccalaureate degrees before the end of the Civil War.<sup>80</sup>

## 2. The Morrill Act of 1862

The Federal Government's minimal interest in higher education for Blacks was slightly evidenced by the passage of the Morrill Act of 1862, named after Justin Smith Morrill, a United States representative from Vermont, an abolitionist and son of a blacksmith.<sup>81</sup> Almost a century after the Northwest Ordinances, President Abraham Lincoln signed the Morrill Act of 1862, funding land-grant colleges.

The Morrill Act of 1862 was the start of the federal commitment to science. Under this act, land-grants were proportioned with respect to a state's congressional representation.<sup>82</sup> Congress appropriated federal money to provide for one college per state in education for agriculture and the mechanical arts.<sup>83</sup> The act presumably was to open a door for the less elite (blue collar families, like those of Congressman Morrill's upbringing) to attend college. Although there is no mention of equal educational opportunities, the purported original intent of the act was for money to flow to all students, including newly freed Blacks.<sup>84</sup> Instead, the funds went to whites-only schools.<sup>85</sup> Where the states had dual systems of education – one for whites and one for

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79. *About Wilberforce University*, WILBERFORCE UNIV., <https://wilberforce.edu/about-wilberforce/> (last visited Nov. 18, 2020); Hill, *supra* note 20, at 506 (noting that the African Methodist Episcopal Church bought Wilberforce University in 1863 and the first bachelor's degrees were awarded in 1867); *see also* GATES, *supra* note 53, at 73-76 (describing the Underground Railroad as an interracial coalition run predominately by free Northern Blacks with the help of white abolitionists, largely Quakers, and noting that it "was the editor of the *Weekly News* of Oberlin, Ohio, in 1885, who first made the Underground Railroad sound like a massive rail operation," which it was not).

80. DREWRY & DOERMANN, *supra* note 47, at 33.

81. ROGER L. GEIGER, *THE HISTORY OF AMERICAN HIGHER EDUCATION: LEARNING AND CULTURE FROM THE FOUNDING TO WORLD WAR II* 281-314 (2015) (describing the enactment of the Morrill Act and universities that were established as a result); WOODSON, *supra* note 64, at 256, 260-64 (noting that abolitionists and colonists offered educational opportunities for Blacks but ultimately the abolitionists conflicted with the colonists, finding the colonists' educational policy for Blacks to be evil and thus many colonists, not all, desisted from educating Blacks so as not to increase the intelligent population of the colored race).

82. WILLIAMS, *supra* note 60, at 36.

83. DREWRY & DOERMANN, *supra* note 47, at 50; VANESSA S. WALKER, *THE LOST EDUCATION OF HORACE TATE* 233 (2018).

84. HOFFMAN, *supra* note 72, at 2.

85. *Id.* ("But with the close of the army's occupation of the Old South, funds from the Morrill Act began to flow systematically to schools offering only all-white education.").

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Blacks – the colleges funded under the act were for only white students.<sup>86</sup> Thus, the newly freed Blacks did not receive the money allocated to them.

Of the sixty-nine colleges funded by the Morrill Act of 1862, only one institution was opened to educate Black students, Alcorn State University in Mississippi.<sup>87</sup> Alcorn State University was founded in 1871 to educate Black males and later designated a public Black land-grant college under the Morrill Act of 1890, but Mississippi's white legislature reduced Alcorn's funding to ensure the lifeline of white supremacy.

[S]egregationist-Democrats [antecedent of today's Republican Party] substantially reduced the funding of public HBCUs and eradicated anyone and anything at these schools that undermined southern white supremacy and capital accumulation. For instance, in 1878 Mississippi Democrats reduced Alcorn State's annual appropriation, ended state scholarships, reduced classical offerings, and gave the HBCU a new focus: "scientific and practical knowledge of agriculture, horticulture, and the mechanical arts."<sup>88</sup>

Despite the purported original intent of the Morrill Acts, the denial of equal access to education for Blacks remained. Thus, Congressman Morrill's aspiration of providing upper-level education for the working class was realized for white Americans but not so much for Black Americans. They remained left out of educational opportunities.

### 3. The Freedmen's Bureau Bills (1865 and 1866)

At the time of the first national census in 1790, there were nearly 700,000 Blacks in the United States, many foreign-born.<sup>89</sup> By

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86. DREWRY & DOERMANN, *supra* note 47, at 50; *see also* John M. Lee & Samaad W. Keys, *Land-Grant but Unequal State One-To-One Match Funding for 1890 Land-Grant Universities*, ASS'N PUB. LAND GRANT U. 1, 5 (2013) ("This inequity in funding to HBCUs by states has been well documented since the founding of these institutions, and funding at these schools was very poor and not equitable compared to white institutions.").

87. The Library of Congress, *Morrill Act*, PRIMARY DOCUMENTS IN AM. HIST., <https://www.loc.gov/rr/program/bib/ourdocs/morrill.html> (last visited Nov. 18, 2020); *see also* Shaun R. Harper et al., *Access and Equity in Higher Education: A Critical Race Historical Analysis of Policy Efforts*, 80 J. HIGHER EDUC. 389, 395 (2009) ("Ten years after the passage of the Act, Alcorn College in Mississippi became the first land-grant institution to be established for African Americans."); *The History of Alcorn State University*, ALCORN ST. UNIV., <http://www.alcorn.edu/discover-alcorn/history/index.aspx> (last visited Nov. 18, 2020); DREWRY & DOERMANN, *supra* note 47, at 50; WILLIAMS, *supra* note 60, at 41-42.

88. ROGERS, *supra* note 8, at 16; *see The History of Alcorn State University*, *supra* note 87; *see* Hill, *supra* note 20, at 351 ("In 1903, the institution admitted women.").

89. FINKELMAN, *supra* note 13, at 18 (citing U.S. Census Bureau, *Negro Population, 1790-1915* (Washington, D.C.: Government Printing Office, 1918), 57); *see also* DREWRY & DOERMANN, *supra* note 47, at 23.

1860, statistics showed that there were nearly four million Blacks, and few were foreign-born.<sup>90</sup> Of that number, few were granted educational opportunities. By the end of the Civil War, only 28 African Americans were graduates with baccalaureate degrees.<sup>91</sup>

After the Civil War, Congress passed three Constitutional Amendments that promised Blacks equal rights: (1) the Thirteenth Amendment passed in 1865, which abolished slavery except as a punishment for a crime; (2) the Fourteenth Amendment passed in 1868, which provided for equal protection of the law and birthright citizenship for former enslaved Blacks; and (3) the Fifteenth Amendment passed in 1870, which opened the right to vote for Black men.<sup>92</sup> Notwithstanding the passage of those amendments, whites still prevented Blacks from exercising their constitutional rights for several decades. In fact, the horrific brutality whites inflicted on Blacks caused Congress to pass several Enforcement Acts in 1870 and 1871 (Ku Klux Klan Acts) “to stop white militiamen who put on robes and hoods, who torment and kill black people, and who attack the government.”<sup>93</sup>

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90. FINKELMAN, *supra* note 13, at 18; *see also* DREWRY & DOERMANN, *supra* note 47, at 23.

91. DREWRY & DOERMANN, *supra* note 47, at 32-33.

92. *See* MIKKI KENDALL, HOOD FEMINISM: NOTES FROM THE WOMEN THAT A MOVEMENT FORGOT 185 (2020) (“The history of voter suppression is well documented. And even though women technically got the right to vote in 1920 [in the 19th Amendment to the U.S. Constitution], realistically, prior to the Voting Rights Act of 1965, states used poll taxes and literacy tests to stop Black and Indigenous people from voting.”); *see also* DAINA R. BERRY & KALI N. GROSS, A BLACK WOMEN’S HISTORY OF THE UNITED STATES 102, 132-34, 180 (2020); *see also* Gillian Brockell, *A White Mob Unleashed the Worst Election Day Violence in U.S. History in Florida a Century Ago*, WASH. POST (Nov. 2, 2020, 7:00 AM), <https://www.washingtonpost.com/history/2020/11/02/oceee-florida-election-day-massacre/> (“This is what is certain: 100 years ago, on Nov. 2, 1920 — the same day women voted nationally for the first time — the worst instance of Election Day violence in American history unfolded in a small Florida town west of Orlando [the Ocoee Massacre]. . . . Many anti-suffragists argued that if women were permitted to vote, Black men might try to vote, too. Some suffragists denied this would happen, and some even argued that White women should be allowed to vote so they could act as a bulwark against any Black men who might try to exercise their rights.”).

93. BALL, *supra* note 3, at 26; *see* DREWRY & DOERMANN, *supra* note 47, at 12; *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> (last visited Nov. 18, 2020) (“The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution extended civil and legal protections to former slaves and prohibited states from disenfranchising voters ‘on account of race, color, or previous condition of servitude.’ Forces in some states were at work, however, to deny black citizens their legal rights. Members of the Ku Klux Klan, for example, terrorized black citizens for exercising their right to vote, running for public office, and serving on juries. In response, Congress passed a series of Enforcement Acts in 1870 and 1871 (also known as the Force Acts) to end such violence and empower the president to use military force to protect African Americans.”); *see* DU BOIS, *supra* note 1, at 680 (“Some excuse the rise of the Ku Klux Klan and the White League and the Knights of the White

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In late 1865, the South began enacting Black Codes, which essentially restored slavery, to ensure Blacks were cheap labor and to control persons of color by restricting their ability to travel, to own guns, to have occupations, and to enjoy other freedoms and privileges granted to whites.<sup>94</sup> During Reconstruction that began in 1865, Congress passed the Civil Rights Act of 1866, essentially ending Black Codes, which laid the foundation for the enactment of Jim Crow laws, named after a Black minstrel show character, which legalized “separate but equal” nearly a year after it began.<sup>95</sup>

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Camellia in the South with the plea that they were the answer to Negro suffrage, and that the Union Leagues started among Negroes were the cause of secret orders among whites. There is no historic foundation for this. . . . The Union League movement influenced the labor vote in the North. It came to the South with the carpetbaggers and used the Northern technique. . . but it never contemplated murder and force. . . . It was not, then, the organization of the Union Leagues that caused the Ku Klux Klan; it was the determination to deprive the Negroes, by force, of any real weapon for economic bargaining.”); Brockell, *supra* note 92 (“A month before the [Nov. 2, 1920] election, two of the White leaders — attorney W.R. O’Neal and Judge John Cheney — received a threatening letter from the KKK. ‘We shall always enjoy WHITE SUPREMACY in this country and he who interferes must face the consequences,’ it read. Across Florida — in Daytona, Jacksonville and Orlando — local KKK chapters held huge rallies to intimidate potential Black voters.”).

94. See *Southern Black Codes*, CONST. RTS. FOUND., <http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html> (last visited Nov. 18, 2020); see also *Black Codes*, HIST. (June 1, 2010), <https://www.history.com/topics/black-history/black-codes>; see also *Slave Code*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/slave-code> (last visited Nov. 18, 2020) (“Slave Code, in U.S. history, any of the set of rules based on the concept that enslaved persons were property, not persons. Inherent in the institution of slavery were certain social controls, which enslavers amplified with laws to protect not only the property but also the property owner from the danger of slave violence. The slave codes were forerunners of the black codes of the mid-19th century.”); see, e.g., DARITY & MULLEN, *supra* note 3, at 186-87 (“In 1833, less than fifteen years after Alabama was granted statehood. It passed slave codes that read in part, ‘No slave shall keep or carry and gun, powder, shot, club, or other weapon whatsoever . . . .’”).

95. See *Jim Crow Laws*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> (last visited Nov. 18, 2020) (“The Jim Crow system was upheld by local government officials and reinforced by acts of terror perpetrated by Vigilantes. In 1896, the Supreme Court established the doctrine of separate but equal in *Plessy v. Ferguson*, [which made ‘separate but equal’ the law in the U.S.] after a black man in New Orleans attempted to sit in a whites-only railway car.”); see also *Southern Black Codes*, *supra* note 94; see also BERRY & GROSS, *supra* note 92, at 102 (noting “the Civil Rights Act of 1866 eliminated the Black Codes”); see also *Jim Crow Laws*, HIST. [hereafter *Jim Crow Laws History*] (Feb. 28, 2018), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> (“Named after a Black minstrel show character, the laws—which existed for about 100 years, from the post-Civil War era until 1968—were meant to marginalize African Americans by denying them the right to vote, hold jobs, get an education or other opportunities.”); see also *Black Codes and Pig Laws*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/black-codes/> (last visited Nov. 18, 2020) (“But after the failure of Reconstruction in 1877, and the removal of black men from political offices, Southern states again enacted a series of laws intended to circumscribe the lives of African Americans. Harsh contract laws penalized anyone attempting to leave a job before an advance had been worked off. ‘Pig Laws’ unfairly penalized poor African Americans for crimes such as stealing



Jim Crow laws existed for three-fourths of a century in the South and the North. Racial hatred against Blacks spread all over the country. For example:

White Americans imposed increased white supremacy outside the South, too . . . In non-Confederate states, many restaurants wouldn't serve black customers. Stores and factories refused to hire African Americans. Hundreds of midwestern communities forcibly evicted African-American residents and became "sundown towns" ("Don't let the sun set on you in this town"). . . . The young people who took the train north to Chicago and New York found that even outside of the South, they faced segregated workplaces and neighborhoods, a door of opportunity only intermittently and partially open.<sup>96</sup>

Those laws restricted and affected every aspect of Blacks' lives, segregating public transportation, libraries, drinking fountains, parks, restrooms, restaurants, and schools until the passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Civil Rights Act of 1968 (parts of it comprising the Fair Housing Act), but *de facto* segregation has never ended.<sup>97</sup> Everything was separate, but nothing was equal – what Blacks were given was always substandard and underfunded as compared to what whites were given.<sup>98</sup> Professor Bell opined that "separate but equal" is the "ultimate oxymoron."<sup>99</sup>

After the Civil War, the Federal Government's Freedmen's Bureau began an effort to educate former enslaved Blacks and poor whites. The Freedmen's Bureau along with the Black community and various philanthropic organizations, principally the American Missionary Association, provided support for recently freed slaves after the

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a farm animal. And vagrancy statutes made it a crime to be unemployed. Many misdemeanors or trivial offenses were treated as felonies, with harsh sentences and fines. The Pig Laws stayed on the books for decades, and were expanded with even more discriminatory laws once the Jim Crow era began.").

96. BAPTIST, *supra* note 1, at xviii, 411; *Jim Crow Laws History*, *supra* note 95; see generally JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2018) (discussing "sundown towns" that excluded Blacks and other minority groups after sundown, where these towns still exist in America, and the residual effects of these towns on American life).

97. *Jim Crow Laws History*, *supra* note 95; see also *Southern Black Codes*, *supra* note 94; see also *Civil Rights Movement Timeline*, HIST. (Dec. 4, 2017), <https://www.history.com/topics/civil-rights-movement/civil-rights-movement-timeline?fbclid=IWAR3dVsheWsRAS1fyOiXc0YWFUzP6uT819Z7O4NbmQgysWYqkH7Cug424j2k>; DARITY & MULLEN, *supra* note 3, at 28.

98. See *Jim Crow Laws*, *supra* note 95; see also WALKER, *supra* note 83, at 233-34 (noting that in 1963, President Kennedy's public language proclaimed the type of federal support Dr. Du Bois, the NAACP, Black educators and others sought ever since Georgia violated the requirements of the Second Morrill Act).

99. FINKELMAN, *supra* note 13, at 33.

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passage of the Freedmen's Bureau bills in March 1865 and July 1866.<sup>100</sup> Had the goals of the Freedmen's Bureau bills been realized, then the newly freed Blacks would have had something with which to start a new life of freedom after slavery, but the provisions of the bills largely went unfulfilled. Excluding the few Blacks who were educated in white colleges, the very few Blacks who passed for white – *passé blanc* – to attend college, or the Blacks educated at the few colleges established to educate them, it was only after the Civil War when Blacks really received the opportunity to obtain higher education, and even then, the opportunities were incomparable to whites' opportunities.<sup>101</sup>

100. See HOFFMAN, *supra* note 72, at 2; see also DREWRY & DOERMANN, *supra* note 47, at 35; see also DARITY & MULLEN, *supra* note 3, at 126-27, 175-76, 181-96, 251 (detailing the unfulfillment of the bills and noting that the second Freedmen's Bureau bill was passed in July 1866, which mandated that blacks receive "any of the rights or immunities belonging to white persons . . ." but that the "freedmen's desires for land, schools and education, and freedom to live their lives alone in peace went unfulfilled" (footnotes omitted)); see also W. E. B. Du Bois, *The Freedmen's Bureau*, THE ATLANTIC (Mar., 1901), <https://www.theatlantic.com/magazine/archive/1901/03/the-freedmens-bureau/308772/>; see also FRANKLIN, *supra* note 1, at 38-39 ("The Bureau's greatest success was education. It established or supervised schools of all kinds: day, night, Sunday, and industrial schools, as well as colleges. . . . Howard University, Hampton Institute, Atlanta and Fisk universities are merely the better known of score of institutions that received Bureau assistance. By 1870, when the educational work of the Bureau ceased, there were approximately a quarter of a million Negroes in 4,300 schools; and the Bureau had spent more than five million dollars on its education program. . . . [T]he former Confederates, with the aid of President [Andrew] Johnson, did much to destroy the effectiveness of the Bureau.").

101. See DREWRY & DOERMANN, *supra* note 47, at 32; see also Monica L. Haynes, *Passing: How Posing as White Became a Choice for Many Black Americans*, POST-GAZETTE.COM (Oct. 26, 2003), <http://old.post-gazette.com/lifestyle/20031026stain1026fnp2.asp>; see also Micah Walker, *He Passed as a White Student at U-M – But Was Actually College's First Black Enrollee*, DETROIT FREE PRESS (Oct. 19, 2019, 8:00 AM), [https://www.freep.com/story/entertainment/2019/10/19/samuel-codes-watson-university-michigan-tylonn-j-sawyer/3992118002/?fbclid=IWAR29RdPvO3tbnWpxIuHLY9cimOidjbxhS\\_ZqVUG0kqaMttE6JoFyetedw0w](https://www.freep.com/story/entertainment/2019/10/19/samuel-codes-watson-university-michigan-tylonn-j-sawyer/3992118002/?fbclid=IWAR29RdPvO3tbnWpxIuHLY9cimOidjbxhS_ZqVUG0kqaMttE6JoFyetedw0w); see, e.g., ROGERS, *supra* note 8, at 22 (noting how Adam Clayton Powell Jr. tried to pass for white at Colgate University to escape racial restrictions and was eventually found out); see, e.g., Mildred E. Taylor, *Passing as White, Belle da Costa Greene Managed J.P. Morgan's Fortune from the 1900s*, FACE 2 FACE AFR. (Dec. 1, 2020, 1:00 PM), [https://face2faceafrica.com/article/passing-as-white-belle-da-costa-greene-managed-j-p-morgans-fortune-from-the-1900s?fbclid=IWAR1Si7yvhtkiFsRDGiR5\\_6qQozzPIR3F4vSeQ\\_yhEG3Yi7meSO3TewgHTQ8](https://face2faceafrica.com/article/passing-as-white-belle-da-costa-greene-managed-j-p-morgans-fortune-from-the-1900s?fbclid=IWAR1Si7yvhtkiFsRDGiR5_6qQozzPIR3F4vSeQ_yhEG3Yi7meSO3TewgHTQ8) ("Becoming 'arguably the most powerful woman in the New York art and book world' at the turn of the 20th century, Greene, with a flamboyant fashion sense, dined with the rich and famous, including opera stars, tycoons, and royalty. She had access to places that were not welcome to Black people, and she won many admirers who were charmed by her acuity and intelligence. But historians say she probably wouldn't have made it to that level had she revealed her background. Greene told everyone who bothered to ask that she was Portuguese, but in fact, she was Black. Her employers did not even learn of her secret until her death. The child of two African-American parents of mixed ancestry, her birth certificate identified her as 'colored' though she was light-skinned as both her parents. Her father was lawyer Richard T. Greener, the first African American

Between 1865 and 1890, there were more than 200 Black private institutions established in the South. However, unlike PWIs that were often led by slave owners, HBCUs were often established and led by former enslaved Blacks or their children.<sup>102</sup> The first HBCUs held classes in churches, shanties, basements, homes, and old school-houses.<sup>103</sup> Some of the institutions were founded in haste, and the inadequate funding by the government is the main reason many of them did not exist after 1900; however, many of those institutions were quite productive, even if they did not last or were merged into other universities.<sup>104</sup> The history of the emergence of HBCUs reflects the

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to graduate from Harvard and the first librarian of color at the University of South Carolina. Genevieve Fleet was her mother.”).

102. See WILDER, *supra* note 46, at 77; see also *Tuskegee Founder Lewis Adams Born*, AFR. AM. REGISTRY, <https://aaregistry.org/story/tuskegee-founder-lewis-adams-born/> (last visited Nov. 18, 2020) (“During Reconstruction [Lewis] Adams, a leader in the Black community was approached by two white politicians who wanted (through him) to secure the Black vote for them in the 1880 election. Adams agreed but only if the two would support establishing a college for Blacks in Tuskegee. The deal was struck, and the two men were elected to the legislature. George W. Campbell, a former slave owner, worked closely with Adams to bring the college to Tuskegee. In 1881, the legislature approved an act establishing the Tuskegee State Normal School to educate teachers. Adams and two other men were appointed commissioners, and with Campbell’s help they recruited a young Virginia educator from Hampton Institute Booker T. Washington as the first principal at Tuskegee.”); see, e.g., *Booker T. Washington*, TUSKEGEE UNIV., <https://www.tuskegee.edu/discover-tu/tu-presidents/booker-t-washington> (last visited Nov. 18, 2020) (noting that Booker T. Washington was born into slavery and later led Tuskegee University); ROGERS, *supra* note 8, at 17 (“Tuskegee president Booker T. Washington emerged as the chief proponent of the accommodating separatists (even as he secretly supported civil rights causes).”); see, e.g., Samara Freemark, *The History of HBCUs in America*, AM. RADIOWORKS (Aug. 20, 2015), <http://www.americanradioworks.org/segments/hbcu-history/> (last visited Nov. 18, 2020) (“St. Paul’s College founder James Solomon Russell was born three years before slavery ended. He became an Episcopal priest and came to this rural region of southern Virginia in 1882 to start churches and a school to educate newly freed blacks. Locals warned him that the Ku Klux Klan had torched a similar school in North Carolina and so Russell waited until 1888 to establish St. Paul’s Normal and Industrial School.”); see, e.g., Hill, *supra* note 20, at 21 (“Organized through the passage of a bill by the Alabama State Legislature, Alabama A&M opened as the Huntsville Normal School in 1875. The first president was William Hooper Council, a former slave.”).

103. See *Historically Black Colleges and Universities*, AC ONLINE (Nov. 5, 2020), <https://www.affordablecollegesonline.org/college-resource-center/hbcu-history-and-modern-importance/>.

104. ROEBUCK & MURTY, *supra* note 30, at 25; see also FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 488 (1962) (“After the war the activities of the Freedmen’s Bureau and the Christian impulse of the stronger caste led to the founding of a great number of institutions which, while collegiate in name, did not remotely resemble a college in standards or facilities.”); but see J. CLAY SMITH JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 277 (1933) (noting that Thomas de Saille Tucker, FAMU’s first president, was an 1882 law graduate of Straight University); see also *Straight University Law Department 1874-1876*, CREOLEGEN (Nov. 27, 2017), <http://www.creolegen.org/2017/11/27/straight-university-law-department-1874-1886/> (noting that

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urgency and importance of Black people's desire for an education, including a collegiate one. It was crucial for newly freed Blacks to share education basics with other Blacks to advance to higher levels of education, and they began this before slavery ended.

By 1860, 5 percent of the slave population had defied the laws and learned to read and write. Some were taught by their masters, but many learned to read in clandestine sessions taught by other blacks. African Americans all over the South organized secret schools long before the arrival of Northern missionaries. When a New England teacher arrived in Atlanta in 1865, he discovered an ex-slave already running a school in a church basement.<sup>105</sup>

In 1865, a plantation owner in Tennessee wrote to his former slave, Jourdon Anderson, asking him to return to help restore the plantation that had fallen in disrepair. Through his new boss in Ohio, Anderson dictated a response seeking reparations, which former slave owners received, and expressing his "great desire" to obtain an education for his children:

*Dayton, Ohio,*

*August 7, 1865*

*To My Old Master, Colonel P.H. Anderson, Big Spring, Tennessee*

*Sir: I got your letter, and was glad to find that you had not forgotten Jourdon, and that you wanted me to come back and live with you again, promising to do better for me than anybody else can. I have often felt uneasy about you. I thought the Yankees would have hung you long before this, for harboring Rebs they found at your house. I suppose they never heard about your going to Colonel Martin's to kill the Union soldier that was left by his company in their stable. Although you shot at me twice before I left you, I did not want to hear of your being hurt, and am glad you are still living. It would do me good to go back to the dear old home again, and see Miss Mary and*

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Straight University was an HBCU that operated from 1868-1934 in New Orleans, Louisiana with a law department that operated from 1874-1886 and that in its 12 year history, one-third of the graduates were white males); *see also* Hill, *supra* note 20, at 257 (reporting that Straight University merged to become Dillard University in Louisiana); *see also* Leedell W. Neyland, *State-Supported Higher Education Among Negroes in the State of Florida*, 43 FLA. HIST. Q. 105, 108 (1964) (noting Thomas de Saille Tucker, [FAMU's first president] was a native of Sherbro, Sierra Leone, Africa).

105. TERA W. HUNTER, *TO 'JOY MY FREEDOM* 40 (1997); *see generally* *Fall Enrollment, Degrees Conferred, and Expenditures in Degree-Granting Historically Black Colleges and Universities, by Institution: 2010, 2011, and 2010-11*, NAT'L CTR. FOR EDUC. STATS., [https://nces.ed.gov/programs/digest/d12/tables/dt12\\_281.asp](https://nces.ed.gov/programs/digest/d12/tables/dt12_281.asp) (last visited Nov. 18, 2020); *see also* ROEBUCK & MURTY, *supra* note 30, at 25 ("During the interval from 1865 to 1890, more than two hundred black private institutions were founded in the South with the help of northern churches and missionary groups . . . and the Freedmen's Bureau.").

*Miss Martha and Allen, Esther, Green, and Lee. Give my love to them all, and tell them I hope we will meet in the better world, if not in this. I would have gone back to see you all when I was working in the Nashville Hospital, but one of the neighbors told me that Henry intended to shoot me if he ever got a chance.*

*I want to know particularly what the good chance is you propose to give me. I am doing tolerably well here. I get twenty-five dollars a month, with victuals and clothing; have a comfortable home for Mandy,—the folks call her Mrs. Anderson,—and the children—Milly, Jane, and Grundy—go to school and are learning well. The teacher says Grundy has a head for a preacher. They go to Sunday school, and Mandy and me attend church regularly. We are kindly treated. Sometimes we overhear others saying, “Them colored people were slaves” down in Tennessee. The children feel hurt when they hear such remarks; but I tell them it was no disgrace in Tennessee to belong to Colonel Anderson. Many darkeys would have been proud, as I used to be, to call you master. Now if you will write and say what wages you will give me, I will be better able to decide whether it would be to my advantage to move back again.*

*As to my freedom, which you say I can have, there is nothing to be gained on that score, as I got my free papers in 1864 from the Provost-Marshal-General of the Department of Nashville. Mandy says she would be afraid to go back without some proof that you were disposed to treat us justly and kindly; and we have concluded to test your sincerity by asking you to send us our wages for the time we served you. This will make us forget and forgive old scores, and rely on your justice and friendship in the future. I served you faithfully for thirty-two years, and Mandy twenty years. At twenty-five dollars a month for me, and two dollars a week for Mandy, our earnings would amount to eleven thousand six hundred and eighty dollars. Add to this the interest for the time our wages have been kept back, and deduct what you paid for our clothing, and three doctor’s visits to me, and pulling a tooth for Mandy, and the balance will show what we are in justice entitled to. Please send the money by Adams’s Express, in care of V. Winters, Esq., Dayton, Ohio. If you fail to pay us for faithful labors in the past, we can have little faith in your promises in the future. We trust the good Maker has opened your eyes to the wrongs which you and your fathers have done to me and my fathers, in making us toil for you for generations without recompense. Here I draw my wages every Saturday night; but in Tennessee there was never any pay-day for the negroes any more than for the horses and cows. Surely there will be a day of reckoning for those who defraud the laborer of his hire.*

*In answering this letter, please state if there would be any safety for my Milly and Jane, who are now grown up, and both good-looking girls. You know how it was with poor Matilda and Catherine. I would rather stay here and starve—and die, if it come to that—than*

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*have my girls brought to shame by the violence and wickedness of their young masters. You will also please state if there has been any schools opened for the colored children in your neighborhood. **The great desire of my life now is to give my children an education, and have them form virtuous habits.***

*Say howdy to George Carter, and thank him for taking the pistol from you when you were shooting at me.*

*From your old servant,*

*Jourdon Anderson.*<sup>106</sup>

White resistance against the freedom of Blacks and their gaining equal rights created significant barriers for Blacks to obtain an education.

The decade of the 1890s marked the decisive onset of Jim Crow in the South. Blacks were systematically deprived of civil and political rights; de facto segregation was given legal sanction by the Supreme Court, as was blatantly unequal provision of education; and white supremacy was enforced through terrorism by lynch law.<sup>107</sup>

Between 1868 to 1884, fewer than 500 Blacks graduated from college.<sup>108</sup> However, by 1900, nearly 2,000 Blacks graduated from college.<sup>109</sup> HBCUs significantly increased the number of Black college graduates. Yet, graduation rates of Blacks were still much less than for whites. Black graduates, however, eventually used their education to overturn *de jure* segregation in education and society, which is partly why whites consider educated Blacks a threat. Educated Blacks entered politics, opened schools, owned successful businesses, and during slavery led slave rebellions.<sup>110</sup>

106. LYDIA M. CHILDS, *THE FREEDMEN'S BOOK* 265-67 (1865) (emphasis added); see also Josh Jones, *Freed Slave Writes Letter to Former Master: You Owe Us \$11,680 for 52 Years of Unpaid Labor (1865)*, OPEN CULTURE (Nov. 11, 2015), <http://www.openculture.com/2015/11/freed-slave-writes-letter-to-former-master-you-owe-us-11680-for-52-years-of-unpaid-labor-1865.html>; see also Tera W. Hunter, *When Slaveowners Got Reparations*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/opinion/when-slaveowners-got-reparations.html> (reporting that white slave owners received reparations after slavery ended, but the former enslaved Blacks did not); see also *Segregation in the United States*, *supra* note 51; see also *FAMU Way*, *supra* note 3, at 6.

107. GEIGER, *supra* note 81, at 468.

108. PAUL FINKELMAN, 1 *ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1619-1895: FROM THE COLONIAL PERIOD TO THE AGE OF FREDERICK DOUGLASS* 456 (2006).

109. *Id.*; GEIGER, *supra* note 81, at 470 (“Du Bois identified nearly 2,400 black college graduates (through 1898).”).

110. FINKELMAN, *supra* note 108, at 456; DU BOIS, *supra* note 14; see also *infra* Part II (discussing Justice Thurgood Marshall); see also DARITY & MULLEN, *supra* note 3, at 227; see, e.g., ALEXANDER, *supra* note 19, at 29 (“[E]ducated blacks began to populate legislatures, open schools, and initiate successful businesses.”); see, e.g., MERRITT, *supra* note 14, at 152 (“Literate slaves and free blacks historically had been the instigators and leaders of slave

4. The Hatch Act of 1887, the Morrill Act of 1890, and the Smith-Lever Act of 1914

The country continued to expand its contributions to land-grant colleges and universities with the Hatch Act of 1887.<sup>111</sup> Its provisions established agricultural departments, which were federally funded and located within land-grant colleges or as independent entities.<sup>112</sup> The act was the start of Federal Government-supported research laboratories in the sciences.<sup>113</sup> Significantly, the Hatch Act established a new precedent: “the federal government could use institutions of higher education as instruments of national policy.”<sup>114</sup> However, there was criticism of the Hatch Act for failing to provide resources for other than agricultural research.<sup>115</sup> This dissatisfaction paved the way for passage of a second Morrill Act.

Aimed at the South, the Morrill Act of 1890 (Second Morrill Act) opened the door somewhat for Black education beyond agriculture.<sup>116</sup> The act extended higher education to previously excluded groups, yet maintained the separation between Blacks and whites.<sup>117</sup> Although the legislation prohibited the issuance of funds to any college that made a distinction based upon race or color in admissions policies, the act was consistent with *Plessy* as it permitted separate colleges for white and Black students, thereby allowing states to escape the clause barring racial discrimination and permitting states to avoid funding Blacks schools in a “just” or “equal” manner.<sup>118</sup> This escape clause ensured that the educational distinctions that defined the country along color lines remained in higher education because the same racist legislative bodies that continued to restrict and deny Blacks’ civil and political rights, freedom, and equality, were also charged with allotting “just” and “equal” funding to Black schools – which never happened.

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rebellions, and slave owners devised strict legal codes preventing African Americans from becoming literate.”); *see also* WOODSON, *supra* note 64, at 1-2 (“Yet, believing that slaves could not be enlightened without developing in them a longing for liberty, not a few masters maintained that the more brutish the bondmen the more pliant [slaves] become for purposes of exploitation.”).

111. Lee & Keys, *supra* note 86, at 2.

112. WILLIAMS, *supra* note 60, at 87.

113. *Id.* at 89.

114. *Id.*

115. *Id.* at 120.

116. *Id.* at 153.; *see also* GEIGER, *supra* note 81, at 285 (noting that “many states merely attached ‘A&M’ units to universities” to create a land-grant college and receive funding under the Morrill Acts); *see also* WALKER, *supra* note 83, at 233.

117. WILLIAMS, *supra* note 60, at 155.

118. FINKELMAN, *supra* note 108, at 455.

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States preferred to open alternative, underfunded institutions for Black students rather than allow Blacks to enroll in white institutions. Those Black institutions later became known as HBCUs.<sup>119</sup>

Following the recommendation of Congressman Adam Clayton Powell Jr., the Higher Education Act of 1965 formally birthed the name, “Historically Black Colleges and Universities,” to refer to higher educational institutions established before 1964, principally to educate Blacks. This categorization provided a segue for a more formal relationship to develop between colleges and the Federal Government.<sup>120</sup> As a result, federal support for the colleges exceeded the states’ support.<sup>121</sup> However, it is understood that, “the public HBCUs were created by the southern state governments for three reasons: to get millions of dollars in federal funds for the development of white land-grant universities, to limit black education to vocational training, and to prevent blacks from attending white land-grant colleges.”<sup>122</sup> Black education and colleges were still not a priority, except to African Americans.

The public HBCUs, entitled to government funds, have never received their share of the funds. “Traditionally, in comparison with other colleges, [HBCUs] are poor in terms of financial resources, physical plant, and teaching facilities; they have faced opposition from the white power structure; and they have dealt with many students who are not adequately prepared for higher education.”<sup>123</sup> Ultimately, the Second Morrill Act was a key turning point in American education for both white and Black land-grant colleges.

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119. Agricultural College Act of 1890, 7 U.S.C. §§ 321-329 (1981); see HOFFMAN, *supra* note 72, at 2; see also Sarah Turner & John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans*, 63 J. ECON. HIST. 145, 151 (2002) (reporting that this act “specifically prohibited the distribution of federal funds to states that did not provide separate accommodation for blacks if the primary state institution denied admission to blacks.”); see DREWRY & DOERMANN, *supra* note 47, at 50.

120. WILLIAMS, *supra* note 60, at 155; GEIGER, *supra* note 81, at 285; Issa, *infra* note 195 (“Before the law was signed by President Johnson, the Chairman of the House Committee on Education, an African-American Harlem Congressman named Adam Clayton Powell made an amendment that defined HBCUs as “any historically black college or university that was established prior to 1964, whose principal mission WAS, AND IS, THE EDUCATION OF BLACK AMERICANS.”).

121. WILLIAMS, *supra* note 60, at 155; GEIGER, *supra* note 81, at 285.

122. ROEBUCK & MURTY, *supra* note 30, at 27; see also LEEDELL W. NEYLAND, *HISTORICALLY BLACK LAND GRANT INSTITUTIONS AND THE DEVELOPMENT OF AGRICULTURE AND HOME ECONOMICS 1890-1990*, at 9-10 (1990) (“Beginning primarily as teacher training institutions for blacks, they have evolved into outstanding land-grant colleges and universities which provide educational opportunities to students from across the nation and on the international scene without regards to race, color, creed, sex, or national origin.”).

123. ROEBUCK & MURTY, *supra* note 30, at 27; see also Lee & Keys, *supra* note 86, at 5.



Still, segregation led to chronic underfunding for Black higher education. Thus, private Black colleges, some of which were under white leadership and control,<sup>124</sup> educated the majority of Black students.

By 1915, there was a total of fifty-two students doing college level work, all located at two of the twenty-seven public institutions, whereas 2,595 students were engaged in such study at thirty-one private colleges. The focus on industrial education and the smaller number of college-level students in state-supported schools reflect an important difference between public and private institutions at the time. Private black colleges became in essence the sole providers for black Americans of higher education as we think of it today.<sup>125</sup>

Private schools were necessary because through taxation, Blacks in the South paid for schools for whites, but in effect whites were not contributing to schools for Blacks.<sup>126</sup> Government legislation has not resulted in providing “just” or “equal” funding between Black and white col-

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124. DREWRY & DOERMANN, *supra* note 47, at 81; *see* ROGERS, *supra* note 8, at 3, 4 (“[Black campus activists] fought at almost every historically black college and university for a black-dominated, oriented, and radical ‘Black University’ to replace what they theorized as the white-controlled, Eurocentric, bourgeoisie, accommodationist ‘Negro University.’ Their ultimate aim was to revolutionize higher education. . . . African Americans were also customarily excluded from many (usually private) HBCU professorial bodies and presidencies into the 1920s, and from boards of trustees into the 1960s.”); *see* EBONY, *supra* note 31, at 142 (“The black university movement marked a clear break with the basic idea promoted by Booker T. Washington that black students should be prepared to live in a world defined and controlled by whites, to play roles deemed acceptable and ‘constructive’ to white society.”); DU BOIS, *supra* note 1, at 694 (“Booker T. Washington became the leader of the Negro race and advised them to depend upon industrial education and work rather than politics. The better class of Southern Negroes stopped voting for a generation.”); ROEBUCK & MURTY, *supra* note 30, at 29 (“[When *Plessy* legalized segregation], [m]any public HBCUs remained controlled by whites who believed in black inferiority.”); MY LIFE AND AN ERA: THE AUTOBIOGRAPHY OF BUCK COLBERT FRANKLIN 113-14 (John Hope Franklin & John W. Franklin eds., 1997) (“Few philanthropists would think of endowing a Negro school without the advice of Mr. [Booker T.] Washington. Even the president of the United States would not make a federal appointment, especially in the South, without first talking it over with Mr. Washington. Powerful enemies within his own race and the open attacks in the press and public places did not disturb him in the least. For a long time, Booker T. Washington was the gateway through which Negro schools and businesses had to pass to get support and recognition from other races. Be it said to the everlasting credit of his leadership that he never failed to endorse and support Negro colleges that applied to the American Baptist Home Mission Society, the General Education Board, or the many Rockefeller foundations.”).

125. DREWRY & DOERMANN, *supra* note 47, at 50.

126. *See* ROEBUCK & MURTY, *supra* note 30, at 29; *see also* Richardson, *supra* note 2, at 374; *see also* Finkelman, *supra* note 70, at 391; *see also* JACKSON & NUNN *supra* note 19, at 105 (noting that equal access and distribution of state tax money for education “is something blacks never seem to obtain, although they are taxpayers.”).

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leges. The “separate but equal provisions” simply systematized racial discrimination in educational practice and policy.<sup>127</sup>

The Smith-Lever Act of 1914 was named for Senator Hoke Smith of Georgia and Representative Asbury F. Lever of South Carolina. The act was enacted to utilize, “federal, state, and local funds to establish a Cooperative Extension Service at state land grant colleges and universities that had been established under the Morrill Land-Grant Act of 1862,” but the act did not bring racial equality in education as the “Smith-Lever Act also allocated funds for a segregated and unequal Negro Extension Service at black colleges and universities,” whose agents answered to white administrators.<sup>128</sup>

Racism in American education was ubiquitous, consistent, and unyielding. Despite the consist inequity in education, both Morrill Acts helped colleges establish greater relationships with federal agencies. The first was with the Department of Agriculture and the second with the Department of Education (then a part of the Interior Department). However, by the 1890s, those colleges interacted more frequently with the Department of War.<sup>129</sup>

### *B. Post-World War II Federal Government Enactments*

#### 1. Servicemen’s Readjustment Act of 1944

Towards the end of World War II, President Franklin D. Roosevelt signed into law the Servicemen’s Readjustment Act of 1944 (G.I. Bill) because America anticipated an influx of soldiers returning home. “Much of the urgency [in enacting the bill] stemmed from a desire to avoid the missteps following World War I, when discharged Veterans got little more than a \$60 allowance and a train ticket home. . . . The return of millions of Veterans from World War II gave

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127. Cherisse Jones-Branch, “*An Uneasy Alliance*”: *Farm Women and the United States Department of Agriculture, 1913–1965*, 10 *FED. HIST.* 98, 100 (2018); see also, G. Thomas Sav, *Funding Historically Black Colleges and Universities: Progress toward Equality?*, 35 *J. ED. & FIN.* 295, 295 (2010) (“For decades, state funding of public historically black colleges and universities (HBCU) has been shown to be de facto discriminatory relative to the funding of their predominately white counterparts. Although the dual system has been legally dismantled, the disparate funding has remained in place in a number of ways. . . . It has long been more than suspect that in the public sector of higher education, [historically Black institutions] have been on a different and less generous financial footing in comparison to their predominately white counterparts.”).

128. Jones-Branch, *supra* note 127, at 100.

129. WILLIAMS, *supra* note 60, at 150, 188.

Congress a chance at redemption.”<sup>130</sup> The G.I. Bill provided veterans with tuition and housing assistance, among other incentives.<sup>131</sup> The Veterans Administration (VA) was established to administer the key provisions of the bill.<sup>132</sup> The bill was regarded as one of the Federal Government’s largest investments in higher education. However, this investment did not extend to Black ex-soldiers.<sup>133</sup>

Even though there was no overt language to exclude Black veterans, the G.I. Bill was “deliberately designed to accommodate Jim Crow.”<sup>134</sup> The programs of the bill were under the direction of white officials, thus, Black veterans seldom reaped the benefits.<sup>135</sup> Racism was no longer expressed so blatantly by law (*de jure*) but was now couched in practice and custom (*de facto*).<sup>136</sup>

Indeed, the G.I. Bill is credited with having created a solid white middle class while denying the same economic and educational advancements to Blacks.<sup>137</sup> The Federal Government subsidized preferences for whites and discriminated against Blacks.<sup>138</sup> In addition to the G.I. Bill, the Federal Government denied Blacks benefits from the National Labor Relations Act, the Social Security Act, and the Fair Labor Standards Act, all major legislative enactments of the New Deal Era. Despite the outstanding exploits of African Americans during

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130. *Education and Training*, U.S. DEP’T OF VETERANS AFF., <http://www.benefits.va.gov/gibill/history.asp> (last visited Nov. 18, 2020).

131. *Id.*; see also *Servicemen’s Readjustment Act (1944)*, OUR DOCUMENTS, <http://www.ourdocuments.gov/doc.php?flash=true&doc=76> (last visited Nov. 18, 2020) (recording that it “provided veterans of the Second World War funds for college education, unemployment insurance, and housing”).

132. See *Education and Training*, *supra* note 130.

133. See Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court’s Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 590 (2014).

134. *Id.* at 591-92 (noting that the bill’s drafting was due in large part to Congressman John Rankin of Mississippi, a racial demagogue, who ensured the bill’s design included racism).

135. See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 115 (2005); see also Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, 6 J. BLACKS HIGHER EDUC. 104, 107 (1994); *Education and Training*, *supra* note 130.

136. Cervantes et al., *supra* note 60, at 10 (“The GI Bill did not even the playing field for all soldiers. Although not discriminated against in the legislation, African-Americans faced a social climate that limited their higher education opportunities, as institutionalized racism in the South maintained a system of segregated colleges.”).

137. See Perea, *supra* note 133, at 590 (“While the Bill created a more middle-class society, it did so ‘almost exclusively for whites.’”).

138. *Id.* at 585.

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World War II, New Deal programs were segregated.<sup>139</sup> The VA quickly became a foe to the nearly one million World War II Black veterans as their applications for unemployment benefits, housing, and higher education were routinely denied.<sup>140</sup> “While white veterans prospered as they pursued higher education and purchased homes with their VA benefits, black veterans languished as they were frequently denied access to their benefits because of their race.”<sup>141</sup>

The effects of how the bill was administered still negatively reverberate in the Black community. The white community gained strong generational wealth from the bill, but the Black community did not. While some have concluded that the G.I. Bill was very beneficial to Black veterans *outside of South*, the reality does not bear witness.<sup>142</sup> “Although the G.I. Bill is often described in universal, celebratory tones as the ‘magic carpet to the middle class,’ this was only true for white veterans, their families, and their heirs.”<sup>143</sup> Whites continue to benefit from the government-sponsored racism perpetuated decades ago. They received a lead in housing, health care, education, and other benefits denied to Blacks who also served the country.<sup>144</sup> One story

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139. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion in the National Labor Relations Act*, 72 OHIO ST. L. J. 95, 104 (2011); see also FLYNN ET AL., *supra* note 14, at 23 (“But overall, the New Deal was a gateway to middle-class prosperity for whites that left many people of color behind.”); DARITY & MULLEN, *supra* note 3, at 247.

140. Herbold, *supra* note 135, at 105-06 (noting how the VA denied Black ex-servicemen claims for unemployment benefits, college and housing); see also C. Munsey, *But Not All Americans Benefited Equally*, AM. PSYCH. ASS’N (Nov. 2010) <https://www.apa.org/monitor/2010/11/gi-bill> (“For African-American service members, of whom almost one million served during World War II, one huge barrier to fully using the GI Bill’s college benefits was a lack of access to higher education.”).

141. Perea, *supra* note 133, at 592.

142. Turner & Bound, *supra* note 119, at 158 (“The availability of benefits to black veterans had a substantial and positive impact on the educational attainment of those likely to have access to colleges and universities outside the South. Unfortunately, for those more likely to be limited to the South in their collegiate choices, the G.I. Bill exacerbated rather than narrowed the economic and educational differences between blacks and whites.”).

143. Perea, *supra* note 133, at 585.

144. *Id.* (concluding “that many white Americans continue to benefit from the federal government’s racism of that era. Contrary to the beliefs of the nearly two thirds of whites who ‘do not believe that whites have benefitted from past and present discrimination against African-Americans,’ [citation omitted] this history makes crystal clear that whites as a group benefitted enormously from this race discrimination”); see also Erin Blakemore, *How the GI Bill’s Promise Was Denied to a Million Black WWII Veterans*, HIST. (June 21, 2019), <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits?fbclid=IWAR2U3j2tVqyozh4unXE1g8UFenbE-B3Cb1dZaeqSUztrvG-VimSgqHf9qBg> (“Though the bill helped white Americans prosper and accumulate wealth in the postwar years, it didn’t deliver on that promise for veterans of color. In fact, the wide disparity in the bill’s implementation ended up helping drive growing gaps in wealth, education and civil rights between white and black Americans.”).

that highlights the disparate treatment between Black and white veterans involves a Black family whose twins were drafted to serve in the military. The military discharged the twins and other Black troops a day before they would be eligible to receive veterans' benefits, whereas, their white counterparts, who served a day more, qualified for the benefits.<sup>145</sup>

Although the language of the bill was race-neutral, racial groups received different information regarding veterans' benefits. Black veterans also had different enrollment qualifications.<sup>146</sup> Black veterans were not given G.I. Bill benefits to attend trade or vocational schools in place of a traditional college, even though such funds were available to white veterans.<sup>147</sup> Black veterans, especially those living in the South, had fewer opportunities as fewer institutions accepted Black students.<sup>148</sup> Black veterans were further limited by degrees available to them, which directly impacted their post-educational employment prospects.<sup>149</sup>

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145. Obtained from the oral family history of John and Joseph Smith from Louisiana; see also Andrew Solender, *Trump's Plan Would End National Guard Deployments One Day Before Benefits Kick In* (May 19, 2020, 4:18 PM) FORBES, <https://www.forbes.com/sites/andrewsolender/2020/05/19/trumps-plan-would-end-national-guard-deployments-one-day-before-benefits-kick-in/#505bdd6518bb> (affirming that this practice of discharging American soldiers a day before they are eligible to receive federal benefits is not an unusual government practice); but see LOIS MARK STALVEY, *THE EDUCATION OF A WASP 3* (1970) (reporting on how the author's white husband, Ben, "had gone to college on the G.I. Bill after service in World War II and then worked his way up to an excellent job as advertising - promotion director of a large, Omaha-based corporation").

146. Turner & Bound, *supra* note 119, at 149 n.7 ("However, there is some evidence that black men in the south had a particularly difficult time gaining access to vocational and on-the-job training programs with G.I. benefits. Southern Veterans Administration centers employed few black counselors and were generally unforthcoming in providing services to black veterans.").

147. *Id.* at 171 ("Beyond collegiate attainment, non-collegiate vocational and technical training was a major component of the World War II G.I. Bill, with more veterans receiving training in these institutions than in colleges. Yet, available evidence does not suggest that this avenue was a substitute for collegiate participation among black men born in the South. Rather, black men in the South also had a particularly difficult time gaining access to vocational and on-the-job training programs with G.I. benefits.").

148. *Id.* at 153 ("Although the portability of aid under the G.I. Bill would have theoretically allowed southern blacks to attend schools in the North, the barriers to enrollment—including limited information about collegiate alternatives, the disruption of living far from home, and the potential persistence of discrimination at northern institutions—would likely have been significant."); see also Perea, *supra* note 133, at 593-94.

149. Turner & Bound, *supra* note 119, at 153 ("With very few of the historically black schools maintaining graduate or professional programs, they were ill-equipped to expand to meet the needs of returning veterans."); see also *FAMU Way*, *supra* note 3, at 15 ("Although FAMU had dormitories at the time, after World War II [1939-45] the school experienced a boost in enrollment and did not have enough housing to accommodate its student population, many of whom were soldiers attending school on the G.I. Bill.").

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The universities that accepted Blacks were ill-prepared to meet the demands of a quickly rising student population.<sup>150</sup> “The historically black colleges were more limited than white colleges in their ability to accommodate returning servicemen because institutional resources were scarcer and deficiencies in physical space were often more serious than at the white institutions.”<sup>151</sup> Limited resources, combined with states’ desire to maintain Jim Crow (segregation), enticed the Federal Government to allocate resources to the Black educational institutions. The Veterans’ Educational Facilities Program accommodated Black veterans who white schools refused to admit.<sup>152</sup> HBCUs used the newly allocated resources to enhance their facilities.<sup>153</sup>

### 2. National Defense in Education Act of 1958

Four years before Congress passed the National Defense Education Act (NDEA) in 1958, *Brown* ended *de jure* segregation.<sup>154</sup> The NDEA aimed to provide educational opportunities in mathematics, sciences, and foreign languages, which were subjects deemed to be essential to national security.<sup>155</sup> The NDEA also included a provision to implement low-interest loans and debt cancellation.

Despite *Brown*, there still appeared to be minimal assistance for Blacks because of discriminatory policies.<sup>156</sup> The barriers were troubling because HBCU graduates demonstrated extreme capabilities in math, science, and computer skills needed to advance America, even in space.<sup>157</sup> For instance, Dr. Frederick S. Humphries earned a Ph.D. in physical chemistry from the University of Pittsburgh after obtaining a B.S. in chemistry in 1957 from FAMU. As its eighth president from

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150. Turner & Bound, *supra* note 119, at 153.

151. *Id.*

152. See James A. Atkins, *Negro Educational Institutions and Veterans’ Educational Facilities Program*, 17 J. NEGRO EDUC. 141, 144-46 (1948).

153. See Turner & Bound, *supra* note 119, at 153 n.22 (“One source suggests that the surplus war buildings and materials increased the physical plant of these institutions by 25 percent. Yet, it is less clear that this expansion in capacity benefited the black veterans returning in the mid-1940s.”).

154. Pub. L. No. 85-864 (1958).

155. See Thomas C. Hunt, *National Defense Education Act*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/National-Defense-Education-Act> (last visited Nov. 18, 2020).

156. 347 U.S. 483 (1954).

157. See, e.g., *Katherine Johnson National Visionary*, NAT’L VISIONARY LEADERSHIP PROJECT, <http://www.visionaryproject.org/johnsonkatherine/#4> (last visited Nov. 18, 2020) (describing the contributions made by HBCU graduate Katherine Johnson, who began at Langley Research Center with the National Advisory Committee for Aeronautics (NACA), the agency that preceded NASA in 1953 and who was adept at calculating the trajectories for the space capsules).

1985-2001, he made significant inroads to increase the number of Black students earning undergraduate degrees in the sciences and engineering and entering graduate programs.<sup>158</sup> FAMU was named “College of the Year” in 1997 by Time magazine and the Princeton Review College Guide.<sup>159</sup> But, because of the limited financial support Black colleges received, the NDEA provided some resources to undergird their science, math and language training programs.<sup>160</sup>

### 3. The Higher Education Facilities Act of 1963

The Higher Education Facilities Act of 1963 (“HEFA”) authorized a five-year program of federal loans and grants to construct or reinforce public and private higher education facilities.<sup>161</sup> Also, HEFA allowed colleges, including HBCUs, to expand due to the low-cost federal construction loans.<sup>162</sup> HEFA was the first bill unrelated to national defense signed into law after the World War II.<sup>163</sup> In his speech at the signing, President Lyndon B. Johnson stated: “So this new law is the most significant education bill passed by the Congress in the history of the Republic. In fact, this session of the Congress will go down in history as the Education Congress of 1963.”<sup>164</sup>

### 4. Higher Education Act of 1965

In furtherance of his promise to build a “Great Society,” President Johnson signed into law the Higher Education Act of 1965 (HEA), which came nearly a century after the Morrill Act of 1862. “Representative Adam Clayton Powell . . . became the committee’s first African-American chairman in the 87th Congress (1961–1963) . . . [and] oversaw the passage of the Higher Education Act of 1965, which authorized

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158. *Frederick Humphries*, HIST. MAKERS, <https://www.thehistorymakers.org/biography/frederick-humphries-41> (last visited Nov. 18, 2020).

159. *Id.*

160. See DREWRY & DOERMANN, *supra* note 47, at 116.

161. Higher Education Facilities Act of 1963, Pub. L. No. 88-204, 77 Stat. 363, 363-64 (1963).

162. DREWRY & DOERMANN, *supra* note 47, at 5.

163. CQ ALMANAC (1970), <https://library.cqpress.com/cqalmanac/document.php?id=CQal70-1294765> (last visited Nov. 18, 2020).

164. Gerhard Peters & John T. Woolley, *Lyndon B. Johnson, Remarks Upon Signing the Higher Education Facilities Act*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-upon-signing-the-higher-education-facilities-act> (last visited Nov. 18, 2020).

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\$840 million dollars for enhanced teacher training and student programs in under-served segments of the education system.”<sup>165</sup>

The legislation was a paradigm shift as to how the Federal Government previously viewed education. It moved from a luxury to a necessity but still not so much for Blacks. There remained pervasive financial discrimination in education.<sup>166</sup> In addition to the HEA, some of the other progressive acts during the building of the “Great Society” were the Civil Rights Act of 1964,<sup>167</sup> the Elementary and Secondary Education Act Amendments of 1966,<sup>168</sup> the Voting Rights Act of 1965,<sup>169</sup> and Medicare and Medicaid legislation.<sup>170</sup> Many of these were enacted as a result of the Civil Rights Movement, including the Civil Rights Act of 1964, which President Johnson signed as Dr. Martin Luther King observed while standing behind President Johnson, and which provided authorization for the commissioner of education to arrange support for institutions of higher education. The assistance offered purported to aid instructional staff in remedying issues caused by desegregation.<sup>171</sup>

The HEA was the first comprehensive program of federal funding to aid students and universities. The purpose of the act was to “strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.”<sup>172</sup> It also intended to assist with all of America’s educational institutions, but Title III of the HEA – Strengthening Developing Institutions – sought to achieve a specific goal. It was

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165. *The Committee on Education and Labor*, HIST., ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1851-1900/The-Committee-on-Education-and-Labor/> (last visited Nov. 18, 2020); Higher Education Act, Pub. L. No. 89-329, 79 Stat. 1219, 1270 (1965).

166. *See Higher Education Act*, THE ASS’N OF CTRS. FOR THE STUDY OF CONGRESS, <http://acsc.lib.udel.edu/exhibits/show/legislation/higher-education-act> (last visited Nov. 18, 2020); *see also* Twinette L. Johnson, *Going Back to the Drawing Board: Re-Entrenching the Higher Education Act to Restore its Historical Policy of Access*, 45 *TOL. L. REV.* 545, 548 (2014) (stating the HEA was clearly meant for the disadvantaged American, by allowing more and more individuals to attend college, campuses across America greatly improved in the services available and the quality of education in which they could provide).

167. Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964).

168. Elementary and Secondary Education Amendments, Pub. L. No. 89-750, 80 Stat. 1191(1966).

169. Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (1965).

170. Social Security Amendments of 1965, Pub. L. No. 89-97, 9 Stat. 286 (1965); *see also* BALL, *supra* note 50, at 404 (“The early 1960s, high years of black assertion, brought the Civil Rights Act of 1964 and the Voting Rights Act of 1965, but the racial caste system remained.”).

171. Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 247 (1964).

172. Higher Education Act, Pub. L. No. 89-329, 79 Stat. 1219, 1270 (1965).



designed to be a “direct intercession favoring black colleges and universities and as a federal commitment to the survival and enhancement of HBCUs.”<sup>173</sup>

Desegregation increased under the HEA.<sup>174</sup> “By the 1970s, previously nonblack institutions were not only enrolling black students but also beginning to hire black faculty, staff, and administrators.”<sup>175</sup> Still, Blacks did not graduate in numbers comparable to whites.<sup>176</sup>

The earliest grants awarded under Title III went to HBCUs (considered “developing institutions”). In 1986, Title III was amended to define more narrowly “developing institutions,” as HBCUs, Hispanic-serving institutions, and tribal-controlled colleges.<sup>177</sup> Nonetheless, by the mid-1990s, more than half of the grant funds went to PWIs, which spuriously claimed to be “developing institutions.”<sup>178</sup> Funding continued to be inequitably distributed along the lines of race – Blacks received less; whites received more.

The HEA and earlier reauthorizations of the act appeared on target to meet its goals and increase the access for higher education for students, which was measured by the significant increase in student enrollment.<sup>179</sup> However, the costs associated with the American troops in the Vietnam War weighed heavily on the United States economy. Consequently, President Johnson’s ambitious platform of a “Great Society” had to take a back seat. The delay seemed to be the beginning of the balancing act of social reform versus fiscal thriftiness.<sup>180</sup> Thus, the later reauthorizations of the HEA evidenced this shift of fiscal conservatism.<sup>181</sup>

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173. See ROEBUCK & MURTY, *supra* note 30, at 39-40.

174. Peter Wallenstein, Desegregation in Higher Education in Virginia, ENCYC. VA. (Apr. 7, 2011), [https://www.encyclopediavirginia.org/Desegregation\\_in\\_Higher\\_Education](https://www.encyclopediavirginia.org/Desegregation_in_Higher_Education).

175. *Id.*

176. CHARLES T. CLOTFELTER ET AL., ECONOMIC CHALLENGES IN HIGHER EDUCATION: PATTERNS OF ENROLLMENT AND COMPLETION, 35 (1991), available at <http://www.nber.org/chapters/c6079.pdf> (“In 1960, the rates for whites and blacks were 11.8 and 4.8 percent, respectively; in 1988, the corresponding rates were 23.5 and 12.3 percent.”).

177. DREWRY & DOERMANN, *supra* note 47, at 256.

178. *Id.*

179. See Johnson, *supra* note 166, at 565 (“In the earlier days of the Acts [*sic*] existence, there seemed to be an urgency of purpose behind the Act – to provide opportunities now for those who had been previously denied opportunities and who would be willing to take advantage of them.”).

180. See Paul Pierson, *The New Politics of the Welfare State*, 48 WORLD POL. 143, 156, 177 (1996).

181. See Johnson, *supra* note 166, at 565 (“The later initiatives were thus not in the spirit of the 1965 HEA or its later reauthorizations, which sought to equalize educational opportunities by reaching down and pulling up, with a financial hand, those who would not otherwise be able to afford a college education.”).

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The same held true for Title III of the HEA. Educational institutions serving racial minorities consistently failed to receive the same government resources to thrive as their white counterparts. Later reauthorizations of the HEA unequivocally acknowledged in congressional findings that Title III fell short of its goals. In Title III – Institutional Aid – of the HEA, Congress found that there were a significant number of HBCUs serving minority students. Nonetheless, HBCUs faced problems of surviving due to issues relating to “the management and fiscal operations of certain institutions of higher education, as well as to an inability to engage in long-range planning, recruitment activities, and development activities, including endowment building.”<sup>182</sup> Considering the insufficient budgets of HBCUs, this was not surprising.

Congress further found that “the Title III program prior to 1985 did not always meet *the* specific development needs of historically black colleges and universities and other institutions with large concentrations of minority, low-income students; [and] the solution of the problems of these institutions would enable them to become viable, fiscally stable and independent, thriving institutions of higher education.”<sup>183</sup> Most significantly, Congress’ specific findings determined that state and federal governments discriminated in providing resources to the land- grant schools created under the Morrill Acts.<sup>184</sup> The allocation of federal resources and opportunities was unequally distributed to public and private Black colleges. Congress found that:

States and the Federal Government have discriminated in the allocation of land and financial resources to support Black public institutions under the Morrill Act of 1862 [7 U.S.C. 301 et seq.] and its progeny, and against public and private Black colleges and universities in the award of Federal grants and contracts, and the distribution of Federal resources under this chapter and other Federal programs which benefit institutions of higher education.<sup>185</sup>

Thus, by its own findings, Congress determined a need to fund these Black institutions properly to remedy the past discrimination that left the HBCUs in their current condition.<sup>186</sup>

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182. Higher Education Act of 1965, § 301, 20 U.S.C. § 1051 (1998).

183. *Id.*

184. Higher Education Act of 1965, § 321, 20 U.S.C. § 1060 (1986).

185. 20 U.S.C. § 1060; *see also* Sav, *supra* note 127.

186. 20 U.S.C. § 1060 (“[T]he current state of Black colleges and universities is partly attributable to the discriminatory action of the States and the Federal Government and this discriminatory action requires the remedy of enhancement of Black postsecondary institutions to ensure their continuation and participation in fulfilling the Federal mission of equality of educational opportunity.”).

Congress identified the remedy as: “financial assistance to establish or strengthen the physical plants, financial management, academic resources, and endowments of the historically black colleges and universities [is an appropriate method] to enhance these institutions and facilitate a decrease in reliance on governmental financial support and to encourage reliance on endowments and private sources.”<sup>187</sup> Notwithstanding the findings and acknowledgment of the funding remedies, the monetary allotments to achieve this goal of HBCUs becoming “viable, fiscally stable and independent, thriving institutions of higher education” never came.<sup>188</sup> Funding and other resources remained inequitable as compared to PWIs, which continued to receive more than HBCUs. Nonetheless, it is remarkable what HBCUs accomplished and continue to achieve in higher education amid the continued flagrant fiscal discrimination based on race. The chronic underfunding is consistent with the country’s historical lack of interest in educating African Americans and perpetuates the false narrative of Black inferiority because underfunding causes HBCUs to be vulnerable; consequently, emergency situations, such as natural disasters, pandemics, and other situations impact HBCUs much greater than PWIs.<sup>189</sup>

Congress has reauthorized the HEA eight times since its enactment in 1965 - 1968, 1972, 1976, 1980, 1986, 1992, 1998, and 2008. According to the Higher Education Opportunity Act of 2008, the last reauthorization was in 2008.<sup>190</sup> In 2007, United States Senator Ba-

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187. *Id.* (“[F]inancial assistance to establish or strengthen the physical plants, financial management, academic resources, and endowments of the historically Black colleges and universities are appropriate methods to enhance these institutions and facilitate a decrease in reliance on governmental financial support and to encourage reliance on endowments and private sources.”).

188. Higher Education Act, 20 U.S.C. § 1051(a)(5) (1998).

189. See Marjorie Valbrun, *Black Colleges Feeling Collective Pain*, INSIDE HIGHER ED (Mar. 18, 2020), <https://www.insidehighered.com/news/2020/03/18/black-colleges-lobby-stimulus-funds>; see also Richardson, *supra* note 2, at 365; see also Sam Fulwood III, *When White Folks Catch a Cold, Black Folks Get Pneumonia*, CTR. AM. PROGRESS (Jan. 28, 2015, 10:24 AM), <https://www.americanprogress.org/issues/race/news/2015/01/28/105551/when-whites-folks-catch-a-cold-black-folks-get-pneumonia/> (discussing the Black adage that hardships for whites are much more detrimental to Blacks); see also Stephen M. Gavazzi, *Why Congress Should Give an Additional \$1.5 Billion to Historically Black Colleges and Universities* FORBES (Apr. 24, 2020, 8:03 AM), <https://www.forbes.com/sites/stephengavazzi/2020/04/24/why-congress-should-give-15-billion-to-historically-black-colleges-and-universities/#464833a6e2ec> (positing that Congress should give an additional \$1.5 billion to HBCUs in the current COVID-19 pandemic because people of color are being most negatively impacted by the virus and HBCUs have historically been underfunded since their founding).

190. See Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008); Teri L. Hinds, *Will the Higher Education Act Be Reauthorized in 2019?*, NASPA (Oct. 24, 2019), <https://www.naspa.org/blog/will-the-higher-education-act-be-reauthorized-in-2019>

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rack Obama sponsored the Predominately Black Institution Act of 2007, which amended the HEA to provide grant programs to expand access for low-income Black students to higher education and strengthen predominately Black institutions, mainly public two-year colleges in urban areas. Then, in 2010, as president of the United States, President Obama amended the HEA by enacting Part II of the Health Care Education and Reconciliation Act of 2010, which is entitled the Student Aid and Fiscal Responsibility Act.<sup>191</sup>

### C. *Recent Federal Enactments*

#### 1. Health Care and Education Reconciliation Act of 2010, Title II (known as the Student Aid and Fiscal Responsibility Act)

On March 30, 2010, seven days after the Patient Protection and Affordable Care Act (Affordable Care Act or ACA – fondly dubbed “Obamacare”) became law, President Obama signed an ACA amendment, the Health Care and Education Reconciliation Act of 2010 (HCERA), which dealt with health care and education.<sup>192</sup> The educational component was tucked inside Title II of HCERA as a rider, entitled the Student Aid and Fiscal Responsibility Act (SAFRA).<sup>193</sup> Its text largely resembled the Student Aid and Fiscal Responsibility Act of 2009.<sup>194</sup> Part of the savings that would result from the significant student loan reform was allocated to fund ACA. SAFRA also provided greater access to higher education for all Americans, including maintaining important initiatives for HBCUs.

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(“The most recent version of the HEA passed in 2008, and while the bill was due for reauthorization in 2013, Congress has yet to pass a new version. Committees in both chambers were working on comprehensive HEA bills for consideration this year, though there have been some disagreements across party lines. The polarization between Democrats and Republicans has contributed to the delay in HEA reauthorization, and the failure of a reauthorization so far has significant effects on higher education institutions and students.”).

191. Health Care & Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029, 1071 (2010).

192. *Smith, Part II, supra* note 68, at 3.

193. Health Care & Education Reconciliation Act, *supra* note 191.

194. Mark Kantrowitz, Overview of Student Aid Changes in the Recent Reconciliation Legislation, MARKETPLACE OF IDEAS, COUNCIL ON L. HIGHER EDUC. (Apr. 14, 2010), <http://www.studentaidpolicy.com/fa/20100330hcera.html>; see THEDA SKOCPOL & LAWRENCE R. JACOBS, REACHING FOR THE NEW DEAL: AMBITIOUS GOVERNANCE, ECONOMIC MELTDOWN, AND POLARIZED POLITICS IN OBAMA’S FIRST TWO YEARS 125-26 (2011) (discussing President Obama’s negotiations to advance the education bill in HCERA and concluding that “[n]ext to health care reform, the student aid legislation stands as one of the most significant accomplishments of Obama’s presidency to date”).

The initial presidential focus on HBCUs was largely due to Dr. Mary Frances Berry, a Howard University graduate, appointed by President Jimmy Carter as his assistant secretary of education from 1977 to 1980. Under her leadership, the United States Department of Education conducted a study in 1977. This study revealed the significance that HBCUs play in the education of African Americans, and fifteen years after the enactment of HEA, she convinced President Jimmy Carter to sign Executive Order 12232, which created a federal program designed, “to overcome the effects of discriminatory treatment and to strengthen and expand the capacity of historically Black colleges and universities to provide quality education.”<sup>195</sup> Ultimately, that resulted in the formation of the White House Initiative on Historically Black Colleges and Universities (WHIHBCU) under President Ronald Reagan in 1981. Each president after President Carter – Ronald Reagan, George Bush, William Clinton, George W. Bush – signed another executive order to maintain President Carter’s initiative.<sup>196</sup> The initiative serves two functions: (1) to provide national and global opportunities for HBCUs, and (2) to provide educational and economic opportunities for HBCU students.<sup>197</sup>

President Obama signed Executive Order 13532, *White House Initiative on Historically Black Colleges and Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities*, with an intent to breathe new life into the WHIHBCU program from what had become somewhat of a trail of lifeless executive orders.<sup>198</sup> According to a former executive director of the

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195. Exec. Order No. 12232, 45 Fed. Reg. 53437 (Aug. 8, 1980); see also Jahi Issa, *The Ethnic Cleansing of Historically Black Colleges and Universities in the Age of Obama, Part 1 of 3*, BLACK AGENDA REP. (Sept. 7, 2011), <https://www.blackagendareport.com/content/ethnic-cleansing-historically-black-colleges-universities-age-obama-part-1-3#sdendnote6anc> (“Although not widely known, Dr. Mary Frances Berry, when she was Assistant Secretary for Education, was responsible for convincing President Jimmy Carter to sign an executive order that brought about the White House Initiative on Historical Black Colleges and Universities. This was done as a result of the Civil Rights Movement and Black Power Struggle during the 1960-70s.”).

196. *White House Initiative on Historically Black Colleges and Universities, About Us*, U.S. DEP’T OF EDUC., <http://sites.ed.gov/whhbcu/about-us/> (last visited Nov. 18, 2020); see JACKSON & NUNN, *supra* note 19, at 79 (noting in 1981 “President Ronald Reagan calls for a 25 percent cut in federal funds to education. The cutbacks decrease funding to poor students and are detrimental to the future of many black colleges.”).

197. *White House Initiative on Historically Black Colleges and Universities*, U.S. DEP’T OF EDUC., <https://sites.ed.gov/whhbcu/> (last visited Nov. 18, 2020).

198. Exec. Order No. 13532, 75 Fed. Reg. 9749 (Mar. 3, 2010); see Marybeth Gasman, *Director John S. Wilson Explains the Purpose of the White House Initiative on HBCUs*, HUFF POST (Sept. 14, 2011, 7:43 PM), [http://www.huffingtonpost.com/marybeth-gasman/john-s-wilson-hbcus\\_b\\_961361.html](http://www.huffingtonpost.com/marybeth-gasman/john-s-wilson-hbcus_b_961361.html) (reporting that director John Wilson thought that “[t]he Initiative was marginalized within the federal government for years” because “it wasn’t

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initiative, John Wilson, President Obama's goal was to change the narrative from *whether* HBCUs are needed to *how* HBCUs can best contribute to the success of higher education in America.<sup>199</sup>

President Obama's approach focused on HBCU funding and student college completion.<sup>200</sup> The initiative's leadership celebrated that one of its major successes was the increase in "the core support [rendered] to HBCUs as measured by Title III [of the HEA] and other institutional support, Pell Grants, and direct funding from various federal agencies."<sup>201</sup> Although the leadership of the initiative stated that "[w]e are bringing ideas and funding to the HBCUs so that money is not an issue," funding remained an issue.<sup>202</sup> The Obama administration's goal was to equip HBCUs with the infrastructure required to remain viable. The executive order placed an emphasis on the need for institutional structural support and provided an opportunity for more structure and guidance for HBCUs to set a foundation for future success.

According to John B. King Jr., who served as President Obama's Secretary of Education:

Over the course of 7 years, the Obama Administration has invested more than \$4 billion in HBCUs, because these institutions are vital engines of economic growth and proven ladders of advancement for generations of African Americans. Under the Obama Administration, 1 million more African-American and Latino students have

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integrated in a way that took advantage of all the resources available to HBCUs"; however, he emphasized that his department "work[ed] hard to connect the Initiative to the resources inside the federal government to maximize the benefits to HBCUs" resulting in "better staff relations, better federal agency relationships, and . . . full advantage of the White House's support"; *but see* HOFFMAN, *supra* note 72, at 2 (asserting that President George Bush demonstrated his belief in the importance of HBCUs by establishing a Presidential Advisory Board to advise the president and the secretary of education on strategies to strengthen these valued institutions in Executive Order 12677, and President Clinton signified his belief in the importance of HBCUs when he signed Executive Order 12876 to provide senior executive agency oversight).

199. See Gasman, *supra* note 198.

200. See *75 Students from 62 Historically Black Colleges and Universities (HBCUs) Named 2014 HBCU All-Stars*, U.S. DEP'T OF EDUC. (Feb. 10, 2014), <https://www.ed.gov/news/press-releases/75-students-62-historically-black-colleges-and-universities-hbcus-named-2014-hbcu-all-stars>.

201. Gasman, *supra* note 198; see also *Education Fact Sheet*, U.S. DEP'T OF EDUC., <https://sites.ed.gov/whiaiane/files/2012/04/President-Obamas-education-agenda.pdf> (last visited Nov. 18, 2020) ("The HCERA provided a \$2.55 billion investment to renew, reform and expand programs at the nation's Historically Black Colleges and Universities and Minority Serving Institutions (MSIs). This assistance will help a greater proportion of African American, Latino, and other minority students obtain a higher education. Our nation's MSIs account for nearly one-third of all degree granting institutions and enroll nearly 60 percent of the 4.7 million minority undergraduates in our nation today.").

202. Gasman, *supra* note 198.

enrolled in college. What's more, black and Hispanic students earned more than 270,000 more undergraduate degrees in 2013-2014 than in 2008-2009. . . . [T]he Department has worked to make new opportunities available to HBCUs. Federal funding to HBCUs has grown each year since 2009. Through the Higher Education Act, HBCUs received a \$17 million funding increase this year—the largest increase for the federal Strengthening HBCUs program in six years. And President Obama's FY 2017 budget seeks to maintain and strengthen these opportunities for HBCUs to build their capacity. The FY 2017 budget proposes \$85 million in mandatory funding to HBCUs, an increase of \$5 million from FY 2016, plus an additional \$244.7 million in discretionary funds for Title III. The Administration has also fought for and won a historic commitment to fully fund Pell Grants and expand student aid for millions of low-income students. Pell Grant funding for HBCU students increased significantly between 2007 and 2014, growing from \$523 million to \$824 million. This year, President Obama announced a plan to make sure that Pell Grants are fully funded, including inflationary adjustments, and used strategically by students to reduce time and cost for receiving a terminal degree. The President's 2017 budget also proposes a \$30 million HBCU and Minority Serving Institution Innovation for Completion Fund, to help students from low-income backgrounds overcome challenges and persist through graduation day.<sup>203</sup>

President Obama's commitment was critical, especially with Pell Grants, the cornerstone of Black higher education. Pell Grants, however, were one of the targets of his successor.<sup>204</sup>

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203. *Fact Sheet: Obama Administration Investments in Historically Black Colleges and Universities*, U.S. DEP'T OF EDUC. (Oct. 24, 2016), <https://www.ed.gov/news/press-releases/fact-sheet-obama-administration-investments-historically-black-colleges-and-universities> (last visited Nov. 18, 2020) (detailing President Obama's support for HBCUs); see also Gasman, *supra* note 198; see also Evan Gerstmann, *Trump's Proposed Cut to Pell Grant Funds Is 'Lunacy'*, FORBES (May 19, 2019, 12:43 PM) <https://www.forbes.com/sites/evangerstmann/2019/05/19/trumps-proposed-cut-to-pell-grant-funds-is-lunacy/#42dca44c3224> (discussing how the Obama administration's student loan policies resulted in funding surpluses for the Pell Grant program); see also *Pell Grants: The Cornerstone of African-American Higher Education*, J. BLACKS HIGHER EDUC., [http://www.jbhe.com/features/65\\_pellgrants.html](http://www.jbhe.com/features/65_pellgrants.html) (last visited Nov. 18, 2020); but see Libby A. Nelson, *Cracking Down on PLUS Loans*, INSIDE HIGHER ED (Oct. 12, 2012), <https://www.insidehighered.com/news/2012/10/12/standards-tightening-federal-plus-loans> (reporting on the Obama administration's changes to the Parent PLUS loan program that negatively impacted enrollment at private HBCUs); see also Michael A. Fletcher, *Obama's Roller-Coaster Relationship with HBCUs*, THE UNDEFEATED (Oct. 10, 2016), <https://theundefeated.com/features/obamas-roller-coaster-relationship-with-hbcus/> ("Since taking office, his administration has increased the size of the maximum Pell Grant, broadened loan repayment programs, and lowered federal loan costs for students."); see also Fortier-Bensen, *supra* note 370 (discussing a partnership to provide free education for prisoners between Claflin University and US Department of Education's Second Chance Pell Experimental Site, which started under President Obama).

204. See Gerstmann, *supra* note 203; see Fletcher, *supra* note 203; see also Michael Stratford, *Congress Clinches Deal to Restore Pell Grants for Prisoners 26 Years after Ban*,

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## 2. Fostering Undergraduate Talent by Unlocking Resources for Education Act (2019-2020)

In an unusual twist of political events that were still unfolding over a year after Donald Trump became president of the United States, support for HBCUs appeared to change overnight. On February 28, 2017, President Trump signed Executive Order 13779 that was intended to be a signal of support for HBCUs.<sup>205</sup> Thurgood Marshall College Fund president, Johnny Taylor Jr., sought \$25 billion dollars from the Federal Government to fund infrastructure projects for all the HBCUs to ameliorate years of underfunding.<sup>206</sup> Within months of signing the executive order, President Trump questioned the constitutionality of federal funding for construction projects at HBCUs, saying that the funds benefit “the schools on the basis of race,” but he, as well as his Secretary of Education, Betsy DeVos, failed to understand that PWIs’ historical denial of admission to Blacks resulted in the need to create and maintain HBCUs.<sup>207</sup> A few months later, in Sep-

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POLITICO (Dec. 20, 2020, 4:30 PM), <https://www.politico.com/news/2020/12/20/congress-pell-grant-prisoners-449364> (“Lawmakers agreed to simplify the application for federal financial aid and forgive more than \$1 billion in loans for historically Black colleges and universities. . . . House and Senate leaders also agreed to boost the maximum Pell grant award by \$150 to \$6,495 for the 2021-2022 school year. The federal government spends roughly \$30 billion a year on the program for low-income students. The cost of providing Pell grants to incarcerated students, which is allowed through a small pilot program, costs a fraction of that amount but has long been a political lightning rod.”).

205. Exec. Order No. 13779, 82 Fed. Reg. 12499 (2017), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-white-house-initiative-promote-excellence-innovation-historically-black-colleges-universities/>; see also Zack Friedman, *What Trump’s Student Loan Forgiveness Plan Means for You*, FORBES (Mar. 27, 2019, 8:32 AM), <https://www.forbes.com/sites/zackfriedman/2019/03/27/what-trumps-latest-proposals-mean-for-your-student-loans/#746716ae508f> (outlining Trump’s proposals for reforming the Higher Education Act); see also *Quick Facts on the PROSPER Act*, COUNCIL OPPORTUNITY IN EDUC. (Jan. 10, 2018), [http://www.coenet.org/files/bulletin\\_board-Quick\\_Facts\\_on\\_the\\_PROSPER\\_Act\\_011018.pdf](http://www.coenet.org/files/bulletin_board-Quick_Facts_on_the_PROSPER_Act_011018.pdf) (“The PROSPER Act is a bill to reauthorize the Higher Education Act of 1965. The bill was introduced in the House Committee on Education & the Workforce, which is chaired by Representative Virginia Foxx of North Carolina.”); see also H.R. 4508 (“*The PROSPER Act*”) *Harms Students While Enriching Corporations*, H.R. Rep. No. 4508, 116 Cong. (2018), [https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/Prosper%20Act%204.18.18\\_FINAL.pdf](https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/Prosper%20Act%204.18.18_FINAL.pdf).

206. Errin Haines, *Trump Signs Executive Order on Black Colleges*, PBS (Feb. 28, 2017, 6:51 PM), <https://www.pbs.org/newshour/nation/trump-signs-executive-order-black-colleges>.

207. See Claudio Sanchez, *Trump, and Most Black College Presidents, Absent From Annual Meeting*, NPR (Sept. 19, 2017, 5:41 PM), <https://www.npr.org/sections/ed/2017/09/19/552121259/trump-and-most-black-college-presidents-absent-from-annual-meeting>; see also, Maya Rhodan, *The Secretary of Education Equated Historically Black Colleges to “School Choice”*, TIME (Feb. 28, 2017, 11:21 AM), <https://time.com/4685456/betsy-devos-black-colleges-school-choice/>; see also, Zeba Blay, *Wendy Williams Finally Said Sorry for Her Tone-Deaf HBCU Comments*, HUFFPOST (July 14, 2016, 3:29 PM), <https://www.huffpost.com/en->



tember, President Trump selected Johnathan M. Holifield, a former NFL player turned business consultant, to lead an advisory board to work with HBCUs. There was some public backlash over Holifield's appointment because some stakeholders believed he lacked educational experience with HBCUs, and President Trump was not perceived as honoring his word of support for HBCUs.<sup>208</sup>

After the United States Supreme Court decided *Trinity Lutheran Church of Columbia, Inc. v. Comer* in 2017, President Trump proclaimed that "he planned to lift restrictions on capital financing funds for faith-based, historically Black colleges and seminaries," but what that entailed remained unclear.<sup>209</sup> Also, President Trump signed a new farm bill that had strong bipartisan support, the Agriculture Improvement Act of 2018, that, among other things, would potentially help some HBCUs, which had not received the proper funds required

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try/wendy-williams-finally-said-sorry-for-her-tone-deaf-hbcu-comments\_n\_5787dd2de4b0867123e04b8f (reporting talk show host Wendy Williams apologizing for her uneducated comments on HBCUs); see, e.g., WALTER WHITE, A MAN CALLED WHITE 143-44, 162 (1948) (reporting that Lloyd Gaines, a Negro and graduate of Lincoln University (Missouri), brought a lawsuit filed by the NAACP to attend law school at the all-white University of Missouri because Lincoln, an HBCU, did not have one and the U.S. Supreme Court ruled for Gaines in 1938, but the University of Missouri stubbornly refused and while waiting, Gaines mysteriously disappeared and was never located); see also Missouri ex rel. Gaines v. Canada 305 U.S. 337 (1938).

208. See Chandelis R. Duster, *Ex-NFL Player Named Head of Black College Initiative*, NBC NEWS (Sept. 18, 2017, 5:57 PM), <https://www.nbcnews.com/news/nbcblk/white-house-names-ex-nfl-player-head-hbcu-initiative-n802191>; see also Joseph Hong & Jamaal Abdul-Alim, *New Executive Director of White House Initiative on HBCUs Receives Mixed Critiques*, DIVERSE EDUC. (Sept. 17, 2017), <https://diverseeducation.com/article/101577/> (quoting Dr. Marybeth Gasman, "I don't think the Trump administration understands or cares about HBCUs. . . . I don't understand the rationale for appointing Johnathan Holifield. He seems to be committed to his work and vision, but that has little to do with HBCUs.").

209. Andrew Kreighbaum, *Trump Asserts New Win for Religious HBCUs*, INSIDE HIGHER ED (Sept. 11, 2019), <https://www.insidehighered.com/news/2019/09/11/trump-administration-acts-funding-restrictions-religious-hbcus> ("It wasn't exactly clear after the speech which, if any, colleges could receive new federal funding. Dena Sher, assistant legislative director for public policy at Americans United for Separation of Church and State, said in a statement that the president's comments didn't fully explain the Department of Justice opinion. The DOJ said government money can be used to assist HBCUs in funding capital projects that will be used for secular purposes — while affirming that taxpayer money cannot be used to build college chapels and other facilities that have a religious purpose," she said. "The government cannot establish or build houses of worship — that would be a fundamental violation of the Constitution."); see also *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2015 (2017); Paul Fain, *Did Trump Save HBCUs?*, INSIDE HIGHER ED (Jan. 23, 2020), <https://www.insidehighered.com/news/2020/01/23/trumps-claim-about-saving-hbcus-was-false-his-administration-has-largely-backed> (reporting on Trump's "useful hyperbole" of how he helped HBCUs and that "the Trump administration appears to have overbilled other purported achievements with HBCUs").

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by the Morrill Act of 1890, but the bill has the potential to simultaneously destroy the food supply in the neediest areas.<sup>210</sup>

Following strong advocacy by United States Senators Kamala Harris and Doug Jones, HBCUs were to receive an increase in federal funding as compared to the level of funding received in 2017.<sup>211</sup> Other congressional efforts were made to support HBCUs.<sup>212</sup> However, President Trump's support for HBCUs remained uncertain for much of his term.<sup>213</sup> What remained to be done regarding Pell Grants was still tenuous, and the Trump administration continued to seek ways to slash the funding for the Department of Education.

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210. *What's in the 2018 Farm Bill? The Good, The Bad and The Offal*. . . , FARM AID (Dec. 20, 2018), <https://www.farmaid.org/issues/farm-policy/whats-in-the-2018-farm-bill-the-good-the-bad-and-the-offal/> (“The 2018 Farm Bill widens loopholes for wealthy mega-farms to exploit commodity and crop insurance subsidies, allowing nieces, nephews, and cousins who may have never worked on the farm to receive taxpayer-funded subsidies. This will continue to drive consolidation in the farm sector, allowing the biggest farms to keep growing and gobble up smaller and mid-sized operations that are so critical to the wellbeing of rural communities.”); see also Dan Nosowitz, *Less-Heralded Parts of the 2018 Farm Bill Will Significantly Help Black Americans*, MOD. FARMER (Jan. 4, 2019), <https://modernfarmer.com/2019/01/less-heralded-parts-of-the-2018-farm-bill-will-significantly-help-black-americans/> (“There was a provision prior to this bill that specifically limited the funding of the schools created by the 1890 Morrill Act. That provision only allowed those 1890-founded schools to carry over 20 percent of their annual funding past the calendar year. And those 1890 schools were . . . HBCUs, including Tuskegee University, Lincoln University, Virginia State University, and Florida A&M University. A study in 2013 found that the states weren't even properly matching the federal funds for these HBCUs the way they were for other, whiter land-grant universities. The new Farm Bill slashes that frankly insane provision, and also now requires that the states report to Congress exactly how much money is going to both land-grant HBCUs and other land-grant schools”); see Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018) (“Farm Bill”); see also *New Farm Bill Provides a Windfall for Land-Grant HBCUs*, J. BLACKS HIGHER EDUC. (Dec. 28, 2018) (noting the benefits of Congress' Farm Bill for HBCUs); see also Lee & Keys, *supra* note 86, at 2 (highlighting from a study “the [racial] disparities that exist in the matching of federal formula funding to our nation's 1890 land-grant universities and to provide policy recommendations to fix this systemic disparity in the nation's land-grant system”).

211. Walter Hudson, *HBCUs to Get Funding Hike in Federal Budget*, DIVERSE EDUC. (Mar. 22, 2018), <https://diverseeducation.com/article/112734/> (“Historically Black colleges and universities will receive a 14-percent increase in federal funding in the U.S. Senate's omnibus bill following strong advocacy by U.S. Senators Kamala Harris and Doug Jones.”).

212. See, e.g., Comm. on Homeland Sec., *H.R. 1494, the “Historically Black Colleges and Universities (HBCUs) Homeland Security Partnership Act,”* <https://homeland.house.gov/imo/media/doc/HBCU%20116th%20Fact%20Sheet.pdf> (last visited Nov. 18, 2020) (outlining a bill introduced by Rep. Bennie Thompson (D-Miss.), chairman of the House Homeland Security Committee).

213. See Erin Dooley, *Trump Vowed to Prioritize Black Schools, but ‘Jury’s Still Out,’ Critics Say*, ABC NEWS (Mar. 4, 2018, 5:57 AM), <https://abcnews.go.com/Politics/trump-vowed-prioritize-black-schools-jurys-critics/story?id=53452981>; see also UNCF, *Public Policy Priorities for the Trump Administration and the 115th Congress* 8, [https://www.uncf.org/wp-content/uploads/PDFs/2017\\_UNCF\\_PublicPolicyPriorities\\_for\\_the\\_115th\\_Congress\\_-\\_Final\\_7.12.17.pdf](https://www.uncf.org/wp-content/uploads/PDFs/2017_UNCF_PublicPolicyPriorities_for_the_115th_Congress_-_Final_7.12.17.pdf).

Considering President Trump's paradoxical record with African Americans by stoking racism and enacting policies that harm Blacks, coupled with his touted disdain for President Obama and his administration, it was prodigious that President Trump signed the FUTURE (Fostering Undergraduate Talent by Unlocking Resources for Education) Act in 2019 to permanently fund HBCUs in the areas of science, technology, engineering, and mathematics (STEM).<sup>214</sup> The FUTURE

214. FUTURE Act of 2019, H.R. 5363, 116th Cong. (2019); see Khalilah Long, *A Once-in-a-Generation Outcome: the FUTURE Act Signed by President, Becomes Law*, UNCF (Dec. 19, 2019), <https://uncf.org/news/a-once-in-a-generation-outcome-the-future-act-signed-by-president-becomes-law> (“This landmark legislation permanently extends mandatory funding for Historically Black Colleges and Universities (HBCUs), Tribal Colleges and Universities (TCUs), Hispanic-Serving Institutions (HSIs) and other Minority-Serving Institutions (MSIs) to increase their science, technology, engineering, and mathematics (STEM) outcomes, among other things. The law also eases the burdens on low-income, first generation college students by simplifying the process for applying for student financial aid.”); see Press Release, *Statement from the President*, WHITE HOUSE (Dec. 19, 2019), <https://www.whitehouse.gov/briefings-statements/statement-from-the-president-12/> (“I have signed groundbreaking legislation to support America’s Historically Black Colleges and Universities (HBCUs) and to simplify the Federal financial aid application for millions of American families. President Obama and the Obama Administration were unable to get this done. I got it done.”); see also Sara Weissman, *Despite Passage of FUTURE Act, HBCUs Still “Woefully Underfunded,” Says UNCF President*, DIVERSE EDUC. (Mar. 3, 2020), <https://diverseeducation.com/article/168787/> (reporting segments of UNCF president’s speech: (1) President Trump wants “bragging rights” for outdoing other presidents in helping HBCUs; (2) Trump’s enacting the FUTURE Act, forgiving the loans of HBCUs affected by Hurricane Katrina and offering capital finance loan deferment for thirteen HBCUs were laudable efforts, but “the FUTURE Act wasn’t included in Trump’s 2021 federal budget and Trump’s efforts to remove programs like federal work study would hurt HBCU students if successful”; and (3) so much more needs to be done for HBCUs “to eradicate decades of disparate treatment of HBCUs,” such as “a \$1 billion grant for HBCU infrastructure, doubling the Pell grant and tripling Title III funding, the funds guaranteed in the FUTURE Act” and making this “the year inequitable treatment of HBCUs is named and shamed”); BOB WOODWARD, RAGE 367 (2020) (reporting on Woodward’s conversations with Trump about Black America and Trump’s signing “a bill continuing \$255 million in annual funding to HBCUs and other schools serving primarily minority students.”); see also Daniel Dale, *Fact Check: No, African Americans Are Not Happy with Trump*, CNN (July 30, 2019, 4:53 PM), <https://www.cnn.com/2019/07/30/politics/fact-check-african-americans-trump-approval/index.html>; see also GLAUDE, *infra* note 362, at 194 (“Every day Trump insists on the belief that white people matter more than others in this country.”); see also Alex Isenstadt & Maya King, *Trump Shocks Black Voters – by Trying to Get Their Votes*, POLITICO (Dec. 13, 2019, 5:04 AM), <https://www.politico.com/news/2019/12/13/trump-reelection-black-voters-082853> (“The Trump ads tout low unemployment among African Americans, Trump’s support for historically black colleges and universities, and the White House-backed criminal reform legislation that passed earlier this year.”); see also AFR. AM. REGISTRY, *supra* note 102 (stating that Tuskegee University was established because two white politicians wanted the Black vote); see also Ross Rosenfeld, *There’s No Longer Any Doubt: Trump Is a White Supremacist*, N.Y. DAILY NEWS (July 1, 2020, 3:00 PM), <https://www.nydailynews.com/opinion/ny-oped-trump-white-supremacist-20200701-5zumhjygabghgfkcydm7xyhbm6a-story.html> (“Rather than try to bring the nation together, address our racist history, and protect the rights of minorities, Trump has spent the preceding weeks, and the last few days in particular, trying to protect the legacies of racists and bigots.”); see also Jennifer Bendery, *Trump*

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Act provides critical financial support for HBCUs and opens doors for low-income students to receive financial aid. Despite the promised changes, equitable and reparative funding for HBCUs remains a need.

### II. HISTORICALLY BLACK COLLEGES AND UNIVERSITIES MATTER

“Most progress toward improving conditions for African Americans between the wars occurred within black institutions, not in American society, and the HBCUs were instrumental in these developments.”<sup>215</sup> HBCUs were called “universities” or “colleges” since they were founded, but in reality, in their early years, many HBCUs focused on providing elementary and secondary schooling for students with no prior education.<sup>216</sup> Because of the prohibition against Blacks learning to read or write, “[i]n the years immediately following the Civil War, nine out of ten newly freed slaves were illiterate. The first curriculum for Blacks thus focused on learning to read and write.”<sup>217</sup> Blacks who

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*Keeps Picking Unqualified People to Be Lifetime Judges. Republicans Don't Care*, HUFFPOST (Nov. 1, 2019, 5:32 PM), [https://www.huffpost.com/entry/trump-lifetime-judges-not-qualified-senate-republicans\\_n\\_5dbc7351e4b0ffdb0f674af](https://www.huffpost.com/entry/trump-lifetime-judges-not-qualified-senate-republicans_n_5dbc7351e4b0ffdb0f674af) (reporting on the numerous unqualified candidates who Trump nominated for lifetime federal judicial appointments); see, e.g., Blake Dodge, *Trump Judicial Nominees Are 85 Percent White and 76 Percent Men, Report Shows*, NEWSWEEK (Jan. 16, 2020, 6:11 PM), <https://www.newsweek.com/trump-judicial-nominees-mostly-white-men-1482638> (reporting that Trump's judicial nominees are 85% white and 76% men); see also Erica Orden, *In Tell-All Book, Michael Cohen Says Trump Hired a 'Faux-Obama' Before White House Run*, CNN (Sept. 6, 2020, 12:52 PM), <https://www.cnn.com/2020/09/05/politics/michael-cohen-book-trump-white-house/index.html?s=09> (“Trump’s disdain for Obama was so extreme that he took his fixation a step further, according to Cohen: Trump hired a ‘Faux-Bama’ to participate in a video in which Trump ‘ritualistically belittled the first black president and then fired him.’”); but see Jarrett Carter Sr., *Trump Executive Order Could Make HBCUs Ineligible for Nearly All Federal Funding*, HBCU DIGEST (Oct. 10, 2020), <https://www.hbcudigest.com/p/trump-executive-order-could-make> (“Last month, President Donald Trump issued an executive order prohibiting federal funds from being awarded to agencies or contractors promoting racial or sexual stereotyping. The objective is to reverse what the White House calls a growing culture of blaming white people for much of America’s social tension and systemic racism in industry and governance. . . . Trump is doubling down on equaling the playing field for white supremacists, their empathizers, and those who make money off their value systems. His game now forces federal agency heads into the unenviable position of auditing organizations for how well they can avoid telling and addressing truths about the prevalence of racism in all areas of American life.”); Ray, *supra* note 23 (“Trump also touts low unemployment for blacks. However, unemployment reversed and decreased most dramatically under President Obama.”).

215. GEIGER, *supra* note 81, at 475.

216. See Office for Civil Rights, *supra* note 19; but see *FAMU Way*, *supra* note 3 (noting FAMU’s rigorous curriculum in the 1880s).

217. JACKSON & NUNN, *supra* note 19, at 25; see also GERBNER, *infra* note 312, at 11 (“Enslaved and free Christians also read and interpreted scripture in new ways that challenged white Christian culture. Their eagerness to learn how to read and write were

could obtain an education did, so that they could then return to teach other Blacks what was learned. Eventually, the number of educated Blacks grew significantly. In the early 1900s, HBCUs offered post-secondary courses, but remarkably, within 50 years, HBCU enrollment swelled.

By 1953, more-than 32,000 students were enrolled in such well known private black institutions as Fisk University, Hampton Institute, Howard University, Meharry Medical College, Morehouse College, Spelman College, and Tuskegee Institute, as well as a host of smaller black colleges located in southern and border states. In the same year, over 43,000 students were enrolled in public black colleges. HBCUs enrolled 3,200 students in graduate programs. These private and public institutions mutually served the important mission of providing education for teachers, ministers, lawyers, and doctors for the black population in a racially segregated society.<sup>218</sup>

The significance of HBCUs in American society is undeniable and irrefutable.

#### A. *Compassionate Culture*

Even with the challenges HBCUs have faced due to the racially segregated American education system, HBCUs are a model for this system because they: (1) foster familial learning environments, (2) promote diversity and inclusion, and (3) invest more time, support, and compassion into students.<sup>219</sup> The HBCU experience provides “a culture of caring – a culture that prepares students to contribute to their com-

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particularly troublesome for both planters and missionaries, who realized that literacy gave black Christians a powerful tool to advocate for themselves and their communities.”).

218. JACKSON & NUNN, *supra* note 19, at 25; *see also* 1865 *The End of the Civil War*, FISK UNIV., <https://www.fisk.edu/about/history/> (recording that Fisk University convened its first classes in 1866 in former Union Army barracks and “first students ranged in age from seven to seventy, but shared common experiences of slavery and poverty — and an extraordinary thirst for learning”).

219. Marybeth Gasman & Thai-Huy Nguyen, *Historically Black Colleges and Universities as Leaders in STEM*, PHILA. PA: PENN CTR. FOR MINORITY SERVING INST., 1, 21-24 (2016); *see also* GALLUP, INC., *supra* note 26, at 22 (“HBCUs appear to have found a model that fits their mission – one that both addresses the need for students to feel supported and provides them with experiential learning opportunities.”); ROEBUCK & MURTY, *supra* note 30, at 204 (concluding that HBCUs: 1) “carry out the central mission of educating black youth.” 2) “provide unique student-teacher relationships and teaching methodology,” and 3) offer a rich archival source for black scholarship” to “become centers for black cultural studies,” and that these things “could be profitably adopted by other colleges and universities”); *see* Sekou Biddle, *The Journey to a Successful HBCU Experience Begins Now*, UNCF (Mar. 27, 2019), <https://unconf.org/the-latest/the-journey-to-a-successful-hbcu-experience-begins-now> (“Most HBCU alums would agree that their college experience was probably the best time of their lives.”).

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munities, a culture that builds confidence and that gives them the essential skills they need to cultivate a career. That is a culture that is good for everyone and can help bridge the academic achievement gap that exists in America today.”<sup>220</sup> This culture of caring extends to all races and ethnicities.

A recent North Carolina A&T State University (A&T) graduate chose the school, one of seventeen HBCUs that offer pre-veterinary and related science programs, because it is an HBCU and because of its animal science program.<sup>221</sup> She said:

I loved attending my university because I was surrounded by people of the same color, culture, and interests similar to myself. . . I developed many close friends while at A&T, and we have all pushed each other beyond our limits. We stuck together like a family, and when one of us would fall, we kept encouraging each other to get back up and keep going. I wouldn't change my experience at an HBCU for the world. I learned a lot about myself and people. It is rewarding to see seven of my classmates and myself going to veterinary school this fall.<sup>222</sup>

Her experience and response to the compassionate community culture is typical of HBCU alumni. The graduate revealed that A&T has its “own research farm unit three minutes from our campus and a laboratory animal research facility within our department building.”<sup>223</sup>

HBCUs are extremely successful because the congenial learning environments allow students to feel more comfortable and less alienated than at PWIs because HBCU students are not racially ostracized, and thus, are able to concentrate on their studies and enjoy emotional support from faculty.<sup>224</sup> HBCU faculty naturally reciprocate

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220. *Historically Black Colleges and Universities: The History of HBCUs and Why They're Still Important Today*, AFFORDABLE COLLS. ONLINE (Nov. 5, 2020), <https://www.affordablecollegesonline.org/college-resource-center/hbcu-history-and-modern-importance/> (quoting Elwood L. Robinson, Chancellor of Winston-Salem State University).

221. Kaitlyn Mattson, *An Untapped Pipeline for Veterinary Schools*, AM. VETERINARIAN MED. ASS'N (July 10, 2019), <https://www.avma.org/News/JAVMANews/Pages/190801c.aspx> (noting that Tuskegee University is the only HBCU with a veterinary college).

222. *Id.*

223. *Id.*

224. See ROEBUCK & MURTY, *supra* note 30, at 202-03 (reporting findings on the necessity of HBCUs for Black students); see also Homer R. Brown & Christine Sacco-Bene, *Path to Success: Shared Wisdom of How HBCU Institutional Agents Support African American Men Matriculate*, 9 J. AFR. AM. MALES EDUC., 23, 24-25 (2018) (discussing that African American[s] reported feelings of invisibility and hostility on PWI campuses); Casey Quinlan, *5 Things That Make It Hard to Be A Black Student at a Mostly White College*, THINK PROGRESS (Jan. 25, 2016, 1:00 PM), <https://archive.thinkprogress.org/5-things-that-make-it-hard-to-be-a-black-student-at-a-mostly-white-college-33ef44abe034/> (reporting on several studies and concluding: “[T]here’s an ample amount of research showing why black college students have to fight for recognition and respect on college campuses?—?particularly over-

the welcoming experiences they received at HBCUs, rather than the typical hostile experiences faculty faced while attending PWIs as students. Both experiences drive HBCU faculty to commit to their students' successes. In turn, students desire to meet faculty expectations from teachers who express a genuine interest in their success. Black students often feel that they have all their lives to be a minority in America. HBCUs allow them at least four years of being in the majority – to be in a “safe space,” a haven from racial hostility. A Spelman College graduate said:

I wanted an undergraduate experience that was supportive, and I wanted to become part of a legacy. I wanted to also go to an institution that was challenging. . . My college advisor was a white woman who did not understand the value of HBCUs. She only pushed the University of California system on me. She noticed that I had stellar grades but didn't understand that it was just as difficult to earn a way into Spelman and Xavier as it was to earn a way into UCLA. Having gone to stellar private schools where I was one of many black children in the class, I was not ready to be the only minority in my classroom. I did not want to learn in spaces where I would be subject to microaggressions daily. . . I knew that racism was everywhere and that going to a school like UC Berkley would afford me many opportunities, but I did not want to deal with covert racism daily.<sup>225</sup>

HBCUs allow Black students to learn in harmonic environments, unlike the hostility or isolation they often experience at PWIs. As a former HBCU president stated, “At [PWIs], Black people are ignorant until they prove that they're smart. At an HBCU, Black people are smart until they prove that they're ignorant.”<sup>226</sup>

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whelmingly white ones?—?which makes it clear why students are saying they've finally had enough of being treated as the 'other' at their own institutions of higher education. [1] Black students in higher education settings have to contend with assumptions about their competence and their interests from both their teachers and their fellow students. . . . [2] One of the greatest challenges of being a black college student at a predominantly white college is the pressure to represent your entire race positively by succeeding at everything. . . . [3] Thanks to a dearth of professors of color at many universities, black college students and other students of color say their point of view isn't represented when, for example, Western culture is considered the default standard by which all literature, architecture, film, and art is judged. . . . [4] There is already distrust between safety officers and black college students, who are often profiled by police officers off campus, and there has been a record of safety officers unnecessarily criminalizing small infractions or stepping outside of their authority when they approach black college students. . . . [5] Among all of these problems with campus climate for black students, the lack of administration response to racist incidents has been the most mobilizing for protesters.”)

225. *HBCUs and Why They're Still Important Today*, *supra* note 220.

226. Robinson, *supra* note 29 (quoting Dr. Julianne Malveaux, former Bennett College president).

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HBCUs have served as the model of diversity and inclusion from their inception – indeed HBCUs pioneered the model. One remarkable example is Hampton University. It educated Blacks and other underrepresented people. Founded in 1868 with monies from the American Missionary Association, Hampton Normal and Agricultural Institute had a clear declared purpose:

[T]o train selected Negro youth who should go out and teach and lead their people first by example, by getting land and homes; to give them not a dollar that they could earn for themselves; to teach respect for labor, to replace stupid drudgery with skilled hands, and in this way to build up an industrial system for the sake not only of self-support and intelligent labor, but also for the sake of character.<sup>227</sup>

Booker T. Washington, a former enslaved person and 1875 graduate of Hampton, modeled its mission. In 1878, Hampton University admitted seventy American Indians, former prisoners of Fort Sill, after the Red River War, and began a Native American education program that lasted more than forty years.<sup>228</sup> In 1879, Washington returned to his alma mater to help educate American Indians; in 1881, he helped found Tuskegee Normal and Industrial Institute in Alabama, now called Tuskegee University and became its first president.<sup>229</sup> Tuskegee produces 70 percent of Black veterinarians in the United States.<sup>230</sup>

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227. *History*, HAMPTON UNIV., <http://www.hamptonu.edu/about/history.cfm> (last visited Nov. 18, 2020); see also *History of American Women*, WOMEN HIST. BLOG, <https://www.womenhistoryblog.com/2014/11/mary-peake.html> (last visited Nov. 18, 2020) (recognizing a little-known fact that some consider Hampton University as being founded in 1861 by Mary Peake, a Black teacher who had been secretly teaching enslaved and free Blacks since she was 16 and who started a school for the children of former enslaved persons during the summer of 1861, under the shade of a huge oak tree. This oak became known as the Emancipation Oak because in 1863, the Virginia Peninsula's Black community gathered under the oak to hear the first Southern reading of President Abraham Lincoln's Emancipation Proclamation, and this outdoor classroom provided the foundation of what would become Hampton University); DU BOIS, *supra* note 1, at 642 ("Mrs. Peake was a mulatto, whose father was an Englishman. She wanted to help her race, and she had gone among the slaves during slavery to teach them to read and write. . . . Her school was not only the first one at Hampton but the first of the kind in the South.").

228. *History*, *supra* note 227.

229. *Id.*; see also *Booker T. Washington*, *supra* note 102; AFR. AM. REGISTRY, *supra* note 102.

230. Ameera Steward, *How Tuskegee University Educates 70% of African-American Veterinarians in the U.S.*, ALA. NEWS CENT. (Apr. 1, 2019), <https://www.alabamane.wscenter.com/2019/04/01/tuskegee-university-educates-70-african-american-veterinarians-u-s/>; see R. SCOTT BAKER, PARADOXES OF DESEGREGATION: AFRICAN AMERICAN STRUGGLES FOR EDUCATIONAL EQUITY IN CHARLESTON, SOUTH CAROLINA, 1926-1972 79 (2006) (reporting that in 1944, Tuskegee created the only veterinary school that admitted Blacks in the South).



*B. Academic and Professional Success*

While remaining viable for over 150 years, HBCUs have remarkable histories in opening the doors to educate Blacks and other races. HBCUs must continue to be leaders in education because the system of social and political inequality built in slavery never ceases. The schools continue to be havens from racial hostility and environments that promote personal and spiritual growth, knowledge, and career opportunities because the stigma of being identified by color never ends.<sup>231</sup>

As a result of the educational opportunities denied generations of Blacks since slavery, even today there remain so many “first-generation” students in high school, undergraduate and graduate schools.<sup>232</sup> HBCUs “serve a significant proportion of first-generation students and those who require financial assistance to afford college.”<sup>233</sup> HBCUs are successful in educating students PWIs decline to educate. HBCUs disproportionately enroll low-income, first-generation, and academically underprepared college students – precisely the students that the country most needs to obtain college degrees, and HBCUs traditionally have provided an affordable education to millions of students of color, graduating an outsized portion of America’s African American professionals.<sup>234</sup>

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231. FINKELMAN, *supra* note 13, at 12; *see also* ALEXANDER, *supra* note 19, at 197 (“Racial stigma is produced by defining negatively what it means to be black. The stigma of race was once the shame of the slave; then it was the shame of the second-class citizen; today the stigma of race is the shame of the criminal.”).

232. Hoffman, *supra* note 28, at 104 (“Twenty percent of all first-professional degrees earned by Blacks were also earned at HBCUs.”).

233. Krystal L. Williams & BreAnna L. Davis, *Public and Private Investments and Divestments in Historically Black Colleges and Universities*, ACE 8 (Jan. 2019), <https://www.acenet.edu/Documents/Public-and-Private-Investments-and-Divestments-in-HBCUs.pdf>; *see also* *About HBCUs*, *supra* note 17 (noting that 52% are first generation college students).

234. *About HBCUs*, *supra* note 17; *see also* Jennifer M. Johnson & Brian L. McGowan, *Untold Stories: The Gendered Experiences of High Achieving African American Male Alumni of Historically Black Colleges and Universities*, 8 J. AFR. AM. MALES IN EDUC. 23, 39 (2017) (“This study illustrates how HBCUs can serve as supportive environments for high achieving Black males. This analysis suggests that intentional programmatic interventions aside, the HBCU environment, consisting of the physical campus environment, the faculty, staff, and student population, serve as spaces where the identity of African American males is affirmed and they are able to actualize their potential. Families and students should consider these findings when making college choices. While there may be different resources available to students who attend PWIs, high achievers would do well to understand the potential benefits of attending HBCUs where issues around race, racism, and stereotypes are minimized.”).

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## 1. Medicine

Because of racism, the world of medicine suffers from a lack of diversity within the field.<sup>235</sup> HBCUs, which graduate the majority of Black doctors, have consistently worked to eliminate the disparity. However, the disproportionate allocation of funds for Black colleges, coupled with racism, led to the closing of five of the seven medical schools for African Americans around 1910.<sup>236</sup> While Howard University and Meharry Medical College continue to serve as HBCU medical schools, this has not solved the problem of producing minority physicians.<sup>237</sup> In fact, “[g]raduate and professional HBCUs hold the top three spots for medical schools that produce the highest number of Black medical school graduates.”<sup>238</sup> Notably, difficulties that African Americans face with medical careers involve a lack of mentorship, lack of a firm high school foundation in science, and a lack of support in “academic environments and institutional structures.”<sup>239</sup> Despite the challenges, HBCUs at the undergraduate level have committed to eliminate those hurdles and have to a large extent.

An example is Xavier University of Louisiana in New Orleans. Xavier, founded by Mother Katharine Drexel, “a former Philadelphia

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235. See Romano, *supra* note 10 at 261-63; see also *Black History Month*, *infra* note 236.

236. See Todd Savitt, *Abraham Flexner and the Black Medical Schools*, 98 J. NAT'L MED. ASS'N 1415, 1419 (2006) (describing the racism involved in the Flexner report that closed HBCU medical schools); see also *Smith, Part I supra* note 68, at 246; *Black History Month: A Medical Perspective: Education*, DUKE UNIV., <https://guides.mclibrary.duke.edu/blackhistorymonth/education> (last updated Nov. 10, 2020) (“Medical schools were closed to Blacks in the South and to a lesser degree in the North. Because of the color line in medicine, the first African-American physicians received their medical degrees abroad. A few older medical schools in the East admitted some blacks; namely, Harvard, Yale, and Pennsylvania. In the Midwest, Indiana, Northwestern, and Michigan accepted some African-American medical students. . . . Seven medical schools for blacks were established between 1868 and 1904. In 1895, there were 385 African-American doctors, only 7 percent from white medical schools. In 1905, there were 1,465 African-American doctors, only 14.5 percent from white medical schools. Almost 2,400 physicians were graduated from Howard and Meharry medical schools from 1890 to the end of WWI.”).

237. Marybeth Gasman et al., *HBCUs and the Production of Doctors*, 4 AIMS PUB. HEALTH 579, 580-89 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6111265/> (“It would not be until 1966, shortly after the Civil Rights Act, that African Americans were admitted into all U.S. medical schools. Prior to that time, Howard and Meharry medical schools were solely responsible for the production of Black doctors.”); see also Nina Lakhani, *Black Babies More Likely to Survive When Cared for by Black Doctors – US Study*, THE GUARDIAN (Aug. 17, 2020, 4:47 PM), <https://www.theguardian.com/world/2020/aug/17/black-babies-survival-black-doctors-study> (“When cared for by white doctors, black babies are about three times more likely to die in the hospital than white newborns.”); see generally Romano, *supra* note 10.

238. Gasman & Nguyen, *supra* note 219, at 9.

239. See Marybeth Gasman et al., *supra* note 237, at 581.

socialite who founded the Sisters of the Blessed Sacrament and devoted her life to the education of African Americans and Native Americans,” is the only HBCU associated with the Roman Catholic Church and is known for its remarkable production of doctors.<sup>240</sup> Xavier, which flourished under the leadership of President Norman C. Francis, produces more Black students who graduate from medical school than any other university in the United States, and its College of Pharmacy is a top producer of Black pharmacists.<sup>241</sup> Xavier continues to boast, like other HBCUs, that “its doors have, and still are, open to all races and creeds.”<sup>242</sup>

## 2. Education

Throughout the country, there is a significant disparity between the racial diversity of students and teachers. “Less than 20 percent of [public school] teachers are minorities nationwide, compared with more than half of students.”<sup>243</sup> HBCUs produce over 50 percent of America’s Black teachers.<sup>244</sup> Since the establishment of HBCUs, education has been emphasized in the curriculum, which forced HBCUs to focus on liberal areas that have a fundamental strength in education.<sup>245</sup> For all the obvious reasons mentioned in this article, Black students need Black teachers, but white students do as well. Studies show that Black students achieve more when taught by Black teachers rather than white teachers as white teachers often have low expectations of Black students and muffle student achievement through

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240. *Xavier University of Louisiana: The Full Story*, XAVIER UNIV., <https://www.xula.edu/history> (last visited Nov. 18, 2020).

241. *Id.*; see also Gemma Greene, *Xavier University: The Perfect Prescription for Black Doctors*, BLACK DOCTOR.ORG (Sept. 14, 2015), <https://blackdoctor.org/xavier-university-more-black-doctors/> (“Xavier’s campus boasts around 3,000 students and consistently produces more black students who apply to and then graduate from medical school than any other institution in the country. More than big state schools like Michigan or Florida. More than elite ivy league schools like Harvard and Yale. Xavier is also first in the nation in graduating black students with bachelor’s degrees in biology and physics. It is among the top four institutions graduating black pharmacists. It is third in the nation in black graduates who go on to earn doctorates in science and engineering.”).

242. *Xavier University of Louisiana: The Full Story*, *supra* note 240.

243. Laura Fay, *What’s the Racial Breakdown of America’s Public School Teachers*, THE 74 (Aug. 14, 2018), <https://www.the74million.org/article/whats-the-racial-breakdown-of-americas-public-school-teachers/>.

244. See Leslie Fenwick, *Teacher Preparation Innovation and Historically Black Colleges and Universities (HBCUs)*, U. MICH. TEACHING WORKS 6 (Jan. 2016) (unpublished manuscript), [http://www.teachingworks.org/images/files/TeachingWorks\\_Fenwick.pdf](http://www.teachingworks.org/images/files/TeachingWorks_Fenwick.pdf); see also *About HBCUs*, *supra* note 17.

245. See JACKSON ST. UNIV., <http://www.jsums.edu/education/> (last visited Nov. 18, 2020).

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racism.<sup>246</sup> But white students and Black students deserve diverse instructors – as a part of undoing racism.<sup>247</sup>

Tennessee State University (TSU) located in Nashville, Tennessee, is recognized as the top producer of African American educators among HBCUs.<sup>248</sup> TSU's method for HBCU student success in education consists of: (1) developing innovative teaching skills, and (2) encouraging empathy in the classroom.<sup>249</sup> The Department of Teaching and Learning at TSU acknowledges that individual students have different learning styles and cultural backgrounds. Skilled teachers must be able to identify and accommodate the “educational needs” of students.<sup>250</sup> Additionally, it is imperative for teachers to “demonstrate their values through their treatment of others” because teachers shape our future leaders.<sup>251</sup>

### 3. Science, Technology, Engineering & Mathematics (STEM)

HBCUs “play an outsized role” in producing Black graduates in STEM.<sup>252</sup> Black students represent the lowest percentage of students earning degrees in STEM majors.<sup>253</sup> Because of chronic underfunding, HBCUs lack “adequate libraries and scientific and research equipment and capabilities,” which placed a serious handicap on many Black stu-

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246. Perry, *supra* note 37; see generally Andre Perry, “Discovering” *Black Teachers at HBCUs*, THE HECHINGER REP. (May 16, 2017), <https://hechingerreport.org/discovering-black-teachers-hbcus/> (“Black educators have higher expectations of students of color, which reduces the chances of them unnecessarily suspending and expelling black and brown children. Black and brown teachers don’t parachute into a culture they don’t know, so they are able to connect with the students they’re teaching. And black and brown teachers give students role models who affirm their culture.”).

247. Perry, *supra* note 37; see also Cheryn & Halpin, *supra* note 38; see also Mehera Bonner, *Michelle Obama Says “It’s Up to All of Us” to Root Out Racism: “It Starts with Self-Examination,”* COSMOPOLITAN (May 30, 2020), <https://www.cosmopolitan.com/entertainment/celebs/a32719361/michelle-obama-statement-george-floyd/> (“Race and racism is a reality that so many of us grow up learning to just deal with. But if we ever hope to move past it, it can’t just be on people of color to deal with it.”).

248. Dr. Larry Walker, *Top 10 HBCUs That Produce Teachers*, HBCU LIFESTYLE (July 2, 2015), <https://hbculifestyle.com/top-10-hbcu-teachers/>.

249. *Teaching & Learning*, TENN. ST. UNIV., <http://www.tnstate.edu/teaching/> (last visited Nov. 18, 2020).

250. *Id.*

251. *Id.*

252. Gregory N. Price, *Historically Black Colleges Give Graduates a Wage Boost*, CONVERSATION (Sept. 11, 2019), <http://theconversation.com/historically-black-colleges-give-graduates-a-wage-boost-121810>; see also Gasman, *supra* note 219.

253. Brian Joseph, *STEM and Blacks*, DIVERSE EDUC. (Nov. 12, 2018), <https://diverseeducation.com/article/131698/>.

dents.<sup>254</sup> This handicap has negatively impacted Blacks entering STEM. Predominantly Black high schools also fail to offer classes that prepare Black students to attain STEM degrees in college.<sup>255</sup> However, HBCUs are picking up the slack and increasing the number of Black students studying and working in STEM fields.<sup>256</sup> “HBCUs remain critical in the effort to minimize racial disparities in STEM education achievement.”<sup>257</sup> HBCUs are responsible for educating nearly half of the Black women with STEM degrees and twenty-five percent of all undergraduate STEM degrees earned by Black students.<sup>258</sup> HBCUs also produce significant numbers of undergraduates with STEM degrees who pursue graduate degrees in STEM.<sup>259</sup> Research reveals that HBCUs have the most success in preparing Black

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254. Office for Civil Rights, *supra* note 19.

255. *The Impact of HBCUs on Diversity in STEM Fields*, UNCF, <https://www.uncf.org/the-latest/the-impact-of-hbcus-on-diversity-in-stem-fields> (last visited Nov. 18, 2020) (“Many African American high school students lack access to the educational resources needed to prepare them to earn STEM degrees. The U.S. Department of Education reports that, among public high schools serving predominantly African American students, less than one-third of schools offer calculus and about 40% offer physics. African American students represent 16% of the country’s high school students, yet only nine percent of them take an advanced placement course. It is for these reasons, among others, that many disadvantaged African American students are not prepared to pursue and succeed in a STEM degree in college.”).

256. See Gasman, *supra* note 219, at 3 (noting eight HBCUs as the top 20 institutions to award the most Science & Engineering bachelor’s degrees to Black graduates from 2008-2012 as Howard University, North Carolina AT&T State University, Florida A&M University, Spelman College, Hampton University, Southern University, Morgan State University and Alabama A&M University); Victoria Gross, *Top 10 STEM Historically Black Colleges and Universities*, NAT’L INSTS. OF HEALTH (Feb. 1, 2019), <https://www.edi.nih.gov/blog/communities/top-10-stem-historically-black-colleges-and-universities#:~:text=HBCUs%20produce%2027%25%20of%20African%20American%20students%20with,financial%20challenges%2C%20and%20driving%20students%20to%20post-baccalaureate%20success> (“Despite the fact that a large majority of African American students attend predominantly white institutions, 21 of the top 50 institutions for educating African American graduates who go on to receive their doctorates in science, math, and engineering, are HBCUs. HBCUs produce 27% of African American students with bachelor’s degrees in STEM fields. HBCUs have implemented proven practices to assist students in STEM fields to obtain rich professional experiences, research opportunities, and mentorships; navigating through courses and financial challenges, and driving students to post-baccalaureate success.”).

257. Gasman, *supra* note 219, at 3.

258. Caroline Harper, *HBCUs, Black Women, and STEM Success*, AM. COUNCIL EDUC. (May 14, 2018), <https://www.higheredtoday.org/2018/05/14/hbcus-black-women-stem-success/>; Mark K. Fiegner & Steven L. Proudfoot, *Baccalaureate Origins of U.S.-Trained S&E Doctorate Recipients*, NAT’L SCI. FOUND. (Apr. 2013), <https://www.nsf.gov/statistics/infbrief/nsf13323/nsf13323.pdf>.

259. Harper, *supra* note 258; *The Impact of HBCUs on Diversity in STEM Fields*, *supra* note 255 (“Twenty five percent of African American graduates with STEM degrees come from HBCUs. HBCUs graduated 46 percent of black women who earned degrees in STEM disciplines between 1995 and 2004. Eight HBCUs were among the top 20 institutions to award the most Science & Engineering bachelor’s degrees to black graduates from 2008-

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students for science careers. They do this by, “[a] supportive atmosphere; a diverse, encouraging faculty; and deliberately preparing students for PhDs.”<sup>260</sup>

## 4. Law

The legal profession appears to have taken momentous steps towards diversifying a field that has historically refused to welcome Blacks. Black lawyers are antagonists to the institution of white supremacy because they have successfully argued to overturn laws designed to maintain racial inequality in America. Although there appear to be numerous notable Black lawyers, the barriers to legal education remain. In 2008, the United States elected its first African American president and first lady, Barack and Michelle Obama, both lawyers. There is some racial diversity on the United States Supreme Court. In Harris County, Texas, nineteen African American women were elected as judges in 2018.<sup>261</sup> However, the Bureau of Labor statistics reveals a lack of racial diversity in the law profession; the profession is overwhelmingly white, hovering around 85 percent white and only five percent Black.<sup>262</sup>

“The legal profession remains one of the least diverse of any profession,” and this result appears intentional based on the exclusion of Blacks from the American Bar Association (ABA) until 1943, and the coordinated effort of the Association of American Law Schools (AALS) to eliminate minority serving law schools.<sup>263</sup> The lack of minorities

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2012. HBCUs are the institution of origin among almost 30 percent of black graduates of science and engineering doctorate programs.”)

260. Andrea Widener, *Who Has the Most Success Preparing Black Students for Careers in Science? Historically Black Colleges and Universities*, CHEM. & ENG'G. NEWS (Sept. 4, 2020), <https://cen.acs.org/education/success-preparing-Black-students-careers/98/i34> (“It’s remarkable how much these institutions are doing, given the stressors and constraints that they face,” says Kent McGuire, program director of education at the William and Flora Hewlett Foundation, who cochaired a 2019 National Academies of Sciences, Engineering, and Medicine study on minority-serving institutions. ‘If faculty at HBCUs are given supports similar to those available at predominantly white institutions,’ McGuire says, ‘you’ll see the return on investment is pretty significant.’”).

261. Andrew Schneider, *Meet ‘Black Girl Magic,’ the 19 African-Americans Women Elected as Judges in Texas*, NPR (Jan. 16, 2019, 4:17 PM), <https://www.npr.org/2019/01/16/685815783/meet-black-girl-magic-the-19-african-american-women-elected-as-judges-in-texas>.

262. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/cps/cpsaat11.htm> (last modified Jan. 22, 2020).

263. Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, A.B.A. (May 2, 2018), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/>; see also SMITH, *supra* note 104, at 41-42; see also Mary Wright, *Mission Accomplished? The*

represented in the legal field will continue to exist until the lack of diversity is acknowledged as a problem and there are authentic efforts to cure it. The ABA reported that in ten years, 2007 to 2017, the number of active African American lawyers only increased from four to five percent.<sup>264</sup> Of the 101 accredited HBCUs in the United States, many of which once had programs or law departments to award law degrees, only six have law schools that currently offer ABA-accredited legal degrees.<sup>265</sup>

Founded in 1869, shortly after the abolishment of slavery, Howard University School of Law was the first HBCU to provide Blacks an education in law. “There was a great need to train lawyers who would have a strong commitment to helping black Americans secure and protect their newly established rights.”<sup>266</sup> Howard Law began as a department within the larger university, which was founded in 1867 to train Black teachers and ministers. In the twentieth century, the law school flourished into a bastion of civil rights advocacy after it became ABA-accredited in 1931.<sup>267</sup>

Howard Law is particularly significant to education and equality in America. Charles Hamilton Houston, the first Black editor of the *HARVARD LAW REVIEW*, was admitted to practice in 1924. Committed to obtaining full and equal rights for Black people in America, he became the dean of Howard Law in 1929 and trained its law students in civil rights advocacy. The roster of those graduates includes legends in the

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*Unfinished Relationship between Black Law Schools and Their Historical Constituencies*, N.C. CEN. L. REV. 1, 1 (2016) (“Today, there are six historically Black law schools operating in the United States. These are all that remain of the twenty-two Black law schools that were in existence at some point beginning in 1869.”).

264. *ABA National Lawyer Population Survey*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/national-lawyer-population-demographics-2009-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf) (last visited Nov. 18, 2020).

265. *List of ABA-Approved Law Schools*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/in\\_alphabetical\\_order/](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/) (last visited Nov. 18, 2020) (listing District of Columbia, Florida A&M, Howard, North Carolina Central, Southern University, and Texas Southern as ABA-accredited institutions); see also SMITH, *supra* note 104, at 50, 55-65 (identifying over 20 Black schools that offered law degrees).

266. *Our History*, HOWARD UNIV. SCH. L., <http://www2.law.howard.edu/content/our-history> (last visited Nov. 18, 2020); see also Hill, *supra* note 20, at 697-98 (noting the first students at Howard University were four white girls who were daughters of two of the founders).

267. *Our History*, *supra* note 266; see also *Howard University School of Law: Preparing for Struggle*, SMITHSONIAN NAT'L MUSEUM AM. HIST., <https://americanhistory.si.edu/brown/history/3-organized/hu-law-school.html> (last visited Nov. 18, 2020).

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civil rights struggle, such as Thurgood Marshall, who would later successfully argue for the abdication of “separate but equal.”<sup>268</sup>

It was common in the early 20th century for HBCU law schools to be successful training grounds for civil rights advocacy. Likewise, their dedication to the achievement of justice for African Americans caused white-dominated legislative bodies to underfund or close Black law schools for no legitimate reason.<sup>269</sup> Nevertheless, HBCU law schools trained students who dedicated their lives serving as the architects behind dismantling racial inequality.

Marshall, the grandson of a man enslaved as a child who escaped, exemplified the excellence of HBCUs. He became the first Black justice on the United States Supreme Court in 1967 when he was appointed by President Lyndon Johnson.<sup>270</sup> In 1930, Marshall earned his undergraduate degree at Lincoln University, an HBCU in Pennsylvania, and that same year, he was denied admission to the University of Maryland School of Law because he was Black.<sup>271</sup> That fueled his desire to pursue equality for Black Americans, and he trained at Howard Law, where he graduated in 1933.<sup>272</sup> In that same year, Marshall successfully sued the University of Maryland to admit Donald Gaines, a Black Amherst University graduate.<sup>273</sup>

Other HBCU law schools emerged as a compromise in states’ efforts to maintain the dual education system based on race. They were an alternative for Blacks denied admission to state law schools, which were for whites only. For example, Southern University Law Center (SULC), located in Louisiana, was established in 1946 after Charles J. Hatfield, III, an African American, sued for admission into a “state in-

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268. See *Charles Hamilton Houston*, SMITHSONIAN NAT’L MUSEUM AM. HIST., <https://americanhistory.si.edu/brown/history/3-organized/charles-houston.html> (last visited Nov. 18, 2020).

269. See SMITH, *supra* note 104, at 58 (highlighting how Allen University, an HBCU, would graduate its law students in 1.5 years and they were “so well prepared that ‘the South Carolina Supreme Court . . . issued a special commendation’ to them”); see also Washington, *supra* note 20, at 167 (“The [Allen] Law Department, functioning as a training ground for potential advocates, was probably viewed by many as a threat to the maintenance of racial ‘stability.’”); see also Longa, *infra* note 275; see also W. LEWIS BURKE, ALL FOR CIVIL RIGHTS: AFRICAN AMERICAN LAWYERS IN SOUTH CAROLINA, 1868–1968, at 90-96 (2017) (finding Allen Law Department closed because of racial tension and several other factors).

270. Patricia Daniels, *Biography of Thurgood Marshall, First Black Supreme Court Justice*, THOUGHTCO, <https://www.thoughtco.com/thurgood-marshall-1779842> (last updated Jan. 23, 2020).

271. *Id.*

272. *Id.*; see also SMITH, *supra* note 104, at 368 n.275.

273. *Timeline of Thurgood Marshall*, THURGOOD MARSHALL, <http://thurgoodmarshall.com/> (last visited Nov. 18, 2020).



stitution.”<sup>274</sup> Instead of allowing his admission, the Louisiana Board of Education took “positive steps to establish a Law School for Negroes at Southern University. . .to be in operation for the 1947-1948 session,” but despite such efforts, the newly formed Black law schools were never equally funded – the white-dominated legislative bodies ensured that.<sup>275</sup>

Similarly, the law school at Texas Southern University was founded as a result of Heman M. Sweatt suing the University of Texas School of Law after he was denied admission because he was Black.<sup>276</sup> Marshall, then chief counsel for the NAACP Legal Defense Fund, successfully argued the case before the all-white United States Supreme Court in 1950, resulting in the Texas Legislature enacting enabling legislation for a Black law school.<sup>277</sup> In 1978, the law school was renamed the “Thurgood Marshall School of Law.”<sup>278</sup> “Each year, the Law School ranks in the top five (5) in the nation in the number of African-American law graduates. In addition, it ranks in the top twenty-five (25) in the number of Mexican-American or Chicano graduates.”<sup>279</sup>

As discussed in the opening of this article, FAMU Law was also established so that University of Florida could avoid admitting Virgil Hawkins to its law school in 1949. After being closed for 34 years,

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274. *About*, SOUTHERN UNIV. L. CTR., <http://www.sulc.edu/page/about> (last visited Nov. 18, 2020); Scottie Hunter, *Black History: Charles Hatfield Creates SU Law School, Changes Fabric of Legal Education in the State*, WAFB (Feb. 15, 2018, 3:09 PM), <https://www.wafb.com/story/37509729/black-history-charles-hatfield-creates-su-law-school-changes-fabric-of-legal-education-in-the-state/>.

275. *About*, *supra* note 274; *see also* Sweatt v. Painter, 339 U.S. 629 (1950); *see also* SMITH, *supra* note 104, at 50, 55-65 (noting other Black law schools that formed as a result of PWIs refusing Black students’ admission); *see also* Gaines, 305 U.S. at 337, *supra* note 207 (holding that under the “separate but equal” doctrine the University of Missouri had to allow Gaines’ admission or establish a separate law school for Black students); *see also* Ernesto A. Longa, A History of America’s First Jim Crow Law School Library and Staff, 7 CONN. PUB. INT. L. J. 77, 78-83, 103 (2007) (noting that Lincoln University (Missouri) was given state funds “to provide Missouri’s black residents with legal educational facilities and training equal to that provided Missouri’s white residents at the University of Missouri” as an option by the U.S. Supreme Court so as to deny Lloyd Gaines’ admission to the state’s white law school, and thus, Lincoln’s law school was the first Jim Crow law school, created with \$200,000 and in the same bill the University of Missouri received \$3,000,000, which was clearly unequal funding that would prevent equal facilities and training as the Supreme Court required).

276. *History of Thurgood Marshall School of Law*, TEX. SOUTHERN UNIV., <http://www.tsulaw.edu/welcome/history.html> (last visited Nov. 18, 2020).

277. *Id.*

278. *Id.*

279. *Id.*

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FAMU Law re-opened its doors in 2002.<sup>280</sup> It has been ranked as one of America's most diverse law schools with a blend of Black (51%), white (26%), Hispanic (18%), Asian (2%), American Indian (.47%), and other (2 students).<sup>281</sup> Like other HBCUs, FAMU Law is committed to educate students from historically underrepresented communities, largely African American students, who may not have a chance to be a lawyer otherwise. HBCUs are successful in uplifting this under-served population even though it is expensive. One study revealed:

Although serving the underserved is an important social justice goal in education, the HBCU presidents, in this study, talked at length about several challenges that they face in trying to serve underserved communities, one of which is finances (i.e., economic resources or lack thereof). Serving underserved communities is hard work, according to our participants, and it takes a lot of money. One president pointed out several areas where additional resources are sorely needed given the institution's commitment to serving "those with the least;" areas included facilities, scholarships, student support services, and even remedial or developmental education.<sup>282</sup>

Florida International University College of Law, founded simultaneously with the re-establishment of FAMU Law, has a median LSAT score over ten points higher than FAMU Law.<sup>283</sup> The median LSAT at UF Law and FSU Law is nearly 20 points higher than FAMU Law.<sup>284</sup> Even if claimed as a school mission, no other Florida law school has the historical mission and responsibility like FAMU Law,

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280. *FAMU College of Law Historical Timeline*, FLA. AGRIC. & MECH. UNIV., <https://law.famu.edu/about-us/college-of-law-history/> (last visited Nov. 18, 2020).

281. *Law School Diversity Index*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/law-school-diversity-rankings> (last visited Nov. 18, 2020); *Fall 2019 Entering Class Profile*, FLA. AGRIC. & MECH. UNIV., <https://law.famu.edu/students/prospective-students/class-profile/> (last visited Nov. 19, 2020).

282. Esters & Strayhorn, *supra* note 22, at 127; *see also* Danielle Moran & Fola Akin-nibi, *Howard Taps Bond Market Most Black Colleges Miss Out On*, BLOOMBERG (July 7, 2020, 12:35 PM), <https://www.bloomberg.com/news/articles/2020-07-07/howard-taps-bond-market-most-black-colleges-miss-out-on> ("Serving underrepresented groups means that Black institutions have to chip in more for tuition for low-income students than peers, said Emily Wadhvani, an analyst for Fitch Ratings. Their endowments are much smaller as well, with the median endowment coming in at half that of a comparable predominantly white school, according to the 2018 GAO report. The combined endowment of all 101 HBCUs totals about \$3.86 billion, a tenth of Harvard University's endowment, according to an estimate by the United Negro College Fund.")

283. *FIU Law Factsheet 2019*, ISSUU (Oct. 13, 2019), [https://issuu.com/lawweb/docs/fiu\\_law\\_factsheet\\_2019](https://issuu.com/lawweb/docs/fiu_law_factsheet_2019) (reporting median LSAT: 157); *Fall 2019 Entering Class Profile*, FLA. AGRIC. & MECH. UNIV., <https://law.famu.edu/students/prospective-students/class-profile/> (last visited Nov. 18, 2020) (reporting median LSAT: 146).

284. *Entering Class Profile*, UNIV. FLA. L., <https://www.law.ufl.edu/admissions-2/apply/entering-class-profile> (last visited Nov. 18, 2020) (reporting median LSAT: 164); *Admis-*

continuing its legacy and mission of educating historically under-represented and under-served students, often first-generation high school, college and professional school.

It is not unusual for FAMU Law students, who have been denied admission to other law schools, to succeed in their first year at FAMU Law, then transfer to one of the law schools that initially denied them admission and return to FAMU Law to inform its faculty that the support and teaching FAMU Law professors provided to them while at FAMU was unparalleled. FAMU succeeds in identifying those who appear not up to the task of navigating their way through law school and nurturing them to completion, aiding them through missteps, mishaps, defeats or repeats along the way. FAMU Law has measured success as its graduates' employment includes judges, law firm partners, entrepreneurs, corporate executives and more.

### C. Racial Transformation

HBCUs matter for other critical reasons as well. There continue to be discussions on whether Black history should be taught in schools. Historically, there was not much state support, although that is changing based on the recent pressure from the Black Lives Matter Movement (BLM), a global movement focused on realizing justice for Black people all over the world. In 2019, Nikole Hannah-Jones, a Pulitzer Prize-winning reporter covering racial injustice, created the landmark 1619 Project to reexamine the consequences of slavery and the legacy of African Americans in the United States. Senselessly claiming that the 1619 Project is radical, historical revisionism to teach America's children to hate America, Republican Senator Tom Cotton introduced federal legislation, Saving American History Act of 2020, to prevent federal funds to any public school to teach the 1619 Project.<sup>285</sup> Although the bill is unlikely to pass, President Trump in-

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sions, FLA. ST. UNIV., <https://law.fsu.edu/admissions-financial-aid/admissions> (last visited Nov. 18, 2020) (reporting median LSAT: 161).

285. Saving American History Act of 2020, S. 4292, 116th Cong. (2020); see also Mica Soellner, *Tom Cotton Defends Bill to Eliminate Funds for Teaching "kids to hate America" with 1619 Project*, WASH. EXAMINER (July 29, 2020, 10:32 PM), <https://www.washingtonexaminer.com/news/tom-cotton-defends-bill-to-eliminate-funds-for-teaching-kids-to-hate-america-with-1619-project>; see also Bobby Gehlen, *Sen. Tom Cotton Bill Would Prohibit Federal Funding for Teaching the 1619 Project*, ABC NEWS (July 24, 2020, 5:14 PM), <https://abcnews.go.com/Politics/sen-tom-cotton-bill-prohibit-federal-funding-teaching/story?id=71963986> ("Cotton, a strong ally of President Donald Trump, drafted the "Saving American History Act of 2020," claiming that America was founded on the ideals of the Declaration of Independence rather than on the history of enslaved people which began more than 100 years before the Declaration was signed. His bill would also make schools

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serted himself in the issue and threatened to defund any schools that teach the 1619 Project to control what America's children learn about slavery. The bill reflects the historical movement to prevent Black history – the truth – being taught in America, and efforts to continue to cement racism in the country and hinder progress for racial honesty and healing.

In 1935, Dr. Du Bois posited:

Negroes must know the history of the Negro race in America, and this they will seldom get in white institutions. Their children ought to study textbooks like Brawley's "Short History," the first edition of Woodson's "Negro in Our History," and Cromwell, Turner, and Dykes' "Readings from Negro Authors." Negroes who celebrate the birthdays of Washington and Lincoln, and relatively unimportant "founders" of various Negro colleges, ought not to forget the 5th of March,—that first national holiday of this country, which commemorates the martyrdom of Crispus Attucks. They ought to celebrate Negro Health Week and Negro History Week. They ought to study intelligently and from their own point of view, the slave trade, slavery, emancipation, Reconstruction and present economic development.<sup>286</sup>

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that teach The 1619 Project ineligible for federal professional-development grants."); see also *The 1619 Project Curriculum*, PULITZER CTR., <https://pulitzercenter.org/lesson-plan-grouping/1619-project-curriculum> (last visited Nov. 18, 2020); see also Kevin Liptak, *Trump Says Department of Education Will Investigate Use of 1619 Project in Schools*, CNN (Sept. 6, 2020, 3:03 PM), <https://www.cnn.com/2020/09/06/politics/trump-education-department-1619-project/index.html> (quoting Trump's tweet: "Department of Education is looking at this. If so, [those schools] will not be funded!" . . . "The message came after the President on Friday night banned federal agencies from conducting racial sensitivity training related to "white privilege" and "critical race theory."); see also Paige Hopkins, *American Students Can't Know Their History Until They Know Black History*, CHARLOTTE AGENDA (July 30, 2020), <https://www.charlotteagenda.com/226192/american-students-cant-know-their-history-until-they-know-black-history/>; see, e.g., Spectrum News Staff, *Forsyth County School Board of Education Votes Again African American History Class*, SPECTRUM NEWS (Oct. 22, 2019), <https://spectrumlocalnews.com/nc/charlotte/news/2019/10/23/forsyth-county-school-board-of-education-votes-against-african-american-history-class> ("The Winston-Salem Forsyth County School Board of Education has voted against the proposed mandatory African American history class.").

286. Du Bois, *supra* note 31, at 333; see also James Baldwin, *A Talk to Teachers*, ZINN EDUC. PROJECT (Oct. 16, 1963), <https://www.zinnedproject.org/materials/baldwin-talk-to-teachers> ("It is not really a 'Negro revolution' that is upsetting the country. What is upsetting the country is a sense of its own identity. If, for example, one managed to change the curriculum in all the schools so that Negroes learned more about themselves and their real contributions to this culture, you would be liberating not only Negroes, you'd be liberating white people who know nothing about their own history. And the reason is that if you are compelled to lie about one aspect of anybody's history, you must lie about it all. If you have to lie about my real role here, if you have to pretend that I hoed all that cotton just because I loved you, then you have done something to yourself. You are mad.").

Dr. Carter G. Woodson, known as the “father of Black history” and the second Black to earn a Ph.D. from Harvard after Dr. Du Bois, established Negro History Week in 1926. The celebration focused on the study of Black history and culture and evolved into Black History Month in 1976.<sup>287</sup>

Dr. Woodson had two purposes for Negro History Week: 1) “to use history to prove to white America that blacks had played important roles in the creation of America and thereby deserve to be treated equally as citizens;” and 2) “to increase the visibility of black life and history, at a time when few newspapers, books, and universities took notice of the black community, except to dwell upon the negative.”<sup>288</sup> Dr. Woodson believed Negro History Week could be the pathway for racial transformation.<sup>289</sup>

This might have been racially transformative for America because most Americans are unaware of the enormous contributions of Blacks, or the century of violent white mobs razing affluent, self-sustaining Black communities. But whites push back against having Black history taught in schools, labeling the curriculum as “racist” in failing to acknowledge that there were white allies who worked alongside Blacks in the Civil Rights Movement. A historian noted:

One cannot discuss the African American freedom struggle or the civil rights movement without paying attention to white allies who were working alongside black people. . . . One of the biggest issues we see, especially for those non-black folks, is that the emphasis on black history is divisive and some mistakenly label it “racist.”<sup>290</sup>

Often others fail to see that Black history is American history and world history. The first class on Black history for students – of any race – is often at an HBCU. Under Black leadership, HBCUs have increased Black history courses in the curriculums. All races need to know history that included Black people. This will dispel the false

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287. Lonnie Bunch, *Our American Story: Knowing the Past Opens Doors to the Future the Continuing Importance of Black History Month*, SMITHSONIAN NAT'L MUSEUM AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/blog-post/knowning-past-opens-door-future-continuing-importance-black-history-month> (last visited Nov. 18, 2020); see TAYLOR, *supra* note 66, at 393 (acknowledging Daniel Murray as “a pioneer in the black history movement,” although not the Father of Black History).

288. Bunch, *supra* note 287.

289. *Id.*

290. Karma Allen, *The Importance of Black History and Why It Should Be Celebrated Beyond February*, YAHOO NEWS (Feb. 8, 2020), <https://www.yahoo.com/gma/importance-black-history-why-celebrated-beyond-february-101305849—abc-news-topstories.html>; see also ROGERS, *supra* note 8, at 23 (noting that in earlier years, aside from one or two courses on Negro history and literature, most HBCU curriculums mirrored PWIs).

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myths about Black people and upend the blameless myths about white people and their alleged superiority.

The 2019 biographical film on Harriet Tubman is astounding to those who do not know history. Ms. Tubman was not only phenomenal in her pursuits to free herself and others from slavery as the lead “conductor” of the Underground Railroad, but she was also a spy for the Union Army during the Civil War – all of that is American history, and so many other incredible stories exist about African Americans. Brilliant Black revolutionaries, like Abraham Galloway, were erased from history to invent a history of “docile black people, happy slaves.”<sup>291</sup> That is far from the truth. The stories about how enslaved Blacks used

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291. Cameron Clinard, *This NC Man was One of the Most Important Civil War Leaders, but He was Erased from History for 100 Years*, ABC 11 (Feb. 10, 2020), <https://abc11.com/5907992/?fbclid=IWAR0Qoqr2o51emBDbsURg5nkuDwifdpt1YaF8IdcX1faCQYxvkvTlU1Wd0>; see also Caroline R. Williams, *You Want a Confederate Monument? My Body Is a Confederate Monument*, N. Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/opinion/confederate-monuments-racism.html> (“I have rape-colored skin. My light-brown-blackness is a living testament to the rules, the practices, the causes of the Old South. If there are those who want to remember the legacy of the Confederacy, if they want monuments, well, then, my body is a monument. My skin is a monument.”); see also DU BOIS, *supra* note 1, at 699-700 (“With thousands of white fathers of colored children, there is scarcely a case on record where such a father has been held legally responsible.”); see also Sara Fling, *The Formerly Enslaved Households of President Andrew Johnson*, THE WHITE HOUSE HIST. ASSOC. (Mar. 5, 2020), <https://www.whitehousehistory.org/the-formerly-enslaved-households-of-president-andrew-johnson> (quoting Frederick Douglass: “Whatever Andrew Johnson may be, he is certainly no friend of our race.”); see also HURMENCE, *supra* note 19, at 52; see also *FAMU Way*, *supra* note 3, at 6; see, e.g., *Slaves of Andrew Johnson*, NAT’L PARK SERV., <https://www.nps.gov/anjo/learn/historyculture/slaves.htm> (last updated July 24, 2020) (initially reporting “[i]n 1842, ANDREW JOHNSON was a State Senator. During this year he bought his first slave. Dolly, a fourteen year old girl, bravely approached ANDREW JOHNSON and asked him to buy her because, according to her future son William, she ‘liked his looks,’” and updating the website in July 2020 changing Dolly’s age from a child to an adult: “On January 3, 1843, Johnson paid \$500.00 to purchase Sam’s half-sister, Dolly. She was ‘about nineteen,’” and deleting the part about Dolly liking Johnson’s looks); see also Minges, *supra* note 49, at 16 (“On this plantation were more than a hundred slaves, who were mated indiscriminately and without regard for family unions. If their master thought that a certain man and woman might have strong, healthy offspring, he forced them to have sexual relations, even though they were married to other slaves. If there seemed to be any slight reluctance on the part of either of the unfortunate ones, Big Jim [slave owner] would make them consummate this relationship in his presence. He used the same procedure if he thought a certain couple was not producing children fast enough. He enjoyed these orgies very much and often entertained his friends in this manner; quite often, he and his guests would engage in these debaucheries, choosing for themselves the prettiest of the young women. Sometimes, they forced the unhappy husbands and lovers of their victims to look on.”); see also BAPTIST, *supra* note 1, at 407 (“Abraham Lincoln was either the last casualty of the Civil War or one of the first of a long civil rights movement that is not yet over. He was succeeded by his vice president, Andrew Johnson, who was unfortunately an alcoholic racist bent on undermining emancipation. Johnson spent the summer signaling to southern whites that they could build a new white supremacy that looked much like the one African Americans had fought to end.”).

cornrows as hairstyles to escape slavery also become relevant in a day and age where African Americans are under attack for wearing cornrows, braids, twists, locs, bantu knots, dreadlocks and other ethnic hairstyles in the work place.<sup>292</sup> Blacks' history has been hidden, revised, misrepresented, deleted and distorted to maintain the false notion of white supremacy, dismissing any chance for racial transformation about which Dr. Woodson dreamed.<sup>293</sup> The recent assault on the 1619 Project is no different.

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292. Bridget Boayke, *How Cornrows Were Used As an Escape Map from Slavery Across South America*, FACE 2 FACE AFR. (June 5, 2018, 1:00 PM), <https://face2faceafrica.com/article/how-cornrows-were-used-as-an-escape-map-from-slavery-across-south-america?fbclid=IWAR3Sg7DyRC4L6EcB0BYNjZ2kVOucdUasya6OB7Z6KjQjVBPvum5ydZsxsE>; see also D. Sharmin Arefin, *Is Hair Discrimination Race Discrimination?*, A.B.A. BUS. L. TODAY (Apr. 17, 2020), <https://businesslawtoday.org/2020/04/hair-discrimination-race-discrimination/> (reporting that hair discrimination occurs in the workplace and schools, and discussing the CROWN Act of 2019 that seeks to protect against discrimination based on hair texture and protective styles); see also *About*, THE CROWN ACT, <https://www.thecrownact.com/about> (last visited Nov. 18, 2020) (“The CROWN Act which stands for ‘Create a Respectful and Open World for Natural Hair,’ is a law that prohibits race-based hair discrimination, which is the denial of employment and educational opportunities because of hair texture or protective hairstyles including braids, locs, twists or bantu knots.”); but see Bruce C.T. Wright, *Jamaican Supreme Court Upholds Schools Ban on Dreadlocks for “Hygiene” Reasons*, NEWSONE (Aug. 1, 2020), <https://newsone.com/3987350/jamaica-supreme-court-dreadlocks-ban-ruling/> (“The highest court in all of Jamaica ruled on Friday in favor of a school that demanded a student cut her dreadlocks over “hygiene” reasons in order to attend classes. The student’s parents vowed not to cut their daughter’s hair and were stunned by the ruling that upholds the kind of systemic racism the world has been protesting in recent months and also condemns a hairstyle readily associated with the Caribbean island nation.”).

293. See Elizabeth Thomas, *White Supremacy and White Nationalism Have Re-entered Our Political Conversation. But What Do They Mean?*, ABC NEWS (Aug. 19, 2019), <https://abcnews.go.com/Politics/white-supremacy-white-nationalism-entered-political-conversation/story?id=64998396> (explaining key tenets of white supremacy as beliefs that “white people of European descent are genetically superior to other non-white people, that their own ‘culture’ is superior to other cultures and that the white race is in danger of extinction due to a rising ‘flood’ or ‘invasion’ of non-whites”); see also *Slaves of Andrew Johnson*, *supra* note 291 (showing how the National Park Service website was updated during the writing of this article to change dolly’s age from a child of 14 to an adult of 19 perhaps to minimize or erase the fact of the sexual assault of Andrew Johnson on a child to procreate); see, e.g., Maulud Sadiq, *The Million Man March Has Been Wiped from the History Books. Why?*, MEDIUM CORP. (Oct. 13, 2017), <https://medium.com/the-brothers/why-the-only-march-on-washington-thats-recognized-happened-50-years-ago-2f8e2483e0d4> (noting the 1995 Million Man March where over a million Black men converged on Washington D.C. is erased from the history books); Liz Mineo, *How Textbooks Taught White Supremacy*, HARVARD GAZETTE (Sept. 4, 2020), <https://news.harvard.edu/gazette/story/2020/09/harvard-historian-examines-how-textbooks-taught-white-supremacy/> (“In [Noah] Webster’s book [History of the United States] there was next to nothing about the institution of slavery, despite the fact that it was a central American institution. There were no African Americans ever mentioned. When Webster wrote about Africans, it was extremely derogatory, which was shocking because those comments were in a textbook. What I realized from his book, and from the subsequent ones, was how they defined ‘American’ as white and only as white. Anything that was less than an Anglo Saxon was not a true American. The further along I

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Nearly one hundred years after the last of many horrific racial massacres (white-on-Black violence), some states are reconsidering their curriculums in teaching about the massacres for better race relations. In 2020, Oklahoma schools committed to teach students about the Tulsa race massacre in which a white mob burned down Greenwood (known as “Black Wall Street”) in 1921, the wealthiest Black neighborhood in Tulsa; hundreds of Blacks were murdered and hun-

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got in this process, the more intensely this sentiment came out, I realized that I was looking at, there’s no other word for it, white supremacy. I came across one textbook that declared on its first page, ‘This is the White Man’s History.’ At that point, you had to be a dunce not to see what these books were teaching.”); Meilan Solly, *158 Resources to Understand Racism in America*, SMITHSONIAN (June 4, 2020, 11:47 AM), <https://www.smithsonianmag.com/history/158-resources-understanding-systemic-racism-america-180975029/> (“How American society remembers and teaches the horrors of slavery is crucial. But as recent studies have shown, many textbooks offer a sanitized view of this history, focusing solely on ‘positive’ stories about black leaders like Harriet Tubman and Frederick Douglass. Prior to 2018, Texas schools even taught that states’ rights and sectionalism—not slavery—were the main causes of the Civil War. And, in Confederate memorials across the country, writes historian Kevin M. Levin, enslaved individuals are often falsely portrayed as loyal slaves.”); *see, e.g.*, Oral family history of Gloria Saulney Curtis from Louisiana (reporting that in 1965, Gloria Saulney Curtis, a Black educator, was the editorial consultant and contributor for a school textbook, “Discovering American History” in which she contributed several Black history facts throughout the textbook and a portion of a chapter that explained post -World War II problems in America – prejudice, discrimination, and segregation in which she referenced the Civil Rights Movement, civil rights laws, Dr. Martin Luther, Jr, the 1963 March on Washington, the Montgomery bus strike, the National Association for the Advancement of Colored People (NAACP), the Congress of Racial Equality (CORE), the Southern Christian Leadership Conference (SCLC), the National Urban League and the war on poverty; however, in the Southern edition of the textbook, which edition was accidentally mailed to Mrs. Curtis by the publisher, she saw that all the references to Black history were omitted because, as she was informed, “white southerners had no interest in learning about Negro history”); *see, e.g.*, Tulani Salah-Din, *Hidden Herstory: The Leesburg Stockade Girls*, SMITHSONIAN NAT’L MUSEUM AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/blog-post/hidden-herstory-leesburg-stockade-girls> (last visited Nov. 18, 2020) (reporting on the little known story about abuse against Black girl activists: “In July of 1963 in Americus, Georgia, fifteen [Black] girls were jailed for challenging segregation laws. Ages 12 to 15, these girls had marched from Friendship Baptist Church to the Martin Theater on Forsyth Street. Instead of forming a line to enter from the back alley as was customary, the marchers attempted to purchase tickets at the front entrance. Law enforcement soon arrived and viciously attacked and arrested the girls. Never formally charged, they were jailed in squalid conditions for forty-five days in the Leesburg Stockade, a Civil War era structure situated in the back woods of Leesburg, Georgia. Only twenty miles away, parents had no knowledge of where authorities were holding their children. Nor were parents aware of their inhumane treatment.”); *see, e.g.*, DU BOIS, *supra* note 1, at 720, 724-25 (“When recently a student tried to write on education in Florida, he found that the official records of the excellent administration of the colored Superintendent of Education, [Jonathan C.] Gibbs, who virtually established the Florida public school, had been destroyed. Alabama has tried to obliterate all printed records of Reconstruction. . . . It is most unfortunate that while many young white [Southern historians] can get funds to attack and ridicule the Negro and his friends, it is almost impossible for first-class Negro students to get a chance for research or to get finished work in print.”).



dreds more never accounted for.<sup>294</sup> That is a start, but Oklahoma students must also be taught about other aspects of Black history, including the other numerous massacres of Black people and towns.

Florida and other states must also consider the same in their curricula. They must educate all students about the white mobs, with police support, that destroyed Black Florida towns, such as Rosewood and Ocoee, where racism, hatred and jealousy incited many less prosperous whites to murder Black residents and destroy their property.<sup>295</sup> Since 1994, Florida schools were required to teach Black history, but often that did not happen; however, at the peak of one of the most significant movements in America, the BLM Movement, the Florida

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294. Christina Maxouris, *The 1921 Tulsa Race Massacre Will Soon Be a Part of the Curriculum for Oklahoma Schools*, CNN (Feb. 20, 2020), <https://www.cnn.com/2020/02/20/us/oklahoma-schools-1921-race-massacre-trnd/index.html>; Deneen Brown & Olivia Hooker, *One of the Last Survivors of the 1921 Tulsa Race Massacre, Dies at 103*, L.A. TIMES (Nov. 22, 2018), [https://www.latimes.com/local/obituaries/la-me-olivia-hooker-obit-20181122-story.html?fbclid=IWAR0JrHm6zVnycGtJdIGSuRMAItoSReZ\\_t1IMZwvwOxE8NvuVmPVmbXTeSt4](https://www.latimes.com/local/obituaries/la-me-olivia-hooker-obit-20181122-story.html?fbclid=IWAR0JrHm6zVnycGtJdIGSuRMAItoSReZ_t1IMZwvwOxE8NvuVmPVmbXTeSt4) (“A group of black war veterans tried to protect the teen, and in the ensuing violence, as many as 300 black people died; thousands more saw their homes and livelihoods destroyed by torch. Some people were burned alive, and 40 square blocks of business and residential property — valued then at more than \$1 million — were destroyed.”); SHOMARI WILLS, *BLACK FORTUNES: THE STORY OF THE FIRST SIX AFRICAN AMERICANS WHO ESCAPED SLAVERY AND BECAME MILLIONAIRES* 201 (2018) (“The children of Greenwood’s professionals attended Columbia Law School, Oberlin College, the Hampton Institute, the Tuskegee Institute, Spelman College, and Atlanta University. Greenwood’s culture prided itself on education; the area had one of the lowest black illiteracy rates in the country and a high school graduation rate above 50 percent. This was unheard-of in other areas of the country. Tulsa was indeed a Magic City for African Americans.”); GATES, *supra* note 53, at 159-163 (describing the Tulsa Race Riot); *see also* Kyle Jones, *First Statewide Black, Latino History Course Moving Forward*, NBC CONNECTICUT (Dec. 9, 2020), <https://www.nbcconnecticut.com/news/local/first-statewide-black-latino-history-course-moving-forward/2380451/> (“What students learn in the classroom is often determined locally by school districts. So, the new statewide curriculum is a first for Connecticut, and for the country. Its official title is ‘African American/Black and Puerto Rican/Latino Course of Studies,’ and may also at times be referred to as the ‘Black and Latino Course.’”).

295. *Rosewood Massacre*, Hist., <https://www.history.com/topics/early-20th-century-us/rosewood-massacre> (last updated Feb. 5, 2019); Carlee Hoffman & Claire Strom, *A Perfect Storm: The Ocoee Riot of 1920*, 93 FLA. HIST. Q. 25, 43 (2014); *None of Them Tried to Stay*, WFTV, <https://www.wftv.com/news/ocoee-massacre/none-them-tried-stay/UEXDYA6BJRH35L7HV3ODZD222I/> (last updated Nov. 1, 2020) (reporting a letter of Ocoee resident, J.H. Hamiter, which letter was included in an orange shipment and described what happened on Nov. 2-3, 1920: “At last one of the most wickedest happening of a life time happened here on Tuesday night and Wednesday morning of the election.” . . . “On the north side of the town all the homes and some of the people were burned, one man was shot and killed and carried to the county seat and hung up as lynched. His daughter was shot and his wife and the same daughter were put in jail. The people on the south of town are being threatred that they must sell out and leave of they will be shot and burned as the others have been.” . . . “It seemed to be a pre-arranged affair to kill and drive the colored people from their homes as they were more prosperous than the white folks, so they are hoping to get their homes for nothing. However, I am trusting in the Lord for goodness.”).

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governor approved that the Ocoee, Florida massacre of 1920 be taught in Florida schools.<sup>296</sup> Again, this is a start, but the Rosewood massacre also needs to be taught as well as Black history in whole, not in pieces. Black and white America must study the enormous number of unprovoked killings by whites against Blacks in America because of white America's unyielding determination to continue to "race manage" Black people. This is not just Black history; these stories are American history – part of the country's horrific past that continues to haunt its present.<sup>297</sup> Most are unaware of the slavery and post-slavery brutality from whites against Blacks. Even fewer know that many Radical Republican Southern governors (today's Democratic Party) established a paid and often armed Negro militia during Reconstruction to protect Blacks against white vigilante brutality but more often to protect the political system.<sup>298</sup>

296. Jeffrey Solocheck, *Teaching African-American and Holocaust History? Prove it, Florida Board of Education Says*, TAMPA BAY TIMES (Sept. 20, 2019), <https://www.tampabay.com/news/gradebook/2019/09/20/teaching-african-american-and-holocaust-history-prove-it-florida-board-of-education-says/>; Kirby Wilson, *Florida Schools Must Now Teach the Ocoee Election Day Massacre. Here's Why That Matters.*, TAMPA BAY TIMES (June 25, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/06/25/florida-schools-now-have-to-teach-the-ocoe-election-day-massacre-heres-why-that-matters/>; see also Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N. Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>; see also FLYNN ET AL., *supra* note 14, at 57 ("BLM was born out of an assertion that black people were very differently situated than white people within the system of public safety and the criminal justice system . . . it's been demonstrably true that black lives do not systemically matter, and thus the deliberate focus on black lives is extremely justified and appropriate.").

297. See also Deneen Brown, *When Portland Banned Blacks: Oregon's Shameful History As an 'All-White' State*, WASH. POST (June 7, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/?fbclid=IwAR2JHXn9AD1jvDvhSv3l-yXxcqqsA\\_S4bcNVA4drkoMLonoFmjzExQHqxi8](https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/?fbclid=IwAR2JHXn9AD1jvDvhSv3l-yXxcqqsA_S4bcNVA4drkoMLonoFmjzExQHqxi8) (reporting how Portland is known for its progressive history but that is a myth as Portland is mainly all-white now because in 1844 all Black people were ordered out of Oregon).

298. FRANKLIN, *supra* note 1, at 51, 121-22 ("The violence directed against the Negro on almost every hand indicated how determined the former Confederates were to maintain this white supremacy. Organized bands of white hoodlums had systematically and regularly terrorized the Negro population since the end of the war. Emancipation had removed the Negro's immunity from wanton and indiscriminate violence at the hands of the 'superior race.' . . . [Radical] Republicans realized that without military support the Democrats would overthrow them. . . . [New Southern governments] sent an urgent request to Congress to repeal the law forbidding the former Confederate states to organize and use militias. . . . The Radicals won the day, however, and in March 1869, the law was repealed so far as it applied to North Carolina, South Carolina, Florida, Alabama, Louisiana, and Arkansas . . . [and for the following year] Virginia, Texas, Mississippi, and Georgia. . . . Virginia and Georgia never acted under the authorization. . . . In Florida, a militia was organized and armed in June, 1868, although it was never used. . . . Tennessee [Governor] also organized a militia that served more as a warning to his enemies than as an actual fighting force. . . . From

1870 to the end of the period in 1877 these [militia] forces were used with varying frequency in Texas, Louisiana, Mississippi, North Carolina, and South Carolina. . . . They contained large numbers of Negroes, and they were usually referred to as the Negro militia. But they were by no means exclusively Negro. Persons of known loyalty of whatever race were welcomed into the militia. Conservatives were usually rejected, and when they protested against this discrimination, they accused the governments of preferring Negroes to keep the whites under control.”); OTIS. A. SINGLETARY, *NEGRO MILITIA AND RECONSTRUCTION* 4, 9, 15, 16, 36, 81, 98-99, 145 (1957) (“The need for the [Negro] militia grew out of the stern dictates of political self-preservation; in the Radical plan for a Republican South the militia forces were assigned the task of perpetuating the existence of the newly created Republican state governments [today’s Democratic Party]. . . . [M]ilitia forces were not active in all Southern states; and . . . the militia units were not made up exclusively of Negro troops [but it was nevertheless called a “Negro militia”]. . . . After Arkansas, South Carolina was the most active of the Southern states in the Negro militia movement, Robert K. Scott, the first of the South Carolina Radical governors, armed the Negro troops just before the campaign that resulted in his re-election in 1870. For several years thereafter, the Ku Klux Klan and the militia engaged in a vendetta that ended only when President Grant ordered nine counties of the state placed under martial law and sent United States troops to enforce his proclamation. . . . The feeling of resentment that resulted from placing armed Negroes in positions of authority over Southern whites goes a long way toward explaining the violent reaction that invariably accompanied military activities. . . . Militia forces were frequently employed during political campaigns. . . . Race war was perhaps never so imminent in Mississippi as during the autumn of 1875. The condition of near-anarchy that accompanied almost any election in that state during Reconstruction was aggravated by the presence of two armed and hostile forces. One group was the Negro militia that had been called up by Governor Adelbert Ames in the wake of the slaughter at Clinton in September of that year; the other was the illegal white volunteer military force that had sprung up throughout the state as part of the Democratic [Conservatives/today’s Republican Party] program for victory in the upcoming election. Both sides were adequately armed. . . . [O]n October 15, 1875, the adversaries negotiated a ‘Peace Agreement,’ which proved to be the undoing of the Governor . . . the Democrats deliberately avoided living up to the their end of the bargain. By a calculated program of fraud, violence, and intimidation, the Democrats won an overwhelming victory in the election of November 3 . . . [this] marked the end of the Negro militia in [Mississippi]. . . . Judged by its accomplishments, as compared with its professed aims, the Negro militia movement was a dismal failure [because the Radical-Republican governors failed] to employ the militia forces to the full extent of their power. . . . By 1877 [when Reconstruction ended by the Federal government pulling its troops out of Southern state politics], it was apparent to see that the last of the Radical state governments were doomed and that individual militia units had been destroyed, disbanded, or rendered militarily ineffective.”); *see also Their Own Hotheadedness*: Senator Benjamin R. “Pitchfork Ben” Tillman Justifies Violence against Southern Blacks, HIST. MATTERS, <http://historymatters.gmu.edu/d/55/> (last visited Nov. 18, 2020) (“Speech of Senator Benjamin R. Tillman [before the U.S. Senate], March 23, 1900: Mr. President, I have not the facts and figures here, but I want the country to get the full view of the Southern side of this question and the justification for anything we did. We were sorry we had the necessity forced upon us, but we could not help it, and as white men we are not sorry for it, and we do not propose to apologize for anything we have done in connection with it. We took the government away from [the Negroes] in 1876. We did take it. . . . We did not disfranchise the negroes until 1895. Then we had a constitutional convention convened which took the matter up calmly, deliberately, and avowedly with the purpose of disfranchising as many of them as we could under the fourteenth and fifteenth amendments. We adopted the educational qualification as the only means left to us, and the negro is as contented and as prosperous and as well protected in South Carolina to-day as in any State of the Union south of the Potomac. He is not meddling with politics, for he found that the more he meddled with them the worse off he got. As to his “rights”—I will not

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Black history does not begin with slavery or end there. For example, Benjamin Banneker, born in 1731 and known for participating in surveying Washington, D.C., was a mathematician and astronomer, who had little formal education but learned much of his scientific knowledge from his previously enslaved father, who was from the erudite Wolof family, part of the African ethnic group – the Songhai Empire – known for their cultural and intellectual epicenters.<sup>299</sup> Un-

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discuss them now. We of the South have never recognized the right of the negro to govern white men, and we never will. We have never believed him to be equal to the white man, and we will not submit to his gratifying his lust on our wives and daughters without lynching him. I would [*sic*] to God the last one of them was in Africa and that none of them had ever been brought to our shores. But I will not pursue the subject further.”); *see also Radical Reconstruction*, U.S. HIST., <https://www.ushistory.org/us/35b.asp> (last visited Nov. 18, 2020) (“The Radical Republicans believed blacks were entitled to the same political rights and opportunities as whites. They also believed that the Confederate leaders should be punished for their roles in the Civil War.”); *see also* JACKSON & NUNN, *supra* note 19, at 105 (discussing former enslaved persons’ stories about the institution of slavery and its brutality); *see generally* Minges, *supra* note 49 (describing the brutality of slavery in personal accounts of women in slavery); *see also supra* note 93 and accompanying text; *accord Massacre at Hamburg (1876)*, FACING HIST. AND OURSELVES, <https://www.facinghistory.org/topics/race-us-history> (last visited Nov. 18, 2020) (“The Hamburg massacre occurred on July 4, 1876, in South Carolina. The Republican governor raised a state militia to stem the spreading violence in the state. An all-black regiment of the militia, led by Dock Adams, was stationed in Hamburg, angering white paramilitary groups, known as the Red Shirts, in nearby towns. Hundreds of Red Shirts surrounded and eventually attacked the 84-member black militia regiment, killing seven.”); *see also White Southern Responses to Black Emancipation*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/reconstruction-white-southern-responses-black-emancipation/> (last visited Nov. 18, 2020) (“The new Reconstruction governments were quite weak. They did try to raise militia units. In some states like North Carolina, Texas, Arkansas, the militia was fairly effective against the Klan. But in states with large black majorities . . . most African Americans, despite the fact you’d had those soldiers in the Civil War, had no military experience, no military training. Most whites in the South were armed and had served in militia or slave patrols, things like that. The governors were fearful of using the militias against the Klan because they thought they might spark off a kind of generalized racial conflagration. . . . Amos Ackerman is the attorney general under Grant when the effort against the Klan really reaches its full extent. . . . He’s a Republican from Georgia. He’s appalled by the atrocities that are taking place. He really feels it’s a sign of some kind of pathology in Southern white civilization, that all these murders and attacks can be taking place with no particular response from the white community.”).

299. Keisha Bentley-Edwards, *We Need to Change How We Teach Black History*, TIME (Feb. 4, 2016) <https://time.com/4208013/black-history-month-education/>; *see also* Benjamin Banneker, BIOGRAPHY, <https://www.biography.com/scientist/benjamin-banneker> (last visited Nov. 18, 2020); GATES, *supra* note 53, at 251-255; *but see* The Mythology of Benjamin Banneker, [https://en.wikipedia.org/wiki/Mythology\\_of\\_Benjamin\\_Banneker](https://en.wikipedia.org/wiki/Mythology_of_Benjamin_Banneker) (attempting to dispel the accomplishments of Benjamin Banneker); *see also* WILLIAM R. HARVEY, PRINCIPLES OF LEADERSHIP: THE HARVEY LEADERSHIP MODEL 5-6 (2016) (describing how his father with an eighth grade education who never took an architect class taught himself how to “draw plans for the houses, commercial buildings, stores, and other structures he built by reading architecture and drafting manuals that he had purchased”); *see also Phillis Wheatley Biography*, BIOGRAPHY, <https://www.biography.com/writer/phillis-wheatley> (last updated

derstanding that Mr. Banneker's knowledge came from Africa explains how he, known for being largely self-taught, was also a scientist, compiler of almanacs and a writer.<sup>300</sup> This is Black history, American history and world history.

Promoting Black history is not an attack on white history. Promoting Black heritage is not an attack on white heritage. Promoting Black history is using shared space to tell the truth – one many do not want to hear.

History reveals that whenever Blacks made significant gains in politics, wealth and civil rights, whites used the political system to regain their advantage; white mobs would destroy the Black people, Black towns, Black establishments, and thus, Black progress.<sup>301</sup> “We

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June 23, 2020) (“After being kidnapped from [Senegal/Gambia] West Africa [at the age of about eight] and enslaved in Boston, Phillis Wheatley became the first African American and one of the first women to publish a book of poetry in the colonies in 1773. . . . Poet Phillis Wheatley was brought to Boston, Massachusetts, on a slave ship in 1761 and was purchased by John Wheatley as a personal servant to his wife [, Susanna]. The Wheatleys educated Phillis and she soon mastered Latin and Greek, going on to write highly acclaimed poetry. . . . Her quick intelligence was hard to miss, and as a result, Susanna and her two children taught [Phillis] to read [English and other foreign languages] and was actively encouraged in her literary pursuits by the household. [Phillis] received lessons in theology, English, Latin and Greek. Ancient history was soon folded into the teachings, as were lessons in mythology and literature. At a time when African Americans were discouraged and intimidated from learning how to read and write, [Phillis’] life was an anomaly.”); *see also* Amna Nawaz & Leah Nagy, *How the Autobiography of a Muslim Slave Is Challenging an American Narrative*, PBS (Apr. 23, 2019, 6:20 PM) (“Omar Ibn Said was 37 years old when he was taken from his West African home and transported to Charleston, South Carolina, as a slave in the 1800s. Now, his one-of-a-kind autobiographical manuscript has been translated from its original Arabic and housed at the Library of Congress, where it ‘annihilates’ the conventional narrative of African slaves as uneducated and uncultured. . . . His literacy and culture completely goes against, abolishes, one might say annihilates, the narrative that slaves were not capable of culture. In fact, they were persons with distinct histories, abilities, culture, and background. . . . He was wealthy. And he was highly educated, because, in his autobiography, he speaks about spending 25 years studying.”); *see also* GATES, *supra* note 53, at 177-78 (“In about 1762 Abd al-Rahman Ibrahima, an ethnic Fulani and a Muslim, was born into a prominent family in the city of Timbo, ‘seat of the Fulani emirs until its occupation by French troops in 1896’. . . . In Timbo [now a part of Guinea in West Africa], Ibrahima was educated, taught to read and write Arabic. . . . His one resolve: he would not convert to Christianity.”).

300. Bentley-Edwards, *supra* note 299.

301. *See, e.g.*, EQUAL JUST. INITIATIVE (Feb 22, 2019), <https://calendar.eji.org/racial-justice/feb/22?fbclid=IWAR01XtJ7HteqF5C7zfiSEzr8Pu-5GHfeAjodoDXydf0VT0c3pUIZ55EKmcc> (reporting that Frazier Baker was the first Black elected postmaster in Lake City, South Carolina in vehement opposition from the white community, resulting in a white mob murdering him and his family by setting their house on fire and shooting them to death); *see, e.g.*, Tim Walters, *Harry T. Moore Helped Thousands of Blacks Register to Vote. It Led to His Assassination on Christmas Night*, FLA. TODAY (Feb. 3, 2020 10:00 AM), <https://www.floridatoday.com/story/news/2020/02/03/harry-t-moore-african-american-black-civil-rights-leader-florida/4481452002/?fbclid=IWAR22vvTCqZsW493lMyM7DjJedUjm-uSYmP2JCSZUrv8DQhzDierLsetiyOg> (reporting that the Ku Klux Klan murdered Harry and Har-

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had 100 years of terrorism and lynching and violence where black people were pulled out of their homes and beaten and murdered and drowned and tortured and lynched. And we've never really talked about that."<sup>302</sup> "For powerful White men throughout US history, committing crimes and evading punishment has often functioned as a rite of passage, whether the wrong was murder, illicit financial activity, or sexual assault."<sup>303</sup> Notwithstanding the constant brutality against Blacks, there is not one – not one – massacre in which a Black mob murdered and burned down a white town, but when whites massacred Black towns, Blacks fought back as best they could with little to no weapons. Thus, today many Blacks are armed, and this population is swiftly increasing just as the overt racism is from some whites against Blacks and other people of color. In response to the increase of Black gun owners, there are whispers of small or independent white-owned gun stores hoarding ammunition and controlling its sales.

HBCUs are part of this history. HBCUs, and even some PWIs like Oberlin College, were stops on the Underground Railroad; HBCUs students and faculty participated in the advancement of Blacks, including in the Civil Rights Movement; and HBCUs are often the first institution where many of their students learn about Africa, slavery in America, Jim Crow, and the subsequent treatment of Blacks in America for the first time. The history of white mobs destroying Black wealth is important because affluent Blacks were often significant do-

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riette Moore in Christmas day in 1951 for registering over 166,000 Black voters); Christina Maxouris, *100 Years Ago, White Mobs Across the Country Attacked Black People. And They Fought Back*, CNN (July 27, 2019, 5:04 PM), <https://www.cnn.com/2019/07/27/us/red-summer-1919-racial-violence/index.html> (reporting that 100 years ago white mobs attacked Black people all over the United States, and Blacks fought back); *see, e.g.*, Maxouris, *supra* note 294 (reporting that the 1981 lynching of a Black man who was sued by the man's family, resulted in bankrupting the Ku Klux Klan); *see generally* DAVID F. KRUGLER, 1919, THE YEAR OF RACIAL VIOLENCE: HOW AFRICAN AMERICANS FOUGHT BACK (2015); *see, e.g.*, STALVEY, *supra* note 145, at 29 ("By May 21, [1961], President Kennedy had sent six hundred U.S. marshals into Montgomery after a white mob attacked a Negro church whose members had merely cheered the Freedom Riders.").

302. Mosely, *supra* note 55; *see generally* IDA B. WELLS-BARNETT, THE RED RECORD (1895) (reporting on the lynching of African Americans in the United States in the late 1800s and showing that whites carried out lynchings to punish Black competition and not for their purported reason of punishing for committing a crime); *see generally* PAULA J. GIDDINGS, IDA: A SWORD AMONG LIONS (2008) (detailing the life of Ida B. Wells and her contributions to the struggle against lynching of Black men and women).

303. Ashton Pittman, *The Right of Subpar White Men to Wield Power and Live Above the Law is on Trial*, DEEP SOUTH VOICE (Jan. 27, 2020 4:20 AM), [https://www.deepsouthvoice.com/index.php/2020/01/27/the-right-of-subpar-white-men-to-wield-power-and-live-above-the-law-is-on-trial?fbclid=IWAR0qdwnv0MOuP2PQRqDII1SEnp6dQ9KPTWftvYym2k3Mgd2kIwEbXsqw7\\_0](https://www.deepsouthvoice.com/index.php/2020/01/27/the-right-of-subpar-white-men-to-wield-power-and-live-above-the-law-is-on-trial?fbclid=IWAR0qdwnv0MOuP2PQRqDII1SEnp6dQ9KPTWftvYym2k3Mgd2kIwEbXsqw7_0).

nors to HBCUs and this remains true today.<sup>304</sup> Thus, the impact of white destruction on Blacks impacted the progress of Blacks in every segment of society, including education.

In addition, without HBCUs, the 1960s Civil Rights Movement would not have been as strong or perhaps as successful. HBCUs were the heart and soul of the Civil Rights Movement. White employers were firing Black employees (often parents of HBCU students) who they knew participated in civil rights activities, so in 1960, Dr. Martin Luther King, Jr. issued a clarion call to HBCUs and their students to take the movement into every Southern community.<sup>305</sup> HBCUs and their students heeded the call and engaged.

HBCUs served as institutions of solidarity. Dorm rooms were transformed into meeting locations; quads became rallying centers, chapel basements transformed into training grounds for non-violent protests, and campuses banded together creating an intricate

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304. See, e.g., Annie Turbo, *A Black Philanthropist and Entrepreneur*, BLACK HIST. HEROES (Sept. 10, 2017), [www.blackhistoryheroes.com/2010/10/annie-turnbo.html](http://www.blackhistoryheroes.com/2010/10/annie-turnbo.html) (“[Annie] Malone is recorded as the U.S.’s first Black woman millionaire based on reports of \$14 million in assets held in 1920 from her beauty and cosmetic enterprises, headquartered in St. Louis and Chicago. . . . During the 1920s, Malone’s philanthropy included financing the education of two full-time students in every historically black college and university. Her \$25,000 donation to Howard University was among the largest gifts the university had received by a private donor of African descent.”); see, e.g., A’Lelia Bundles, *Madame C.J. Walker, American Businesswoman and Philanthropist*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Madam-C-J-Walker> (last updated May 21, 2020) (reporting that Madame C.J. Walker was one of the first Black female millionaires in the United States and that “[s]he provided scholarships for students at several black colleges”); see, e.g., Kelley L. Carter & Randall C. Williams, *Oprah Winfrey Donates \$2 Million to HBCU Tennessee State and Its Surrounding Community*, THE UNDEFEATED (May 20, 2020), <https://theundefeated.com/features/oprah-winfrey-donates-2-million-to-hbcu-tennessee-state-and-its-surrounding-community/> (reporting HBCU graduate Oprah Winfrey’s long history of significant donations to HBCUs as well as other wealthy African American philanthropists); see, e.g., David Gelles, *Who Is Robert F. Smith, the Man Paying Off Morehouse Graduates’ Loans?*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2019/05/19/business/robert-f-smith-morehouse-vista-equity.html> (reporting that Robert F. Smith, the richest Black man in America, announced while giving the Morehouse commencement speech that he was paying off the nearly 400 graduates’ school loans).

305. See Brian McClure, *Heart and Soul of the Movement: Influence of Historically Black Colleges and Universities on the Civil Rights Movement*, ST. OF HBCUS (Aug. 26, 2013), <https://stateofhbcus.wordpress.com/tag/civil-rights/>; see, e.g., Cecil Williams, *Remembering the 1968 Orangeburg Massacre When Police Shot Dead Three Unarmed Black Students*, DEMOCRACY NOW (Nov. 8, 2019), [https://www.democracynow.org/2019/11/8/remembering\\_orangeburg\\_massacre\\_1968\\_south\\_carolina](https://www.democracynow.org/2019/11/8/remembering_orangeburg_massacre_1968_south_carolina) (reporting on the 1968 Orangeburg, SC massacre that occurred on the HBCU campus of South Carolina State University); see ROGERS, *supra* note 8, at 4 (arguing that neither Brown nor the Civil Rights Act of 1964 integrated higher education but the Black College Movement “forced the rewriting of the racial constitution of higher education”); see generally JO ANN GIBSON ROBINSON, *THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT* (1987).

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system of social networks. Moreover, these institutions served as breeding grounds for the surfacing generation of Black leaders.<sup>306</sup>

This civil rights activism – the fight for racial equality – is what triggered the Florida Legislature in the 1960s to shut down FAMU Law and establish the all-white FSU Law.<sup>307</sup> The Civil Rights Movement transformed America and the world.

Interestingly, Bluefield State College, founded in 1865 as the Bluefield Colored Institute, hired a white president in 1966 who replaced the Black faculty with white faculty and ejected the Black students from the residential campus by closing the dorms.<sup>308</sup> Today, Bluefield State College is approximately ninety percent white, but with the continued designation as an HBCU, it still receives federal funding for HBCUs, even though it is not truly fulfilling its original mission or the mission of Black colleges.<sup>309</sup> Although some believe educating any under-served student satisfies the mission of HBCUs.<sup>310</sup> The plain language of the enacting legislation, however, disputes that interpretation.

HBCUs contribute significantly to the national economy by providing nearly 135,000 jobs and \$14.8 billion in economic impact in 2014 alone.<sup>311</sup> Yet, notwithstanding the remarkable achievements of HBCUs, they are often unfairly judged. Because of the racist history of America, the fictitious “white” Jesus, and the harebrained white superiority ideology, anything Black is often easily labeled as “inferior.”

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306. McClure, *supra* note 305.

307. See Damron, *supra* note 8 (“We fought like hell to keep [the FAMU law school] open, but we couldn’t stop them,” said [Perker L.] Meeks, [a former] San Francisco Superior Court judge.”).

308. Dennis, *supra* note 20 (“The struggle over Bluefield State racial demographics and its status as a commuter campus are tied up in a turbulent history; in the 1960s it ejected black students from what was once a residential campus.”); see also Meraji & Demby, *supra* note 16 (“The bombing and the closing of the dorms led to a dramatic shift in Bluefield State’s makeup. The black students who’d come to the college from far away suddenly had no place to live. And with black folks migrating away from the region, the Bluefield State campus began to look increasingly like the rest of West Virginia, one of the whitest states in the country. (West Virginia State, the state’s other black college and the second-whitest HBCU in the country, underwent a similar transformation.)”).

309. Meraji & Demby, *supra* note 16.

310. *Id.* (reporting then Bluefield State president stated that “while the students might look different than they used to . . . educating underserved students is still the college’s primary mission” and noting that Bluefield State’s HBCU designation “means that Bluefield State receives millions in federal dollars each year, about a 10th of its total \$20 million budget,” although its principal mission is no longer the education of Black Americans, as required by federal legislation); see also *What Is an HBCU?*, *supra* note 15.

311. Williams & Davis, *supra* note 233, at 8; *HBCUs Make America Strong*, *supra* note 17 (outlining the significant economic impact of HBCUs).



This is perfectly captured by Bryan Stevenson, public interest lawyer and author of *Just Mercy*:

The great evil of American slavery wasn't involuntary servitude. It wasn't forced labor. It was this idea, this narrative, that black people aren't as good as white people, that black people aren't fully human. [That] black people aren't evolved. [That] they can't do this, they can't do that. And that narrative created an ideology of white supremacy. And for me, that was the true evil of American slavery.<sup>312</sup>

The intentional machination to conceal the overwhelming successes of African Americans and their booming towns that were destroyed in God-awful massacres by covetous white mobs erased the achievements of Black America to promote the narrative of white superiority.

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312. Terry Gross, "Just Mercy" Attorney Asks U.S. to Reckon with Its Racist Past and Present, NPR (Jan. 20, 2020), <https://www.npr.org/2020/01/20/796234496/just-mercy-attorney-asks-u-s-to-reckon-with-its-racist-past-and-present>; see, e.g., DARITY & MULLEN, *supra* note 3, at 225 ("Segregation in the public sphere has taken many forms: separate water fountains, separate train cars, separate waiting rooms, separate seats on city buses and in theatres, separate toilets (when blacks were given access to public toilets at all), separate physical spaces with black spaces marked and designated as inferior, and even 'Negro days' at state fairs, city parks, or downtown shops."); see also JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY* 303 (1972) ("A number of slaves were so oppressed that they accepted their master's claims about the rightness, the power, and the sanctity of whiteness and the degradation, the powerlessness, and the shame of blackness. As a result, some blacks wished passionately that they were white. . . . The idea of the superiority of whites was etched into the slave's consciousness by the lash and the ritual respect he was forced to give to every white man."); see also KATHARINE GERBNER, *CHRISTIAN SLAVERY: CONVERSION AND RACE IN THE PROTESTANT ATLANTIC WORLD* 2, 9 (2018) ("Protestant Supremacy was the predecessor of White Supremacy, an ideology that emerged after the codification of racial slavery. . . . First of all, it is important to acknowledge that many enslaved and free Africans living in the Protestant colonies would have been exposed to Christianity in Africa or Latin America. For example, the Kingdom of Kongo had embraced Christianity as early as the fifteenth century, and many men and women were familiar with Catholicism before they were enslaved. . . . Some blacks were also Muslims."); see also GATES, *supra* note 53, at 360 ("Slavery predates the written historical record and at critical turns was supported legally by the major religions of Judaism and Christianity. Islam followed."); see generally ELIZABETH ISICHEI, *A HISTORY OF CHRISTIANITY IN AFRICA* (1995) (exploring the history of Christianity in Africa from antiquity to present, including the Atlantic slave trade); *THE ORIGINAL AFRICAN HERITAGE STUDY BIBLE* cxxii- cxxiii (Cain Hope Felder ed., 2007) ("It is chiefly the illiterates, the undereducated, and racially biased who refute the fact that the earliest and first human (*Homo sapiens*) was discovered in the area of what is known today as Africa. And that the place at the time was called Eden. From this point humankind migrated throughout the world. . . . Because of abundant facts and scientific findings, it is clear that most of the Old Testament developed from African/Edenic roots. . . . But literate England and Portugal knew quite well that these peoples whom they captured and chained were the same that were spoken of in the Holy Scriptures, and knew they were the first ones to carry and establish Christianity and Judaism in Africa, northeast Africa, and Europe. Western biases have so thwarted the history of the black race that it takes great study and research to unravel this maze of myths and confusion.").

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America succeeded and continues to do so in bringing life to its mantra of “white superiority” by underfunding Black educational institutions, then labeling them “inferior.”<sup>313</sup> However, this ignores the history of Black success and perpetuates racial discrimination, hatred and misunderstanding toward Blacks, especially when majority-white HBCUs and well-funded PWIs have some of the same problems that cause HBCUs to be labeled as “inferior.”<sup>314</sup>

Even with severe underfunding, the success of the Black students and graduates of HBCUs speaks for itself.<sup>315</sup> Imagine if HBCUs were properly funded – the successes would be even more remarkable and perhaps even more threatening to the American establishment – as much as an educated Black was deemed to be a threat to slavery

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313. See Du Bois, *supra* note 31, at 332; see also *supra* 43 and accompanying text; see also Jason L. Riley, *Black Colleges Need a New Mission*, WALL ST. J. (Sept. 28, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704654004575517822124077834> (reporting unsubstantiated thoughts by Black libertarian conservatives that HBCUs were once an essential response to racism, but are now academically inferior); see also David Leonhardt, *The Declining Payoff from Black Colleges*, N.Y. TIMES (Feb. 22, 2011, 3:19 PM), <https://economix.blogs.nytimes.com/2011/02/22/the-declining-payoff-from-black-colleges/?partner=RSs&emc=RSs> (noting HBCU graduates experience a hefty wage gap in comparison to non-HBCU graduates); but see Price, *supra* note 252 (“Students who went to HBCUs do not suffer a relative wage penalty. In fact, we found that they typically and on average earn more than similar students who went to non-HBCUs. Our findings are based on comparing HBCUs to other schools with a sizable black student population.”).

314. See *HBCUs and Why They’re Still Important Today*, *supra* note 220 (providing a general overview of the HBCU history); see ROGERS, *supra* note 8, at 162 (“Some African Americans (let alone whites) classify HBCUs as inferior using false claims, and demean HBCUs for complications that regularly occur at similarly funded [PWIs].”); see, e.g., Charles Boothe, *Krotseng Resigns As President of Bluefield State College*, BLUEFIELD DAILY TELEGRAPH (Dec. 20, 2018), [https://www.bdtonline.com/news/krotseng-resigns-as-president-of-bluefield-state-college/article\\_0c65bc94-048a-11e9-8119-cba889b6edbe.html](https://www.bdtonline.com/news/krotseng-resigns-as-president-of-bluefield-state-college/article_0c65bc94-048a-11e9-8119-cba889b6edbe.html) (reporting on the immediate resignation of then president of Bluefield State College, a majority-white HBCU, due to “lack of accountability, transparency and community involvement,” affirming that mismanagement is not a race issue); see, e.g., Ryan Lynch, *UCF seeks to move on after final report on funding issue*, ORLANDO BUS. J. (Aug. 30, 2019, 12:21 PM), <https://www.bizjournals.com/orlando/news/2019/08/30/ucf-seeks-to-move-on-after-final-report-on-funding.html> (reporting on the misuse of school operations funding at a PWI).

315. See, e.g., Howard Newsroom Staff, *The ‘Great Debate’ Returned Featuring Howard University and Harvard University*, HOWARD UNIV. (Nov. 1, 2019), <https://newsroom.howard.edu/newsroom/article/11471/howard-prevails-great-debate-v-harvard> (reporting that the Howard University debate team beat the Harvard University debate team before an audience of 10,000 in Hartford, Connecticut on October 28, 2019); see, e.g., Kent Pierce, *Debate Teams from Harvard, Howard University Square Off in 10th Annual Great Debate*, NEWS 8 (Oct. 28, 2019, 5:58 AM), <https://www.wtnh.com/news/connecticut/debate-teams-from-harvard-howard-universities-to-square-off-in-10th-annual-great-debate/>; see generally *About FAMU*, *supra* note 3 (“In 1992, 1995 and 1997, FAMU enrolled more National Achievement finalists than Harvard, Yale and Stanford. In 1999, Black Issues in Higher Education cited FAMU for awarding more baccalaureate degrees to African-Americans than any other institution in this nation.”).

and the ultimate freedom for Black people.<sup>316</sup> Inferior educations could not produce the success stories that come from HBCUs. That this needs to be stated or defended is because of racism.

### III. MAKING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES EQUAL

HBCUs are a model for the American education system because they foster an environment of growth and development that embraces their students as family.<sup>317</sup> HBCUs have been and continue to be critical to the advancement of African Americans and others. The sustainability and success of HBCUs, especially with the blatant racial inequities and challenges, are unparalleled. HBCUs have been the backbone of education for Blacks in the United States, when over a century ago, few institutions would accept a Black student. And even when they were accepted, the hostility they faced attending the institution often interfered with their matriculation. Nevertheless, they achieved. Professor Bell noted:

Engagement and commitment are what black people have had to do since slavery: making something out of nothing. Carving out a humanity for oneself with absolutely nothing to help – save imagination, will, and unbelievable strength and courage. Beating

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316. FINKELMAN, *supra* note 13, at 12; DU BOIS, *supra* note 14, at 27; *see also* DARITY & MULLEN, *supra* note 3, at 227 (noting that gubernatorial candidate and *Greenwood Enterprise* editor, James K. Vardaman, won his election by claiming that educated Negroes threatened political domination of the white race and his promise to remove the Black vote won him support from poor whites, small farm owners and factory workers); *see also* MERRITT, *supra* note 14, at 152 and accompanying text; *see also* Baldwin, *supra* note 286 (“It is your responsibility to change society if you think of yourself as an educated person.”); *see generally* WILLS, *supra* note 294 (describing the funding that educated, wealthy African Americans provided to the advancement of other Blacks and the anti-slavery movement during the last generation of Blacks born into slavery); *see* BALL, *supra* note 3, at 80 (noting that a Southern governor stated, “educated blacks want to end the blessed tradition of the South, the ‘divine institution,’ as many in these parts call enslavement”); *see supra* note 110 and accompanying text.

317. *See generally* Marybeth Gasman & Andrés Samayoa Castro, *Historically Black Colleges and Universities: Fostering Familial Learning Environments for Student Success*, AM. COUNCIL EDUC: HIGHER EDUC. TODAY BLOG (Oct. 4, 2017), <https://www.higheredtoday.org/2017/10/04/historically-black-colleges-universities-fostering-familial-learning-environments-student-success/> (“Looking at completion, students at HBCUs complete at higher rate than what the federal graduation rate suggests. . . . Student success at HBCUs can be attributed to multiple factors, including how HBCUs cultivate an ethos of familial success and provide robust services for students hailing from low-income and other under-resourced backgrounds. . . . HBCUs’ ethos of success is steeped in the idea of family. Many of these institutions emphasize collaboration over competition through cohort models in which students understand that their success is deeply tied to others and not merely a product of their own doing.”).

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the odds while firmly believing in, *knowing* as only they could know, the fact that all those odds are stacked against them.<sup>318</sup>

But there are obvious fixes that would make the HBCU model even more remarkable and sustainable and begin to unstack the odds against Black people. Despite the uncontroverted and uncontested evidence to the contrary and the civil rights lawsuits for financial parity, HBCUs continue to lack comparability to PWIs, even the state-funded schools.<sup>319</sup> This is critical as HBCUs rely more heavily on government funding than PWIs, and seventy percent of HBCU students have limited financial resources to pay for college.<sup>320</sup>

### A. *Disproportionate Funding*

In efforts to undermine the effectiveness and success of HBCUs, they have never been given funding that is equitable to PWIs – including federal, state, local, corporate, and foundation funding.<sup>321</sup> This has been since the creation of HBCUs to present, largely as a result of the dual school system segregated by race that remains in place even after *Brown*.

The State of Mississippi, for example, established the University of Mississippi for the exclusive higher education of white persons in 1848 and did not admit a Black student until 1962 – and then only under court order.<sup>322</sup> In 1975, private plaintiffs sued the State, alleging that “Mississippi had maintained the racially segregative effects of its prior dual system of postsecondary education in violation of [the

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318. FINKELMAN, *supra* note 13, at 38.

319. Robert T. Palmer, *Desegregation Policy and Disparities in Faculty Salary and Workload: Maryland's Historically Black and Predominately White Institutions*, 60 NEGRO EDUC. REV. 7, 8 (2009), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.856.41&rep=rep1&type=pdf>.

320. Williams & Davis, *supra* note 233, at 2-3.

321. ROEBUCK & MURTY, *supra* note 30, at 25 (1993); *see also* RUDOLPH, *supra* note 104 and accompanying text; *see also* Melissa Wooten, *Why Historically Black Colleges and Universities Matter in Today's America*, HIGHER EDUC. JOBS (Aug. 14, 2015) (“For instance, southern state legislative bodies routinely diverted money away from HBCUs, leaving the schools to operate on razor-thin budgets.”); Williams & Davis, *supra* note 233, at 5-7; JACKSON & NUNN, *supra* note 19, at 86-87 (“States with public HBCUs have in, tradition and practice, resisted equitable treatment of public HBCUs compared to the treatment of public historically white institutions. . . . When inequitable treatment is not addressed by the state, HBCUs and their constituents have looked to the federal government for redress.”); *see, e.g.*, EBONY, *supra* note 31, at 139 (“Predominately white land-grant colleges received an average of \$2,400 in state and federal aid per student, while predominately black ones received only \$1,365.”).

322. *United States v. Fordice*, 505 U.S. 717, 722 (1992).

United States Constitution].”<sup>323</sup> With the United States and others intervening as plaintiffs, the case became a class action.<sup>324</sup> The parties wasted twelve years attempting “to achieve a consensual resolution of their differences through voluntary dismantlement by the State of its prior separated system.”<sup>325</sup> The federal district court and appellate courts found in favor of Mississippi, but that was overturned by the Supreme Court in 1992.<sup>326</sup> It remanded the case for the lower court to determine whether the State’s higher educational practices, including the inequitable funding of the three HBCUs [Alcorn State University, Jackson State University, and Mississippi Valley State University] need revamping to dismantle the State’s prior discriminatory system.<sup>327</sup> Nearly 30 years later, the parties reached a settlement to award over \$500 million dollars to the State’s three HBCUs in 2002.<sup>328</sup>

With the achievements of Blacks and HBCUs, despite the financial inequities, it is unfathomable to imagine where Mississippi’s and other states’ HBCUs would be now had they received equitable funding, especially when given the remarkable growth and development of PWIs. A Bloomberg analysis revealed:

[N]one of the ninety institutions of higher education in the U.S. with endowments of more than \$1 billion is an HBCU, and even the wealthiest of the HBCUs, Howard University in Washington, D.C., only ranks a hundred and sixtieth on the list, with an endowment of \$578 million — just 2 percent of that of top-ranking Harvard University, which has an endowment of \$35.7 billion. The impact of such a discrepancy is profound: the bigger a school’s endowment, the more it can spend on attracting highly qualified students, regardless of need, and on providing those students with the academic services they need to succeed. . . . Although African Americans tend to give a larger share of their discretionary incomes to charity than do white Americans, they also tend to have less accumulated wealth, even at similar levels of educational attainment. In addition, HBCUs historically have been at a disadvantage in receiving large philanthropic gifts from non-alumni.<sup>329</sup>

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323. *Id.* at 723.

324. *Id.* at 724.

325. *Id.*

326. *Id.* at 717, 743.

327. *Id.* at 741.

328. Talia Richman, *Coalition of Maryland HBCUs Seeks \$577 Million to Drop Lawsuit, Avoid ‘Litigating for the Next 10 Years,’* BALT. SUN (Sept. 10, 2019, 6:29 PM), <https://www.baltimoresun.com/education/bs-md-hbcu-lawsuit-settlement-offer-20190910-cbop4pgn-bzbj5emeyni77xcuoy-story.html>.

329. Kate Smith, *HBCUs Struggle to Close the Endowment Gap*, PND (July 19, 2017), <https://philanthropynewsdigest.org/news/hbcus-struggle-to-close-the-endowment-gap>.

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Even with the settlement, Mississippi will never restore the generational wealth that has divided its residents. What is unspoken is that over three decades of educational opportunities were lost to Black students while this case languished in the court system, which has significantly interfered with Blacks' access to education.

In 2006, alumni from Maryland's HBCUs – Bowie State University, Coppin State University, Morgan State University, and the University of Maryland Eastern Shore – filed a lawsuit against the State of Maryland for systemic discrimination against the universities.<sup>330</sup> These HBCUs sought a settlement of \$577 million, which is more than five times the amount that the State of Maryland offered.<sup>331</sup> In 2020, the Maryland Senate passed legislation, ultimately vetoed by its Republican governor, then signed a veto-proof bill in 2021, that guarantees “\$577 million in additional funding for the schools over the course of a decade.”<sup>332</sup>

South Carolina State University has also sought judicial intervention based on the unequal distribution of funds to the only public HBCU in the state.<sup>333</sup> Even without equitable funding, HBCUs have remained grounded and steadfast in their mission to educate a race of people consistently and intentionally excluded from higher educational advancement. This exclusion has unequivocally stifled the progress of African Americans.

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330. Talia Richman, *4th Circuit Judges Say Maryland HBCU Lawsuit Should Be Settled, Set Mediation Deadline of April 30*, BALT. SUN (Jan. 3, 2019), <https://www.baltimore.sun.com/education/bs-md-hbcu-lawsuit-update-20190103-story.html>; B. Denise Hawkins, *A Coalition of Maryland HBCUs Keep the Hope of a Legal Settlement Alive*, DIVERSE EDUC. (June 19, 2020), <https://diverseeducation.com/article/181481/> (reporting that the near 15 year battle by the Maryland HBCUs against the state of Maryland is in limbo).

331. Richman, *supra* note 330.

332. Pamela Wood, *Maryland Gov. Hogan Signs Bill Sending \$577 Million to State's Historically Black Universities*, BALT. SUN (Mar. 24, 2021, 5:27 PM), <https://www.baltimore.sun.com/politics/bs-md-pol-ga-hbcu-signing-20210324-vzsbxgmzfnfpqk3zkvdaml7q-story.html>.

333. Gene Crider, *SCSU Supporters Suing State: Legal Action Claims S.C. Has Caused Problems via Segregated System*, TIMES & DEMOCRAT (Feb. 15, 2015), [https://thetandd.com/news/local/scsu-supporters-suing-state-legal-action-claims-s-c-has/article\\_30bedb00-b4cc-11e4-8ac5-efaf2f2cc7c0.html](https://thetandd.com/news/local/scsu-supporters-suing-state-legal-action-claims-s-c-has/article_30bedb00-b4cc-11e4-8ac5-efaf2f2cc7c0.html) (alleging “South Carolina has caused the institution’s financial problems by funding competing programs at traditionally white schools. . . since research shows white students won’t go to a historically black college or university if the program they want is offered at a traditionally white one”); *About SC State*, S.C. STATE UNIV., <https://www.scsu.edu/aboutscstate/factsampstatistics.aspx> (last visited Nov. 18, 2020) (“South Carolina’s only public, historically black college and university (HBCU)”).

*B. Renaming, Consolidating, or Closing Historically Black Colleges and Universities*

A recent attack against HBCUs has been the effort of state legislatures sponsoring the idea of potentially renaming state colleges to increase enrollment and diversity.<sup>334</sup> In North Carolina, legislators considered changing the names of schools. Johnny Taylor, Jr., then-CEO of the Thurgood Marshall College Fund said: “I do not for the life of me understand why you would even begin to talk about name changing. . . . The notion that some legislator can decide to change the name of your institution ignores history, it ignores the alumni, it ignores current students.”<sup>335</sup>

Consolidation is another form of closure.<sup>336</sup> Instead of state legislatures allotting the appropriate funding and sponsoring reparations bills to compensate for the lack of funding that governments – local, state, and federal – swindled HBCUs out of since their founding, they are seeking other solutions. An HBCU graduate in the Georgia legislature sponsored legislation to consolidate three HBCUs – Savannah State University, Albany State University, and Fort Valley State University – into the Georgia A&M University to “meet” enrollment needs.<sup>337</sup> Some argue legacies would be lost; others argue that consolidation would save the HBCUs.

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334. Rick Seltzer, *Fears for Future of UNC Black Colleges*, INSIDE HIGHER ED (May 18, 2016), <https://www.insidehighered.com/news/2016/05/18/proposed-hbcu-tuition-cuts-draw-criticism-north-carolina> (“The system’s board of governors would then be charged with recommending name changes for institutions if it’s determined new names would improve application numbers, academic strength and student diversity.”).

335. *Id.*

336. JACKSON & NUNN, *supra* note 19, at 105; Iyani Hughes, *Bill Proposes Georgia Merge Three HBCUs Struggling to Meet Enrollment Goals*, CBS46 (June 26, 2019), [https://www.cbs46.com/news/bill-proposes-georgia-merge-three-hbcus-struggling-to-meet-enrollment/article\\_b8ea1f18-987e-11e9-8f3f-df410f9a5b27.html](https://www.cbs46.com/news/bill-proposes-georgia-merge-three-hbcus-struggling-to-meet-enrollment/article_b8ea1f18-987e-11e9-8f3f-df410f9a5b27.html); RON STODGHILL, *WHERE EVERYBODY LOOKS LIKE ME: AT THE CROSSROADS OF AMERICA’S BLACK COLLEGES AND CULTURE* 12 (2015) (“But the push from state governments, many Republican-led, to close or consolidate public HBCUs seems all but certain to accelerate black colleges’ disappearance from the landscape of higher education.”).

337. S.B. 273, Gen. Assemb., Reg. Sess. (Ga. 2019), <http://www.legis.ga.gov/Legislation/en-US/display/20192020/SB/273>; see also David Pluviose, *Georgia HBCU Consolidation May Be Reintroduced*, DIVERSE EDUC. (July 8, 2019), <https://diverseeducation.com/article/149010/> (“After the original measure, Senate Bill 273, was withdrawn earlier this year following backlash, it was replaced by Senate Bill 278, which allowed Savannah State, Albany State and Ft. Valley State to keep their individual names, according to an earlier Diverse report. However, the move did not alleviate the concerns of alumni and supporters of the three Georgia HBCUs, as some stakeholders wished for more transparency in the crafting of the bills.”).

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In addition, Denmark Technical College, the only historically Black technical college in South Carolina, initiated a discrimination lawsuit in 2019 after it was tasked to downgrade or consolidate. The complaint described the grave disparity in support and funding from the State.

The lawsuit also points to how Denmark Tech has suffered from a lack of local support — though the suit notes that the counties it serves are too poor to contribute more money. For example, between 2014 and 2018, Denmark Tech received a total of \$38,100 from county contributions to the school, while Greenville Technical College received \$59 million, according to the suit.<sup>338</sup>

This college is critical to the community as it brings money and jobs to the very under-served area.

Historically, with the advent of integration in the 1960s and 1970s, most of the Black teachers in once segregated schools were terminated. Black students were forced to attend schools that lacked diversity in teaching staffs. Consolidation of HBCUs potentially mirrors that history. Schools that pioneered the concept of inclusion and diversity would be eradicated. This would be baleful to Black education.

Likewise, state legislatures also are advancing the idea of low-cost tuition to increase enrollment. However, that approach could bankrupt HBCUs.<sup>339</sup> North Carolina's Republican-sponsored Senate Bill 873 (Access to Affordable College Education Act) introduced the concept of \$500 tuition for some of its public universities, including three HBCUs — Elizabeth City State University, Fayetteville State University, and Winston Salem State University. The language of the bill was noncommittal regarding replacing the tuition lost and equitably funding the three schools to ensure their longevity. Sometimes, state legislatures target smaller or less popular HBCUs. Nevertheless, after public outcry and tremendous dissent, Bill 873 passed but with the removal of two of the HBCUs; Elizabeth City State University remained a part of the bill.<sup>340</sup> There is a potential for increased student

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338. Lucas Daprile, *Denmark Tech Sues SC, Saying the State Financially Starved Historically Black School*, THE STATE (Apr. 17, 2019, 05:27 PM), <https://www.thestate.com/news/local/education/article229387129.html>.

339. NAACP: *Lawmakers Trying to Bankrupt Historically Black North Carolina Schools*, ABC (May 31, 2016), <https://abc11.com/politics/naacp-bill-is-an-attack-on-historically-black-schools/1363999/>.

340. *NC Promise Tuition Plan Frequently Asked Questions*, ELIZ. CITY ST. UNIV., [http://www.ecsu.edu/administration/business/budget-office/ncpromisefaq.html#:~:text=NC%20Promise%20will%20set%20the,year\)%20for%20nonresident%20undergraduate%20students](http://www.ecsu.edu/administration/business/budget-office/ncpromisefaq.html#:~:text=NC%20Promise%20will%20set%20the,year)%20for%20nonresident%20undergraduate%20students) (last visited Nov. 18, 2020) (“NC Promise will set the tuition rates for



enrollment, but absent a guaranteed promise to fund HBCUs permanently and equitably, as well as replace the lost tuition, a reduction of tuition to \$500 would starve the budgets of HBCUs, which already struggle as compared to PWIs. The University of the Virgin Islands is the first HBCU to offer free tuition.<sup>341</sup> However, its majority Black island location makes it unique as compared to other HBCUs.

But would enrollment at HBCUs diminish if college tuition were free in all universities? That is highly unlikely because HBCUs do not simply offer an education for Black students but rather a richer and more unique experience as compared to PWIs.<sup>342</sup> Black students choose HBCUs for reasons PWIs cannot compare. Some students have

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[Elizabeth City State University, University of North Carolina at Pembroke, and Western Carolina University] at \$500 per semester (\$1,000 per year) for resident undergraduate students and \$2,500 per semester (\$5,000 per year) for nonresident undergraduate students. . . . Any potential loss in funding for the university due to lower tuition will be made up for with state appropriation.”); Jane Stancill & Colin Campbell, *HBCUs to Be Dropped from Low-Tuition Proposal at UNC Campuses, Sponsor Says*, THE NEWS OBSERVER (June 2, 2016, 5:44 PM), <https://www.newsobserver.com/article81232307.html> (“Senate Bill 873 . . . threatens the economic viability of three [public] black campuses: Elizabeth City State, Fayetteville State and Winston-Salem State universities . . . [and] new merit scholarship program, called the Cheatham-White scholarships, would be created at the state’s two larger historically black campuses – N.C. A&T State and N.C. Central universities.”); Herbert L. White, *African American NC Lawmakers Criticize Tuition-Slashing Bill SB 873 Seen As Threat to Public Black Colleges*, CHARLOTTE POST (May 28, 2016, 2:30 PM), <http://www.thecharlottepost.com/news/2016/05/28/local-state/african-american-nc-lawmakers-criticize-tuition-slashing-bill/> (“We will strongly oppose the closing of any HBCUs in the University of North Carolina System or any legislation which dilutes the rich cultural experiences provided at these important institutions,” the Legislative Black Caucus said in a statement. “We support the full and sustainable funding of our HBCUs, remain skeptical, but willing to engage in this discussion.”); see also ROGERS, *supra* note 8, at 162-63 (detailing HBCU students’ protests against phasing out five public HBCUs in North Carolina); see also Williams & Davis, *supra* note 233, at 3 (finding that private HBCUs are significantly tuition-dependent); see also Moran & Akinnibi, *supra* note 282; see also Derek Major, *Biden’s Build Back Better Plan Proposes Free Tuition to HBCUs*, BLACK ENTERPRISE (July 31, 2020), <https://www.blackenterprise.com/bidens-build-back-better-plan-proposes-free-tuition-to-hbcus/> (“To help Black Americans, Biden’s plan will include students receiving tuition-free access to four-year, public historically black colleges and universities (HBCUs) and minority-serving institutions if their families earn below \$125,000.”); Biden for President, *The Biden Plan for Education Beyond High School*, JOE BIDEN, <https://joebiden.com/beyondhs/#> (last visited Nov. 22, 2020) (outlining the Biden-Harris plan for strengthening HBCUs, providing increased access for students to attend college, and committing to rectify funding disparities faced by HBCUs and other minority-serving educational institutions).

341. *U.S. Virgin Islands High School Graduates Eligible for Free College Tuition at UVI*, UNIV. VIRGIN ISLANDS (Feb. 5, 2019), [https://www.uvi.edu/news/articles/2019/19\\_015\\_high\\_school\\_students\\_free\\_tuition.aspx](https://www.uvi.edu/news/articles/2019/19_015_high_school_students_free_tuition.aspx).

342. See Maria Moseley & Tanya A. Chri, *20 HBCU Graduates on Why They Attended Historically Black Schools*, ESSENCE (June 12, 2017), <https://www.essence.com/culture/hbcu-graduates-why-i-went-to-black-school/>; see also Skylar Mitchell, *Why I Chose a Historically Black College*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/opinion/sunday/finding-growth-at-my-historically-black-college.html>.

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limited options because of their high school record and HBCUs offer more help to succeed for those students PWIs may have denied; some want to continue the HBCU family legacy; most want, indeed, deserve a few years without constantly fighting racism; and some, who earned full scholarships to PWIs, forewent them for the HBCU experience. The notion that only gifted Blacks attend PWIs since segregation ended is nonsensical and unsupported – and it continues the false “white supremacy” mantra.

However, governments must partner with HBCUs before proposing directional changes for HBCUs, such as free or reduced tuition, downgrades, mergers, or name changes because those efforts could destroy HBCUs. Considering options for survival of HBCUs is not unvalued, but any proposal must consider the impact of destroying HBCUs, the potential for diverting HBCUs from their mission, and whether the proposal would pass constitutional muster.<sup>343</sup> HBCUs do not need to be controlled or controlled again by entities other than HBCU leadership. Public HBCUs have increased oversight by majority-white state governing boards, but that must not divert the mission of HBCUs as it has in the past. Providing the reparative funding that HBCUs deserve would solve many of their current issues, then HBCUs could focus on being better and producing even more phenomenal graduates.

As mentioned earlier, *Brown* dismantled the “separate but equal” framework for the American educational system, making segregation of public schools unconstitutional, but the focus should have been on the “equal.” Instead of integration, equal funding should have been the focus to ensure that Black children received the education to which they are entitled.<sup>344</sup> The racial disparities in the unequal funding for educational resources for Black children at all levels is numbing. Thus, the well-documented, chronic underfunding of Black education must be remedied so that American children have an equal opportunity for an education. Two scholars posited:

Many American children are affected by institutional racism. Education is their best hope for breaking racism’s chains. Yet, although such issues as equal opportunity, desegregation, and inequities in educational achievement have received considerable attention in

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343. See, e.g., Alvin J. Schexnider, *Governance and the Future of Black Colleges*, INSIDE HIGHER ED (Dec. 20, 2017), <https://www.insidehighered.com/views/2017/12/20/struggling-hbcus-must-consider-new-options-survival-opinion> (recommending options for HBCU sustainability: a new business model, a new vision, commitment to recruit the best talent for leadership, and meaningful engagement among key stakeholders ensuring shared governance).

344. Trei, *supra* note 33.

recent years, very few schools have developed deliberate and systematic programs to reduce prejudice. The prevailing attitude seems to be that society has done away with the problem of racism through legislative action and special programs. But continuing instances of overt racism belie this notion, and institutionalized manifestations of racism – less blatant and thus more insidious – continue to stunt the aspirations and talents of minority children and distort the views and psyches of white children. . . . The effects of racism that plague the lives of minority children are more than personal problems. They damage not only the health and welfare of children, but the character of our society, the quality of our civilization, and our prospects for the future. Our children are our future – *all* our children.<sup>345</sup>

#### EPILOGUE

From beginning as rudimentary schools to producing Rhodes Scholars, HBCUs have made their own case as to why they are still relevant. Before *Brown*, over 90 percent of Blacks were educated at HBCUs.<sup>346</sup> From 1837 to present, in varying degrees, HBCUs have faced, “lack of encouragement from the world around them; neglect and lack of funds; and an all-pervasive racism that had to be experienced to be believed.”<sup>347</sup> Nevertheless, despite what often seemed like insurmountable odds, HBCUs emerged with missions intact, continuing their legacy. Their ability to produce scholars, leaders, and intellectuals is unparalleled.<sup>348</sup> HBCUs are not monolithic – some have under 500 students and some over 10,000, some are well-known as the “elite” and many are lesser-known that educate the lion’s share of severely under-served students in the rural South – but because of why and

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345. Pine & Hilliard III, *supra* note 10, at 1-2.

346. ROEBUCK & MURTY, *supra* note 30, at 43.

347. DREWRY & DOERMANN, *supra* note 47, at 127.

348. See, e.g., BAKER, *supra* note 230, at 82-83 (reporting a story that was often the case in that Black law schools trained law students who became lawyers who dismantled segregation: South Carolina State Law School was created to maintain segregated schools but its faculty trained students who played key roles in dismantling the segregated law school because it was not comparable to the University of South Carolina, the white law school, in that attending South Carolina State “deprived African Americans of opportunities to interact with current and future members of South Carolina’s political and legal establishment”); see, e.g., Shawna Mizelle, *Howard University’s History of Producing Trailblazing Black Leaders on Display with Harris Pick*, CNN (Aug. 13, 2020, 9:37 PM), <https://www.cnn.com/2020/08/13/politics/howard-politicians-kamala-harris/index.html> (“Howard has served as a starting block for many lawmakers at various levels of government, including the first Black Supreme Court justice, first Black US governor, first Black US ambassador to the United Nations and now the first Black woman to be picked as a vice presidential candidate.”).

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how they emerged, HBCUs have a shared model.<sup>349</sup> This HBCU model should be emulated in American education.

HBCUs pioneered the original model of inclusion and diversity. Their very foundation stands firmly on a model of caring and compassion for their students, which has resulted in educating those marginalized and deprived of economic opportunities.<sup>350</sup> HBCUs have expectations of their students where they are nurtured and

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349. *Table 313.10 Fall Enrollment, Degrees Conferred, and Expenditures in Degree-Granting Historically Black Colleges and Universities, by Institution: 2017, 2018, and 2017-18*, NAT'L CTR. EDUC. STATS., [https://nces.ed.gov/programs/digest/d19/tables/dt19\\_313.10.asp](https://nces.ed.gov/programs/digest/d19/tables/dt19_313.10.asp) (last visited Nov. 18, 2020); *see, e.g., Ten Top Smaller HBCUs That Are Rising*, HBCU CAMPAIGN FUND (Feb. 5, 2018), <https://hbcucampaignfund.org/2018/02/05/ten-top-smaller-hbcus-that-are-rising/> (highlighting Rust College, Clinton College, Arkansas Baptist College, Lawson State Community College, Morris College, LeMoyne-Owen College, Huston-Tillotson University, Paine College and other smaller HBCUs); *2019 Ten Top Smaller HBCUs That Are Rising*, HBCU CAMPAIGN FUND (Sept. 20, 2019), <https://hbcucampaignfund.org/2019/09/20/2019-ten-top-smaller-hbcus-that-are-rising/> (highlighting Morris Brown College, Simmons College of Kentucky, Denmark Technical College, Allen University, Lane College, Philander Smith College and other smaller HBCUs); *2020 Ten Top Smaller HBCUs That Are Rising*, HBCU CAMPAIGN FUND (Feb. 6, 2020), <https://hbcucampaignfund.org/2020/02/06/2020-ten-top-smaller-hbcus-that-are-rising/> (highlighting J.F. Drake Community and Technical College, Tougaloo College, Miles Colleges, Stillman College, Edward Waters College, Paul Quinn College, Wiley College, and Bennett College); *see also* Nick Chiles, *HBCUs Graduate More Poor Black Students Than White Colleges*, NPR (Mar. 1, 2017, 5:01 AM), <https://www.npr.org/sections/codeswitch/2017/03/01/517770255/hbcu-graduate-more-poor-black-students-than-white-colleges> (“The Education Trust, a Washington, D.C.-based nonprofit, revealed that the nation’s HBCUs are doing a much better job than predominantly white schools in graduating low-income black students.”).

350. Williams & Davis, *supra* note 233, at 8; *see also* Lorelle L. Espinosa et al., *Minority Serving Institutions As Engines of Upward Mobility*, AM. COUNCIL ON EDUC. iii (2018), <https://www.acenet.edu/Documents/MSIs-as-Engines-of-Upward-Mobility.pdf> (“Minority serving institutions (MSIs) [which include HBCUs] play an integral role in the education of students from low-income families and communities of color where educational attainment is disproportionately low and income mobility can be stagnant. With a commitment to serve the nation and their surrounding communities, MSIs are engines of upward mobility for millions of students, and play this role even while the majority of MSIs are at a financial resource disadvantage when compared to non-MSIs.”); *see also* Timothy Pratt, *Historically Black Colleges See a Spike in Enrollment from Racial Unrest*, PBS (Oct. 5, 2016, 9:00 AM), <https://www.pbs.org/newshour/education/racial-unrest-historically-black-colleges-universities-seeing-spike-enrollment> (“Cost has long been seen as a plus for HBCUs. . . . HBCU tuition rates are 50 percent lower than those of their historically white counterparts; about a third of HBCUs have tuition and fees under \$15,000.”); *see also* Ivory A. Toldson et al., *Historically Black Colleges Are Unprepared to Weather the Coronavirus*, NAT'L INT. (Mar. 25, 2020), <https://nationalinterest.org/blog/buzz/historically-black-colleges-are-unprepared-weather-coronavirus-136577> (quoting Gasman: “HBCUs rely a lot on tuition and have smaller endowments than other schools. If these HBCUs get into financial trouble, they risk losing their accreditation since financial stability is one part of what it takes to remain accredited. Without accreditation, it is nearly impossible to recruit students.”); Chiles, *supra* note 349 (reporting that “roughly half of the nation’s 105 HBCUs have a freshman class where three-quarters of the students are from low-income backgrounds, while just 1 percent of the 676 non-HBCUs serve as high a percentage of low-income students”).

mentored.<sup>351</sup> One scholar labels the HBCU model “a second curriculum.” He explained:

Beyond the written course of study, at Black colleges, an unwritten *second curriculum* thrived. This second curriculum defined the bond between teacher and student, inspiring youths to develop a “linked sense of fate” within the race. This second curriculum was a pedagogy of hope grounded in idealism, race consciousness, and cultural nationalism. More importantly, within the noncollapsible space of Black colleges, this instruction and mentoring was beyond the reach of outsiders. Emerging from the teacher-student relationship, the second curriculum was shielded from the hostilities of whites, who despite their best efforts, remained unaware of how fruitful this association would eventually become.<sup>352</sup>

Meanwhile, another scholar identified what she labeled an “unspoken curriculum” that whites employed for generations of their children.<sup>353</sup>

White children in the South often accepted incidents of racial violence as natural and inherent to the racial order of Jim Crow, as parents and the community indoctrinated white youth to believe in white male supremacy through parental stories, schoolbooks, toys, playacting, and children’s organizations. White southerners sought to maintain white supremacy by teaching their youth that whites and African Americans who failed to uphold segregation threatened the entire power structure of the white South. As a result, white children learned that African American violations of the dictates of segregation required punishment, primarily through physical brutality.<sup>354</sup>

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351. See, e.g., Delece Smith-Barrow & Aaricka Washington, *A College Where the Graduation Rate for Black Students Has Been Zero Percent – For Years*, HECHINGER REP. (June 3, 2020), <https://hechingerreport.org/a-college-where-the-graduation-rate-for-black-students-has-been-0-percent-for-years/> (reporting that a PWI with no or low expectations of Black students and that according to federal data, Kent State in Ashtabula has had a zero percent graduation rate for first-time, full-time Black students for several years and that the University says it has limited resources targeted for Black students and that it’s not the University’s fault “but that their students, many of whom are low-income, must juggle jobs along with their coursework, lengthening the time it takes them to graduate. They also said local public schools don’t prepare young people for the rigor required for university classes.”); see, e.g., STACEY ABRAMS, *LEAD FROM THE OUTSIDE* xxiii (2018) (recalling repeated instances of white educators challenging Abrams’ scholastic abilities because she is Black, potentially undermining her confidence); see also Pine & Hilliard III, *supra* note 10, at 8 (“Studies have consistently shown a significant correlation between low self-esteem and prejudice.”).

352. JELANI M. FAVORS, *SHELTER IN A TIME OF STORM: HOW BLACK COLLEGES FOSTERED GENERATIONS OF LEADERSHIP AND ACTIVISM* 5 (2019).

353. ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 150 (2020) (quoting historian Kristina DuRocher: “White culture desensitized children to racial violence so that they could perpetuate it themselves one day.”).

354. KRISTINA DUROCHER, *RAISING RACISTS: THE SOCIALIZATION OF WHITE CHILDREN IN THE JIM CROW SOUTH* 93 (2011).

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This “unspoken curriculum,” however, was not exclusive to the South. Racist attitudes, although often harsher in the South, were in the North as well. The white curriculum was anti-Black, but the Black curriculum was not anti-white. This is why the HBCU model that embraces students is so necessary.

The HBCU model includes inviting and challenging environments – safe spaces to learn and develop self-identity; they are havens away from racial hatred. Students feel valued, respected, safe and wanted at HBCUs.<sup>355</sup> HBCUs establish familial learning environments where professors invest in their students, even the ones who enter ill-prepared. HBCUs promote Black culture, Black life, Black professors and Black history, debunking stereotypes and building student confidence, career skills and survival skills, all without the pressure of Black students being perceived as a threat.<sup>356</sup> This allows the students to dream of who they can be while being unapologetically, authentically Black. HBCU students are not invisible or isolated but embraced and encouraged. With this model, HBCUs have a successful track record of over 100 years of providing rudimentary to rigorous curriculums, resulting in productive professionals, international leaders and world scholars, proudly including “Senator Kamala Harris [, a Howard University alumna,] making history as the first HBCU graduate on a major party’s presidential ticket,” and the first woman and Black woman as Vice President of the United States of America.<sup>357</sup>

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355. See generally KENDALL, *supra* note 92, at 198 (“The most common form of racial discrimination in education is harassment of students of color by their white counterparts. Every few days, the news carries a story of racist bullying, whether it be racially motivated physical attacks, racial epithets scrawled on school walls, or organized hateful activities directed at making marginalized students feel unwelcome and unsafe.”).

356. See, e.g., ABRAMS, *supra* note 351, at 9 (“Spelman operates as a four-year course on deprogramming black women stereotypes – the welfare queen, the hypersexualized Jezebel, being the lowest rung of the minority hierarchy – replaced by a parade of chief executive officers, public intellectuals, scientists, artists, and actors.”); see, e.g., BRITTANY COOPER, *ELOQUENT RAGE* 9 (2018) (“Howard offered an explicit education in the workings of racism and white supremacy,” but sexism lessons were much more subtle).

357. Candace Coleman, *Senator Kamala Harris Makes History As First HBCU Graduate on a Major Party’s Presidential Ticket*, WJTV (Aug. 13, 2020, 9:11 AM), <https://www.wjtv.com/news/senator-kamala-harris-makes-history-as-first-hbcu-graduate-on-a-major-party-presidential-ticket/>; Lisa Lerer & Sydney Ember, *Kamala Harris Makes History As First Woman and Woman of Color As Vice President*, N.Y. TIMES, <https://www.nytimes.com/2020/11/07/us/politics/kamala-harris.html> (last updated Nov. 10, 2020) (“A senator from California and a former prosecutor, Ms. Harris has a track record in breaking new ground. Now, she is the first woman, first Black person, and first person of Asian descent elected to the country’s second-highest office.”); see also Kevin Powell, *The Power of Stacey Abrams*, WASH. POST (May 14, 2020) (reporting on Stacey Abrams, another HBCU graduate who was being considered to join the Biden presidential ticket: “At Spelman College, a historically black women’s college in Atlanta, she majored in interdisciplinary

HBCUs also embrace their non-Black students. And, even in the midst of the unyielding hostility that Blacks were experiencing and continue to experience in America, since their founding, HBCUs created a model that embraces and educates all.

Imagine if the HBCU model was universally employed. America may be a more civil country for all Americans. The white curriculum advanced racial hatred to persist and grow stronger, deeper, and more hostile against Blacks, whereas the Black college curriculum continues to teach students to hope and believe in a better America and to be inspired to believe that their generation and generations beyond would be the agents of change for America. The Black college curriculum evolved out of dreaming of who and what Black children could be if allowed. Unlike the white curriculum, the Black one was not based in hatred or on race, yet Blacks understood that “a different set of rules applied to Blacks than to whites.”<sup>358</sup> This distinction has never ended.

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studies (political science, economics and sociology), with a minor in theater. It was the first time she would be steeped so broadly in black life and culture outside of her family home. Johnnetta Cole, who later led the Smithsonian National Museum of African Art and was the school's president at the time, became Abrams's mentor. Cole encouraged young Abrams — who was perpetually raising her voice — to get involved, attend meetings and bring about change. Abrams did that and then some, on and off campus.”); *see also* Juana Summers, *Howard University Shaped Kamala Harris' Path to Political Heights*, NPR (Oct. 19, 2020, 5:00 AM), [https://www.npr.org/2020/08/19/903716274/howard-university-shaped-kamala-harris-path-to-political-heights?fbclid=IWAROnceUhkL-XWFvJcEaUX9YcvFvBE\\_wOr\\_uYlvsK0mh0CcHJRyUkHAr\\_4mY](https://www.npr.org/2020/08/19/903716274/howard-university-shaped-kamala-harris-path-to-political-heights?fbclid=IWAROnceUhkL-XWFvJcEaUX9YcvFvBE_wOr_uYlvsK0mh0CcHJRyUkHAr_4mY) (“In choosing Howard, regarded as one of the nation's premier historically Black educational institutions, Harris was immersing herself in Black culture and Black life. She pledged Alpha Kappa Alpha, the nation's oldest Black sorority, founded more than 100 years ago at Howard. She attended protests against apartheid.”); *see also* MARJORIE H. PARKER, *ALPHA KAPPA ALPHA: IN THE EYE OF THE BEHOLDER* vi, 2 (1979) (“[T]he influence and concerns of Alpha Kappa Alpha Sorority extend far beyond campus gates and student interests. The major goals of program activities center upon significant issues in our larger national life and focus on areas which range from remote corners of depressed communities, to the halls of government and the chambers of world assemblies. . . . Membership in Alpha Kappa Alpha is open to women of high ethical and scholastic standards who are pursuing or have completed a course leading to a degree in an accredited college of university.”); *see generally* LARRY C. ROSS JR., *THE DIVINE NINE: THE HISTORY OF AFRICAN AMERICAN FRATERNITIES AND SORORITIES* (2000) (discussing the nine Black Greek lettered organizations, one of which is Alpha Kappa Alpha Sorority, Inc.); Nicole Chavez, *Ralph Warnock is the Latest HBCU Grad to Make History in US Politics*, CNN, <https://www.cnn.com/2021/01/06/us/hbcu-raphael-warnock-georgia-senate-runoff/index.html> (last updated Jan. 6, 2021) (“The Rev. Raphael Warnock is the latest HBCU grad breaking barriers and standing up to shape the nation. Students and alumni from historically Black colleges and universities around the country are celebrating Warnock winning his US Senate race in Georgia, hoping it will change the misconceptions around the institutions' quality of education and graduates' social mobility. Warnock, a Morehouse College alum, has regularly credited his education as he was the first in his family to graduate college.”).

358. *See, e.g.*, DUROCHER, *supra* note 354, at 97-98 (looking through the eyes of a journalist who in 1946 noticed that in Alabama the killing of a white man by a Black man was a capital offense, but the killing of a Black man by a white man was not a major offense, and

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The continued criminality of Black skin in America is enough to make HBCUs continuously relevant. HBCUs have always been on the frontlines of protection for Black America. For instance, in the 1970s, fifteen HBCU presidents met with President Richard Nixon to request that he make a public address to affirm “the government’s resolve to protect the lives of black citizens.”<sup>359</sup>

Fifty years later, not much has changed with police brutality against Black citizens, and white America cannot relate.

White people, by and large, do not know what it is like to be occupied by a police force. They don’t understand it because it is not the type of policing they experience. Because they are treated like individuals, they believe that if ‘I am not breaking the law, I will never be abused.’<sup>360</sup>

White skin is not criminalized like Black skin.

On June 4, 2020, at the funeral of George Floyd, an unarmed Black man who was murdered by a white police officer on May 25, 2020, Reverend Al Sharpton, delivered an impassioned and fiery eulogy:

George Floyd’s story has been the story of Black folks. Because ever since 401 years ago, the reason we could never be who we wanted and dreamed to be is you kept your knee on our neck. It’s time for us to stand up in George’s name and say, “Get your knee off our necks!”<sup>361</sup>

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the rape of a Black woman by a white man rarely prosecuted, but a Black man who “so much as looked at a white woman” would face harsh criminal prosecution); WILKERSON, *supra* note 353, at 177 (“In the southern courtrooms, even the word of God was segregated. There were two separate Bibles – one for blacks and one for whites – to swear to tell the truth on. The same sacred object could not be touched by hands of different races.”).

359. See ROGERS, *supra* note 8, at 103 (“President Nixon demurred [to the HBCU presidents’ request], but as a palliative he did offer more money to HBCUs.”).

360. Nikole Hannah-Jones, *Yes, Black America Feels the Police. Here’s Why.*, PROPUBLICA (Mar. 4, 2015, 9:14 PM), <https://www.propublica.org/article/yes-black-america-feels-the-police-heres-why> (quoting KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2011)); see also Anna North, *How Racist Policing Took Over American Cities, Explained by a Historian*, VOX (June 6, 2020; 8:00 AM), <https://www.vox.com/2020/6/6/21280643/police-brutality-violence-protests-racism-khalil-muhammad> (quoting historian Khalil Muhammad: “And what comes out of that is the first blue-ribbon commission to study the causes of riots. In that report, the Chicago commission [concludes] that there was systemic participation in mob violence by the police, and that when police officers had the choice to protect black people from white mob violence, they chose to either aid and abet white mobs or to disarm black people or to arrest them. And a number of people testify, all of whom are white criminal justice officials, that the police are systematically engaging in racial bias when they’re targeting black suspects, and more likely to arrest them and to book them on charges that they wouldn’t do for a white man.”).

361. Jacklyn Reiss, ‘Get Your Knee Off Our Necks!’ Watch the Al Sharpton Speech That Got Multiple Standing Ovarations at George Floyd’s Memorial, BOS. *GLOBE* (June 4, 2020, 4:37



Floyd's murder – the latest in police killings of numerous Black people, such as: Eric Garner, Gabriella Nevarez, Michael Brown, Aura Rosser, Tamir Rice, Michelle Cusseaux, Walter Scott, Tanisha Anderson, Alton Sterling, Pearlie Golden, Philando Castile, Shantel Davis, Stephon Clark, and Breonna Taylor – sparked new energy into the BLM Movement – reenergizing a new civil rights movement, teetering on the potential of a sorely needed third Reconstruction.<sup>362</sup>

Notwithstanding the criminal interference by far-right extremists associated with the “boogaloo” movement, local scalawags, and some gangs, the BLM Movement has advanced with overwhelmingly peaceful protests in America and across the globe.<sup>363</sup> Far from being a

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PM), <https://www.bostonglobe.com/2020/06/04/nation/get-your-knee-off-our-necks-listen-al-sharpton-speech-that-got-multiple-standing-ovations-george-floyds-memorial/>.

362. See Kimberlé W. Crenshaw et al., *Say Her Name: Resisting Police Brutality against Black Women*, AFR. AM. POL'Y F., <https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/5edc95fba357687217b08fb8/1591514635487/SHNReportJuly2015.pdf> (last updated July 2015) (spotlighting the numerous “invisible” Black women killed by police); see also FLYNN ET AL., *supra* note 14, at 15-34 (detailing the First (1863-1877) and Second (1954-1980) Reconstructions); see also Rebecca E. Zeitlow, *It's Time for a Third Reconstruction*, THE HILL (June 17, 2020, 2:30 PM), <https://thehill.com/opinion/civil-rights/503182-its-time-for-a-third-reconstruction>; see also Peniel E. Joseph, *America Is on the Brink Like None Since the Civil War*, CNN (July 31, 2020, 8:54 PM), <https://www.cnn.com/2020/07/31/opinions/1619-project-tom-cotton-slavery-joseph-opinion/index.html> (“This year has ushered in the most dynamic social movement for racial justice in American history as Black Lives Matter 2.0 awakened the entire nation to a reality of White supremacy — made more legible to millions of White Americans who, in the context of the Covid-19 pandemic, shelter-in-place orders and mass unemployment showed new layers of empathy in taking the streets to protest against the killing of George Floyd.”); see also EDDIE S. GLAUDE JR., *BEGIN AGAIN* xix (2020) (noting that heretofore America has faced a moral reckoning with the first and second Reconstructions and that here again, America must “decide, once and for all, whether or not we will truly be a multiracial democracy”); see also *Three HBCUs Announce the Creation of New Centers for Racial Justice*, J. BLACKS IN HIGHER EDUC. (July 3, 2020), <https://www.jbhe.com/2020/07/three-hbcus-announce-the-creation-of-new-centers-for-racial-justice/> (“In the wake of protests following the murder of George Floyd, several historically Black colleges and universities have established new academic centers focused on racial justice.”); see generally WILLIAM J. BARBER II & JONATHAN WILSON-HARTGROVE, *THE THIRD RECONSTRUCTION: HOW A MORAL MOVEMENT IS OVERCOMING THE POLITICS OF DIVISION AND FEAR* (2016).

363. Harmeet Kaur, *About 93% of Racial Justice Protests in the U.S. Have Been Peaceful, a New Report Finds*, CNN (Sept. 4, 2020, 6:45 PM), [https://www.cnn.com/2020/09/04/us/blm-protests-peaceful-report-trnd/index.html?utm\\_medium=social&utm\\_term=link&utm\\_source=fbCNN&utm\\_content=2020-09-05T03%3A31%3A08](https://www.cnn.com/2020/09/04/us/blm-protests-peaceful-report-trnd/index.html?utm_medium=social&utm_term=link&utm_source=fbCNN&utm_content=2020-09-05T03%3A31%3A08) (“The findings, released Thursday, contradict assumptions and claims by some that protests associated with the Black Lives Matter movement are spawning violence and destruction of property.

The report was produced by the US Crisis Project, a joint effort by the Armed Conflict Location & Event Data Project (ACLED) and the Bridging Divides Initiative (BDI) at Princeton University, which collects and analyzes real-time data on demonstrations and political violence in the US.”); see Rhea Mahbubani, *Thousands Across the UK, Germany, Italy, New Zealand, Canada, and More Condemn Racism and Demand Justice at Global Black Lives Matter Protests*, INSIDER (June 5, 2020, 10:35 AM), <https://www.insider.com/>

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terrorist organization, BLM has more support than did the revered Dr. Martin Luther King, Jr. when he was murdered in 1968. On the other hand, the United States Department of Homeland Security reports, “White supremacists present the gravest terror threat to the United States.”<sup>364</sup>

Historically, civil rights movements have resulted in social and political backlashes against African Americans, and thus, various forms of “policies that are clearly racially motivated but masquerade as either economic or values-based initiatives” will likely emerge as a result of the recent BLM protests, Black progress, and the election of the first Black vice-president, Kamala Harris.<sup>365</sup> Backlashes have begun.

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global-george-floyd-black-lives-matter-protests-photos-2020-5; see also Meg Kelly & Elyse Samuels, *Who Caused the Violence at Protests? It Wasn't Antifa.*, WASH. POST (June 22, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/06/22/who-caused-violence-protests-its-not-antifa/>; see also Jane Coaston, *The “Boogaloo” “Movement,” Explained*, VOX (June 8, 2020, 4:50 PM), <https://www.vox.com/2020/6/8/21276911/boogaloo-explained-civil-war-protests>; Lois Beckett, *Anti-Fascists Linked to Zero Murders in the US in 25 Years*, THE GUARDIAN (July 27, 2020, 6:00 PM), <https://www.theguardian.com/world/2020/jul/27/us-rightwing-extremists-attacks-deaths-database-leftwing-antifa> (citing a new database assembled by the Center for Strategic and International Studies, indicating that white supremacists and right-wing groups, not left-wing groups, are the major threat to America).

364. Betsy W. Swan, *DHS Draft Document: White Supremacists Are Greatest Terror Threat*, POLITICO (Sept. 4, 2020, 5:45 PM), <https://www.politico.com/news/2020/09/04/white-supremacists-terror-threat-dhs-409236> (“But all three [draft reports from the Department of Homeland Security] describe the threat from white supremacists as the deadliest domestic terror threat facing the U.S., listed above the immediate danger from foreign terrorist groups.”); see also Kim Parker et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RES. CTR. (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/>; see also James C. Cobb, *Even Though He Is Revered Today, MLK Was Widely Disliked by the American Public When He Was Killed*, SMITHSONIAN MAG. (Apr. 4, 2018), <https://www.smithsonianmag.com/history/why-martin-luther-king-had-75-percent-disapproval-rating-year-he-died-180968664/>; see also *Black Girl Called Racial Slurs and Attacked with a Pole*, BET (Sept. 3, 2020), [https://www.bet.com/news/national/2020/09/03/kansas-city-girl-racial-slurs-attacked.html?cid=BET\\_FBPAGE\\_\\_3649855467&linkId=98776952](https://www.bet.com/news/national/2020/09/03/kansas-city-girl-racial-slurs-attacked.html?cid=BET_FBPAGE__3649855467&linkId=98776952) (“Nevah Thomas was playing with friends when she was being bullied with racial slurs by a 12-year-old boy. According to her mother, she responded to the hate speech by saying, ‘My Black is beautiful.’ The 12-year-old boy reportedly began hitting Thomas in the head with a pole, she went unconscious and was bleeding. She also lost a tooth.”); Poussaint, *infra* note 378 (finding that extreme racism is a mental illness).

365. See FLYNN ET AL., *supra* note 14, at 15-34 (describing the various historical backlashes against Blacks, resulting in resegregation and racial exclusion); see also GLAUDE, *supra* note 362, at 23 (“We should resist the language of backlash, not merely because it is inaccurate, but because it wrongly concedes the frame of the question. The term describes a political response to a problem that cuts much deeper than politics, suggesting that white people believe they have gone far enough in addressing black people’s demands; it mistakes the substance of those demands for the underlying fears that have produced the politics and laws to begin with.”); see also Ward, *infra* note 413 (“‘There is always a backlash that comes after progression — always,’ [social-welfare-policy researcher Sandra Edmonds] Crewe told

For instance, in August of 2020, the Republican governor in Tennessee quietly enacted a bill to criminalize protesting and potentially prohibit protestors from voting and imprison them for up to six years.<sup>366</sup> Also in early September in Missouri, a group of Republican lawmakers forced a bill through the Senate, effectively reducing the power of city's first Black prosecutor.<sup>367</sup>

In America, where whites have stolen Black labor, slaughtered Blacks for their property and political rights, and squelched Black dreams by racist policies and practices, HBCUs have always been and will always be relevant.<sup>368</sup> After emancipation, instead of inserting African Americans as amendment add-ons into an outdated constitution, America should have embraced African Americans as allies to a new America with a new constitution. America still should and can do so.<sup>369</sup>

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*Business Insider*, likening the backlash against welfare expansion to the resurgence of white nationalism in response to Barack Obama's presidency.”).

366. See, e.g., Sanya Mansoor, *New Tennessee Law Severely Sharpens Punishments for Some Protesters, Potentially Endangering Their Voting Rights*, TIME (Aug. 23, 2020), <https://time.com/5882735/tennessee-law-protest-voting-rights-felony/>.

367. See, e.g., Summer Ballantine, *Senate Passes Bill Targeting Black St. Louis Prosecutor*, ROLLA DAILY NEWS (Sept. 3, 2020, 2:03 PM), <https://www.therolladailynews.com/news/20200903/senate-passes-bill-targeting-black-st-louis-prosecutor/1>.

368. See *supra* section II.C.; see BAPTIST, *supra* note 1, at 411, 415-17 (finding that “[In early twentieth-century South], African-American households had virtually no wealth, for instance, while a substantial portion of the wealth held by white households, even after emancipation, could be traced to revenue generated by enslaved labor and financing leveraged out of their bodies before 1861 and asserting two ways to look at the “body of African America, sutured together in the trauma of slavery’s expansion” – one profited enslavers and was marked by vast suffering of African Americans; and the other: “enslaved people had created something else, an identity, a political unity, a common culture, a story, and a sense of how it shaped them and made them one . . . so people survived, and helped each other to survive, and not only to survive but to build . . . African Americans took up arms and defeated the enslavers. . . . In the war, survivors ended slavery. When the survivors began to die off, they could pass on to their descendants very little in the way of material wealth. So much had been stolen from them. But African Americans had a story that made them a people. They had a unity that was ultimately political. This had led them to choose solidarity over individual deals. They had lodged their claim to citizenship in the Constitution . . . They had, with white allies, created in the form of abolitionism the ideological template of American dissent, of progressivism, of the faith that social change, pursued with a religious zeal, could make America truer to its ideal self.”); see MERRITT, *supra* note 14, at 337 (“After emancipation, of course, African Americans became the only race in America ever to start out – as an entire people – with close to zero wealth.”); see, e.g., BALL, *supra* note 3, at 161 (“In July 1863 in New York City, thousands of white men and some white women riot against the Union’s military draft, marauding in black neighborhoods for nearly one week and killing hundreds of African Americans. If you put the question, few whites in the North would say they want to fight to free the enslaved. The war is the fault of the blacks, says the workingman, he who is a ‘wage slave.’”).

369. See Alex Seitz-Wald & National Journal, *The U.S. Needs a New Constitution – Here’s How to Write It*, THE ATLANTIC (Nov. 2, 2013), <https://www.theatlantic.com/politics/archive/2013/11/the-us-needs-a-new-constitution-heres-how-to-write-it/281090/> (“Where

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HBCUs were created because of the white American hostility that denied Blacks educational opportunities. That is why HBCUs must be part of the solution.<sup>370</sup> As United States Senator Kamala Harris proclaimed in her nomination address for vice president of the United

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modern constitutions in other nations get specific, we get judicial activism. Sometimes it works, but it's not an approach without serious drawbacks. Take civil rights, which the courts have done a decent job of protecting—only after reversing earlier mistakes. And there's theoretically nothing to stop judges from flip-flopping back to their pre-*Brown v. Board of Education* jurisprudence.”).

370. Police departments should consider partnering with HBCUs to train police and culturally enlighten police forces, and America should seek guidance from HBCU leadership for a new, modern U.S. Constitution. *See, e.g.*, FLYNN ET AL., *supra* note 14, at 162-63 (arguing for divestment from the criminal justice system, including reducing police budgets and eliminating for-profit prisons; and reinvesting in communities, such as community policing, public education and higher education); *The Black Lives Matter Movement and Preventing Police Use of Lethal Force: Interview with Mitch Crusto*, SCHOLASTICA (July 15, 2020), <https://blog.scholasticahq.com/post/black-lives-matter-preventing-police-lethal-force/> (listing Professor Crusto's ideas on changes the Supreme Court and Congress should make to protect Black lives from police brutality (modern-day lynching): “(1) Recognize the right to life for all people, against governmental infringement, under the 5th and 14th Amendments. (2) Use 5th and 14th Amendment jurisprudence and not 4th Amendment search and seizure jurisprudence to assess whether the use of lethal force was justified. (3) Abolish the use of lethal force as it is an unconstitutional violation of the ‘Cruel and Unusual Punishment Clause’ of the Eighth Amendment. (4) Revisit the *Screws v. United States* decision to allow criminal liability for negligent use of lethal force, regardless of the officer's intent. (5) Revisit the ‘objective reasonableness’ standard used to assess police criminal liability under *Graham v. Connor*, by removing the criteria of what the police officer might have believed at the time of the use of lethal force. It should be replaced with a ban on the use of lethal force. In that case, if a police officer used lethal force, it would have to be in self-defense, subject to State laws on the subject. (6) The Federal Government should follow its constitutional mandate under the 14th Amendment and Civil Rights statutes to investigate every person's death that is in any way related to law enforcement.”); *see, e.g.*, Phillip Sitter, *Lincoln University Police Academy Chief Outlines Next Steps*, NEWS TRIBUNE (Dec. 19, 2020, 10:55 PM), <https://www.newstribune.com/news/local/story/2020/dec/20/lincoln-university-police-academy-chief-outlines-next-steps/853290/> (“LU is the first historically Black college or university in the country to have a law enforcement academy. Law enforcement's relationship with Black communities, in particular, is also under intensified national scrutiny following the deaths of George Floyd and Breonna Taylor earlier this year and the massive protests that ensued. Lincoln University Police Department Chief Gary Hill, who is also director of the academy, said the 22 applicants so far for the academy's first class in January have been as diverse as desired in terms of race, gender, income background and age.”); *see, e.g.*, Tony Fortier-Bensen, *Clafin University, SCDC Partner Together to Offer Bachelor's Degrees to Inmates*, ABC NEWS 4 (Dec. 17, 2020), <https://abcnews4.com/news/local/clafin-university-scdc-to-offer-bachelors-degrees-to-inmates-prison-reform> (“Those incarcerated will now have a chance to get their bachelor's degrees while in jail thanks to a partnership between Clafin University and the SC Department of Corrections. . . . Clafin University was selected as part of the US Department of Education's Second Chance Pell Experimental Site, which started under Pres. Barack Obama. The goal is to help inmates earn university credentials, and it will be at no-cost to the inmates.”).

States: “[T]here is no vaccine for racism. We’ve [got to] do the work.”<sup>371</sup> All Americans must partner together to do the work.

The white supremacist narrative falsely advances a Black on white crime problem. The Southern Poverty Law Center explained:

The idea that black people are wantonly attacking white people in some sort of quiet race war is an untruthful and damaging narrative with a very long history in America. White Americans’ unsubstantiated views about the potential of violence from black people was the number one excuse they used to justify slavery, lynching, Jim Crow and various forms of mass incarceration. Never was Klan violence or the lynching of black people by white people ascribed to an inherent white trait. Without the ability to claim oppression of black people as a form of self-defense, racial segregation and white supremacy would be seen for what they are: rank oppression of other people for financial or other benefit.<sup>372</sup>

According to a Southern author, “[w]hites normally fear a black uprising.”<sup>373</sup> But it is Black people who have lived under a constant violence or threat of violence in America by virtue of the color of their skin. For them, it is incomprehensible. How can race bring such harm, hatred and hostility against a people as a group who are not known as individuals? There is a popular meme circulating that reads: “Sometimes I sit and wonder, what exactly did Black Americans do to make white Americans HATE us so much. We cooked your food, raised your babies, worked your land, built your roads . . . prayed for you, forgave you . . . what is it?” Americans must see each other as humans, not colors. A historian stated:

Most Southern whites could not envision a society in which Blacks had rights, in which Blacks were treated as humans. They just assumed that Black supremacy would replace white supremacy. It

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371. *Watch: Kamala Harris’ Address to the 2020 Democratic National Convention*, NPR (Aug. 19, 2020, 11:45 PM), <https://www.npr.org/2020/08/19/904071636/watch-kamala-harris-address-to-2020-democratic-national-convention> (“And we are a nation that’s grieving. Grieving the loss of life, the loss of jobs, the loss of opportunities, the loss of normalcy. And yes, the loss of certainty. And while this virus touches us all, let’s be honest, it is not an equal opportunity offender. Black, Latino and Indigenous people are suffering and dying disproportionately. This is not a coincidence. It is the effect of structural racism.”).

372. *The Biggest Lie in the White Supremacist Propaganda Playbook: Unraveling the Truth about “Black -on-White Crime,”* S. POVERTY L. CTR. (June 14, 2018), <https://www.splcenter.org/20180614/biggest-lie-white-supremacist-propaganda-playbook-unraveling-truth-about-%E2%80%98black-white-crime>.

373. BALL, *supra* note 3, at 136; *see also* FRANKLIN, *supra* note 1, at 3 (“Even before the war white Southerners had frequently entertained a wild, nightmarish fear that the Negroes would rise up, slay them, and overthrow the institution of slavery. It had happened in Haiti. Perhaps it would happen here. . . . That this was pure fantasy, born of a sense of guilt and despair, only the passage of time and the remarkable reserve of the freedmen could prove.”).

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would be one or the other, and that fueled their desire to do anything possible to prevent that from happening.<sup>374</sup>

But white fear has never been rooted in fact. Indeed, another historian affirmed that:

One of the remarkable features of the Negro leadership [during Reconstruction] was the small amount of vindictiveness in their words and their actions. There was no bully, no swagger, as they took their places in the state and federal governments traditionally occupied by the white planters of the South. The spirit of conciliation pervaded most of the public utterances the Negroes made. . . . Negroes generally wished to see political disabilities removed from the whites [*e.g.*, Confederates be allowed to vote]. . . . In Mississippi, a Democratic newspaper the Jackson *Clarion*, admitted that in their general conduct Negroes “have shown consideration for the feelings of the whites. . . . In other words, the colored people had manifested no disposition to rule or dominate the whites, and the only Color Line which had existed, grew out of the unwise policy which had previously been pursued by the Democratic [-Segregationist] party in its efforts to prevent the enjoyment by the newly-emancipated race of the rights and privileges to which they were entitled, under the Constitution and laws of the country.” . . . Negroes attempted no revolution in the social relations of the races in the South. . . . While Negroes sought equality as human beings, they manifested no desire to involve themselves in the purely social relations of whites as individuals or as groups.<sup>375</sup>

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374. THE AFRICAN AMERICANS: MANY RIVERS TO CROSS (Public Broadcasting Service 2013) (quoting John Stauffer); *see generally* BALL, *supra* note 3 (detailing the author’s family history of Klansmen who made a career of white terror against the recently freed four million Blacks to restore white power and noting that 50% of whites in America are a descendant of a Ku Klux Klan member).

375. FRANKLIN, *supra* note 1, at 89-91 (“It is false, it is a wholesale falsehood to say that we wish to force ourselves upon white people, declared the near-white [Pinckney Benton Stewart] Pinchback of Louisiana.”); GATES, *supra* note 53, at 209-10 (“[P.B.S.] Pinchback, a member of New Orleans’ black social elite, . . . was the son of a white plantation owner and black slave mother. Pinchback moved to Cincinnati with his brother, Napoleon, in 1847. By the time he was 12, he was supporting his family as a cabin boy after his father had died and the white side of the family left the black side penniless and in fear of being re-enslaved. . . . Pinchback could have fooled anyone into thinking he was white. It wasn’t until the outbreak of the Civil War that Pinchback embraced being ‘a race man,’ when, after a stint with the all-white First Louisiana Volunteers, he recruited black soldiers for the Corps d’Afrique and joined the Second Louisiana Native Guard (later, the Seventy-fourth U.S. Colored Infantry). Once there, he rose to captain, then resigned over discriminatory promotional practices and unequal pay. After lobbying for black schools in Alabama, Pinchback returned to Louisiana in time for the state’s 1868 constitutional convention (a pre-condition for rejoining the Union). As a delegate, he ‘worked to create a state-supported public school system and wrote the provision guaranteeing racial equality in public transportation and licensed businesses. . . .’ Pinchback was the only black governor of any state during Reconstruction and remained the only one in U.S. history until Douglas Wilder’s election in Virginia in 1989.”); *but see* BRIAN K. MITCHELL ET AL., MONUMENTAL: OSCAR DUNN AND HIS RADICAL FIGHT IN RECONSTRUCTION LOUISIANA 14-15 (2021) (“This book corrects the record

The continuation of knowingly withholding proper funding from HBCUs for over a century – purposefully denying Blacks a fair chance in life with educational opportunities mainly reserved only for whites – is part of this effort to sustain white supremacy. An author explained:

White supremacy is not a marginal ideology. It is the early build of the country. It is a foundation on which the social edifice rises, bedrock of institutions. White supremacy also lies on the floor of our minds. Whiteness is not a deformation of thought, but a kind of thought itself.<sup>376</sup>

Another intellectual mused:

The racism on which America was founded didn't push [Black people] away from participating in democracy. It never let us in at the onset. The United States was never founded with Black people in mind. . . . [Black people] are not just participants in the American experiment. [They] are also every bit as much its architects as the framers. Our blood stripes the American flag red, staining the white backdrop. Yet the white backdrop still dominates so much.<sup>377</sup>

In 1946, Dr. Albert Einstein, the Jewish Nobel Prize-winning physicist, who, “was sensitized to racism by the years of Nazi-inspired threats and harassment he suffered during his tenure at the University of Berlin,” visited Lincoln University in Pennsylvania, an HBCU, where he gave a speech in which he called racism “a disease of white people,” then added, “I do not intend to be quiet about it.”<sup>378</sup> Dr. Einstein's visit to Lincoln University and his momentous speech was overlooked by mainstream media, which habitually covered his speeches, because his visit was to a Black college to speak about Black

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on a significant historical distinction: Dunn was the first Black governor in U.S. history, not P.B.S. Pinchback. . . . Pinchback is popularly credited as the first [Black governor] for serving as acting governor of Louisiana for thirty-six days beginning in December 1872, but Dunn served in the same capacity for about thirty-nine days eighteen months earlier.”).

376. BALL, *supra* note 3, at 12.

377. TIFFANY D. CROSS, SAY IT LOUDER 3 (2020).

378. Ken Gewertz, *Albert Einstein Civil Rights Activist*, HARVARD GAZETTE (Apr. 12, 2007), <https://news.harvard.edu/gazette/story/2007/04/albert-einstein-civil-rights-activist/>; *see also* WILKERSON, *supra* note 353, at 147 (“At the depths of their dehumanization, both Jews and African-Americans were subjected to gruesome medical experimentation at the hands of dominate-caste physicians.”); *see also* BAPTIST, *supra* note 1, at 415 (“[S]cientific racism had a long history after the fall of the Confederacy. It was used to justify anti-Semitism, the extermination of native peoples around the world, brutal forms of colonialism, and the exclusion of immigrants. And it continued to be used to justify discrimination against the descendants of the enslaved.”); Alvin F. Poussaint, *Is Extreme Racism a Mental Illness?*, 176 WEST. J. MED. 4, 4 (2002), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1071634/pdf/wjm17600004.pdf> (“To continue perceiving extreme racism as normative and not pathologic is to lend it legitimacy. Clearly, anyone who scapegoats a whole group of people and seeks to eliminate them to resolve his or her internal conflicts meets criteria for a delusional disorder, a major psychiatric illness.”).

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issues.<sup>379</sup> Today, BLM is supported by the majority of American Jews.<sup>380</sup>

Around this same time that Dr. Einstein was visiting Lincoln University, Walter White, an African American and HBCU graduate, who could pass for white but spent his life fighting for civil rights, noted in his autobiography that a man once asked him, “How have you managed to escape hate? I would imagine that you would despise every white face you see after the horrible experiences you have had.”<sup>381</sup> White explained that he understood that all white people were not, “evil and bigoted in their attitude toward dark-skinned peoples.”<sup>382</sup> So, too, does Black America. Blacks are not fighting against whites; Blacks are fighting against white supremacy and racism.<sup>383</sup>

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379. Gewertz, *supra* note 378 (“The reason Einstein’s visit to Lincoln is not better known is that it was virtually ignored by the mainstream press, which regularly covered Einstein’s speeches and activities. (Only the black press gave extensive coverage to the event.) Nor is there mention of the Lincoln visit in any of the major Einstein biographies or archives. In fact, many significant details are missing from the numerous studies of Einstein’s life and work, most of them having to do with Einstein’s opposition to racism and his relationships with African Americans.”); *see also* Harriet Sherwood, *Nearly Two-thirds of US Young Adults Unaware 6M Jews Killed in the Holocaust*, *THE GUARDIAN* (Sept. 16, 2020, 3:32 PM), <https://www.theguardian.com/world/2020/sep/16/holocaust-us-adults-study> (“Almost a quarter of respondents (23%) said they believed the Holocaust was a myth, or had been exaggerated, or they weren’t sure. One in eight (12%) said they had definitely not heard, or didn’t think they had heard, about the Holocaust.”).

380. *Majority of American Jews in Full Page New York Times Ad: “Unequivocally: Black Lives Matter,”* *MEDIUM* (Aug. 28, 2020), <https://medium.com/@jewishorgssayblacklivesmatter/majority-of-american-jews-in-full-page-new-york-times-ad-unequivocally-black-lives-matter-60ae44e7c305>; *see also* Adam Shapiro, *Dianne & Brenda*, *YOUTUBE* (July 25, 2020), <https://www.youtube.com/watch?v=XX8Y6c1Edk8&feature=youtu.be> (interviewing a Black Catholic woman and a white Jewish woman who intentionally became friends to understand the other’s culture, race and religion, and who shared experiences as they navigated life as close friends in Miami, Florida through racism and anti-Semitism).

381. WHITE, *supra* note 207, at 27; *Jim Crow Laws History*, *supra* note 95 (“White had lighter skin and could infiltrate white hate groups.”).

382. WHITE, *supra* note 207, at 27; *see* Paterson, *infra* note 392 (“The majority of white Americans have also undergone a radical transformation in their racial views, especially the young, who are arguably the most racially liberal group of whites anywhere in the world.”).

383. *See* FLYNN ET AL., *supra* note 14, at 13 (“[T]he focus on black Americans is a response to the proliferation of and increased attention to police violence and mass incarceration and to the demand from grassroots movements for leaders at all levels to acknowledge our nation’s long history of devaluing blackness and fostering black inequality in virtually every segment of American political, economic, and social life.”); *see also* Barbara Smith, *The Problem Is White Supremacy*, *BOS. GLOBE* (June 30, 2020, 12:01 PM), <https://www.bostonglobe.com/2020/06/29/opinion/problem-is-white-supremacy/> (“The way we describe this problem matters. For example, ‘systemic racism’ clearly conveys the pervasiveness of racial oppression, but white supremacy goes further, by indicating that there is a rigid nexus of power that protects and enforces it.”); *see also* Tom Gjelten, *White Supremacist Ideas Have Historical Roots in U.S. Christianity*, *NPR* (July 1, 2020, 1:38 PM), <https://www.npr.org/2020/07/01/883115867/white-supremacist-ideas-have-historical-roots-in-u-s-christianity>.



While continuing to be treated as marginalized citizens, Black people continue to forgive, dismiss, work around, overlook, explain away, pray through and offer an olive branch to whites and the racist systems they develop and attitudes they groom to cement white supremacy in the fabric of America and destroy Black progress.<sup>384</sup> Black people are seeking, “equality and not revenge.”<sup>385</sup> Blacks know what they have been fighting for: “[They] ‘want justice - oceans of it. [They] want fairness - rivers of it.’”<sup>386</sup> But America has proved that it does not operate on Christian principles. Renowned author and activist James Baldwin said:

My ancestors and I were very well trained. We understood very early that this was not a Christian nation. It didn't matter what you said or how often you went to church. My father and my mother and my grandfather and my grandmother knew that Christians didn't act this way. It was a simple as that. And if that was so there was no point in dealing with white people in terms of their own moral professions, for they were not going to honor them. What one did was to turn away, smiling all the time, and tell white people what they wanted to hear. But people always accuse you of reckless talk when you say this.<sup>387</sup>

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384. See Kevin Powell, *The Insanity of White Justice and Black Forgiveness*, THE PROGRESSIVE (Oct. 4, 2019), <https://progressive.org/dispatches/insanity-of-white-justice-black-forgiveness-powell-191004/>.

385. Kimberly Jones, *Black People ‘Exceptionally Forgiving’ . . . Now We’re Fighting for Our Rights!!!*, TMZ (June 9, 2020, 1:21 PM), <https://www.tMZ.com/2020/06/09/kimberly-jones-viral-speech-black-people-plight-pain-oppression/>; see also GLAUDE, *supra* note 362, at 27 (“[S]o many Americans continue to hold the view that ours is a white nation.”); see also JAMES BALDWIN, *THE FIRE NEXT TIME* 24 (1962) (speaking to Baldwin’s nephew in a letter said: “For this is your home, my friend, do not be driven from it; great men have done great things here, and will again, and we can make America what it must become.”).

386. See Amos 5:24 (“Do you know what I want? I want justice - oceans of it. I want fairness - rivers of it. That’s what I want. That’s all I want.”).

387. HANDBOOK OF RESEARCH ON TEACHER EDUCATION 206 (Marilyn Cochran-Smith et al., ed. 2008); BAPTIST, *supra* note 1, at 210-11 (“[During slavery], [m]inisters developed a theological argument that claimed that Christianity justified slavery. They leaned on the apostle Paul, with his admonitions to servants to obey their masters. Increasingly, they also argued that a holistic view of the Bible showed that slavery was not sinful. In fact, they said, God had ordained that the Israelites, and white people in general, could enslave allegedly inferior ‘Hamitic’ peoples (supposedly descended from Ham, one of Noah’s sons). Such as Africans, so long as they treated the latter with paternalistic goodness.”); see also Leonardo Blair, *White Christians More Racist than Secular Ones*, *Researcher Robert P. Jones Reveals*, CHRISTIAN POST (July 29, 2020), <https://www.christianpost.com/books/white-christians-more-racist-than-secular-whites-researcher-robert-p-jones-reveals.html> (“[Jones’ book] WHITE TOO LONG demonstrates how deeply racist attitudes have become embedded in the DNA of white Christian identity over time and calls for an honest reckoning with a complicated, painful, and even shameful past. Jones challenges white Christians to acknowledge that public apologies are not enough—accepting responsibility for the past requires work toward repair in the present. Jones argues that contemporary white Chris-

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Whites constructed segregation – the diabolical system of “separate but equal.” Blacks, powerless against the white power structure had to deal with it.<sup>388</sup> At the State Conference of Colored Men of Florida held in Gainesville in 1884, John Menard said, “If we must have separate schools and separate cars, let them have the same conveniences and advantages as those provided for the whites.”<sup>389</sup> But that equality never happened. Today, schools remain segregated and unequally funded, which continues to negatively impact education and progress for African Americans.<sup>390</sup>

History does not support the fanciful, chimeric notion of white supremacy.<sup>391</sup> History reveals the blatant atrocities of the white power structure that intentionally denied Black people any educational opportunity comparable to whites. History sheds light on the white mobs that destroyed Black people and their communities, including schools, homes and churches, by massacres, riots, looting and lynchings as a reaction to Black progress and Black competition.<sup>392</sup> History evidences the unconscionable inequities of government monies given by white political bodies for white education but withheld for Black education. It records those actions occurred, despite federal and state statutes or United States Supreme Court orders for equality in school funding. A decade after the Supreme Court’s *Gaines* decision, requiring equal educational opportunities between the races, Blacks had access to only two law schools compared to sixteen for whites, two accredited medical

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tians must confront these unsettling truths because this is the only way to salvage the integrity of their faith and their own identities.”)

388. DU BOIS, *supra* note 1, at 699 (“While all instruments of group control – police, courts, government appropriations and the like – were in the hands of whites, no power was left in Negro hands.”); *see also* Chemerinsky, *supra* note 10 and accompanying text.

389. FAMU Way, *supra* note 3, at 20.

390. *See* Emma Garcia, *Schools Are Still Segregated, and Black Children Are Paying a Price*, ECON. POL’Y INST. (Feb. 12, 2020), <https://files.epi.org/pdf/185814.pdf> (“Unaddressed school segregation is a major longstanding policy failure. It consigns most black children to schools that put them behind academically. The persistent performance gaps between white and black children that challenge the education and career prospects of black children from early on demonstrate that school segregation continues to cast a very long shadow—from well before *Brown v. Board of Education* to today, and into the future.”).

391. *See* ALEXANDER, *supra* note 19, at 26 (“White supremacy over time, became a religion of sorts. Faith in the idea that people of the African race were bestial, that whites were inherently superior, and that slavery was, in fact, for blacks’ own good, served to alleviate the white conscience and reconcile the tension between slavery and the democratic ideals espoused by whites in the so called New World.”).

392. *See* Orlando Paterson, *The Long Reach of Racism in the U.S.*, WALL ST. J. (July 5, 2020, 11:55 AM), <https://www.wsj.com/articles/the-long-reach-of-racism-in-the-u-s-11591372542?st=OQkbshaeh7a7qp3&fbclid=IWAR1YW-6wc6c7mIrXKgIJnaWUiqbX2I6zWwctQWW2lbz6l7aI-SY7aGABaSo>; *see generally* WELLS, *supra* note 302; *see generally* IDA B. WELLS-BARNETT, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* (1892).

schools compared to fifteen for whites, one pharmacy school compared to fourteen for whites and no school of engineering in contrast to thirty-six for whites.<sup>393</sup> No one really believes that America's education system is "serving black students acceptably."<sup>394</sup>

"Who writes the rules matters."<sup>395</sup> Presumably, in an effort to purloin the 2020 election, President Trump, who was overwhelmingly defeated by former vice-president Joseph Biden and the first United States president to be impeached twice, tried to re-write the rules.<sup>396</sup> President Trump admitted that he attempted to dismantle the United States Postal Service to make it more difficult for mail in ballots.<sup>397</sup> The former Democrat-Segregationists (proslavery-Conservative) Party, which is antecedent of today's Republican Party, tried to steal the election as well in 1860 against Abraham Lincoln, who the Democrat-Segregationists called the "Black Republican."<sup>398</sup> The Louisiana state election officials, Democrat-Segregationists, intentionally excluded

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393. BAKER, *supra* note 230, at 77.

394. FLYNN ET AL., *supra* note 14, at 93 ("By no measure – racial integration, academic achievement, economic outcomes – is America's education system serving black students acceptably.").

395. *Id.* at 159 (finding that to make racially inclusive rules, people in power must be diverse in racial, economic, and ethnic backgrounds as well as in gender and age).

396. See Laurence Arnold, *QAnon, the Conspiracy Theory Creeping into U.S. Politics*, BLOOMBERG (Aug. 21, 2020, 12:34 PM), <https://www.bloomberg.com/news/articles/2020-08-21/qanon-the-conspiracy-web-creeping-into-u-s-politics-quicktake> (describing the entree of QAnon conspiracy group in U.S. politics: "It's a concoction of allegations against Democratic politicians, celebrities and supposed members of a 'deep state' government bureaucracy, against whom Trump is seen as waging a valiant battle."); see also Stephen Collinson, *Trump's Bid to Steal Georgia Exposes GOP Election Ruse*, CNN (Jan 4, 2021, 9:09 AM), <https://www.cnn.com/2021/01/04/politics/donald-trump-georgia-election-joe-biden-congress/index.html> ("Astonishing new evidence of a desperate President Donald Trump caught on tape trying to steal the election exposes the depth of his corruption and makes his Republican Capitol Hill allies complicit in his bid to thwart the will of voters. In a fresh abuse of power, Trump tried to bully a top Georgia GOP official into finding votes to overturn President-elect Joe Biden's win in the state. The staggering telephone call, audio of which was obtained by CNN and first reported by The Washington Post, amounted to the most serious threat yet posed by his authoritarian instincts to American democracy.").

397. Sam Levine, *Trump Admits He Is Undermining USPS to Make It Harder to Vote by Mail*, THE GUARDIAN (Aug. 13, 2020, 12:25 PM), <https://www.theguardian.com/us-news/2020/aug/13/donald-trump-usps-post-office-election-funding> ("Trump's comments lend evidence for critics who say the president is deliberately trying to hamstring the USPS in advance of the November elections to help his re-election bid."); see also Andy Sullivan & Michael Martina, *In Recorded Call, Trump Pressures Georgia Official to "Find" Votes to Overturn Election*, REUTERS (Jan. 3, 2021, 2:40 PM), <https://www.reuters.com/article/us-usa-election-trump/in-recorded-call-trump-pressures-georgia-official-to-find-votes-to-overturn-election-idUSKBN2980MG> ("U.S. President Donald Trump pressured Georgia's top election official to 'find' enough votes to overturn his defeat in the southern state, according to a recording of the hour-long call.").

398. BALL, *supra* note 3, at 114.

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Lincoln's name on the ballot for United States president, so he received no votes in Louisiana, but he won because the three proslavery opponents split the white vote in the North and South.<sup>399</sup> But, the record reflects that the Conservative Party often employed fraud, intimidation and violence in Southern elections to win the vote.<sup>400</sup> To the

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399. *Id.* at 116.

400. See SINGLETARY, *supra* note 298 and accompanying text; see also GIDDINGS, *supra* note 302, at 147 (“The election of 1888 was marked by wholesale fraud. When the Tenth Congressional District – a Republican stronghold that included Shelby County [Tennessee] and whose electorate was 50 percent black – was lost to Democrats that year, the Republican *Knoxville Journal*, among others, charged that the election represented ‘one of the most flagrant outrages ever perpetuated upon the ballot-box in a free republic.’”); see also DU BOIS, *supra* note 1, at 682, 685 (“During election time, the gun stores of New Orleans were thronged with buyers, and the price of Colt’s revolvers doubled. . . . Concerning Mississippi, President Grant said: ‘As to the state election of 1875, Mississippi is governed today by officials chosen through fraud and violence, such as would scarcely be accredited to savages.’”); see also BAPTIST, *supra* note 1, at 409 (“Across the South, night riders went out – hooded in white, burning, raping, beating, and killing. They stole one state’s elections after another. They torched the houses of black folks bold enough to buy land, or even bold enough to paint their own house, for that matter.”); see also Rosalind S. Helderman et al., *Despite Trump’s Intense Hunt for Voter Fraud, Officials in Key States Have So Far Identified Just a Small Number of Possible Cases*, WASH. POST (Dec. 23, 2020, 8:00 AM), [https://www.washingtonpost.com/politics/voter-fraud-investigations-2020/2020/12/22/bdbe541c-42de-11eb-b0e4-0f182923a025\\_story.html](https://www.washingtonpost.com/politics/voter-fraud-investigations-2020/2020/12/22/bdbe541c-42de-11eb-b0e4-0f182923a025_story.html) (“After an intense hunt by President Trump’s allies to surface voting irregularities in this year’s election, law enforcement agencies in six key swing states targeted by the president have found just a modest number of complaints that have merited investigation, according to cases tracked by state officials.”); see also Kristen Clarke, *Voter Intimidation is Surging in 2020. Fight for the Right that Begets All Other Rights.*, USA TODAY (Oct. 27, 2020, 12:01 PM), <https://www.usatoday.com/story/opinion/2020/10/27/voter-intimidation-surging-2020-protect-minority-voters-column/6043955002/> (“Already this year, my organization, Lawyers’ Committee for Civil Rights Under Law, has filed litigation and undertaken advocacy to stop coordinated efforts to intimidate voters — especially Black voters and other voters of color. . . . Voter intimidation has been part of the American electoral landscape for as long as we’ve had elections. This has been particularly true for communities of color. Frederick Douglass put the point plainly, asking, ‘The United States Government made the negro a citizen, will it protect him as a citizen?’ . . . Not only is the sitting president [Trump] purportedly amassing an ‘Army’ of amateur provocateurs to fan out across the country, but we’re also seeing misinformation campaigns, disinformation campaigns, and ‘lone wolf’ intimidation efforts by armed militias. Just recently, we filed suit under the Ku Klux Klan Act of 1871 against two dirty tricksters — Jacob Wohl and Jack Burkman — for an unlawful robocall scheme targeting largely Black cities like Detroit and Cleveland.”); see also Rebecca Jennings, *The Incredibly Bizarre Dean Browning and “Dan Purdy” Twitter Drama, Explained*, VOX (Nov. 10, 2020, 6:44 PM), <https://www.vox.com/the-goods/2020/11/10/21559458/dean-browning-dan-purdy-by-holte-patti-labelle-twitter-gay-black-man> (“Dean Browning, a former commissioner in Lehigh County, Pennsylvania, confused Twitter users on Tuesday when he replied to his own tweet claiming to be a gay Black man who voted for Trump. In reality, Browning is a white man who describes himself as a ‘proud pro-life & pro-2A Christian conservative,’ as his Twitter photo and bio clearly illustrate. . . . If Browning turns out to be the man behind the account, this is not a new phenomenon, particularly among conservatives. As far back as 2016, experts were identifying huge networks of pro-Trump bot accounts for people who didn’t actually exist. In October, Clemson University social media researcher Darren Linvill told the Washington

dismay of the losing candidate in 2020, President Trump, no voter fraud was found to have entered that presidential election through the Democratic Party, but the historical voter intimidation antics from some conservatives continued. In his last-ditch effort to overturn the election results, he egged on a violent partisan mob of conservatives to attack the United States Capitol in a failed insurrection, resulting in his being impeached for inciting violence against the United States government.

By now, most Americans are aware that the Republican Party of which Abraham Lincoln and Frederick Douglass were members “was the direct antecedent of the present Democratic Party.”<sup>401</sup> This tidbit is often manipulated to confuse voters – the theory advances: Frederick Douglass, a Black man, was a Republican and so all Blacks should vote Republican now. Today, however, Douglass’ belief in “certain entitlements for the underprivileged” align with the modern Democratic Party.<sup>402</sup>

Contributing to the race issue in America is the admittance by whites of a Black-on-Black crime problem but denial of a white-on-

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Post that he’d identified more than two dozen Twitter accounts claiming to be Black Trump voters who’d gained hundreds of thousands of ‘likes’ and retweets in the span of just a few days, sparking major doubts about their identities. Many used photos of Black men from news reports or stock images, including one in which the text ‘black man photo’ was still watermarked on the image. White nationalists have also had a history of disguising as ‘antifa’ online to sow fear toward leftists.”).

401. *Democrat-Republican Party*, BRITANNICA, <https://www.britannica.com/topic/Democratic-Republican-Party> (last updated May 14, 2020); see Henry L. Gates Jr. & John Stauffer, *Five Myths about Frederick Douglass*, WASH. POST (Feb. 10, 2017), [https://www.washingtonpost.com/opinions/five-myths-about-frederick-douglass/2017/02/10/0aaeb592-ea3b-11e6-bf6f-301b6b443624\\_story.html](https://www.washingtonpost.com/opinions/five-myths-about-frederick-douglass/2017/02/10/0aaeb592-ea3b-11e6-bf6f-301b6b443624_story.html) (“During the Civil War, Douglass became a Republican and remained a devoted member of the party for the rest of his life. At the time, the GOP — the party of Lincoln and Charles Sumner — consistently received enormous support from black voters and advocated a strong central government and certain entitlements for the underprivileged. In other words, it bears little resemblance to today’s Republican Party.”); see *Party Realignment and the New Deal*, HIST., ART & ARCHIVES, U.S. HOUSE OF REP., <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Party-Realignment—New-Deal/> (last visited Nov. 18, 2020) (discussing the history of the “realignment of black voters from the Republican Party to the Democratic Party that began in the late 1920s”); MY LIFE AND AN ERA, *supra* note 124, at 190 (“I returned to Rentiesville [, Oklahoma] during the second presidential campaign of FDR, and Negro Republicans were as scarce as Negro Democrats had been in 1912 through 1929.”); *Mary McLeod Bethune*, WOMEN’S HIST. (Debra Michals, ed., 2015), <https://www.womenshistory.org/education-resources/biographies/mary-mcleod-bethune> (“Bethune also played a role in the transition of black voters from the Republican Party—“the party of Lincoln”—to the Democratic Party during the Great Depression. A friend of Eleanor Roosevelt, in 1936, Bethune became the highest ranking African American woman in government when President Franklin Roosevelt named her director of Negro Affairs of the National Youth Administration, where she remained until 1944.”).

402. Gates & Stauffer, *supra* note 401.

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white crime problem.<sup>403</sup> The majority of violent crimes are intra-racial and this is especially evident in lower income neighborhoods, where there is inadequate health care and educational opportunities, unemployment or underemployment, poverty, and also for Black people, racism, which has “cost Black Americans trillions of dollars over the course of several generations.”<sup>404</sup> Although the rates of intra-racial killings among the poor, Blacks or whites, are relatively equal, the media representation is heavily slanted against Blacks to make it appear that a crime problem exists in the poor Black community and not the poor white community.<sup>405</sup> According to a study that examined the representation of families by race in the media:

[N]ews and opinion media overrepresent Black family poverty by 32 percentage points while White family poverty is underrepresented

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403. Kerry Coddett, *White on White Crime: An Unspoken Tragedy*, HUFF POST (Mar. 2, 2015, 12:17 PM), [https://www.huffpost.com/entry/white-on-white-crime-an-u\\_b\\_6771878](https://www.huffpost.com/entry/white-on-white-crime-an-u_b_6771878); see also Bump, *infra* note 409; Shirley Carswell, *What the “Black-On-Black” Crime Fallacy Misses about Race and Gun Deaths*, WASH. POST (July 8, 2020, 1:00 PM) (“The ‘what about black-on-black crime’ rejoinder usually is meant to imply that African Americans are indifferent to the thousands of young black men — and increasingly, black children — who are slain every year in gun violence. It insinuates that black people blithely accept killings by our own that have racked some communities for decades and take to the streets only when white police officers are doing the killing. . . . As a group, African Americans are consistently more likely to be concerned about crime than white Americans. They also are the staunchest supporters of tougher gun-control laws, with 72 percent saying that controlling gun ownership is more important than protecting gun rights, compared with 40 percent of white people. . . . the majority of the gun deaths in the United States are not homicides but suicides, and white men account for 74 percent of them. . . . When white men respond to their life circumstances with gun violence, it’s treated as a public health problem, brought on by mental illness and stress. When black men do, it’s portrayed almost solely as a criminal issue, caused by lawlessness and moral failing.”); see also Troy L. Smith, *Stop Using ‘Black-On-Black’ Crime to Deflect Away from Police Brutality*, CLEVELAND.COM, <https://www.cleveland.com/news/2020/06/stop-using-black-on-black-crime-to-deflect-away-from-police-brutality.html> (last updated June 23, 2020) (“The majority of black people murdered are killed by other black people. That’s true, but also misleading. The overwhelming majority of white murder victims each year are killed by white assailants. So, when’s the last time you heard the term “white on white crime?”).

404. Mariette Williams, *Racism Has Cost Black Americans \$70 Trillion Since the Start of Slavery – Here’s How That Cost Breaks Down*, BUS. INSIDER (Sept. 14, 2020, 12:09 PM), <https://www.businessinsider.com/personal-finance/what-racism-has-cost-black-americans-black-tax-2020-9>; Joshua Adams, *Bringing Up “Black on Black” Crime Is Racist. It Also Doesn’t Make Sense*, MEDIUM (June 15, 2020), <https://medium.com/@journaljoshua/bringing-up-black-on-black-crime-is-racist-it-also-doesnt-make-sense-b5889bd773d9>; ALEXANDER, *supra* note 19, at 210 (“Studies have shown that joblessness – not race or black culture – explains the high rates of violent crime in poor black communities.”).

405. Rachel E. Morgan & Barbara A. Oudekerk, *Criminal Victimization, 2018*, U.S. DEP’T OF JUST. (Sept. 2019), at 13, <https://www.bjs.gov/content/pub/pdf/cv18.pdf> (finding that white on white crime equals 62.1% of 3,581,360 total violent incidents; Black on Black crime equals 70.3% of 563,940 total violent incidents; white on Hispanic crime equals 28.2% of 734,410 total violent incidents as compared with Black on Hispanic crime at 15.3%).

by 49 percentage points. That is, Black families represent 59% of the poor in news and opinion media but make up just 27% of the poor, according to official reports, while White families represent 17% of the poor in news and opinion media but make up 66% of the poor.<sup>406</sup>

Poor-on-poor crime is a symptom, not a cause.<sup>407</sup> America continues to treat the symptom while ignoring the cause. Fairly and properly educating the poor will ameliorate the crime issue because it will allow people, who have been starved of opportunities to dream again. A psychologist concluded:

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406. TRAVIS L. DIXON, A DANGEROUS DISTORTION OF OUR FAMILIES: REPRESENTATIONS OF FAMILIES, BY RACE, IN NEWS AND OPINION MEDIA (June 2017), <https://colorofchange.org/dangerousdistortion/> (“News and opinion media overrepresent the proportion of Black families receiving welfare by 18 percentage points. That is, Black families represent 60% of welfare recipients in news and opinion media but make up just 42% of welfare recipients, according to official government reports. Moreover, fewer than 10% of the news stories we coded cited any data referencing structural, historic or systemic barriers to Black wealth acquisition. Instead, Black people tended to be depicted as lazy and inept welfare recipients in news broadcasts. News and opinion media are more likely to identify Black fathers as uninvolved and generally not present for their families compared to White fathers. In reality, evidence shows that Black fathers are actually more involved in parenting than White fathers, both when comparing Black and White fathers who live with their children and when comparing Black and White fathers who live separately from their children. Often embedded in media reporting and punditry is an assumption that fathers who live separately from their children are not involved in their lives, for which there is no evidence. News and opinion media are 1.32 times more likely to associate Black family members with criminality compared to White family members. In addition, news media overrepresent Black family members as criminals by 11 percentage points while underrepresenting White family members as criminals by 39 percentage points. That is, 37% of those represented as criminal in news and opinion media are Black family members, though Black family members constitute only 26% of family members arrested for criminal activity, according to crime reports, while 28% of those represented as criminal are White family members, though White family member constitute 77% of those arrested for criminal activity. News and opinion media are almost 1.5 times more likely to represent a White family as an illustration of social stability than a Black family. White families are seen by news consumers as fostering social stability more often than instability while Black families are seen by those same consumers as inciting or maintaining social instability more often than social stability. Therefore, news and opinion media propagate racialized cause-effect explanations for social problems, cumulatively characterizing Black families, Black people and Black culture as presenting a fundamentally destabilizing force in their own communities and beyond while lessening the credibility of Black people as a stabilizing force.”).

407. See ALEXANDER, *supra* note 19, at 237 (“Although it is common to think of poverty and joblessness as leading to crime and imprisonment, . . . research suggests that the War on Drugs is a major cause of poverty, chronic unemployment, broken families, and crime today.”); see Vikram Dodd, *Rising Crime Is Symptom of Inequality, Says Senior Met Chief*, THE GUARDIAN (June 14, 2018, 1:00 PM), <https://www.theguardian.com/uk-news/2018/jun/14/rising-is-symptom-of-inequality-says-senior-met-chief> (“[S]ocial inequality is a cause that needs tackling and that those arrested and jailed tend to be people with less money and opportunity.”).

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Income inequality can cause all kinds of problems across the economic spectrum—but perhaps the most frightening is homicide. Inequality—the gap between a society’s richest and poorest—predicts murder rates better than any other variable. . . . It is more tightly tied to murder than straightforward poverty, for example, or drug abuse.<sup>408</sup>

HBCUs have been the beacon of hope for Black people and have allowed them to accomplish their dreams. HBCUs have historically and contemporarily ushered in solutions to problems and progress in the Black community. They have mastered the embrace of first-generation, low-income students and nurtured them from the gateway to graduation to greatness.

Historically, whites created myths about Blacks to derail their progress during Reconstruction and beyond, interfering and destroying the progress of Black people.<sup>409</sup> For instance, President Richard

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408. Maia Szalavitz, *Income Equality’s Most Disturbing Side Effect: Homicide*, SCI. AM. (Nov. 1, 2018), <https://www.scientificamerican.com/article/income-inequalitys-most-disturbing-side-effect-homicide/> (quoting Martin Daly, a professor emeritus of psychology at McMaster University in Ontario, who has studied this connection for decades); see Hilton Als, *My Mother’s Dreams for Her Son, and All Black Children*, THE NEW YORKER (June 29, 2020), <https://www.newyorker.com/magazine/2020/06/29/my-mothers-dreams-for-her-son-and-all-black-children>; Isabelle Dills, *Do Higher Graduation Rates Reduce Crime?*, NAPA VALLEY REG. (Dec. 18, 2013), [https://napavalleyregister.com/news/local/do-higher-graduation-rates-reduce-crime/article\\_e688076a-6746-11e3-afce-0019bb2963f4.html](https://napavalleyregister.com/news/local/do-higher-graduation-rates-reduce-crime/article_e688076a-6746-11e3-afce-0019bb2963f4.html) (reporting that a study makes the case for “education spending”); see, e.g., Scott Simon, “A Most Beautiful Thing” Tells of the First U.S. All-Black High School Rowing Team, NPR (June 27, 2020, 7:57 AM), <https://www.npr.org/2020/06/27/883885055/a-most-beautiful-thing-tells-of-the-first-u-s-all-black-high-school-rowing-team> (reporting on a documentary about how rowing got several Black male teens from Chicago’s West Side away from gang life in the 1990s); see, e.g., Thomas Fuller & Tim Arango, *Police Pin a Rise in Murders on an Unusual Suspect: Covid*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/us/coronavirus-murders.html> (“Like many American cities, where economies have been ravaged by the pandemic, Oakland has seen a surge in gun violence, including six killings of juveniles since June and a 40 percent increase in homicides over all. To the south, in Los Angeles, the picture is equally bloody, with the city on pace to have more than 300 homicides for the first time since 2009. . . . Criminologists studying the rise in the murder rate point to the effects the pandemic has had on everything from mental health to policing in a time of social distancing, with fewer officers able to perform the up-close-and-personal community outreach work that in normal times has helped mitigate violence. Experts also attribute the rise to increased gang violence and a spike in gun ownership, including among many first-time gun owners.”).

409. See, e.g., FAMU Way, *supra* note 3, at 7; see also Gross, *supra* note 312; see also Phillip Bump, *America’s Biggest Issue Is “Black Africans” Killing Each Other*, Sebastian Gorka Says, THE WASHINGTON POST (Oct. 24, 2017, 10:22 AM), <https://www.washingtonpost.com/news/politics/wp/2017/10/24/americas-big-issue-is-black-africans-killing-each-other-sebastian-gorka-says/> (“A bit less than a year before he would win election as president of the United States, Donald Trump retweeted an entirely incorrect and explicitly racist set of data on crime . . . .”); see also Baldwin, *supra* note 286 (“Now, if what I have tried to sketch has any validity, it becomes thoroughly clear, at least to me, that any Negro who is born in this country and undergoes the American educational system runs the risk of becoming



Nixon's domestic policy chief, John Ehrlichman, admitted conjuring a diabolical plan to destroy Black communities in the 1970s:<sup>410</sup>

"You want to know what [the War on Drugs] was really all about?" he asked with the bluntness of a man who, after public disgrace and a stretch in federal prison, had little left to protect. "The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."<sup>411</sup>

Fifty years later, Blacks are still being vilified and crucified. This is not conjecture or hypothesis – it is fact, determined by experts and sup-

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schizophrenic. On the one hand he is born in the shadow of the stars and stripes and he is assured it represents a nation which has never lost a war. He pledges allegiance to that flag which guarantees 'liberty and justice for all.' He is part of a country in which anyone can become president, and so forth. But on the other hand he is also assured by his country and his countrymen that he has never contributed anything to civilization—that his past is nothing more than a record of humiliations gladly endured. He is assumed by the republic that he, his father, his mother, and his ancestors were happy, shiftless, watermelon-eating darkies who loved Mr. Charlie and Miss Ann, that the value he has as a black man is proven by one thing only—his devotion to white people. If you think I am exaggerating, examine the myths which proliferate in this country about Negroes."); S. POVERTY L. CTR., *supra* note 372.

410. *War on Drugs*, HIST. (May 31, 2017), <https://www.history.com/.amp/topics/crime/the-war-on-drugs> ("The War on Drugs is a phrase used to refer to a government-led initiative that aims to stop illegal drug use, distribution and trade by dramatically increasing prison sentences for both drug dealers and users. The movement started in the 1970s and is still evolving today. Over the years, people have had mixed reactions to the campaign, ranging from full-on support to claims that it has racist and political objectives."); *see also* FLYNN ET AL., *supra* note 14, at 119 ("The War on Drugs increased arrests among African Americans, but those arrests were not reflective of drug use in black communities. Research shows that African Americans comprise only 15 percent of the country's drug users, yet they make up 37 percent of those arrested for drug violations, 59 percent of those convicted, and 74 percent of those sentenced to prison for a drug offense. Black high school seniors report using drugs at a rate that is three-quarters that of white high school seniors, and white students have three times the number of emergency room visits for drug overdose." (footnotes omitted)); *see also* American News X, *Facts on Race*, FACEBOOK (July 18, 2016), <https://www.facebook.com/anxfreedom/photos/a.369209113264748/583468728505451> ("To justify slavery, we whites portrayed blacks as subhuman: primitive, stupid, and servile. To justify segregation, we whites portrayed blacks as morally corrupt: ignorant, predatory, and sinful. After civil rights, we whites portrayed blacks as evil: drug addicts, gang bangers, and welfare queens. There has never been a point in our history when we whites have systemically and institutionally valued black lives as we do our own. That's why #BlackLivesMatter. Period.").

411. Dan Baum, *Legalize It All*, HARPER'S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>.

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ported by research. A recent four-year study conducted by Harvard Law School researchers found:

[The] analysis shows that one factor—racial and ethnic differences in the type and severity of initial charge—accounts for over 70 percent of the disparities in sentence length. We explore several mechanisms by which racial disparities in initial charging decisions lead to the substantial average disparities we document. We find that:

- Black and Latinx people are more likely to have their cases resolved in Superior Court where the available sentences are longer. . . ;
- Black and Latinx people charged with drug offenses and weapons offenses are more likely to be incarcerated and receive longer incarceration sentences than White people charged with similar offenses. This difference persists after controlling for charge severity and additional factors;
- Black and Latinx people charged with offenses carrying mandatory minimum sentences are substantially more likely to be incarcerated and receive longer sentences than White people facing charges carrying mandatory minimum incarceration sentences.<sup>412</sup>

This begs the question: How many studies, scholars and researchers do we need to reconfirm what Americans have known all along?

Then, there are the myths about Blacks and welfare. Yet, “far more white people have benefited from US welfare programs over the years — reflecting their greater share of the population — while Black

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412. See, e.g., ELIZABETH T. BISHOP ET AL., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM 2 (Sept. 2020), <http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf>; see, e.g., U.S. SENT’G COMM., REP. ON THE CONTINUING IMPACT OF U.S. V. BOOKER ON FED. SENT’G (2012), [https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part\\_E.pdf](https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_E.pdf) (“Sentences of similarly situated Black male offenders were 19.5 percent longer than those of similarly situated White male offenders.”); see, e.g., U.S. SENT’G COMM., DEMOGRAPHIC DIFFERENCES IN SENT’G: AN UPDATE TO THE 2012 BOOKER REP. (Nov. 2017), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf) (reporting that the update study determined: “Black male offenders continued to receive longer sentences than similarly situated White male offenders. Black male offenders received sentences on average 19.1 percent longer than similarly situated White male offenders during the Post-Report period (fiscal years 2012-2016), as they had for the prior four periods studied.”); Michael Harriot, *A Judge Asked Harvard to Find Out Why So Many Black People Were in Prison. They Could Only Find One Answer: Systemic Racism*, THE ROOT (Sept. 10, 2020, 5:00 PM), <https://www.theroot.com/a-judge-asked-harvard-to-find-out-why-so-many-black-peo-1845017462> (“It wasn’t Black-on-Black crime. Violent video games and rap songs had nothing to do with it; nor did poverty, education, two-parent homes or the international ‘bootstraps’ shortage. When a judge tasked researchers with explaining why Massachusetts’ Black and Latinx incarceration was so high, a four-year study came up with one conclusion. Racism. It was always racism.”).

people and other people of color have been denied them in various ways.”<sup>413</sup> From crime to welfare, myths about Black people germinate myths about HBCUs.

The myths surrounding HBCUs since their founding are destructive to Black education. These myths perpetuate ideas that HBCUs are no longer relevant or sustainable.<sup>414</sup> HBCUs have challenges to overcome, but the entire story is rarely told.<sup>415</sup> Black colleges,

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413. Marguerite Ward, *How Decades of US Welfare Policies Lifted Up the White Middle Class and Largely Excluded Black Americans*, BUS. INSIDER (Aug. 11, 2020, 11:40 AM), <https://www.businessinsider.com/welfare-policy-created-white-wealth-largely-leaving-black-americans-behind-2020-8> (“From the Great Society moving forward, one could say that white people, because of their numbers and percentage of the population, have always constituted the largest number of people. . . . Black people, Latinx, American Indians, because of their oppressed condition, have constituted a much greater percentage than their percent of the population. . . . Public assistance was not as demonized until African Americans began to exercise their right to use it . . . And that’s when welfare started to be seen as this inferior program for nonwhite people who didn’t play by the white middle-class rules of work and family.”).

414. STODGHILL, *supra* note 336, at 12 (“[I]t’s hard to separate the prevailing rhetoric against black colleges from a national social climate that provides new evidence all the time of a nation given to devaluing African American life and culture generally, whether it’s buried in racist e-mails of a senior Sony executive, or a CNN broadcast from the fiery, riotous streets of Ferguson, Missouri.”); *HBCUs and Why They Are Still Important Today*, *supra* note 220 (delineating between the myths and realities of HBCUs and explaining their continued relevance); Melissa E. Wooten, *The Important of Historically Black Colleges and Universities*, NEWSONE (Nov. 28, 2019), <https://newsone.com/3895119/the-importance-of-historically-black-colleges-and-universities/> (“[D]oubts about these schools’ continued relevance underestimate the relationship between HBCUs and the struggle for black liberation within America that continues to this day.”); *see also* Derrick Z. Jackson, *NCAA Must Stop Perpetuating Academic and Financial Disparities for HBCUs*, THE UNDEFEATED (May 27, 2020), <https://theundefeated.com/features/ncaa-must-stop-perpetuating-academic-and-financial-disparities-for-hbcus/> (reporting that the NCAA is spinning a false narrative on HBCUs and reinforcing stereotypes of intellectually inferior Black athletes and HBCUs); *see also* *The “HBCU Effect,”* UNCF, [https://uncf.org/pages/the-hbcu-effect#:~:text=the%20%E2%80%9CHBCU%20Effect%E2%80%9D%20seeks%20to,and%20competitiveness%20of%20our%20institutions.&text=education%20has%20always%20been%20considered,equalizers%20in%20the%20United%20States](https://uncf.org/pages/the-hbcu-effect#:~:text=the%20%E2%80%9CHBCU%20Effect%E2%80%9D%20seeks%20to,and%20competitiveness%20of%20our%20institutions.&text=education%20has%20always%20been%20considered,equalizers%20in%20the%20United%20States.). (“The ‘HBCU Effect’ seeks to understand, validate, and promote the success of [HBCUs] to develop a counter narrative that fully illustrates the value and competitiveness of our institutions.”).

415. Walter Kimbrough, *How Alternative Facts Can Create Fake HBCU News*, INSIDE HIGHER ED. (Feb. 21, 2019), <https://www.insidehighered.com/views/2019/02/21/its-important-get-facts-about-hbcus-right-opinion> (“I have said over and over that I hate when those in the HBCU community proclaim that we need to tell our stories. Not only do we often fail to tell our stories, we sit quietly when false stories are shared. Today, we need a modern, data-driven and unapologetic fact-checking approach to present HBCUs in a fair and accurate light. Yes, like all of higher education, we have challenges — significant ones based on the economic factors impacting our primary population. But we can’t ignore it any longer when those challenges are presented in the worst possible light.”); *HBCUs and Why They are Still Important Today*, *supra* note 220 (quoting Chancellor Robinson: “I think HBCUs haven’t done a great job in recent years of telling our stories.”); *see, e.g.*, Greg Howard, *Michael Sorrell Revived Paul Quinn College (and Almost Died Doing It)*, DALLAS OBSERVER

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which have never received the funding to which they are entitled, are crucified in public smear campaigns when they have any challenges, especially financial challenges, but the Covid-19 pandemic has revealed the economic frailty of many of America's major corporations. Many of them wobble on the brink of bankruptcy and permanent closures because of the pandemic, yet there is rarely a question about their management.<sup>416</sup> The systemic racism woven in the perceptions surrounding HBCUs is undeniable.

Racial injustice, however, is unlikely to change without a drastic transformation of the federal and state elected officials who continue to deny educational opportunities based on race.<sup>417</sup> Because of pervasive racism, Black students have never been able to just be students. Their own experiences and history inspire them, indeed require them, to become activists, advocates and agents of change for equality while trying to achieve their dreams.<sup>418</sup> As long as white America con-

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(Feb. 16, 2012, 4:00 AM), <https://www.dallasobserver.com/news/michael-sorrell-revived-paul-quinn-college-and-almost-died-doing-it-6424628> (detailing the remarkable turnaround of Paul Quinn College, an HBCU, under the leadership of Michael Sorrell); see also *The Numbers Don't Lie: HBCUs Are Changing the College Landscape*, UNCF, <https://uncf.org/the-latest/the-numbers-dont-lie-hbcus-are-changing-the-college-landscape> (last visited June 16, 2020) (providing the statistics that underscore the value of HBCUs).

416. See Kelly Tyko, *Are More Store Closings Coming? As Many As 25,000 Stores Could Shutter in 2020 Due to COVID-19 Impact*, USA TODAY (June 9, 2020, 11:59 AM), <https://www.usatoday.com/story/money/2020/06/09/store-closures-2020-coronavirus-impact/5325795002/>; see also FAVORS, *supra* note 352, at 239 (“[Y]ears of historic underfunding exacerbated internal struggles [of HBCUs], marrying relationships between trustee board members, administrators, faculty, and students, and thus created a public relations nightmare that effectively weakened the brand of HBCUs and prevented a new generation of potential students and faculty from considering matriculation and work on Black college campuses.”).

417. See DARITY & MULLEN, *supra* note 3, at 27, 31; Williams & Davis, *supra* note 233, at 4 (“This underscores the importance of a healthy partnership between HBCU leadership and federal, state, and local governments for continued institutional vitality.”); see also WALKER, *supra* note 83, at 230 (stating that “the voices of black college presidents were for the most part muffled due to southern states’ control of funding for state black colleges”); see, e.g., Haughney & Deslatte, *supra* note 8 (noting a continuing “50-year series of racially charged conflicts between a predominantly white Florida government and one of the nation’s most prestigious black universities [FAMU].”).

418. See, e.g., Obtained from the oral family history of Jennifer Smith (reporting that as a child in the 1970s-80s, her family was the only Black family in the neighborhood, and she experienced severe racism in the neighborhood and in the integrated schools; that although she and her siblings had full scholarships to PWIs, they chose to attend HBCUs, as her parents did; that at Hampton University she marched against apartheid in South Africa in the 1980s; that during law school at a PWI she participated in the economic boycott in Miami when the Miami mayor snubbed Nelson Mandela in 1990; that after law school in the mid-1990s she took an unpaid leave from her first legal job to volunteer for an agency in South Africa that provides free legal services to impoverished Africans; and that as a young lawyer she recruited others to help her birth the Washington Bar Association Young Lawyers Division to ensure networking opportunities, professional development activities, and

siders and treats Black America as the enemy, as Ehrlichman described, HBCUs will always be relevant.<sup>419</sup>

“American institutional racism produced the inequality of HBCUs and [PWIs].”<sup>420</sup> America must confront, acknowledge, and accept, its horrid history that “slavery *was* the country.”<sup>421</sup> That slavery produced the abundance of white generational wealth that exists today.<sup>422</sup> That enslaved Blacks were not happy, docile nonhumans, but human beings who whites repeatedly and constantly beat, whipped, maimed, raped, branded, humiliated, and denied basic necessities like food and medical care.<sup>423</sup> That slavery has never ended; it just evolved.<sup>424</sup> That slavery advanced higher education for whites.<sup>425</sup> When America’s true slave history is accepted, then the concept of reparations for African Americans and HBCUs is readily understandable and justifiable.<sup>426</sup> “Investing in historically black colleges and universities is possibly the most socially responsible investment that well-endowed institutions can make, especially those that profited from slavery.”<sup>427</sup>

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social justice engagement for young Black attorneys in the D.C. area, <https://www.wbayld.org/about/>); see, e.g., Summers, *supra* note 357 (reporting that U.S. Senator Harris marched against apartheid at Howard University as a student in the 1980s).

419. See Baum, *supra* note 411.

420. ROGERS, *supra* note 8, at 149; see also WILKERSON, *supra* note 353, at 68-70 (arguing that “racism” is such a “radioactive” word for whites that it derails any opportunity for open discussion, but that “caste,” which “predates the notion of race” is a more appropriate and powerful word because it “is not hatred” or “necessarily personal,” rather it is the “worn grooves of comforting routines and unthinking expectations, patterns of a social order that have been in place for so long that it looks like the natural order of things”).

421. WILKERSON, *supra* note 353, at 43.

422. See *id.* at 46.

423. See *id.* at 45 (“The institution of slavery was, for a quarter millennium, the conversion of human beings into currency, into machines who existed solely for the profit of their owners, to be worked as long as the owners desired, who had no rights over their bodies or loved ones, who could be mortgaged, bred, won in a bet, given as wedding presents, bequeathed to heirs, sold away from spouses or children to cover an owner’s debt or to spite a rival or to settle an estate. They were regularly whipped, raped, and branded, subjected to any whim or distemper of the people who owned them. Some were castrated or endured other tortures too grisly for these pages, tortures that the Geneva Conventions would have banned as war crimes had the conventions applied to people of African descent on this soil.”).

424. See *id.* at 103 (“Slavery officially ended in 1865, but the structure of caste remained intact, not only surviving but hardening.”); see Mosley, *supra* note 55 and accompanying text.

425. WILDER, *supra* note 46.

426. See generally DARITY & MULLEN, *supra* note 3 (making the case for reparations for African Americans); see also ROTHSTEIN, *supra* note 35, at 195-213 (considering remedies for the intentional residential segregation created by federal, state, and local governments).

427. Felicia M. Davis, *HBCU Green Fund Says America’s Elite Colleges Can Lead on Reparations by Partnering with Black Colleges*, HBCU GREEN FUND (June 23, 2020, 3:45

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This evidence-based article lays out how HBCUs have not only advanced the African American community but society as well. HBCUs deserve recognition that they are relevant and must be equitably supported with resources, especially considering the systemic racism that remains so pervasive in America.<sup>428</sup> HBCUs are not only transformative for their students, but the HBCU model can be transformative for PWIs in higher education and all educational levels as well. HBCUs have designed the roadmap – created the model – of inclusion, fairness, and diversity for education in America and have been more successful at embracing white students than PWIs have been at embracing African American students.

The success of HBCUs speaks for itself. A recent Gallup report found that with the remarkable success that African Americans have from their HBCU experiences, this success “needs to be examined more closely and potentially modeled at other institutions.”<sup>429</sup> HBCUs are

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PM), <https://www.prnewswire.com/news-releases/hbcu-green-fund-says-americas-elite-colleges-can-lead-on-reparations-by-partnering-with-black-colleges-301082319.html>.

428. See Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> (discussing the 1965 Daniel Patrick Moynihan Report, “The Negro Family,” summarizing it as “[Moynihan’s] point was simple if impolitic: Blacks were suffering from the effects of centuries of ill treatment at the hands of white society. Ending that ill treatment would not be enough; the country would have to make amends for it,” and addressing today’s impact from centuries of political and economic marginalization of Black people); See DARITY & MULLEN, *supra* note 3, at 230 (“The dual school system had ensured racial differences in the quality of school facilities, in teacher compensation per pupil, and in the quality of instructional materials. . . . frequently under the dual system, black teachers’ salaries were 60 percent or less of white teachers’ salaries.”); see also Marva Wiley, *Dianne Saulney Gaines (Admitted: 1980)*, in FLORIDA’S FIRST BLACK LAWYERS, VOL 2, 1980-1989 (2018) (reporting on Dianne Saulney Gaines, who was born in the segregated South, graduated from Xavier University of Louisiana [HBCU] in 1962 and began her first career as a teacher but was inspired to become a lawyer after “[s]uffering a disparate wage system for black teachers”); see also Michelle Alexander, *America, This Is Your Chance*, N. Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/opinion/george-floyd-protests-race.html>; see A’Lelia Bundles, *Know Your History: Understanding Racism in the US*, ALJAZEERA (Aug. 15, 2015), <https://www.aljazeera.com/indepth/features/2015/08/race-history-ferguson-150814082921736.html>; see also GLAUDE, *supra* note 362, at 195 (“When we make Trump exceptional, we let ourselves off the hook, for he is *us* just as surely as the slave-owning Founding Fathers were us; as surely as Lincoln, with his talk of sending black people to Liberia, was us; as surely as Reagan was us, with his welfare queens. When we are surprised to see the reemergence of Klansmen, neo-Nazis, and other white nationalists, we reveal our willful ignorance about how our own choices make them possible.”).

429. Julie Ray, *Grads of Historically Black Colleges Have Well-Being Edge*, GALLUP (Oct. 27, 2015), [https://news.gallup.com/poll/186362/grads-historically-black-colleges-edge.aspx?g\\_source=CATEGORY\\_WELLBEING&g\\_medium=topic&g\\_campaign=tiles](https://news.gallup.com/poll/186362/grads-historically-black-colleges-edge.aspx?g_source=CATEGORY_WELLBEING&g_medium=topic&g_campaign=tiles); ROEBUCK & MURTY, *supra* note 30, at 204; see also Johnson & McGowan, *supra* note 234; see generally HARVEY, *supra* note 299 (describing the Harvey leadership model for higher education success).

critical to America.<sup>430</sup> They are educational models that create environments that foster learning atmospheres conducive for all students. Even with meager, inequitable funding, HBCUs are success stories.

HBCUs are on the upswing again.<sup>431</sup> “The campuses that served as incubators for the Civil Rights Movement in the mid–20th century are experiencing something of a renaissance. Freshman enrollment is up at 40% of HBCU schools.”<sup>432</sup> There is new interest from CEOs to private donors, who are learning about and understanding the outsized impact that HBCUs make to America and the world.<sup>433</sup> Black

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430. Toldson et al., *supra* note 350 (quoting Gasman: “HBCUs are vitally important to African Americans and other students as well. Their outsized contributions in STEM, in the preparation of students for graduate school and in medicine are essential to the representation of African Americans across these areas. Without HBCUs, we would see an immediate drop in the number of new black scientists, black professors and black doctors.”).

431. ROGERS, *supra* note 8, at 167 (“Progress is vibrant at HBCUs in the twentieth-first century . . . . Amid the criticism, many have a fertile love for HBCUs, growing from enriching social, cultural, and political experiences.”); *see also* FAVORS, *supra* note 352, at 238 (“Black colleges experienced something of a renaissance through the late 1980s and early 1990s.”).

432. Maya Rhodan, *A New Era of Protest Is Energizing Historically Black Colleges and Universities. But There Are Challenges*, TIME (May 23, 2018, 12:46 PM) <https://time.com/5286691/hbcu-black-colleges-protest-activism/> (quoting the former director of the Penn Center for Minority Serving Institutions); Alina Tugend, *Seeking a Haven in H.B.C.U.s and Single-Sex Colleges*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/education/learning/hbcu-womens-colleges-haven.html?action=click&module=relatedCoverage&pgtype=article&region=footer>; Breanna Edwards, *HBCU Enrollment on the Rise Amid Increasing Racial Tensions*, ESSENCE (Mar. 18, 2019), <https://www.essence.com/news/hbcu-enrollment-on-the-rise-amid-increasing-tensions/> (reporting about the increase in enrollment at HBCUs because of the increase in racism fueled by Donald Trump and that HBCUs have always been havens away from racism); Sarah Wood, *Report: HBCU Enrollment Increase Is a Result of Current Political Climate*, DIVERSE EDUC. (Oct. 22, 2019), <https://diverseeducation.com/article/158096/>.

433. *See, e.g.*, Madeline St. Amour, *Netflix CEO Donates Millions to HBCUs*, INSIDE HIGHER ED. (JUNE 18, 2020), <https://www.insidehighered.com/quicktakes/2020/06/18/netflix-ceo-donates-millions-hbcus>; Kiara Brantley-Jones, *6 Historically Black Colleges Receive Millions in Record Donations from Mackenzie Scott, Amazon Boss Jeff Bezos’ Ex-Wife*, ABC NEWS (July 31, 2020, 4:06 AM), <https://abcnews.go.com/US/black-colleges-receive-millions-record-donations-mackenzie-scott/story?id=72068091>; *BlueCross BlueShield of SC Donates Millions to State’s HBCUs*, WLTX (Aug. 25, 2020, 2:02 PM), <https://www.wltx.com/article/news/education/bluecrossblueshield-donates-millions-to-historic-black-colleges-universities-hbcu-southcarolina/101-99062796-a08b-4e2a-baab-3964967dbf7b> (providing funding to the state’s five qualified, private four-year HBCUs); Michael J. de la Merced & Andrew R. Sorkin, *Michael Bloomberg to Give \$100 Million to Historically Black Medical Schools*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/09/03/business/dealbook/bloomberg-black-medical-schools-donation.html>; Mark W. Wright, *Howard, Morehouse Among Five HBCUs to Receive Millions in New Equipment for COVID-19 Testing*, THE UNDEFEATED (Sept. 1, 2020), <https://theundefeated.com/features/howard-morehouse-among-five-hbcus-to-receive-millions-in-new-equipment-for-covid-19-testing/>; *Brown Is First Non-HBCU Invited to Join National HBCU Library Alliance*, BROWN UNIV., <https://www.brown.edu/news/2020-11-16/alliance> (last visited Nov. 18, 2020) (“Sandra Phoenix, director of the HBCU Library Alliance, sees Brown’s new membership as a mutually beneficial partnership and one that

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college athletes who generate billions for PWIs, “while the HBCUs that some of [those athletes] socialize at flounder financially” are coming home to HBCUs.<sup>434</sup> Black entrepreneurs are finding ways to finan-

will open doors for HBCUs much in the way it will do so for Brown. She said Brown stands out among other universities for its openness to collaboration, including directly with HBCUs, pointing to its decades-long partnership with Tougaloo College, a historically Black college in Jackson, Mississippi.”); Danielle Alio, *Princeton University Library Partners with HBCUs in Inaugural Archiving Program*, PRINCETON UNIV. (July 30, 2018, 12:00 PM), <https://www.princeton.edu/news/2018/07/30/princeton-university-library-partners-hbcus-in-inaugural-archiving-program> (reporting that Princeton University Library partnered with Howard University, Lincoln University, Texas Southern University, Tougaloo College and Tuskegee University for a collaborative history program); Jarrett Carter Sr., *Philanthropist MacKenzie Scott Single-Handedly Shatters All-Time HBCU Philanthropy Support Record with More Than \$500 Million in Donations*, HBCU DIGEST (Dec. 15, 2020), <https://www.hbcudigest.com/p/mackenzie-scott-hbcu-giving-500-million> (“The estimated amount between [MacKenzie] Scott’s two rounds of funding totals at least \$500 million in support of HBCUs, extending her record of being the single-largest donor to HBCUs in American history and single-handedly surpassing the all-time collective record of gifts and contracts to HBCUs in one year, a mark of \$478 million set in 2018.”); Michael Lozano, *Fayetteville State Academic Partnership Helps Provide Doctors, Medical Care to the Sandhills Region*, ABC NEWS (Oct. 23, 2020), <https://abc11.com/fayetteville-state-university-meharry-medical-college-partnership/7280186/> (“Fayetteville State University has partnered with [Meharry Medical College] for a training program aimed at providing more doctors and other health care providers in the Sandhills.”); Anika Chaturvedi, *Morehouse School of Medicine Enters \$100 M Partnership to Train More Black Doctors*, ATLANTA JOURNAL-CONSTITUTION (Dec. 17, 2020), <https://www.ajc.com/education/morehouse-school-of-medicine-enters-100m-partnership-to-train-more-black-doctors/QYKYWAZYKRD6HLWOJGBLOGVVKM/> (“Morehouse School of Medicine is teaming up with CommonSpirit Health in a 10-year, \$100 million partnership to train more Black physicians and work toward health equity for underserved communities.”); Arrman Kyaw, *Dominion Energy Commits \$25 Million in Grants for STEM at HBCUs*, DIVERSE EDUC. (Dec. 11, 2020), <https://diverseeducation.com/article/199129/> (“Dominion Energy is committing \$25 million in grants to support science, technology, engineering and math (STEM) programs at historically Black colleges and universities (HBCUs).”); *MSU Partners with HBCU Institution to Offer Accelerated Graduate Programs*, SPRINGFIELD NEWS-LEADER (Dec. 28, 2020, 7:30 AM), <https://www.news-leader.com/story/news/education/2020/12/28/msu-partners-hbcu-institution-offer-graduate-programs/4031186001/> (“Missouri State University has forged a new partnership with Central State University, which will allow more undergraduates to pursue accelerated master’s degrees through the Springfield campus. CSU, a land-grant university, was named the 2017 HBCU — Historically Black Colleges and Universities — of the Year. It is located in Wilberforce, Ohio. This partnership with a HBCU is the first of its kind for MSU.”); Jacob Kastrenakes, *Apple’s First Major Racial Equity Investments Include a Detroit Developer Center and HBCU Tech Hub*, THE VERGE (Jan. 13, 2021, 10:05 AM), <https://www.theverge.com/2021/1/13/22228580/apple-detroit-developer-academy-equity-center-hbcu-tech-hub> (“In Atlanta, Apple is partnering to help launch the Propel Center, a tech-focused hub for HBCUs. The center will offer in-person and online courses focused on technology, entertainment, and business. It’ll be located in the Atlanta University Center that links four HBCUs — Clark Atlanta University, Spelman College, Morehouse College, and the Morehouse School of Medicine. Apple and Southern Company, an Atlanta-based energy giant, will each contribute \$25 million.”).

434. ROGERS, *supra* note 8, at 162; Deyscha Smith, *The Bigger Picture: Why High School Stars Are Turning to HBCUs*, SLAMONLINE (Aug. 31, 2020), <https://www.slamonline.com/college-hs/hbcus-story/>; see also Alisha Ebrahimji, *Affluent White Student-Athletes Are Prof-*



cially pour into HBCUs because they “understand how vital the HBCU system is to the Black ecosystem.”<sup>435</sup> Artists are creatively paying homage to HBCUs.<sup>436</sup> Scholars with numerous college options are choosing HBCUs.<sup>437</sup> PWI graduate programs are opening new opportunities for HBCU graduates.<sup>438</sup> Innovative college course curriculums on HBCUs are emerging so that “HBCUs can rightfully move from the periphery of African-American history, to take their rightful place as a central part of American and educational History.”<sup>439</sup>

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*iting from the Labor of Their Poor Black Peers, Study Says*, CNN (Sept. 8, 2020), <https://www.cnn.com/2020/09/08/us/ncaa-student-athletes-equal-pay-trnd/index.html>; Annika Hammerschlag, *Black Lives Matter Protests Spawn Push for Athletes to Attend Historically Black Colleges*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/sports/ncaa-basketball/black-lives-matter-hbcus-college-athletes.html> (“As more top Black athletes express interest in an H.B.C.U. movement, they are signaling that Power 5 institutions may no longer hold the same allure.”).

435. See, e.g., Kiara McClendon, *This App Wants to Raise \$1 Billion for Historically Black Colleges and Universities*, FORBES (Aug. 19, 2020, 1:59 PM), <https://www.forbes.com/sites/forbestheculture/2020/08/19/this-app-wants-to-raise-1-billion-for-historically-black-colleges-and-universities/#2675a719270f>.

436. See, e.g., *Delta Sigma Theta Sorority Member, Tara Lynn, Release New Single Paying Homage to HBCUs*, HISTORICALLY BLACK SINCE (June 3, 2020), <http://news.hbcusince.com/2020/06/delta-sigma-theta-sorority-member-tara-lynn-releases-new-single-paying-homage-to-hbcus/>; see, e.g., Will Moss, *Morehouse Grad Creates Comic and Film’s Next Big Thing – HBCU Superheroes!*, HBCU CONNECT (Dec. 26, 2020), [https://hbcuconnect.com/content/361941/morehouse-grad-creates-comic-and-film-s-next-big-thing-hbcu-superheroes?utm\\_source=dlvr.it&utm\\_medium=facebook](https://hbcuconnect.com/content/361941/morehouse-grad-creates-comic-and-film-s-next-big-thing-hbcu-superheroes?utm_source=dlvr.it&utm_medium=facebook).

437. See, e.g., Holly V. Hays, *“The Sky Is The Limit”: Tindley Grad Accepted to 65 Colleges Will Go to Howard University*, INDYSTAR (Aug. 19, 2020, 6:01 AM), <https://www.indystar.com/story/news/education/2020/08/19/tindley-graduate-accepted-65-schools-headed-howard-university/3365344001/>; see, e.g., Ronda Bryant, *Why I Chose a HBCU for College*, NEXTSTEP.U, <https://www.nextstepu.com/why-i-chose-a-hbcu-for-college.art#.X0AkwMhKjzA> (last visited Nov. 18, 2020) (“After some advice and wise decision-making, I chose Hampton University. I couldn’t be happier with my decision. I enjoy the family atmosphere, traditional values, academic excellence and loads of opportunities. I have never been surrounded by such a diverse group of students who are serious about their education.”).

438. See, e.g., *University of Florida College of Law Offers Full-Tuition Scholarships for HBCU Graduates*, THE FLA. BAR (Aug. 31, 2020), <https://www.floridabar.org/the-florida-bar-news/university-of-florida-college-of-law-offers-full-tuition-scholarships-for-hbcu-graduates/?fbclid=IWAR1hIDAG90J5Y8ydiI1tRRfEvm1z0KRhL7nYU6n0kaNrjuSgl1FTnP9dVjo> (“The University of Florida Fredric G. Levin College of Law has launched a new scholarship program for graduates of Historically Black Colleges and Universities (HBCUs) seeking to enter the legal profession. The program will award full-tuition scholarships to at least five HBCU graduates enrolling at UF Law every year.”); see, e.g., Kennedy Williams, *Princeton University is Looking to Hire HBCU Grads!*, HBCU CONNECT (Jan. 8, 2021), [https://hbcuconnect.com/content/362145/princeton-university-is-looking-to-hire-hbcu-grads?utm\\_source=dlvr.it&utm\\_medium=facebook](https://hbcuconnect.com/content/362145/princeton-university-is-looking-to-hire-hbcu-grads?utm_source=dlvr.it&utm_medium=facebook).

439. See, e.g., Candace Burns, *New Course Could Be “Next Frontier For Black Colleges,” Professor Believes*, WTVR (Aug. 20, 2020, 10:50 PM), <https://www.wtvr.com/news/local-news/new-course-could-be-next-frontier-for-black-colleges-professor-believes> (“The course titled “342-HBCU History” is new to the University this fall. VSU administrators believe it could be the nation’s first higher education course on the topic. The class will cover a range

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HBCUs have mastered creating learning environments that develop greatness. History, studies, analyses, findings, reports, outcomes, opinions, experiences, and statistics show that with funding commensurate to PWIs, HBCUs would lead the charge as *the* American educational model.<sup>440</sup> “The question isn’t why [HBCUs] still exist; the issue is really, how excellent can [they] be?”<sup>441</sup>

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of historical and cultural subjects including, the schools’ origins; political activism; roles in creating the black middle and upper class; sports, music, campus life; contributions to America; roles in African decolonization; notable alums; and past, present, and future challenges.”).

440. See, e.g., Ivan Rodriguez, *Montbello STEAM School to Be Modeled after Historically Black Colleges and Universities*, THE DENVER CHANNEL (Dec. 17, 2020, 3:54 PM), <https://www.thedenverchannel.com/news/local-news/montbello-steam-school-to-be-modeled-after-historically-black-colleges-and-universities> (“The Robert F. Smith STEAM (Science, Technology, Engineering, Art, Mathematics) Academy will be a district-run high school [in Colorado] modeled after historically Black colleges and universities.”); see also Gelles, *supra* note 304 (reporting Robert F. Smith as the richest Black man in the United States of America).

441. Adam Harris, *Why America Needs Its HBCUs* (May 16, 2019), <https://www.theatlantic.com/education/archive/2019/05/howard-universitys-president-why-america-needs-hbcus/589582/> (quoting Wayne Frederick, the president of Howard University); see generally, FAVORS, *supra* note 352; see generally, SURVIVAL OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (Edward Fort, ed., 2013); see Donna M. Owens, *HBCUs Are Our Future*, ESSENCE (May 12, 2020), <https://www.essence.com/feature/hbcus-are-our-future/> (“Historically black colleges and universities provide so many students with opportunities to achieve greatness. We must protect these institutions.”).

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